IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
PRACTICE COURT

Not Restricted

No. 6890 of 1999

BRIAN WILLIAM SHAW & ORS — Plaintiffs

v

G FRAGAPANE NOMINEES PTY LTD — Defendant

JUDGE:	KAYE J
WHERE HELD:	Melbourne
DATE OF HEARING:	11 October 2007
DATE OF JUDGMENT:	11 October 2007
CASE MAY BE CITED AS:	Shaw & Ors v G Fragapane Nominees Pty Ltd
MEDIUM NEUTRAL CITATION:	[2007] VSC 454

PRACTICE COURT – Stay of proceeding – Abuse of process – Appeal from Order of Master staying action dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr Brian Shaw appeared in person on behalf of the Plaintiffs	Legal Rite
For the Defendant	Mr J.G. Rutherford	Harwood Andrews Lawyers

HIS HONOUR:

1 This is an appeal by the plaintiffs against an order by Master Daly dated 21 September 2007, whereby the Master ordered that the proceeding be stayed under Rule 23.01.

2 This action has had a long history and it is not necessary for me to recite the whole of it. A short resume will suffice. The writ was issued in September 1999. By order made 9 June 2000, Master Evans ordered that the statement of claim be struck out. Four years later, on 6 July 2004, the plaintiffs issued a summons for leave to file an amended statement of claim.

3 On 20 July 2004, Master Kings ordered that the summons be dismissed and that no further amended statement of claim be filed, save with the leave of the Court. The plaintiffs then appealed from that decision. On 20 September 2004 Smith J dismissed that appeal. The plaintiffs then sought leave to appeal to the Court of Appeal. On 19 November 2004, the Court of Appeal dismissed that application.

4 In August 2005, the plaintiffs made an application before Mandie J to stay four costs orders which had resulted from the failed applications which I have just recited. On 15 August 2005, Mandie J made an order removing the affidavit which had been filed in support of that application.

5 The plaintiffs sought leave to appeal from that decision to the Court of Appeal. On 9 September 2005, the Court of Appeal dismissed that application with costs. From that order the plaintiffs then sought leave to appeal to the High Court and that application in turn was dismissed in June 2006.

6 In the meantime, on 16 November 2005 the defendant issued the summons which was before Master Daly for an order staying the proceedings. On 5 December 2005, Master Evans adjourned that summons pending the outcome of the High Court proceedings which were still on foot. Ultimately, as I stated, the application came before Master Daly and it is from that Master's order staying the proceeding that this appeal was brought.

7 The proceedings seem, so far as I can understand them, to have their genesis in a share farming agreement entered into by the plaintiffs in respect of a property called Bambra Park at Mount Cottrell in August 2007. In about 1999, the owner of the property sold it to the defendant. It appears, so far as I can understand it, that the defendant subsequently moved to remove the plaintiffs from the property.

8 The plaintiffs, in the amended statement of claim of 2004, sought to ventilate issues which were much wider than the issues simply arising from their removal from the land. They also sought to ventilate a number of issues, such as religious issues, Freemasonry and constitutional issues.

9 It is not necessary for me to refer to the history of the various allegations that have been made by the plaintiffs in these proceedings. They are in fact set out at some length in the affidavit which is sworn by Mr Rutherford, the solicitor for the defendant, in support of the application.

10 It is sufficient to say that, in the amended statement of claim which was struck out in 2004, and in an affidavit since, the plaintiffs have sought repeatedly to ventilate a number of issues including constitutional issues, criminal issues, issues relating to Freemasonry and religious issues.

11 In the affidavit that was filed in response to the application which is before me, those issues loom large. In submissions which have been made before me Mr Shaw submitted that those issues are inextricably connected with the issues arising from the removal of the plaintiffs from the land.

12 It has been submitted to me that various persons have committed the crime of treason. Mr Shaw submitted that in this proceeding he wishes to ventilate those matters. He has submitted that there is a case that the crime of treason has been committed by, as I understand it, the enactment of the *Australia Act 1986*, by the removal of the oath of allegiance in the *Legal Profession Act*, and also by amendments which were brought into the Western Australian law in the *Acts Amendment and Repeal (Courts and Legal Practice) Act* of Western Australia 2003.

13 Mr Rutherford, who appeared before me for the defendant, submitted that the defendant had made out a case of abuse of process on three bases. Firstly, the delay in the proceeding; secondly, that there was a series of unpaid cost orders against the plaintiffs in respect of interlocutory applications and appeals; and thirdly, the bringing of a number of interlocutory appeals which were largely peripheral to the main issue which is at stake.

14 The principles relating to an application to stay a proceeding as an abuse of the process have been stated in a number of authorities, including the decision of the High Court in *Williams v. Spautz*[1]. It has been said in a number of the authorities that the concept of abuse of process covers a number of different concepts. It includes the bringing of an action for an ulterior purpose, the use of an action to pursue an ulterior objective, and the persistence and pursuit of an action which contains and continues to contain causes of action which are simply unknown to the law.

15 In my view, the defendant has made out its application in this case that the proceedings as constituted are an abuse of the process on a number of bases. Firstly, it must be noted that this proceeding was issued in 1999. Eight years later there is still not before the Court a statement of claim. The last attempt at a statement of claim was struck out three years ago. The plaintiffs have put forward, in the material, and in argument before me, the clear desire that in these proceedings they will ventilate matters which I have unsuccessfully attempted to persuade Mr Shaw simply do not raise causes of action which are known to civil law. They include matters relating to constitutional issues and criminal matters. If there is any foundation for those matters, and I say nothing about that, it does not lie within the scope of a properly constituted civil action.

16 It seems clear that the plaintiffs are intent on pursuing, under the umbrella of this action, claims and allegations which simply are not known to our civil law. As long ago as June 2000, Master Evans made it clear to the plaintiffs that the type of issues which have been discussed before me cannot validly be part of a civil process which

1 (1992) 174 CLR 509

is issued in this Court. The plaintiffs have been on full warning that the proceeding itself cannot as a matter of law contain such allegations. Indeed, the plaintiffs themselves have sought to pursue some of the allegations through different vehicles such as grand jury applications, and I say nothing about that, but the simple point which is before me is that these proceedings are now eight years of age; there is no statement of claim as yet on foot, and I have no confidence at all that the plaintiffs intend to or could put before this Court a pleading which confines themselves to actions which could be said to be justiciable at civil law.

17 In addition to that, the plaintiffs now have a series of costs orders against them which they have not paid. The cost orders include those made by Master Evans on 22 November 2000, by Master Evans on 16 February 2001, by Master Kings on 7 September 2004, by Smith J on 20 September 2004, and by the Court of Appeal by order of 19 November 2004. Those costs were taxed by Master Bruce on 9 August 2005 in the sum of $26,466.60. Those costs are still outstanding. While that matter alone would not, in my view, justify a stay, they add weight to the defendant's application for a stay. The costs themselves arise out of a number of interlocutory steps which had failed. They arise out of a number of appeals which really relate to tangential issues which would not be central to anything which could be said to be justiciable in this Court in this case.

18 The third matter, which in my view supports my conclusion, concerns the number and nature of the appeals which have been made by the plaintiffs in these proceedings. I have already recited the history of them but, as Mr Rutherford in my view correctly points out, the appeal which was made by the plaintiffs from the order of Mandie J of 15 August 2005 exemplifies the difficulty which has bedevilled and would continue to bedevil this proceeding were it to continue. Mandie J, it would seem, struck out the affidavit of the plaintiffs for the very reason which I have discussed with them and which I have articulated in these reasons, namely that it contains a number of matters which have no place in civil proceedings, that is, proceedings brought for civil relief.

19 The plaintiffs were at liberty to place before the Court a further affidavit in support of the application to stay the costs order. However, instead of doing so, they challenged the order of Mandie J before the Court of Appeal. When they failed there they went to the High Court. Two matters are, I think, relevant in relation to that. Firstly, it tied down the litigation in a series of appeals on tangential and peripheral matters, and secondly, it reinforced the firm conclusion to which I have come, and that is that the plaintiffs are inextricably wedded to the notion that in these proceedings they must agitate matters which simply must be bound to fail in a civil proceeding.

20 It is a serious matter for a court to stay a civil proceeding brought in its court. It is an important principle that these courts are open to proceedings which are brought before them, and where the proceedings are instituted by litigants who are not lawyers this Court does allow a wide degree of latitude and takes considerable pains to avoid striking out or staying such proceedings in a summary way such as this. The principles of *audi alteram partem* lie at the heart of the civil justice system. However, by the same token there must be reached a stage in proceedings, such as this, where the Court must bring an end to those proceedings where they are hopelessly doomed to failure, and where the constant repetition within them of allegations which would not give the plaintiffs any relief at civil law dooms the proceedings, if they were continued, to go absolutely nowhere.

21 The plaintiffs have persistently, as I say, refused and not wished to confine their allegations in this proceeding to the narrow point arising out of the share farming agreement and the dispute with the defendant out of which it would seem these proceedings first arose. It is perhaps a pity that they have not seen fit to do so, but it is clear that Mr Shaw on behalf of the plaintiffs does not wish to do that and it would seem to me hopeless to expect in the future that he would do so.

22 For those reasons, I have come to the conclusion that I have no alternative but to uphold the decision of the Master and therefore uphold the stay of the proceeding. For those reasons the appeal will be dismissed.