SUPREME COURT OF QUEENSLAND

CITATION:	*Pro Teeth Whitening (Aust) Pty Ltd v Commonwealth of Australia & Ors* [2015] QSC 175
PARTIES:	**PRO TEETH WHITENING (AUST) PTY LIMITED** (plaintiff) **v** **COMMONWEALTH OF AUSTRALIA** (first defendant) **DAVID JOHN BRADBURY** (second defendant) **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)** (third defendant) **JOHN JAMIESON** (fourth defendant)
FILE NO/S:	2970 of 2013
DIVISION:	Trial Division
PROCEEDING:	Civil - Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2014
JUDGE:	Peter Lyons J
ORDER:	
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the plaintiff sold tooth whitening products – where the second defendant was the Parliamentary Secretary to the Commonwealth Treasurer and the fourth defendant held the position of Director, Recalls & Hazard Assessment, Product Safety Branch with the third defendant – where the fourth defendant recommended that the second defendant compulsorily recall the plaintiff's products pursuant to s 132J of the *Competition and Consumer Act* – where the second and third defendants published recall notices on their respective websites – where the plaintiff seeks leave to amend the statement of claim to include a claim for damages for misfeasance in public office – whether the proposed pleading alleges facts which would be sufficient for a claim for damages for misfeasance in public office – whether the statement of

claim alleges an exercise of power by the fourth defendant – whether the making of a recommendation constitutes an exercise of power or authority for the purposes of the tort of misfeasance in public office – whether the pleading alleges that the fourth defendant held a public office

Australian Consumer Law (Cth), s 109, s 118, s 122, s 124, s 127, s 224,

Competition and Consumer Act 2010 (Cth), s 131, s 132A, s 132J

Calveley & Ors v Chief Constable of the Merseyside Police & Ors [1989] AC 1228; [1989] 1 All ER 1025, discussed.

Cannon & Anor v Tache & Ors (2002) 5 VR 317; [2002] VSCA 84, discussed.

Cornelius v London Borough of Hackney [2002] EWCA Civ 1073, discussed.

Dau v Emanuele (1995) 60 FCR 270; (1995) 84 A Crim R 197, cited.

Elliot v Chief Constable of Wiltshire [1996] TLR 693; *The Times*, December 5, 1996, discussed.

Emanuele v Hedley & Ors (1998) 179 FCR 290, discussed.

Garrett v Attorney-General [1997] 2 NZLR 332, cited.

Greville v Sprake [2001] EWCA Civ 234, discussed.

Henley v The Mayor and Burgesses of Lyme (1828) 130 ER 995; (1828) 5 Bing 91, cited.

Jones v Swansea City Council [1990] 1 WLR 1453; [1990] 3 All ER 737, cited.

Jones v Swansea City Council [1990] 1 WLR 54; [1989] 3 All ER 162, cited.

Kuddus v Chief Constable of Lestershire Constabulary [2001] UKHL 29; [2002] 2 AC 122, discussed

Leerdam & Anor v Noori & Ors (2009) 255 ALR 553; [2009] NSWCA 90, discussed.

Northern Territory & Ors v Mengel & Ors (1995) 185 CLR 307; [1995] HCA 65, cited.

Odhavji Estate v Woodhouse [2003] 3 SCR 263; [2003] SCC 69, discussed.

Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 3) [2010] FCA 361; (2010) 267 ALR 494, cited.

R v McCann [1998] 2 Qd R 56; (1998) 95 A Crim R 308, cited.

Roncarelli v Duplessis [1959] SCR 121, discussed.

Sanders v Snell (1998) 157 ALR 491; [1998] HCA 64, cited

Smith v East Elloe Rural District Council [1956] UKHL 2; [1956] AC 736, discussed.

Tampion v Anderson [1973] VR 829; [1973] VicRp 82, cited.

Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16; [2001] 2 All ER 513, cited.

Watkins v Secretary of State for the Home Department [2006] EWHC 2927 (Admin); [2006] 2 AC 395, discussed.

Whitehorn v R (1983) 152 CLR 657; [1983] HCA 42, cited.

SOLICITORS: The plaintiff appeared on his own behalf

Australian Government Solicitor for the defendants

[1] By an order made on 10 February 2014, this matter was placed on the Supervised Case List. At a review hearing on 28 May 2014, I ordered that the plaintiff file and serve an amended statement of claim omitting previous allegations relating to misfeasance in public office. I made further orders that the plaintiff provide a proposed amended statement of claim incorporating any proposed claim for damages for misfeasance in public office by 4 June 2014; and that the defendants notify their objections to the proposed amendments, with supporting information, by 2 July 2014.

[2] The statement of claim on which the plaintiff wishes to rely was served on the defendants on 8 July 2014, being produced in response to the objections notified by the defendants to an earlier draft. Nevertheless, the defendants maintain their opposition to it. This hearing is to determine whether the plaintiff should be permitted to file and serve it. The application has been treated as an application for leave to amend the current statement of claim, made necessary by the earlier orders. Although the defendants submit that leave should be refused for other reasons, the position reached at the hearing was that it should first be determined whether the proposed pleading alleges facts which would be sufficient for a claim for damages for misfeasance in public office.

Background

[3] The statement of facts which follows is based on the allegations in the proposed statement of claim, titled 'Second Further Amended Statement of Claim' (*Statement of Claim*). It seems appropriate, for the purposes of the present application, to assume that these facts can be established.

[4] As at late 2011 and early 2012, the plaintiff conducted a business which included selling teeth whitening products containing hydrogen peroxide. At that time, the second defendant was the Parliamentary Secretary to the Commonwealth Treasurer[1]. The fourth defendant held the position of Director, Recalls & Hazard Assessment, Product Safety Branch with the third defendant (*ACCC*)[2].

[5] Before going further, it is convenient to attempt to summarise the statutory scheme which appears to be relevant to the allegations made by the plaintiff.

[6] *The Australian Consumer Law* (*ACL*) is Schedule 2 to the *Competition and Consumer Act* 2010 (Cth) (*CCA*). The relevant provisions of the ACL are made applicable to the conduct of corporations by s 131 of the CCA.

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1 Statement of Claim para 5.

2 Statement of Claim para 5.

[7] Section 109 of the ACL authorises the relevant Commonwealth Minister (Minister) to impose an interim ban on consumer goods of a particular kind, in certain circumstances. Section 118 of the ACL prohibits the supply of goods subject to an interim ban. Section 122 of the ACL authorises the Minister to issue a recall notice for consumer goods of a particular kind, in certain circumstances. Section 124 of the ACL provides that if a recall notice requires a supplier to inform persons that the supplier will repair or replace the goods or refund the person to whom the goods were supplied, then the supplier must act accordingly: see also s 127. A corporation who fails to comply with these requirements faces a substantial pecuniary penalty: see s 224 of the ACL.

[8] The Minister's powers in relation to these matters are regulated by provisions of the CCA. In particular, s 132J of the CCA authorises the Minister to certify that an interim ban on consumer goods should be imposed without delay, or a recall notice for consumer goods should be issued without delay, if it appears to the Minister that the goods create an imminent risk of death, serious illness or serious injury. That has the consequence that the Minister may impose the interim ban, or issue the recall notice, without regard to the conference process for which provision is made elsewhere in the CCA.

[9] On 11 December 2011, the ACCC sent to the plaintiff an email stating that products of the type sold by the plaintiff were unsafe and that the plaintiff should immediately take all reasonable steps to cease supplying such products, and to recall them from the market[3]. Elsewhere it is alleged that the fourth defendant's office contacted the plaintiff by email dated 11 December 2011, demanding the recall of the plaintiff's products from the market[4]. It seems likely that these are references to the same email.

[10] On the same day, the plaintiff requested from the fourth defendant information regarding a number of things, and stated that it had received no complaints about injury resulting from its products. The email stated that a product recall would severely damage its business, and asked that the ACCC's policy be fairly and consistently applied to all suppliers[5].

[11] By emails of 12 and 15 December 2011, the plaintiff informed the fourth defendant of its request to participate in the conference process under s 132A of the CCA[6].

[12] On 12 January 2012 the fourth defendant sent an email to the plaintiff stating that he would inform the plaintiff of any legislative action the ACCC planned to recommend for decision by the second defendant, prior to such action taking place[7]. It seems that in the same email, the fourth defendant indicated approval of the supply of products to people such as dentists, orthodontists and beauty therapists[8].

[13] In an email of 13 January 2012 the plaintiff requested the fourth defendant to provide details of injury reports in relation to the plaintiff's products[9]. By an email of 13

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3 Statement of Claim para 15.
4 Statement of Claim para 69.
5 State of Claim para 16. It seems likely that this is the email referred to in para 58(e) of the Statement of Claim, there said to amount to a request for information from the fourth defendant "or his office".
6 Statement of Claim para 77.
7 Statement of Claim para 56(j).
8 Statement of Claim para 56(h).
9 Statement of Claim para 58(i).

January 2012, the plaintiff indicated it would consider voluntary recall of its products, and expressed concern that dentists supplying similar products were not being treated in the same way as the plaintiff[10].

[14] On 18 January 2012 the ACCC sent an email to the plaintiff stating that the matter would be referred to the area responsible for the enforcement of the CCA and consideration would be given to "possible Ministerial recommendations" if the plaintiff did not voluntarily recall its products[11].

[15] On 3 February 2012 the ACCC sent the second defendant a document described as "Minute No 4/2012" (*Minute*). It recommended that the plaintiff's products be subject to "Compulsory Recall without Delay". The communication made a statement about the effect of the *Poisons Standard* 2011 (made under the *Therapeutic Goods Act* 1989 (Cth)), said in the Statement of Claim to be known to be false. Included with the communication were provisions from the CCA relating to the application of s 132J(1)(b) of the CCA[12] including a requirement that "the goods must create an imminent risk of death, serious illness or serious injury". It is alleged that the recommendation of the ACCC "was accepted from the Fourth Defendant"[13]. It is also alleged that the fourth defendant did not believe in the truth of the recommendation to the second defendant (it would seem that this is a reference to the existence of an imminent risk of serious injury)[14]; and that the fourth defendant did not believe that the plaintiff's products represented an imminent risk of serious injury to consumers[15].

[16] On 6 February 2012 the plaintiff was served with "Consumer Protection Notice No 1 of 2012" (*Notice 1*) and "Consumer Protection Notice No 2 of 2012" (*Notice 2*) and an explanatory statement to Notice 2, by representatives of the ACCC[16]. On the same day the plaintiff received by email a copy of the Notices and explanatory statement and an additional letter signed by the fourth defendant, stating, "First and foremost, within 3 days you must notify all persons to whom you have supplied the goods that the goods are being recalled because they are unsafe"[17]. By Notice 1, the second defendant certified that a recall notice for the plaintiff's product should be issued without delay, and without a conference process, as it appeared to the second defendant that such goods created an imminent risk of serious injury[18].

[17] On 6 February 2012, the second defendant posted a media release naming the plaintiff and its products on his Parliamentary website, stating that the products contained hydrogen peroxide in higher concentrations than the recognised safe limits in the *Poisons Standard*, and stating that these products were unsafe for DIY teeth whitening. The media release also stated that Poisons Information Centres in Queensland, New South Wales and Victoria had received at least 58 reports of injuries involving teeth whiteners since 2004[19]. These are elsewhere referred to as the "injury

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10 Statement of Claim para 61(m).
11 Statement of Claim para 18.
12 Statement of Claim para 19.
13 Statement of Claim para 39B(b).
14 Statement of Claim para 39C(k).
15 Statement of Claim para 39C(n).
16 Statement of Claim para 20.
17 Statement of Claim para 20.
18 Statement of Claim para 20(a).
19 Statement of Claim para 21.

reports"[20]. They are alleged to have been included in the recommendation to the second defendant (at this point alleged to have been made by the fourth defendant)[21].

[18] On the same day the ACCC posted on its website a notice entitled "Compulsory Recall of Teeth Whiteners Supplied by Pro Teeth Whitening (Aust) Pty Ltd". This notice stated that the safe limit was set by the *Poisons Standard*, and made reference to injuries of a number of kinds[22]. The plaintiff alleges that these are impliedly associated with its products. The notice was linked to the media release of the Second Defendant.

[19] Within three days, the plaintiff posted a Recall Notice on the ACCC's public Recalls website and contacted consumers who had been supplied with its products[23]. In a letter sent by email and dated 10 February 2012, the ACCC demanded a series of further specific actions in relation to the plaintiff's supply of teeth whitening products, including the provision of replacement goods, or repayment to consumers[24]. The ACCC also sent letters to business customers of the plaintiff relating to the Compulsory Recall Notice[25]. The plaintiff took action to comply with the notices, ran out of money about two months later, and ceased to carry on business[26].

[20] The plaintiff took proceedings in the Federal Court. Ultimately that Court set aside the decision of the second defendant to certify the issue of the Recall Notice and ordered that Notice 1 and Notice 2 be set aside *ab initio*[27].

Claim alleging misfeasance in public office

[21] The Statement of Claim, having been drafted by a non-lawyer, is lengthy. In addition to making allegations of fact and law, it includes argumentative material, and extracts from authorities. I shall attempt to summarise the allegations which are of greatest relevance for the present application.

[22] The conduct of the fourth defendant on which this claim is based is said to be the demand for the recall of the plaintiff's products; and the recommendation for the exercise by the second defendant of powers pursuant to s 132J of the CCA[28], no doubt a reference to Notice 1 and Notice 2[29]. The fourth defendant's recommendation was said to have resulted in loss to the plaintiff[30].

[23] It is alleged that the second[31] and fourth[32] defendants was each a public officer, with a duty to exercise his powers in the public interest.

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20 Statement of Claim paras 22, 23.
21 Statement of Claim para 58(g).
22 Statement of Claim para 24.
23 Statement of Claim para 26.
24 Statement of Claim para 27.
25 Statement of Claim para 28.
26 Statement of Claim para 29.
27 Statement of Claim para 3.
28 Statement of Claim para 49.
29 See also paras 56(b), (c) and (d) of the Statement of Claim.
30 Statement of Claim para 93.
31 Statement of Claim para 37A(b).
32 Statement of Claim paras 42-46.

[24] It is alleged that the fourth defendant's recommendation in favour of the compulsory recall was a wilful abuse of his public function[33]. It is alleged that the decision of the second defendant to exercise the powers conferred by s 132J of the CCA was unlawful, because natural justice was not afforded to the plaintiff, and the decision was beyond the scope of the powers conferred by s 132J[34]. It is then alleged that, by extension, the recommendation initiated by the fourth defendant was also invalid[35]. The recommendation of the fourth defendant is alleged to be invalid because of a failure to observe the hearing rule; because of an absence of evidence to support the recommendation, the evidence being known to be false or misleading; because it was not open on the facts; and because the fourth defendant was biased against the plaintiff[36].

[25] It is alleged that the fourth defendant included in the recommendation information which he knew to be erroneous, with the intent of harming the plaintiff[37]. It is alleged that the fourth defendant acted with targeted malice, intending that the acceptance of his recommendation would cause harm to the plaintiff[38].

[26] It is alleged that the fourth defendant knew that he acted beyond power, because he knew he had a duty to accord natural justice[39]; he knew he had a duty to act in a non-discriminatory way[40]; he knew that the injury reports were mostly irrelevant, and not relevant to the plaintiff's products; he did not honestly believe that the plaintiff's product represented an imminent risk of serious injury to consumers[41]; and he fabricated a view of the *Poisons Standard*[42]. He also knew that the recommendation, if acted on, would cause damage to the plaintiff[43].

[27] It may fairly be said that, in identifying the background and in summarising the allegations in support of the claim, I have taken a generous view of the Statement of Claim. In my view, given the nature of the issue I am to determine, that course is appropriate.

Contentions

[28] The defendants contended that the proposed Statement of Claim, so far as it relates to the fourth defendant, fails to allege some of the elements of the tort of misfeasance in public office. The acts of the fourth defendant relied upon by the plaintiff do not amount to an exercise of a power; and it is an essential ingredient of the tort that the defendant purport to exercise a public power which is an incident of a public office. The fourth defendant did no more than make an internal recommendation, report or advice; and it is established, in particular by *Calveley v Chief Constable of the Merseyside Police*[44] (*Calveley*) that to do so is not a relevant exercise of power, and accordingly not within the scope of the tort. Nor was the other conduct of the fourth

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33 Statement of Claim para 55.
34 Statement of Claim para 56(a).
35 Statement of Claim para 56(b); see also (h).
36 Statement of Claim para 56(i).
37 Statement of Claim para 57; see also para 58 and 59.
38 Statement of Claim para 60.
39 Statement of Claim para 66.
40 Statement of Claim para 68.
41 Statement of Claim paras 56(e), and 71- 75.
42 Statement of Claim para 57.
43 Statement of Claim para 42(v), 66(d), 78 and 90.
44 [1989] AC 1228.

defendant, relied upon in the Statement of Claim, namely, "influencing" or "requesting" the ACCC to issue the Minute, a relevant exercise of power. It was also submitted that the fourth defendant did not hold a public office, a necessary ingredient of the tort. The defendants further submitted that the plaintiff could not establish that any of the conduct of the fourth defendant relied upon for this cause of action was invalid, such invalidity also being a necessary ingredient of the tort.

[29] For the plaintiff, it was submitted that there was no authoritative statement of a test for determining that a person is a public officer for the purpose of the tort of misfeasance. Nor (by reference to the judgment of Brennan J in *Northern Territory v Mengel*[45] (*Mengel*)) is the tort limited to a case where a defendant has purported to exercise a power; an act or omission by a public official in purported performance of the functions of the office is sufficient to found the cause of action. It has not been established that no recommendation can constitute an element of the tort since the scope of the tort has not yet been authoritatively decided. The tort has two bases, one being the action of a pubic officer who knows that the officer has no power to do the act complained of; the other is where there is targeted malice by the public officer. In the present case, the fourth defendant's recommendation was not merely a "report" of the kind considered in *Calveley*.

[30] It is convenient to commence with a discussion of the defendants' submission that the conduct of the fourth defendant relied upon in the proposed statement of claim does not amount to an exercise of a power; and the submission that the invalidity of the exercise of power is also an essential element of the tort. The two propositions were related in the defendants' submissions[46].

No exercise of a power

[31] The defendants' submissions on this topic is supported by *Calveley*. A regulation required that, when a complaint was received from which it appeared that an offence may have been committed by a member of the police force, the matter was to be referred to an investigating officer who was required to investigate it. Where, from the report of the investigation, it appeared that a member of the police force may have committed a disciplinary or criminal offence, the Chief Officer was given power to suspend the member from the force, and from his office. A complaint was received about the plaintiff, and the defendant was appointed to investigate it. The plaintiff alleged that in carrying out the investigation, the defendant acted maliciously. It was held that the pleaded case against the investigating officer must stand or fall according as to whether it identified any act done by him "in the exercise or purported exercise of a power or authority vested in him as investigating officer which was infected by the malice pleaded against him"[47]; and that "the mere making of a report is not a relevant exercise of power or authority by the investigating officer"[48]. Accordingly, the pleaded allegations were not sufficient to establish a case of misfeasance in public office.

[32] A similar approach was taken by the Full Court of the Federal Court in *Emanuele v Hedley*[49], relied upon by the present defendants. The case arose out of a proposed

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45 (1995) 185 CLR 307 at 355-356.
46 See paras 10, 11, 22.
47 *Calveley* at p 1240.
48 *Calveley* at p 1241.
49 (1998) 179 FCR 290.

sale by the Commonwealth of a shopping centre in the Australian Capital Territory. The defendant to the claim for damages for misfeasance in public office was a public servant, the First Assistant Secretary of the Department of Territories, and Chairman of an InterDepartmental Committee responsible for the sale of the shopping centre[50]. For present purposes, the relevant conduct was the reporting by the defendant of a conversation with a third person in which that person was alleged to have offered the defendant a bribe for favourable treatment of the plaintiff in the tender process[51]. Of this conduct, the Court in *Emanuele* said that the compilation and delivery of the report "were not actions done in the exercise of powers attaching to a public office. They were simply the actions of an employee reporting an alleged event to superior officers"[52]. The Court held that in any event, this reporting did not cause the loss alleged by the plaintiff[53].

[33] The defendants also relied upon the judgment of Macfarlan JA in *Leerdam v Noori*[54]. There, the respondent plaintiff had sought a protection visa under the *Migration Act* 1958 (Cth) upon his arrival in Australia. He then sought a review in the Administrative Appeals Tribunal of the refusal of the relevant Minister to issue the visa. The first appellant acted as the Minister's solicitor at the hearing. He was employed by the second appellant. The respondent sued the appellants for misfeasance in public office. He alleged that the appellants did not provide any or sufficient of the particulars which the Tribunal had ordered the Minister to provide; and, on the application of the first appellant, the Tribunal conducted part of the hearing in the absence of the respondent. This conduct was relied upon for the claim for damages for misfeasance in public office.

[34] In upholding the appeal, and ordering dismissal of the action against the appellants, Macfarlan JA held that "an office cannot be characterised as a public office for the purposes of the tort if no relevant power is attached to it"[55]. In doing so, his Honour adopted the reasoning of the Victorian Court of Appeal in *Cannon v Tahche*[56] (discussed later in these reasons). His Honour also adopted a statement of Brennan J in *Mengel*[57] to the effect that the tort "consists of a purported exercise of some power or authority by a public officer", otherwise than in an honest attempt to perform the functions of his or her office[58]. His Honour considered that the appellants were simply performing the functions which the second appellant's contract with the Minister required them to perform at the Tribunal hearing[59].

[35] The submissions for the defendants also relied on the judgment of Spigelman CJ in *Leerdam*, who held that in that case, there was no "office" or governmental power of any character[60]. However, his Honour's analysis, it seems to me, did not focus solely on whether or not an exercise of a power was involved. Thus, just before the passage relied upon, his Honour said that the appellants "were not discharging a public duty,

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50 *Emanuele* at 296.
51 *Emanuele* at 300; see *Dou v Emanuele* (1995) 60 FCR 270 at 272-273.
52 *Emanuele* at 300.
53 *Emanuele* at 300.
54 (2009) 255 ALR 553.
55 *Leerdam* at [100].
56 (2002) 5 VR 317.
57 At 357.
58 *Leerdam* at [103].
59 *Leerdam* at [106].
60 The passage relied upon is in *Leerdam* at [16].

nor were they exercising a public power, nor in any other way did they occupy a public office"[61] (emphasis removed).

[36] The third member of the Court in *Leerdam* was Allsop P. As I read his Honour's judgment, the critical fact was that neither of the appellants "was a public officer" for the purposes of the tort[62]. His Honour's conclusion followed from the nature of the duties owed by the first and second appellant, which arose under the second appellant's retainer, and also included "duties to the Court"[63]. These were not public duties[64].

[37] The defendants' submissions also relied on *Cannon*. There the plaintiff had been charged and convicted of a crime, his conviction being quashed on appeal. He then sued the prosecutor (a barrister), and the prosecutor's instructing solicitor (an employee of the Director of Public Prosecutions), alleging that they had committed the tort of misfeasance in public office by withholding from him evidence that the complainant in the criminal proceedings had fabricated her evidence. The Victorian Court of Appeal held that no action for misfeasance in public office lay against the defendants[65]. The Court said

> "… it seems that, since the tort is essentially concerned with the misuse of a relevant power which is an incident of a public office, it follows as a matter of practicality that an office cannot be characterised as a public office for the purposes of the tort if no relevant power is attached to it. Put another way, an essential feature of such a public office is that a relevant power is an incident of it."[66]

[38] However, the Court recognised that an office might be a public office for the purpose of the tort if public duties attach to it[67]; but went on to say[68]

> "If, however, an essential element of the tort is the misuse by the holder of the public office of a relevant power that is attached to it, it must follow that the elements of the tort are not sufficiently established unless there is a relevant power attached to the office in question. A plaintiff who sues for misfeasance in public office must therefore establish, inter alia, that the office has a relevant power attached to it."

[39] Their Honours also said that while a position which involves the discharge of a prosecutorial function may be said to involve the discharge of public duties, that function did not carry with it any relevant power, so that it could not properly be said of a prosecutor appearing at a trial that that person occupies a public office for the purposes of the tort[69].

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61 *Leerdam* at [15]; see also at [4] and [5].
62 See *Leerdam* at [58]; see also [49].
63 See *Leerdam* at [49]-[53].
64 *Leerdam* at [56].
65 *Cannon* at [80].
66 *Cannon* at [49].
67 *Cannon* at [50].
68 *Cannon* at [53].
69 *Cannon* at [54].

[40] Although special leave to appeal from this decision was refused[70], that would appear to be because success in an action for damages against the appellants would be inconsistent with what Deane J said in *Whitehorn v R*[71] in relation to the duties of a prosecutor, the relevant sanctions being the making of orders at the trial of the accused or on an appeal. The refusal of special leave, as I read the transcript, did not involve an endorsement of the passages from the judgment from the Court of Appeal, referred to earlier.

[41] There is, however, reason to think that the tort is not so narrowly defined as the defendants submit. Thus in *Mengel*, Brennan J[72] said the tort is not limited to an abuse of office by exercise of a statutory power. His Honour referred to *Henley v Mayor of Lyme*[73] which, his Honour pointed out, was not a case arising from an impugned exercise of a statutory power, but a failure to maintain a seawall, the maintenance of which was a condition of the grant to the corporation of Lyme of the seawall, and associated tolls. His Honour then continued,

> "Any act or omission done or made by a public official in purported performance of the functions of the office can found an action for misfeasance in public office."

[42] This part of the judgment of Brennan J was adopted by the Supreme Court of Canada in *Odhavji Estate v Woodhouse*[74] (*Odhavji*). There the estate of a deceased person who had been shot by police officers sued police officers who had failed to co-operate with an investigation into the shooting. It was alleged that they were guilty of misfeasance in public office. The defendants sought to strike out the statement of claim. They succeeded in the Ontario Court of Appeal, on the basis that "the defining element of the tort is the unlawful exercise of the statutory or prerogative powers that adhere to a defendant's office"[75]. This conclusion was rejected by the Supreme Court. After considering earlier Canadian cases, *Mengel*, *Garrett v New Zealand (Attorney General)*[76] (*Garrett*) and *Three Rivers District Council v Bank of England (No 3)*[77] (*Three Rivers*), Iacobucci J (with whom the other members of the Court agreed) said,

> "In Australia, New Zealand and the United Kingdom, it is equally clear that the tort of misfeasance is not limited to the unlawful exercise of a statutory or prerogative power actually held".

[43] At least on one analysis, *Roncarelli v Duplessis*[78] (*Roncarelli*), an earlier decision of the Supreme Court of Canada, is a case where a defendant was held liable for damages, though his conduct did not involve any exercise of power. Rather it depended on the fact that, because of his position, the defendant was able to cause another body to exercise a statutory power in a way that caused harm to the plaintiff. A statute of province of Québec, the *Alcoholic Liquor Act* 1941, authorised the Québec Liquor Commission to cancel a liquor licence granted under that Act[79]. The

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70 *Tahche v Cannon* [2003] HCAT rans 524.
71 (1983) 152 CLR 657 at 665.
72 *Mengel* at 355.
73 (1828) 5 Bing 91 at 107-108; (130 ER 995 at 1001).
74 [2003] SCC 69; 233 DLR (4th) 193; see at [20].
75 *Odhavji* at [16].
76 [1997] 2 NZLR 332.
77 [2001] 2 All ER 513..
78 [1959] SCR 121.
79 See *Roncarelli* at [158].

defendant, as Premier and Attorney-General of the province, ordered the Commission to cancel the plaintiff's licence, which the Commission did[80]. The defendant had no power to give such an order[81]. The defendant was held liable for the damages which the plaintiff suffered as a consequence of the Commission's cancellation of his licence.

[44] In *Smith v East Elloe Rural District Council*[82] it was held that an action might proceed against a clerk to the Council who had procured the Council to issue a compulsory purchase order of the plaintiff's land. The plaintiff alleged that the clerk had knowingly acted wrongfully and in bad faith, in procuring the order and its confirmation. It was held that the action against the clerk might proceed, but on the footing that the validity of the purchase order itself could not be questioned (being protected by a statutory provision from challenge)[83]. The plaintiff's loss did not result from an exercise of power by the clerk, but from conduct in which he was able to engage because of his office.

[45] In *Elliott v Chief Constable of Wiltshire*[84] it was held that the plaintiff had an arguable claim for damages for the tort of misfeasance in public office. The conduct on which the plaintiff relied was the disclosure by the defendant, as a police officer, of the plaintiff's previous convictions for an improper purpose and with intent to cause him injury. The defendant had submitted that the tort concerned the purported exercise of some power or authority. The decision carried with it the rejection of this proposition as a comprehensive statement of the conduct on which the action might be based.

[46] *Cornelius v London Burrow of Hackney*[85] involved an application to strike out a statement of claim for damages for misfeasance in public office. The conduct on which the claim was based was the publication of four statements relating to the termination of the plaintiff's employment with the defendant. The Court was referred to the decision in *Three Rivers*, and in particular to the identification by Lord Steyn of the second requirement for the tort as "the exercise of power as a public officer"[86]; and to the decision of *Calveley*, relating to the making of a report[87]. However, their Lordships were not prepared to strike out the claim, considering it to be sufficient to show that the defendant was a public officer, who abused that position[88].

[47] There are other cases which indicate that the tort is not limited to a purported exercise of a power by a defendant.

[48] In *Garrett*, the plaintiff based her claim in misfeasance in public office on the failure of a police officer to investigate her claim that she had been raped by another police officer. The action failed because the damage on which it was based was not shown

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80 See *Roncarelli* at [159] and [162].
81 *Roncarelli* at [167].
82 [1956] AC 736.
83 *Smith*, see 752-753 (per Viscount Simonds); 759 (per Lord Morton of Henryton); 766 (per Lord Reid; per Lord Radcliffe); 773 (per Lord Sommervell of Harrow).
84 *The Times*, December 5, 1996; [1996] TLR 693. This and a number of other cases referred to in these reasons are discussed in Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (2009) Thompson Reuters (Legal) Limited pp 187-237.
85 [2002] EWCA Civ 1073.
86 See *Cornelius* at [13].
87 *Cornelius* at [14] – [15].
88 *Cornelius* at [17].

to have been foreseen by the defendant[89]; but not because the conduct did not amount to an invalid exercise of a power.

[49] In *Greville v Sprake*[90] a plaintiff in an action for misfeasance in public office failed because she did not establish malice on the part of the defendant. The defendant was a member of a parish council, and made a statement to the council to the effect that the plaintiff had carried out work on land without the lessor's consent. It appears to have been accepted that a statement made by the defendant, in his capacity as parish councillor, was conduct on which a claim for damages for misfeasance in public office could be based.

[50] In *Kuddus v Chief Constable of Lestershire Constabulary*[91] it was held that exemplary damages could be awarded in an action for misfeasance in public office, the misfeasance being the forging by a police constable of the plaintiff's signature on a statement purporting to withdraw a complaint made by the plaintiff to police. The conduct does not seem to have involved an exercise of power.

[51] A claim for damages for misfeasance in public office failed in *Watkins v Secretary of State for the Home Department*[92] because of the failure of the plaintiff to establish damage. The conduct was the opening by prison officers of a prisoner's mail, contrary to the Prison Rules. That does not seem to involve the exercise of a relevant power.

[52] In *Jones v Swansea City Council*[93] the Court of Appeal[94] (*Jones CA*) and, it would seem, the Trial Judge[95] (*Jones HLE*), held that a cause of action lay, notwithstanding that the conduct on which it was based was the exercise by the Council of its rights as a landlord. In the House of Lords, Lord Lowry[96], with whose reasons on this point the other members of the House of Lords appeared to have agreed[97], was inclined to accept the views of the Court of Appeal and the Trial Judge on this question.

[53] It is also relevant to note the statement of Flick J in *Pharm-a-care Laboratories Pty Ltd v Commonwealth (No 3)*[98] to the effect that *Emanuele* is not authority for a broadly expressed proposition that a recommendation cannot in any circumstances constitute the tort of misfeasance in public office.

[54] Subsequent to the hearing, the parties, on invitation, provided further submissions on a number of the cases just discussed.

[55] In the submission of the defendants, controverted by the plaintiff, a number of these cases (*Garrett*, *Smith*, *Greville*, *Kuddus*, *Watkins*, and *Karagozlu*) did not deal with the question whether the tort is confined to cases where a defendant purported to exercise a public power which is an incident of a public office, and the purported exercise of the power was invalid either because there was no power, or because it

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89 *Garrett*, see 349-352.
90 [2001] EWCA Civ 234.
91 [2002] 2 AC 122.
92 [2006] 2 AC 395.
93 [1990] 1 WLR 54 (*Jones CA*) and 1453 (*Jones HLE*).
94 See *Jones CA* at pp 70-71; 85.
95 See *Jones HLE* at p 1458.
96 *Jones* at p 1458.
97 *Jones* at pp 1455-1456.
98 (2010) 267 ALR 494 at [116].

would be so determined on judicial review. The defendants therefore submitted that these cases are irrelevant.

[56] It may be accepted that the cases referred to by the defendant did not in terms deal with the question raised by the defendants' submissions. However, the fact that the question was not raised in them tends to suggest that the defendants' submissions are not correct, particularly in light of some of the other cases discussed earlier.

[57] Unlike their original submissions for the hearing, the defendants' further submission recognised that a failure to act, rather than some positive conduct, might come within the scope of the tort. However, they submit that the plaintiff has not alleged any relevant breach of duty.

[58] In my view, the allegations in the proposed statement of claim include allegations of a failure to act, for example, that the fourth defendant wilfully denied the plaintiff natural justice, which included the obligation to undertake the conference process identified in s 132A of the CCA[99]. While these allegations may warrant further consideration, the claim for damages for misfeasance in public office does not depend solely on them.

[59] The defendants submitted that *Smith* did not involve a consideration of the elements of misfeasance in public office. While that might be literally correct, as has been indicated, the House of Lords considered there was a sufficient basis on which to proceed against the clerk[100].

[60] With respect to *Elliot* and *Cornelius* the defendants submitted that these cases do not establish that "anything done by a public officer as part of his employment can found an action for misfeasance in public office". The difficulty with that is that it is not directed to identifying whether the conduct relied upon by the plaintiff in the present case comes within the scope of the tort. In *Elliot* the Vice-Chancellor appears to have accepted[101] that the relevant person had acted "in his capacity as a police officer". This was not a case of an omission; nor did any question of the exercise of a power, capable of being determined to be invalid on judicial review, arise. The same can be said of *Cornelius*.

[61] In *Leerdam* Allsop P "accepted that the precise limits of the tort have not been defined"[102]. His Honour's statement is consistent with that of five members of the High Court in *Mengel*[103]. It seems to me, in light of the cases discussed earlier, considerable uncertainty about the scope of the tort still remains.

[62] Having regard to the cases which have been discussed, it does not seem to me that I can safely conclude that the plaintiff's claim for damage for misfeasance in public office must fail, because the plaintiff does not allege conduct of the fourth defendant which amounted to a purported exercise of a power.

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99 Statement of Claim paras 76, 91, and 92.

100 *Smith's* case was recognised as dealing with the tort by Moules, *op cit* at [5-042]; and by Cockburn and Thomas, "Personal Liability of Public Officers in the Tort of Misfeasance in Public Office (2001) 9 TLJ 80 at n 70.

101 *Elliot* at p 694.

102 *Leerdam* at [47].

103 *Mengel* at 345; see also at 355 per Brennan J, and the reference by Deane J to "latent ambiguities and qualifications" in his summary of the elements of the tort at 370. See also *Sanders v Snell* (1998) 196 CLR 329 at 346.

[63] On the same basis, it seems to me that I cannot safely conclude that the plaintiff's claim against the fourth defendant for damages for misfeasance in public office must fail, because the plaintiff does not allege acts of the fourth defendant which can be shown to be invalid. The cases to which I have referred would indicate that damages are available, in some circumstances, although no question of invalidity of any conduct of the defendant could arise.

A public officer?

[64] The defendants submitted that the fourth defendant would not be found to be a holder of a public office who was exercising a public power in doing any of the acts alleged in the claim made against him. The submissions relied upon an affidavit of Ms Auld, a solicitor, on information and belief as to the fourth defendant's position with the ACCC, and some aspects of his role in relation to the plaintiff's products.

[65] The description of the tort itself recognises the fact that it is an element of the cause of action that the defendant hold public office. There is, however, no clear criterion for establishing whether a particular position satisfies this description. As Byrne J pointed out in *R v McCann*[104], the content of the expression depends very much on its context. In the context of this tort, the expression is used "in a relatively wide sense"[105]. In *Tampion v Anderson*[106] it was said that the office must be one, the holder of which has duties to members of the public as to how the office is to be exercised. That statement is not itself without difficulties. In any event, in *Jones CA*[107] in a case involving an allegation of a misuse of a power, it was considered sufficient that the holder of the power was required to exercise it for the public good. The cases referred to earlier demonstrate that the class of persons who are holders of a public office is wide[108].

[66] This application is obviously not the trial of the action. As the submissions for the plaintiff point out, disclosure has not occurred. Miss Auld's affidavit does not purport to be a comprehensive statement of the role of the fourth defendant. In those circumstances, and given the width of the class of persons who have come within the scope of the tort, I am not prepared to find that the plaintiff will fail to establish that the fourth defendant is a public officer. Accordingly, I am not prepared to refuse leave on this ground.

Conclusion

[67] I am not prepared to refuse the plaintiff leave to amend the statement of claim on the ground that the proposed claim for damages for misfeasance in public office must fail. I shall hear submissions from the parties relating to the other matters raised by the defendants.

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104 [1998] 2 Qd R 56 at 67.

105 *Three Rivers* at 191 per Lord Steyn.

106 [1973] VR 829.

107 *Jones CA* at p 71.

108 See also Moules *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* 2009, Thompson Reuters (Legal) Limited, pp 203-208.