



[2016] HCA Trans 154

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Perth

No P66 of 2015

Between -

RAOUL AGAPIS

Plaintiff

and

A DEPUTY DISTRICT REGISTRAR OF
THE FEDERAL COURT OF
AUSTRALIA AT PERTH

First Defendant

PLUMBERS LICENSING BOARD OF
WESTERN AUSTRALIA

Second Defendant

Application for order to show cause

GORDON J

TRANSCRIPT OF PROCEEDINGS

FROM MELBOURNE BY VIDEO LINK TO PERTH

ON THURSDAY, 7 JULY 2016, AT 11.31 AM

Copyright in the High Court of Australia

MR R. AGAPIS appeared in person.

MR A.J. SEFTON: I appear on behalf of the second defendant, if it please the Court. (instructed by State Solicitor's Office (WA))

5

HER HONOUR: Mr Agapis.

MR AGAPIS: This application was made to the Court, your Honour, in regards to – it had its genesis from the refusal of Deputy Registrar Trott in the Federal Court of Australia, his refusal to allow me to appeal Justice Gilmour's decision that was made on 26 September 2014.

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HER HONOUR: Yes, I have read your very helpful material which you filed.

15

MR AGAPIS: Good.

HER HONOUR: I have read your affidavit of 24 June.

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MR AGAPIS: Very good.

HER HONOUR: Plus your submissions. Are there matters that you wish to put to me in addition to those matters that are raised both in the affidavit and in the submissions?

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MR AGAPIS: There is, your Honour.

HER HONOUR: What are they?

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MR AGAPIS: I have made reference to certain issues such as bias, such as denial of procedural fairness, et cetera, and I would like to elaborate on that.

35

HER HONOUR: Right. One of the mechanisms – one of the issues that I have to consider in an application for an order to show cause is to seek to determine whether or not there is another form of relief available to you. Do you understand what I am putting to you?

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MR AGAPIS: I do because the constitutional writs do not take the place of an appeal.

45

HER HONOUR: That is exactly right. I noticed that in a letter that you sent to the Federal Court you referred to the provisions that are provided for and set out in sections 37AR through to AT of the *Federal Court of Australia Act*.

MR AGAPIS: Correct. Actually 37AQ as well, your Honour.

50 **HER HONOUR:** I accept that. I am just explaining - - -

MR AGAPIS: Sorry.

55 **HER HONOUR:** - - - just dealing with some of the provisions that seem to deal with the matters which you currently have before me. I say that for this reason. One of the things which you seek to complain about is the order that made you – or what is described as a vexatious proceedings order. Is there any reason why you could not use those provisions to seek to get the relief you require?

60 **MR AGAPIS:** That is what I tried to do.

HER HONOUR: No, I do not think that is quite right. That is the problem. Under those provisions – do you have the Federal Court Act and Rules with you?

65 **MR AGAPIS:** I think so, your Honour. I do have them here somewhere – sorry, your Honour.

HER HONOUR: That is all right. We will get you a copy straight away.

70 **MR AGAPIS:** Thank you. Sorry, your Honour.

HER HONOUR: That is all right. One of the mechanisms that is provided for under that Act – and one of my associates will just go and get it for you – is a mechanism which enables you, I think, arguably – or at least provides you an avenue to seek to apply in a sense in a prescribed form and accompanied by an affidavit which addresses particular matters - - -

80 **MR AGAPIS:** I think those matters that you refer to are the cases that were found vexatious.

HER HONOUR: Well, that is only one of the matters listed.

85 **MR AGAPIS:** Okay, yes.

HER HONOUR: As I read it, it seems as though sections 37 – you have to comply with the procedures set out in sections 37AR to AT.

90 **MR AGAPIS:** Yes.

HER HONOUR: One of them under 37AR(2) requires that you file a form in a particular form – that is what the rule says, or that is what the section says.

95 **MR AGAPIS:** Correct.

100 **HER HONOUR:** The second is that under section 37AR(3) and (4) it seems to require that that application for leave to institute the proceeding – because you have been declared – or have a vexatious proceedings order against you – is that you file an affidavit which addresses quite particular and prescribed matters.

MR AGAPIS: Correct, your Honour.

105 **HER HONOUR:** You have not done either of those things.

MR AGAPIS: Well, the reason I did not follow through - - -

110 **HER HONOUR:** No, no, I do not want the reason. You have not done either of those things.

MR AGAPIS: No, I have not, your Honour. Now, may I state the reason why I did not do them or - - -

115 **HER HONOUR:** Is it on affidavit? Do you explain to me in the affidavit why you have not done it?

MR AGAPIS: No.

120 **HER HONOUR:** Mr Sefton, do you have any objection to him telling me from the Bar table?

MR SEFTON: No objection, your Honour.

125 **MR AGAPIS:** Because Deputy Registrar Trott stated emphatically that he was not going to let me file. Because of my living conditions and the fact that I am doing university, your Honour, I have very limited resources and what was happening is that – I appeared before Justice Nettle on
130 23 September 2015 by – I attempted to file on 23 October 2015 in the Federal Court after Justice Nettle’s comments which also – I did not file an appeal of Justice Nettle’s decision to the Full Bench of the High Court due to his comments.

135 Time was getting away from me. I was coming up to exams in university – university exams. I needed to get – I have had constant problems throughout this whole litigation as to time issues. I needed to get

140 an appeal into the Federal Court so that they could not say it was laches or
any other instance as far as the comments or as far as my appearance before
Justice Nettle. There was already a month gone past so I wanted to get
something in front of the Federal Court and applications can be made once
you have the appeal lodged, et cetera, and, you know, applications can be
lodged, grounds can be added, at least once anyway.

145 **HER HONOUR:** The problem is, though, Mr Agapis, you have a
vexatious proceedings order against you.

MR AGAPIS: Yes.

150 **HER HONOUR:** That has particular consequences and you have to meet
those consequences. One of the consequences is that you are not entitled
just to file documents now in the Federal Court without following a
particular procedure. One of those procedures, if you were to follow them,
would have been to seek, maybe, to set aside that order, which is what you
are complaining about.

155 **MR AGAPIS:** That would have definitely been my – the ground.

160 **HER HONOUR:** No, I understand, but that is what the Act says. You
have to follow a particular procedure. I mean, none of us quite like playing
by rules sometimes, but that is what the Act says.

165 **MR AGAPIS:** I agree with you, your Honour. I am not trying to be
defiant in any way. It is just a matter of my – such limited resources that I
do have – trying to get my life back in order from the malpractice of these
people to begin with.

HER HONOUR: I cannot deal with any of those issues. I have to deal
with your application on its merits.

170 **MR AGAPIS:** Yes.

HER HONOUR: My associate will now give you the relevant section
which she has photocopied for you.

175 **MR AGAPIS:** Thank you, your Honour.

HER HONOUR: Do you have any objection to that, Mr Sefton?

180 **MR SEFTON:** No, your Honour.

HER HONOUR: I have to deal with what I have in front of me, which is
what you filed.

185 **MR AGAPIS:** Yes, yes.

HER HONOUR: My powers are limited.

MR AGAPIS: Yes.

190 **HER HONOUR:** So I cannot deal with any of the substantive complaint
that you make. It is neither necessary nor appropriate. What I have to work
out is whether or not your application for an order to show cause seeking
the relief you seek (a) should be made and (b) if not, why not. As I said to
195 you, I think one of the very large hurdles that I have yet to determine but
which worries me is that you had a procedure. It was a procedure made
available to you by the Federal Court Act dealing precisely with your
position and it has not been complied with.

200 **MR AGAPIS:** Well, if that is the major issue that is before us - - -

HER HONOUR: There may be other issues but at least on my
preparation, having read your very helpful submissions and your affidavit,
as well as Mr Sefton's submissions, it seems to be a very large hurdle.

205 **MR AGAPIS:** Okay.

HER HONOUR: Why do I not do two things? I think I will give you
time to have a read of the Rules just so you can refresh yourself – or the
Act – and while you are doing that – I am sure you can do two things at
210 once – we will hear what Mr Sefton has to say.

MR AGAPIS: Thank you, your Honour.

215 **HER HONOUR:** You can then make submissions. Do you have paper
and pen?

MR AGAPIS: I do have, your Honour.

220 **HER HONOUR:** Thank you. Mr Sefton, do you wish to add anything to
your submissions?

225 **MR SEFTON:** Just very briefly by way of amplification, your Honour, it
seems to us that there are three issues which perhaps are significant to the
disposition of this application. One of them relates to whether or not,
irrespective of the vexatious proceedings order, there would have been any
avenue to appeal to the Full Court of the Federal Court from the decision of
Justice Gilmour. The Deputy Registrar in the letter expressing the Deputy
Registrar's reasons indicates that there is no right of appeal.

230 **HER HONOUR:** Well, I do not understand that – I am not going to
express a view on that but there are two aspects to that. Do you have the
Act in front of you?

MR SEFTON: Yes, I do.

235 **HER HONOUR:** The first is that the Act – and Mr Agapis will follow
this as I am going along – provides in 37AO(5) that it is a final order. It
does that, I would have thought, for very good reason – to distinguish it
240 from an interlocutory order in order to remove any doubt about the fact that
it is a matter which is able to be subject of an appeal. I do not know
whether that is right or wrong, but it seems to me that is a pretty good
indication that they have at least turned their minds to it. The second thing
about it is it would be a very odd result that someone could be made the
subject of vexatious proceedings order and not have a right of appeal.

245 **MR SEFTON:** Yes, and we accept that and - - -

HER HONOUR: So why do you rely upon that first proposition that is set
out in the Registrar's letter?

250 **MR SEFTON:** We do not rely upon it. We point to the fact that the
Registrar's decision appears to have been based on a conclusion that there
was no avenue of appeal, whereas in fact we accept that it is arguable that
there was for the reason that your Honour has indicated.

255 **HER HONOUR:** Right. So I understand why that is relevant then in the
context of – maybe I misunderstand you, Mr Sefton. I am dealing with an
application by Mr Agapis for an application for an order to show cause.

260 **MR SEFTON:** Yes.

HER HONOUR: I have identified a matter of concern to me and what I
am asking you is are there matters of concern to you – and the first one does
not seem to be a matter of concern to you.

265 **MR SEFTON:** No, and I am merely trying to assist the Court in terms of
what we see the issue is potentially which your Honour may wish to
consider in reaching an ultimate conclusion about disposing of the matter,
the first question being whether there is any arguable right to appeal – and
270 we accept that arguably there is and, indeed, there are sound reasons why
one might reach the conclusion that there is, as your Honour has observed.

Secondly, if there is such a right of appeal, the next issue is whether
the effect of the vexatious proceedings order is to indeed require that the

275 plaintiff obtain leave under the relevant provisions dealing with obtaining
leave where you were subject to such an order, or whether in fact, properly
construed, where you are seeking to appeal against the very order that has
been the vexatious proceedings order you do not have to comply with that
requirement.

280 Now, there is a Full Court Federal Court decision we have referred to
which concludes – late last year – that you are required to go through the
process of obtaining leave. We have drawn to the Court’s attention in a
footnote that in many other State jurisdictions, which have differently
285 worded provisions, the relevant Courts of Appeal have concluded that,
properly construed, their legislation does not, in fact, require you to obtain
that leave.

290 The plaintiff in this matter has not, as we understand it, advanced by
way of his grounds that as an issue, but in the event that this matter were
either to be dismissed on the basis that the plaintiff make an application
under those provisions or if the Court were considering whether to remit
this matter for ultimate determination by the Federal Court, we
simply.....ultimately there may be scope – or there appears to be scope for
295 argument as to whether that Full Court decision is correct or not.

HER HONOUR: Is that the extent of your submissions, Mr Sefton?

MR SEFTON: Yes, if it please the Court.

300

HER HONOUR: Thank you. Mr Agapis.

MR AGAPIS: Yes, your Honour.

305 **HER HONOUR:** So Mr Sefton has helpfully identified two issues. One
is the one I put to you and that is that there is an avenue at least open to you
to apply for – arguably, to apply for leave to institute a proceeding seeking
to set aside or appeal against the final order which made you a vexatious
litigant. He raises a separate question about whether or not the Full Court
310 decision which says that you have to follow that procedure is right or
wrong. For present purposes, assume for the moment it is right, it does not
detract, I think, from the fact that there is an avenue open to you. Do you
wish to make any submissions in relation to that question?

315 **MR AGAPIS:** No. I think your Honour is – I am totally agreeable with
you that the avenue does arise for me to make an application to appeal
Justice Gilmour’s decision – vexatious. The provisions in the statute
provide for it. The reason that I did not follow through any more with the
situation was that Registrar Trott flatly refused to file the appeal on

320 different grounds and his job as a Deputy Registrar, your Honour, I believe
is – it seems, your Honour, is to actually point those issues out to me.

HER HONOUR: I am not going to go into what is right or wrong. The
325 problem for you is whether or not that is an appropriate course of conduct is
in a sense not the issue. What you filed did not comply with the Act.

MR AGAPIS: Right.

HER HONOUR: That is the problem.
330

MR AGAPIS: Yes.

HER HONOUR: Unfortunately, the Rules prescribe a prescribed form. It
335 must be accompanied by an affidavit and the affidavit must address
prescribed matters. That is what the Act says.

MR AGAPIS: Correct, your Honour.

HER HONOUR: And you did not do either of those two things. Now,
340 Mr Sefton properly says there is at least an argument that you do not have to
follow that procedure. It seems to me that is a matter which you may want
to agitate in the Federal Court but, as a matter of procedure, regardless of
whether or not that subsequent issue is a live issue, there is a procedure
open to you which you have not followed.

345 **MR AGAPIS:** Well, your Honour, I am very happy to go back there and
refile. I am very happy to fulfil the requirements of the provisions in the
statute.

350 **HER HONOUR:** What do you want me to do with your application for an
order to show cause?

MR AGAPIS: Well, rule 25.06.1 of the High Court Rules allows for
355 certiorari to be filed and then - whilst an appeal is in progress which fulfils
the notion that appeals are different to the constitutional writs and the
discretionary writ.

HER HONOUR: I will have a chat to Mr Sefton. Mr Sefton, you have
360 heard the exchange between me and Mr Agapis and it is apparent
Mr Agapis wants to go back and follow the procedure prescribed by the
Federal Court Act and Rules, in particular that dealing with applications for
leave to file a proceeding which would seek to address the vexatious
proceedings order in its terms.

365 **MR SEFTON:** Yes.

HER HONOUR: Whether or not he then seeks to include as part of that that he arguably has a right of appeal – per se, I will leave to one side. What are your submissions in relation to what I should do with this application for an order to show cause?

MR SEFTON: In those circumstances, given that other avenue which is available, we say that provides a compelling reason as to why the application to show cause should be dismissed on the basis that ultimately the prospects of it succeeding, given that the avenue which on the face of it is available to the plaintiff to pursue has not been pursued, is such that its dismissal is appropriate.

If your Honour was not minded to that course, being possibly consideration as to whether it simply adjourns sine die with liberty to apply, although contrary to what the second defendant has just indicated, that process is a process with respect to seeking leave, as I understand it, in respect of Justice Gilmour’s decision which is not an appeal from the Registrar’s decision to refuse to lodge documents. So the reference to putting this to one side, while that is dealt with in our submission, does not – should not carry the day.

HER HONOUR: With respect, I do not think that the Registrar’s refusal to lodge the documents is the relevant issue here. The issue here is that if Mr Agapis had filed the prescribed form and the affidavit consistent with the provisions of the Federal Court Act then they must be taken to a judge for consideration under the Act. That is what the Act says.

MR SEFTON: Yes, yes. That not having been done, the appropriate course, in our submission, is for this application to be dismissed and for the plaintiff, should he wish to pursue that option, to pursue that option. In anticipation - - -

HER HONOUR: Yes, and what – I am sorry, I interrupted.

MR SEFTON: Sorry, I have nothing further to say.

HER HONOUR: Mr Agapis.

MR AGAPIS: Yes, your Honour.

HER HONOUR: I think that is the appropriate course – to dismiss your application. I will give some short reasons which I will publish in the next day or so. What time is your flight back to Perth?

MR AGAPIS: I fly back in the morning, your Honour.

HER HONOUR: Tomorrow morning?

415 **MR AGAPIS:** I stay overnight, yes.

HER HONOUR: Okay.

420 **MR AGAPIS:** Could I just say something at this point, please?

HER HONOUR: Sure.

425 **MR AGAPIS:** I believe I was forced into this position to come before the High Court because of the continuing treatment I get in the courts over there. They have written some horrid things to me, they have deprived me of all procedural fairness in the criminal matter where I was subject to torture.

430 **HER HONOUR:** Those matters are not before me, Mr Agapis.

MR AGAPIS: I realise, your Honour, but what I am - - -

HER HONOUR: I cannot deal with them. I can only deal - - -

435 **MR AGAPIS:** No, but what I am trying to say is that I do not think I am going to get a fair trial over there.

HER HONOUR: Well, we are not dealing with fair trials at the moment.

440 **MR AGAPIS:** Well, over - - -

HER HONOUR: Just one moment, let me finish.

445 **MR AGAPIS:** Yes, yes, your Honour.

450 **HER HONOUR:** What I am dealing with is an application for an order to show cause by you. What I will seek to identify is - in the reasons why I am dismissing your application in my reasons and that will demonstrate that there is arguably an avenue open to you prescribed by the Act that if you comply with it would require documents to be taken to a judge for a judge to consider them.

MR AGAPIS: That is my fear, your Honour.

455 **HER HONOUR:** Well, then, you cannot have a fear without – fear is not – we do not work on fear. We work on fact.

MR AGAPIS: You are right. You are right.

460 **HER HONOUR:** So let us just stop and talk about that.

MR AGAPIS: Sure.

465 **HER HONOUR:** Let us set it out and if you are unhappy then you take appropriate steps after you have complied with the Act and the Rules, all right?

MR AGAPIS: Yes, your Honour.

470 **HER HONOUR:** What I propose to do is to adjourn this Court for half an hour. Mr Sefton, is that suitable to you?

MR SEFTON: Yes, your Honour.

475 **HER HONOUR:** I will come back and deliver some short reasons and then they will be available. Adjourn the Court.

480 **AT 11.55 AM SHORT ADJOURNMENT**

UPON RESUMING AT 12.29 PM:

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HER HONOUR: On 23 December 2015, the plaintiff filed, in this Court an application for an order to show cause seeking constitutional writs and related relief. The background to that application is lengthy.

490

On 28 March 2013, the Administrative Appeals Tribunal affirmed a decision of the Plumbers Licensing Board of Western Australia (“the PLB”) to refuse the plaintiff’s application under the *Mutual Recognition Act* 1992 (Cth) as adopted by the *Mutual Recognition (Western Australia) Act* 2010 (WA) for a Western Australian plumbing contractor’s licence (“the AAT Decision”) (see *Agapis v Plumbers Licensing Board* [2013] AATA 187).

495

The plaintiff appealed to the Federal Court of Australia under section 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth). That appeal was dismissed by Justice Siopis on 18 November 2013 (see *Agapis v Plumbers Licensing Board* [2013] FCA 1221).

500

505 On 6 December 2013, the plaintiff commenced an appeal
(WAD 460/2013) from the orders made by Justice Siopis (“the Plumbing
Licence Appeal”). On 31 July 2014, in that appeal, Justice Gilmour heard
two interlocutory applications. The first was an application by the plaintiff
for leave to amend his appeal grounds. The second was an application by
510 the PLB for orders under section 37AO of the *Federal Court of Australia
Act 1976* (Cth) (“the FCA Act”).

515 On 26 September 2014, Justice Gilmour made orders that included
an order dismissing the plaintiff’s appeal from Justice Siopis pursuant to
section 37AO(2)(a) of the FCA Act and an order prohibiting the plaintiff
from instituting further proceedings in the Federal Court pursuant to
section 37AO(2)(b) of the FCA Act (“the Justice Gilmour Orders”) (see
Agapis v Plumbers Licensing Board (No 2) [2014] FCA 1045).

520 On 23 September 2015, Justice Nettle in this Court dismissed two
applications filed by the plaintiff in two separate proceedings for extensions
of time to commence applications seeking constitutional writs in the High
Court’s original jurisdiction (see *Agapis v A Deputy President of the
Administrative Appeals Tribunal at Perth* [2015] HCATrans 246).

525 In P53/2014, the plaintiff sought certiorari to quash the AAT
Decision. In P21/2015, the plaintiff sought certiorari to quash the
Justice Gilmour Orders.

530 On 23 October 2015, the plaintiff attempted to file in the
Federal Court a Notice of Appeal dated 17 October 2015 and an affidavit of
the plaintiff dated 23 October 2015 (collectively “the Appeal Documents”).
The first defendant in this proceeding, a Deputy District Registrar of the
Federal Court in Perth, refused to accept the Appeal Documents for filing
pursuant to rule 2.26 of the Federal Court Rules 2011 (Cth) (“the FCR”).
535 The first defendant sent a letter to the plaintiff which stated, amongst other
things, that the Appeal Documents “appear on their face to be an attempt to
re-litigate issues that have already been decided to finality within the
Australian legal system and, as such are an abuse of process, frivolous or
vexatious”.

540 It is against that background that on 23 December 2015, the plaintiff
filed in this Court the application for an order to show cause seeking
constitutional writs and related relief. In that application, the principal
relief sought is, first, a writ of mandamus ordering the first defendant to
545 accept the Appeal Documents for filing; second, a writ of prohibition
prohibiting the first defendant from “participation in any dealings with the
Plaintiff in any actions in the Federal Court of Australia”; and, third, a writ
of certiorari to quash the decision of the first defendant, to refuse to accept
the Appeal Documents for filing.

550

Eight grounds were identified as the bases on which that relief was claimed. It is unnecessary to set out the bases of that relief. It is also unnecessary to address each of those grounds individually. Why: because the plaintiff's complaints are all directed at his principal complaint – that the first defendant refused to accept the Appeal Documents for filing pursuant to rule 2.26 of the FCR.

555

The plaintiff faces hurdles in his current application. There were and remain a number of steps that the plaintiff might have taken in the Federal Court. The fact that the plaintiff might have taken those steps (and that those steps appear to remain available to him) will explain why this application for an order to show cause should be dismissed with costs.

560

The plaintiff has been made the subject of a vexatious proceedings order under section 37AO(2) of the FCA Act. A vexatious proceedings order under that section has certain important consequences. First, it is a final, not interlocutory, order: see section 37AO(5) of the FCA Act. That is significant. Second, the person the subject of the order must not institute proceedings in the Federal Court without the leave of the Court under section 37AT of the FCA Act: see section 37AQ(1)(a). Where, as here, the person the subject of the vexatious proceedings order wishes to appeal the making of the vexatious proceedings order itself, the person must apply for the leave of the Court under section 37AT of the FCA Act: see *Fuller v Toms* (2015) 234 FCR 535 at paragraphs 11 to 18.

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That position in the Federal Court is, as counsel for the second respondent pointed out, to be contrasted with that adopted by at least some State Courts: see, for example, *Kay v Attorney-General* (2000) 2 VR 436 at 445 to 447, paragraphs 26 to 30.

580

In making application for leave to institute a proceeding (including in the plaintiff's case an application for leave to institute an appeal against the making of the vexatious proceedings order itself) an application, in a prescribed form, must be filed (see section 37AR(2) of the FCA Act and rule 6.03 of the FCR) accompanied by an affidavit that contains specific information and the applicant for leave must not serve a copy of the application or the affidavit on a person unless a separate order is made under section 37AT(1)(a): see sections 37AR(3) and (4) of the FCA Act.

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The affidavit must: (a) list all the occasions on which the applicant has applied for leave under section 37AR; (b) list all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of section 37AR; and (c) disclose all relevant facts about the application, whether supporting or

595 adverse to the application that are known to the applicant: see
section 37AR(3) of the FCA Act.

600 The steps contained in section 37AR of the FCA Act (an application
in a prescribed form accompanied by an affidavit containing specific facts
and matters) are important because an application under section 37AR may
be dismissed if the Court or a Judge of the Federal Court considers that the
605 affidavit does not substantially comply with section 37AR(3) and must be
dismissed if the Court or Judge considers the proceeding is a vexatious
proceeding: see sections 37AS(1) and (2). And, no less importantly, the
Court or a Judge may dismiss the application without an oral hearing: see
section 37AS(3).

610 Section 37AT addresses what is to occur *before* the Court makes any
order granting an application under section 37AR for leave to institute a
proceeding. The steps to be taken include service of the application on the
person against whom the applicant proposes to institute the proceeding and
any other specified person and for the Court to give the applicant and those
people served with the application an opportunity to be heard at the hearing
of the application: see section 37AT(1). What the Federal Court may do
615 during and after the hearing is set out in sections 37AT(2) to (4) of the FCA
Act.

620 It was common ground that the plaintiff has not, pursuant to
sections 37AR to 37AT of the FCA Act, applied to the Federal Court for
leave to institute a proceeding and, no less importantly, he has not prepared
an accompanying affidavit addressing the prescribed facts and matters. The
evidence before this Court demonstrates that by no later than 27 October
2015, the plaintiff not only knew that the procedure provided for by the
FCA Act was available to him, but what was required of him by that Act,
625 and in particular section 37AR.

630 Certiorari, mandamus and prohibition are all discretionary remedies:
see *SZBYR v Minister for Immigration and Citizenship* (2007)
81 ALJR 1190 at 1192, paragraph 2, and at 1197 to 1198 at paragraphs 27
to 28; [2006] HCA 26; see also *Re Refugee Review Tribunal; Ex parte Aala*
(2000) 204 CLR 82 at 89 at paragraph 5, at 91 at paragraph 17, at 101 to
109 at paragraphs 43 to 60, at 137 at paragraph 149 and at 144 at
paragraph 172; [2000] HCA 57; and *Federal Commissioner of Taxation v*
Futuris Corporation Ltd (2008) 237 CLR 146 at paragraphs 88 to 92;
635 [2008] HCA 32.

640 A writ may not be granted if a more convenient and satisfactory
remedy exists. The availability and viability of other relief are factors for a
court to consider in exercising the discretion to refuse to grant such relief.
Here, there was and remains a proper forum for the plaintiff to seek to

645 address the making of the vexatious proceedings order – the Federal Court
of Australia – and a prescribed procedure – sections 37AR to 37AT of the
FCA Act. That forum and procedure provided by the Federal Court is not
only just an “equally convenient, beneficial, and effectual” alternative to the
relief sought in the application for an order to show cause, it is in fact more
convenient, beneficial and effective because it is directed to the very issue
the plaintiff wants considered: see *Perpetual Executors and Trustees
Association of Australia Ltd v Hosken* (1912) 14 CLR 286 at 291 to 292;
[1912] HCA 31.

650 For those reasons, the application for relief in this Court is refused
with costs. The order of this Court is that the application for an order to
show cause filed on 23 December 2015 is refused with costs.

655 Adjourn the Court please.

AT 12.44 PM THE MATTER WAS CONCLUDED

