[1993] QCA 212

COURT OF APPEAL

McPHERSON JA
PINCUS JA
SHEPHERDSON J

Appeal No 222 of 1992

PATRICK LEO CUSACK and
CATHERINE FRANCES CUSACK — Appellants

and

AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED — Respondent

BRISBANE

..DATE 25/03/93

JUDGMENT

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McPHERSON JA: In October 1988 Master McLauchlan gave judgment in the Supreme Court against the present appellant Mr Cusack and his wife for possession of a property of which those two persons were the owners.

The judgment was given against them summarily under O 18 of the Rules of the Supreme Court on an application made by the respondent Bank, which was the plaintiff in the action, acting under powers conferred upon it by a mortgage of the property.

Some four years later on 15 October 1992, Mr Justice Byrne refused an application by Mr Cusack to enlarge the time within which to appeal against the orders of the Master. This is Mr Cusack's appeal against that decision of Mr Justice Byrne.

Before Mr Cusack can hope to succeed in an appeal like this he must, at the outset, be in a position to demonstrate two matters. The first is that there was before Master McLauchlan something capable of being considered a defence that would raise a triable issue in answer to the plaintiff's claim in the action. The second is that there was a satisfactory explanation for the delay that had

occurred between the time when judgment was given in 1988 and the time in 1992 where it was sought to set it aside or to obtain an enlargement of the time for doing so.
In dismissing the application for that extension of time, Mr Justice Byrne considered both of these matters. His Honour gave reasons for thinking the appellants had failed to satisfy either of those two requirements. I agree with His Honour's conclusion and will briefly state reasons of my own for arriving at it.

As regards delay, the only reasons offered by Mr Cusack, either here or in his affidavit filed in the proceedings below, are that he is a layman inexperienced in the law; and also that he was so heavily involved in pursuing other litigation at the time that he was unable to attend to this matter.

I do not consider either of these reasons to be good enough. I use that terminology advisedly because Mr Cusack is critical of the way in which lawyers use words like "satisfactory" and "reasonable".

My reason for thinking as I do is that the present litigation was obviously very important to Mr Cusack. The subject of it was his own home, which was his major asset

that, through not doing anything about it sooner, he has now lost to the mortgagee, who, he told us, sold it late last year.

It is, moreover, difficult to accept the explanation that the appellant was too busy with other litigation in and after 1988 to pay attention to this when, as my brother Shepherdson has pointed out, the appellant and his wife applied in November 1988 for a stay of execution in respect of the judgment against which relief is now sought.

The application on that occasion was refused by Mr Justice Williams who, in giving his reasons, specifically adverted to the fact that there was then no appeal against the Master's decision. That should, in my opinion, have been enough to alert even a layman to the pressing need for instituting such an appeal as he now wishes to bring.

I turn now to the other question, which is whether any kind of defence to the action appears to be available to the defendants if, in the end, they were to be given leave to defend. As to that, Mr Cusack was willing for present purposes to restrict himself to only a single point in his submissions. It is that there is, in section 115 of the Constitution, a constitutional bar against the issue by the

Commonwealth of paper money as tender.

His difficulty in relying on that is the decision of the High Court in Re Skyring's Application (No. 2) (1985) 59 ALJR 561. In that matter His Honour Mr Justice Deane said that his conclusion was that there was no substance in the argument to the effect of that which Mr Cusack now desires to put.

Mr Cusack here submits that His Honour's conclusion on that occasion was either obiter or a non sequitur and therefore would not be binding upon us here, or at least would be a decision of such a kind that we would not be bound to follow it. I do not agree that that is so.

In any event, the matter later went on application for special leave to appeal to a full High Court consisting of four other learned Justices. In refusing leave, their Honours quoted the passage in the reasons for judgment of Mr Justice Deane that has been cited here. Having done so they said this:-

> "We are no persuaded that the judgment of Deane J contains any error. We should say, in addition, that the power conferred upon the Commonwealth Parliament by section 51(ii) of the Constitution

> to legislate with respect to taxation extends to the imposition of taxation and its collection even though it has the effect of requiring the person on whom taxation is levied to pay the tax out of property which he owns."

In the face of those remarks and of the fact that the applicant there was unable even to secure special leave to appeal in order to raise the very point now presented to us, it seems to me that it can scarcely be said to give rise to a triable issue sufficient to justify a grant of leave to defend.

Quite apart from that, I for my part am no more persuaded now than I was in 1983 that section 115, which in terms embodies a prohibition address to the State, has any application to the Commonwealth at all.

It is perhaps undesirable to do more than mention that point without attempting to decide it here; but it is, I think, legitimate to take it into account in refusing, as I would do, to interfere on appeal with a decision like this that inevitably contained a strong discretionary element.

Nothing that Mr Cusack has said, either orally or in his

extensive written submissions to us, has persuaded me that the judgment sought to be appealed from given by Mr Justice Byrne in this matter was arrived at through the exercise of a discretion which was vitiated by any incorrect or mistaken consideration of fact or law.

The appellant in the course of the last part of his submission also suggested that a proper course to take in this matter would be to adjourn it pending determination of another application which he identified as C20/1992 between Cusack and Jones. We know nothing about that litigation, and it cannot affect this appeal to the point where I would be prepared to put this matter aside in order to await a determination of those proceedings.

In short, I would not accede to the application for an adjournment, particularly having regard to the late stage at which it has been made.

In all the circumstances, I would dismiss the appeal in this matter.

PINCUS JA: I agree.

SHEPHERDSON J: I agree. I would only add that insofar as

the triable issue for which Mr Cusack has argued might be thought to be a serious point of law such as is discussed in Theseus Exploration NL v. Foyster (1972) 126 CLR 507 at page 515. That point has already been decided, contrary to Mr Cusack's arguments, in the decision of the High Court of Australia already adverted to by the learned presiding Judge.

McPHERSON JA: The appeal is dismissed.

MR DERRINGTON: We ask for costs, may it please the Court.

McPHERSON JA: Yes. Can you argue any submission in opposition to costs, Mr Cusack, apart from the one, of course, that you are not in a position to pay it with paper money? Is there anything else you could say against an order for costs?

APPELLANT: Well, I must say what you said is probably unnecessary to say, Your Honour, and I ask the Court to take that as said. The other submission I would make is that they may as well take my shirt and my shoes now, if that order is made.

McPHERSON JA: Yes, thank you for that. The order will be as I have stated it, that is to say the appeal is dismissed with costs.
