Laferla v Birdon Sands Pty Ltd & Ors [2005] NTSC 12

PARTIES:	LAFERLA, JAMES v BIRDON SANDS PTY LTD and RUSSELL C. BYRNES and MESSRS CRIDLANDS LAWYERS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 70 of 2001
DELIVERED:	11 MARCH 2005
HEARING DATES:	27, 28, 29, 30 APRIL, 4, 5, 6 MAY, 11, 12, 13 OCTOBER, 15 DECEMBER 2004, 7 JANUARY, 14 FEBRUARY, 1 MARCH 2005
JUDGMENT OF:	ANGEL J

CATCHWORDS:

TORTS – NEGLIGENCE

Whether solicitor owes duty of care to unrepresented opposing litigant – safeguards against impropriety to be found in the rules and procedure that control the litigation and not in tort - litigating parties generally protected

from serious misconduct by solicitors acting for their opponent by wasted cost orders within the proceedings, not by an action in tort - to permit an action in negligence or tort involves relitigating the litigation, contrary to public policy

D'Orta–Ekenaike v Victoria Legal Aid [2005] HCA 12; *Al–Kandari v J R Brown & Co* [1988] QB 665; *Business Computers Ltd v Company Registrar* [1988] Ch 229; *Medcalf v Mardell* [2003] 1 AC 120; *Myers v Elman* [1940] AC 282; *Rondel v Worseley* [1969] 1 AC 191, applied

TORTS – MALICIOUS PROCEDURE – ABUSE OF PROCESS

Whether solicitor maintaining baseless defence on behalf of opposing litigant - process is not abused merely because it is employed without success - defence not "manifestly groundless", "obviously untenable" or palpably foredoomed to failure

Collateral abuse of process - insufficient to show that there is an absence of belief in the truth of the defence - need in addition for a predominant collateral purpose, that is, to achieve a purpose outside the scope of the proceedings – need for process of the court to be put in motion or used for a purpose which in the eye of the law it is not intended to serve

Dowling v The Colonial Mutual Life Assurance Society Ltd (1915) 20 CLR 509; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35; *Walton v Gardiner* (1993) 177 CLR 378; *Williams v Spautz* (1992) 174 CLR 509, followed

Metall & Rohstoff v Donaldson Inc [1990] 1 QB 391; R v Smith [1995] 1 VR 10; (1994) 73 A Crim R 384, applied

White Industries (Qld) Pty Ltd v Flower & Hart (1998) 156 ALR 169, on appeal *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; 163 ALR 744; *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575, distinguished

TORTS – MISCELLANEOUS TORTS – FRAUD

Heavy onus of proof upon the plaintiff having regard to the seriousness of the allegations – failure to establish fraud

Briginshaw v Briginshaw (1938) 60 CLR 336, followed

TORTS – MISCELLANEOUS TORTS – CONSPIRING TO INJURE

No unlawful means and no sole or predominant purpose of injuring the plaintiff as distinct from defending the interests of the first defendant established

R v Tighe and Maher (1926) 26 SR (NSW) 94, followed

REPRESENTATION:

Counsel:

Plaintiff:	Self–Represented
First Defendant:	No appearance
Second Defendant:	P. Brereton SC
Third Defendant:	S. Kerr

Solicitors:

Plaintiff:	Self–Represented
First Defendant:	No appearance
Second Defendant:	Minter Ellison
Third Defendant:	Ward Keller

Judgment category classification:	B
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Ang2005001
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Laferla v Birdon Sands Pty Ltd & Ors [2005] NTSC 12
No. 70 of 2001

BETWEEN:

JAMES LAFERLA
Plaintiff

AND:

BIRDON SANDS PTY LIMITED
First Defendant

AND:

RUSSELL C. BYRNES
Second Defendant

AND:

MESSRS CRIDLANDS LAWYERS
Third Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 11 March 2005)

[1] ANGEL J:

Introduction:

[2] The self–represented plaintiff is a former employee of the first defendant, a company at one time conducting dredging operations at

East Arm in Darwin harbour. The second defendant, a legal practitioner resident in Sydney, was a director of the first defendant from 30 November 1993 to 20 January 1998, and at all material times its solicitor. The third defendant is a firm of solicitors in Darwin retained by the second defendant on behalf of the first defendant to act as the second defendant's local agent in defending legal proceedings commenced by former employees against the first defendant for unfair dismissal and under–payment of wages.

[3] In June 1996 the plaintiff sued the first defendant in the Small Claims Court for underpayment of wages. He transferred his claim to the Local Court in October 1996. The plaintiff's Local Court claim for wages came on for hearing in March 1997. The plaintiff was self–represented. The first defendant was represented by counsel, Mr Spargo, now deceased, instructed by the second defendant. The plaintiff's claims were dismissed. The plaintiff appealed to the Supreme Court. The appeal was allowed and judgment entered for the plaintiff against the first defendant which was ordered to pay to the plaintiff party–party costs both in respect of the appeal and the trial in the Local Court.

[4] In the present action the plaintiff claims damages against the second and third defendants for abuse of process in maintaining a false defence not believed to be defensible on behalf of the first defendant to the plaintiff's Local Court claims, for conspiracy with the first defendant in

maintaining an indefensible defence knowing it to be indefensible, and for negligence and breach of duty of care allegedly owed to him as an unrepresented opposing party in civil litigation. In addition there are various allegations of fraud.

[5] The trial proceeded before me from 27 April to 6 May 2004 at which time it was adjourned. It resumed on 11 October 2004. On 13 October 2004 the plaintiff closed his evidence and the defendants elected to call no evidence. The matter was adjourned on the basis that written submissions would be filed by each of the parties. For various reasons the receipt of written submissions was protracted and my decision was eventually reserved on 1 March 2005.

[6] On the first day of the trial, there being no appearance for the first defendant and it having been proved that the first defendant was on notice of the proceedings, at the behest of the plaintiff I struck out the first defendant's defence and gave judgment for the plaintiff against the first defendant in a sum to be assessed.

The earlier litigation:

[7] The background to the current claim lies in earlier litigation. Its genesis stems from proceedings in the Industrial Relations Court brought by Robert Welfare and Martin Donnelly, former employees of the first defendant, against the first defendant for damages for unfair dismissal and in the Local Court of the Northern Territory for

underpayment of wages, raising similar although not identical issues to those later raised in the plaintiff's claim. The present plaintiff, to the knowledge of the present defendants, participated in and assisted Welfare and Donnelly in their proceedings against the first defendant.

[8] The hearings in the Industrial Relations Court commenced on 6 June 1996. Settlement of both matters was thought to have been negotiated that same day, although this was later disputed by Welfare. However, on 13 September 1996, Judicial Registrar Murphy in the Industrial Relations Court declared that Welfare's proceedings for unfair dismissal had been settled by oral agreement on 6 June1996 on the basis Welfare would be paid $4,000. An appeal by Welfare was dismissed by Wilcox CJ on 29 November 1996.

[9] On 9 May 1997, Welfare brought a contempt charge against the second defendant in the Industrial Relations Court in respect of the conduct of certain aspects of the earlier proceedings in that Court. This was ultimately heard in the Federal Court and was dismissed by von Doussa J on 3 November 1997 (*Welfare v Birdon Sands Pty Ltd* (1997) 79 FCR 220).

[10] The unpaid wages claims subsequently came before the Local Court. In respect of Donnelly, these proceedings had been part of the settlement negotiated on 6 June 1996. This settlement being then denied by Welfare, he maintained his proceedings and on 15 July 1996

unsuccessfully sought to have them consolidated with the plaintiff's proceedings. The matter was listed for hearing on 11 and 12 September 2004. On 4 September 1996 the second defendant advised the third defendant by phone that he had sent by mail a cheque in the amount of Welfare's Local Court claim, being $2,220.83, which the third defendant paid on behalf of the first defendant into the Local Court on 6 September. Similarly, a cheque in respect of Welfare's claim in the Industrial Relations Court was provided to the third defendant and paid into that Court on 9 September.

[11] At this point in the proceedings, an event occurred upon which the plaintiff placed some reliance. On 11 September 1996 at approximately 10.15 am Mr Sweet of the third defendant received a call from Mr Trigg SM's clerk who asked why he was not at Court. Sweet indicated that as far as the first defendant was concerned the matter had been resolved by the amount paid into Court, and as such Sweet had not been intending to be at Court nor did he have instructions to do so. The clerk indicated that Mr Trigg SM required explanation and requested Sweet to attend which he did. Mr Trigg SM took a preliminary view that the payment into Court did not satisfy Welfare's claim and that the matter should proceed to hearing that day. Prior to the Court adjourning before lunch, Sweet indicated to Mr Trigg SM that he was personally not available to return to Court in the afternoon because of a long standing commitment to present a paper at the Law Asia Conference but

would endeavour to have somebody else attend in his place. In the event, Sweet made no such arrangement, and at approximately 3.40pm a lawyer from the third defendant attended at the Conference and informed Sweet that a warrant for his arrest had been issued and he should proceed to the Local Court immediately. He did. Mr Trigg S.M. charged him with contempt of court, granted bail and adjourned the matter for a period of 1 week. On 18 September 1996 the charge of contempt was withdrawn.

[12] Australian Broadcasting Commission television footage of Sweet leaving court on 18 September after the charge was withdrawn became part of Exhibit P15; the transcript accompanying the visual footage became Exhibit P65. Welfare gave oral evidence that the Australian Broadcasting Commission had been at the Local Court on that day as a result of his efforts although on other matters, and was therefore in a position to obtain the footage they did. The plaintiff attached some significance to these events, on two bases: (i) "because it was Mr Welfare that informed ABC to be there" this "[i]n turn … created a bigger animosity on Mr Sweet's part" (which was denied by Sweet) and (ii) he alleged that Sweet's non-appearance "was not an oversight [but] was part of the tactics of how the defence was run … ".

[13] The proceedings were completed before Trigg SM on 12 September 1996. His Worship found in Welfare's favour in the sum of $3,240.21,

the sum of $2,220.83 paid into Court being paid out to Welfare in partial satisfaction.

The plaintiff's earlier proceedings against the first defendant:

[14] During the course of the Welfare and Donnelly litigations, the plaintiff commenced his own proceedings against the first defendant for recovery of unpaid wages. This was bitterly fought litigation. Neither party sought nor gave any quarter. The plaintiff was single minded in the pursuit of his claim. He was quite uncompromising in his attitude, at times elevating the quantum of his claim which the first defendant faced without prospect of compromise or settlement out of court. The plaintiff was quite unrelenting in the pursuit of his claim. The legal costs incurred by the first defendant in defending the action were out of all proportion to the claim. The second defendant's client, the first defendant, 'dug in' and became determined to defend the case stoutly and the second defendant had difficulty at times conducting the defence. This notwithstanding, in the course of the litigation various offers to settle the matter were made by the first defendant. All were rejected by the plaintiff out of hand. He wanted his claim in full and costs and nothing less. The second defendant became frustrated at times, even exasperated. In a letter dated 15 March 1999 to Mr J Bruce of the first defendant he wrote, "I will keep you informed, but will there ever be an end to this madness". See p 698 of the documents annexed to Exhibit P68.

[15] The history of the plaintiff's actions against the first defendant is as follows. On 11 June 1996, the plaintiff filed his Statement of Claim in the Small Claims Court for recovery of his unpaid wages in the amount of $5,000. On 10 October 1996 the plaintiff was granted leave in the Local Court to increase his claim to more than $10,000 ($11,839.49) and to transfer the claim out of the Small Claims Court. On 4 November 1996 the plaintiff was given leave to file a Second Amended Statement of Claim, which he did on 6 November, further increasing his claim to $12,392.37.

[16] The matter having been transferred to the Local Court, a more specific Defence was required to be pleaded. This not having been done, on 3 December 1996 the plaintiff filed an application for default judgment, which was dismissed by consent by Gray CM on 9 December 1996. A Notice of Amended Defence was filed on 23 December 1996. On 6 January 1997 the plaintiff sought further particulars of the defence. It was considered by the first defendant as in its nature a request for discovery rather than particulars and despite follow up by the plaintiff on 28 January 1997, was not responded to. On 12 February 1997 Registrar Finn ordered that the particulars requested in paragraph 3 of the plaintiff's letter of 6 January be provided by 21 February, but found that the matters addressed in paragraphs 1,2, 4 and 5 were properly requests for discovery. Later that same day, the plaintiff renewed his request as a request for discovery. Pursuant to the order of

12 February, the first defendant's Particulars of Defence were filed on 21 February 1997.

[17] The proceedings commenced before Hannan SM on 3 March 1997. The matter was adjourned on 4 March and ultimately did not come back before Hannan SM until 15 August 1997. A subsequent application by the plaintiff to re-open his case was adjourned to 15 August when the matter came back before Hannan SM and his application was refused. In the interim, on 3 April 1997, the plaintiff commenced unfair dismissal proceedings in the Industrial Relations Court; the plaintiff's application for leave to proceed out of time came before Commissioner Deegan on 14 May. Hannan SM reserved his decision on 18 August 1997. However, on 11 November 1997, he wrote to the parties indicating a tentative conclusion that the plaintiff did not come within the Building and Construction Industry (Northern Territory) Award and no common rule applied, but as neither party had addressed him on the Award inviting written submissions. On 19 November the plaintiff provided written submissions, the defendant considering further submissions on its part unnecessary.

[18] On 25 November 1997, Hannan SM gave judgment, finding the plaintiff was not a work boat driver and dismissing the plaintiff's claim with costs. On 17 December 1997 the plaintiff filed a Notice of Appeal in the Supreme Court. On 18 December pursuant to Hannan SM's order the first defendant filed a Bill of Costs in taxable form in the Local

Court, the taxation to occur on 19 January 1998. On 2 January 1998 the plaintiff filed an Amended Notice of Appeal in the Supreme Court. On 12 January 1998 the plaintiff filed a summons in the Supreme Court seeking a stay of execution of Hannan SM's decision, a stay of His Worship's costs orders and the taxation of the Bill of Costs, leave to file a further amended Notice of Appeal and costs of the appeal. On 5 February 1998 Gray AJ granted the plaintiff leave to further amend his notice of appeal but refused his application for a stay.

[19] The Local Court taxation concluded before Judicial Registrar Fong Lim on 23 April 1998, with costs allowed in the sum of $15,891.32. On 30 April 1998 the plaintiff filed an application to appeal against and a stay of the taxation orders. The application for a stay was refused by Bradley CM on 8 May 1998 but by consent His Worship ordered that costs taxed and allowed be in the sum of $15,761.20, and the plaintiff to pay the costs of the application assessed at $480.

[20] On 19 May the first defendant applied for the issue of a warrant for seizure and sale in respect of the taxed costs order. This issued on 25 May. On 12 June the plaintiff applied to the Supreme Court for a stay of the warrant. On 15 June 1998 the first defendant filed a summons in the Supreme Court seeking orders that the plaintiff's appeal against the decision of Hannan SM be stayed or that, alternatively, he be required to provide security for costs. On this

application, on 18 June Thomas J ordered that the plaintiff pay $4000 into court, which the plaintiff did.

[21] The appeal proceeded before Mildren J on 7 and 8 July. On 8 July Mildren J made an order staying the first defendant's warrant for seizure and sale in respect of the taxed Local Court costs on the basis that having heard the arguments on the appeal the plaintiff's claim was not without merit. On 21 August 1998, Mildren J allowed the appeal, holding that the plaintiff was entitled to be paid as a work boat driver. He gave judgment for the plaintiff in the sum of $10,945.38 and refused an application by the first defendant for an interim stay of execution of the judgment pending the filing of a Notice of Appeal. On 31 August 1998 Mildren J ordered that the first defendant pay the plaintiff's costs of the Local Court proceedings and appeal.

[22] On 4 September 1998 the plaintiff filed a warrant for seizure and sale. The first defendant filed a Notice of Appeal against the judgment of Mildren J on 15 September. On 21 September the plaintiff filed an application in the New South Wales Local Court for Writ of Execution against the first defendant for the outstanding judgment sum ordered by Mildren J. On 24 September the plaintiff filed in the Supreme Court his Bill of Costs in the Local Court and on appeal to the Supreme Court for taxing. On 6 October 1998 the plaintiff filed a summons seeking that the appeal by the first defendant be stayed or alternatively that it provide security for the costs of the appeal, and an order for payment of

the judgment debt. On 8 October the first defendant filed an application to stay the execution of the judgment and orders of Mildren J made on 31 August.

[23] Both the plaintiff's and the first defendant's summonses came before me on 8 October. I granted an interim stay of execution of Mildren J's judgment, and ordered that the first defendant pay the judgment sum into Court (which was done on 14 October). On 14 October the first defendant filed Notice of Objection in relation to the Bill of Costs filed by the plaintiff in relation to his appeal before Mildren J. On 15 October the plaintiff filed a summons seeking an order that the judgment sum paid into Court pursuant to my order of 8 October be paid out to the plaintiff. On 22 October I ordered the judgment sum paid into Court by the first defendant be paid to the plaintiff. That same day the first defendant made an oral application for a stay of that order until the first defendant's application for leave to appeal against it. Kearney J granted an interim stay to 28 October. A summons formally seeking this relief was filed on 23 October; it also sought a stay of the judgment of Mildren J of 31 August 1998. On 23 October the first defendant also filed an application for leave to appeal my order of 22 October. At around this time the plaintiff was granted leave to file his Bill of Costs out of time in respect of his Local Court costs, claiming $7,920.50. On 28 October 1998 I heard both applications by the first defendant upon the summons filed on 23 October. Neither was

successful. By 3 November 1998, the appeals by the first defendant against my orders of 22 October (AP22 of 1998) and against Mildren J's judgment (AP18/1998) had been discontinued.

[24] On 3 November 1998 the plaintiff served on the first defendant a summons seeking taxation of his costs in the Local Court. On that same day the first defendant filed Notice of Objection in relation to those costs. On 5 November I ordered that the first defendant pay the plaintiff's costs of the appeal from the judgment of Mildren J. On 18 November the plaintiff issued a summons in the Supreme Court for taxation of his costs in the appeal from the judgment of Mildren J. On 19 November the first defendant filed Notice of Objection in relation to the Court of Appeal taxation. On 24 November Registrar Daniel-Yee adjourned the taxation of the plaintiff's costs of the appeal before Mildren J to 22 December when the Court of Appeal taxation was to be heard. On 1 December 1998 the plaintiff filed a summons seeking to set aside the interim orders of Registrar Daniel-Yee of 24 November. That summons also sought that Mildren J's award of costs in his favour be amended to an order for costs on an indemnity basis. On application by the plaintiff, this summons was adjourned sine die by Bailey J on 3 December with the plaintiff to pay the first defendant's costs of the application.

[25] On 7 December the plaintiff's application for the taxation of his costs in the Local Court proceeded before Judicial Registrar Fong Lim. She

reserved certain items and adjourned the taxation with liberty to apply. On 18 December the plaintiff filed a Notice of Appeal of the orders of Judicial Registrar Fong Lim on 7 December; he also filed an application to set aside those orders. These matters came before Lowndes SM on 8 February 1999 who reserved his decision until 12 February. On 9 February the taxation of the plaintiff's costs in the appeals before Mildren J and the Court of Appeal proceeded before Registrar Daniel-Yee. On 12 February Lowndes SM dismissed both the plaintiff's application to set aside the orders of Judicial Registrar Fong Lim on 7 December and the Notice of Appeal, the plaintiff to pay the costs of the application. On 2 March 1999 the plaintiff sought an extension of time to file a notice requesting Registrar Daniel-Yee to review her orders in the taxation of the appeal before Mildren J and the Court of Appeal. On 8 March the first defendant also filed a summons seeking such an extension of time with respect to the appeal before Mildren J. On 9 March the plaintiff filed a summons seeking orders for the recovery of his costs on his warrant of seizure and sale, for payment of interest on the judgment sum and interest on all costs allowed in the Bills of Costs in the Supreme Court matters. On 11 March Master Coulehan ordered, by consent, that the parties in the taxation of the costs of the appeal before Mildren J have leave to apply to Registrar Daniel-Yee to reconsider her decision. Master Coulehan dismissed

with costs the plaintiff's summons seeking orders for the recovery of his costs on his warrant of seizure and sale.

[26] On 26 March the first defendant filed Bills of Costs in relation to the costs orders that it had against the plaintiff as ordered by Bailey J on 3 December 1998 and Master Coulehan on 11 March 1999. The taxation of the costs in the Supreme Court matters resumed before Registrar Daniel-Yee on 28 June 1999. On 12 July 1999 the taxation of the plaintiff's Local Court costs and of the costs orders in favour of the first defendant proceeded before Registrar Fong Lim. The taxation processes were marked by a series of adjournments, and it is clear that in many cases this was at the instance of the plaintiff.

[27] That summarises the procedural history. However relevant to this summary are the observations of Mildren J about the conduct of the proceedings. On 25 November 1997, Hannan SM dismissed the plaintiff's claim. On appeal, on 21 August 1998, Mildren J described the proceedings before Hannan SM in the following terms:

> "The learned Magistrate, in his written reasons, identified the issues as follows. The first question was whether the appellant was correct in his claim that the award applied to the respondent's employees of which he was one. The respondent contended in its defence to the claim that the terms of the engagement were covered by the *Birdon Sands Pty. Ltd.*

Enterprise Agreement 1993, made under the *Industrial Relations Act, 1991* (NSW). This contention, the learned Magistrate held, was abandoned during the hearing. Next, the respondent contended that the common rule was confined to wages and conditions in the industry of building and construction, or to the industrial pursuits of that industry, and dredging was not such a pursuit. The learned Magistrate found for the appellant on this issue. The respondent does not seek to reargue this finding on this appeal. Finally the respondent contended that in any event the appellant was not entitled to be paid as a work boat driver. The respondent called expert evidence from a Mr Rutledge, (one of its employees), to the effect that 'work boat' was a technical term for a boat capable of doing heavy work, which, in the dredging industry, involved a boat which was used to lift the anchors that kept the dredges stationary above the sea bed, was equipped with a lifting device such as a winch to lift pipelines through which debris from the sea floor was transported elsewhere, and which was used to locate and relocate dredges which have no motive power of their own. The appellant operated a punt, for which no qualifications were required (such as a Master's certificate). The learned Magistrate found that he operated dinghies and punts during his shifts working on the dredging operation for

the respondent, and much of his work involved shifting personnel and bunkering fuel. His Worship also found that he performed labouring tasks on dredges and as required on dinghies and punts. His Worship accepted Mr Rutledge's expert evidence as to what is a work boat. He found that punts and dinghies were not work boats and that the appellant was not a work boat driver."

[28] Mildren J allowed the appeal. The plaintiff had submitted that Hannan SM erred in accepting the evidence of Mr Rutledge as to the meaning to be given to the expression "work boat driver" as found in the award. It was conceded by counsel for the first defendant that the evidence of Mr Rutledge was inadmissible. Mildren J found that concession was properly made. The plaintiff had represented himself both at the hearing in the Local Court and on appeal. At no time did the first defendant's legal advisers serve upon him a copy of Mr Rutledge's statement of evidence covering the matters of expert evidence he was called to give.

[29] Rule 19.01(1) of the Local Court Rules (as then in force) required such a statement to be served upon the appellant at least twenty-eight days before the hearing. Mildren J found that the failure to comply with this rule had the result that the evidence was inadmissible except by leave or with the parties consent: see r19.01(3). The respondent did not seek

leave, or the plaintiff's consent, and its counsel did not draw to Hannan SM's attention that r19.01(1) had not been complied with.

[30] Mildren J said:

> "It was submitted by counsel for the respondent that no objection was taken by the appellant at the time, but the appellant was unrepresented and would not be expected to know that this evidence was inadmissible. It was the duty of counsel for the respondent to draw to the learned Magistrate's attention that r19.01(3) had not been complied with and to seek the leave of the Court pursuant to r19.01(3). Counsel said nothing about that. He merely called Mr Rutledge in the usual way, as if the rule had been complied with, in circumstances where the appellant was not represented. The learned Magistrate was not alerted to the fact that part of this witness's evidence was to be of an expert nature; the witness was led on this part of his evidence towards the end of his examination in chief after having given evidence on other topics of a non-expert nature. If the learned Magistrate had been alert, he should have enquired about the admissibility of the expert evidence once the topic was raised. His Worship should have been aware of r19.01. It was his Worship's duty to have made that enquiry, as the appellant was not represented. But that did not happen.

> … Counsel has an independent duty to the Court which transcends his duties and obligations to his client not to deliberately mislead the Court. … Here the evidence sought to be led was critical to the outcome of the case, and was presented to the Court on the basis that it was admissible, and no leave was necessary, the inference being that r19.01(1) had been complied with. The unstated assumption inherent in this conduct was plainly false. It is not proven that counsel's conduct was deliberate, in the sense that he knew at the time he led the evidence that it was inadmissible; but he should have known this. Be that as it may, the evidence was inadmissible, and should not have been led.
>
> … The learned Magistrate did not advise the appellant of his right to challenge the admissibility of the evidence. He plainly should have done so."

[31] Having found that the plaintiff was not a work boat driver, the learned magistrate was not prepared to apply any alternative classification to the plaintiff which may have been applicable under the award on the basis that the plaintiff had not sought to make an alternative claim in these terms. Mildren J concluded that "[t]he approach of the learned Magistrate seems to have been that because the appellant was not in any event a work boat driver, and he had not submitted an alternative claim

for any lesser classification, he could not find what lesser classification covered the appellant, and make an award accordingly".

[32] Referring to clause 35of the Award which provided for the rate of payment of an employee performing mixed functions or subject to a change in classification, His Honour took a different view from that of the learned magistrate. He said:

> "It was clear at the beginning of the trial how the appellant was presenting his case. He said his employer gave him the classification of casual labourer. He pointed to the rate of a labourer assistant to a tradesman, the provisions of clause 35, and the rate for work boat drivers, and asserted that 'it was an intrinsic part of my job where I had to drive work punts every day and throughout my whole day at work'. In those circumstances, if the evidence did not support a finding that he was a work boat driver, but supported a finding that he was covered as a labourer assistant to a tradesman or by some other lesser category, the learned Magistrate should have so found, as this was inherent in his claim."

[33] As I have noted in my earlier summation of the procedural history, Mildren J held that the plaintiff was entitled to be paid as a work boat driver. On 21 August 1998, he gave judgment for the plaintiff in the sum of $10,945.38 and on 31 August 1998 ordered that the first

defendant pay the plaintiff's costs of the Local Court proceedings and appeal.

[34] On 8 October 1998 an interim stay of execution of Mildren J's judgment was granted, and the first defendant was ordered to pay the judgment sum into Court (which was done on 14 October). On 22 October the monies paid into Court by the first defendant were ordered to be paid out to the plaintiff. By 3 November 1998, appeals by the first defendant against this decision (AP22 of 1998) and against Mildren J's judgment (AP18/1998) were discontinued.

[35] Whilst Mildren J found certain aspects of the proceedings below to be unsatisfactory, this was not found to be the result of any deliberate conduct on the part of the first defendant's then counsel.

The Present Proceedings

[36] The plaintiff was self-represented before me. He claims that the defendants' conduct in the earlier proceeding was tortious, at trial, during interlocutory steps, on appeal, and generally.

[37] In his Amended Statement of Claim dated 17 December 2001, the plaintiff claims, at paragraph 22 (omitting capitals):

> "a. damages;
>
> b. damages for fraud;

c. secondary damages for fraud;

d. punitive damages for fraud;

e. damages for abuse of process;

f. secondary damages for abuse of process and damages for negligence;

g. punitive damages for consequences of the abuse of process by the defence tactics in a prolonged litigation, causing economic loss to the plaintiff;

h. aggravated and special damages;

i. equitable damages;

j. the recovery and restitution of the wasted and lost costs and disbursements imposed on and incurred by the plaintiff, but not recovered by the plaintiff in the previous litigation taxation process;

k. interest pursuant to section 84 of the Supreme Court Act on judgment; and

l. costs on indemnity basis."

[38] The Amended Statement of Claim is repetitive and embarrassing. However, in the course of proceedings, it became apparent that the torts alleged are:

(i) as against the second defendant: abuse of process (in maintaining a baseless defence on behalf of his client the first defendant), conspiracy (with the first defendant and David Sweet, a solicitor with the third defendant with day to day conduct of the earlier proceedings as agent of the second defendant), fraud, and negligence (in breaching a duty of care allegedly owed to the plaintiff as an unrepresented opposing litigant); and

(ii) as against the third defendant: abuse of process (in maintaining a baseless defence on behalf of their client the first defendant, as agent of the second defendant), conspiracy (with the first defendant and second defendant), fraud, and negligence (in breaching a duty of care allegedly owed to the plaintiff as an unrepresented opposing litigant).

[39] The plaintiff called eight witnesses, including the second defendant and David Sweet of the third defendant. At the close of the plaintiff's case no evidence was called by the defendants. The evidence concluded this way as a consequence of a foreshadowed submission by the counsel for the second and third defendants on 30 April 2004 that at the conclusion

of the plaintiff's case they intended to make a submission that there was in effect no case to answer. Faced with the prospect of a submission from counsel of no case to answer, the plaintiff elected to called the second defendant (11 and 12 October 2004) and Sweet (13 October 2004) in his own case, having received an explanation from me concerning the forensic disadvantage to him in doing so given that counsel for the second and third defendant would then be in a position to cross-examine their own clients. Substantial affidavits from each witness (in the second defendant's case running to more than 500 paragraphs and 2 thick volumes of annexed documents, and in Sweet's case more than 400 paragraphs and incorporating 4 thick volumes of annexed documents) became Exhibits P68 and P70 respectively.

[40] The other witnesses in the plaintiff's case besides himself (27, 28, 29 and 30 April and 11 October 2004) were Ian Cook (29 April 2004), David Phillips (30 April 2004), John Loty (4 May 2004), Phillip Coleman (4 May 2004) and Robert Welfare (30 April and 4 and 5 May 2004). Coleman and Loty were originally intended to have been witnesses called by the defendants. Arrangements had been made by the defendants for Loty's evidence to be given by videolink. However, counsel having foreshadowed in the course of the plaintiff's evidence that they now anticipated submitting there was no case to answer at the close of his case, nevertheless offered to maintain those video arrangements at their own cost if the plaintiff wished to take advantage

of that should he wish to call Loty himself. Ultimately, the plaintiff took advantage of this offer and also elected to call Coleman in his own case.

[41] Cook is a civil engineer who had supervisory responsibilities as an employee of the first defendant at the East Arm Port Development Project in 1995. Having commenced employment on 28 June 1995, he ceased working for the first defendant on 10 November 1995 "under a bit of a cloud". Two affidavits by Cook are before me as annexures to Exhibits P7 (dated 8 May 1997) and P13 (dated 15 November 2002).

[42] Phillips worked for the first defendant at the East Arm Port Development Project for a period of nearly 12 months from 13 July 1995, having been engaged by Cook on a flat rate of $15 per hour.

[43] Loty initially practised at the Sydney Bar from 1975 until March 1985, at which time he left to work as General Manager, Legal and Personnel at Brambles Industries Limited. In 1989, he left Brambles and was appointed as an arbitrator of the Local and District Courts of New South Wales and acted as a negotiator and industrial relations adviser for clients generally. He returned to the Sydney Bar in March 1996, again practising in industrial relations law, amongst others. He left the Sydney Bar in late 1999, taking up his current role as a director of a registered training organisation. His affidavit, dated 5 September 2003,

which in oral evidence he maintained to be true and correct became Exhibit P63.

[44] Coleman is a barrister who has been at the Sydney Bar since 1988, practising principally in the areas of employment and industrial relations law. His affidavit, dated 4 September 2003, which he maintained in oral evidence to be true and correct became exhibit P64.

[45] Sweet was first admitted to legal practice in 1983. He became a partner in Phillips Fox Lawyers in 1994, moved to Darwin in 1995 and worked for Cridlands Lawyers before becoming a partner in that firm in 2000. Much of his experience has been in insurance litigation.

[46] The second defendant has been a solicitor in private practice in New South Wales for almost 30 years, almost all of that period as a sole practitioner. He first met Jim Bruce, principal director of the first defendant, in 1981. From about the mid-1980s until the end of 2000 he had a general retainer from the first defendant to act as the company's solicitor. He was appointed a company director in November 1993 and ceased to be a director on 20 January 1998, after the requirements of the Corporations Law changed to allow sole directors of companies.

[47] The plaintiff had also intended to call Anthony Rutledge, but was unable to organise his giving videolink evidence. On the evidence before me, Rutledge was an employee of the first defendant at the

relevant time. He, rather than Cook, had been the one who had actually employed the plaintiff.

[48] The proceedings before me were drawn out and protracted. Many of the matters sought to be agitated by the plaintiff with witnesses were irrelevant. There were regular invariably justified objections by counsel for the second and third defendants to the plaintiff's questions, to the introduction of irrelevant material, and to interjections by the plaintiff from the Bar table.

[49] In paragraph 10(l) of his Amended Statement of Claim, the plaintiff summarises his allegations as follows:

> "Mr Byrnes, Counsel Mr Spargo and Mr Sweet of Messrs Cridlands Failed to act in good faith and/or in accordance with their duty to the Courts or in the interests of the Public Policy, and did not observe their duty of care towards the unrepresented Plaintiff".

[50] The main thrust of the plaintiff's allegations concerns abuse of process, although these allegations are intrinsically bound up with the further allegations of conspiracy, fraud and negligence.

[51] In paragraph 8 the plaintiff outlines his allegations in terms of an arrangement between the defendants whereby *inter alia*:

"(b) Amongst other things, the Defendants would falsely and or negligently and or recklessly represent to the Local Court that the Plaintiff was paid in full in accordance to the rates of pay set out in the 'Certified Birdon Sands Enterprise Agreement 1993 NSW', and that the Building and Construction Industry (NT) Award 1989 'the Award' did not apply to the Plaintiff's employment with Birdon Sands P/L at the East Arm Port Development Project in Darwin in 1995

(c) And, the substance of which meant that the Defendants and its employees and its agents would not undertake any genuine investigation into or assessment of the validity and merit of the Plaintiff's claim, and/or the veracity of the documentation upon which the Defendants would rely

(d) And, the Defendants would take such steps as were necessary to ensure that the Plaintiff's claim was defeated at all costs, ie. The vigour of the Defence conduct and the extent which they intended to go".

[52] In paragraph 9, the purpose or objects of this arrangement are said to be:

"(a) To ensure that the Plaintiff did not succeed in obtaining a judgement against Birdon Sands P/L

(b) To leave the Plaintiff bereft of any assets or resources to enable him to continue the litigation against Birdon Sands P/L

(c) To ensure that Birdon Sands P/L would retain the benefit of any monies that it was lawfully obliged to pay to the Plaintiff

(d) To ensure that Birdon Sands P/L were not subject to further legitimate claims by other employees of it, as in a Floodgate effect

(e) To ensure that the Plaintiff would incur financial losses, incur high levels of stress and mental fatigue, where otherwise it would not have been the case for the Plaintiff".

[53] Paragraph 10(w) of the amended Statement of Claim also provides a general statement of the plaintiff's allegations:

"The Defendants intentionally set out to defend the Plaintiff's claim in a deceitful and unprofessional manner, with the intent and the sole aim to deny the Plaintiff his legal entitlements to his claim

(i) Whilst defending the claim and denying the Plaintiff his legal entitlements, all of the Defendants unjustly profited at the Plaintiff's expense. The solicitors got their fees and the client had the costs of litigation, set as a tax deduction at the end of financial year.

(ii) The plaintiff as the unrepresented party, is the only one that has suffered and remained at a financial loss, as a result of bringing his claim before the Courts

(iii) The Plaintiff eventually won his claim, but financially he lost more than the Court awarded him in merit of his claim".

The Plaintiff says the Defence had no reasonable prospect of success

[54] The main aspect of the allegation of abuse of process is that the defence maintained by the defendants was known, or should have been known, by them to have no reasonable prospects of success, and was advanced for ulterior purposes:

"The Defendants severally or together defended the proceedings brought by the Plaintiff for ulterior motives knowing that there was no substantial Defence to the claim". (Amended Statement of Claim, paragraph 10(n))

[55] Paragraph 15 of the Amended Statement of Claim provides:

"In the course of acting for Birdon Sands P/L, the Solicitors have

(a) Continued the proceedings on behalf of Birdon Sands P/L in the knowledge that it had no worthwhile prospects of success in the proceedings in order to vex the Plaintiff

(b) Continued the proceedings on behalf of Birdon Sands P/L for the purpose of:–

(i) Delaying actions by the Plaintiff against Birdon Sands P/L to recover money being unpaid wages payable under the Building and Construction Industry (NT) Award 1989

(ii) putting the Plaintiff under pressure to compromise such claim

(c) Delivered an Amended Defence with allegations where there was no factual basis for making the allegations

(d) accepted instructions to conduct the proceedings in a manner designed to obstruct the Plaintiff and mislead the Court and did in fact conduct the proceedings in a manner designed to so obstruct and mislead the Court

(e) The Defendant Birdon Sands P/L through Mr Jim Bruce (owner & Company and director) along with their legal representatives Mr Russell C. Byrnes (solicitor & Birdon Sands Company director), Mr David L. Sweet of Cridlands lawyers as agent in town and Counsel Mr Michael Spargo, have intentionally and negligently set out to ambush the Plaintiff throughout and in every aspect of the litigation process, and then set back and allowed the legally unrepresented Plaintiff to suffer the consequences of their actions

(f) The Plaintiff states and asserts that whilst the Defendants' conduct, their actions and tactics, might have appeared to all, to be within the frame work of the legally acceptable practice, when done in good faith in bona fide, in this matter the conduct and the actions of the Defendants were not done in good faith, but were done in a deceitful and unprofessional manner in order to vex the Plaintiff

(i) Evidence of the Defendants conduct and their tactics can be adduced to, throughout the litigation process that took place, from the Small Claim Tribunal in June 1996 right through to the Court of Appeal in October 1998".

[56] This is amplified in paragraph 16:

"In the course of defending the Plaintiff's claim the Defendant's Solicitors conduct has been such that,

(a) No real attempt has been made to verify the merits of the Plaintiff's claim

(b) The Solicitors have permitted themselves to be used by the client in a scheme or arrangement to trick the Plaintiff unfairly out of his legal rights and entitlements and they have treated the Plaintiff unfairly.

(c) Have attempted to gain an advantage for their client at the expense of the Plaintiff by unfair means

(d) Have engaged in conduct that was prejudicial to the administration of Justice

(e) Have engaged in conduct, which would be regarded as unfair by ordinary standards of decency in the community

(f) Have engaged in conduct indicative of a failure on their part to understand or practise the precepts of fair dealing in relations to a person having an interest adverse to those of their client

(g) Have failed to treat an unrepresented person having interests different to those of their client with courtesy and fairness

(h) Have taken advantage on behalf of their client of the Plaintiff's ignorance of Court procedures and his ignorance of his legal rights

(i) Have engaged in conduct, which was capable of bringing the legal profession into disrepute".

[57] In paragraphs 17 and 18, the plaintiff alleges that this conduct amounted to an abuse of process on the part of the second and third defendants:

"17. At all material times, the Solicitors and Counsel had a duty to the Courts:

(a) not to improperly delay or put the Plaintiff to unnecessary expense

(b) not to conduct themselves in a way that tended to defeat the course of Justice in the proceedings

(c) not to conduct the proceedings when the real purpose of the proceedings was not to the litigation of the claim

(d) to conduct the proceedings before the Courts with due propriety

(e) to be candid and honest with the Courts

(f) not to obstruct the administration of justice by the Court

(g) not to abuse or facilitate the abuse of the Court's process

(h) to act in good faith towards the Courts and the opponent an unrepresented Plaintiff".

"18. The conduct of the Defendant's Solicitors was in breach of the duty set out in paragraph 17 hereof and in the items described herein".

[58] Mr Trigg SM had held in Welfare v Birdon & Sands Pty Ltd (No. 9524073, 12 September 1996) that the Award applied to Welfare as an employee of the first defendant. The plaintiff points to his being "an identical claim" under the Award which the defendants knew had been determined by Mr Trigg SM to be covered by the Award. In addition, the plaintiff pointed to the fact that on 8 November 1995, John Loty then at the New South Wales Bar provided legal advice to the second defendant that the Birdon Sands Enterprise Agreement 1993 NSW had no application to employment in the Northern Territory. It followed, the plaintiff said, the defence put forward that the plaintiff's employment was under an oral common law contract but some of the terms and conditions of that employment were governed by the Birdon

Sands Enterprise Agreement 1993 NSW, was known to have no reasonable prospects of success.

[59] The plaintiff pointed to a letter dated 27 May 1996 by barrister Phillip Coleman referenced "Welfare & Donnelly v Birdon Sands", in which Coleman advised that he had "serious doubts whether we can successfully defend either case". In his oral evidence Coleman noted that this was not inconsistent with his view that there was nevertheless at least an arguable defence and, in any event, was an advice provided urgently without the benefit of a conference with his client held on 29 May 1996. Coleman affirmed in his oral evidence the contents of his affidavit of 4 September 2003 that he formed the opinion, which he provided at that conference, that there was at least an arguable defence. He also stated in that affidavit that no one said anything to him which indicated the first defendant's defence was being advanced other than to pursue its legal rights, rather than for an ulterior purpose.

[60] Similarly, in an affidavit dated 5 September 2003 the contents of which John Loty affirmed in oral evidence before me he stated that:

> "At all times, based on my instructions, I believed that the First Defendant had reasonable prospects of success in relation to the substantive claims made by Mr Laferla against the First Defendant. At no time did I believe, or did anyone say anything to me which suggested to me, that the First Defendant was defending those proceedings other than to indicate its legal rights or for some ulterior motive".

[61] In oral evidence, the plaintiff confirmed that he considered that the defendants' sole purpose in maintaining their defence to his claim was to ensure he did not receive the money he claimed. While he conceded that this is the nature of litigation, he believes that it was not conducted in good faith in this case and it was this fact which tortiously infected the defendants' otherwise apparently proper conduct of the litigation.

[62] The plaintiff seeks to provide as a motive for the defendants' abuse of process their dislike of a friend of the plaintiff's, Robert Welfare, which he alleges they applied to him by association. The plaintiff provided a body of evidence suggesting that the various defendants would have had reason to, and indeed did, hold significant animosity towards both himself and Welfare. The thrust of that evidence was to the effect that the two of them, and in particular Welfare, had challenged the status quo in the work and occupational safety practices of the first defendant. He also links this claim with the earlier proceedings brought by his friend and work colleague, Welfare, against the first defendant: (identified by the plaintiff in his Amended Statement of Claim, para 3(c)(iii) as *Welfare & Donnelly v Birdon Sands P/L; Welfare v Birdon Sands Pty Ltd* (FCA, June 1996); *Welfare v Birdon Sands* (Nov 1996, Local Court, NT) – "They treated me badly because of my friendship with Welfare. Mr Welfare caused the Defendants some grief and they were determined to take it out on me".

In venting their angst against the plaintiff, he alleges the defendants overstepped lawful litigation practices and processes.

[63] The plaintiff also pointed to the flood gates argument should he have been successful in his litigation. He asserted a number of employees of the first defendant had been underpaid and there had already been such a claim by Welfare.

[64] Typical of the material tendered before the Court by the plaintiff as demonstrating this animosity towards him are the contents of letters from the second defendant to the third defendant:

(i) dated 5 December 1996: "I don't really want to pursue Laferla for some paltry costs, what I want to do is take a message back to Laferla, that if Laferla is serious about running his case and he loses, we will pursue him for costs to the nth degree. I am hoping this tactic will make it easier to settle Laferla's matter";

(ii) dated 11 February 1997: "Generally, we wish to make life as difficult as possible for Laferla".

[65] In assessing this material, it is trite to note that the parties were engaged in bitterly fought, hostile litigation. On its face, the material before me on this issue is consistent with a position that might well be taken by one litigant towards another in that litigation. However, the plaintiff argues that when this material is considered in the wider context of the conduct of the proceedings, the tortious elements of the defendants' actions are apparent.

[66] There are various other allegations which the plaintiff argues support his claim of abuse of process, one of which is an allegation that the defendant's "doctored" the Enterprise Agreement.

"Doctored" Enterprise Agreement

[67] In his Amended Statement of Claim, the plaintiff alleged in paragraph 10(b) that:

> "Mr Byrnes instructed Counsel Mr Spargo to submit at the Local Court hearing a falsified and altered copy of the 'Certified Birdon Sands P/L Enterprise Agreement 1993 NSW' containing an added page (P5) showing altered rates of pay, intentionally and or negligently and or recklessly falsified and altered for the sole purpose of defeating the claim."

In paragraph 10(a) of the Amended Statement of Claim, the plaintiff asserted:

> "(a) Birdon Sand P/L and Mr Byrnes Instructed Mr Sweet of Messrs Cridlands to draft a false and misleading Amended Defence filed Local Court 23.12.96, in which it stated that the Plaintiff was paid in accordance with the rates of pay in to the Birdon Sands Pty Ltd Enterprise Agreement 1993 NSW, therein referred to as the 'Agreement'."

[68] The plaintiff conceded in oral evidence before me that he had understood during the Local Court proceedings that the first defendant was submitting that he had been employed under an oral contract of employment, the rate of pay applicable being that under the Enterprise Agreement. Counsel for the second defendant submitted that the rate of

pay under that Agreement was $15 per hour, which the plaintiff conceded was the rate he understood he would be paid. However, the plaintiff contended that the second defendant had “doctored” the copy of the Birdon Sands Enterprise Agreement 1993 NSW, which in the circumstances of the proceedings had actually been tendered by the plaintiff before Mr Hannan SM, to reflect this rate by amending page 5 and with the sole purpose of defeating the plaintiff’s claim. Page 5 of the Agreement as tendered in the Local Court refers to relevant wage rates, identifying the casual rate for a Dredge Operator’s Assistant as $12 per hour. However, this rate along with other rates appear to have been crossed “superceded” (sic). It is this which the plaintiff alleged was “doctored”.

[69] I unhesitatingly accept the submission of counsel for the second defendant that there is absolutely no basis for concluding that the NSW Enterprise Agreement was "falsified" or "doctored":

(a) as a matter of inference, there would not appear to be any advantage to the defendants in the action in increasing the rates of pay, and indeed in all categories, not just casual labourers;

(b) the Enterprise Agreement produced in the Local Court had been quite obviously altered, with the rates of pay

struck out on one page and the word "superceded" marked on it;

(c) Mr Cook's statement, adopted by him in re-examination, shows that he knew that the rate was $15 per hour in accordance with the NSW Enterprise Agreement at the time of the engagement of the plaintiff, which I accept tends to show that the NSW Enterprise Agreement so provided at that time, and is against its having been later "falsified".

[70] There is no reason to doubt the second defendant's explanation that what was produced was probably an office copy on which increases in rates of pay since 1993 had been recorded. The Enterprise Agreement formed no part of the defence, and there was no reason to doctor it for that purpose.

[71] I set out, seriatim, some other complaints of the plaintiff:

A. *Failure to comply with Local Court Rules*

[72] The plaintiff also points to the failings identified by Mildren J of Spargo as counsel for the first defendant in the earlier litigation as evidence of the attempts by the defendants unlawfully to undermine his claim, a course of action which he asserts was deliberate. In his amended Statement of Claim at paragraph 10(f), he states:

> "The Defence at the local Court Hearing, deliberately did not to comply with the Local Court Rules, specifically Rule 19.01 (Local Court Rules prior to June/July 1997) which pertains to Expert Witnesses, in calling the Defendant's partisan witness Mr Anthony Rutledge, as a purported expert witness.
>
> (i) Counsel Mr Spargo, did not advise the unrepresented Plaintiff, that the Defence was calling Mr Rutledge an expert witness, and with out notice during the hearing withdrew the only Defence witness on Court file record a Mr Ian Cook, Birdon Sands' site manager at East Arm Port Development Project, and substituted this witness with Mr Anthony Rutledge. This was after the Plaintiff gave evidence".

[73] The plaintiff contended that this change resulted from an awareness by the defendants that Ian Cook had left the first defendant "under a bit of a cloud" and would have been an unreliable witness. Counsel for the second defendant suggested that this change was perhaps prompted by a realisation from conversations with Ian Cook in late February 1997 that while he had interviewed the plaintiff and introduced him to Anthony Rutledge, it had been Rutledge, rather than Cook, who had actually employed the plaintiff. Cook, while not recalling such a conversation, conceded it to have been possible.

B. *Re-opening of case*

[74] In paragraph 10(g) of the Amended Statement of Claim the plaintiff states:

> "On the 4 March 1997, the Plaintiff closed his case prematurely, without having a proper recourse to address Mr Rutledge evidence. The Plaintiff made applications to the Local Court before Judiciary Registrar Fong Lim and

Mr Hannan for leave to reopen the case in order to call Mr Cook as a witness for the Plaintiff

(i) Mr Sweet and Counsel Mr Spargo strongly opposed the Plaintiff's applications to the Local Court for the Plaintiff to reopen his case and allow the Plaintiff to call the Defendant's original witness Mr Ian Cook as a witness for the Plaintiff.

(ii) Magistrate Hannan accepted Counsel's objections and wrongfully did not permit the Plaintiff to re-open his case and to call Mr Ian Cook as a witness for the Plaintiff.

(iii) Mr Cook would have been able to contradict the testimony of the Defendant's witness Mr Anthony Rutledge, in reference to the Plaintiff's work his duties and his job performance".

[75] Having been taken through the relevant parts of the transcript in the Local Court proceedings, the plaintiff in oral evidence before me conceded that:

(i) at the time that he closed his case he had understood that Cook was not going to be called; and

(ii) the objections taken by Spargo to the plaintiff's re-opening his case were legitimate and proper on their face. On the other hand, he contended that this would be so only if done honestly, bona fide and in good faith and he concluded "I do not believe that the evidence given by Rutledge was honest".

It is clear from the transcript of proceedings in the Local Court that the plaintiff had every opportunity to put his submissions

supporting his being granted leave to re-open his case. The plaintiff's challenges to the bona fides of Spargo's submissions in opposition to his re–opening his case and to the learned magistrate's conclusion following adversarial argument are without foundation.

C. *Leading questions and false answers*

[76] In paragraph 10(h) (and see also paragraph 3(d)) of the Amended Statement of Claim the plaintiff states *inter alia*:

> "Mr Byrnes instructed and or encouraged Counsel Mr Spargo to lead the witness Mr Rutledge during the questioning of the witness, and for Mr Rutledge to give answers that would mislead the Magistrate's own understanding of the claim at the Local Court hearing.
>
> Mr Rutledge an employee of Birdon Sands gave false testimony to the Court under oath
>
> (i) It is the Plaintiff's assertion that the Defendants colluded and solicited perjury from their partisan witness Mr Rutledge or that Mr Rutledge committed perjury to support his employers' case
>
> (ii) Mr Rutledge gave false evidence as to the actual work and duties Performed by the Plaintiff during his employment and wrongfully and knowingly testified that the term **workboat** was a technical term, in answers to counsel leading questions
>
> (iii) Mr Anthony Rutledge gave false testimony in the guise of an Expert Witness, when he was not, in response to Counsel Mr Spargo's leading questions and deliberately and wrongfully testified that the term or the word **workboat** was a technical term. Magistrate Hannan accepted this false and misleading testimony as valid for his Reasons for Decision to the claim dated

25.11.97".

[77] Specifically, the plaintiff submitted in oral evidence before me that Spargo in asking Rutledge "Do you understand 'workboat' to be technical term" was "leading this witness … to give his understanding of a technical term". The plaintiff conceded that he did not know when making this allegation what a leading question was. The plaintiff's related claim with respect to this question appears in paragraph 10(j):

> "Mr Byrnes instructed Counsel Mr Spargo to submit at the Local Court that the term 'Workboat' as used in the Building and Construction Industry (NT) Award 1989, in clause 6 classification item 17 -Workboat driver- was a technical term, and that this term was not to be construed by reference to the ordinary meaning of the word".

D. ***Reference to Cachia v Hanes (1994) 179 CLR 403***

[78] The plaintiff also asserted that the defendants "unjustly used" *Cachia v Hanes* (1994) 179 CLR 403 during taxation of costs. The substance of this complaint is set forth in sub-paragraph 10(u) of the amended Statement of Claim.

[79] The plaintiff apparently does not understand that *Cachia v Hanes* is a High Court decision, as a matter of precedent binding on the Master and the parties, including the defendants, who had referred him to the case, as was their duty.

E. ***Took advantage of the plaintiff's financial situation***

[80] In paragraph 11(h) of the amended Statement of Claim, the plaintiff alleges:

> "(h) The Defendants knew that the Plaintiff had limited funds and was unemployed having lost his employment as a direct result of the litigation and by Mr Hannan's SM initial conclusion to the claim, as stated in his letter of 11.11.97 to the Plaintiff
>
> (i) The Plaintiff to lost his employment, as a direct consequence of Mr Hannan SM initial conclusion to the case for his decision, that was solely based on Counsel Mr Spargo wrongful and misleading submissions in stating that the Award did not apply
>
> (ii) the Plaintiff was forced to terminate his employment in Tennant Creek in order to return to Darwin and as requested submit a response to Mr Hannan SM by the 20.11.97
>
> (iii) The Plaintiff had less than 9 days in which to respond to Mr Hannan request for submissions in reference to the Building and Construction Industry (NT) Award 1989 with particular reference to the Schedule of Respondents to the Award.
>
> • This can be attested to in the letter dated 11.11.97 from Mr Hannan SM to the Plaintiff".

[81] On the question of the plaintiff's having limited funds to the knowledge of the defendants, counsel for the first defendant pointed to the fact that in an application before Kearney J on 22 October 1998 for a stay of the interlocutory order which I had made earlier that day, Sweet brought to His Honour's attention that my reasons for ordering payment to the plaintiff included that I was not satisfied on his affidavit of 15 June 1998 that there was acceptable evidence of impecuniosity.

F. *Absence of settlement steps*

[82] The plaintiff also asserted that there had been no steps taken by the defendants towards settlement, a fact which he submitted supported his claim that their defence of the case was prompted by ulterior motives. This assertion is simply not true. The first defendant via the second and third defendants made offers in vain to settle the plaintiff's claim.

G. *Casting of false aspersions*

[83] In paragraph 10(o) of the amended Statement of Claim, the plaintiff alleges:

> "The Defendants negligently influenced and tried to influence the Courts by deliberately casting false Aspersions on the Plaintiff thus abusing the processes of the Court".

[84] In oral evidence the plaintiff clarified that this was an allegation directed to the agitation of the plaintiff's pecuniosity before me when on 8 October 1998 I granted an interim stay of execution of Mildren J's judgment, and ordered that the first defendant pay the judgment sum into Court (which was done on 14 October). On 22 October I ordered the monies paid into Court be paid out to the plaintiff. The plaintiff also alleged that the first defendant's counsel, Spargo, in the Local Court proceedings cast unjustifiable aspersions and wrongful inferences on him, which gave rise to Hannon SM accusing the plaintiff of proceeding with the claim for ulterior motives. There is simply no substance in any of these allegations.

H. *Local Court costs*

[85] In paragraph 10(p) of the Amended Statement of Claim the plaintiff asserts:

> "The Defendants attempted to recover excessive costs of the Local Court proceedings in the face of an appeal by the Plaintiff to the Supreme Court".

[86] In oral evidence, the plaintiff conceded that he was aware that the defendants had taken action in relation to costs in circumstances where he had applied several times for a stay of that process and the courts had refused his application in each case.

I. *Security for costs and related procedural issues*

[87] In paragraph 10(q) of the amended Statement of Claim, the plaintiff alleges:

> "The Defendants applied for and unjustly demanded an order of the Supreme Court before her Honour Justice Thomas, that the Plaintiff provide $4,000.00 as Security for costs of the Appeal LA22/97, after an appeal against that decision was already set to be heard, this was done in order
>
> (i) to preclude the Plaintiff from access to a hearing for his appeal
>
> (ii) Causing the Plaintiff to incur extra financial burdens, suffer extra stress and anxiety, and thus diminish his capacity to appeal the matter".

[88] The plaintiff acknowledged in oral evidence that he provided the security and the application had not resulted in his appeal not proceeding. Indeed, he acknowledged that he himself sought security for costs in the first defendant's appeal to the Court of Appeal.

[89] In paragraph 10(q) of the amended Statement of Claim, the plaintiff alleges:

> "(a) The Defendants Bills of Costs for the Local Court hearing, before the Taxation of the Bills of Costs, were brought in to a Total of $36,460.
>
> Cridlands and Mr Spargo's bills came to $20,366.00. Mr Byrnes bill came to $ 16,094.00.
>
> (b) The application for Security for costs for the Plaintiff's appeal LA22/97, was made after the Plaintiff refused Mr Sweet' suggested offer in a letter marked without prejudice dated the 20 March 1998, in it Mr Sweet suggested for the Plaintiff, to discontinue the appeal process and Birdon Sands would forego their costs against the Plaintiff for the Local Court hearing.
>
> (i) The Plaintiff considers that Mr Sweet's letter of 20 March 1998, is a letter of undue influence and duress, designed for the sole purpose to stop the Plaintiff form assessing his rights to have his appeal heard, an appeal that was already set for hearing.
>
> This letter was not drafted with the objective for a settlement of the dispute between the parties.
>
> This letter clearly indicates that the Defendant Birdon Sands P/L would have been prepared to forego their costs of the Local Court, on the condition the Plaintiff discontinued from proceeding with the appeal.
>
> (c) This letter also clearly indicates that the Defendant was not all concerned for the costs it had incurred thus far. As long as the appeal was stopped from proceeding.
>
> (d) This letter did not represent the true position of the Plaintiff at the alleged discussion of the 18 March 98, as referred therein by the writer Mr Sweet.
>
> (e) This letter is not an honest offer from Mr Sweet for the settlement of the litigation.
>
> The letter is more akin to a letter of duress, thus it was signed without prejudice and hidden behind the privilege.

(f) The Defendants conduct past this point in the litigation process, has been one of reckless negligence and of dishonest representation to the Court of the client's concerns.

(g) All the submissions and affidavits made by the Defendants in order the gain a Security for costs form the Plaintiff, and there after made in order to support their applications for not paying the Plaintiff the Judgement Debt, by stating the need to save guard and guarantee the client's money and interests from the Plaintiff, if the Plaintiff was to be paid, were made without evidence, were not made in good faith and were made under a false premise".

[90] The plaintiff conceded in oral evidence that Sweet's letter of 20 March 1998 had no effect on his ability to prosecute his appeal. Similarly, the application for security for costs had not prevented him prosecuting his appeal, having raised the $4,000 in question.

J. *Influence on co-worker*

[91] In paragraph 10(r) of the amended Statement of Claim, the plaintiff alleges:

> "Mr Byrnes approached a co-worker and witness of the Plaintiff namely Mr Robert J. Welfare (against whom Byrnes had a costs order) with the intention to dissuade the Plaintiff from proceeding with his appeal in consideration of Mr Byrnes foregoing his (Byrnes) right to enforce the costs order held against Mr Welfare.
>
> This was improper and it was unfair to have placed the Plaintiff in such a position".

[92] The plaintiff acknowledged in oral evidence that he had appointed Welfare to be his agent in his proceedings and Welfare had attended and sat at the Bar table with him during the proceedings before

Hannan SM. He also conceded that it was not the second defendant who had approached Welfare. After the decision in the Local Court and with a substantial costs order against the plaintiff, it had been Welfare who had caused a solicitor acquaintance, his cousin Helen Matthews, to contact the second defendant on a speaker phone in his presence to see if there was anything that could be done about the situation. He took the subsequent offer to the plaintiff convinced that the plaintiff "didn't have any chance of success in his appeal and so I thought it was in his best interest to drop the appeal and then I pointed out that – well it's in my best interests too". In oral evidence, Welfare said he told the plaintiff:

> "This is a very good deal, James, you should – you should think about it long and hard, I mean people don't drop $30,000 bills against you every day, you know, it's a huge financial burden …".

K. *Appeal*

[93] In paragraph 10(s) of the amended Statement of Claim, the plaintiff alleges:

> "Mr Sweet of Messrs. Cridlands lodged an appeal to His Honour Justice Mildren decision 21.08.98 to the Appeal L/A22/97, knowing it to be improper".

[94] The plaintiff explained in oral evidence that he considered Sweet's notice of appeal raised only frivolous grounds. Even a brief examination of the grounds raised in the Notice of Appeal suggests that, whatever the ultimate merits of the grounds may have been on

appeal, they were not on their face frivolous. The appeal was not "improper". Nor was it known to be such by Mr Sweet.

[95] In paragraph 10(t) (and see paragraph 7(b)) of the amended Statement of Claim, the plaintiff alleges:

> "Mr Sweet lodged an Exparte application before Justice Kearney for an Appeal from the decision of Angel J of the Court of Appeal 22.10.98, knowing it to be improper and failed to adduce facts and evidence in the interests of the respondent who was not present".

[96] In oral evidence before me, the plaintiff was directed to various parts of the transcript of proceedings before Kearney J wherein His Honour had been directed by Sweet to the various matters, in so far as they were material, identified by the plaintiff as having not been adduced.

[97] The plaintiff also submitted that the appeals against my order of 22 October 1998 and Mildren J's judgment were discontinued because the defendants appreciated the appeals were groundless [and see amended Statement of Claim, sub-paragraph 7(e)]. I deal with the second and third defendants' opinion on the prospects of success below.

L. *Refusal to pay judgment debt*

[98] In paragraph 10(v) (and see also paragraphs 4 and 5) of the amended Statement of Claim, the plaintiff alleges:

> "Mr Sweet and Mr Byrnes failed to advise Birdon Sands P/L and or Birdon Sands P/L, refused to pay the Plaintiff the Judgement Debt without the Plaintiff bringing enforcement

proceedings".

[99] The plaintiff clarified in oral evidence that this allegation was that Mildren J having given judgement in the plaintiff's favour, the first defendant had refused to pay the judgment debt without enforcement proceedings. In oral evidence, the plaintiff conceded that the judgment debt was in fact paid out of court on 28 October 1998 and that prior to that payment the first defendant had the benefit of an interim stay for 7 days. On the other hand, the plaintiff also conceded that he himself did not pay the costs order against him in the Local Court proceedings until after enforcement proceedings had been brought by the first defendant.

Conspiracy

[100] The plaintiff alleges conspiracy. In paragraph 8 of his Amended Statement of Claim, the plaintiff outlines his allegations in terms of an arrangement between the defendants; paragraph 9 sets out the purpose or objects of this arrangement.

[101] I cite certain paragraphs from the Amended Statement of Claim.

Paragraph 10(k):

> "Mr Jim Bruce of Birdon Sands P/L and Mr Byrnes either severally or together instructed Solicitor Mr Sweet and Counsel Mr Spargo to not act in accordance with their duty to the Courts, or gave such instructions to Mr Sweet or Counsel which precluded them from so acting".

Paragraph 10(m):

"The Defendants either severally or together abused the process of the Courts intending to pervert or in effect perverting the course of Justice, and thereby denied the Plaintiff Natural Justice".

Paragraph 10(n):

"The Defendants severally or together defended the proceedings brought by the Plaintiff for ulterior motives knowing that there was no substantial Defence to the claim".

Paragraph 14:

"In the premises the Defendants:

(a) Have intentionally conspired and fraudulently attempted to deprive the Plaintiff's rights and legal entitlements.

(b) Have conspired to wrongfully and unlawfully cause the plaintiff to incur and suffer greater financial losses, than he would otherwise have incurred or lost

(c) Have with clear intent set out to mislead the Courts to their understanding of the case, in an effort to pervert the course of Justice and defeat the claim and deny the Plaintiff his legal entitlements".

Specific allegations of conspiracy

[102] In paragraph 10(h) (and see also paragraph 3(d)) of the Amended

Statement of Claim the plaintiff states:

"Mr Byrnes instructed and or encouraged Counsel Mr Spargo to lead the witness Mr Rutledge during the questioning of the witness, and for Mr Rutledge to give answers that would mislead the Magistrate's own understanding of the claim at the Local Court hearing.

Mr Rutledge an employee of Birdon Sands gave false testimony to the Court under oath

(1). It the Plaintiff's assertion that the Defendants colluded and solicited perjury from their partisan witness Mr Rutledge or that Mr Rutledge committed perjury to support his employers' case

(ii). Mr Rutledge gave false evidence as to the actual work and duties Performed by the Plaintiff during his employment and wrongfully and knowingly testified that the term **workboat** was a technical term, in answers to counsel leading questions

(iii). Mr Anthony Rutledge gave false testimony in the guise of an Expert Witness, when he was not, in response to Counsel Mr Spargo's leading questions and deliberately and wrongfully testified that the term or the word **workboat** was a technical term. Magistrate Hannan accepted this false and misleading testimony as valid for his Reasons for Decision to the claim dated 25.11.97".

[103] The plaintiff argued before me that not only was the second defendant part of a conspiracy against him, but that the second defendant did not act independently of Bruce. He described the second defendant as having "acted in unison" with Bruce's "wishes and demands". In support of his claim he pointed for example to the second defendant having confused his roles by charging as a director of the first defendant for his time instructing Spargo at the Local Court. His complaint was that the second defendant did not conduct himself professionally as a solicitor but rather as a "mere mouthpiece" for the wishes of Bruce. There is no substance in this allegation.

Fraud

[104] The following allegations as to fraud appear in the Statement of Claim:

[105] Paragraph 14:–

"In the premises the Defendants:–

(a) Have intentionally conspired and fraudulently attempted to deprive the Plaintiff's rights and legal entitlements.

(b) Have conspired to wrongfully and unlawfully cause the Plaintiff to incur and suffer greater financial losses, than he would otherwise have incurred or lost

(c) Have with clear intent set out to mislead the Courts to their understanding of the case, in an effort to pervert the course of Justice and defeat the claim and deny the Plaintiff his legal entitlements".

[106] Paragraph 13:

"On the 14.05.97 at Industrial Relation Commission hearing for unfair dismissal in the matter of James Laferla v Birdon Sands P/L - U No 80066 of 1997, Mr Byrnes testified under oath before Commissioner Deegan, that at the time the Plaintiff was employed, there was no Award that covered the Plaintiff's employment, and it was the employer's position, that the Plaintiff was employed on a common law contract but the terms and conditions of that were governed by the principals set out in the NSW Birdon Sands Enterprise Agreement 1993

(a) Mr Byrnes did mislead Commissioner Deegan in this matter, by not disclosing the true facts as they were known to him

(i) The Commissioner was not familiar with the terms and conditions set out in the NSW Enterprise Agreement, nor that they were irrelevant in the Northern Territory

(ii) Commissioner Deegan was not aware of the fact that the Plaintiff was not a signatory to the NSW enterprise agreement, and was not. aware that the enterprise agreement did not cover the Plaintiff's job classification, nor that an enterprise agreement cannot be imposed on persons that have not signed or agreed to the terms of the enterprise agreement Sect 121 I.R. Act 1991 No.34 NSW

(iii) The Commissioner was not aware of the fact, that the first time Birdon Sands P/L ever made reference to an enterprise agreement was in the pleadings of

Birdon Sands Amended Defence filed 23.12.97 for the Local Court hearing.

(iv) Contrary to Mr Byrnes testimony in his evidence in chief, Commissioner Deegan was not aware of the fact that at the time the Plaintiff was employed by Birdon Sands P/L, there was an existing and applicable Federal Award operating in the Northern Territory and it was a Common Rule Declared Award, this was the Building and Construction Industry (NT) Award 1989.

(v) Commissioner was not aware of and was not informed by Mr Byrnes of the Local Court Decision 12.11.96 finding the Building and Construction Industry (NT) Award 1989 applied to the company employees claim for unpaid wages".

Negligence

[107] As to negligence the plaintiff alleges as follows:

Paragraph 11(j):

"The Defendants knew of their duty to the Court and of their duty to the Plaintiff as the other party, a duty not to cause the other party to incur undue financial loss or grievances as a direct result of the litigation".

Paragraph 17:

"At all material times, the Solicitors and Counsel had a duty to the Courts:

(a) not to improperly delay or put the plaintiff to unnecessary expense

(b) not to conduct themselves in a way that tended to defeat the course of Justice in the proceedings

(c) not to conduct the proceedings when the real purpose of the proceedings was not to the litigation of the claim

(d) to conduct the proceedings before the Courts with due propriety

(e) to be candid and honest with the Courts

(f) not to obstruct the administration of justice by the Court

(g) not to abuse or facilitate the abuse of the Court's process

(h) to act in good faith towards the Courts and the opponent an unrepresented plaintiff".

Paragraph 18:

> "The conduct of the Defendant's Solicitors was in breach of the duty set out in paragraph 17 hereof and in the items described herein."

Paragraph 19:

> "The Solicitors Mr Byrnes, Mr Sweet of Messrs Cridlands and Counsel Mr Spargo owed a duty to the Court and to all concerned.
>
> They breached their duty to the Courts and because of that breach, the Plaintiff has suffered harm and incurred financial losses".

Paragraph 20:

> "At common law the Solicitors and Counsel's standard of care constituting negligence was such that no reasonably well informed and competent member of the legal profession could have done it".

Paragraph 21:

> "By reason of the Defendants conduct, the negligence and the lack of professional competence as aforesaid, has caused the Plaintiff to have suffered loss, particulars of which will be provided prior to trial".

Trade Practices Act

[108] In paragraph 12, the plaintiff makes a general claim not directly raised or addressed during the trial:

> "Birdon Sands P/L was in breach of the **Trade Practices Act 1974 sect 53B *Misleading conduct in relation to employment***, in the employment of its employees by setting their own terms and conditions of employment and rates of pay".
>
> Under the **Trades Practices Act 1974 sect 53B,** the onus is on the employer to ensure that prospective employees are employed under the proper terms and conditions of employment and with rates of pay, as prescribed in a relevant and existing Award
>
> (i) Birdon Sands P/L failed to comply with section 53B of the Trades Practices ACT 1974
>
> (ii) Birdon Sands P/L failed to comply with the requirements for the employment of prospective employees employed in the Northern Territory, as set out in an existing and relevant Federal Award that was applicable in the Northern Territory,
>
> (iii) Contrary to the requirements of the Trades Practices Act 1974, Birdon Sands P/L did in fact set terms and conditions of employment with rates of pay to employ prospective employees in the Northern Territory, that were not in line with neither the Birdon Sands Enterprise Agreement 1993 NSW nor with an existing and relevant Award in the Northern Territory".

[109] I might add that the plaintiff called evidence from David Phillips, an employee of the first defendant during the period of the plaintiff's employment. It emerged in the course of his evidence that the plaintiff was unhappy and that in his view Phillips' evidence in the Local Court proceedings had been misunderstood by the learned magistrate and may have led him to fail to pursue a similar claim, a matter of no relevance in the current proceedings. Much of the evidence sought to be adduced

from this witness by the plaintiff was irrelevant to the present proceedings.

The Plaintiff

[110] Counsel for the second defendant very fairly observed in his submissions that it was not part of the second defendant's case to contend that the plaintiff had been deliberately dishonest. He conceded that in the circumstances it was likely that the plaintiff honestly believed in the serious allegations he made against the defendants. I agree with his submission that the plaintiff's belief that he had been done a wrong has so coloured his perception that he is prone to draw the most serious and sinister conclusions from facts which simply do not sustain them. From time to time during the plaintiff's cross–examination, as counsel submitted, the plaintiff would be taken to material which objectively demanded that one or other of his many allegations be withdrawn and yet he would decline to do so maintaining that he stood by everything that he had said. He maintained every allegation in his Statement of Claim notwithstanding the many incredible aspects of his allegations. The plaintiff's want of objectivity resulted in his intransigent and impractical position which would admit of no possibility that he was either mistaken or in error and to which he adhered despite being confronted with material which roundly contradicted him. Whilst the plaintiff honestly believes what he asserts, and I discharge him from any wilful dishonesty, nonetheless his

evidence must be regarded as unreliable. It is not to be preferred to that of either the second defendant or Mr Sweet, each of whom I acquit of any wrongdoing and find to be both honest and reliable witnesses.

The Plaintiff's claim in negligence – no duty of care

[111] Bingham LJ, as he then was, said in *Al–Kandari v J R Brown & Co* [1988] QB 665 at 675, "Ordinarily … in contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent." As Lord Hobhouse of Woodborough pointed out in *Medcalf v Mardell* [2003] 1 AC 120 at 142 the proper discharge by a barrister of his duty to his own client, will often be disadvantageous to the interests of his client's opponent. The same is true of a solicitor.

[112] So in the present case the second defendant acting for the first defendant against the plaintiff necessarily and inevitably did things disadvantageous to the plaintiff's interests. Neither the second defendant nor Mr Sweet owed any duty of care to the plaintiff in the conduct of the litigation on behalf of the first defendant against the plaintiff.

[113] The law was correctly summarised by Scott J in *Business Computers Ltd v Company Registrar* [1988] Ch 229 at 240–241 in a judgment approved in *Al-Kandari v J R Brown & Co* and by Lord Hobhouse of Woodborough in *Medcalf v Mardell*:

At 240:

> "… control of litigation and of the various steps taken in prosecuting litigation lies in the court and the rules and procedures that govern litigation and cannot be sought via a tortious duty of care imposed on one party for the benefit of the other."

And further, at 241:

> "In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort."

[114] The plaintiff's claim in negligence fails.

No Abuse of Process:

[115] Exhibit P68 is an 118 page affidavit of the second defendant comprising 504 paragraphs to which are exhibited documents comprising 709 pages. The second defendant deposed, amongst other things, as follows:

> "30. … I had a further telephone conversation with Mr Loty to the following effect:

He said: 'I've had a better look at it. I'm not aware of any other Northern Territory or Federal award which applies to dredging generally. There is a Federal dredging award, but it is not a common rule award. As we are not a respondent to it, it does not cover us. I don't think the Building and Construction Industry Northern Territory Award applies to Birdon Sands because it does not apply to dredging and further there are no classifications in it referring to dredge operators, etcetera. I think that the employees are award free. Therefore, their contract is a common law contract of employment. On what you've told me Jim has said, if they were shown or told that the New South Wales Enterprise Agreement was the basis of their employment, then the probability is that the terms and conditions of that Enterprise Agreement would be the basis of their common law contract'.

31. Mr Loty and I had a number of conversations in relation to the Welfare and Donnelly proceedings and, subsequently, proceedings brought by Mr Laferla, the plaintiff in these proceedings, wherein Mr Loty continued to express the opinion set out in the preceding paragraph. I respected Mr Loty's opinion

and relied on it throughout the conduct of the Welfare and Donnelly and, subsequently, the Laferla proceedings in relation to this aspect of various claims. I passed the substance of Mr Loty's advice onto Mr Bruce on a number of occasions and discussed it with him. I shared Mr Loty's opinion and would not have acted for the First Defendant in defence of the proceedings if I had not received Mr Loty's advice and share his opinion. As set out below, the substance of Mr Loty's opinion was confirmed by Mr Coleman and Mr Spargo, other barristers who acted for the First Defendant in proceedings brought by Messrs Welfare, Donnelly (Mr Coleman) and Laferla (Mr Spargo). If, at any time, I had held a different view, I would have provided strong advice to Mr Bruce to the effect that the First Defendant should reach an early commercial compromise on the best terms available to avoid a determination that the Award applied being recorded against the First Defendant after a contested hearing which may then set a precedent for the other employees of the First Defendant. If I ever had the view that the First Defendant did not have reasonable prospects of success or was going to lose, I would have advised the

First Defendant in writing and would have obtained a written opinion of counsel to assist in providing effective advice to the First Defendant.

…

37. At about this time, I sought and obtained Mr Bruce's instructions to retain Darwin agents to act for the First Defendant in both proceedings. I instructed Mr David Sweet, a solicitor at Cridlands Lawyers in Darwin, the Third Defendant in the present proceedings. I had not had prior dealings with Mr Sweet, Cridlands or any solicitors in Darwin. Cridlands was recommended to me by another solicitor in Darwin, who I initially approached at the recommendation of Mr Bruce. I believed and continued to believe that Cridlands was an experienced and reputable law firm. My dealings with that firm were almost exclusively with Mr Sweet. I was always very happy with my dealings with Mr Sweet who I found to be a capable and competent solicitor. He also always appeared to me to be a reasonable and sensible person.

…

63. The fact that Mr Roberts, a capable advocate on behalf of a strong union, was prepared to and did recommend substantial compromise to Messrs Welfare and Donnelly of their claims against the First Defendant provided, in my mind, some corroboration of the view or belief that the First Defendant had reasonable prospects of success in defences to the claims made by Messrs Welfare and Donnelly which were materially similar to the claim made by Mr Laferla. If anything, the claims of Messrs Welfare and Donnelly were stronger than the claim subsequently made by Mr Laferla because there was no dispute that they were 'master class 5' and drove the 'work boats'. In that regard, I refer to the evidence of Mr Laferla himself set out in the preceding paragraphs given at the hearing on 6 June 1996.

…

333. At all times during the various proceedings the subject of the current allegations by Mr Laferla, while I have not attempted to set out all my discussions with Mr Bruce in this affidavit, I sought, obtained and acted on instructions from the First Defendant in relation to every material step in the conduct of the various proceedings involving Mr Laferla. At all times, I

believed that the defence and all applications being made by the First Defendant had reasonable prospects of success on the basis of available facts and a reasonably arguable view of the law. The defence and all applications were, in my opinion, always tenable. While I have not attempted to set out all my discussions in this affidavit, I took and relied on advice from experienced counsel, Messrs Coleman, Loty and Spargo. In particular, Mr Loty and, to a lesser extent, Mr Coleman, I believed, were very experienced in industrial relations law and practiced virtually exclusively in that area. Mr Spargo was the local counsel who, I believed, was knowledgeable about and experienced in the practice and conduct of contested proceedings in the Northern Territory. In my dealings with Mr Spargo, he impressed me as a very conscientious and diligent counsel. He appeared well prepared and presented cases well in court. He produced comprehensive written submissions which, in my opinion, articulated a proper and legitimate defence of the First Defendant to the claims of Mr Laferla. In particular, Mr Spargo struck me as a real gentleman and very fair in the conduct of his practice and litigation

generally. Mr Sweet never said anything to me to doubt my own views or views of counsel. I was also mindful of and had regard to the views expressed by Ms Inta Tumols of the Department of Labour & Industry of the Northern Territory on 22 December 1995 as to the application of the Award and to the preparedness of Mr Roberts of the CFMEU to recommend substantial compromise to Messrs Welfare & Donnelly of their claims against the First Defendant.

…

354. In relation to paragraph 17 of the first statement, I agree that Mr Laferla was a witness and observer in some of Mr Welfare's proceedings against the First Defendant. I deny any motivation in my conduct or, as far as I was aware, on the part of any of the defendants was for the purpose of retaliating at Mr Welfare. I deny that Mr Laferla's relationship with Mr Welfare was the main reason that any defendant treated Mr Laferla in the way that the First Defendant actually acted in the conduct of the proceedings. However, it was obvious that Mr Welfare had a close relationship with Mr Laferla in the conduct of the proceedings brought by Mr Laferla against the First Defendants, including Mr Welfare

appearing as his agent/representative in the Local Court proceedings. I had formed the view that Mr Welfare was very difficult to deal with. I was concerned that Mr Welfare would and did influence the conduct by Mr Laferla in his own proceeding, including the rejection by Mr Laferla of any reasonable offer of settlement from the First Defendant. The behaviour of Mr Laferla in all of his matters confirmed in my view that he was behaving in a similar manner to Mr Welfare, whom I understood was studying law.

…

504. I refer to paragraph 166 of the second statement and confirm that, at all times, I honestly believed in the bona fides of the defence of the First Defendant and that I believed that there was evidence available to properly defend the proceedings according to law. At no time did I ever try to unfairly or improperly act towards Mr Laferla in respect of these proceedings or at all. I did not conspire with anyone to defeat the claim that Mr Laferla may have had against the First Defendant. At no time did I take any point or issue which I did not believe was genuinely available to the First Defendant in the proceedings. At no time did I, to my knowledge, take

> advantage of the unrepresented status of Mr Laferla and nor did I give any instructions for any person involved in the proceedings to do so. At all times, I acted in accordance with instructions given to me in relation to various issues from time to time by Mr Bruce. I always believed that the instructions given to me by Mr Bruce were properly motivated and not in an attempt by Mr Bruce to abuse the process of the court. Mr Bruce, in my experience, had a hard uncompromising attitude to industrial relations and generally. I deny each and every allegation of wrongdoing against me made by Mr Laferla in the amended statement of claim."

[116] I have carefully considered the evidence of the second defendant and closely observed him for days in the witness box whilst being examined by the plaintiff. In my judgment the second defendant was an honest witness doing the best he could in trying circumstances. Having considered all the evidence, documentary and otherwise, I find that throughout he acted in good faith in full discharge of his duty to his client. He was an experienced litigation solicitor. He took and accepted the advice of counsel. The fact that the case he was presenting to court ultimately failed on appeal is beside the point. As Brooking J said in *R v Smith* [1995] 1 VR 10 at 14; (1994) 73 A Cr R 384 at 388:

> "Process is not abused merely because it is employed without success. The very function of the courts is to hear and determine claims, sound and unsound, and to filter out those which are unsound, not (save in extreme cases, where a stay or other summary order may be appropriate) by declining to deal with them in the usual way, but by hearing and determining them."
>
> (the decision of the Victorian Supreme Court (Appeal Division)
>
> was reversed on other grounds: (1994) 181 CLR 338.)

[117] The second defendant was acting as I have said in hostile litigation instructed by a client who at times was difficult and uncompromising whilst faced with a single minded self–represented opponent who appeared to the second defendant to be both blind to common sense and deaf to advice. The defence was not "manifestly groundless", or "obviously untenable" or palpably foredoomed to failure: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129, 138; *Walton v Gardiner* (1993) 177 CLR 378 at 393. After all, the defence succeeded at trial.

[118] The second defendant was never neglectful of his duty as a legal practitioner either to his client or to the Court in his preparation and conduct of the first defendant's case against the plaintiff. In the circumstances it was appropriate and reasonable for him to rely upon the views of Loty and Coleman. The second defendant did not blindly seek to shelter behind the opinions of counsel in defending the plaintiff's claim against the first defendant. He made his own independent assessment as to whether the proceedings should be defended and concluded they should. He was neither

neglectful in his choice of counsel nor in his manner of briefing them. Compare *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, on appeal *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134; 163 ALR 744 and *Boland v Yates Property Corporation Pty Ltd* (1999)167 ALR 575, especially at 616 [142] per Kirby J.

[119] In the present case the plaintiff has failed to establish that either the second defendant or Sweet is guilty of professional misconduct or of fraud or of any of the other wrongdoing alleged by the plaintiff. Particularly is this the case bearing in mind the heavy onus of proof upon the plaintiff having regard to the seriousness of the allegations he makes: *Briginshaw v Briginshaw* (1938) 60 CLR 336. In his response to the second defendant's written submissions, the plaintiff says Mr Brereton SC, counsel for the second defendant, deliberately misrepresented matters before me. This allegation is patently unfounded and I take this opportunity to thank Mr Brereton for his assistance as counsel in what has been a drawn out matter, not without its difficulties.

[120] I accept and find that what the second defendant says in the paragraphs I have quoted above from his affidavit is true. That being so, the plaintiff's whole case against the second and third defendants fails and should be dismissed.

[121] So far as the plaintiff 's alleged cause of action in the tort of malicious or collateral abuse of process is concerned it fails. In order for the plaintiff to

succeed in this cause of action it is insufficient to show that there is an absence of belief in the truth of the defence; there must in addition be a predominant collateral purpose, that is, to achieve a purpose outside the scope of the proceedings and, it may be, an overt act pursuant to that end. Presenting a false case to sustain or defeat a claim in legal proceedings does not, without more, constitute an actionable tort: *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB 391 at 469 E–H, 470 B–C.

[122] Collateral abuse of process occurs when the process of the court is put in motion or used for a purpose which in the eye of the law it is not intended to serve: *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35; *Dowling v The Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509; *Williams v Spautz* (1992) 174 CLR 509. The essence of the tort of collateral abuse of process is that the defendant has used some aspect of the machinery of the law to achieve a purpose which was entirely outside the ambit of the legal issues upon which the court has been asked to adjudicate. The essence of the tort is the improper purpose of a party namely the institution or defence of proceedings to procure a result not within the scope of the process. The test is whether the predominant purpose was an improper one.

[123] Here the plaintiff has failed to establish any intention on the part of the second or third defendant to secure a result beyond dismissal of the plaintiff's claim. The plaintiff has failed to establish a secondary collateral purpose let alone a predominant or dominant secondary collateral purpose to that of merely defeating the plaintiff's claim. If an improper act in the

prosecution of the process is a necessary element, as was held in *Butler v Simmonds Crowley & Galvin* [2000] 2 Qd R 252, no such act has been established either.

[124] At all events, for the reasons already given, the defendants have not been shown to have put forward or maintained a defence maliciously or knowing it to be baseless and without any prospect of success.

[125] Any advantageous secondary consequences of obtaining a favourable outcome of the proceedings does not render the defence an actionable abuse of process.

[126] At all material times both the second defendant and Mr Sweet were solicitors acting for the first defendant in defending the plaintiff's claim in the Local Court proceedings the dominant purpose of which was to achieve judgment for their client. Such a purpose was entirely within the proper scope of the proceedings. Whilst it appears that the first defendant was motivated by a desire to avoid establishing a precedent for other employee claims, that was but a secondary consequence of achieving the dominant purpose of a judgment for the defendant in the plaintiff's proceedings. In short, no predominant collateral purpose was established by the plaintiff and as a matter of law the cause of action in abuse of process fails.

[127] Litigating parties are generally protected from serious misconduct by solicitors acting for their opponent by wasted cost orders within the proceedings: *Myers v Elman* [1940] AC 282, not by an action in tort.

Compare *Medcalf v Mardell* [2003] 1 AC 120, and see Evans, *The Wasted Costs Jurisdiction* (2001) 64 Mod LR 51. To permit an action in negligence or tort would inevitably and unacceptably involve relitigating the litigation, a course quite contrary to public policy: *Rondel v Worseley* [1969] 1 AC 191; *D'Orta–Ekenaike v Victoria Legal Aid* [2005] HCA 12 [45], [84]; A*l–Kandari v J R Brown & Co* [1988] 1 QB 665. Lord Donaldson of Lymington MR said in the latter case (at 672):

> "A solicitor acting for a party who is engaged in 'hostile' litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent … . This is not to say that, if the solicitor is guilty of professional misconduct and someone other than his client is damnified thereby, that person is without remedy, for the court exercises a supervisory jurisdiction over solicitors as officers of the court and, in an appropriate case, will order the solicitor to pay compensation … ." (citation omitted)

His Lordship also said:

> " … public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re–litigation of disputes … ."

Conspiracy:

[128] In so far as the plaintiff relies upon the civil tort of conspiracy that claim also fails because no unlawful means and no sole or predominant purpose of injuring the plaintiff as distinct from defending the interests of the first defendant was established against either the second defendant or Mr Sweet.

[129] The plaintiff's claim for conspiracy is an allegation against the first defendant and its solicitors. Whilst a solicitor might necessarily to some

extent appear to act in combination with his client that indeed is his duty as a solicitor and he will only be guilty of conspiracy if he does things in combination with his client over and above what his duty requires of him as his client's solicitor.

[130] As was pointed out by Street CJ with the concurrence of Gordon and Ferguson JJ in the Full Court of the Supreme Court of New South Wales in *R v Tighe and Maher* (1926) 26 SR (NSW) 94 at 108–109:

> "I think therefore that the conviction must be quashed, but before parting from that case I wish to say this. Although, in the inception of the transactions which have been under review, Tighe acted as solicitor for Martin and for his daughters, he was not their regular solicitor, and he only acted for them on one or two isolated occasions. In all, or at all events in nearly all, the transactions which have been relied upon for the purpose of proving a criminal conspiracy between him and Maher, he was acting as the solicitor of the latter. It is expected of course of every solicitor that he shall act up to proper standards of conduct, that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a Court of Justice; but, in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest, and he is not called upon to sit in judgment beforehand upon his client's conduct, nor, because he does his best for him as a solicitor within proper

limits, is he to be charged with being associated with him in any improper way. In acting for a client, a solicitor is necessarily associated with him, and is compelled to some extent to appear as if acting in combination with him. So he may be, but combination is one thing and improper combination, amounting to a conspiracy to commit a crime or a civil wrong, is another thing. An uninstructed jury may easily fail to draw the necessary distinction between such combined action as may properly and necessary be involved in the relation of solicitor and client, and such acts on the part of a solicitor, over and above what is required of him by his duty as a solicitor, as may properly give rise to an inference of an improper combination. I think, therefore, that it may be useful to point out the importance in cases where a solicitor is charged with entering into an agreement with his client which amounts to a criminal conspiracy, of seeing that the jury are properly instructed as to a solicitor's duty to his client, and that it is made plain to them that, before a solicitor can be convicted of conspiring with his client to commit a wrong, it must be proved that he did things in combination with him, *over and above what his duty as a solicitor required of him*, which lead irresistibly and conclusively to an inference of guilt." (emphasis added)

[131] The plaintiff's claim based on the tort of conspiracy also fails.

[132] For these reasons the plaintiff's action against the second and third defendants is dismissed.