
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : SOURAKI AZAD -v- JOSE [2023] WASC 160

CORAM : LUNDBERG J

HEARD : 16 MAY 2023

DELIVERED : 19 MAY 2023

FILE NO/S : CIV 1065 of 2023

BETWEEN : MOHAMMAD AMIN SOURAKI AZAD
Plaintiff

AND

ROSS JOSE
Defendant

Catchwords:

Defamation - Practice and procedure - Urgent application by plaintiff to join Australian Health Practitioner Regulation Agency as additional defendant to the action - Plaintiff seeks urgent restraints against Australian Health Practitioner Regulation Agency - Application arises from the suspension of the plaintiff as a medical practitioner - Not necessary for party to be joined to the action and numerous deficiencies in the relief sought - Turns on own facts

Legislation:

Defamation Act 2005 (WA)
Health Practitioner Regulation National Law
Health Practitioner Regulation National Law (WA) Act 2010 (WA)
Rules of the Supreme Court 1971 (WA)

Result:

Application dismissed
Affidavits filed by plaintiff to be made subject to restriction order under Order
67B rule 5 RSC

Category: B

Representation:

Counsel:

Plaintiff : In Person
Defendant : Ms J A Sims

Non-party : Ms J M McKenzie

Solicitors:

Plaintiff : In Person
Defendant : Steedman Stagg Lawyers

Non-party : MinterEllison (for Australian Health Practitioner Regulation
Agency)

Case(s) referred to in decision(s):

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA
63; (2001) 208 CLR 199
Azad v Mithila Family Trust t/as Rockingham GP [2023] FCA 404
Eshelby v Federated European Bank Ltd [1932] 1 KB 423
Hunter Automotive Group Pty Ltd v Range Motors Pty Ltd [2021] WASC 122
Soclever Investments Pty Ltd as trustee for the Andrew Tonner Family Trust v
Jaytona Pty Ltd [2021] WASC 133

Table of Contents

A. Introduction and summary 4

B. Background..... 5

The nature of the action 5

Directions hearing on 3 April 2023 5

Application to restrain Steedman Stagg Lawyers 7

Non-compliant writ of summons 7

C. Application to join and restrain AHPRA..... 8

Overview 8

Letter from AHPRA dated 8 May 2023 9

Plaintiff's minute of proposed orders filed on 5 May 2023 13

Basis for joinder 15

D. Disposition..... 17

Joinder and restraints 17

Allegedly scandalous affidavits 20

E. Orders..... 22

LUNDBERG J:**A. Introduction and summary**

1 This is a defamation action brought by the plaintiff against another medical practitioner, the defendant. The plaintiff and the defendant formerly worked in a medical practice with each other, in Rockingham. The practice in question was known as the Rockingham Maternity and Family Practice (**RMFP**). For convenience, I will refer to the plaintiff as Dr Azad and the defendant as Dr Jose.

2 These reasons relate to an application which has been brought by Dr Azad, who seeks to join the Australian Health Practitioner Regulation Agency (**AHPRA**) as an additional defendant to the action. The application also seeks various restraints against AHPRA, with no undertaking as to damages proffered by the plaintiff.

3 The plaintiff is unrepresented. As a result, the present application has not been prepared or filed precisely in accordance with the *Rules of the Supreme Court 1971 (WA)* (**RSC**) or the court's usual practices.¹ Nonetheless, adopting a pragmatic approach to the matter and giving due allowance to the position of the plaintiff as an unrepresented litigant, I have treated the matter as, in effect, an interlocutory application seeking orders to join AHPRA as a defendant to the action and seeking injunctive restraints against AHPRA. Although the plaintiff did not articulate the provision of the Rules upon which the joinder application is advanced, I will treat the application as having been made pursuant to Order 18 rule 6(2)(b) RSC.

4 It should not be thought to be typical that an unrepresented party will be permitted to proceed with an application in this court in the absence of substantial compliance with the requirements imposed by the RSC, or the court's usual practices. Those requirements exist for good reason and provide a measure of protection for all parties, as well as permitting fairness to be accorded to parties against whom urgent relief is being sought. In the present matter, given the absence of prejudice to the defendant and to the party sought to be joined to this action (i.e. AHPRA), and as a result of the flexible approach adopted by counsel for those parties, it was possible for this application to be heard

¹ The plaintiff did not file a chamber summons, nor a memorandum pursuant to Order 59 rule 9 RSC, and nor did he proffer an undertaking as to damages in support of the restraints.

and determined in an expeditious manner, notwithstanding the plaintiff's failures to adhere to the procedural requirements.

5 For the reasons set out below, the plaintiff's application must be dismissed.

B. Background

The nature of the action

6 This action was commenced in January 2023. As the action involves claims for defamation, it is being managed as part of the Commercial and Managed Cases List (**CMC List**).

7 In essence, the action centres on written and oral publications said to have been made between October and December 2022, and which are alleged to be defamatory of the plaintiff. The plaintiff asserts the defendant is legally responsible for the publications in question. The publications include emails, text messages and oral statements directed to business partners of the parties, as well as written statements and oral statements directed to mutual patients of the parties. The plaintiff has not at this stage filed a statement of claim so as to fully articulate his claims against the defendant. That pleading is due on 3 June 2023.

8 There appear to be related proceedings to the present action which are running in the Federal Court of Australia (WAD 92 of 2023), and which has been the subject of a recent decision of Colvin J: *Azad v Mithila Family Trust t/as Rockingham GP* [2023] FCA 404.² The material before the court also makes reference to other proceedings in the Magistrates Court.

9 The action has already required a high degree of case management by the court. This is in part because the plaintiff is unrepresented (and, indeed, the defendant was, for a time, also unrepresented). Additional case management has also been required because the issues in the action are regarded by the plaintiff as extremely personal and highly charged.

Directions hearing on 3 April 2023

10 At the first directions hearing in the matter, on 3 April 2023, I made some introductory observations to the parties regarding the nature

² In those proceedings, Colvin J declined to grant urgent relief sought by Dr Azad, including urgent orders against AHPRA, in response to the show cause procedure which it had then implemented against Dr Azad (and which has now further developed into a suspension decision).

of litigation, and defamation litigation in particular, as well as the protocols for communications by parties with the court. I had prepared those remarks as both parties were initially unrepresented, although immediately before the first hearing the defendant engaged his current lawyers. Both parties are professional persons but I expected they were not well versed in superior court litigation and so I made my comments in the expectation the parties would reflect on them in due course.

11 The general observations I made were as follows:

- (a) Litigation is a stressful and costly process. It can cause great pressure on the parties and become a time consuming and all-encompassing feature of their lives. Even when a party has legal representation, that pressure remains and of course the fact of legal costs can become significant, not only to the party paying them but to an opponent who may face the prospect of adverse costs orders.
- (b) Defamation litigation is a particularly stressful form of litigation, because it involves matters that are inevitably quite personal to the parties and because the rules which apply to the pleading and determination of defamation claims are quite complex. Pleading disputes in relation to defamation matters are notorious for delaying the overall resolution of a proceeding.
- (c) On the subject of communications to the court and filing documents, I noted that my associates had received a number of unsolicited written communications from the parties about these matters, which contained contentious material. My exhortation to the parties was that this practice must stop. I repeat that exhortation.
- (d) The parties are of course permitted to file appropriate court documents through the e-courts portal and that should be the primary manner in which the parties submit material to the court.
- (e) There are occasions in which a party may need to email my associates with a document that has also been e-filed if it is close to a hearing date - but that is not strictly necessary. My associates and I will identify documents once they are filed on the e-courts portal.

(f) Fundamentally, it is not appropriate for a party to submit communications to the court (either directly to the Judge or through my associates) which contain contentious material. If evidence is to be adduced, that should be done through an affidavit, in proper form and consisting only of material which is relevant to the proceedings. Additionally, affidavits need only be filed if they have been ordered by the court to be filed, or are in support of an application which has been filed.

12 I had hoped the parties would take these comments on board in the expectation these proceedings would be able to be conducted in an efficient manner for the parties and for the court. I also directed that a copy of the transcript of the proceedings on 3 April 2023 be provided to the parties.

Application to restrain Steedman Stagg Lawyers

13 Dr Jose is now represented in this action by Steedman Stagg Lawyers. I am presently considering an application issued at the request of the plaintiff to restrain those lawyers from acting for the defendant. That application was heard on 2 May 2023 and further affidavit material is due to be filed by the plaintiff on that issue by Friday, 19 May 2023. I anticipate I will give a ruling on that issue in the week of 22 May 2023.

Non-compliant writ of summons

14 At the hearing on 2 May 2023, I also addressed the subject matter of the plaintiff's writ of summons which, when filed, was non-compliant with Order 6 rule 3 RSC. It was non-compliant because it included more than a general indorsement on the writ itself (which is impermissible for a defamation action).

15 Given the nature of the information indorsed on the writ, I made an order on 16 February 2023, on my own motion, that, until further order of the court, access to the writ of summons filed on 24 January 2023 be restricted to the court and the parties pursuant to Order 67B rule 5 RSC, and the parties were ordered not to disclose the contents of those documents to any non-party.

16 An amended writ of summons was subsequently sought to be filed by the plaintiff but was ultimately rejected by the Registry as also being non-compliant with the Rules. I resolved that issue by making the following orders on 2 May 2023:

1. The plaintiff have leave to amend his writ of summons in the form of the writ provided to the Court by email on 20 April 2023 at 12 noon, other than as to paragraphs 9 and 10 thereof.
2. The Court's Registry is directed to accept the plaintiff's amended writ of summons for filing notwithstanding non-compliance with Order 21 Rule 9 RSC (such amended writ to be in the form provided to the Court by email on 20 April 2023 at 12 noon, provided paragraphs 9 and 10 are removed).
3. The requirement for service of the filed amended writ of summons be dispensed with.

17 The paragraphs within the amended writ which were objectionable, being paragraphs 9 and 10 of the draft amended writ, concerned an allegation of criminal defamation against the defendant contrary to the Criminal Code and the proposed suspension of the defendant's medical registration (that is, the plaintiff was seeking relief to the effect that the defendant's medical registration should be suspended). Both matters were plainly objectionable in my view and I declined leave to permit the plaintiff to file an amended writ of summons containing those matters.

18 Against that background, I now turn to the plaintiff's present application.

C. Application to join and restrain AHPRA

Overview

19 Commencing on or about 5 May 2023, the plaintiff began providing to my chambers several documents seeking urgent relief against AHPRA. That body is not a party to these proceedings. The relief sought by the plaintiff arises from a decision by AHPRA to suspend the plaintiff's medical registration.

20 In general terms, I understand AHPRA is a national body which provides administrative support to various Boards, including the Medical Board of Australia, to regulate registered health practitioners in this country.

21 AHPRA works within a national scheme of laws which apply in each State and Territory. In this State, the applicable legislation is the *Health Practitioner Regulation National Law (WA) Act 2010* (WA). The Schedule to that legislation embodies the uniform scheme and is referred to as the *Health Practitioner Regulation National Law*

(**National Law**). AHPRA is established as a body corporate pursuant to s 23 National Law, with its functions detailed in s 25 National Law.

- 22 AHPRA should not be confused with the National Health Practitioner Boards which exist for each type of health professional, such as the Medical Board of Australia. Section 31 National Law contemplates the establishment or continuation of those individual Boards.

Letter from AHPRA dated 8 May 2023

- 23 Amongst the material provided to the court by the plaintiff is a letter from AHPRA to the plaintiff dated 8 May 2023 (to which is attached a document prepared by AHPRA entitled '*Information Sheet about Immediate Action*'). It appears a show cause process had been initiated by the Medical Board in April 2023, directed to the plaintiff. On its face, that letter from AHPRA dated 8 May 2023 informed the plaintiff that the Medical Board of Australia had considered a submission from the plaintiff in response to the show cause process (apparently dated 5 May 2023) but had nonetheless decided to '*take immediate action under section 156 of the Health Practitioner Regulation National Law*'.

- 24 Section 156(1) National Law provides in part as follows:

- (1) A National Board may take immediate action in relation to a registered health practitioner or student registered in a health profession for which the Board is established if -
 - (a) the National Board reasonably believes that -
 - (i) because of the registered health practitioner's conduct, performance or health, the practitioner poses a serious risk to persons; and
 - (ii) it is necessary to take immediate action to protect public health or safety...

- 25 Specifically, the letter stated that the Medical Board had decided to suspend Dr Azad's registration, with effect from 8 May 2023. For present purposes, I need not repeat the entirety of the matters set out in the letter from AHPRA, but it is appropriate to summarise aspects of the letter.

26 I pause to note that the plaintiff vehemently denies the allegations against him and denies any wrongdoing on his part. He has filed five tranches of affidavit material in support of his application, to which are attached over 100 documents, in support of those denials and in order to explain his position. The affidavits sworn by the plaintiff and filed in these proceedings are as follows:

- (a) the affidavit filed on 5 May 2023 containing attachments 'DSASC-1 to DSASC-4' titled 'Affidavit of Plaintiff Requesting Urgent Injunction Order to Restrain AHPRA Due to Contravention Related to Current Matter & Request For Adding AHPRA as the New Party (The Second Defendant)';
- (b) the affidavit filed on 8 May 2023 containing attachments 'DSASC-5 to DSASC-30' titled 'Affidavit of Documents (DSASC-5 – DSASC-30)';
- (c) the affidavit filed on 10 May 2023 containing attachments 'DSASC-31 to DSASC-55' titled 'Affidavit of Documents (DSASC-31 – DSASC-55)';
- (d) the affidavit filed on 15 May 2023 at 1.16pm containing attachments 'DSASC-56 to DSASC-78' titled 'Affidavit of Documents (DSASC-56 – DSASC-78)'; and
- (e) the affidavit filed on 15 May 2023 at 1.35pm containing attachments 'DSASC-79 to DSASC-105' titled 'Affidavit of Documents (DSASC-79 – DSASC-105)'.

27 I also note that both the defendant and AHPRA, through their respective counsel, have objected to much of the material in the plaintiff's affidavits as being scandalous and seek orders to have all five of the aforementioned affidavits uplifted.³

28 Let me return to the letter from AHPRA to Dr Azad dated 8 May 2023. *First*, the letter stated that:

..the Board reasonably believes that because of your conduct and/or performance, you pose a serious risk to persons and it is necessary to take immediate action to protect public health or safety.

29 *Second*, the information detailed in the letter relates to the plaintiff's conduct towards a patient who I will refer to as Ms X and to a

³ ts 102, 104.

junior female nurse who was employed at the RMFP who I will refer to as Ms Y.

30 *Third*, as to the matters concerning Ms X, the letter includes serious allegations that, during the treating relationship with Ms X, the plaintiff breached professional boundaries. It is not necessary that the full detail of these allegations be repeated in these reasons. It suffices to say that the alleged conduct includes inappropriate and unprofessional conduct, and the making of sexualised comments. The alleged conduct extends to the plaintiff pursuing a close relationship with Ms X's children. The plaintiff denies these allegations.

31 *Fourth*, the letter also referred to allegations that the plaintiff engaged in sexualised conduct towards a junior female nurse, Ms Y, when she was employed at the RMFP. Again, the plaintiff denies these allegations.

32 *Fifth*, the letter noted that the alleged conduct and/or performance poses a serious risk of emotional and/or psychological harm to those persons affected, the alleged conduct and/or performance demonstrates the plaintiff is using his position of trust and power (as both a treating general practitioner and senior colleague) to '*exploit and pursue his own needs over the needs of others*', and such alleged conduct and/or performance also demonstrates a general absence of qualities essential for a registered medical practitioner, including trust and compassion, regard for the welfare of persons, and the ethical exercise of judgement.

33 *Sixth*, the letter observed that, in circumstances where a colleague has been impacted by and/or becomes distressed by the conduct of their colleague, there is an increased risk of errors by the affected health practitioner which may impact on their ability to practise safely. According to the letter, the risk is heightened in circumstances where the notifications allege that the plaintiff's breach of professional boundaries are not confined to Ms X and Ms Y.

34 *Seventh*, the letter stated that the plaintiff is no longer employed at RMFP and is now working as a general practitioner at the Rockingham General Practice. The letter stated that the plaintiff currently holds limited registration as a medical practitioner and is subject to supervision requirements. As the alleged conduct and/or performance had occurred in circumstances where the plaintiff was already subject to supervision, and where the plaintiff's current employer is likely

unaware of the alleged conduct and/or performance, the Medical Board concluded that there were insufficient risk controls in place.

35 *Finally*, the letter recorded that the Medical Board's paramount role is protection of the public, and stated that immediate action is necessary whilst these matters are further investigated. According to the Medical Board, suspending the plaintiff's registration was the appropriate regulatory response necessary to mitigate the identified serious risk. Lesser forms of action would not be sufficiently protective, according to the Medical Board, in circumstances where the plaintiff's alleged conduct demonstrated deficient professional and ethical judgement in relation to maintaining professional boundaries with at least one patient, the children of the patient, and a junior female colleague. Further, according to the Board, the alleged breach of boundaries in this matter involved conduct occurring both inside and outside of practice.

36 The letter from AHPRA concluded by noting that the Medical Board had decided to refer the matter for investigation under s 160(1) National Law. The letter indicated that the plaintiff would be provided with further correspondence about this decision. The letter also explained that the plaintiff has appeal rights, as follows:

Appeal Rights

A decision to suspend your registration is an appellable decision.

If you wish to appeal, you must apply to the State Administrative Tribunal (WA) no more than 28 days after being given notice of the decision.

The contact details of the Tribunal are:

State Administrative Tribunal

565 Hay Street, Perth WA 6000

Telephone: 08 9219 3111

Website: www.sat.justice.wa.gov.au

37 The State Administrative Tribunal is designated pursuant to s 6 of the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) as the responsible tribunal for the purposes of the National Law in Western Australia.

Plaintiff's minute of proposed orders filed on 5 May 2023

38 The plaintiff's minute of proposed orders filed on 5 May 2023 seeks, in substance, orders to restrain AHPRA in certain respects and to join AHPRA and certain unnamed officers of AHPRA to the present action.

39 The following orders are contained in the plaintiff's minute:

- 1 To restrain AHPRA, to continue with its illegal retaliatory actions against the Plaintiff, because of him criticising them for numerous obvious serious misconducts and corrupt acts of some of its officers over the past 3 years in relation to the various matters, impacting the first applicant and his patients, including the comprehensive complaint that the first respondents lodged on 25/10/2021, to the offices of then Federal Attorney General, State Attorney General, then State & Federal Health Ministers, as well as the Federal Parliament Member for Brand (the letter has adduced to the Affidavit as DSASC4).
2. Adding AHPRA and its certain Officers as the Defendant to this matter, due the numerous common causes of actions, especially recent cooperation with the current defendant in fabricating new loads of falsified and defamatory materials against the plaintiff.
3. Restraining AHPRA from any sorts of the so-called disciplinary actions (including suspension), and use of any threatening communication with the plaintiff, until the total conclusion about the plaintiff's current extensive case against them.
4. To restrain the AHPRA to provide a vehicle for the plaintiff's legal opponents and assisting them in fabricating continuous groundless allegations against the first applicant, and providing them with the so-called qualified privilege of not being pursued legally due to being protected by AHPRA, and from being able to continue fabricating false materials against the plaintiff, so AHPRA could continue threatening the plaintiff about exercising its power to suspend him (to buy more time in the favours of the opponents and inflict some further financial damages to the applicant, even for a few more weeks with the hope of making him totally collapse) – it be ordered that while the plaintiff already has extensive legal cases in various jurisdictions, including Australian superior courts (FCA & Supreme Court), which almost all of them are in some ways related to those fabricated materials, any sorts of complaint be adduced to one of the related proceeding (as the plaintiff is prepared to defend himself in front of any court, as he believes in the Justice System of Australia, while he has lost his faith in the corrupt disciplinary arm of AHPRA long times ago).

40 On 9 May 2023, I directed my associate to communicate with the parties to acknowledge receipt of the minute of proposed orders from the plaintiff and the plaintiff's affidavit material. I directed my associate to inform the parties that I had not acceded to the plaintiff's request to urgently list the matter for a hearing for several reasons. In particular, the papers filed had not been filed in accordance with the Rules, the plaintiff was seeking relief against a body which was not a party to the action, there was no evidence to indicate that AHPRA had been served with the papers, and in any event the defendant ought be given a proper opportunity to make submissions as to whether AHPRA should be joined to this action.

41 Accordingly, the matter was listed for a directions hearing on 12 May 2023. Unfortunately, the court was unable to sit on that day, and the matter was re-listed to 16 May 2023. To facilitate the determination of the issues raised by the plaintiff, I also made the following orders on 9 May 2023:

1. The plaintiff's application constituted by the minute of proposed orders and supporting affidavit filed by the plaintiff on 5 May 2023 and 8 May 2023 (which seek orders to join the Australian Health Practitioner Regulation Authority (AHPRA) and certain unnamed officers of AHPRA as defendants in these proceedings and seeking urgent restraints against AHPRA) be listed for a hearing at 9.30am on Friday, 12 May 2023.
2. By 5.00pm on Wednesday, 10 May 2023, the plaintiff must serve on AHPRA and the defendant (through the defendant's solicitors) copies of the following documents:
 - (a) this order (which will constitute notice of the hearing on 12 May 2023);
 - (b) the email sent by the court to the parties at 10.50am on Tuesday, 9 May 2023;
 - (c) the plaintiff's minute of proposed orders dated 5 May 2023;
 - (d) the affidavit of the plaintiff sworn 5 May 2023;
 - (e) the document entitled 'Affidavit of Documents DSASC-5 to DSASC-30' filed on 8 May 2023;
 - (f) the following emails sent by the plaintiff together with any attachments:

- (i) the email sent to the court at 5.08am on 5 May 2023;
 - (ii) the email sent to the court at 11.30am on 5 May 2023;
 - (iii) the email sent to the court at 2.14pm on 8 May 2023;
 - (iv) the email sent to the court at 2.17pm on 8 May 2023; and
 - (v) the email sent to the court at 3.41pm on 8 May 2023.
3. Insofar as service on AHPRA is concerned, the plaintiff must serve the documents referred to in order 2 above by email to notification2@ahpra.gov.au and niru@ahpra.gov.au, quoting reference number 00519818.
 4. By 12.00 noon on Thursday, 11 May 2023, the plaintiff must file an affidavit of service verifying service on AHPRA and the defendant in compliance with orders 2 and 3 above.

Basis for joinder

42 The plaintiff has not identified the power upon which he relies to seek the joinder of AHPRA to the action. It is clear that Order 18 rule 4 RSC does not confer power on the court to grant leave for additional parties to be joined to existing proceedings: *Hunter Automotive Group Pty Ltd v Range Motors Pty Ltd* [2021] WASC 122 [5] (Allanson J) and the cases cited therein.

43 The relevant power which permits the addition of a party to an existing action is found in Order 18 rule 6(2)(b) RSC. Rule 6 provides:

6. Misjoinder and nonjoinder of parties

- (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
- (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -
 - (a) order that any person who has been improperly or unnecessarily made a party or who has for

any reason ceased to be a proper or necessary party, to cease to be a party;

- (b) order that any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, be added as a party,

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

- (3) An application by any person for an order under subrule (2) adding him as a defendant must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter.

44 The addition of AHPRA as a party would also require leave pursuant to Order 21 rule 1 RSC. The court's power to allow a plaintiff to amend its writ and to allow any party to amend its pleadings is conferred by Order 21 rule 5 RSC (which is subject to Order 18 rules 6, 7 and 8 RSC).

45 The primary question in terms of the joinder of AHPRA is whether, using the language of Order 18 rule 6(2)(b), that entity is a *'person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'*.

46 The power is to be interpreted beneficially, but the test remains whether the presence of the party is necessary. That is, a party cannot be joined merely because it is thought to be just or convenient. The court must consider whether the proposed party's rights against or liabilities to any existing party in respect of the subject matter of the action will be directly affected by any order that may be made in the action: *Hunter Automotive Group* [9] (Allanson J).⁴

⁴ See also the summary of the principles detailed by Registrar Whitby (as her Honour then was) in *Soclever Investments Pty Ltd as trustee for the Andrew Tonner Family Trust v Jaytona Pty Ltd* [2021] WASC 133 [21].

D. Disposition*Joinder and restraints*

47 At the hearing on 16 May 2023, the plaintiff made lengthy submissions in support of his application. At one point during the hearing the plaintiff intimated that he would withdraw the application to join AHPRA once it became evident to him, as a result of his interchanges with the court, that there were various obstacles to that course succeeding. In response, I stood the matter down for a short period to allow the plaintiff to reflect on his application and allow him time to make a considered decision.⁵

48 Upon resumption, the plaintiff indicated he wished to maintain his application and thereafter I heard from both Ms J M McKenzie who appeared for AHPRA and from Ms J A Sims who appeared for the defendant. Both counsel opposed the application.

49 Having considered the submissions made by the plaintiff and reviewed his affidavit material, my view is that the plaintiff's application must be dismissed. There are several reasons why this is so, as explained below, which pertain to the deficiencies in the application insofar as joinder is concerned and the deficiencies with respect to the proposed relief sought against AHPRA. The reasons set out below draw upon the submissions advanced by both Ms McKenzie and Ms Sims at the hearing on 16 May 2023.

50 *First*, the claims which the plaintiff proposes to advance against AHPRA are distinct and quite different to the claims which the plaintiff is presently advancing against the defendant. I raised this issue with the plaintiff during the hearing on 16 May 2023 and, other than generalised assertions that the defendant is somehow involved with or has facilitated the making of the allegations by AHPRA, I could not discern any substantive overlap or commonality of material issues between the two matters.

51 I certainly could not discern how AHPRA's joinder to the action was necessary to ensure that all matters in dispute in the defamation action may be effectually and completely determined and adjudicated upon.

52 *Second*, and allied to the first point, the proposed claims against AHPRA concern a dispute between a medical practitioner and a

⁵ ts 95 - 96.

regulator, and is by its very nature likely to be a conceptually different type of proceeding, involving different considerations, compared to a private defamation action between two individuals. It would be inappropriate, in my view, to intermix such claims in one proceeding and, indeed, it would be inherently unfair to the defendant to graft onto the current proceedings an action in the nature of a vocational disciplinary proceeding which does not directly concern him.

53 It should be remembered that the plaintiff's defamation claim against Dr Jose will involve a series of exchanges of pleadings in order to distil the issues in dispute between those parties. As I have already mentioned, and is well known, the pleadings in a defamation action are typically quite complex and may be productive of interlocutory disputes (although the court naturally discourages excessive disputation in this regard). Further, if the matter proceeds to a final hearing, it is possible the trial of the defamation action will be conducted before a judge and a jury: see s 21(1) *Defamation Act 2005* (WA). These are all further reasons why it would be inappropriate, from the defendant's perspective, to join AHPRA as a party to the action.

54 *Third*, while the plaintiff has directed his reactions to AHPRA itself, and seeks to join that body to the current action, this approach is misconceived. AHPRA is the administrative body which assists the substantive Boards to administer the National Law. However, it is the Medical Board of Australia which is responsible for the decision to suspend the plaintiff. Joining AHPRA to the present action, and imposing restraints on that body, would serve little or no useful purpose.

55 *Fourth*, despite the volume of material adduced by the plaintiff for the purposes of the application, the merits of the plaintiff's responses to AHPRA (and the Medical Board) and the explanations for the restraints the plaintiff wishes to impose, remain obscure. There is, fundamentally, no identifiable cause of action which would justify the restraints which are sought to be imposed.

56 In this regard, I recognise that, in applications for interlocutory relief, it may be necessary for the court to give careful consideration to the legal basis on which an applicant claims to be entitled to permanent relief: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 [18] (Gleeson CJ). Gleeson CJ explained that the purpose of an interlocutory injunction is to preserve the *status quo* until the rights of the parties can be determined

at the hearing of the suit. This means that a plaintiff must be able to show sufficient colour of right to the final relief in aid of which interlocutory relief is sought. If there is no serious question to be tried because, upon examination, it appears that the facts alleged by the plaintiff cannot, as a matter of law, sustain such a right, then there is no subject matter to be preserved.⁶

57 I understand the plaintiff considers that AHPRA and others are engaged in a conspiracy against him and that they have, at best, misunderstood his actions and his motivations and, at worst, deliberately constructed a case against him. However, none of the material adduced provides me with any satisfaction that the plaintiff has a recognised basis in law to sustain final relief against AHPRA (or, indeed, the Medical Board).

58 Put another way, the material does not support a contention that the plaintiff has a seriously arguable basis to restrain AHPRA (or the Medical Board) from implementing its suspension process.

59 The material adduced also fails to demonstrate that the balance of convenience in the present situation favours an approach which would allow the plaintiff to continue to practice while these serious allegations are being further investigated. My present assessment is that the public interest considerations weigh heavily in the balance of convenience in favour of maintaining the interim suspension of the plaintiff's registration.

60 *Fifth*, the gist of the plaintiff's complaint, as far as I can discern it, is that AHPRA (and the Medical Board as well, I assume) should be precluded from further implementing the suspension process which it has initiated (and perhaps that the suspension should be ordered, in some way, to be of no immediate effect). As I have noted above, there is no evident basis in the materials for the making of such orders. However, I should note that the restraints sought by Dr Azad travel well beyond these types of restraints, and include restraints upon AHPRA to the following effect:

- (a) to preclude it continuing with its *'illegal retaliatory actions'* against the plaintiff;
- (b) to preclude it using *'threatening communication[s] with the plaintiff'*; and

⁶ *ABC v Lenah Game Meats Pty Ltd* [15] (Gleeson CJ).

(c) to preclude it providing a *'vehicle for the plaintiff's legal opponents and assisting them in fabricating continuous groundless allegations'*.

61 As will be immediately apparent, these restraints are vague and do not precisely describe the actions or conduct which the plaintiff says AHPRA should be prevented from taking. The vague nature of the claims provides another justification for the court's decision to dismiss the application.

62 *Sixth*, the claims against AHPRA which the plaintiff wishes to litigate (if there are any recognisable claims) have arisen in the period of time subsequent to the filing of the writ of summons in the present action. A cause of action that has not accrued at the time of the writ cannot be added to that proceeding: *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423.

63 *Seventh*, the plaintiff has not availed himself of the appeal rights he has to pursue these matters in the State Administrative Tribunal. Undoubtedly, it is that Tribunal which has the primary jurisdiction to consider these matters. That Tribunal also has requisite powers to grant injunctive relief if appropriate. On more than one occasion during the hearing on 16 May 2023 I reminded the plaintiff that he had appeal rights he could explore in the State Administrative Tribunal, and reminded him of the applicable time limit to pursue those rights.

64 The presence of a specific avenue available to the plaintiff to pursue his challenge to the matters raised in the letter from AHPRA dated 8 May 2023 provides a further justification for declining to permit the plaintiff to join AHPRA to the current action (in order for the plaintiff to then be permitted to pursue injunctive restraints against AHPRA in this court).

Allegedly scandalous affidavits

65 Both counsel who appeared on 16 May 2023 sought orders to have the entirety of the affidavit material filed by Dr Azad uplifted and removed from the court file on the basis the material is scandalous, irrelevant and otherwise oppressive.

66 Counsel relied upon Order 37 rule 7 RSC to support this application:

7. Scandalous matter

The Court may order to be struck out from an affidavit any matter which is scandalous, irrelevant or otherwise oppressive, or may order that the affidavit containing such matter be taken off the file.

67 In essence, counsel submitted that the affidavit material contained serious and unsupported allegations of criminal wrongdoing by various persons, including representatives of the Medical Board and AHPRA, as well as the defendant. The affidavits contained a large number of photographs of children including the defendant's children, the production of which was not directly relevant to the matters in issue in the action and which ought not to have been included in the affidavit material.

68 Counsel submitted that the affidavit material was intended to, or had the effect of, embarrassing or denigrating the defendant and others and, in the context of a misconceived application to join and restrain AHPRA, the adduction of this material was wholly unnecessary and should not remain on the court file.

69 By way of example only, the allegations contained within the affidavit material filed by the plaintiff include an allegation that some unnamed parts of AHPRA have '*become deeply corrupt*' and there are '*some criminal arrangements happening with the Medical regulatory body of this country*'.⁷ Further, the plaintiff deposes that there is a '*very dangerous pattern of organised misconduct within the Medical Regulatory Body of this country, which now turning to a Criminal Club in the Medical Industry*'.⁸

70 There is limited judicial authority in this court regarding the procedure which is permitted by Order 37 rule 7 RSC. Undoubtedly, to order the uplift of an affidavit from the court file is an extreme step for the court to take, and a step which should be undertaken with great caution.

71 In my view, where the affidavit or affidavits may assume significance in the balance of the proceedings, it would be preferable for the court to stay its hand and refrain from ordering the removal of the affidavit material from the court file. These proceedings are at an early stage. An interim solution is to make an order pursuant to Order 67B rule 5 RSC that access to these affidavits be restricted to the court

⁷ See the plaintiff's affidavit sworn 5 May 2023 [107].

⁸ See the plaintiff's affidavit sworn 5 May 2023 [112].

and the parties, and the parties be ordered not to disclose the contents of those documents to any non-party.

72 I consider it appropriate to implement this interim solution at this stage, and will make an order under Order 67B rule 5 RSC in this regard. The application to have the affidavits uplifted can be revisited as the action progresses.

E. Orders

73 I will therefore dismiss the plaintiff's application embodied in his minute of orders filed on 5 May 2023 and will make a restriction order under Order 67B rule 5 RSC in relation to the plaintiff's affidavits.

74 As the application has been wholly unsuccessful, the plaintiff should pay the defendant's and AHPRA's costs of the application, but I will hear further from the counsel on the precise costs orders which should be made.

75 Subject to hearing from the parties, the orders I propose to make are as follows:

1. The application contained in the plaintiff's minute of orders filed on 5 May 2023 (seeking to join and restrain the non-party (**AHPRA**)) is dismissed.
2. The plaintiff pay the defendant's and AHPRA's costs of the application to be taxed if not agreed.
3. Until further order of the court, access to:
 - (a) the plaintiff's affidavit filed on 5 May 2023 containing attachments 'DSASC-1 to DSASC-4' titled 'Affidavit of Plaintiff Requesting Urgent Injunction Order to Restrain AHPRA Due to Contravention Related to Current Matter & Request For Adding AHPRA as the New Party (The Second Defendant)';
 - (b) the plaintiff's affidavit filed on 8 May 2023 containing attachments 'DSASC-5 to DSASC-30' titled 'Affidavit of Documents (DSASC-5 - DSASC-30)';
 - (c) the plaintiff's affidavit filed on 10 May 2023 containing attachments 'DSASC-31 to DSASC-55' titled 'Affidavit of Documents (DSASC-31 - DSASC-55)';

LUNDBERG J

- (d) the plaintiff's affidavit filed on 15 May 2023 at 1.16pm containing attachments 'DSASC-56 to DSASC-78' titled 'Affidavit of Documents (DSASC-56 - DSASC-78)'; and
- (e) the plaintiff's affidavit filed on 15 May 2023 at 1.35pm containing attachments 'DSASC-79 to DSASC-105' titled 'Affidavit of Documents (DSASC-79 - DSASC-105)',

be restricted to the court and the parties to these proceedings pursuant to Order 67B rule 5 of the *Rules of the Supreme Court 1971* (WA) and the parties are not to disclose the contents of those documents to any non-party (other than to AHPRA).

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

SAO

Associate to the Honourable Justice Lundberg

19 MAY 2023