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Précis Paper

Banking, Litigation, and Access to Law

This presentation looks at the very important area of access to justice, particularly between customers and large banks. It looks at this question in the context of the recent case of *Sanderson v Bank of Queensland Limited* [2016] QCA 137, but also takes a broader view.

Discussion Includes

- Banks versus self-represented litigants – what constitutes fairness in practice?
- The disturbing prevalence of organised pseudo-legal commercial arguments (OPCAs)
- "Equality of arms" – should a bank plaintiff have to pay for a customer's defence?
- Who can afford a lawyer in modern litigation?
- The effect of the rule that costs follow the event
- What is the role of organisations such as Queensland Public Interest Law Clearing House, and lawyers acting pro bono?
- What is happening with legal aid bodies and community legal centres?
- The importance of clear and accurate drafting of mortgage documents

Précis Paper

Banking, Litigation, and Access to Law

1. In this edition of BenchTV, Matthew Jones (Barrister) and Ian Benson (Solicitor) discuss the recent Queensland Court of Appeal (Morrison and Philip McMurdo JJA and Burns J) decision in *Sanderson & Anor v Bank of Queensland Limited* [2016] QCA 137 involving self-represented litigants. Alan Conolly (Partner of AR Conolly & Company Lawyers) also discusses the issue of legal costs and affordability of legal services with Mr Jones.

Sanderson & Anor v Bank of Queensland Limited [2016] QCA 137

2. The case of *Sanderson & Anor v Bank of Queensland Limited* [2016] QCA 137 initially began as a standard bank recovery action against a guarantor. The appellants had borrowed money through a corporation from the Bank of Queensland, but unfortunately the business failed and the security property was sold by the Bank. The Bank sued for the shortfall owed to them, whilst the appellants complained about the exercise of the power of sale. The appellants' counterclaim made the usual claims for damages arising from the sale of the property and the Bank's lending decisions, including a $10 million claim for pain and suffering, which is also not unusual.

3. There are three interesting aspects to the case:

    1. The appellants were self-represented litigants;
    2. There was use of an OPCA, that is an organised pseudo-legal commercial argument; and
    3. The appeal was pitched squarely on the argument of "equality of arms". The appellants relied upon fair trial provisions (Article 14) from the *International Covenant on Civil and Political Rights* to argue that they had a right to legal representation which they regarded as competent and sufficient to square up the ledger against the Bank, and that the Bank ought to pay for the appellants' costs of defending against the Bank's claim.

4. Mr Jones believes that the judgment of the Court of Appeal in this case provides a good example of how to fairly and even-handedly address a range of concerns from self-represented litigants and it now stands as intermediate appellate authority for what fairness actually means in practice for a matter involving a self-represented litigant.

i. OPCA Argument

5. An OPCA is an acronym, originally coined in Canada, which stands for an organised pseudo-legal commercial argument. These are usually contrivances where legal terms are used out of context. The arguments have a variety of forms and are generally pitched by services and schemes like websites such as "Get Out of Debt Free" which produces sheets and pamphlets for people to follow when they are running their court actions. Some examples of OPCA arguments include "a transfer of money to a vendor for a house is not actually an advance of money to the borrower, therefore there is no loan", "if the bank cannot produce the original signed document within a certain amount of time, the loan cannot be proved despite any rules of admissibility of business records", and "that if a bank receives notice in a particular form and does not respond in the right way, that discharges the loan". A more common argument post GFC is that "the Bank did securitise or may have securitised the loan, therefore there is no longer a loan between the lender and borrower, it is between an unknown person and the borrower, therefore there is no loan and the borrower is entitled to a discharge of mortgage". The arguments do not have any legal or logical substance necessarily. The arguments involve legal words (e.g. tender, estoppel, pledge, and bailment) but are generally not upheld by courts.

6. In *Sanderson*, the OPCA used was that the Bank had not produced the original document, therefore there was no loan. McMurdo JJA remarked that this was an unusual argument to take because the making of the advance to the company was admitted on the pleadings, thus it was difficult to reconcile how the argument would work in practice.

7. OPCA have caused frustration, particularly in Canada. The useful Canadian decision of *Meads v Meads* [2012] ABQB 571; [2013] 3 WWR 419, which provides a 500-paragraph analysis and de-bunking of the various schemes, has been relied upon in Australia at various court levels, particularly at lower levels.

8. Mr Jones' observation from being involved in a number of OPCA claims is that courts, to their credit, universally give adherence to these arguments and give proponents of them the benefit of the doubt. These arguments tend to be made by vulnerable people, who for a variety of reasons may not have access to a lawyer. The approach by the court is thus consistent with the appearance of fair and due administration of justice. It also enables the court during argument to test whether there is something of substance which is being obscured by adherence to one of these schemes. Practitioners should take the same approach to OPCA, by giving the arguments proper respect to be ventilated and then relying on the orthodox court processes, like a strike-out application or summary judgment application on reasonable notice, to deal with these matters, but in a respectful way that does not leave the claimant feeling like they have been ripped off by the justice system.

ii. Equality of Arms Argument

9. The source of the "equality of arms" argument relied upon is Article 14 of the *International Covenant on Civil and Political Rights*, which is a treaty ratified by Australia but not incorporated into Australian Law, dealing in particular with the fairness of civil trials.

ARTICLE 14:

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

...

3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
   - *(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him*
   - *(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing*
   - *(c) To be tried without undue delay;*
   - *(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
   - *(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
   - *(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
   - *(g) Not to be compelled to testify against himself or to confess guilt.*

10. Article 14(1) deals with the requirements of fairness generally, including access to an impartial tribunal which is generally provided in Australia without any question. Article 14(3) refers to

the accused in criminal matters being provided with access to a lawyer should they choose not to retain their own, and to be told of their right to retain their own or one will be provided. These principles were dealt with in *Dietrich v R* [1992] HCA 57; 177 CLR 292 where it was found that for serious criminal matters, depending on the facts of the case, it may be necessary for fairness for the accused to have access to legal representation. However, for years it has been clear that these principles do not apply to civil matters (*New South Wales v Canellis* [1994] HCA 51).

11. These matters were raised in two District Court Applications and in the Queensland Court of Appeal in *Sanderson*, and it was found that Article 14(3) on its face did not stand as authority for the proposition for which the appellants were advancing since it was a civil matter and thus the argument should not have been brought to court.

iii. Case Management Issues

12. Case management issues were thus raised in this case. There were several costs to the Bank including two days of hearing time in court, other attendant staffing and occupancy costs, two matters in the District Court as well as the costs from the Appeal, including the registry time leading up to the appeal with a self-represented litigant. According to Mr Jones, these costs were all for the same argument to be run three times with effectively the same outcome each time. In addition, there may in the future be a special leave application to the High Court, leading to more time and costs expended.

13. While there is unlikely to be public sympathy for Banks paying these costs, there may be more when taxpayer's funds are expended. The policy setting at the moment seems to tolerate these applications so that they are dealt with on their merits, however this must be balanced against the wastage of court time.

iv. Lessons from Sanderson

14. The Court of Appeal in *Sanderson* provided guidance regarding OPCA arguments such that courts should maintain the fact and appearance of scrupulous fairness when these arguments are raised. The court demonstrated that it will on an interlocutory basis determine these types of arguments. For example, the judgment made findings on the effect that certain medical conditions, which the appellants referred to, might have on them prosecuting the case and made findings about the way in which those medical conditions might affect litigation in the future. This demonstrates that these arguments can be given a fair hearing, but in practice they can be dealt with on a quick interlocutory basis, if given appropriate notice. Mr Jones believes this is very valuable.

15. The case also exposed the need for community legal services and for solicitors and barristers to reconsider their fee rates in order to ensure that as many people as possible do get access to justice. The court said in *Sanderson* that "perfect justice" is not the goal, but rather it is fairness, and fairness and efficiency can both be assisted by more and more qualified lawyers being more and more available to the public.

16. Mr Jones notes that the difficulty in this case was that the appellants arguably went too far in arguing that they needed "perfect justice", when this was a case that could have potentially been headed off before it got to hearings and before an appeal was filed if a solicitor in a properly funded community legal centre or an affordable solicitor in private practice were able to spend time with these particular litigants and go through the pros and cons of proceeding with their arguments. If the litigants had chosen to take another course, the savings to the public and the Bank would have been quite considerable.

17. The litigants by arguing for "equality of arms" felt that fairness and access to justice for them meant resourcing and funding for a legal team equivalent to the Bank at least. This case might implicitly point to a concern in the community that true access to justice is restricted to the financially elite. Mr Jones believes that the legal profession does need to address this perception by looking at how this issue arose and establishing steps to address it.

<u>Cost and Affordability of Legal Services</u>

18. Mr Jones believes that the average person, earning less than $100k per year, cannot afford a lawyer for large civil matters involving a trial. While people can generally afford a lawyer for conveyancing or to have a will drafted, this is only due to the strong competition in those areas and the ability to charge fixed fees rather than time billing due to the simplicity of the work and the ability for it to be delegated to junior lawyers with limited supervision.

19. To be prepared for a civil matter usually requires a lot of time for lawyers. While in certain circumstances time costing is more appropriate, at other times it is better to apply a general overlay of judgment on each bill. Mr Jones finds it frightening when young practitioners in particular talk about billables as if they are the end, rather than focusing on quality and output of work. He notes that sometimes lawyers struggle with balancing the business and professional sides of legal work.

20. Mr Jones thinks there are many people who have rights to litigate but choose not to due to financial constraints and risk, particularly if they are given an accurate costs estimate at the outset. The cost downside for the losing party pervades almost every matter. Responsible conservative people will mostly not take the risk if well advised.

21. Mr Jones does not believe that there is a one-size fits all solution to the issue of cost and affordability of legal services. There is some good in applying cost pressure to parties to legal disputes as it focuses the mind and helps keep matters reasonably efficient. In no cost jurisdictions, like in parts of the United States, where one or both parties are not facing ongoing costs it is much easier for them to let the dispute take longer and for parties to use riskier interlocutory applications as there is limited downside in terms of cost.

22. The two major problems that Mr Jones believes need to be addressed are:

    1. General affordability of legal services and
    2. Lack of funding to community legal centres

The Queensland Public Interest Law Clearing House (QPILCH)

23. QPILCH is a clearing house that has been operating for 15 years in Queensland and it has equivalents in other States and Territories. It acts as a referral agency where individuals without means or ability to access other assistance, have a central place to telephone volunteer law students and solicitors who assist with making referrals to mental health practices, various clinics, law firms and barristers. QPILCH circulates emails asking for volunteers for particular matters and members pick up the matters as normal pro bono retainers after that. A number of people who contact QPILCH fail on the merits assessment, are outside income requirements or do not have a legal problem and need to be referred elsewhere. Alternatively, they might fall into areas that QPILCH does not deal with due to funding constraints, which includes crime and family matters, and need to be referred to other services like Legal Aid or given general information. Mr Jones notes that the income thresholds for Legal Aid are now very low in Queensland such that almost no one qualifies for it. QPILCH is funded by State Government funding, certain Commonwealth grants, philanthropic funders and individual fundraising efforts. Mr Jones' Chambers participated in the annual legal walk which raised money this year for the Mental Health Legal Service to fund a solicitors wage for a year.

Future for Community Legal Services

24. While QPILCH is large and well established after having excellent management for 15 years and is thus well entrenched in the system, the situation for community legal centres more generally on the other hand is much more dire across Australia because on 30 June 2017 there is expected to be a large drop in Commonwealth funding. This funding drop will trickle down to all legal services in all States and Territories. Mr Jones is aware that most legal services have started contingency planning for letting people go from that date.

Association Between Legal and Non-Legal & Social Problems

25. It is very common for someone with a legal problem to also have other general and social non-legal problems. QPILCH has recently launched a service called LegalPod where particularly at risk young people with a legal problem but with other associated problems as well get assigned to a group of practitioners and a group of referrers for a number of years to help them transition from troubled youth to adulthood. Practitioners will help with various issues including minor debt issues, State penalty and fine issues, housing tenancy issues, mobile phone issues, and gym membership issues.

Issues with Banking Instruments

26. Mr Conolly notes that at the moment many standard forms provided by Banks, such as mortgage documents, cannot be completely understood by the average person., Mr Jones believes the practical solution is for Banks to have readable documents that they are comfortable with and borrowers to have real access to legal advice so that someone can help them understand the instruments if they do not. The *Code of Banking Practice* provides a set of promises outlining how a Bank should conduct itself in its dealings with customers. Clause 25.1 deals with appropriate assessments and there are also plain English provisions. There have also been a few recent decisions, including *National Australia Bank Ltd v Rice* [2015] VSC 10, which have dealt with the meaning of plain English. Thus, Banks are aware of the need to provide readable documents. Moreover, the Banks have an interest in making sure that borrowers and guarantors have a fair chance of understanding instruments as they do not want that understanding challenged in enforcement provisions. Banks also spend a lot of money dealing with the Financial Ombudsman's service which gives borrowers quite a lot of leeway.

BIOGRAPHY

Matthew Jones

Matthew was called to the Queensland Bar in 2009. He has appeared before the High Court of Appeal, and the Queensland Supreme, District and Magistrates Courts among others. Those matters have involved banking, franchising, construction, real property, contract, commercial, insolvency, insurance, class action, intellectual property, and trade practices.

Ian Benson

Ian Benson is a solicitor at A R Conolly and Company and holds a First Class Honours degree in law.

Alan Conolly

Alan Conolly founded the legal firm A R Conolly and Company in 1968 where he remains a partner in full-time practice. He has chaired companies in diverse industries including oil, IT, dance, agrochemicals and film. Life Member of the Law Society of New South Wales, publisher of Benchmark.

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Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_01-06-2016_insurance_banking_construction_government.pdf

Judgment Link

http://archive.sclqld.org.au/qjudgment/2016/QCA16-137.pdf

Cases

Dietrich v R [1992] HCA 57; 177 CLR 292
Meads v Meads [2012] ABQB 571; [2013] 3 WWR 419
National Australia Bank Ltd v Rice [2015] VSC 10
New South Wales v Canellis [1994] HCA 51

Other

International Covenant on Civil and Political Rights
Code of Banking Practice