
AUSTRALIA / JUDGMENT

Ittyerah v Infosys Technologies Pty Ltd [2022] NSWSC 1048

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Supreme Court

New South Wales

Medium Neutral Citation: Ittyerah v Infosys Technologies Pty Ltd [2022] NSWSC 1048

Hearing dates: 30 November; 1 December 2021

Date of orders: 5 August 2022

Decision date: 05 August 2022

Jurisdiction: Common Law

Before: Campbell J

Decision: See paragraph [114]

Catchwords: CIVIL PROCEDURE – summary disposal – dismissal of proceedings – no reasonable cause of action disclosed – where plaintiff fails to plead material facts in statement of claim – proceedings commenced against six defendants

Legislation Cited: Civil Liability Act 2002 (NSW), s 3B

Civil Procedure Act 2005 (NSW), ss 65, 91, 146

Commonwealth Constitution, s 71

Corporations Act 2001 (Cth)

Fair Work Act 2009 (Cth)

Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW)

Limitation Act 1969 (NSW), ss 50F, 52

Limitations of Actions Act 1958 (Vic), ss 5, 23, 27D

Uniform Civil Procedure Rules 2005 (NSW), rr 7.36, 13.4, 14.7

Wrongs Act 1959 (Vic)

Cases Cited: Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41

Bennett v Talacko [2017] VSCA 163

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69

Ittyerah v Coles Supermarkets Australia Pty Ltd [2019] FWC 7404

Ittyerah v Coles Supermarkets (Australia) Pty Ltd [2020] FWCFB 407

Ittyerah v Coles Supermarkets (Australia) Pty Ltd (No 2) [2021] FCA 412

Magill v Magill (2006) 226 CLR 551; [2006] HCA 51

O'Brien v Bank of Western Australia [2013] NSWCA 71

Spencer v The Commonwealth of Australia (2010) 241 CLR 118; [2010] HCA 28

Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161; [2006] HCA 19

Weston v Publishing and Broadcasting Limited [2011] NSWSC 433

Tabet v Gett (2010) 240 CLR 537; [2010] HCA 12

Category: Principal judgment

Parties: George Ittyerah (Plaintiff)

Infosys Technologies Systems (First Defendant)

Duncan Taylor (Third Defendant)

Emma Byrne (Fourth Defendant)

State of New South Wales (Fifth Defendant)

Coles Supermarkets Australia Pty Ltd (Sixth Defendant)

Representation: Counsel:

Ms C Gleeson for the First Defendant

Ms L P McFee for the Third Defendant

Ms C Coventry for the Fourth Defendant

Mr N Bentley for the Fifth Defendant

Ms V Bulut for the Sixth Defendant

Solicitors:

Bird & Bird Lawyers (First Defendant)

Barry Nilson Lawyers (Third Defendant)

DLA Piper (Fourth Defendant)

Crown Solicitors (Fifth Defendant)

Lander & Rogers (Sixth Defendant)

File Number(s): 2020/00305502

Judgment

1. By a document styled "Statement of Claim" filed on 26 October 2020, the plaintiff, Mr Ittyerah, purported to commence proceedings against, in substance, five defendants. I will identify the defendants a little later in these reasons. I say "purported to commence proceedings" because Mr Ittyerah did not seek any substantive relief against any of the named defendants in the statement of claim. Rather, he sought orders of an interlocutory type, being orders that: the Court, in the exercise of its inherent powers, direct that he be provided with legal services "on a paid basis" by an unspecified lawyer; alternatively, he be referred for pro bono assistance under r 7.36 Uniform Civil Procedure Rules 2005 (NSW) ("UCPR"); notwithstanding any deficiency in the statement of claim, proceedings be taken as having been duly commenced against each of the defendants by the filing of the statement of claim; and an order that the defendants defer filing a defence until otherwise directed by the Court. The purpose of this last order seems to have been to avoid the raising of any limitation defence or other bar to the proceedings of a technical type before his claims were properly pleaded.
2. The purported Statement of Claim does not plead any of the material facts upon which Mr Ittyerah relies against any named defendant, contrary to r 14.7 UCPR. Rather, it sets out in ten paragraphs the difficulties that he says he has experienced in obtaining legal representation. Although he qualified as a lawyer in his homeland of the Republic of India, was admitted to practice in the State of Karnataka and has apparently completed the educational requirements prescribed by the Legal Practitioners Admission Board ("LPAB") for his admission to practice here, he asserts that he "does not have adequate legal skill and experience to manage these legal proceedings by himself" and being required to do so would cause him "significant emotional distress" (SOC [8]).
3. Mr Ittyerah has attempted to outline at least some of the material facts he relies on in his affidavit affirmed on 23 October 2020, which he has styled his "initiating affidavit". He states, however, this is not intended to contain pleadings or particulars of his claims (Affidavit [6]). The initiating affidavit runs to some 39 pages, and I do not propose to summarise it as Mr Ittyerah has propounded another document in the nature of draft proposed pleadings, which is somewhat different, in circumstances I will set out below.

4. Suffice it to say that the first defendant is Infosys Technologies Limited ("Infosys"), a technology or information technology company with which he commenced employment in India in about 2005 in its legal department. At his request he was transferred to the Australian office, again in the legal department. He alleges workplace bullying from about the middle of 2011. After further bullying he made a formal complaint in about March 2014, which made matters worse. The outcome of his complaint was in substance adverse to him and as a result of the bullying he developed a psychiatric condition. His Australian assignment was terminated with effect from 26 October 2014. He was directed to return to head office in India, which he was unwilling to do.
5. The second defendant is the now deregistered former wholly owned Australian subsidiary of the first defendant. Understandably, it has not purported to appear, nor has Mr Ittyerah purported to take further steps against it. Bearing in mind the statutory stay of proceedings arising under the Corporations Act 2001 (Cth), Mr Ittyerah is content that proceedings against it be dismissed as it is "frankly no longer relevant" (20.9T).
6. The third defendant, Dr Duncan Taylor, is a legally qualified specialist psychiatrist practising in Victoria. Mr Ittyerah sought medical treatment for the psychological difficulties he had experienced at Infosys and was referred to Dr Taylor whom he saw on three occasions in February and March 2015. Dr Taylor apparently diagnosed Mr Ittyerah as suffering from an adjustment disorder. Mr Ittyerah did not accept the validity of the diagnosis because he understood that by definition it was a temporary condition not exceeding six months duration. He did not continue to seek treatment from Dr Taylor after 11 March 2015.
7. After the discontinuance of treatment, Mr Ittyerah obtained a letter from Dr Taylor certifying him fit to be registered as a student-at-law for LPAB requirements and again on 22 July 2016 certifying him as fit to serve in the Australian Defence Force Reserve. He seems to have formed the view that Dr Taylor was in cahoots with Infosys and providing deliberately false information to injure his interests and assist Infosys in any claim for compensation or damages that Mr Ittyerah may bring. There are other more detailed assertions made.
8. The fourth defendant is Emma Byrne, a registered psychologist. Mr Ittyerah consulted her for treatment on referral from a GP after he had moved to Sydney to take up his additional legal studies. Given his experience with Dr Taylor, he adopted what he described as a random process of selecting medical providers and by this means was ultimately referred to Ms Byrne, whom he consulted once only on 27 May 2017. Because of what he regarded as his experience with Dr Taylor he requested a copy of Ms Byrne's clinical notes after the consultation, which Ms Byrne agreed to, providing them on 31 May 2017. When Mr Ittyerah read them, he "realised they contained significant errors" (Affidavit [82]). He formed the belief that Ms Byrne had falsified the records for the purpose of downplaying: the significance of his complaints; the circumstances of the termination of his employment with Infosys; his belief that Dr Taylor had falsified records; and the severity of his symptoms. He did not consult Ms Byrne again. However, through his own enquiries, he ascertained that Ms Byrne was a full-time employee of the New South Wales government who was exercising a

right of private practice on weekends. He came to the conclusion that Ms Byrne was working in cahoots with New South Wales Police against his interests and in the interests of Infosys, who had "an ongoing and high-profile relationship with the New South Wales government" (Affidavit [85]).

9. The fifth defendant is the State of New South Wales ("the State"). Mr Ittyerah seeks to sue the State basically as vicariously liable for the alleged torts of Ms Byrne.
10. The sixth defendant is Coles Supermarket (Australia) Pty Ltd ("Coles"). Mr Ittyerah commenced work for Coles at Wynyard in 2015 after he had moved to New South Wales. He believed that Coles had "unlawfully disclosed" his work location and that persons were approaching him on behalf of Infosys threatening and intimidating him. These circumstances made his psychological condition worse. He says that Coles deliberately set about increasing the anxiety he was suffering and forced him to undergo a psychiatric assessment on their terms rather than his. He alleges that Coles breached the terms of the Fair Work Act 2009 (Cth) between November 2015 and November 2018 and from the latter date embarked upon "a deceitful course of action to target [the] security of (his) employment" (Affidavit [94]). He "realised" that Coles were acting in this way to bring about the termination of his employment. He believed that he was being unfairly targeted by Coles. Their conduct towards him interfered with his studies and made his psychological condition worse.

Other relevant procedural matters

1. On 17 February 2021, Button J made an order under r 7.36 UCPR referring Mr Ittyerah to the Registrar for referral for pro bono assistance "limited ... to advice about his claims, and the drafting of proceedings if appropriate". Mr Ittyerah apparently had the benefit of written advice from a member of the Bar, with which he did not agree, as he has made quite clear. On 4 May 2021 by email Mr Ittyerah informed the Registrar and through her the solicitors for the defendant who had been copied into the email that he believed he should progress his claim even though the manager of the Legal Assistance Referral Scheme conducted by the New South Wales Bar Association had "indicated that [the Bar] is ceasing involvement with the matter". However, no proper pleading was forthcoming. Mr Ittyerah was aware that the defendants proposed to apply to summarily dismiss the proceedings against each of them. It was his position that he wished to have his claim to an entitlement to the provision of legal representation for the conduct of civil proceedings determined before the resolution of any application for summary dismissal.
2. Each active defendant filed a motion seeking summary dismissal: the first defendant on 7 June 2021; the third defendant on 8 June 2021; the fourth defendant on 2 June 2021; the fifth defendant on 8 June 2021; and the sixth defendant on 8 June 2021.

3. Mr Ittyerah filed and served various motions seeking various iterations of the only relief sought in the Statement of Claim. None of those motions are pressed and in particular a Notice of Motion filed on 8 June 2021 claiming an implied constitutional right "to invoke the exercise of judicial powers" with legal assistance arising out of s 71 of the Constitution is not pressed. The motions for summary dismissal were listed for hearing before me on 30 November and 1 December 2021, however, on 21 November 2021, Mr Ittyerah filed a motion seeking leave to amend the Statement of Claim to incorporate proposed amended pleadings against each of the active defendants and a further referral for pro bono assistance under r 7.36(1) UCPR. Other related relief was sought. The proposed amended pleading runs to 61 pages. It was drafted by Mr Ittyerah without legal assistance. While it is not as complete in all respects as Mr Ittyerah would wish it (see for example p. 9 [48]), it is certainly comprehensible and, so far as it is complete, comprehensive. Whether it is liable to be dismissed or struck out is another matter.
4. When the matter came on for hearing, it was agreed amongst the parties that logically, although filed last, I should consider Mr Ittyerah's motion of 21 November first, as the resolution of it may render the hearing of the various motions for summary dismissal otiose. Having said that, it seemed to me when considering the matter further in chambers that I should first consider the application for a further referral under r 7.36 and if that relief were refused, I should then consider Mr Ittyerah's proposed amended pleading in the context of the summary dismissal applications. As Macfarlan JA pointed out in *O'Brien v Bank of Western Australia Ltd* [2013] NSWCA 71 (at [3]), "On a summary judgment application, the real issue is whether there is an underlying cause of action or defence, not simply whether one is pleaded".

Consideration of a further referral

1. I am prepared to accept from the extensive evidence that Mr Ittyerah has filed in this regard that he has tried hard to obtain legal representation over a period of 2 or 3 years prior to purporting to commence these proceedings. It also appears that he has been unable to persuade any of the lawyers approached to give any proper consideration to the case he wishes to make and whether instructions should be accepted. The situation appears to be that when he has outlined in the most general terms the nature of his proposed case, representation has been refused. Sometimes this has been because the scope of the work was outside the usual run of the solicitor's practice. At other times, Mr Ittyerah's own standards have limited his choices.
2. So far as the referral for pro bono assistance by Button J is concerned, Mr Ittyerah asserted that the advice he received "was of extremely poor quality" (15.12T). He considered that the barrister had misapprehended the nature of the case he proposed, at least in some respects. For example, the barrister was under the impression that Mr Ittyerah wished to claim for a psychiatric injury against the sixth defendant when Mr Ittyerah said that the psychiatric injury occurred at the "workplace of the first defendant" (15.25T). Paradoxically, he told me

that he was not claiming personal injury damages from the first defendant (18.5T). He argued that the curse of being a lawyer is that you understand when another lawyer is making a very clear error (15.33T).

3. He was not afforded the benefit of a conference with the barrister. He set out his complaints about the quality of the advice in his affidavit affirmed on 5 June 2021 (Court Book ("CB") Tab 18). The brief excerpt from the barrister's written advice annexed to that affidavit is entirely insufficient for me to gauge in any way the level of competence with which the advice was rendered. It is certainly entirely impossible for me to conclude as Mr Ittyerah contends that the advice was incompetent.
4. The Court's power to refer a litigant for pro bono assistance is conferred by r 7.36 UCPR. Relevant considerations are to be found in r 7.36(2), some of which would favour a referral for assistance in a very large number of cases. However, the most significant consideration in the present case is to be found in r 7.36(2A), which applies directly to Mr Ittyerah. The sub-rule is in the following terms:

The court may not refer a litigant for assistance under this rule if the litigant has obtained assistance under a previous referral at any time during the immediately preceding period of 3 years unless the court is satisfied that there are special reasons that justify a further referral.

The primary purposes of this sub-rule are to protect scant pro bono resources from being overtaxed and to discourage litigants from shopping around for the advice they find the most commodious.

1. The only matter Mr Ittyerah pointed to which may possibly have constituted special reasons was the criticism he made of the proficiency or competence of the advice he received under Button J's referral. I must say, however, I am far from persuaded that the advice fell below the standard of advice to be expected from a practising barrister of reasonable skill and competence. It was quite apparent that a nine page written advice was provided by the barrister of which Mr Ittyerah chose to publish an excerpt of five paragraphs found on two pages dealing with the proposed claim against the sixth defendant only. Despite the criticisms Mr Ittyerah made of it, there's nothing on the face of that excerpt which of itself raises a serious concern about whether the advice Mr Ittyerah previously received was appropriate advice from a competent practitioner, even if some facts may have been misapprehended. I am not satisfied that Mr Ittyerah has established special reasons that justify a further referral.
2. Although Mr Ittyerah vehemently rejects any suggestion that as he is a foreign trained lawyer with actual experience in practice albeit in a corporate environment he is therefore in a superior position to other self-represented litigants (72.6 - .25T), the fact remains that he was admitted to legal practice in India nearly 20 years ago, worked in a legal capacity in-house for a multi-national Indian company and has completed the additional academic requirements of the LPAB for admission as a lawyer in this State. Moreover, as I have said, his written work, so far as it goes, is of a reasonable standard: clear, intelligible and

relevantly comprehensive. Whether it adequately articulates the claims he wishes to propound is another matter which will be considered below. He also presented the oral argument in the case without obvious difficulty. If occasionally he tended to repetition, he accepted judicial correction in that regard and moved on to his next point.

3. Moreover, I formed the very strong impression that Mr Ittyerah had his own ideas about his case and his entitlements. One, of course, must bear in mind the aphorism about a lawyer who acts for himself. However, it was clear that Mr Ittyerah had his own views and was not really interested in obtaining contrary advice from another lawyer. In his affidavit of 11 February 2021 he said (at [4]):

"I may not need complete representation, since I am able to complete certain legal tasks on my own. I am also able to represent myself to some extent. My preference is to receive legal services from a skilled legal professional who can provide assistance and supervision to address gaps in my legal capabilities. I would prefer to retain control over the conduct of this matter, since it appears to me that certain wrongful conduct by medical professionals has been normalised to avoid personal injury and workers' compensation liability and that the legal profession is unwilling to provide legal assistance to claims pertaining to such conduct".

I reiterate that Mr Ittyerah has not articulated a claim for workers' compensation (which he could not in this Court), or personal injury damages (the latter is not entirely clear) against any of the defendants. Neither is his perception about the willingness of the legal profession to act in such matters consistent with Court's conduct. His real objective in seeking another referral was to obtain assistance with the completion of the draft of his amended pleadings. I do not regard it as a proper function of a favourable exercise of the power of pro bono referral that a barrister or solicitor prepared to give freely of his or her time in furtherance of the scheme should be reduced to the status of the "advocate's devil" of the self-litigant. I refuse Mr Ittyerah's application for further reference for pro bono assistance.

The claims for summary dismissal

1. I should say at this stage that in the form in which it is filed, the Statement of Claim, without question, is liable to be summarily dismissed, or struck out, as it does not plead the material facts necessary to establish any cause of action against any defendant. I am not of the view that the "initiating affidavit" is capable of curing, or cures, this defect. The form of the Statement of Claim is more than merely irregular. It is wholly defective and to that extent, in my judgment, the proceedings are an abuse of the process of the Court: r 13.4(1)(c) UCPR. However that may be, it is certainly the case that "no reasonable cause of action is disclosed": r 13.4(1)(b); none is pleaded against any defendant. I would have summarily dismissed the proceedings on the application of each defendant.
2. But it is now necessary to consider the applications for summary dismissal made by each defendant in the light of the late proposed amendments propounded by Mr Ittyerah in his document of 21 November 2021. I need to emphasise that this document puts some of the

claims made differently from the impression I formed from reading the initiating affidavit as I have outlined (at [3]-[10] above). Where there are inconsistencies in the formulation of the proposed claims, the later document and Mr Ittyerah's explanation of his case in oral argument will prevail for present purposes.

Principles informing the exercise of the power to summarily dismiss proceedings

1. The principles governing the exercise of the Court's power of summary disposal are clearly established, well-known and require no detailed exposition by me. The Court's power turns upon the existence of a high degree of predictability of the outcome of the case. The power is to be exercised cautiously and with restraint. Any uncertainty about the possible outcome tells in Mr Ittyerah's favour and requires me to permit the case to proceed to hearing and judgment in the normal way. As I have said already, the question is not whether an arguable case has been pleaded; it is whether such a case on the materials available to the Court appears pleadable.
2. In *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41 Gaudron, McHugh, Gummow and Hayne JJ said at [57]:

"It is, of course, well accepted that a court whose jurisdiction is regularly invoked in respect of a local defendant (most often by service of process on that defendant within the geographic limitations of the court's jurisdiction) should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

1. In *Spencer v The Commonwealth of Australia* (2010) 241 CLR 118; [2010] HCA 28 Hayne, Crennan, Kiefel and Bell JJ pointed out (at [54]) that the test requires "certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success". In the oft-cited case of *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69, Barwick CJ (at 130) pointed out that the various formulations in which the test has been cast in various cases amounted to a requirement that the defendant must demonstrate "that the case of the plaintiff is so clearly untenable that it cannot possibly succeed".

The case against the first defendant

1. Mr Ittyerah's claim against the first defendant covers some 12 pages of his proposed pleading (CB pp. 564 – 567). The pleading is in three parts. The first part is concerned with a claim for damages for breach of his contract of employment with the first defendant. The second part concerns a claim for declaratory relief concerning a particular episode in his employment

with the first defendant. The third part involves what might be described as a pre-emptive attempt to plead facts demonstrating that there has been a suspension of the limitation period by operation of s 50F(1) Limitation Act 1969 (NSW) ("NSW Limitation Act"). The period of suspension pleaded runs from 2 November 2018 until 23 July 2019 and is relevant to events which occurred during Mr Ittyerah's employment with the sixth defendant, which at least substantially impeded him in the management of his affairs "by a reason of a disease or impairment of [his] mental condition".

2. On my reading, it is tolerably clear from the proposed pleading Mr Ittyerah is claiming damages for breach of a deputation agreement dated 23 March 2012 governing his assignment to work for the first defendant in its Australian branch office. The first part of Mr Ittyerah's case is that the first defendant breached the deputation agreement by terminating his deputation with effect from 26 October 2017. It is averred by Mr Ittyerah that this was effected by letter dated 26 September 2014. The first defendant gave notice that his deputation to work in its Australian branch would be terminated "with effect from 26 October 2014" and requiring him to return to head office in India to resume his employment there. In substance, Mr Ittyerah avers that the termination letter was a repudiation of the deputation agreement which he elected to accept and to sue for damages. It is apparent from the pleading that he anticipates a dispute about whether an email from him on 24 October 2014 constituted that election or was in effect his resignation of his employment as the first defendant contended at the time.
3. It is important to state that it is evident that this part of Mr Ittyerah's case is substantially based upon what he regards as implied terms of the deputation agreement. These implied terms include an implied term in a deputation extension time agreement of 5 May 2014 that the first defendant would not terminate the deputation and require the plaintiff to return to India within 2 years of the grant of an Employer Nomination Permanent Residency Visa, which he had been awarded on the sponsorship of the first defendant in place of his Temporary Worker 457 Visa. The proposed pleading avers that the new visa was awarded on 24 October 2013. Mr Ittyerah accepted that his entitlement to damages in respect of that alleged breach would be limited to about 12 months' salary (17.45T). I interpolate that this would be an amount clearly within the jurisdiction of the District Court of New South Wales.
4. He also relies upon an implied term that the first defendant would act towards him in good faith or, at least, the first defendant would not act in bad faith. He accepts this is a controversial claim.
5. The second aspect of his proposed pleading, the claim for declaratory relief, relates to events which occurred in or about June 2014 when the plaintiff disputed the propriety of a direction from executives within the Australian branch office that he involve the "regional head" of the Australian and New Zealand branches and another lawyer in negotiations he was then engaged in on behalf of his employer. It is apparent from the proposed pleading that Mr Ittyerah was strident in his refusal to accept any direction that those other persons be involved in his work unless it emanated directly from his superiors in the legal branch.

He avers that his non-legal superiors formed the view that his refusal to accept their direction in relation to the matter was misconduct (CB p. 571 [57]). He was warned that his conduct was not acceptable and "any further misconduct issues might" be dealt with in accordance with the first defendant's disciplinary procedures. Mr Ittyerah continued to remonstrate that he had at all times acted in accordance with the first defendant's code of conduct.

6. Mr Ittyerah seeks a declaration that his conduct concerning the matter was not "misconduct". It is apparent from his proposed pleading (at CB p. 572 [63]) he is concerned that an allegation of "misconduct" in carrying out his duties as an employed lawyer may affect his fitness for admission to the legal profession in New South Wales. He had an exchange of emails about this matter with officers of the first defendant on 7 March 2015 after he had left the first defendant's employ. There is no suggestion that Mr Ittyerah has not disclosed the matter to the LPAB if he believed it could possibly affect his fitness for admission to practice or that the LPAB has taken the view that the circumstances of the workplace dispute is a matter affecting his fame or character. It is hard to believe on the basis of the material contained in the pleading that such a conclusion would be open. Moreover, the LPAB has not been made a party to the proceedings and strictly would not be bound by any such declaration even if it was likely to treat a finding of this Court in that regard with respect and by affording it due persuasion.
7. The third part of the proposed pleading relates to the operation of the NSW Limitation Act. Mr Ittyerah filed the document styled "Statement of Claim" on 26 October 2020, that is just within six years of the termination of his employment with the first defendant. However, he is obviously concerned about the potential for the first defendant to raise the statutory bar and has sought to act pre-emptively. This is inappropriate, in my view. Unless and until the first defendant is required to plead and raises the statutory bar in its defence there is no place for pre-emptive pleading of a matter which may be available in reply. In any event it is difficult to see how the pleaded suspension could assist, being limited to a period of 8 months and 22 days. It is important to bear in mind that the proposed pleading has not been filed. Rather it is propounded as a series of annexures to the Notice of Motion filed on 21 November 2021. There is a more fundamental problem in any event with that third part and that is, for reasons I will explain, it is beyond argument that the relevant Limitation Act is the Limitations of Actions Act 1958 (Vic) ("Victorian Act").
8. The proposed pleading refers in passing only to aspects of workplace bullying that Mr Ittyerah alleges he was subject to during the later period of his employment with the first defendant. It provides at best additional context to the circumstances in which Mr Ittyerah's employment came to an end but adds nothing to the material facts upon which he relies. No claim for damages is made in respect of the "bullying" matter. In this regard the proposed pleading is quite different from what is outlined in the initiating affidavit (see [5] above). The "bullying" averments are to that extent otiose and therefore "scandalous" in the pleading sense.

9. Ms C Gleeson of Counsel who appeared for the first defendant relied upon her detailed written submissions, which she addressed orally. With respect I do not propose to summarise the whole argument in detail. Counsel addressed the following matters: first, "the causes of action articulated in the proposed pleadings are at worst untenable and at best vexatious and oppressive" (35.14T); secondly, the action for breach of contract is time barred; and thirdly, case management considerations tell against the granting of leave to file the proposed pleading as an amended Statement of Claim against the first defendant. Under the rubric of case management considerations, Ms Gleeson laid emphasis upon s 65 Civil Procedure Act 2005 (NSW) ("CPA") which is also relevant to her second point.

Determination

1. I am of the view that each part of Mr Ittyerah's substantive claim against the first defendant "is so clearly untenable that it cannot possibly succeed". Dealing with the first part of Mr Ittyerah's claim, it is evident from his proposed pleading that his case is that there are three relevant written agreements. The first is his "Indian Employment Agreement" dated 11 April 2005 (CB p. 564 [4]), the second is the "Deputation Agreement" dated 23 March 2012 (CB p. 564 [7]). And the third is "The Deputation Extension Agreement" dated 5 May 2014 (CB p. 567 [37]). The general employment agreement of 2005 is not central to his claims and may be put to one side, but the deputation agreement of 2012 and the extension agreement of 2014, according to Mr Ittyerah's proposed pleading contain express terms inconsistent with the implied terms he wishes to establish to make good his claim for damages for breach of contract. The law in relation to the implication of terms in a written contract has been authoritatively stated for the common law of Australia by the opinion of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283. The principle is or principles are:

"For a term to be implied. The following conditions (which may overlap) must be satisfied:

- (1) It must be reasonable and equitable;
 - (2) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
 - (3) It must be so obvious that "it goes without saying";
 - (4) It must be capable of clear expression;
 - (5) It must not contradict any express term of the contract."
1. Focusing on the fifth principle for present purposes, the deputation agreement contained a number of express terms as set out in Mr Ittyerah's proposed pleading. It needs to be borne in mind that the agreement is a contract of service between the first defendant, as employer, and Mr Ittyerah as employee. Clause 1 of the deputation agreement provided,

"On the expiry of this deputation or the termination of the deputation, whichever is earlier, you shall revert to the company's office located at Bangalore as its full time employee with no obligation to the Australian Branch."

1. Clause 2 provided,

"Company reserves the right to vary the duration of your deputation according to its business needs, at its absolute discretion".

1. Clause 16(a) of the deputation agreement reserved to the first defendant the right to terminate the agreement at any time on 2 weeks' notice at its sole discretion "or on the advice of the Australian branch office"; and clause 22 provided that the deputation agreement constituted the entire agreement between the first defendant and Mr Ittyerah regarding the terms of his deputation. Other representations are excluded.
2. The deputation extension agreement of 5 May 2014, clause 1 extended Mr Ittyerah's deputation until 14 May 2015, although the first defendant expressly reserved "the right to call for your return to your base location at any point during your assignment". It should be said that in accepting these terms, Mr Ittyerah avers (CB pp. 567 - 8 [37]) that he reserved "all legal rights including in relation to employment status due to employer sponsored permanent residency".
3. Mr Ittyerah also avers (CB p. 567 [36]) that prior to him signing the deputation extension agreement in May 2014 he had a discussion with an executive in the human resources department who explained that he would be given one month notice before returning to India. Mr Ittyerah states that he asserted his assignment (or deputation) should not be terminated prior to the expiration of 2 years from the date of the grant of his permanent residency visa i.e. from 24 October 2013.
4. Neither the conversation with the HR executive on 8 April 2014 nor Mr Ittyerah's express reservation of rights when he accepted the offer contained in the deputation extension agreement are in my opinion capable of effecting a variation to that agreement. Viewed objectively there is nothing to suggest that the HR executive, or anyone else on behalf of the first defendant accepted the plaintiff's assertion about when his deputation might be terminated or his reservation of rights. These were simply statements of his subjective position, which were not accepted by the first defendant and had no contractual effect. That is to say, Mr Ittyerah's claim that they had contractual effect, if that is the effect of his averments, is untenable.
5. Nor can it be said that the implication of a term to the effect contended for by Mr Ittyerah meets the BP Refinery criteria for the implication of a term to that effect in his contract of service. As I have said, it is sufficient to focus on principle 5 and such a term would contradict the express terms of the deputation agreement and the deputation extension agreement.

6. An implied term of good faith may be in a somewhat different category as an incident of a contract of service. Even if only to the extent that such an implied term would exclude a party to the contract from acting in bad faith. It is notable, however, that Mr Ittyerah makes no express claim of bad faith, or unconscionability. As I have said, his bullying allegations, which were being dealt with inhouse by the first defendant, are proffered, at the highest, as context but even the averment that he received the deputation termination letter on the day that he was seeking to escalate his complaints to the first defendants audit committee (CB p. 568 [40] – [41]) does not of itself give rise to a necessary implication of bad faith. It is notable that Mr Ittyerah had been informed of the adverse outcome of his complaint on 2 June 2014 nearly 4 months before he took steps to escalate the matter. Moreover, a serious allegation like one of bad faith needs to be expressly pleaded which it is not. An allegation of breach of an implied term of good faith is untenable on the proposed pleading.
7. These conclusions are sufficient to justify summary dismissal even on the assumption that the averments contained in the proposed pleading can be made good at the hearing. Despite his reservation of other legal matters (at CB p. 569 [48]) there is no reason supporting a decision that with further time, Mr Ittyerah could bring forward a formulation of a case which overcame the difficulties which I have identified.
8. Turning then to the second part of Mr Ittyerah's case. From the proposed pleading (CB p. 572 [65]), he seeks a declaration that his conduct on 16 June 2014 did not amount to misconduct. It will be recalled that on 16 June 2014, the regional head of the first defendant for Australia and New Zealand sought to become involved in negotiations for an important contract and to co-opt another lawyer from the legal department, not to the exclusion of Mr Ittyerah, in the process. While an allegation of an employee failing to follow "a reasonable or lawful direction" may in the context of a contract of service amount to misconduct in truth on his averments, Mr Ittyerah was not accused of misconduct; I might add, let alone serious and wilful misconduct which of itself may have constituted a repudiation of his contract of service. Mr Ittyerah has set out the terms of a warning he received following the incident and is said to be in the following terms (CB p. 571 [57]):

"You have a common law obligation to comply with all lawful and reasonable directions. Failure to comply with lawful and reasonable directions can and has caused enormous operational concerns given that [the clients] require the differences regarding the contract to be resolved urgently. Your assertion that [the regional head] was required to first seek your consent to involve another lawyer is unacceptable ... you are hereby warned that your conduct is not acceptable and must not be repeated. Any further misconduct issues might, depending upon the circumstances, be dealt with in accordance with the company's disciplinary procedures".

It is notable from his proposed pleading, Mr Ittyerah did not accept this correction. Further communication resulted in the establishment of a mechanism for resolving disagreements about who had the obligation to control client negotiations (CB p. 571 [59] – [60]).

1. It must be said that the email does not involve any assertion of misconduct on Mr Ittyerah's part, as opposed to unacceptable conduct. The reference to "further misconduct issues" does not of itself imply that his unacceptable conduct was regarded as misconduct by the first defendant. Moreover, at its highest, the letter contained a "warning", it did not amount in any way to "disciplinary action".
2. I accept that the jurisdiction in the Court to grant declaratory relief is broad and may apply to declarations made in relation to the obligations and rights of parties to a contract. But all that is sought here is, effectively, a finding of fact that is in truth moot. There is no averment that any disciplinary action was taken against Mr Ittyerah; neither his deputation nor his general employment was terminated on the basis of any alleged misconduct occurring on 16 June 2014; and that matter is entirely devoid of any legal consequences affecting either Mr Ittyerah or the first defendant.
3. So far as Mr Ittyerah is concerned about how the matter of a warning about unacceptable conduct in an employment setting may affect his fitness for admission to legal practice in New South Wales, I accept the submission of Ms Gleeson (45.5T):

"[the matter complained of] doesn't come anywhere near the kind of matter that would cause the designated regulator or, indeed, this Court, should the matter ever be escalated to this Court in a dispute about admission, to conclude that Mr Ittyerah is not a fit and proper person. It does not go to his honesty, it does not go to his candour, it does not go to any behaviour that might be considered to be disgraceful in the eyes of the public; it doesn't go to any of the matters that are generally recognised as standing in the way of fitness and propriety for the purposes of the Legal Profession Uniform Law."

1. I have also had regard to the authorities that Ms Gleeson has set out at paragraph 34 of her written submissions (CB pp. 672 – 3) and I am of the view that the application for declaratory relief is doomed to fail. I also accept that it would be vexatious within the meaning of the rules to require the first defendant to defend the claim about a single incident that occurred 7 years ago which is noyt said to have any legal consequences for it. As I have said, I regard the question as entirely moot, not requiring the exercise of judicial power to quell any actual controversy between Mr Ittyerah and the first defendant.
2. I have not gone through the exercise of setting out the relevant passages from the authorities that Ms Gleeson has referred to. I am conscious, as I have said, of the caution and restraint that a court must exercise before summarily dismissing a case. It seems obvious on the face of the claim that the relief sought must be refused.
3. In the extremely unlikely event that the matter becomes an issue when Mr Ittyerah applies for admission, he can doubtless undertake to establish to the satisfaction of the LPAB that he was within his rights in refusing the direction, or alternatively, that any unacceptable conduct in that employment context does not reflect upon his fitness for admission.

4. I am also of the view that the claim for damages for breach of Mr Ittyerah's employment contract with the first defendant is out of time and cannot be cured by reference to the power contained in s 65 CPA. The first question is the identification of the applicable law. According to the proposed pleading (CB p. 565 [11]), clause 21 of the deputation agreement of 2012 provides that disputes relating to or arising out of Mr Ittyerah's employment relationship with the first defendant while on deputation in Australia "shall be governed by the laws of Australia". It is also clear that while on deputation, Mr Ittyerah lived in the State of Victoria. The first defendant's office where Mr Ittyerah worked was in Victoria. The Victorian office was the head office of the Australian and New Zealand branch and senior management of the branch was located there. While Mr Ittyerah's work had an interstate and trans-Tasman component, for all employment purposes he was based in Victoria even if I assume he may have had to travel interstate or to New Zealand in the performance of his work. Quite apart from the express terms of cl 21 of the Deputation Agreement, all other relevant factors point to the law of Victoria being the proper or governing law of the Deputation Agreement. This being so, the relevant statute of the limitation is the Victorian Act. Bearing in mind that there is no claim for damages for personal injury proposed or propounded, under s 5 of the Victorian Act "actions founded on simple contract" "shall not be brought after the expiration of six years from the date from which the cause of action accrued". The effect of this is that Mr Ittyerah's action for breach of contract is required by law to be commenced no later than 26 October 2020. Indeed, as notice of the termination of his deputation was given by letter dated 26 September 2014, arguably proceedings should have been commenced by 26 September 2020. I am prepared to proceed on the basis that his cause of action accrued on his last day of work in the Australian branch, bearing in mind that he was not prepared to return to the Indian office at that time.
5. The difficulty for Mr Ittyerah is that, as I have said, (see [23] above), the Statement of Claim filed on 26 October 2020 did not plead any cause of action against the first defendant whether in contract or otherwise. The bare purported commencement of proceedings, not seeking any relief by way of damages for breach of contract on the basis of material facts pleaded does not constitute the bringing of an action on a cause of action founded on simple contract within the meaning of s 5 of the Victorian Act.
6. I accept that the power to amend conferred by s 64 CPA is broad. However, the general rule is that an amendment raising for the first time a new cause of action operates from the date on which the amendment was made, it is not referred back to the date of the commencement of the proceedings. Obviously the Court would not exercise its discretion to grant leave to raise the cause of action for the first time in those circumstances where inevitably the amendment would be met by a defence pleading the statutory bar created by s 5 of the Victorian Act.
7. Section 65 CPA has some possible application if one is to treat the proceedings commenced by filing the Statement of Claim, contrary to my opinion, as effective. On that basis the proceedings would be taken to have commenced before the expiration of the limitation

period prescribed by s 5 of the Victorian Act, provided the amendment is one to which the provisions of s 65(2) apply. If it is, subject to a contrary order s 65(3) would have the effect that the amendment is referred back to 26 October 2020. The only possible application of s 65(2) to the present case is s 65(2)(c), which is in the following terms:

[with leave a party may amend the originating process] to add or substitute a new cause of action, together with a claim for relief on the new cause of action, being a new cause of action that, in the Court's opinion, arises from the same (or substantially the same) facts as those giving rise to an existing cause of action and claim for relief set out in the originating process. (My emphasis)

As there was no "existing cause of action and claim for relief set out in the originating process", Mr Ittyerah cannot satisfy the statutory condition upon which a beneficial order under s 65 depends. Were I not of the view that his claims for substantive relief were untenable, I would nonetheless exercise my discretion to refuse his application to amend in accordance with his proposed pleading as such an order would be of no practical utility.

1. I should add that under the Victorian Act, Mr Ittyerah's alleged limited disability affecting him during the period of his employment with the sixth defendant would not provide any answer to a pleaded limitation defence relying upon s 5 of the Victorian Act. Section 23(1) of the Victorian Act is in the following terms:

If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued is under a disability, the action may be brought at any time before the expiration of 6 years, or in the cause of any action for which a less number of years is prescribed by this Act ... as the period of limitation then such less number of years, from the date when the person ceased to be under a disability or died whichever event first occurred notwithstanding that the period of limitation has expired. (My emphasis.)

Mr Ittyerah makes no allegation that he was under any disability when his right of action accrued to sue the first defendant for breach of contract. Accordingly, were I to allow him to amend, had I that power, it would still be of little practical utility as he would be unable to overcome a defence based upon the Victorian Act.

1. I acknowledge that the claim for declaratory relief is not caught by s 5, nonetheless the long effluxion of time giving rise to a serious question about laches as a discretionary reason to refuse declaratory relief may be a powerful discretionary factor indicating that leave to amend should be denied.
2. In due course I will make orders refusing Mr Ittyerah's application for leave to amend and summarily dismissing the proceedings against the first defendant.

The claim against the third defendant

1. The claim against the third defendant is set out in Annexure B to Mr Ittyerah's Notice of Motion filed on 21 November 2021, it covers some 9 pages (CB pp. 577 – 586). From paragraphs 48 to 55 (CB pp. 584 – 586), Mr Ittyerah set outs that he claims "compensatory

damages, aggravated damages and exemplary damages". Frankly, it is impossible to distil from his proposed pleading whether the plaintiff is making a claim for damages for personal injury or not in the form of mental harm or a recognised psychiatric condition. The plaintiff refers to "ongoing pain, distress and loss of enjoyment of life". He also seems to blame the third defendant for causing or contributing to the termination of his employment with the sixth defendant. He makes reference to "aggravation of his psychiatric injury" but does not clearly plead the nature of any psychiatric injury that he attributes to the tort of the third defendant, bearing in mind he eschews any reliance upon personal or psychiatric injury against the first defendant. To state what must be obvious, the third defendant is a legally qualified psychiatrist. Presumably the plaintiff consulted him due to troubling symptoms, at least, from which he was already suffering.

2. During oral argument, Mr Ittyerah had considerable difficulty articulating the nature of the loss he suffered for which he wished to hold Dr Taylor legally responsible. As he had posited in his "initiating affidavit", Mr Ittyerah seemed to be alleging a form of pure economic loss in that Dr Taylor falsely diagnosed his condition as an adjustment disorder with features of anxiety and depression for the purpose of defeating any workers' compensation claim, "if at some point [Mr Ittyerah] had decided to make a workers' compensation claim" (21.40T – 22.5T; 23.15T). Mr Ittyerah did not articulate any other claim of loss against the third defendant.
3. Turning then to the pleading itself, it is important to point out that Mr Ittyerah consulted the third defendant while he was a resident of Victoria at the third defendant's rooms in Melbourne on referral from a general practitioner he consulted in Docklands. He pleads that he required an assessment of his mental health due to "psychiatric distress" he experienced after his employment with the first defendant.
4. Mr Ittyerah alleges three consultations on 18 February, 25 February and 11 March 2015. He relies upon implied terms in the contract for the provision of medical services being that the third defendant would treat and advise the plaintiff with reasonable skill and care and would keep accurate records of his consultation with Mr Ittyerah. Mr Ittyerah also relies upon those matters as representations for the purpose of an allegation of deceit.
5. Mr Ittyerah avers that he made a request to the third defendant on 10 August 2016 for a copy of his clinical notes which he received on 19 September 2016. The central tenet of his case seems to be (CB p. 578 [14]):

"Upon receipt of the medical records [Mr Ittyerah] became aware that the third defendant made the representation that he would create and keep accurate medical records of the consultation which occurred pursuant to the referral knowing that it was false or was reckless or careless whether such representation was false or not. The plaintiff asserts that the third defendant made such representation knowing it was false or was reckless or careless. Whether the representation was false or not because the medical records contained deliberately falsified information as to the matters that the plaintiff communicated to the third defendant during the consultation. The

plaintiff alleges that the third defendant acted at the behest of a third party, whose identity is not known to the plaintiff, but which/who is likely to be one of the first defendant ... its agents, its contractors or its insurers in including such false information in the medical records. The material facts on the basis upon which the plaintiff makes such assertions of deceitful intention on the part of the third defendant, and the particulars of the false information included in the medical records are as pleaded ... below."

1. The matters referred to in the averments are a false record of an admission of stalking a person with whom he was in a relationship, false notes about a pre-existing mental health condition, false notes about Mr Ittyerah considering taking action against the first defendant, false notes about pre-existing mental health conditions and a false diagnosis being the adjustment disorder diagnosis, which as I have said, Mr Ittyerah asserts was made for the purpose of denying him compensation in a claim he had never made. Alternatively, Mr Ittyerah relies upon the tort of conspiracy. He states that the purpose of the conspiracy was obtaining unlawful access to the plaintiff's medical records and creating false records as a means of avoiding or limiting liability of persons who may be liable for damages. Mr Ittyerah alleges that the conspiracy was made with the first defendant, its insurers and other agents.

2. It's important to set out paragraph 29 of the proposed in pleading in full (CB p. 581):

"The plaintiff is not aware of the particulars of the time and making of each agreement between the alleged co-conspirators. [Mr Ittyerah] [reasonably] believes that his personal information held in an electronic form or private communications were unlawfully accessed to enable the conspiracy. The plaintiff is also not able to identify the precise information or communication of the plaintiff that was accessed since it is impossible for a person to effectively monitor unlawful access to electronic information or communications. The primary electronic information created at the relevant time and held by third parties in relation to the consultation with [the third defendant] were: (i) call records, since [Mr Ittyerah] arranged the consultations using his Telstra mobile phone with no. XXXX 37; (ii) banking records since [Mr Ittyerah] made payments to [the third defendant] using his XXXXX bankcard; (iii) Medicare records; and (iv) Internet records, since [Mr Ittyerah] searched for [the third defendant] and the Melbourne clinic on his TPG internet account. [Mr Ittyerah] reasonably believes that his calls or internet was monitored since he perceived some physical surveillance at the time of the first meeting with [the third defendant]. [Mr Ittyerah] pleads the conspiracy on the basis of inferences from the following material facts: (i) [Mr Ittyerah] and the third defendant have had prior dealings and, in the absence of the conspiracy, the third defendant had no obvious motive to create false medical records; (ii) the beneficiary of the false medical records was not the third defendant personally, but was the first defendant ... its employees, agents and insurers; and (iii) the source of specific information found in the medical records of the third defendant was [the first defendant's general counsel]."

Determination

1. In written submissions, counsel for the third defendant helpfully sets out the elements of the torts of deceit and conspiracy. In *Magill v Magill* (2006) 226 CLR 551; [2006] HCA 51 at [37] Gleeson CJ set out the elements of deceit as follows:
 - (i) there must be a representation of fact made by words, or, it may be, by conduct. ...
 - (ii) the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true;
 - (iii) it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. ... it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made.
 - (iv) it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing."
 - (v) Damages available for the tort of deceit can include damages for personal injury including psychiatric harm.
1. It is clear that Mr Ittyerah's proposed pleading is entirely defective to plead the essential elements of a case of deceit. The whole case depends upon the record made by the third defendant of his consultations with Mr Ittyerah. The records made were clinical records kept by the third defendant for use in his practice. There is no averment that they were published to anybody other than to Mr Ittyerah at his own request for his own purposes. Even if 18 months after the consultation, the plaintiff took issue with the accuracy of them, there is no reason in fact to suppose that the third defendant knew his record was false as opposed to inaccurate or mistaken. There was certainly no intention pleaded that the record should be acted upon in any way by the plaintiff or a class of which he was a member. There is no averment that the plaintiff acted on the representation to his detriment. There is no averment that the plaintiff acted on any false statement and sustained damage by doing so including in the nature of personal injury or psychiatric harm. It is obvious that the averments, such as they are, are proved at a trial, they do not make out the elements of the tort of deceit and accordingly that claim must fail.
2. According to *Bennett v Talacko* [2017] VSCA 163 at 4 elements of the tort of unlawful means conspiracy are:
 1. Proof of an agreement or combination between the defendants;
 2. To commit an unlawful act;
 3. With an intention to injure the plaintiff;
 4. Resulting in pecuniary loss to the plaintiff.

Moreover, given the seriousness of an allegation of conspiracy falling into the category of deliberate unlawful conduct, the third defendant is entitled to know the precise factual basis on which it is asserted he has acted dishonestly or with a deliberate intention to injure the plaintiff in an unlawful way: *Weston v Publishing and Broadcasting Limited* [2011] NSWSC 433 at [652] per Ward J (as the President then was). It is clear that the proposed pleading falls short of these standards. Even if one were to accept the plaintiff's averments, it is clear that the elements of the tort of conspiracy are not made good.

1. But there is a fundamental defect in the plaintiff's case in that it is obvious that the plaintiff's allegations against the third defendant have no discernible basis in fact. It is apparent from the passages in the proposed pleading I have set out in full and from what Mr Ittyerah says in the initiating affidavit, that the whole case against the third defendant is a strawman argument born of completely unfounded speculation on Mr Ittyerah's part. Despite his averment of having reasonable grounds for his belief those grounds are not set out in the proposed pleading. It's obvious from the form of the pleading that the grounds really amount to no more than Mr Ittyerah's belief that the third defendant's records are inaccurate. From that contestable basis he engages in wild speculation that others, namely the first defendant and its agents, have had access to the third defendant's records, and the plaintiff's personal telephone records and banking records.
2. The case sought to be made out against the third defendant in deceit and conspiracy is manifestly untenable.
3. Were I wrong in this conclusion, given the unsatisfactory nature of the proposed pleading in the respects I have made out, I would not exercise my discretion to permit the amendments to be made. Given what I have said about the original Statement of Claim, Mr Ittyerah's claim against the third defendant must be summarily dismissed.
4. Ms McFee of Counsel who appeared for the third defendant on the hearing before me also drew to my attention that, obviously, the applicable law in any claim in tort against Dr Taylor was the law of Victoria.
5. She also submitted that by reference to paragraph 52 of the initiating affidavit that it was clear that the whole case against the third defendant is based upon speculation. That paragraph is in the following terms:

"Once I realised what Dr Taylor had done, I looked back at the events surrounding the consultations to form my own view about how there could have been an interference in the consultation with Dr Taylor." (My emphasis).

1. Ms McFee also pointed out that the Victorian Act was applicable in terms of the limitation of actions. To the extent to which the claim propounded personal injury, which was far from clear, Part 2A of the Victorian Act imposed a period of three years from the date on which the cause of action is discoverable by the plaintiff: s 27D. On the plaintiff's proposed pleading, as well as the initiating affidavit, his realisation of the third defendant's tort

followed his receipt of a copy of the clinical notes on 19 September 2016. It was from there that according to his account he put two and two together. On this basis, presumptively in any event, the cause of action expired on 19 September 2019. Moreover, under Wrongs Act 1958 (Vic), the plaintiff is required to establish a "significant injury" to establish an entitlement to damages for non-economic loss for personal injury. There is no evidence that those steps have been taken.

2. I will in due course make orders refusing Mr Ittyerah leave to file the proposed pleading and summarily dismissing the proceedings against the third defendant.

The claim against the fourth defendant

1. Mr Ittyerah's claim against the fourth defendant is formulated in Annexure C to his Notice of Motion of 21 November 2021. It has striking similarities with the case against the third defendant. It will be recalled that Ms Byrne is a registered psychologist. Mr Ittyerah consulted the fourth defendant on one occasion only on 27 May 2017. The fourth defendant agreed to make a copy of her clinical notes available to Mr Ittyerah after the consultation and did so on 31 May 2017. The gravamen of his claim is that Mr Ittyerah alleges that the fourth defendant made "deliberately falsified" entries in her clinical notes and expressed "false opinions" about his mental health. He alleged by these matters the fourth defendant "intentionally denied [Mr Ittyerah] medical treatment" (CB p. 588 [14]). He alleges that the false information and opinions relate to his complaints against the third defendant, the circumstances in which his employment with the first defendant ended, the pattern of assaults against him which Mr Ittyerah complained of and his mental health. He alleges:

"The beneficiaries of the false information and opinions were the New South Wales police and the first defendant. The deceitful information and opinions in the medical records are particularised in the paragraphs below".

He set out at some length what he alleged were the false entries.

1. Like the case against the third defendant, he purports to rely upon the torts of deceit and conspiracy.
2. As in other matters, he attempts to pre-emptively deal with any pleading of the statutory bar under the NSW Limitation Act asserting that his cause of action is not for personal injury (CB p. 593 [51]). Alternatively, if it was the running of the three year limitation period from the date of discoverability was suspended between 10 June 2017 and 23 July 2019, meaning the limitation period did not expire until 23 July 2022. He avers he was incapacitated because he was incapable of, or substantially impeded in, the management of his affairs in relation to his cause of action in respect of the limitation period by reason of a disease or impairment of his mental condition (CB p. 594 [56]). He attributes this to workplace bullying with the first defendant (CB p. 595 [60]), for which I interpolate he has not purported to sue the first defendant in his proposed pleadings against it.

3. His allegation of injury is that the acts of the fourth defendant caused him ongoing, distress and loss of enjoyment of life and resulted in a denial of medical treatment which denied him the opportunity to recover from a psychiatric condition caused in the workplace of the first defendant (CB p. 597 [68] and [70]). This sounds a little like personal injury but the loss of an opportunity of a better medical outcome is not: *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12. He attributes his loss of employment with the sixth defendant to the "denial of medical treatment".
4. As in the case against the third defendant, it is clear that Mr Ittyerah has difficulty formulating and expressing the loss he allegedly suffered in respect of which he sues the fourth defendant. This difficulty in articulating that matter, in my judgment, says a great deal about whether the claim is tenable.
5. It's relevant to refer to certain aspects of the evidence read before me in relation to this matter. In his initiating affidavit, Mr Ittyerah narrates threats to which he was subject following the termination of his employment with the first defendant in Melbourne and after he moved to Sydney before consulting the fourth defendant (CB p. 30 – 35, [62] – [77]). He says that neither the Victorian nor the New South Wales Police investigated these matters properly.
6. He narrates the circumstances in which he came to consult the psychological practice known as Inner West Mental Health in 2017. He chose the practice randomly to avoid a repeat of his experience with the third defendant. The principal of the practice referred him to the fourth defendant, as I have said he saw her on 31 May 2017.
7. It is not in issue that the fourth defendant was a full-time employee of the New South Wales Department of Justice, working in the juvenile justice area, Monday to Friday. Nor is it in dispute that the fourth defendant had recently commenced exercising a right of private practice as a sub-contractor of the psychological practice and had in early May 2017 registered an Australian Business Number for that purpose.
8. As I have said, following the consultation with the fourth defendant, Mr Ittyerah received a copy of clinical notes on 31 May 2017. In his initiating affidavit he states the following (CB pp. 36 – 7 [82]):

"On 31 May 2017, [the fourth defendant] provided me the medical notes she had created (sic). When I received the medical notes, I immediately realised that they contained significant errors. Based on the review of [the fourth defendant's notes], I formed the belief that [the fourth defendant] notes had been falsified for primary purposes, (a) to indicate that the threats I believed I faced were infrequent or just random acts by a homeless persons which could have been the result of "paranoia", "ideas of reference", "general cognitive distortions" or "pre-occupation with thoughts/ideas"; (b) that I had stated that I had "resigned" from my employment with [the first defendant], instead of being terminated; (c) to dilute the extent of my belief that [the third defendant] has deliberately falsified his medical records; and (d) "to limit the severity of my symptoms".

It can be seen that, even accepting that the fourth defendant's clinical records were erroneous or mistaken for the purpose of the argument, the attribution to the fourth defendant of deliberate falsification to injure Mr Ittyerah's case against the first defendant, which he has not sought to pursue in his proposed pleading, is entirely the product of Mr Ittyerah's introspective ruminations. Frankly, this is the whole basis of his "case" and is based upon no more than a wild leap to a baseless conclusion.

1. Evidence has also been filed on behalf of the fourth defendant in the form of an affidavit of her solicitor, James Derick Berg sworn on 25 November 2021. Although provided on the basis of information and belief, as is admissible on an interlocutory application, Mr Berg: confirmed the fourth defendant's full-time employment; that she commenced a second job in May 2017 with Inner West Mental Health; and for which she obtained an ABN. Her consultation with the plaintiff was in her capacity as a sub-contractor to that practice. She denies the allegations that she deliberately falsified her clinical record or formed a false opinion. An email exchange between Mr Ittyerah and the fourth defendant dated 3 June 2017 through to 9 June 2017 is attached to Mr Berg's affidavit. Although Mr Ittyerah took exception to the clinical record, he did not accuse her of any deliberately false conduct, but rather insisted that any subsequent consultations focused upon his history of workplace bullying. The fourth defendant refused to change her record but stated she would include Mr Ittyerah's comments in her file. She explained that at the initial consultation she was obliged to consider the various clinical possibilities and assured him that he did not need to prove anything as she accepted what he said. After further correspondence, Mr Ittyerah did not make another appointment with the fourth defendant.

Determination

1. I have set out the evidence of the tort of deceit at [67] above and of the tort of conspiracy at [69] above. Focusing upon Mr Ittyerah's proposed pleading, it is clear that he has not pleaded facts which bring him within each of the elements of either tort. In relation to deceit, it is quite clear that Mr Ittyerah has not pleaded facts which establish, at the very least, the third and fourth elements. That is to say, there is no allegation that the false representation, being in substance, that the fourth defendant would render psychological treatment and keep an accurate record of it was made with the intention that it should be acted upon by the plaintiff or a class of persons of which he was a member in a manner which resulted in damage to him. It should be borne firmly in mind that the alleged representations were implied by law in the therapeutic relationship. They were not express representations. The same is true of the third defendant. Nor does Mr Ittyerah plead that he acted upon the alleged false statement and has sustained damage by so doing. Quite the contrary, on his account, he consulted the fourth defendant once and upon receiving a copy of her clinical notes formed the belief that the implied representations must have been false. Far from acting upon the allegedly false statements, he discontinued further consultations. He has not pleaded that by his reliance on the matters complained of he has sustained damage. On this basis alone, the claim in deceit is clearly untenable.

2. Nor am I satisfied that there is any pleadable basis for bringing such a claim. The facts I have referred to on the evidence before me demonstrate that no claim in deceit could be properly pleaded and brought to trial against the fourth defendant.
3. The claim in conspiracy is in a similar position, Mr Ittyerah has not pleaded an agreement or combination between named parties to commit a specified unlawful act with the intention of injuring him resulting in pecuniary loss to him. I accept the submissions of Ms C Coventry of Counsel, who appeared for the fourth defendant that Mr Ittyerah expressly pleads in his proposed pleading, that he does not know the persons with whom the fourth defendant is alleged to have conspired, nor when the agreement was made between the alleged conspirators. From his own evidence, the claim is entirely baseless and cannot properly be made.
4. At best the loss or harm allegedly suffered by Mr Ittyerah so far as it can be ascertained from the proposed pleading has at best the flavour of an alleged form of personal injury or more specifically mental harm. It is evident that he has not addressed the matters referred to in Part 3 of the Civil Liability Act 2002 (NSW) dealing with such claims. Although he has raised s 3B of that Act, implying that the fourth defendant's civil liability is in respect of an intentional act done by her with the intent to cause injury. But this is not explicitly pleaded. Even if it were, it would still be caught by the provisions of Part 2, Div. 6 of the NSW Limitation Act. As I have said, prima facie, the proceedings are statute barred and there is no material from which it could be inferred that Mr Ittyerah could properly plead the suspension of the limitation period provided for by s 52 of that Act.
5. For these reasons, I would not grant leave to Mr Ittyerah to rely upon his proposed pleading. I am not satisfied that he has a pleadable cause of action of the type he has sought to articulate against the fourth defendant or any cause of action at all. To put it more accurately, the causes of action he asserts are clearly untenable and I will in due course order summary dismissal of the proceedings against the fourth defendant.

Claim against the fifth defendant

1. The claim against the fifth defendant is set out in Annexure D to Mr Ittyerah's Notice of Motion of 21 November 2021. The substantive pleadings in this regard are succinctly pleaded in 7 paragraphs. There is a much more extensive pleading of his pre-emptive attempt to avoid the statutory bar created by Part 2, Div. 6 NSW Limitation Act which is largely repetitive of the matters averred against the fourth defendant.
2. The proposed substantive pleading is entitled "Vicarious Liability Pleadings". In substance, Mr Ittyerah alleges that the fifth defendant is the employer of the fourth defendant and that "the fourth defendant committed the wrongful acts in the course or scope of employment with the fifth defendant, further the interest of the fifth defendant by committing the wrongful acts and or was given occasion to commit the wrongful acts by her employment with the fifth defendant".

Determination

1. As I will summarily dismiss the claims against the fourth defendant, it must necessarily follow that the fifth defendant can have no vicarious liability and the claims against it must likewise be dismissed.
2. I remain very conscious that the test for summary dismissal requires "certain demonstration of the outcome of the litigation, not an assessment of the prospects of its success" (see [26] above). The line dividing these concepts may be, however, very fine indeed. I cannot help but observe it borders on the fanciful to say that the fourth defendant was in the course of her employment with the fifth defendant when Mr Ittyerah consulted her. Without this essential element it makes no difference that the fifth defendant in Mr Ittyerah's thinking may have benefited from her alleged tort or provided the occasion for its commission by allowing her to pursue a limited right of private practice when not working for the fifth defendant: *Sweeney v Boylan Nominees Pty Ltd* (2006) 22 CLR 161; [2006] HCA 19.
3. In oral addresses, Mr Ittyerah picked up a regrettably facetious comment of mine that perhaps the fourth defendant could be working undercover (31.15T), presumably for the purpose of entrapping him for the benefit of the New South Wales Police who had, to his mind, failed to take his complaints of intimidation and assault, presumptively, to his mind, involving the first defendant, seriously. The New South Wales government is said to have been a large client of the first defendant and apparently prepared, on Mr Ittyerah's reckoning, to act in its interest to protect it from Mr Ittyerah who made no claim against it at all until 26 October 2020. The case is entirely baseless and as I have said, is at best the product of Mr Ittyerah's introspective ruminations, conjectures and speculations. The whole case against the fourth defendant, and the fifth defendant, depends upon no more than a suspicion entertained by Mr Ittyerah in relation to entirely innocent facts. The material that Mr Ittyerah has put before me does not suggest that there is any possibility that he had a properly pleadable case against fifth defendant. There is no triable issue to be determined, in my judgment.
4. I will refuse Mr Ittyerah leave to file the proposed pleading against the fifth defendant and summarily dismiss the proceedings against it.

The claim against the sixth defendant

1. The proposed pleadings against the sixth defendant are contained in Annexure E to Mr Ittyerah's Notice of Motion. The proposed pleading runs to some 65 pages. As I have already stated Mr Ittyerah was employed by the sixth defendant from September 2015 until 23 July 2019 when his employment was terminated. He was employed as a cleaner and took the work to help support himself while he was completing the Law Extension Committee Course of legal study to qualify as an Australian Lawyer. He relies on a number of causes of action including damages for wrongful dismissal.

2. The gravamen of the matter is Mr Ittyerah avers that he was summarily dismissed for serious misconduct on 23 July 2019. In his proposed pleading he seeks to negative 7 allegations of failing to follow a lawful and reasonable direction that had been levelled against him between 29 January 2019 and 21 July 2019 including a failure to follow a direction that he re-locate to a different place of work. The central averment is that individually and together the matters did not amount to serious misconduct for the reasons set out in his pleading. He seeks damages, costs and declaratory relief. The declaration he seeks is that he did not commit misconduct or serious misconduct over the course of his employment with the sixth defendant.
3. He also seeks damages for breach of the contract of employment, specifically he complains of breach of an implied term in his contract of employment that the sixth defendant must act in good faith and rationally in conducting disciplinary proceedings, that it must not act in bad faith in the same area and it must not exercise its disciplinary powers as an employer arbitrarily, capriciously or unreasonably. Mr Ittyerah alleges that the sixth defendant breached this implied term by making adverse findings of serious misconduct to justify the termination of his employment and for no good reason relevant to the business requirements of the sixth defendant. There are four instances of what he avers are unjustified discipline proffered as particulars of the breach. In each instance he alleges that the sixth defendant denied access to his workplace, did not replace damaged or destroyed equipment and abused the right to give reasonable and lawful directions. The plaintiff seeks damages in an unspecified amount for breach of contract.
4. Mr Ittyerah also purports to propound "statutory claims" arising under the Fair Work Act for which he acknowledges this Court has no jurisdiction. However, he seeks to commence the proceedings in the Supreme Court to facilitate the transfer of the proceedings to an eligible court, either under s 146 CPA or "if permitted" by the Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW). It appears to be common ground that the limitation period is one of six years and accordingly the plaintiff is within time to commence separate proceedings in a court with jurisdiction.
5. The statutory claims relate to two alleged breaches of the "National Employment Standards Contravention" for which he seeks the imposition of a civil penalty and compensation under various provisions of the Fair Work Act. He also claims penalties and compensation for two alleged breaches of the relevant enterprise agreement applicable to his employment with the sixth defendant.
6. While Ms V Bulut of Counsel, who appeared for the sixth defendant, accepted that Mr Ittyerah's purported claims under the Fair Work Act were in time, she argued that the pleadings were completely unsatisfactory and that I would not permit those matters to be pleaded, even if the pleadings could be put in proper form, because this court lacked jurisdiction and ought not to allow the matters to be pleaded merely for the purpose of transferring them to a court with jurisdiction.

7. I accept the merit of Ms Bulut's argument in relation to the statutory claims. The pleadings do not comply with the rules, and it seems to me to be contrary to the interests of justice and the administration of justice to allow Mr Ittyerah to plead these claims in proper form simply for the purpose of transferring them, if the sixth defendant were to be successful in its claim for summary dismissal.
8. On the affidavits of Luke Andrew Skandritt read in the sixth defendant's case, sworn on 7 June 2021 and on 29 November 2021, Mr Ittyerah's employment with the sixth defendant was purportedly terminated on notice by letter dated 22 July 2019. However, from the letter of termination, it is clear that notice was given against a background of serious allegations of misconduct and the sixth defendant formed the view "that the relationship of trust and confidence has been eroded and the ongoing employment relationship is untenable. [The sixth defendant] does not accept the reasons provided in your response as sufficient nor reasonable".
9. It also appears from Mr Skandritt's affidavits that Mr Ittyerah sought to commence proceedings in the Fair Work Commission for unfair dismissal. However, his application was lodged late and an application for an extension of time was refused: *Ittyerah v Coles Supermarkets Australia Pty Ltd* [2019] FWC 7404. An appeal to the Full Bench was dismissed: *Ittyerah v Coles Supermarkets (Australia) Pty Ltd* [2020] FWCFB 407 and an application for judicial review in the Federal Court of Australia was dismissed on 23 April 2021 by Abraham J: *Ittyerah v Coles Supermarkets (Australia) Pty Ltd (No 2)* [2021] FCA 412. An appeal to the Full Court lodged by Mr Ittyerah on 20 May 2021 has since been discontinued. Obviously, Mr Ittyerah's claims have not been decided on their merits.
10. In oral submissions, Ms Bulut submitted the following:
 1. The claim for damages for wrongful dismissal was untenable because the evidence clearly established that the sixth defendant did not purport to summarily dismiss Mr Ittyerah for misconduct but terminated his employment on notice with a payment of wages for the notice period in lieu of him being required to serve it out. The sixth defendant's payroll records were in evidence, proving the payment;
 2. The declaratory relief sought was misconceived. No declaration of any legal right was sought, rather a declaration of fact was sought. This was unnecessary and would be of no utility if factual findings were made one way or the other after a contest;
 3. The claim for damages for breach of the implied term was at best a novel argument and Mr Ittyerah conceded there is no authority in Australia to support the implied terms;
 4. His pleadings had failed to grapple with the principles discussed in *BP Refinery*;
 5. In any event the pleading did not comply with the provisions of the rules and Mr Ittyerah had made clear he wished to further consider refining his pleadings;

6. In any event the damages sought were unparticularised, but there was nothing about the nature of the claim to suggest that the matter was properly commenced in the Supreme Court rather than in either the District Court or Local Court.

Ms Bulut sought summary dismissal or the strike out of the proposed pleading, given its unsatisfactory form.

Determination

1. Mr Ittyerah's claim against Coles is in a somewhat different category to the other claims. First, it appears to be manifestly in time. Secondly, although he was a wage earner, it appears arguable that his employment was terminated on notice, not because his labour was surplus to requirements, but against the background of what the sixth defendant regarded as his unsatisfactory conduct as an employee such that the relationship of confidence between employer and the employee had become untenable. This conclusion is capable of flavouring the circumstances of the termination of his employment. In many cases, of course, termination of an employee's employment on appropriate notice will be unimpeachable in the ordinary courts. On the other hand, weak as Mr Ittyerah's case may be, I cannot say that it is clearly untenable.
2. The fact that he claims damages for breach of the contract of employment, perhaps as an alternative to his claim for wrongful dismissal, on a novel ground is not of itself a reason to summarily dismiss the case. Novelty, of itself, does not render a case untenable. There has been no detailed argument before me to demonstrate that the case for which he contends is legally untenable. And in the circumstances, I am not persuaded that the case for summary dismissal has been made out.
3. It is true, although comprehensible and comprehensive, the pleading itself does not comply with the rules. It is of concern that there are no particulars of the loss that Mr Ittyerah claims set out in the pleading. However, I am not satisfied that he has no pleadable case against the sixth defendant.
4. As against the sixth defendant, I am of the view that Mr Ittyerah should be given an opportunity to bring in an amended Statement of Claim pleading his wrongful dismissal and breach of contract of employment case properly in accordance with the Rules within a period of 14 days. If Mr Ittyerah is able to comply with this requirement, then given what appears to be the obviously limited nature of the damages which may be recoverable by him, consideration will be given to transferring the matter to the District Court of New South Wales.
5. I accept Ms Bulut's argument that at best the claim for declaratory relief is, at best, otiose and for reasons similar to those expressed in relation to the same relief sought against the first defendant I will not permit that claim to be propounded.

6. Although this Court lacks jurisdiction in relation to the statutory claims, as I intend to transfer the proceedings to the District Court, it better serves the overriding purpose for Mr Ittyerah to plead those claims now. The District Court is an eligible court for the purpose of the federal legislation. If I refuse leave, doubtless it would be open to Mr Ittyerah to apply to amend in there inevitably adding an unnecessary interlocutory step in that court.

Orders

1. My orders are:
 1. In relation to Mr Ittyerah's Notice of Motion filed on 21 November 2021:
 1. Refuse leave to amend the Statement of Claim to incorporate the pleadings attached to the Notice of Motion as Annexure A, Annexure B, Annexure C and Annexure D;
 2. Grant leave to amend the Statement of Claim to incorporate the pleadings attached to the Notice of Motion as Annexure E (including his "statutory claims"), as further amended in accordance with these reasons within 14 days.
 3. Refuse application for further referral for pro bono legal assistance;
 4. Refuse prayers for relief numbered 3 and 4.
1. In relation to the first defendant's Notice of Motion filed on 7 June 2021, order that the proceedings against it are summarily dismissed under Rule 13.4 Uniform Civil Procedure Rules 2005 (NSW);
2. In relation to the third defendant's Notice of Motion filed on 8 June 2021, order that the proceedings against him are summarily dismissed under Rule 13.4 of the said rules;
3. In relation to the fourth defendant's Notice of Motion filed on 2 June 2021, order that the proceedings against her are summarily dismissed under Rule 13.4 of the said rules;
4. In relation to the fifth defendant's Notice of Motion filed on 8 June 2021, order that the proceedings against it are summarily dismissed under Rule 13.4 of the said rules;
5. In relation to the sixth defendant's Notice of Motion filed on 8 June 2021, the Notice of Motion is dismissed;
6. All other pending motions motions filed by Mr Ittyerah but not pressed including the motion filed on 8 June 2021 are dismissed;
7. Dismiss the proceedings against the second defendant under s 91(1) Civil Procedure Act 2005 (NSW);
8. List the matter of Ittyerah v Coles Supermarkets (Australia) Pty Ltd for directions before Campbell J at 9:15 a.m. on Monday 22 August 2022 to check compliance by the plaintiff with these orders and with a view to transferring the proceedings to the District Court of New South Wales;

9. The plaintiff is to pay the costs of the first, third, fourth and fifth defendants of the proceedings.
10. The costs of the plaintiff as against the sixth defendant (so far as they may be legally recoverable) and of the sixth defendant are the parties' costs in the cause.

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Decision last updated: 05 August 2022

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