FEDERAL COURT OF AUSTRALIA

Agapis [2017] FCA 286

File number(s):	WAD 395 of 2016
Judge(s):	**MCKERRACHER J**
Date of judgment:	22 March 2017
Catchwords:	**PRACTICE AND PROCEDURE** – vexatious proceedings order pursuant to s 37AO of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) – whether leave should be granted to institute a proceeding pursuant to s 37AR(2) of the Federal Court Act – applicant seeking to appeal vexatious proceedings order – application for leave filed out of time – apprehended bias – whether primary judge should have recused himself **Held**: application for leave to institute a proceeding refused
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 37AO, 37AQ, 37AM(1), 37AR, 37AR(2), 37AR(3), 37AS, 37AT
Cases cited:	*Agapis v Plumbers Licensing Board (No 2)* [2014] FCA 1045 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 *Fuller v Toms* [2015] FCAFC 91 *Jones v Skyring* (1992) 109 ALR 303 *Ramsey v Skyring* (1999) 164 ALR 378 *SZVBN v Minister for Immigration and Border Protection (No 2)* [2017] FCA 123
Date of hearing:	9 December 2016
Registry:	Western Australia
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	28
Counsel for the Applicant:	The Applicant appeared in person

ORDERS

WAD 395 of 2016

RAOUL AGAPIS
Applicant

JUDGE: **MCKERRACHER J**

DATE OF ORDER: **22 MARCH 2017**

THE COURT ORDERS THAT:

1. The application for leave to file an appeal is refused.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

1 Mr Agapis applies for leave to institute a proceeding pursuant to s 37AR(2) of the *Federal Court of Australia* ***Act*** *1976* (Cth).

2 In *Fuller v Toms* [2015] FCAFC 91 the Full Court (Siopis, Logan and McKerracher JJ) noted that such an applicant requires a grant of leave to file a notice of appeal so as to institute ('start') an appeal. This is effectively what Mr Agapis has sought. The reasoning of the Full Court is as follows (at [8]-[19]):

> 8. The point is a novel one but generally relevant to practice and procedure under Part VAAA of the Federal Court Act, which is directed to the subject of vexatious proceedings.
>
> 9. Order 3 was expressed to have been made pursuant to s 37AO(2) of the Federal Court Act, which provides:
>
> > (2) The Court may make any or all of the following orders:
> >
> > (a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;
> >
> > (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;
> >
> > (c) any other order the Court considers appropriate in relation to the person.
>
> 10. Insofar as Order 3 provided that Mr Fuller must not start any proceedings in the Court against any of the respondents, the particular foundation for it within s 37AO(2) of the Federal Court Act was in s 37AO(2)(b).
>
> 11. By s 37AO(5) it is provided that, "An order made under paragraph (2)(a) or (b) is a final order." Because it is expressly declared to be a final order, an order made under s 37AO(2)(b) is outside the requirement, flowing from s 24(1A) of the Federal Court Act, that leave to appeal must first be obtained in order to appeal against any interlocutory order. So far, it might be thought that this meant that Mr Fuller was entitled to appeal as of right against the prohibition in Order 3.
>
> 12. Insofar as the prohibition in Order 3 was expressly authorised by s 37AO(2)(b) of the Federal Court Act, that order was, to that extent, a "vexatious proceedings order" in terms of the definition of that term in s 37AM of the Federal Court Act. The effect of s 37AR(2) of the Federal Court Act is that a person subject to a vexatious proceedings order is permitted to apply to the Court for leave to institute a proceeding that is subject to such an order. Thus, the balance of Order 3, which required Mr Fuller to obtain leave from the Court before instituting any proceedings against any of the respondents, stated a position which flowed in any event from the operation of s 37AR(2) upon the making of a vexatious proceedings order. So viewed, this part of Order 3 was otiose.
>
> 13. That is not to say that the express imposition of the requirement to seek

leave, found in Order 3, was necessarily beyond the Court's power. By s 37AO(2)(c) of the Federal Court Act, the Court may also make, "any other order the Court considers appropriate in relation to the person". Further, s 37AN of the Federal Court Act provides that Part VAAA of that Act, in which ss 37AM, 37AO and 37AR are found, "does not limit or otherwise affect any powers that the Court has apart from this Part to deal with vexatious proceedings". That means that, in dealing with a vexatious litigant, the Court's general power in respect of a matter in which it has jurisdiction to make such orders as the Court thinks appropriate, found in s 23 of the Federal Court Act, is not affected by Part VAAA. The Court had jurisdiction to entertain the application made by the active party respondents. Either or each of s 37AO(2)(c) or s 23 of the Federal Court Act would support imposition of the express requirement to seek leave found in Order 3.

14. Further, though s 37AR has a like effect, it is by no means impossible to see how there may be advantage both to Mr Fuller and the respondents in a requirement to seek leave being expressly stated in an order. The advantage lies not just in the express drawing of the requirement to Mr Fuller's attention but also in making it plain to him that the prohibition entailed in Order 3 is not absolute but admits of the possibility that, in the future, he might nonetheless, if satisfactory cause is shown, be permitted to institute a proceeding against the respondents.

15. We are inclined to the view that so much of Order 3 as required Mr Fuller to obtain leave from the Court before instituting any proceedings against any of the respondents was ancillary to the prohibition entailed in the order. That being so, the question becomes whether, as we have already intimated, Mr Fuller was, by s 37AO(5), entitled to appeal as of right against Order 3?

16. Acceptance of his being entitled to appeal as of right is complicated by the definitions of "institute" and "proceeding" found in s 37AM of the Federal Court Act. Section 37AM provides that the word "proceeding" has the meaning given to it by s 4 of the Federal Court Act, which is, "a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal". The word, "institute" is defined by s 37AM as follows:

"***institute***", in relation to proceedings, includes:

(a) for civil proceedings - the taking of a step or the making of an application that may be necessary before proceedings can be started against a party; and

(b) for proceedings before a tribunal--the taking of a step or the making of an application that may be necessary before proceedings can be started before the tribunal; and

(c) for criminal proceedings - the making of a complaint or the obtaining of a warrant for the arrest of an alleged offender; and

(d) for civil or criminal proceedings or proceedings before a tribunal--the taking of a step or the making of an application that may be necessary to start an appeal in relation to the proceedings or to a decision made in the course of the proceedings.

17. One would ordinarily read the permissive statement, "The applicant may apply to the Court for leave to institute a proceeding that is subject to the order", found in s 37AR(2) of the Federal Court Act, informed by the definitions of both "institute" and "proceeding". There does not appear to be any warrant for ignoring the definition of "institute" because it refers to "proceedings", rather than

"proceeding". Within these definitions, both the inclusion of an appeal in the definition of "proceeding" and the reference to the institution of an appeal in paragraph (d) of the definition of "institute" are to be noted. In terms of paragraph (d) of the definition of "institute", an appeal from a single judge is "started" by the filing of a notice of appeal: r 36.01(c), Federal Court Rules 2011 (Cth) (Federal Court Rules).

18. By this somewhat circuitous route, the position which is reached is that Mr Fuller did not require a grant of leave to seek leave to appeal. Rather, what he required was a grant of leave to file a notice of appeal so as to institute ("start") an appeal. Mr Fuller is, therefore, correctly termed an "applicant", rather than an "appellant". We have corrected the title of this proceeding accordingly.

19. Mr Fuller does not presently have the benefit of an order granting him leave to file a notice of appeal. While we do not, for the reasons given, accept that he was in law entitled to appeal as of right against Order 3, we would readily grant him leave to file a notice of appeal *nunc pro tunc*, deem his draft notice of appeal to be a notice of appeal filed in the Court and allow his appeal in the event that any of the grounds in his draft notice had merit. We consider that the interests of justice are best served in this case by considering his grounds on the merits as if an appeal had been regularly instituted. The active party respondents invited us to do as much.

3 Mr Agapis' extensive application is supported by two equally extensive affidavits, and submissions. He seeks to file a notice of appeal from the judgment of *Agapis v Plumbers Licensing Board (No 2)* [2014] FCA 1045, delivered on 26 September 2014.

STATUTORY PROVISIONS

4 The relevant statutory provisions applying to Mr Agapis' application are as follows:

Division 2 – Vexatious proceedings orders

37AO Making vexatious proceedings orders

(1) This section applies if the Court is satisfied:

(a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or

(b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by paragraph (a), has instituted or conducted a vexatious proceeding in an Australian court or tribunal.

(2) The Court may make any or all of the following orders:

(a) an order staying or dismissing all or part of any proceedings in the Court already instituted by the person;

(b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court;

(c) any other order the Court considers appropriate in relation to the person.

Note: Examples of an order under paragraph (c) are an order directing that the

person may only file documents by mail, an order to give security for costs and an order for costs.

(3) The Court may make a vexatious proceedings order on its own initiative or on the application of any of the following:

(a) the Attorney General of the Commonwealth or of a State or Territory;

(b) the Chief Executive Officer;

(c) a person against whom another person has instituted or conducted a vexatious proceeding;

(d) a person who has a sufficient interest in the matter.

(4) The Court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(5) An order made under paragraph (2)(a) or (b) is a final order.

(6) For the purposes of subsection (1), the Court may have regard to:

(a) proceedings instituted (or attempted to be instituted) or conducted in any Australian court or tribunal; and

(b) orders made by any Australian court or tribunal; and

(c) the person's overall conduct in proceedings conducted in any Australian court or tribunal (including the person's compliance with orders made by that court or tribunal);

including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section.

Division 3 – Particular consequences of vexatious proceedings orders

37AQ Proceedings in contravention of vexatious proceedings order

(1) If the Court makes a vexatious proceedings order prohibiting a person from instituting proceedings, or proceedings of a particular type, in the Court:

(a) the person must not institute proceedings, or proceedings of that type, in the Court without the leave of the Court under section 37AT; and

(b) another person must not, acting in concert with the person, institute proceedings, or proceedings of that type, in the Court without the leave of the Court under section 37AT.

(2) If a proceeding is instituted in contravention of subsection (1), the proceeding is stayed.

(3) Without limiting subsection (2), the Court may make:

(a) an order declaring a proceeding is a proceeding to which subsection (2) applies; and

(b) any other order in relation to the stayed proceeding it considers appropriate, including an order for costs.

(4) The Court may make an order under subsection (3) on its own initiative or on the application of any of the following:

(a) the Attorney General of the Commonwealth or of a State or Territory;

(b) the Chief Executive Officer;

(c) a person against whom another person has instituted or conducted a vexatious proceeding;

(d) a person who has a sufficient interest in the matter.

37AR Application for leave to institute proceedings

(1) This section applies to a person (the applicant) who is:

(a) subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the Court; or

(b) acting in concert with another person who is subject to an order mentioned in paragraph (a).

(2) **The applicant may apply to the Court for leave to institute a proceeding that is subject to the order**.

(3) The applicant must file an affidavit with the application that:

(a) lists all the occasions on which the applicant has applied for leave under this section; and

(b) lists all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and

(c) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

(4) The applicant must not serve a copy of the application or affidavit on a person unless an order is made under paragraph 37AT(1)(a). If the order is made, the applicant must serve the copy in accordance with the order.

(emphasis added)

37AS Dismissing application for leave

(1) The Court or a Judge may make an order dismissing an application under section 37AR for leave to institute a proceeding if the Court or Judge considers the affidavit does not substantially comply with subsection 37AR(3).

(2) The Court or a Judge must make an order dismissing an application under section 37AR for leave to institute a proceeding if the Court or Judge considers the proceeding is a vexatious proceeding.

> (3) The Court or a Judge may dismiss the application without an oral hearing (either with or without the consent of the applicant).

5 Sackville J in *Ramsey v Skyring* (1999) 164 ALR 378 (at [52]) observed in relation to vexatious proceedings orders that there is:

> … the need to protect the community, including litigants who wish to have their disputes resolved in an orderly and expeditious manner, against disruption of the court system flowing from the repeated institution of groundless proceedings.

6 Toohey J in *Jones v Skyring* (1992) 109 ALR 303 (at 312) described the objective as being one to reinforce:

> … the power of the Court to protect its own process against unwarranted usurpation of its time and resources and to avoid the loss caused to those who have to face actions which lack any substance.

THE PRIMARY DECISION

7 By the primary decision from which Mr Agapis seeks leave to lodge an appeal under s 37AR of the Act, the Plumbers Licensing **Board** sought orders under s 37AO of the Act on the basis that Mr Agapis had frequently instituted or conducted vexatious proceedings in Australian courts and tribunals as contemplated by s 37AO(1) of the Act. The Board sought a vexatious proceedings order of the Court under s 37AO(2)(b) of the Act prohibiting Mr Agapis from instituting proceedings in this Court. The primary judge noted (at [10]) that 'vexatious proceedings' is defined in s 37AM(1) of the Act to include the following matters:

> (a) a proceeding that is an abuse of the process of a court or tribunal; and
>
> (b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
>
> (c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
>
> (d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

8 The primary judge then listed the following proceedings (at [11]) which had been instituted and conducted or were currently being conducted by Mr Agapis:

> (a) following his criminal conviction in 2011 in respect of burglary, the appellant sought leave to appeal against his conviction and sentence in the Court of Appeal of the Supreme Court of Western Australia (CACR 148 of 2011 and CACR 149 of 2011);
>
> (b) on 15 June 2012, the appellant filed an application in the AAT for review of the respondent's decision to refuse to grant a plumbing contractor's licence under the *Mutual Recognition Act 1992* (Cth);

(c) on 17 August 2012, the appellant appealed an interlocutory order made in the AAT to this Court (WAD 198 of 2012);

(d) on 17 April 2013, the appellant filed an appeal in this Court (WAD 111 of 2013) concerning the decision of the AAT;

(e) following the conclusion of the proceeding mentioned at (a) above, the appellant filed an application for judicial review in the Supreme Court of Western Australia (CIV 2139 of 2013) in respect of the decision made in his criminal trial;

(f) following the decision of McKechnie J in CIV 2139 of 2013 in the proceeding mentioned at (e) above, the appellant filed an appeal (CACV 105 of 2013) in the Supreme Court of Western Australia;

(g) on 6 December 2013, the appellant filed a notice of appeal in this Court (WAD 460 of 2013) out of which arises the current application;

(h) on 12 December 2013, the appellant filed a writ of summons in the Supreme Court of Western Australia (CIV 2874 of 2013) seeking damages for negligence against the respondent and one of its previous executive officers;

(i) on 30 January 2014, the appellant filed a notice of appeal relating to a stay order made by Registrar Boyle on 24 January 2014 in Supreme Court action CIV 2874 of 2013;

(j) on 27 February 2014, the appellant filed an interlocutory application seeking a stay of the proceedings in WAD 460 of 2013 arising out of certain personal disorders; and

(k) on 3 June 2014, the appellant filed an interlocutory application seeking leave to amend the grounds of his appeal in WAD 460 of 2013.

9 The primary judge then went on to examine at some length, over nine pages, each of those proceedings.

10 His Honour concluded (at [54]-[55]) that the appeal proceeding was vexatious, had no merit whatsoever and made orders pursuant to s 37AO(2)(a) and s 37AO(2)(b) of the Act, dismissing the substantive appellate proceeding as well as making an order prohibiting Mr Agapis from instituting proceedings in the Court.

THIS APPLICATION

11 The 11 page originating process in this proceeding is somewhat discursive. It proceeds thus:

…

Application for Leave to Institute a Proceeding

This Application is made in accordance with s 37 AR(2) of the Federal Court of Australia Act 1976 (Cth) (the Act).

Affidavit, sworn by [Mr Agapis] 17 August 2016, filed in support of Application in accordance with s 37 AR(3) of the Act.

As in previous cases concerning Application Seeking Leave to File Notice of Appeal the [Mr Agapis] has provided numerous Grounds of Appeal from which the Court can draw upon.

For the reason above, the seriousness and the complexity of the disputes and issues to be decided, combined with the decision maker's opportunity for direct questioning and the clarification of any issue in this matter, the rule of law that judicial decisions be made in an open Court with the parties present, earlier precedent in the Court regarding this issue and the public's confidence in the administration of justice, [Mr Agapis] asks for a hearing and to be present at that hearing, to participate in that hearing, when the decision regarding this application is made by a Justice of the Federal Court of Australia.

…

A. Vexatious Order- Grounds of Appeal:

1. [The primary judge] made judgment in [Mr Agapis'] proceedings in an earlier interlocutory hearing in the Federal Court of Australia on appeal from the AAT, his Honour ought to have been prevented from adjudicating the vexatious interlocutory hearing due to the reasonable apprehension of bias;

2. The reasonable apprehension of bias concerning conduct, was high-lighted by the failure of [the primary judge] to conduct the vexatious order proceeding in obedience with *Federal Court Rules 2011* (Cth), rr 36.72(1), 36.72(1)(a), 36.72(4) to the detriment of [Mr Agapis];

3. The combination of conduct, previous involvement and possible pre-judgment in relation to the denial of natural justice by [the primary judge], constitutes reasonable apprehension of bias in the vexatious order;

4. The reasonable apprehension of bias in [the primary judge's] vexatious order judgment alleged by [Mr Agapis] also extends to the severity of the vexatious order made at Order 4, as more appropriate remedies were available;

5. [The primary judge's] denial of natural justice in the first interlocutory hearing from the AAT heard in 2012 which was mirrored by his Honour in the same matter while determining the vexatious order in 2014, constitutes by pre-judgment a reasonable apprehension of bias to the detriment of [Mr Agapis];

6. As natural justice is primarily concerned with procedure, [the primary judge's] failure to conduct the vexatious order proceeding in obedience with the *Federal Court Rules 2011* (Cth), rr 36.72(1), 36.72(1)(a), 36.72(4) constitutes a denial of natural justice in the vexatious order proceeding;

7. [The primary judge] failed to recognise the breach of natural justice in the interlocutory hearing on appeal from the Administrative Appeals Tribunal, and consequently failed to recognise the breach of natural justice in the same matter in the interlocutory hearing deciding the vexatious order demonstrating pre-judgment and/or failure to have an impartial mind;

8. [The primary judge] at various times throughout the assessment of

the cases regarding the vexatious order purported to have fairly and justly considered elements of cases, when it appears his Honour had little knowledge or failed to take into account relevant factors when making the vexatious order judgment;

9. [The primary judge] erred in law and fact by omitting and ignoring in the vexatious order judgment [Mr Agapis'] important ground concerning s 21 (4) of the *Mutual Recognition Act 1992* (Cth) in the appeal before the Administrative Appeals Tribunal that still to this day has not been answered in accordance with correct law;

10. [The primary judge] erred in law and fact by misconstruing the cogency of [Mr Agapis'] argument concerning the Administrative Appeals Tribunal not being a Ch Ill Court, as [the member] engaged in statutory interpretation, which is a judicial function;

11. [The primary judge] erred in law and fact by misconstruing the cogency of [Mr Agapis'] argument concerning the Administrative Appeals Tribunal not being a Ch Ill Court, as [the member] engaged in interpretation of case law of the Western Australia Supreme Court, which is a judicial function;

12. [The primary judge] failed to recognise that [the member's] conduct in making a botched and somewhat absurd attempt of statutory interpretation and consequent interpretation of WA Supreme Court case law, was a reasonable apprehension of bias;

13. [The primary judge] erred in law and fact by misconstruing and dismissing [Mr Agapis'] claim that the Administrative Appeals Tribunal cannot make quasi-judicial or judicial decisions;

14. [The primary judge] failed to acknowledge that the Administrative Appeals Tribunal is at federal body that consists of judicial and non-judicial functions, which transgresses the Commonwealth Constitution 1901 (Cth) and numerous decisions of the High Court of Australia;

15. [The primary judge] when making judgment in the vexatious order, failed to acknowledge that the Administrative Appeals Tribunal was not lawfully able to determine the error of law on the face of the record in relation to the criminal charge in the District Court Perth;

16. The seriousness and the complexity of the disputes and issues to be decided combined with the decision maker's opportunity for direct questioning and the clarification of any issue in this matter, serves as correct conduct and law to conduct a hearing including [Mr Agapis] in Court when seeking leave to file appeal;

17. The essential characteristic of Court proceedings in this country that they are conducted in public, as demonstrated in the Federal Court of Australia Act 1976 (Cth), s 17, is correct law that [Mr Agapis] ought to be given a fair hearing in open Court in this matter;

18. The vexatious order made by [the primary judge] in the interlocutory hearing is stated by s 37AO(5) of the Federal Court of Australia Act 1976 (Cth) to be a final order, yet definitively, a final order can only be issued from the more superior High Court of Australia;

19. The vexatious order made by [the primary judge] in the interlocutory hearing is stated by s 37AO(5) of the Federal Court of Australia Act 1976 (Cth) to be a final order, yet correct law reasons that a final order cannot be made in an interlocutory hearing;

20. The trauma inflicted upon [Mr Agapis] in Western Australia during the District Court Trial and subsequent appeal processes, the voluminous denial of procedural fairness accompanied by illegal and unlawful behaviour during all litigation processes, caused the symptoms of depression and anxiety in the mind of [Mr Agapis], resulting in [Mr Agapis] not understanding or responding correctly to the vexatious order hearing;

21. The voluminous and severe denial of procedural fairness and natural justice in many instances of [Mr Agapis'] cases before the Courts combined with the instances of impropriety and inconsistency of opposing participants, sometimes the tribunals themselves, negate many actions deemed to be vexatious by [the primary judge];

22. The voluminous and severe denial of procedural fairness and natural justice in many instances of [Mr Agapis'] cases before the Courts, combined with the many instances of unlawfulness by participants and sometimes the Tribunals themselves, were the primary cause of [Mr Agapis] showing symptoms of depression and anxiety, was reason for [Mr Agapis] failing to correctly address the vexatious order proceeding;

23. [Mr Agapis] while exercising his lawful right to appeal an erroneous decision/conviction in a criminal trial into the Court of Appeal, while an indigent unrepresented person without legal advice or representation and untrained in law before the Court, does not make [Mr Agapis'] failure to negotiate complex questions of law vexatious;

24. [The primary judge] failed to take into account that the balance of [Mr Agapis] to seek access to justice in the Courts in the Western Australia jurisdiction has been continuously derailed due to the erroneous conduct and flawed judgments of many decision makers that were contrary to correct law;

25. [The primary judge] failed to acknowledge the constant miscarriages of justice which occurred regarding [Mr Agapis'] matters in the Western Australia jurisdiction, which brought upon [Mr Agapis] a sense of being an alien in the Courts and foreign to his rights and the rule of law, brought a cloud of confusion that dominated [Mr Agapis'] mind during procedure in the vexatious order interlocutory hearing;

26. A miscarriage of justice occurred in the vexatious order interlocutory hearing due to many inaccurate comments made by his Honour [the primary judge] in judgment of the cases listed;

27. A miscarriage of justice occurred in the vexatious order interlocutory hearing as a result of his Honour [the primary judge] asserting irrelevant issues and not stating relevant or having knowledge of relevant issues concerning the procedure and content of cases listed in question;

28. A miscarriage of justice occurred in the vexatious order judgment as [the primary judge's] balance between the certainty and the responsibility of the administration of justice was misconstrued and misconceived and therefore non-existent;

29. The severity and inappropriateness of the Orders in [the primary judge's] vexatious order judgment, especially Order 4, was extreme and unwarranted when considering all events and evidence in their entirety during [Mr Agapis'] litigation process against the Plumbers Licensing Board;

30. When considering the basis of the numerous allegations of reasonable apprehension of bias at many stages of [Mr Agapis'] litigation and the extreme and severe nature of the Orders made by [the primary judge] in the vexatious order hearing, the Orders themselves constitute a reasonable apprehension of bias;

31. When considering the breach of natural justice and the transgression of the separation of powers at the Administrative Appeals Tribunal and the impropriety and inconsistencies of the Federal Court of Australia judgments, the Orders made by [the primary judge] in the vexatious order judgment are excessive and unwarranted;

32. Due to numerous reasons, too many to list in a ground, the Plumbers Licensing Board application to have the appeal dismissed as a vexatious proceeding was an abuse of process;

33. The application for the vexatious orders sought by the Plumbers Licensing Board (the PLB) in relation to [Mr Agapis'] appeal in the Federal Court of Australia, was a continuation and extension of the impropriety and inconsistency in law [Mr Agapis] has experienced since first coming into contact with the PLB on 3 March 2011;

34. [The primary judge] misconstrued the intent of the principles found in High Court of Australia decisions when making the vexatious order, to erroneously evidence and document [Mr Agapis'] behaviour in litigation as vexatious;

B. Substantive Issue at Administrative Appeals Tribunal - Grounds of Appeal:

1. [The member], a functionary of the executive, crossed the line of legality by making statutory interpretation, which is a judicial function;

2. [The member], a functionary of the executive, crossed the line of legality by interpreting WA Supreme Court case law, which is a judicial function;

3. [The member], a functionary of the executive, made statutory interpretation and interpretation of WA Supreme Court case law, which transgressed the doctrine of separation of powers;

4. [The member], a functionary of the executive, while determining a matter in a tribunal that is not a Ch Ill Court, acted judicially and exercised the judicial power of the Commonwealth, thus breaching the doctrine of separation of powers;

5. The conduct and illegality of [the member] to act judicially while exercising the judicial power of the Commonwealth in making statutory interpretation and case law interpretation demonstrates a reasonable apprehension of bias.

6. [The member's] conduct, the participation in statutory interpretation and the interpretation of WA Supreme Court case law, combined with the implication of not having an impartial mind when making the determination, demonstrated a reasonable apprehension of bias;

7. The Administrative Appeals Tribunal is a federal body comprising of judicial and non-judicial functions which is contrary to the *Commonwealth Constitution 1901* (Imp) and High Court decisions;

8. [The member], as a functionary of the executive, could not lawfully adjudicate on the error of law on the face of the record concerning the name the criminal charge/prosecution notice was in, as that question of law is a judicial function;

9. At the Administrative Appeals Tribunal, the Plumbers Licensing Board failed to answer in Submission [Mr Agapis'] ground concerning s 21(4) of the *Mutual Recognition Act 1992* (Cth), [the member] answered the ground on behalf of the Plumbers Licensing Board, demonstrating a reasonable apprehension of bias;

10. [The member] ignored and failed to apply the rules and correct practice of statutory interpretation and wrongly disregarded the context, intent and purpose of the legislation in relation to s 21(4) of the *Mutual Recognition Act 1992* (Cth), implying a decision makers mind that is not impartial, demonstrating a reasonable apprehension of bias;

11. [The member] erroneously ignored the context, intent and purpose of the *Mutual Recognition Act 1992* (Cth) when applying the legislation to WA Supreme Court case law;

12. [The member's] illegality of participating in statutory interpretation and the interpretation of case law was a calculated and blatant intention to cause damage to an indigent unrepresented litigant before the Tribunal;

13. [The member's] application of incorrect procedure and law in the determination by failing to define his role as a functionary of the executive correctly, resulted in an abuse of process to the detriment of [Mr Agapis];

14. 1t is difficult to understand that [the member], who was voted Western Australia Lawyer of the Year in 2009, did not materially realise or have factual knowledge that he was participating in erroneous conduct when making determination of [Mr Agapis'] matter;

15. [The member] is authorised by law to make administrative decisions but lacks authority to make decisions that are quasi-judicial or judicial in nature by the *Commonwealth Constitution 1901* (Cth) (Imp) and may High Court of Australia decisions;

16. [The member] is authorised by law to make administrative decisions

but lacks lawful authority to make decisions that are quasi-judicial or judicial in nature by the *Commonwealth Constitution 1901* (Imp) and many High Court of Australia decisions;

17. [The member's] conduct concerning the participation in statutory interpretation and the interpretation of WA Supreme Court case law, resulted in a procedural miscarriage of justice to the detriment of [Mr Agapis];

18. [The member], a functionary of the executive, erroneously participated in judicial review, when his role at the Administrative Appeals Tribunal consists of merits review;

19. The denial of natural justice by Deputy President Hotop and the erroneous conduct of [the member] of making statutory interpretation and interpretation of WA Supreme Court case law in the determination, was an abuse of process at the Administrative Appeals Tribunal;

20. [The member] when making statutory interpretation and interpretation of case law committed a jurisdictional error making the determination at Administrative Appeals Tribunal a nullity;

21. [The member] had a complete absence of power to participate in statutory interpretation and the interpretation of case law in the determination at the Administrative Appeals Tribunal, resulting in a jurisdictional error by a decision maker making the determination a nullity;

C. Siopis J Judgment - Grounds of Appeal:

1. Siopis J correctly stated that a "plumber's contractor's licence" (licence) was needed in Western Australia, yet no legislation exists that states only a Western Australia licence must be used in Western Australia or a licence from another Australian State cannot be used in Western Australia;

…

12 The application is supported by a primary 25 page affidavit and 46 pages of submissions. A further 43 page affidavit in support of the application for leave was also filed. Suffice to say that a very significant amount of the material in these documents is devoted to rearguing matters which are already determined and foreclosed.

13 For the purpose of the present application, focus is also required on the question of whether leave should be granted to permit filing of an appeal when the appeal would be some two years out of time from the decision of the primary judge.

CONSIDERATION

14 There is no doubt that Mr Agapis has exhaustively catalogued numerous reasons for contending that the original decision was wrong, with particular focus on apprehended bias.

In citing from the decision in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (at [6]), particular emphasis has been placed on the word 'might', where it appears twice in the well-known recitation of the test that a judge is disqualified if a fair minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question.

15 This argument omits focus on the word 'reasonably'.

16 Mr Agapis says the decision was prejudged, contending that in fact the Board did not seek to have Mr Agapis prohibited from instituting proceedings in this Court. In fact this submission is wrong. That is exactly what the Board sought by its application filed on 11 March 2014.

17 Mr Agapis also contends that 'less severe' actions were open to his Honour under the relevant section, including an order staying or dismissing all or part of any proceedings in the Court already instituted by the person, an order prohibiting the person from instituting proceedings of a particular type or any other order the Court considered necessary.

18 Complaint is made that the primary judge simply adopted the submissions for the Board.

19 Mr Agapis then proceeds to give his own version of the proper way in which the numerous proceedings examined by the primary judge should be viewed and in doing so makes strenuous criticism of a number of decision-makers, including judges of this and other courts, a Deputy District Registrar of this Court and at least one member of the Administrative Appeals Tribunal.

20 One of the main difficulties for Mr Agapis is that these submissions effectively go behind conclusions already reached by judges, courts and tribunals in proceedings which have been finalised and in respect of which any prospect for appeal is either exhausted or, as in this case, is well out of time. Despite the requirements of s 37AR(3), it is difficult for a person who has been declared a vexatious litigant to persuade the Court that leave should be granted to institute a proceeding in circumstances where such a broad sweeping approach is taken. To attempt to re-litigate out of time, in effect, all the matters on which the vexatious litigant has already lost, is not a course which is likely to be met with success as distinct from the preferred position of selectively identifying a specific and more precise complaint which requires ventilating. Unfortunately, by re-agitating or attempting to re-agitate so many concluded matters adversely decided to him, such an applicant is simply reimpressing on the Court reasons why he should not be permitted leave to issue proceedings. It is entirely

inappropriate and pointless that, in an application for leave pursuant to s 37AO of the Act, the Court should attempt to re-hear, in effect, all of the proceedings on which the vexatious litigant has previously lost.

21 The fact, in this instance, that the remarks made by the primary judge in his Honour's reasons coincide with submissions made by the Board is explicable by the fact that they are the relevant observations from other proceedings that have been extracted for the purpose of deciding the question identified in s 37AO of the Act.

22 The written submissions for Mr Agapis make severe criticisms of all of the judicial officers who have previously rejected Mr Agapis' contentions. The likelihood that all of these decisions were as significantly incorrect as alleged by Mr Agapis, or at all, is minimal at best.

23 Criticisms of apprehended bias have also been levelled at a Deputy District Registrar in the Western Australian Registry of this Court, but none of those complaints goes to the question of whether leave should be granted to institute an appeal two years out of time from the decision of the primary judge. Further, the factual events to which the litigation with the Board relates are now several years old.

24 There are various other submissions raised, including a suggestion that the doctrine of 'necessity' did not require that the primary judge, as distinct from other judges, be allocated to determine the Board's application. But, in my view, no valid reason is advanced as to why the primary judge should have recused himself, even if he had been asked to do so. The simple fact that his Honour had resolved another matter previously involving Mr Agapis adversely to him is not a sufficient reason.

25 Indeed, Mr Agapis also raised the question in passing as to whether I should sit on the application in light of my being a member of the Full Court in *Fuller*, a case which bore some resemblance to the present. As indicated above (at [2]), the only point to be extracted from *Fuller* is that I am satisfied that Mr Agapis has formed his application in accordance with the Act's provisions. Robertson J very recently considered such matters in *SZVBN v Minister for Immigration and Border Protection (No 2)* [2017] FCA 123 where his Honour said (at [9]-[18]):

> 9 It is also submitted that since the current constitution of the Court in the present appeal "appears to be inconsistent with the published reasons in Betfair", it would be useful for future litigants if short reasons could be given explaining whether that reasoning is correct.

10 I take as my starting point what was said by Mason J in *Re JRL; Ex parte CJL* [1986] HCA 39, 161 CLR 342 at 352:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group; Watson; Re Lusink; Ex parte Shaw*. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.
>
> (Footnotes omitted.)

11 Next I consider the authorities referred to at [9.250] in Aronson, Groves and Weeks *Judicial Review of Administrative Action and Government Liability* (6th ed, Lawbook Co, 2017) where it is said: “A judge’s ruling in an earlier case on the same point of law as arises in the instant case is no ground for disqualification.” The authorities referred to include *Kartinyeri v Commonwealth* [1998] HCA 52; 156 ALR 300 and *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* [1999] HCA 56; 166 ALR 302.

12 In *Kartinyeri*, Callinan J in refusing, at that point, to disqualify himself, said:

> [24] I do not think that the expression of an opinion as to a legal matter, whether as a practising lawyer or as a judge on a prior occasion, will ordinarily of itself give rise to a reasonable apprehension of bias according to the relevant test. Mason J in the passage I have already quoted points out that the making of a previous decision by a judge on issues of fact and law, although perhaps generating an expectation of a particular outcome, does not mean that the judge will not be impartial and unprejudiced in the relevant sense.
>
> (Footnote referring to *Re JRL; Ex parte CJL* omitted.)

13 In *Helljay Investments*, Hayne J said, after also quoting the judgment of Mason J in *Re JRL; Ex parte CJL*:

> [12] The principles about apprehension of bias must be understood in the context of a judicial system founded in precedent and directed to establishing, and maintaining, consistency of judicial decision so that like cases are treated alike and principles of law are applied uniformly. The bare fact that a judicial officer has earlier expressed an opinion on questions of law will therefore seldom, if ever, warrant a conclusion of appearance of

bias, no matter how important that opinion may have been to the disposition of the past case or how important it may be to the outcome of the instant case. Fidelity to precedent and consistency may make it very likely that the same opinion about a question of law will be expressed in both cases. But that stops well short of saying that the judicial officer will not listen to and properly consider arguments against the earlier holding. As Lush J said in *Ewert v Lonie*: [[1972] VR 308 at 311–12]

> Every reasonable man knows that consistency in decision is one of the aims of judicial or quasi-judicial institutions, but if he is exercising his quality of reasonableness he does not suppose that a tribunal will refuse to entertain or will fail to give proper attention to a submission opposed to its former decision merely because it is so opposed. In this case, the reasonable onlooker might have thought that the appellants would not have much chance of succeeding, but this is not the same thing as feeling or believing that they would not get a proper hearing. It is not a characteristic of the law's reasonable man either to be irrationally suspicious of every institution or authority or to think that every cynical appraisal represents an absolute truth.

(Footnotes omitted.)

14 In *Re Finance Sector Union of Australia and another; Ex parte Illaton Pty Ltd* [1992] HCA 30; 107 ALR 581 at 583, Deane, Toohey and Gaudron and JJ said:

> The basis for disqualification is not merely that the member's past decisions, on questions of fact or law, might lead to a reasonable expectation that she or he will decide the case adversely to one of the parties.

15 If the prejudgment is said to be of law, it is not enough that a judge has determined a legal issue in the past in a particular way: *Ceccattini v ICM 2000 Pty Ltd* [1999] NSWSC 1196 at [17] per Santow J.

16 It may therefore be important to consider the terms in which the conclusion in *Kim* was expressed. Those terms were as follows:

> 36 The purpose of s 48 is to prevent more than one application for a visa in the specified circumstances. But does this mean an application validly *made* or is the section directed more to the person making the application?
>
> 37 In our opinion the better construction is that it is directed to the person and to an application of which the non-citizen had knowledge, rather than an application which merely validly affected the non-citizen or from which the non-citizen would have benefited.
>
> …
>
> 41 The issue is not, in our opinion, whether the 2008 visa application was valid, as to which compare *Minister for Immigration & Multicultural & Indigenous Affairs v WAIK* [2003] FCAFC 307, but whether the respondent made the application. We do not accept the submission on behalf of the Minister to the effect that if an application is valid then, within the meaning of s 48, the visa application is made by any person named in the application as a person on whose behalf it was made.
>
> …

> 50 In our opinion, the legislative history and extrinsic material do not clearly show, one way or the other, what the legislature intended by the words of the present statutory provisions. We observe, however, that there is some emphasis on non-citizens making repeat applications which may tend to suggest that the mischief was narrower than the mere validity of such earlier applications.
>
> (Emphasis in original.)

> 17 These reasons show that, as with many other questions of statutory construction, the question in *Kim* was contestable and recognised to be so. The reasons do not show or suggest that I have, or might have, closed my mind to argument on the point.
>
> 18 In my opinion the circumstances in *Betfair* were quite different. *Betfair* was not concerned with a question of statutory construction as arises in the present appeal but with s 92 of the *Constitution* or statutory derivatives thereof. Also, in reaching his conclusion in *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; 186 FCR 226, which conclusions were the point of the interlocutory application in *Betfair*, Perram J was highly critical of Racing New South Wales, in particular, its chief executive Mr V'landys. In my view, [18], including [18(b)], of Perram J's reasons in *Betfair* should be read in that light and as aspects of a single conclusion to recuse himself from hearing Betfair's interlocutory application for leave to reopen its case.

26 The primary judge did not and should not have recused himself.

27 It is also contended, although not substantially developed, that it was not open for the primary judge to make a final order on what was an interlocutory hearing. What is not clarified, however, is why Mr Agapis contends that the hearing concerned was an interlocutory hearing. It was a hearing in which, in terms, final relief was sought and in which Mr Agapis was afforded ample opportunity to make submissions in opposition to the final relief.

28 Having examined the very considerable volume of material filed by Mr Agapis, I am quite unpersuaded that he has demonstrated that there are grounds for appeal from the decision under consideration. In those circumstances, together with the unexplained and very substantial delay in applying, leave to file an appeal is refused.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 22 March 2017