SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2013 0043

BRIAN WILLIAM SHAW — Applicant

v

THE ANZ EXECUTORS AND TRUSTEE COMPANY LIMITED (AS THE TRUSTEE OF THE ESTATE OF JOHN WILLIAM SHAW, DECEASED) — Respondent

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JUDGES	NETTLE and NEAVE JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	10 May 2013
DATE OF JUDGMENT	10 May 2013 — 17 MAY 2013
JUDGMENT APPEALED FROM	[2013] VSC 100 (Habersberger J)

APPLICATION ON SUMMONS

APPEARANCES:	COUNSEL	SOLICITORS
For the Applicant	In person	
For the Respondent	Mr R C Wells	Aitken Partners Pty Ltd

NETTLE JA:

1 At the outset of the hearing of this matter last week, the applicant moved *ore tenus* that I should recuse myself on the ground of apprehended bias. He submitted that the perception of bias arose from the fact that I have previously sat in two matters in which the judgment of this court was adverse to him.

2 Both matters were some years ago. The first was an application for leave to appeal from an order of Hansen J (as his Honour then was) to declare the applicant a vexatious litigant. Dodds-Streeton JA and I rejected the application. The second was an application to strike out an appeal by the applicant in another matter. Hansen JA and I struck out the appeal for want of prosecution. The applicant relied in particular on the second matter because he said it involved allegations, like those which he makes in this proceeding, as to the constitutional ramifications of the deletion of references to the Crown in state legislation and the abrogation in this State of the requirement that an applicant for admission to practise as a barrister or solicitor swear an oath of allegiance to the Crown.

3 The test of apprehended bias was recently reconsidered by the High Court in *British American Tobacco Australia Services Limited v Laurie*.[1] As the Court said, the test remains, as was stated in *Livesey v New South Wales Bar Association*,[2] whether:

> in all the circumstances the parties or the public might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question involved...[3]

4 For that purpose, what is reasonable depends on what a reasonable observer or fair-minded observer with a 'fair understanding of all of the relevant circumstances' would think to be the case.

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1 (2010) 242 CLR 283, 304 [43] (French CJ).

2 (1983) 151 CLR 288.

3 Ibid 293–4.

5 Further, as was said in *Laws v Australian Broadcasting Tribunal*:[4]

> When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be *firmly established* is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she *will not alter that conclusion* irrespective of the evidence or arguments presented to him or her.[5]

6 Approaching the matter on that basis, I do not consider that a fair-minded person would entertain a reasonable apprehension that I have prejudged this case; for, apart from anything else, I have never before had to consider the issues in this case. They did not arise at all in the application to appeal from the order declaring the applicant a vexatious litigant and, although the applicant made allegations in the other proceeding about deletions from state legislation of references to the Crown, and the allegedly pernicious effects of Freemasonry, it was unnecessary for me to consider those questions. The only question in that case, so far as this court was concerned, was whether the appeal should be struck out for want of prosecution due to inordinate delay on the part of the applicant.

7 In case it matters, I should perhaps also say that, when I was admitted to practise, I was required and pleased to swear an oath of allegiance to the Crown, and that I did so again both upon my appointment as a judge of the Supreme Court and my later appointment as a judge of appeal. Finally, I am not, and never have been, a Freemason.

8 In the result, I decline to recuse myself on the ground of apprehended bias.

9 I invite Neave JA to deliver the judgment of the Court.

NEAVE JA:

10 The applicant, Brian William Shaw, who was declared to be a vexatious

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4 (1990) 170 CLR 70.

5 Emphasis added.

litigant[6] in 2007,[7] seeks leave to appeal against interlocutory orders made by Habersberger J. Those orders, made on an appeal from orders made by Randall AsJ, were as follows:

> 1. The plaintiff's application for special leave to rely on his nine affidavits affirmed by him on 23 May 2012 and on his four affidavits affirmed by him on 27 July 2012 be refused.
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> 2. The plaintiff's application that he be granted leave to include the additional claims referred to in the reasons for judgment published on 13 March 2013 be refused.
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> 3. The plaintiff's appeal against the order of Randall AsJ is allowed.
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> 4. The plaintiff have leave to file, within 28 days, an amended statement of claim containing:
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> (i) paragraphs 1 to 7, 22 and 23 of, and paragraph G of the prayer for relief in, the draft amended statement of claim being exhibit 'A' to the affidavit of the plaintiff affirmed on 17 September 2012 and filed herein, and
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> (ii) paragraphs 8, 9 and 11 of, and paragraphs A, B and C of the prayer for relief in, the statement of claim filed on 9 July 2009 and annexed to the writ herein.
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> 5. The plaintiff pay the defendant's costs of the oral application for leave to include additional claims, including any reserved costs, such costs to be taxed, in default of agreement, on a party and party basis.
>
> 6. The plaintiff pay 75% of the defendant's costs of the appeal, including any reserved costs, such costs to be taxed, in default of agreement, on a party and party basis.

11 Although Mr Shaw is apparently seeking leave to appeal against all of those orders, he presumably does not seek to seek the setting aside of order 4, which gave him limited leave to amend his statement of claim.

History of the Proceedings

12 These proceedings have a complex and tortuous history, which is explained comprehensively in the reasons of Habersberger J.[8] For that reason, we will describe

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6 *Attorney-General v Shaw* [2007] VSC 148.

7 *Supreme Court Act 1986*, s 21.

8 *Shaw v ANZ Executors & Trustee Company Limited* [2013] VSC 100 ('Reasons'), [5]–[23].

the previous proceedings only briefly.

13 Since about 2002, Mr Shaw has been in dispute with ANZ Executors and Trustees Company Limited ('ANZ') which administered his father's estate as successor to the Trustees, Executor and Agency Company Limited ('TEA'). The administration of the estate was finalised in 2007.

14 In 2008, Vickery J gave Mr Shaw leave under s 21(3) of the *Supreme Court Act 1986* ('the Act') to commence proceedings against ANZ in the manner described in the statement of claim which Mr Shaw had submitted. That statement of claim is set out in Habersberger J's reasons.[9] It sought an order requiring ANZ to prepare and provide to Mr Shaw, for the period from July 1978, until final distribution of the estate, an order that the Administration Statement and Mr Shaw's file be audited, and a declaration that ANZ Executors had breached ss 6, 8 and 38 of the *Trustee Act 1958*.

15 In 2009, Mr Shaw attempted to commence the proceedings to which this application relates. The statement of claim which he sought to file went beyond the terms of the grant of leave given by Vickery J. In particular, paragraph 10 alleged that ANZ Executors had sold two properties in the father's estate at an under-value. On 24 March 2010, following an application by ANZ, Daly AsJ struck out paragraph 10 of the statement of claim, without prejudice to the applicant's rights to seek leave under s 21 of the Supreme Court Act to pursue that claim. Mr Shaw did not appeal against Daly AsJ's orders and did not seek leave under s 21.

16 In March 2012, Mr Shaw filed a summons seeking leave to file an amended statement of claim, which contained 61 paragraphs and 18 separate grounds of relief and which substantially expanded the pleadings on which he had relied before Daly AsJ. He filed seven affidavits in support of those claims.

17 On 10 May 2012, Randall AsJ refused leave, holding that if the amendments

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9 Reasons, [3].

were permitted, the statement of claim would be 'scandalous, frivolous, vexatious or would prejudice, embarrass or delay the fair trial of the proceedings as those expressions are used in r 23.02' of the *Supreme Court (General Civil Procedure) Rules 2005* ('the Rules').

Reasons of Habersberger J

18 On appeal to Habersberger J from the orders made by Randall AsJ, Mr Shaw sought to rely on another version of the amended statement of claim from that which had been before Randall AsJ. This statement of claim, (described below as the draft amended statement of claim) contained 51 paragraphs divided into numerous sub-paragraphs and 9 separate grounds of relief covering a range of matters additional to those before Vickery J. It was supported by a further 13 affidavits covering matters which had not been relied upon before Randall As J.

19 Habersberger J referred to r 77.06(7)(b) of the *Supreme Court (General Civil Procedure) Rules* which then required Mr Shaw to obtain leave to rely on evidence which had not been before the Associate Judge. His Honour refused leave on the basis that the affidavits were irrelevant to the matters raised in the appeal to his Honour. The headings of those affidavits were as follows:

(a) 'Governor General Brother Major General Michael Jeffrey Plus the Structure of Freemasonry';

(b) 'Private Prosecution 2004';

(c) 'Concealment of Criminal Activity';

(d) 'Fractional Reserve Banking';

(e) 'Extract of a Substituted Socialist Constitution';

(f) 'Shaw Affidavit 23 December 2009';

(g) 'High Court Justice Virginia Bell';

(h) 'Brief of Evidence'; and

(i) 'The Constitution and the Law of Treason'.

The remaining four affidavits, which were all affirmed by Mr Shaw on 27 July 2012, were respectively headed:

(j) 'Stamped High Court Application';

(k) No heading but the exhibit was headed 'Grand Jury Defendants';

(l) 'The Murder of Corryn Rayner'; and

(m) 'David Ward'.[10]

20 Habersberger J said that none of those affidavits had anything whatsoever to do with Mr Shaw's appeal. That view was clearly correct. Accordingly, there is no basis for granting leave to appeal against his Honour's first order.

21 Under s 21(4) of the *Supreme Court Act 1986* a vexatious litigant cannot be given leave to commence proceedings unless the court is satisfied that it would not be an abuse of process to do so. Mr Shaw was granted an adjournment by Habersberger J to adduce some evidence on the further claims which he wished to make in the draft amended statement of claim. These included five additional claims against the respondent, two of which were not pursued by Mr Shaw, after the judge had explained to him why they could not be sustained. His Honour examined the three remaining claims, and the evidence Mr Shaw adduced to support them, with considerable care.

22 The first claim was that in 1988 the respondent had sold a property at Fitzgerald Road, Laverton, held on trust for the beneficiaries, under its value. After discussing a retrospective valuation of the property at the time of sale, which Mr Shaw relied on in support of his claim, and evidence called by ANZ about its previous unsuccessful attempts to sell the property before it was finally sold for $450,000 in 1988, his Honour concluded that there was no evidence to support this allegation and that it would be an abuse of process for Mr Shaw to be given leave to pursue this claim. He also rejected a claim relating to the sale of a second property in 1999, on the basis that there was no evidence of any wrongdoing by ANZ in its conduct of the sale.

23 The second claim related to the sum of $57,647.59, which the respondent had

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10 Reasons, [16].

deducted from the applicant's two-eighth share of his father's residuary estate which was distributed to him after his mother's death. ANZ drew his Honour's attention to a deed of arrangement to which the applicant, all other beneficiaries of the father's estate and the respondent were parties, under which Mr Shaw agreed not to make any claim against the estate if he were advanced $150,000 out of his share and also agreed to indemnify the respondent from any liability for that payment.

24 The relevant clause in the deed was as follows:

> in consideration of the said advance, Brian William Shaw undertakes that he will not:
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> a) seek any further advances of capital from the Settlement; and
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> b) make any claim against the Trustee or any of the Remainder Beneficiaries in respect of this advance or pursuant to Part IV of the *Administration and Probate Act* 1958 **or in respect of any past or future administration of the settlement in the Estate of John William Shaw.**

25 His Honour held that this was a full defence to that second claim. We note in parenthesis that the words 'in respect of any past or future administration of the settlement in the Estate of John William Shaw' also appear to be an answer to the other claims that Mr Shaw has attempted to make against ANZ, except possibly the claim that ANZ should be required to provide him with an administration statement.

26 The third claim was that:

> The interest return on the capital fund investment ... was extremely low and did not reflect first mortgage interest rates or bank deposit rates over the period of the administration (1978-2011).

27 His Honour held that there was no admissible evidence of the figures asserted by Mr Shaw as to an appropriate rate of return and that in any case, Mr Shaw's claim did not take account of costs and expenses in administering the estate. As we have already said, the deed of arrangement probably precluded Mr Shaw from pursuing that claim in any case.

28 For these reasons, his Honour held that the three additional claims made in the draft amended statement of claim could not be made out and that giving him

leave to pursue them would amount to an abuse of process.

29 His Honour then carefully compared the draft amended statement of claim with the statement of claim with which Mr Shaw had purported to commence these proceedings. He concluded that a number of the paragraphs in the former were repetitive of the similar paragraphs in the existing statement of claim and that no difficulties would be raised by including the versions before him. That was reflected in Order 4 (i) made by his Honour.

30 His Honour also held that paragraphs 8, 9 and 11 and paragraphs A, B and C of the prayer for relief in the existing statement of claim (which repeated the claims for an administration statement and a declaration that ANZ had 'acted in contravention of its duties to the plaintiff pursuant to provisions of the *Administration and Probate Act 1958*, the *Trustee Act 1958*, the *Trustee Companies Act* and/or the *Supreme Court Act 1986*' could be repeated in the draft amended statement of claim.

31 Mr Shaw made a specific claim that the advancement to him of more than half the capital to which he would become entitled breached s 38 of the *Trustee Act 1958*, which did not permit advancement of an amount to a beneficiary exceeding half of his or her share of capital. His Honour accepted ANZ's argument that the *ANZ Executors & Trustee Company Act 1983* gave ANZ a complete indemnity against any assertion that it was liable for any breach of duty by its predecessor, Trustees Executors & Agency Company Limited and occurring prior to its trust business being transferred to ANZ. His Honour accepted that submission and struck out paragraphs 10 to 10.7 and 12 to 15.1 of the draft amended statement of claim as a consequence. However, he permitted retention of the existing statement of claim provision, which sought general relief for breach of duty, on the basis that ANZ could apply to strike out any claim relating to s 38 of the *Trustee Act 1958* and that Mr Shaw would then have an opportunity to argue this question.

32 His Honour also excluded paragraphs in the amended statement of claim

pertaining to new claims which Mr Shaw had failed to make out and other paragraphs which he held were irrelevant or embarrassing.

The Application

33 The applicant's application for leave to appeal does not address any of the issues which were comprehensively examined by Habersberger J. Rather, it replicates part of the applicant's argument to Habersberger J, which his Honour described as follows:[11]

> Mr Shaw commenced his application by making lengthy submissions about topics such as freemasonry, grand juries, and fracture of the Crown by removal of the Crown from State legislation in Victoria and Western Australia. In particular, he submitted that the Court was unconstitutional as a result of the amendment to s 6(1) of the *Legal Practice Act 1996* by s 3 of the *Courts and Tribunals Legislation (Further Amendment) Act 2000* removing the requirement that applicants for admission to practice swear an oath of allegiance to the Queen. He submitted that these matters raised an inter se question.

34 Before Habersberger J, the applicant claimed that the court was unconstitutional and the proceedings raised an *inter se* question that must be removed to the High Court.

35 Habersberger J rejected that submission, observing that:

> I ruled that no inter se question was raised by Mr Shaw's submissions. I also ruled that none of the topics he wished to raise, even if they had merit, were relevant to the application then before me, namely his appeal against the order of Randall AsJ dismissing his application to amend his statement of claim in this proceeding against ANZ Trustees. The Court of Appeal has previously pointed out the 'fundamental difficulties' with Mr Shaw's submissions on these topics.[12]

36 His Honour correctly held that the issue whether Mr Shaw should be permitted to file the amended statement of claim did not raise an *inter se* question. During the hearing of this application for leave to appeal, we explained to Mr Shaw that he needed to make submissions directed to the contention that his Honour

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11 *Shaw v ANZ Executors & Trustee Company Limited* [2013] VSC 100, [14]-[15].

12 *Shaw v Attorney-General for the State of Victoria* [2011] VSCA 63, [22]-[31] (Maxwell P and Buchanan JA).

should have permitted him to file amended pleadings. Nevertheless, he persisted in pursuing arguments which were entirely irrelevant to the leave application. In our view, Mr Shaw was simply using the application as a means of airing his views about the role of courts and parliament. This reflects a basic misunderstanding of the purpose of litigation, which is to resolve disputes. The role of this Court is to decide appeals against decisions and applications and not to provide a soapbox by which an applicant can pursue hypothetical issues. The purpose of Mr Shaw's appeal is epitomised in the 52 grounds of appeal on which he relied.

37 Grounds one to three and seven to nine relate to the removal of the oath of allegiance to the Crown in a number of pieces of legislation.[13] These grounds allege that since the removal of the oath, all judicial officers in Victoria are either concealing a criminal act or committing fraud and that all judicial officers, lawyers and law firms are committing treason. Ground nine makes a series of similar allegations in relation to the government of Western Australia.

38 Grounds four and five relate to a conspiracy between the United Nations, the Freemasons and the government of former Prime Minister Paul Keating to abolish private ownership and implement communism. These grounds allege that the officers of the Supreme Court of Victoria are part of this conspiracy and are concealing a criminal act.

39 Ground six relates to the powers of the Supreme Court of Victoria and alleges that the Court is operating outside the *Victorian Constitution Act 1975*. This ground alleges further that the officers of the Court are operating outside of the constitutional grant in that Act. It is ironic that Mr Shaw has turned to this Court for relief, while asserting at the same time that it is an entirely unconstitutional body.

40 Grounds 10 to 13 make a number of allegations against the Prime Minister, the Hon Julia Gillard MP, seven former and sitting Justices of the High Court of

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13 Grounds one to three refer to the removal of the oath in the *Court and Tribunal Act (Further Amendment) Act 2000* and the *Legal Practices Act 1994*. It is presumed that this is a reference to the *Courts and Tribunal Legislation (Further Amendment) Act 2000* and either the *Legal Practices Act 1996* or the *Legal Profession Act 2004* or both.

Australia and Associate Justices Mukhtar and Randall of this Court. The grounds allege that they are either committing treason and fraud or concealing the crimes of treason and fraud. The grounds also allege that offences were committed in relation to the government's bank deposit guarantee of 2008.

41 Grounds 13 to 52 are a list of public figures and other individuals who are, to use the words of the applicant, 'grand jury defendants'. Each ground names an individual and outlines their alleged crimes.

42 The orders for relief seek removal of the matters to the Privy Council, on the basis that they are inter se matters, over which the High Court has exclusive jurisdiction, and that 'the High Court Judges have been charged pending Grand Jury'. Mr Shaw's application on the day of the hearing was supported by a further 29 affidavits, which allegedly raise an inter se question to be referred to the High Court and which purport to make 'grand jury applications' in relation to a long list of judicial officers and public officials. As we have already said, the application does not raise any inter se question and the affidavits are entirely irrelevant.

43 In order to obtain leave to appeal, the Court must be satisfied that his Honour's discretion miscarried in the *House v The King*[14] sense. It clearly did not. Mr Shaw has not identified any aspect of Habersberger J's judgment or orders which raise sufficient doubt to justify the grant of leave to appeal. They are indubitably hopeless.

44 Following the hearing of his application, Mr Shaw filed further affidavits which, among other things, allege that the Court was acting unconstitutionally. Those affidavits are as irrelevant as the former affidavits which he filed.

45 For these reasons, leave to appeal against the orders of Habersberger J should be refused.

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14 (1936) 55 CLR 499.

NETTLE JA:

46 It is ordered that the application for leave to appeal is dismissed.

47 (Discussion ensued.)

48 The respondent, having succeeded in the application, seeks an order for costs, notwithstanding the provisions of Rule 63.20 of the *Supreme Court (General Civil Procedure) Rules 2005*.

49 The court is of the view that, despite that Rule, it is appropriate that an order be made that the applicant pay the respondent's costs of the application.

50 The court is further of the view that the application was from the outset hopeless and that the applicant should have realised it. Thus, in accordance with the principles espoused by Woodward J in *Fountain Selected Meats v International Produce Merchants*,[15] it is appropriate that the costs be paid on an indemnity basis.

51 Accordingly, it is ordered as follows:

1. The application for leave to appeal is dismissed.

2. It is ordered that notwithstanding Rule 63.20 of the *Supreme Court (General Civil Procedure) Rules 2005*, the applicant shall pay the respondent's costs of the application.

3. It is further ordered, pursuant to Rule 63.28(c) of the Rules, that those costs shall be taxed on an indemnity basis.

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[15] (1988) 81 ALR 397.