

SUPREME COURT OF QUEENSLAND

CITATION: *Markan v Bar Association of Queensland* [2013] QCA 379

PARTIES: **PETER MARKAN**
(appellant)
v
BAR ASSOCIATION OF QUEENSLAND
(respondent)

FILE NO/S: Appeal No 3595 of 2013
Appeal No 5272 of 2013
SC No 928 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 8 October 2013

JUDGES: Margaret McMurdo P, Mullins and Ann Lyons JJ
Judgment of the Court

ORDERS: **In Appeal No 3595 of 2013:**
1. Appeal is dismissed.
2. The appellant must pay the respondent's costs of the appeal to be assessed.

In Appeal No 5272 of 2013:
1. Appeal is dismissed.
2. The appellant must pay the respondent's costs of the appeal to be assessed.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FOR BIAS IN JUDICIAL PROCEEDINGS – where the appellant appeals against the refusal of the primary judge to remove herself from hearing the respondent's strike out application in the appellant's proceeding against the respondent claiming damages for various alleged breaches by the respondent in its investigation of his complaints against his counsel – whether the primary judge was an impartial and independent judge – whether the primary judge erred in concluding that she was not disqualified from hearing the strike out application

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY –

where the appellant appeals the decision to strike out his claim and statement of claim – where the claim was based on breach of contract – where there was no contract between the appellant and the respondent – where the appellant relied on provisions of the *Australian Consumer Law* – where the conduct complained of was not in trade or commerce – whether the exercise of the discretion to strike out the claim and statement of claim was arbitrary, capricious or in bad faith

Constitution of Queensland 2001 (Qld), s 59

Legal Profession Act 2007 (Qld), s 435, s 439

Uniform Civil Procedure Rules 1999 (Qld), r 16, r 171

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, followed

Johnstone v Victorian Lawyers RPA Ltd (2003)

132 FCR 411; [2003] FCA 1052, considered

Markan v Bar Association of Queensland [2013] QSC 108, related

Markan v Bar Association of Queensland [2013] QSC 146, related

R v Markan [2009] QCA 110, related

COUNSEL: The appellant appeared on his own behalf
D G Clothier QC, with P J McCafferty, for the respondent

SOLICITORS: The appellant appeared on his own behalf
Bartley Cohen for the respondent

- [1] **THE COURT:** Mr Markan appeared for himself when he was tried in the District Court in October 2008 before a jury on one count of grievous bodily harm. He was convicted and sentenced to four years' imprisonment with a parole eligibility date after serving two years' imprisonment. He engaged solicitors to represent him on an appeal. Those solicitors briefed Mr Carmody SC and Mr Douglas Wilson of counsel. Mr Markan applied for leave to appeal against sentence in addition to appealing his conviction. The sentence application was abandoned on his behalf before the Court of Appeal and the appeal proceeded in relation to conviction only. The appeal was dismissed: *R v Markan* [2009] QCA 110.
- [2] Mr Markan then engaged another solicitor to advise him in relation to an appeal to the High Court, particularly in relation to certain matters that were not advanced on his behalf before the Court of Appeal. That solicitor briefed Mr Paul Smith of counsel to advise Mr Markan as to his prospects of success in an application for special leave to the High Court.
- [3] On 19 May 2011 Mr Markan wrote a letter of complaint to the respondent in respect of the conduct of his appeal by Mr Carmody SC and Mr Wilson. On the same date he wrote another letter to the respondent making a complaint about the conduct of Mr Smith in failing to advise on the matters on which Mr Markan had requested advice.
- [4] The respondent must have referred the complaints to the Legal Services Commissioner (the Commissioner) who decided pursuant to s 435(2) of the *Legal*

Profession Act 2007 (the Act) to refer the complaints to the respondent for investigation. On 1 August 2011 the Chief Executive of the respondent sent letters to Mr Markan in respect of each complaint in identical terms advising that the complaint had been referred to the respondent by the Commissioner for investigation and as to how the investigation would be conducted. Mr Markan was informed the investigation would be conducted by the respondent's Professional Conduct Committee (PCC) and each letter then stated:

"The procedure adopted by the Association for investigating complaints is as follows:

- The complaint is recorded in the Complaints Register kept by the Association;
- The complaint will be forwarded to the PCC for its consideration;
- The PCC will require the Barrister to respond to your complaint;
- The PCC may require further written information and/or documentation from you in order to assist with the investigation of the complaint;
- The PCC may also need to make enquiries of third parties for information relating to your complaint.

Under the *Legal Profession Act 2007*, the role of the Association is to:

- Investigate matters referred to it by the LSC, and
- Report to the LSC on the outcome of its investigation, including a recommendation about whether a proceeding before a disciplinary body in relation to the complaint should be started.

Responsibility for deciding whether a disciplinary proceeding is commenced rests with the LSC.

The Association will conduct its investigation as expeditiously as possible, but you should be aware that some investigations do take some time to complete. I will contact you again if any further information concerning the complaint is required, and otherwise will advise you when the Association has reported to the LSC."

- [5] The respondent provided one written report to the Commissioner dated 4 April 2012 in relation to Mr Carmody SC and Mr Wilson and another written report dated 4 April 2012 in relation to the complaint against Mr Smith.
- [6] On 16 May 2012 the Chief Executive of the respondent sent a letter to Mr Markan in respect of each complaint advising that the respondent had completed its report which had been sent to the Commissioner. Although those letters were addressed to Mr Markan at the address on his original letters of complaint, the letters were returned to the respondent as unclaimed. Mr Markan's complaints were dismissed by the Commissioner.
- [7] On 4 February 2013 Mr Markan commenced the proceeding in the Trial Division against the respondent by claim and statement of claim claiming damages of \$10,000,000.13 for the losses suffered by him for anticipatory breach, breach of promise, breach of trust, material breach and fundamental breach. The essence of the claim was that the offer of investigation expressed in the respondent's letters

dated 1 August 2011 was accepted by Mr Markan and the respondent failed to fulfil the services it promised.

- [8] The respondent made an application to strike out the claim and statement of claim. That application was due to be heard on 14 March 2013, but the two judges who were listed in the Court's applications jurisdiction indicated they were unable to hear the application, because of connections with the respondent. The matter was then listed to be heard by Atkinson J on 24 April 2013 on the basis that Atkinson J did not have connections with the respondent of the same type or to the same extent as the judges who indicated their inability to hear the application. Mr Markan filed an application seeking an order that Atkinson J be disqualified from hearing the strike out application on the basis that she was not a "neutral, independent and impartial arbiter."
- [9] That application was heard by Atkinson J on 17 April 2013 and the application dismissed: *Markan v Bar Association of Queensland* [2013] QSC 108. Appeal Number 3595 of 2013 (the first appeal) is Mr Markan's appeal against Atkinson J's refusal to disqualify herself from hearing the strike out application.
- [10] Atkinson J heard the strike out application on 24 April 2013 and reserved the decision. The decision was given on 7 June 2013: *Markan v Bar Association of Queensland* [2013] QSC 146 (the reasons). Appeal Number 5272 of 2013 (the second appeal) is Mr Markan's appeal against Atkinson J's decision to set aside the claim and the amended claim pursuant to r 16(e) of the *Uniform Civil Procedure Rules* 1999, strike out the statement of claim and amended statement of claim pursuant to r 171(1)(a) and (c) of the *UCPR*, and order Mr Markan to pay the respondent's costs of and incidental to the proceeding to be assessed.

The first appeal

- [11] On the application for disqualification, Mr Markan had put in issue Atkinson J's impartiality on the basis that she had been a member of the respondent when she was a barrister between 1987 and 1998, she may return to being a barrister when she retires from the Court, she is professionally and socially associated with members of the respondent and she remains a barrister and is therefore a party to the proceeding. Mr Markan had researched various extra-curial roles undertaken by Atkinson J and made allegations that during Atkinson J's tenure in the relevant organisations she had been in a position of influence to initiate positive change for the advancement of human rights, but had not done so. In her reasons, Atkinson J addressed each of the arguments advanced by Mr Markan and concluded that there was nothing in her history or present situation which disqualified her from hearing the case, applying the test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]:
- "... a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."
- [12] In his grounds to support the first appeal Mr Markan identifies the issue to be addressed as "the lack of respect for the human rights in Queensland and the issue of racist attitude, discrimination and vilification of people who are not lawyers and not of anglo origin and who represent themselves in courts." Mr Markan expressly relies on article 14 of the *International Covenant on Civil and Political Rights*. His specific complaint was that Atkinson J did not have the impartiality that he

describes she “attributed to herself” during the hearing on 17 April 2013 and that she was a judge in her own case. Mr Markan claims that conduct brought the administration of justice in Queensland into disrepute.

- [13] Mr Markan made many statements in the course of his written and oral submissions that revealed his unhappiness with the justice system in Queensland. His general grievances, such as his perception of the homogeneity of judges of the Supreme Court and the asserted lack of respect for human rights in this State, had nothing to do, however, with the specific issues relevantly raised by the first appeal. Those can be summarised as:
- (1) was Atkinson J an impartial and independent judge?
 - (2) did Atkinson J err in concluding that she was not disqualified from hearing the strike out application?
- [14] The respondent did not take an adversarial role in the hearing of Mr Markan’s disqualification application before Atkinson J and also adopted that position on the first appeal, except in relation to costs which the respondent sought on the basis that it had been served with the notice of appeal.
- [15] In relation to the first issue, there is a fundamental flaw in Mr Markan’s submissions that Atkinson J was a party to the application. The issue of whether Atkinson J should be disqualified from hearing the strike out application was the subject matter of that application, but did not make Atkinson J a party to the application. Atkinson J’s role in relation to the disqualification application was as the judge who was hearing the question of whether there were grounds for her disqualification.
- [16] Observations were made in the majority judgment in *Ebner* about whether it should be the judge whose disqualification is sought or another judge who hears the application for disqualification. Although it was not an issue that was argued in *Ebner*, the majority judgment observed at [74] that the procedure adopted by the primary judge (whose disqualification was sought) was “both the ordinary, and the correct, practice in deciding the matter himself.”
- [17] The authorities that Mr Markan relies on for the principle that a judge should not be a judge in his or her own cause are not relevant to the role of Atkinson J in deciding the disqualification application. Mr Markan cannot succeed on the issue that is based on asserting that Atkinson J was a party to the disqualification application. There was no error in Atkinson J following the ordinary practice that the judge whose disqualification is sought hears the disqualification application.
- [18] On the second issue, Mr Markan takes exception to Atkinson J reaching a conclusion about what a fair minded lay observer might consider about her own impartiality. Atkinson J followed the orthodox approach, however, of applying the test of apprehended bias to the facts.
- [19] A person may be appointed by the Governor in Council as a judge of the Supreme Court of Queensland only if a person has been a barrister or solicitor of the Supreme Court of at least five years standing: s 59 of the *Constitution of Queensland* 2001. Most judges of the Court were barristers before appointment, but whether a judge was a barrister or solicitor, the nature of the qualification for appointment as a judge and the duty of a judge to hear cases (where the parties are usually represented by barristers and/or solicitors) mean that any judge has connections, associations or

contact with the legal profession and the professional associations for members of the legal profession.

- [20] Mr Markan speculated about and attempted to characterise Atkinson J's connections with the respondent as involving greater involvement and interest than in fact existed for Atkinson J who has been a judge since 1998. In the circumstances, Atkinson J's conclusion that she was not disqualified from hearing the strike out application and it was therefore her duty to hear the application was not in error.
- [21] Mr Markan cannot succeed on the first appeal. The orders that should be made are:
1. Appeal No 3595 of 2013 is dismissed.
 2. The appellant must pay the respondent's costs of the appeal to be assessed.

The second appeal

- [22] Atkinson J set aside the amended claim (at [36] of the reasons) on the ground that it had been filed without obtaining the leave of the Court pursuant to r 377 of the *UCPR*. To the extent that the claim was for damages based on breach of contract, it was held (at [41] of the reasons) that there was no possible cause of action in breach of contract, as on the facts pleaded, there was no contract between Mr Markan and the respondent or the Commissioner. It was held (at [44] of the reasons) that the provisions of the *Fair Trading Act 1989* relied on by Mr Markan did not found a civil cause of action.
- [23] Although Mr Markan had identified provisions of the *Competition and Consumer Act 2010* (Cth) in his claim, Atkinson J understood them as intending to refer to the provisions of the *Australian Consumer Law* (at [45] of the reasons) and dealt with them on that basis. To the extent that Mr Markan was alleging misleading or deceptive conduct, unconscionable conduct, false or misleading representation as to services or that services would be rendered with due care and skill, Atkinson J held (at [49] of the reasons) that to be actionable the conduct complained of had to be conducted in trade or commerce and (at [58] of the reasons) the investigation of a complaint against a legal practitioner pursuant to a statutory duty to do so was not an activity engaged in "in trade or commerce" so as to attract the operation of the *Australian Consumer Law*.
- [24] Atkinson J held (at [61] of the reasons) that the remaining portions of the claim and statement of claim and amended statement of claim "merely make scandalous accusations of criminal or other serious misconduct without pleading any material facts which could be said to support such allegations."
- [25] Mr Markan seeks to raise as grounds of his second appeal similar issues to that advanced in the first appeal of "the lack of respect for the human rights in Queensland" and "racist attitude, discrimination and vilification of people who are not lawyers and not of anglo origin and who represent themselves in courts." Again, Mr Markan's general grievances are irrelevant to the specific issues raised by the second appeal:
- (1) the effect of the failure of Atkinson J to refer to the Balfour Declaration;
 - (2) whether there was an error in not characterising the respondent's investigation of Mr Markan's complaints as services rendered in trade or commerce;

- (3) whether an explanation was required for why parts of the claim and statement of claim made scandalous accusations;
- (4) whether the exercise of the discretion to strike out the claim and statement of claim was arbitrary, capricious or in bad faith.

- [26] Mr Markan had also included as a ground of appeal for the second appeal that he was entitled to a hearing by an independent and impartial tribunal, but that issue has been disposed of in respect of the first appeal.
- [27] In respect of the first ground, Mr Markan had endeavoured before Atkinson J to draw an analogy between the Balfour Declaration and the respondent's letters of 1 August 2011. There was no reference to the Balfour Declaration in the reasons, as Atkinson J had rejected the copy of the Balfour Declaration that Mr Markan sought to tender as relevant evidence and merely marked it "A" for identification.
- [28] Mr Markan's intention may have been to engage the respondent to undertake an investigation of his complaints against the three barristers, but this is not the basis on which the respondent undertook the investigations due to the involvement, quite properly, of the Commissioner. The Act regulated the respondent's investigations and there was no room for any contract to be created between the respondent and Mr Markan. There was no contractual offer made in each of the letters of 1 August 2011 that was capable of acceptance. There was no analogy to be drawn between the conduct of the respondent evidenced by each letter of 1 August 2011 and the Balfour Declaration. There was no error in Atkinson J refusing to allow the tender of the Balfour Declaration.
- [29] With respect to the second ground of appeal, Mr Markan argues that he approached the respondent as a private person requesting services and that there is nothing in the Act which binds him as a private citizen. This is an extension of Mr Markan's contract argument. He cannot unilaterally, however, disclaim the Act when it regulates the role the respondent was bound to undertake in relation to Mr Markan's complaints that were referred by the Commissioner to the respondent for investigation: s 439 of the Act. Atkinson J followed *Johnstone v Victorian Lawyers RPA Ltd* (2003) 132 FCR 411 where similar issues had been considered and it was held by Sundberg J that the sending of a letter in the exercise of a mandatory obligation to investigate a complaint under the relevant Victorian Act was not conduct in trade or commerce. Atkinson J's conclusion to the same effect in respect of the operation of s 439 of the Act was clearly correct.
- [30] There was no explanation required for the conclusion at [61] of the reasons in relation to the "scandalous accusations of criminal or other serious misconduct" as the accusations were appropriately characterised as that by reference to their terms.
- [31] The conclusion that the statement of claim and the amended statement of claim did not disclose any reasonable causes of action was unimpeachable and there was no question in such a clear case of any arbitrariness, capriciousness or bad faith in respect of the exercise of the discretion to strike out the claim and both versions of the statement of claim as an abuse of process of the court.
- [32] Mr Markan must also fail in the second appeal. The orders that should be made are:
1. Appeal No 5272 of 2013 is dismissed.
 2. The appellant must pay the respondent's costs of the appeal to be assessed.