DIGEST

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CASE LAW

Vexatious litigants and abuse of dominant market position

In three cases the High Court has declined to issue process at the suit of litigants it found to be pursuing hopeless or vexatious causes of action. In *Staats v United States of America* (1992) 66 ALJR 793, Justice Deane declined to issue process at the instigation of Mr Steven Staats against the USA and Australia for conspiracy, and also a subpoena *duces tecum* for documents concerning the CIA, ASIO and Mr Staats from 1958. Nine months earlier, Justice Toohey had given a similar direction to the Registrar when Mr Staats had sought to lodge a notice of motion against the Prime Minister and ASIO to restrain 'intelligence neutralization operations'. Careful consideration led Justice Deane to the 'firm and clear view' that the action 'would not enjoy any prospect of success' considering the strength of evidence. Justice Deane expressed ideals about access to the courts when he said

> The rule of law which permeates our system of government requires that all persons have access to the courts of the land. That principle is at its most important in a case where proceedings against government and those exercising governmental power are involved. Indeed, in a case such as the present, where proceedings against the Commonwealth or an officer of the Commonwealth in the original jurisdiction of the court are involved, the right of access is constitutionally entrenched. . . . Nonetheless, considerations of justice, the interests of plaintiffs themselves and the public interest combine to require that there be procedures for insuring that a court can prevent the institution or maintenance of frivolous or vexatious proceedings.
>
> [66 ALJR 793]

Readers will recall that these ideals do not go as far as the provision of legal aid to an accused, as the Full High Court decided in *Dietrich v The Queen* (13 November 1992 — F.C. No. 92/044).

Jones v Skyring (1992) 109 ALR 303 arose from the resolve of Mr Alan Skyring to press at every possible opportunity his view that the Commonwealth has no power to issue paper money as legal tender. After some activity the matter had been ruled on by Justice Deane in *Re Skyring's Application (No. 2)* (1985) 58 ALR 629, 633. An appeal was dismissed by the Full Court. Nevertheless, Mr Skyring made at least 20 further applications designed to raise the argument again before the court, including a challenge to the election of a member of the House of Representatives objecting to the legal tender with which the candidate paid his nomination deposit. Justice Toohey found the applications vexatious and that he had power to direct the Registrar not to issue any process at the instigation of *a particular individual* without leave of a justice of the court, in contrast to a particular process lodged for issue, and did so. *Jones v Cusack* (1992) 109 ALR 313 was dealt with by Justice Toohey at the conclusion of *Jones v Skyring*. Mr Cusack was also alive to any opportunity to challenge the status of paper money as legal tender, although he was probably not as active as Mr Skyring. Justice Toohey made a similar order.

The issue of whether a party abuses its dominant economic position by relentlessly pursuing a weaker competitor through litigation, and thus acts vexatiously, was considered by Justice Smellie in the High Court of New Zealand in *Telecom Corporation of New Zealand Ltd v Clear Communi-cations Ltd* [1992] 3 NZLR 247. In New Zealand the issue arises under s.36 of the *Commerce Act* 1986, which is similar to s.46 of the Australian *Trade Practices Act* 1974. The point dealt with in *Telecom v Clear Communications* arose when Clear Communications served a counterclaim on Telecom and Telecom applied to strike it out. Telecom had initiated six causes of action ranging from breach of a compromise to passing off and breach of copyright. Clear Communications countered that Telecom's conduct in the matter was an abuse of its dominant position in deliberately attempting to restrict the entry of Clear Communications into the New Zealand telecommunications market, and this amounted to vexatiousness. Telecom argued that the counterclaim should be struck out because it disclosed no reasonable cause of action.

In finding for Telecom, Justice Smellie dealt first with the issue of striking out and second with the use of litigation as a tool in the abuse of a dominant position. First, the jurisdiction to strike out is only to be exercised sparingly, when the issue is so clearly untenable that it cannot possibly succeed, and only in plain and obvious cases (at 248). Second, despite US antitrust texts and a swag of Australian trade practices cases indicating the feasibility of the counterclaim (251-2), Justice Smellie relied on the New Zealand case *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] NZLR 641 to maintain that it is difficult to envisage a situation in which s.36 would be contravened by the reasonable exercise by a dominant party of its rights. whether an exercise of rights could be market dominance is a matter of evidence, but even a monopoly is entitled to make a case for preservation of its monopoly. Making those arguments and preparing such a case could not amount to use of a dominant position in the market. *Something more* would have to be shown (253). Justice Smellie could not exclude the possibility that Telecom's claims might ultimately be regarded as trivial, but they were causes of action with a remedy, which might not be trivial. His Honour could not find *something more*, ruled that the counterclaim had no prospect of succeeding and struck it out.

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