COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: **11066/15**

NUMBER: **BD2801/14**

Appellant: **MICHAEL FRANCIS SANDERSON**
(First Defendant)

AND
PHYLLIS KAREN SANDERSON
(Second Defendant)

AND

Respondent: **BANK OF QUEENSLAND LIMITED**
ABN 32 009 656 740
(Plaintiff)

OUTLINE OF ARGUMENT

His Honour erred in law when he failed to consider the paramount context of rule 367 of the Uniform Civil Procedure Rules that states clearly and unambiguously that:

> *"in deciding whether to make an order or direction, the interests of justice are paramount".*

This rule also gives the court unprecedented and significant latitude in order to facilitate the paramount interests of justice when it states:

> *"the court may make any order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules".*

Furthermore there is a requirement that *"not only must Justice be done; it must also be seen to be done".* The foundation pre-1986 Australia Act case *R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256 at 259 per Lord Hewart CJ* established the principle that the mere appearance of bias is sufficient to overturn a judicial decision.

Justice cannot be done nor seen to be done whilst there is not a reasonable opportunity for the appellants to present their case under conditions that do not disadvantage them as against other parties to the proceedings. This includes but is not exclusive to the financial resources available that undoubtedly impacts and the lack of legal aid that put the applicants at an unacceptable state of inequality.

His honour judge Brendan Butler stated (refer EOA-4 Page 9 (5)):

> *I understand and recognise what's been said to me by Mr Sanderson, but the simple matter is that, on the law as it stands in Australia in relation to civil proceedings such as this, there's no power to grant an order which might meet his express concerns.*

This is not to say that there is not a requirement that there should not be a power to grant an order that addresses the disproportionality that currently exists in this countries monetarised legal system. It could be argued that the lack of suitable precedent is directly linked to the disproportionality that is the lack of "Equality of Arms".

Where one side has significant monetary advantage, not only do they gain a significant legal advantage, they are also able to finance an out of court monetary settlement in the event that there is a danger of losing in the court. These settlements are generally accompanied by a gag agreement and the precedent that may have been established by a just but adverse judgement is never established.

It is because of the lack of suitable precedent that I rely on material to illustrate this widely acknowledged deficiency.

The Australian Attorney General defines what is required in order to facilitate "fair trial and fair hearing rights" on the official web site (refer EOA-4 Pages 44 to 48). The paragraph headed "Equality" states:

> *What constitutes a fair hearing will require recognition of the interests of the accused, the victim and the community (in a criminal trial) and of all parties (in a civil proceeding). In any event, the procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. The UN Human Rights Committee has found a violation of article 14(1) in a case in which a right of appeal was open to the prosecution but not to the accused.*

Constitutional, executive, legislative and cross jurisdictional relevance is addressed by Deane and Toohey JJ *in Leeth v Commonwealth [1992] HCA 29; (1992) 174 CLR 455 (25 June 1992)* (refer EOA-4 Pages 67 to 71) who state:

> *"…The States themselves are, of course, artificial entities… It is the people who, in a basic sense, now constitute the individual States just as, in the aggregate and with the people of the Territories, they constitute the Commonwealth… Any constitutional protection of the people themselves from arbitrary or discriminatory treatment must be found, if at all, in other express or implied doctrines or provisions…Again, the Constitution contains no detailed statement of the content or implications of the doctrine of the*

separation of judicial power from executive and legislative powers which it implements by expressly vesting the judicial power of the Commonwealth in Ch.III courts (49) s.71, the legislative power of the Commonwealth in the Parliament (50) s.51. and the executive power of the Commonwealth in the Crown…The doctrine of legal equality is in the forefront of those doctrines. It has two distinct but related aspects. The first is the subjection of all persons to the law: "every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals…The second involves the underlying or inherent theoretical equality of all persons under the law and before the courts…"

The states are nothing more than "artificial entities" that are allowed to exist for the purposes of law and order so long as they make and enforce law in (almost) complete accordance with the laws of the Commonwealth and in particular, the Commonwealth Constitution. Meaning that; no court can have any judicial authority to make an enforceable order, unless it accepts that its judicial power comes from Ch.III of the Commonwealth Constitution.

Unable to find any precedent in Australian law relating to "Equality of Arms" two European cases was cited in written submissions (Refer EOA-4 pages 49 to 53). These cases where *"European Court of Human Rights CASE OF BULUT v. AUSTRIA (Application no. 17358/90)"* and *"European Court of Human Rights CASE OF STEEL AND MORRIS v. THE UNITED KINGDOM (Application no. 68416/01)".* His Honour Judge Brendan Butler stated (refer EOA-4 Page 6 (45)):

"The international cases are of little assistance to me, because they do not relate to Australian law."

These cases may not relate to Australian law, however do define and relate to the requirements of a fair trial and fair hearing; the principle of "Equality of Arms" and ultimately justice that the rules say is paramount. They are also directly relevant to Article 14(1) of Schedule 2 International Covenant on Civil and Political Rights contained in the Australian Human Rights Commission Act 1986. As such, in the absence of relevant Australian law, the court should if nothing else refer to them in order to assist in its deliberations.

It is also well known within the legal fraternity that there is gross inequality in the Australian legal system that is openly acknowledged at all levels and indeed the victims of this injustice. A publication that clearly articulates this disproportionality is Community Law Australia's final report titled "Unaffordable and out of reach". This academic peer report describes the inadequacies and quotes in context, numerous high profile individuals within the legal profession. Again, in the absence of relevant Australian law, the court should if nothing else refer to the report in order to assist in its deliberations.

His Honour Judge Brendan Butler stated in relation to rule 367 (refer EOA-4 Page 7 (10 to 35)):

The rule should be read in light of rule 5 of the Uniform Civil Procedure Rules, a rule which is headed Philosophy-Overriding Obligations of Parties and the Court. That rule says:

The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

The rule is:

…to be applied … with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules. [A] court may impose appropriate sanctions if a party does not comply with the rules or an order of the Court.

In the case of Barker and Linklater (2008) 1 Qd R 405, Justice Muir for the Court of Appeal said that:

The purpose of the Uniform Civil Procedure Rules 'is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'. They 'are to be applied with the objective of avoiding undue delay, expense and technicality' –

the rule I've just cited. He went on to say:

Plainly, the Rules are to be applied with a view to facilitating the conduct of litigation and not so as to obscure the real issues and impede the progress of a trial.

His Honour has erred in law as he has failed to correctly interoperate the context of rule 367. It should be noted that nowhere in the entire judgement has His Honour used the word "justice" or it would seem, considered the question of justice. The comments he has cited made by Justice Muir and for that matter all the other cases, were not made in the context of rule 367.

Justice Muir has placed emphasis on "conduct", "obscure" and "impede" and places no weight on "just" and fails to consider or mention "justice" at all. If one was to be cynical it would seem that interpretation of rule 5 has devolved to "just cheap and quick". The word just is no longer an adjective, but an adverb. As stated previously the paramount (supreme, dominant, principle, top, overriding) consideration of rule 367 is justice and only justice. Rule 367 (2) states:

"in deciding whether to make an order or direction, the interests of justice are paramount".

This is rule 367 (2) in its entirety, there is no other qualification, category or direction. If the matter was dealt with "expeditiously" however justice was not done

or seen to be done the rule would be breached. Nowhere in any part of rule 367 is there any reference to monetary consideration therefore any consideration of minimising expense without first considering justice, is a breach of the rule.

Notwithstanding, if the court considers rule 5 in the context of the principle of "Equality of Arms" there would be no inconsistency with its philosophy and overriding obligations, nor would it breach rule 367.

- The court is well aware that generally self-litigants within the court system consume considerable more court time than litigants with legal representation. Not only is there a waste of court time, but the total process is generally extended thus wasting the irretrievable real time of all those involved. To deny justice to a self-litigant in order to be expeditious is not only a breach of 367, but a fundamental failure of the legal system and justice itself.

- The majority of self-litigants would struggle to identify "real issues" within the highly complex and technical legal system never alone be able to present a case coherently and in a manner acceptable to the court. In fact self-litigants not only would struggle to identify and understand the "real issues" but also the maze of law, Acts and rules that govern the "real issues". It is therefore left to the party with the disproportional advantage to identify the issues to the court, which may not in fact be the "real issues". This not only breaches rule 367 potentially resulting in injustice, but also rule 5 because there is no guarantee that "real issues" are, or have been resolved.

  Consequently, because of this interpretation of the context of the rules it could be argued that a greater emphasis has been placed on the "expeditious" and "expense" parts of rule 5 than "just" and "real issues". In the event that "real issues" are omitted or are failed to be identified, due to "Inequality of Arms" a case may be made that many summary judgements are made unfairly and unjustly. It therefore could not be claimed that justice has been done nor seen to be done.

- Rule 5 (4) states:

  "the court may impose appropriate sanctions if a party does not comply with the rules or an order of the Court."

  This part of the rule does not make any allowance for the ability of a party to comply. In the event that a court makes an order that requires a party to comply to something that that party does not have the ability or knowledge to comply it in itself would be a sanction, justice would not be done, nor seen to be done. Both rule 5 and 367 would be breached.

- The question of expense was articulated by Sir Anthony Mason, Former Chief Justice of the High Court of Australia (Keynote speech to the Public Interest

Law Clearing House 10th anniversary dinner, 2004) who said (refer EOA-4 Page 58)

"A first class court system and a first class legal profession are of no avail to a person who cannot afford to access them."

Of all the shortcomings of this countries legal system, it is the narrow definition of expense that denies access, drives disproportionality and is the cause of inherent injustice. It would seem that the courts interpretation within the rules, of expense is based on quantity, not worth or value. In fact it would seem the courts definition of expense is exclusively focused on monetary considerations. Expenditure although relevant, is however not exclusive, one must also consider price and sacrifice.

The expense of the price of the legal system is so removed from the price of the real things that our society cannot do without, it defies comparison. This is not to say that law and the legal profession is not a valuable or desirable part of our complex society. In its current metamorphose it is monopolistic, inefficient, complex, technical and demands a disproportionate share of this societies productive wealth. The price of the legal profession is no longer affordable to that part of society (the majority) that creates the wealth that sustains it and who collectively own the system. It is not uncommon for an individual to be successful in the courts but in the process lose a life time of wealth, their health and irretrievable time. If the primary driver of expense is in fact the unjustifiable and disproportionate price, both rule 5 and 367 would be breached. George Brandis, Federal Attorney-General (Brandis G "Lack of access an impending social crisis" The Australian 1 June 2012) said (refer EOA-4 Page 64):

"…This is a social crisis in the making. The courts are the guarantors of our rights, but increasingly the costs of legal representation and court fees mean that ordinary Australians are forced either to abandon their legitimate claims or enter the minefield of self-representation..."

The question of the expense of sacrifice is largely one of degree. In order to sustain a legal system society is required to sacrifice some of its productive wealth in order to sustain those who oversee the system on behalf of that society. If this sacrifice is disproportionate as illustrated above, it increases expense and restricts access. Other justifiable sacrifice within the system could be compromise and the interests of the greater good. The sacrifice of justice is an unjustifiable expense with respect to both rule 5 and 367 and if it has not done so already would render the legal system to some degree, dysfunctional.

His Honour Judge Brendan Butler has to some degree attempted to normalise the lack of equity in the following comments (refer EOA-4 Page 8 (45) to 9 (1)) :

> *"It's clear from those authorities that this Court has no power either to discharge or to stay the civil proceedings on the basis that the defendant is unrepresented. The processes before the Court to provide for procedural fairness to be available to all litigants in civil matters – that, of course, does not mean that all litigants in civil matters are going to have equal representation or equal skill in the presentation of their cases. Of course, that's true even where there is legal representation. The opposing barristers or lawyers might differ in ability and knowledge."*

The question that is not addressed by His Honours comments is that of degree. In an adversarial legal system such as the one that exists in this country it is in the interests of justice to keep these differences to a minimum. The hearing that resulted in the judgements subject to this appeal, the defendant/appellant unemployed, surviving on social security, was a self-litigant with no legal knowledge, experience, advice or representation. The plaintiff/respondent with substantial monetary advantage was represented by two specialist barristers and an assisting lawyer. This "Inequality of Arms" bears no resemblance to His Honours comments above.

It could be suggested that the establishment of a precedent that introduces the principle of "Equality of Arms" would be too expensive, therefore unaffordable. The court should not consider this question if it is at the expense of justice. The question of legal aid was put into context by Murray Gleeson, Former Chief Justice of the High Court of Australia ('State of the Judicature' Speech delivered at the Australian Legal Convention, 10 October 1999) (refer EOA-4 Page 64):

> *"The expense which governments incur in funding legal aid is obvious and measurable, but what is real and substantial is the cost of the delay, disruption and inefficiency which results from the absence or denial of representation. Much of the cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid."*

The court is asked to consider the contention that "Equality of Arms" would not increase expense, rather it would reduce expense, justice would be done and seen to be done and done in a timely manner. This would be consistent with not only rule 367 but also rule 5. It is also contended that the Principle of "Equality of Arms" would over time, establish within this countries law, fair and balanced precedent that serve justice and afford access to its owners, it citizen's.

Basic economic principle dictates that competition in a level playing field is the greatest possible insurance of the most efficient, cost effective and best result. In the event that a referee allows a bout between a light weight and a heavy weight to take place the result, notwithstanding an extraordinary circumstance, is predictable. The court must accept that ultimately the cost of the legal system irrespective of who pays the legal bill is borne by the people of this country collectively. This cost manifests itself in the form of higher prices for goods and services, taxes and loss. In the main the average citizen is oblivious to these negative externalities. Ironically,

although the majority ultimately pay for the legal system, they are excluded by its cost which they collectively bear.

Conclusion

This appeal is not an attempt to avoid litigation or waste the courts time; rather it is the appellants/defendants fervent desire to engage with the respondent/plaintiff in a fair and just arena. However, it is argued that in the event that the court is unable to ensure "Equality of Arms" justice may not be done and undoubtedly would not be seen to be done and the matter must be dismissed. One only has to acknowledge the comments of those who have worked at some of the highest levels within the monetarised adversarial legal system, to conclude that the arena is far from fair and consequently in such a system, justice cannot be paramount.

For any individual to compete within an adversarial system without equality cannot, by any test be equal. To be excluded from, or be at a disadvantage within the legal system because one does not have the monetary or intellectual assets to do so cannot be equal.

There is an expectation that the respondent/plaintiff would support this appeal. Failure to do so, to sit silent or oppose would indicate to the court that the lack of "Equality of Arms" affords them an advantage and they have no confidence in their claim. If there was "Equality of Arms" this matter would have likely been dealt with some time ago and there would not have been the number of interrogatory hearings to date or indeed this appeal. Such an outcome would be consistent with and enhance rules 367 and 5, as it would be less expensive, avoid delay, identify and resolve the real issues. Critically it would afford the best environment not only for justice to be done, but seen to be done. The respondent/plaintiff surely could not oppose or argue against this?

The Australian Human Rights Commission Act 1986, article 14 (1) states *…All persons shall be equal before the courts and tribunals…* there must be "Equality of Arms".

His Honour Judge Brendan Butler in dismissing the application for "Equality of Arms" has made it impossible to comply with all other orders contained in his judgement and in doing so breaches both rules 367 and 5. This is clearly articulated by George Brandis, Federal Attorney-General (Brandis G "Lack of access an impending social crisis" The Australian 1 June 2012) (refer EOA-4 Page 64):

> *"... Self-represented litigants, who cannot hope to master the procedural and substantive learning that lawyers spend years acquiring, themselves add to the cost and delays of litigation and exacerbate these problems for other litigants..."*

In the event that the court is unable to make orders that ensure “equality of arms” that results in a fair hearing and trial of the claim, the claim, all orders and all cost orders must be dismissed.

Should for any reason this outline of argument, affidavit and associated application be judged in any way deficient it is because we the appellants have been denied legal aid that has put we the appellants/defendants at an unacceptable state of inequality. We the appellants do not have a reasonable opportunity of presenting our case under conditions that do not disadvantage us against the respondent/plaintiff. The UN Human Rights Committee has found a violation of article 14(1) in a case in which a right of appeal was open to the prosecution but not to the accused. There is no “Equality of Arms”.

Michael Sanderson
Appellant
27/11/2015