

SUPREME COURT OF QUEENSLAND

CITATION: *Re Application by Geoffrey James Bird* [2019] QSC 148

PARTIES: **RE APPLICATION BY GEOFFREY JAMES BIRD**

FILE NO/S: BS No 4585 of 2018

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 12 December 2018

JUDGE: Brown J

ORDER: **Application refused.**

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – VEXATIOUS LITIGANTS AND PROCEEDINGS – where the applicant was declared a vexatious litigant – where the applicant seeks leave to set aside a vexatious proceedings order made against him – whether the proposed application is a vexatious proceeding

Vexatious Litigants Act 1981 (Qld), s 3, s 7, s 11, s 12 *Vexatious Proceedings Act 2005* (Qld), s 11, s 12, s 16

Conde v Gilfoyle [2010] QCA 109, applied

Kay v Attorney-General (2002) 2 VR 436, cited

Lohe v Bird [2004] QSC 23, considered

Re Application by Geoffrey James Bird [2015] QSC 100, cited

COUNSEL: Applicant appeared in person

SOLICITORS: Applicant appeared in person

[1] Mr Bird applies for leave to issue an originating application to set aside the vexatious proceedings order made against him on 27 February 2004.¹ I have in a separate decision

¹ *Lohe v Bird* [2004] QSC 23. Mr Bird was in that judgment declared a vexatious litigant pursuant to s 3 of the *Vexatious Litigants Act 1981* (Qld). The order continues in force under the *Vexatious Proceedings Act 2005*

considered the question of whether leave is required for such an application under the *Vexatious Proceedings Act 2005 (Qld)* (the 2005 Act) and determined that leave is required.²

- [2] Justice Boddice ordered on 21 September 2018 that if it was determined leave was required, paragraphs 1 to 3 of the Originating Application were to continue and be treated as if commenced as an application for leave pursuant to s 11(2) of the 2005 Act.
- [3] In this application I must consider whether Mr Bird has established a basis upon which leave should be granted in order for him to issue an application to set aside the vexatious proceedings order.

The vexatious proceedings order

- [4] In the decision declaring Mr Bird to be a vexatious litigant,³ McMurdo J in his reasons for judgment considered:
- (a) A judicial review decision of the Guardianship and Administration Tribunal ('the Tribunal') to appoint M's father as guardian and administrator of M in 2001;
 - (b) A notice of appeal against a decision of the Tribunal in 2002, in relation to which his Honour noted the inevitable outcome of the appeal was avoided by M's father informing the Court that he wished to be relieved of his appointments, such that the appeal was allowed by Fryberg J, even though it never determined on its merits, and remitted back to the Tribunal;⁴
 - (c) Two appeals from the 2002 decision of Fryberg J which were dismissed by the Court of Appeal in 2003 and found to be "entirely without merits";⁵
 - (d) A 2003 decision in relation to an accommodation arrangement with respect to M which summarily dismissed the proceedings, holding them to be an abuse of process;
 - (e) A damages claim which included an appeal from the Tribunal appointing the Adult Guardian as M's guardian and the Public Trustee as her administrator. The statement of claim was struck out in its entirety in 2003 twice. The appeal was dismissed; and
 - (f) An originating application claiming contempt of court which was stayed pending security for costs, which his Honour stated he was not yet satisfied was vexatious.
- [5] His Honour found all but one of the proceedings he considered were vexatious.⁶ His Honour ultimately determined that Mr Bird should be declared a vexatious litigant.

(Qld), s 16.

² *Crown Solicitor v Bird* [2019] QSC 147.

³ *Lohe v Bird* [2004] QSC 23.

⁴ At [40].

⁵ At [50].

⁶ At [83].

- [6] Mr Bird quite correctly accepts for the purpose of this application it is not appropriate to go behind the decision of McMurdo J in considering this application, although he has made some comments about the decision in his affidavit which I consider below.

Affidavit material

- [7] Mr Bird has filed two affidavits which appear to substantially satisfy the requirements of s 11(3) of the 2005 Act. He relies on his affidavit filed on 28 May 2018⁷ and his affidavit filed on 1 November 2018.⁸ Mr Bird also provided an outline of submissions.
- [8] As required by s 11(3)(a) of the 2005 Act, Mr Bird outlined the occasions on which he has applied for leave to issue proceedings. His affidavit of 1 November 2018 identified six applications where he sought leave to issue proceedings, all of which were refused. They were heard in 2005, 2010 and 2015 and on three occasions in 2017. Further to these six applications, the affidavit also made reference to an application for leave brought on 15 March 2018, where the Court determined Mr Bird did not require leave to apply to set aside the vexatious proceedings order against him. That question is the subject of a separate decision after the Crown Solicitor made an application to set aside the originating application.
- [9] From the information provided by Mr Bird in his affidavit, the applications for leave made prior to 2018 appear to have been predominantly in relation to M,⁹ who was Mr Bird's partner. It is of some relevance to the determination of this application to consider the previous applications for leave. Other than the decision of Martin J,¹⁰ the information is derived from Mr Bird's affidavit.
- [10] In 2005 Mr Bird sought leave to appeal on M's behalf a decision of the Queensland Civil and Administrative Tribunal (QCAT) to refuse her application to have the Public Trustee and Adult Guardian removed from managing her affairs, which was refused. In 2010 he sought leave for an application for *habeas corpus* against the Public Guardian, Director-General of Health and Secretary of the Commonwealth department in charge of social security, contending that the orders under which M was detained were invalid. It is said to have been dismissed on the basis of a lack of standing.
- [11] In 2015, Mr Bird sought leave to apply for *habeas corpus* against the Public Guardian, Director-General of Health and Secretary of the Commonwealth department in charge of social security, which was refused by Justice Martin.¹¹ Those matters again related to M, where Mr Bird was seeking a number of orders including a declaration that M was not mentally incapacitated and not bound by any guardianship, administration or involuntary treatment

⁷ CFI 7.

⁸ CFI 19.

⁹ I note M's identity was kept confidential in the decision in which Mr Bird was originally declared to be a vexatious litigant. Consistent with that, I will refer to the person as "M" throughout the judgment. Mr Bird has previously identified M as his partner.

¹⁰ *Re Application by Geoffrey James Bird* [2015] QSC 100.

¹¹ *Re Application by Geoffrey James Bird* [2015] QSC 100.

order. It also sought, amongst other orders, injunctive relief against the Public Guardian and his staff and the Director-General of Queensland Health and his staff. His Honour refused leave due to the lack of standing of Mr Bird to bring the application, the fact that he was seeking orders with respect to decisions for which the time to appeal had expired and on the basis that Mr Bird did not have reasonable grounds for his application.

- [12] Two applications for leave were dismissed by Atkinson J in 2017. According to Mr Bird's affidavit, the first was dismissed on the basis that the affidavit tendered at that application did not comply with the 2005 Act and the second was dismissed on the basis that the tribunal whose decision he was challenging had declared M to be mentally incapacitated and her power of attorney to therefore probably be invalid.
- [13] A further decision was made by Douglas J in 2017, refusing Mr Bird leave to make an application to QCAT concerning M based on changed circumstances. Mr Bird also outlined proceedings before he was made subject of a vexatious proceedings order in 2004, as well as all the proceedings he had instituted in Australia.

Should leave be given?

- [14] Accepting that his affidavit complies with s 11(3) of the 2005 Act on its face, the question is whether Mr Bird has established a basis on which leave should be given for him to issue an application by which he would seek rescission of the vexatious proceedings order.
- [15] Mr Bird contends that the correct approach for the granting of leave is determining whether a matter could be dismissed by way of summary judgment and that the vexatious proceedings order should be treated as an injunction. The 2005 Act, however, provides for the basis upon which an application for leave must be dismissed or granted.
- [16] Pursuant to s 12 of the 2005 Act, the Court must dismiss an application if it considers the proceeding is a vexatious proceeding.¹² If leave is to be granted notice is required to be given to relevant parties to allow them to be heard prior to granting leave. In the context of an application to vary or set aside a vexatious proceedings order, the relevant question in an application for leave is whether Mr Bird has established an arguable basis or reasonable grounds for setting aside the vexatious proceedings order. In determining whether a vexatious proceedings order should ultimately be set aside, the correct approach would appear to be whether there is evidence of a change in relevant circumstances since the making of the original order,¹³ such that it would be appropriate that the order be set aside. This is similar to the approach adopted in Victoria in relation to the *Supreme Court Act 1986* (Vic).¹⁴

¹² The term "vexatious proceeding" is defined and includes a proceeding that is instituted or pursued without reasonable ground. The Court must also dismiss the application if the affidavit does not substantially comply with s 11(3): s 12(a).

¹³ Given that order can be appealed without leave being sought: *Conde v Gilfoyle* [2010] QCA 109.

¹⁴ *Kay v Attorney-General* (2002) 2 VR 436 at [23], per Chernov JA, referred to by Mullins J in *Re Skyring* [2013] QSC 197 at [9].

- [17] Mr Bird identifies three reasons why the Court should not continue the vexatious proceedings order against him:
- (1) Firstly, that there is no need for a vexatious proceedings order where the circumstances that led him to bringing proceedings with no prospect of success no longer apply;
 - (2) Secondly, that the vexatious litigant order (or, as it is referred to under the 2005 Act, the vexatious proceedings order) is an unduly severe measure that the court should be reluctant to impose;
 - (3) Thirdly, that there is an absence of clean hands on the part of the government agencies which seek the continuation of the vexatious proceedings order.
- [18] Mr Bird in his affidavit outlined what he considers are the material facts supporting the application, although many of the matters to which he referred are not factual and are matters of assertion, conclusions based on opinion, or matters of submission.

Bringing proceedings with prospects of success

- [19] As to the first matter, Mr Bird deposed to the fact that he has now completed three years of a Bachelor of Commerce and Bachelor of Laws degree, whereas his knowledge of the law at the time of the proceedings considered by Justice McMurdo was very limited. In that regard, I note that he has obtained a number of credits as well as distinctions and some high distinctions in respect of his law subjects. He further stated that as he has now undertaken law subjects, including administrative law, he is in a good position to decide whether any given application has reasonable prospects of success. He stated he now understands that decisions of QCAT can only be called into question by appealing them.
- [20] He stated that the proceedings which he is contemplating bringing are against government agencies, in particular QCAT and the Mental Health Review Tribunal, seeking directions regarding M's treatment by the Public Guardian or a cancellation of M's guardianship and involuntary patient status.
- [21] Mr Bird stated that the fact he is willing to go out on a limb to help M, who he asserted he treats as a pro bono client, ought to be regarded as praiseworthy and as a sign of good character which should be rewarded by society, not punished.
- [22] While Mr Bird stated that the fact he has undertaken legal studies negates the premise on which Justice McMurdo made him a vexatious litigant, that is not in fact quite correct. While the lack of legal understanding reflected in the proceedings brought by Mr Bird was a factor considered by his Honour,¹⁵ his Honour also had regard to matters such as the scandalous and irrelevant nature of allegations made in the proceedings. The basis upon which he was made a vexatious litigant was that his Honour found Mr Bird had brought a number of vexatious proceedings over a two year period. In making that declaration, his Honour was mindful of the difficulties unrepresented litigants face in properly articulating their cases. Further, while

¹⁵ See for example, *Lohe v Bird* [2004] QSC 23 at [92].

knowledge of the law should lead to a party not bringing proceedings without any prospects of success, it does not automatically follow that it will.

- [23] There is little evidence to support his contention that he now has sufficient understanding and insight to bring proceedings for which he would have standing and which would not again be regarded as vexatious. For the purposes of this application, that evidence obviously does not need to be set out in great detail or of the quality required for the final hearing, but there must be some evidence to show he has reasonable grounds to support his submission that he is now in a position to bring proceedings which are not vexatious.
- [24] Mr Bird's evidence demonstrates he still has not developed sufficient knowledge of the law and its operation to ground an inference that he will not in future bring proceedings which are vexatious. For example, he stated in his affidavit of 1 November 2018: "The law and public opinion accepts that people ought to be able to bring ongoing meritless challenges to people's detention, such as bail applications, even if it means the government incurring unrecoverable legal costs". The law does not accept that people ought to be able to bring meritless challenges. An application or proceeding must have a proper basis, even if ultimately unsuccessful.
- [25] Similarly, he deposed that the agencies against which he may bring proceedings against all have in-house solicitors, so would not incur costs in bringing an application to throw out a case by way of summary judgment. That is not a relevant consideration in the determination of whether a vexatious proceedings order should be set aside. The purpose of such orders is not simply to avoid parties incurring costs, but also to avoid wastage of public resources and force defendants to respond to actions that are groundless and without substance.
- [26] Mr Bird stated he intends to first make an application to QCAT on the basis of an enduring power of attorney made by M in Tasmania not having been considered by the Tribunal. He relied on s 23 of the *Guardianship and Administration Act 2000* (Qld), which only applies to a guardian or administrator advising the tribunal of such an enduring power of attorney, neither of which position he holds, such that he would lack standing.
- [27] It is of some significance that Mr Bird particularly wants to bring proceedings against government agencies and public office holders in relation to M. Justice McMurdo in determining Mr Bird was a vexatious litigant considered a number of proceedings in relation to M, which he concluded were vexatious. While considerable time has passed since those proceedings, Mr Bird's evidence is that he still wishes to bring proceedings in relation to or on behalf of M and that is one of the reasons he wishes the vexatious proceedings order to be set aside.
- [28] Mr Bird's affidavit contains many accusations against the Public Trustee, Public Guardian and Ombudsman, which are largely based on assertion and his opinion particularly in respect of M, and do not constitute evidence of unclean hands as he asserts. He concludes that "[f]or the above reasons, the Queensland Government should be considered to blame for my being placed in the position of having to bring the various legal proceedings that led to my being declared a vexatious litigant, and the proceedings that I have brought or sought to bring since then". That statement demonstrates that Mr Bird still has not developed a sufficient understanding and insight as to the basis upon which a determination that a person is a

vexatious litigant is made and the responsibility of any litigant in bringing proceedings. Nor, indeed, does it show that he accepts the basis upon which the order was made against him in 2004. His material also indicates a lack of understanding as to the basis of the order made in 2004 declaring him to be a vexatious litigant.¹⁶

- [29] Mr Bird in his affidavit material also raised allegations which show a distorted view of the justice system,¹⁷ are unsubstantiated, matters of opinion and in some respects border on scandalous.¹⁸
- [30] It is also of some relevance in assessing Mr Bird's submission that he has not successfully obtained leave since the vexatious proceedings order was made. In particular, Mr Bird did seek to bring applications for leave in 2017 after he had commenced his law degree, which were refused. While he is a year further progressed in his law degree since the 2017 applications, and each application must be considered on its own merits, the lack of leave being granted does not support his submission that he can now bring proceedings, particularly in relation to M, which have prospects of success.
- [31] While it is accepted that the fact that Mr Bird has now completed some part of a law degree may well result in him having a better understanding as to what constitutes a proper legal basis for proceedings, it alone is insufficient to establish that he has reasonable grounds to establish a change of circumstance and successfully bring an application under s 7. His appreciation that he must appeal decisions of QCAT is not enough. His submissions and affidavit material do not support his submission that as a result of his legal understanding to date he would no longer bring proceedings with no prospects of success.

Damaging effects of vexatious proceedings order

- [32] As to the second ground relied upon by Mr Bird, Mr Bird pointed to the damaging effects of a vexatious proceedings order. Mr Bird stated that the vexatious proceedings order has had and will continue to have a prejudicial effect on him. He gave a number of examples where people were not prepared to engage because he was declared a vexatious litigant, including that various solicitors were not prepared to continue to act for him, difficulties he had with institutions such as universities, challenges made to him holding a position as executor of a deceased estate because of his status as a vexatious litigant, government officers refusing to investigate complaints on the basis that he is a vexatious litigant and judicial officers being rude to him. While it is unfortunate if Mr Bird's status as a vexatious litigant has been used against him in an unjustified way, that is not the result of the order or the 2005 Act,¹⁹ which

¹⁶ See, for example: Affidavit of GJ Bird CFI 19 at [27], [28]-[30] and [61] and "Comments on Parts of Justice McMurdo's Judgment" at [66]-[75].

¹⁷ See, for example: Affidavit of GJ Bird CFI 19 at [14]. While the submission that there is a principle of equality before the law is not incorrect, the notion upon which it is tested shows a misunderstanding of the court process.

¹⁸ See, for example: Affidavit of GJ Bird at [32], [40], [41], [43], [53]-[57] and [60].

¹⁹ Or its predecessor Act.

operates only to regulate how a vexatious litigant may bring proceedings. It does not establish any reasonable ground upon which the vexatious proceedings order may be set aside.

- [33] Mr Bird also stated that his being subject to a vexatious proceedings order would tend to bring the judiciary into disrepute with right-thinking people for someone who has completed the greater part of a law degree to be subject to a vexatious litigant order. That is not a matter which has any relevance to whether the vexatious proceedings order should be set aside.
- [34] While I accept that the vexatious proceedings order is a burdensome one to Mr Bird and it is an infringement on Mr Bird's common law right to freely access the courts to bring legal actions, the order does not prevent him from bringing proceedings which have a proper basis and for which he could expect leave would be given.
- [35] Mr Bird suggested there are other ways to better accomplish the protection of parties from vexatious proceedings than the making of such an order, such as a practice direction. The fact that there are other ways of dealing with vexatious litigants is not a matter which would be relevant to an application to set aside a vexatious proceedings order. The Parliament has determined that where the relevant threshold is met for the making of such an order, a vexatious proceedings order is an appropriate way to protect parties and the courts from being vexed by groundless proceedings.

Absence of clean hands

- [36] As to the third matter, Mr Bird states that there is an absence of clean hands by the government agencies which seek the continuation of the vexatious proceedings order.²⁰ Mr Bird submits that the order is designed to protect the Queensland government from legal challenges to the detention and mistreatment of his fiancé, M. While that may be his belief, it is misconceived in terms of the present application. Insofar as he considers that the continuation of his status as a vexatious litigant is being sought principally by the Office of the Public Guardian, that is not the case. The making of the vexatious proceedings order results in that order continuing unless varied or set aside. It is not a matter of any party seeking to continue the order but is rather the effect of the 2005 Act.²¹ Similarly, his contention that some agencies do not have clean hands for the purpose of continuing the order is misconceived for the same reason and does not constitute a reasonable ground relevant to the present application.

Conclusion

- [37] No reasonable ground has been established by Mr Bird which provides an arguable basis to show any change of circumstance since the 2004 order was made upon which the vexatious proceedings order may be set aside. Accordingly, I refuse leave.

²⁰ I have referred above to the fact that his affidavit in this regard is largely a matter of assertion and opinion which is unsubstantiated and in some respects scandalous.

²¹ And previously the 1981 Act.

[38] Even if I had approached the matter as if it were an application for summary judgment as Mr Bird submits, I would still have reached the conclusion that his application had no real prospects of success for the reasons outlined above.

Order

[39] The application for leave filed on 1 May 2018 be refused.