SUPREME COURT OF QUEENSLAND

CITATION:	*Mathews v Legal Services Commissioner & Anor* [2016] QCA 22
PARTIES:	**RUSSELL GORDON HAIG MATHEWS** (applicant) **v** **LEGAL SERVICES COMMISSIONER** (respondent) **JOHN PEDEN** (respondent)
FILE NO:	Appeal No 6434 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out
DELIVERED ON:	12 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Fraser JA
ORDERS:	**1. The application filed by Mr Mathews on 30 June 2015 be struck out.** **2. The parties have leave to file written submissions about costs within 14 days of today.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERAL – COURT ORGANISATION AND DISTRIBUTION OF BUSINESS – SUPREME COURT – where the applicant filed a document in the Court of Appeal Registry applying for a statutory order of review – where the respondent alleged that the matter was improperly instituted in the Court of Appeal and instead should have been brought in the Trial Division – where the Trial Division has jurisdiction to hear an application for a statutory order of review – where the general scheme of the *Uniform Civil Procedure Rules* is that the Trial Division exercises the court's original civil jurisdiction – where there was no apparent merit in the application – whether the Court of Appeal has jurisdiction to hear the application – whether the matter was improperly instituted in the Court of Appeal – whether the application for a statutory order of review should be struck out PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERAL – JURISDICTION – FULL COURT – where, invoking the Court of Appeal's 'inherent jurisdiction', the applicant filed a document with the Court of Appeal registry seeking an order

striking out a legal practitioner – where the applicant alleged that the legal practitioner had committed professional misconduct – where the applicant alleged that the legal practitioner had failed to "advance the correct decision to be made by the Court" – whether the Court of Appeal has inherent jurisdiction to control and discipline legal practitioners – whether the Court should exercise this jurisdiction

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the respondent submitted that a single judge of appeal had jurisdiction to strike out an improperly instituted notice of appeal – whether a single judge of appeal may strike out a notice of appeal

Judicial Review Act 1991 (Qld), s 19, s 20, s 25, s 48, s 49
Legal Profession Act 2007 (Qld), s 13, s 430
Supreme Court of Queensland Act 1991 (Qld), s 5, s 29, s 45, s 62
Uniform Civil Procedure Rules 1999 (Qld), r 566, r 744, r 745

McElligott v McElligott [2014] QCA 54, followed
Queensland Law Society Inc v Smith [2001] 1 Qd R 649; [2000] QCA 109, cited
Re Hope [1996] 2 Qd R 25; [1995] QCA 471, cited
Syddall v The National Mutual Life Association of Australasia Ltd [2009] QCA 341, cited

COUNSEL: No appearance by the applicant, the applicant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: No appearance for the applicant
No appearance for the respondent

[1] **FRASER JA:** Mr Mathews had filed in the Court of Appeal Registry a document headed "Application for a Statutory Order of Review and Originating Application Invoking the Exclusive Inherent Jurisdiction of the Court of Appeal to Strike off Legal Practitioners". The application names as respondents the Legal Services Commissioner and a barrister, Mr Peden.

[2] Mr Mathews and the Legal Services Commissioner filed written submissions addressed to the question raised by the Court whether or not Mr Mathews' proceeding was improperly instituted in the Court of Appeal and, if so, whether or not it should be struck out on that ground. This matter was dealt with on the papers, having regard to Mr Mathews' request that all proceedings on his application be dealt with in this manner because of disabilities from which he suffers. Mr Peden did not file any submissions; it seems that he may not have been served with Mr Mathews' application.

[3] Mr Mathews' written submission advances propositions to the following effect:

- The Court of Appeal has "exclusive inherent jurisdiction" to strike off legal practitioners: *Queensland Law Society Inc v Smith* [2000] QCA 109.
- If his application was improperly instituted in the Court of Appeal the Court is not obliged to dismiss or strike it out; it may instead make an order designed to rectify any defect in the proceeding or exercise its inherent jurisdiction by bringing a proceeding on its own motion.
- The decision in *McElligott v McElligott* [2014] QCA 54, in which Holmes JA (as the Chief Justice then was) held that a judge of appeal was authorised to strike out an appeal which had been improperly instituted, was distinguishable because the present proceeding had a much greater relevance to the conduct of the judicial arm of government.
- Mr Mathews' application was not filed outside any relevant appeal period, or, if it was, there should be an extension of time having regard to the effect of Mr Mathews' disabilities upon his ability to prosecute his application.

[4] Otherwise Mr Mathews' submission largely comprises accusations of misconduct against Mr Peden and many others, and statements to the effect that Mr Mathews' application involves very important issues and would expose corruption in Queensland.

[5] The submission on behalf of the Legal Services Commissioner advances propositions to the following effect:

- Mr Mathews' application was not properly instituted in the Court of Appeal and should instead have been brought in the Trial Division: the submission referred to rr 566, 744 and 745 of the *Uniform Civil Procedure Rules* 1999 (Qld).
- As was held in *McElligott v McElligott & Ors*, s 44 of the *Supreme Court of Queensland Act* 1991 (Qld) empowers a judge of appeal to strike out a notice of appeal where that appeal has been improperly instituted.
- The appropriate order in this case is to strike out the application and order the applicant to pay the first respondent's costs.

[6] These submissions require reference to the content of Mr Mathews' application. I have already quoted the heading. Although that heading describes the application both as an application for a statutory order of review and an application invoking "the exclusive inherent jurisdiction of the Court of Appeal to strike off legal practitioners", the text of the document concerns only an application for a statutory order of review. The first substantive paragraph describes the application as, "application to review the decision dated the 5th June 2015 of the first respondent to dismiss the complaint of the Applicant that legal practitioner John Peden had abrogated his Paramount Duty to the Court, and thus committed Professional Misconduct." The immediately following paragraph sets out the basis of a contention that "Mr Mathews is aggrieved by the decision". That paragraph adopts the words of s 20(1) of the *Judicial Review Act* 1991 (Qld) which empowers a person "who is aggrieved by a decision to which this Act applies" to apply to the court for a statutory order of review in relation to the decision". The succeeding paragraph of the application then sets out as the "grounds of the application" the text of s 20(2)(a) – (i) and (apparently as particulars of ground 5 (which replicates s 20(2)(e)), the text of s 23(a) – (i)).

[7] There follows a heading "Particulars of Fraud or Bad Faith" which, in the context just mentioned, must be understood as particulars of ground 7 (which replicates the text of s 20(2)(g), "that the decision was induced or affected by fraud") and ground 5(d) (the example of an improper exercise of power (s 20(2)(e)) in s 23(d) "an exercise of a discretionary power in bad faith"). These particulars refer to the alleged misconduct of many different people and organisations, including the Brisbane City Council, the Legal Services Commission, a number of legal practitioners, a university college, a Synod, a University of Queensland Registrar, the Crime and Misconduct Commission, various police officers, and others. General allegations of serious misconduct are asserted against Mr Peden. There is next a paragraph commencing with the text "The applicant claims …", followed by eight claimed orders or declarations.

[8] With one exception, that document is in the approved form for an application for a statutory order of review (Form 54), including in the concluding paragraph a reference to a directions hearing in the application. The only departure from that approved form is that, instead of heading the document "Supreme Court of Queensland" (the heading used for proceedings in the Trial Division), the heading is "In the Court of Appeal Supreme Court of Queensland" (the heading provided for proceedings in the Court of Appeal, including an application in the Court of Appeal (Form 69)).

[9] Section 19 of the *Judicial Review Act* 1991 (Qld) provides that the "court" (a term defined in that Act to mean "the Supreme Court") has jurisdiction to hear and determine such applications. The Supreme Court is divided into the office of the Chief Justice, the Court of Appeal, and the Trial Division.[1] Section 29 of the *Supreme Court of Queensland Act* 1991 (Qld) provides:

> "(1) Subject to this Act, the Court of Appeal has jurisdiction to hear and determine all matters that, immediately before the commencement of this section, the Full Court had jurisdiction to hear and determine.
>
> (2) The Court of Appeal has such additional jurisdiction as is conferred on it by or under this Act, another Act or a Commonwealth Act.
>
> (3) The Court of Appeal may, in proceedings before it, exercise every jurisdiction or power of the court, whether at law or in equity or under any Act, Commonwealth Act or Imperial Act."

[10] Section 29(3) is not presently relevant because it operates only where there is already a proceeding in the Court of Appeal. Section 29(1) does not confer jurisdiction on the Court of Appeal in this matter because the *Judicial Review Act* 1991 (Qld) was not enacted until after the Full Court had been replaced by the Court of Appeal.[2] As to s 29(2), the question is whether the reference to "the court" in s 19 of the *Judicial Review Act* 1991 (Qld) (read alongside that Act's definition of that term as "the Supreme Court") should be construed as conferring jurisdiction upon the Court of Appeal.

[11] It should first be noted that the Trial Division has jurisdiction to hear an application for a statutory order of review. Section 45(2) of the *Supreme Court of Queensland Act* 1991 (Qld) provides that "[t]he jurisdiction and powers of the court that are not required to be exercised only by the Court of Appeal may be exercised by the court

---

1 *Supreme Court of Queensland Act* 1991 (Qld), s 5(1).

2 The *Supreme Court of Queensland Act* 1991 (Qld) was assented to and commenced on 24 October 1991. The *Judicial Review Act* 1991 (Qld) was assented to and commenced on 17 December 1991.

in the Trial Division." Whether or not s 19 of the *Judicial Review Act* 1991 (Qld) vests jurisdiction in the Court of Appeal, it plainly does not require the Court of Appeal to exercise that jurisdiction to the exclusion of the Trial Division. (That is so even though the Full Court formerly exercised jurisdiction to issue prerogative writs to similar effect as the orders now authorised by the *Judicial Review Act* 1991 (Qld)).[3] Section 46(1) of the *Supreme Court of Queensland Act* 1991 (Qld) requires that all proceedings in the Trial Division must be heard and disposed of before a single judge. For such proceedings, s 46(2) provides that "the judge constitutes, and is to exercise all the jurisdiction and powers of the court".

[12] In *Re Hope* [1996] 2 Qd R 25 at 27, McPherson JA expressed the view that, before the commencement of the *Supreme Court of Queensland Act* 1991 (Qld), "when a statute or a Rule of Court uses the expression "the Court", it should, in the first place, be taken to mean what it says and not to include a single judge of the Court".[4] Whether or not an Act enacted after the commencement of the *Supreme Court of Queensland Act* 1991 (Qld) confers jurisdiction on the Court of Appeal must depend upon the proper construction of the particular Act, but in the context of s 29(2) of the *Supreme Court of Queensland Act* 1991 (Qld) there can be no presumption or *prima facie* rule that a conferral of jurisdiction upon "the court" or "the Supreme Court" confers jurisdiction upon the Court of Appeal.

[13] The *Judicial Review Act* 1991 (Qld) does not expressly confer jurisdiction upon the Court of Appeal. There is no indication in that Act of a statutory purpose of conferring original jurisdiction upon the Court of Appeal. Instead s 25 of the *Judicial Review Act* 1991 (Qld) requires an application for a statutory order of review to be made in the way prescribed by rules of court. The general scheme of the *Uniform Civil Procedure Rules* is that the Trial Division exercises the court's original civil jurisdiction, including in relation to applications for judicial review, such applications being regulated by *Uniform Civil Procedure Rules* 1999 (Qld), Part 4 of Chapter 4. In that Part, r 566 requires such an application to be made in the approved form which, as I have indicated, is in the form approved for applications in the Trial Division rather than in the Court of Appeal.

[14] That is consistent with ss 48 and 49 of the *Judicial Review Act* 1991 (Qld). Section 48 confers power upon "the court" to stay or dismiss applications (including an application under s 20) and s 49 confers power upon "the court" in relation to costs of an application made to the court. Each of ss 48(5) and s 49(5) provide that an appeal from an order under the section may only be brought with the leave of "the Court of Appeal". Thus each provision both distinguishes the "Court of Appeal" from "the court" (upon which jurisdiction to hear applications is conferred by s 19) and contemplates an appeal from "the court" to "the Court of Appeal". Consistently with those provisions, s 62 of the *Supreme Court of Queensland Act* 1991 (Qld) creates a right of appeal to the Court of Appeal from judgments and orders "of the court in the Trial Division".

[15] Pursuant to r 745 of the *Uniform Civil Procedure Rules* 1999 (Qld), such an appeal is regulated by Part 1 of Chapter 18 of those Rules. In *Syddall v The National Mutual Life Association of Australasia Ltd* [2009] QCA 341 at [11], McMurdo P observed of r 745 that it "contemplates that Trial Division judges will find facts and apply the law to those facts to decide the issue or issues in dispute between the parties, with an

---

3 See the repealed *Rules of the Supreme Court* 1900 (Qld), Order 81.

4 See also, to the same effect, *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd* [1989] 1 Qd R 8 per McPherson J at 12-14.

appeal from the resulting order to the Court of Appeal if a party is dissatisfied." The same may certainly be said of the statutory provisions identified in [13]-[14].

[16] The circumstances that the Full Court formerly exercised jurisdiction to issue relevant prerogative writs and the Court of Appeal now might have that jurisdiction are insufficient to displace the clear effect of those statutory provisions. An application under the *Judicial Review Act* 1991 (Qld) should be made to the Supreme Court by filing the application in the Trial Division rather than in the Court of Appeal. The applicant's application for a statutory order of review was wrongly instituted in the Court of Appeal.

[17] If there were arguable merit in that application perhaps it might be appropriate to direct that it be treated as an application in the Trial Division. There is, however, no apparent merit in the application. Section 430 of the *Legal Profession Act* 2007 (Qld) empowers the Legal Services Commissioner to dismiss a complaint if it was received by the Commissioner more than three years after the conduct that is the subject of the complaint occurred. The Legal Services Commissioner explained in his letter to Mr Mathews dated 5 June 2015 (which is exhibited to Mr Mathews' affidavit) that his complaint was out of time, the conduct the subject matter of the complaint having occurred in 2005 - 2006. Mr Mathews' application identifies as the only suggested error in this decision that the Commissioner was not entitled to dismiss his complaint because it was "a Conduct Complaint as opposed to a Consumer Complaint, and is a clear complaint of Professional Misconduct, of two instances of Professional Misconduct …". Section 430(2)(b)(ii) of the *Legal Profession Act* 2007 (Qld) provides that the Commissioner may dismiss a complaint "unless the Commissioner decides that … the complaint involves conduct of the following type and it is in the public interest to deal with the complaint – (A) conduct of an Australian legal practitioner that the Commissioner considers may be professional misconduct …". That provision does not apply because the Commissioner decided either that it was not in the public interest to deal with the complaint or that the complaint did not involve conduct that the Commissioner considered may be professional misconduct. Rather, the Commissioner considered that there was no evidence that Mr Peden had engaged in professional misconduct: the Commissioner pointed out that Mr Peden was not acting for Mr Mathews but for the Brisbane City Council, with whom Mr Mathews was in conflict, that Mr Peden had no responsibility to advance Mr Mathews' interests, and that there was no evidence that Mr Peden was not acting on instructions, was wrongfully acting on instructions, or knew that his instructions were untrue or unethical. Notwithstanding the assertions made by Mr Mathews in his affidavit, it remains the case that he has not adduced any evidence of that kind. Mr Mathews' application for a statutory order of review should be struck out.

[18] Section 13 of the *Legal Profession Act* 2007 (Qld) preserves the inherent jurisdiction and power of the Supreme Court in relation to the control and discipline of local lawyers and legal practitioners. This jurisdiction was conferred upon the Court of Appeal by s 29(1) of the *Supreme Court of Queensland Act* 1991 (Qld).[5]

[19] However, the text of Mr Mathews' application confines itself to an application under the *Judicial Review Act* 1991 (Qld) despite the formal heading of the application. That might be overlooked if it appeared that a barrister might have committed misconduct, but that is not the case here. It appears from Mr Mathews' affidavit that his complaint about the conduct of Mr Peden is based upon his (Mr Mathews') view

---

5 *Queensland Law Society v Smith* [2001] 1 Qd R 649 at [3]-[6], [11].

that a barrister "must advance the correct decision to be made by the Court".[6] This assumption apparently informs Mr Mathews' complaint that in a proceeding in 2006 (*Brisbane City Council v Mathews* [2006] QSC 25) Mr Peden did not inform the judge that Mr Peden's client, the Brisbane City Council, required a court order under s 160 of the *Health Act* 1937 (Qld) to authorise its employees to enter Mr Mathews' property on 29 November 2004. The assumption is incorrect. It is for the court, not the barrister, to decide the correct view of the facts and the law. The barrister must act honestly and ethically, but within those limits the barrister must act in the client's interests; the barrister's personal view of the law and the facts cannot dictate his or her conduct of a case. An exhibit to Mr Mathews' affidavit includes extracts from an opinion of a different barrister, who advised the Brisbane City Council that it had the relevant power of entry under a different statutory division, s 200(1) of the *Health Regulation* 1996 (Qld). Whether or not that advice was correct in law is not to the point. The mere fact that Mr Peden did not advocate the view now expressed by Mr Mathews could not possibly be regarded as a sufficient basis for the Court to embark upon on examination of Mr Peden's conduct in these circumstances.

[20] Mr Mathews also refers to *R v Mathews* [2010] QCA 196, in which the Court of Appeal set aside orders made in the Magistrates Court on 1 June 2005 and 17 December 2008 and ordered that a charge of public nuisance brought against Mr Mathews be dismissed. The Court found that, although Mr Mathews had indicated to the magistrate that he intended to contest his guilt of a summary charge of public nuisance, the magistrate did not ask Mr Mathews to plead to the charge, he did not hear evidence, he did not allow Mr Mathews to cross examine prosecution witnesses, he did not allow Mr Mathews to give or call evidence or address the court, and he did not determine in a reasoned way whether, on the evidence, Mr Mathews was guilty or not guilty before sentencing him. The transcript of the proceeding showed that, in a short discussion between the magistrate and the police prosecutor, and despite Mr Mathews mentioning that there were witnesses in the court, after the magistrate heard from the prosecutor he imposed sentence by ordering that Mr Mathews was discharged. In Mr Mathews' affidavit he complains that Mr Peden (who Mr Mathews says was present in court representing a witness), should have intervened to prevent the magistrate from making that error. There is no basis, however, for thinking either that, before the magistrate proceeded in the unusual way that he did, Mr Peden should have anticipated that the magistrate would do so, or that Mr Peden, as counsel only for a witness, had an obligation to intervene in the proceedings in Mr Mathews' interests.

[21] In circumstances in which there is no evidence before the court to suggest possible misconduct by Mr Peden, no basis appears for the Court to make any order other than an order striking out Mr Mathews' application. Such an order may be made by a judge of appeal.[7]

Orders

[22] Order that:

(a) The application filed by Mr Mathews on 30 June 2015 be struck out.

(b) The parties have leave to file written submissions about costs within 14 days of today.

---

6 Affidavit of Mr Mathews, [14].

7 See *McElligott v McElligott* [2014] QCA 54.