HIGH COURT OF AUSTRALIA

Toohey J.

FRANK WILLIAM DUDLEY JONES v. ALAN GEORGE SKYRING
27 August 1992

Decision

TOOHEY J. The applicant, who is the Registrar of the High Court of Australia, seeks an order that the respondent, Mr Skyring, "shall not, without the leave of the Court or a Justice, begin any action, appeal or other proceeding in the Court".

2. The authority for the making of such an order is to be found in O.63 r.6 of the High Court Rules ("the Rules"), which reads:
"(1) Upon the application of a Law Officer, or the Australian
Government Solicitor or of the Principal Registrar of the Court,
the Court or a Justice, if satisfied that a person, or another
person in concert with that person, frequently and without
reasonable ground has instituted vexatious legal proceedings,
may, after hearing that person or that other person or giving him
an opportunity of being heard, order that he shall not, without
the leave of the Court or a Justice, begin any action appeal or
other proceeding in the Court.
(2) Leave shall not be given under this rule unless the Court
or a Justice is satisfied that the proceedings are not an abuse
of the process of the Court and that there is prima facie ground
for the proceedings."
It will be necessary to examine the rule in some detail. For the moment it is enough to note that its object is to curb "vexatious legal proceedings". The application of the rule can only be considered against the background of the facts.

3. The relevant history begins on 3 May 1984 with the lodging of a notice of motion by Mr Skyring in the High Court (B11/84). (I should interpolate that the Registrar's application relies only upon proceedings brought in this Court.) The motion, which sought leave to appeal from a judgment of the Full Court of the Federal Court on 18 April 1984, was not proceeded with. Nevertheless it has some significance because, in an affidavit filed in support of the motion, Mr Skyring foreshadowed an attack on the constitutionality of Commonwealth statutes

relating to banking and finance, having regard to the scope of "legal tender" in s.115 of the Constitution.

4. By summons dated 26 July 1984 (B24/84) Mr Skyring sought an order for leave "to exhibit an Information of Quo Warranto against that body known as 'Cabinet' headed by the 'Prime Minister'". On 6 August 1984 Brennan J. refused the application (1) Re Skyring's Application (1984) 59 ALJR 123., essentially on the basis that quo warranto did not lie where the validity of the office of Cabinet itself was challenged rather than the individual title to the office. While the affidavit in support of the motion does not, in express terms, raise the question of legal tender, it does repeat Mr Skyring's concerns about the financial affairs of this country.

5. In December 1984 Mr Skyring lodged with the Court's Registry six documents which he wished to have issued as writs (B4/85). They were addressed to the Treasurer, to four other Commonwealth Ministers, and to "the Judge of the Federal Court of Australia holden at Brisbane". The Registrar referred the documents to Gibbs C.J. for a direction under O.58 r.4(3) of the Rules. In each case Gibbs C.J., on 17 January 1985, directed the Registrar to refuse to issue the writs without the leave of a Justice first had and obtained. The documents were supported by an affidavit sworn by Mr Skyring which spoke in general terms of the financial system of this country and, specifically, of s.115 of the Constitution.

6. On 23 January 1985 Mr Skyring lodged with the Court a summons (B4/85) asking for leave "to issue a Writ of Certiorari to remove into the said Court certain judgments and orders" made by Spender J. in the Federal Court at Brisbane on 18 October 1984 refusing applications by Mr Skyring for orders for review under the Administrative Decisions (Judicial Review) Act 1977 (Cth). The summons was supported by an affidavit in which Mr Skyring repeated some of his earlier concerns. The summons came before Deane J. on 6 February 1985 and his Honour delivered an ex tempore judgment. It is apparent from his Honour's judgment that he was dealing not only with the summons for leave to issue certiorari but also with the writs in respect of which Gibbs C.J. had given directions. His Honour said at the end of his reasons: "Leave to issue the writs must be refused. The application is dismissed." (2) (Re Skyring's Application (No.2) (1985) 59 ALJR 561, at p 562; 58 ALR 629, at p 633. It is necessary to mention only one passage from his Honour's reasons because it crystallises the argument that Mr Skyring had raised in the earlier proceedings and which he subsequently sought to pursue. Deane J. said (3) ibid., at pp 561-562; p 633 of ALR:

"I have come to a clear conclusion that there is no substance
in the argument that there is a constitutional bar against the
issue by the Commonwealth of paper money as legal tender. Nor,
in my view, would there be any substance in an argument that the
provisions of s.36(1) of the Reserve Bank Act 1959 are
invalidated or overruled by the provisions of the Currency Act
1965."

7. To anticipate what is to follow, it is fair to say that the aim of all subsequent proceedings brought or attempted to be brought by Mr Skyring has been to debate the correctness of Deane J.'s conclusions. For this reason it is unnecessary to set out in great detail each step in those proceedings.

8. On 7 February 1985 Mr Skyring appealed against the decision of Deane J. (B11/85). On 9 July 1985 a Full Court (Mason, Wilson, Brennan and Dawson JJ.) heard and dismissed the appeal. The Court concluded its reasons with these words:

"(W)e are not persuaded that the judgment of Deane J.
contains any error. We should say in addition that the power
conferred upon the Commonwealth Parliament by s.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."

9. On 21 May 1985 Mr Skyring lodged an affidavit (B30/85) seeking a writ of certiorari directed to quashing his conviction under s.52(a) of the Reserve Bank Act 1959 (Cth) which made it an offence to "wilfully deface, disfigure or mutilate an Australian note". In refusing the application after argument on 10 July 1985, Wilson J. said:
"Mr Skyring frankly admits that the central issue is
precisely the same issue which was the subject of consideration
by Deane J. on 6 February 1985".
His Honour added that, in view of the dismissal of Mr Skyring's appeal:
"The disposition of the appeal by the Full Court has the
necessary practical effect that the issue is no longer open to be
addressed in these proceedings."

10. On 21 May 1985 Mr Skyring lodged an affidavit (B31/85) in support of an application for a writ of certiorari to quash a decision of the Full Court of the Supreme Court of Queensland made on 19 April 1985. On 10 July 1985 Wilson J. refused the application, saying:
"(Mr Skyring) candidly admits that the proceedings in the
Supreme Court of Queensland were directed ultimately to the same
question which was the subject of an earlier application by Mr
Skyring made in the High Court (No. B24 of 1984)".
This was a reference to the proceedings heard by Brennan J. on 6 August 1984.

11. On 30 April 1986 Mr Skyring lodged with the High Court a document which he sought to have issued as a writ of certiorari (B11/86). He supported his application with a lengthy affidavit, canvassing inter alia the question of legal tender which had already been determined by the Court. On 5 May 1986 Wilson J. gave a direction pursuant to O.58 r.4(3) of the Rules that the Registrar "refuse to issue these proceedings without the leave of a Justice first had and obtained".

12. By summons dated 9 May 1986 Mr Skyring sought leave to issue a writ of certiorari to quash certain judgments and orders of the Full Court of the Supreme Court of Queensland made on 23 April 1986 (B11/86). In May or June 1986 Mr Skyring lodged with the Court a summons by which he sought leave to issue a writ of certiorari to quash a judgment and order of the Full Court of the Supreme Court of Queensland delivered on 22 May 1986. Both applications were expressed to relate to "certain state legislation".

13. On 2 June 1986 Gibbs C.J. gave a direction pursuant to O.58 r.4(3) of the Rules in similar terms to those given earlier. It is clear that the direction related to the summons lodged in May or June 1986. It is not clear whether the direction related to the summons lodged on 9 May 1986 or whether any direction was given in respect of that summons.

14. By summons dated 18 June 1986 (B22/86) Mr Skyring sought leave to issue a summons to review a judgment and order of the Full Court of the Supreme Court of Queensland made on 22 May 1986. On 24 June 1986 Deane J. refused leave to issue these proceedings and also the proceedings the subject of the direction by Gibbs C.J. on 2 June 1986. It is clear from the documents and the reasons of Deane J. that Mr Skyring was continuing his efforts to re-argue the question of legal tender which Deane J. had decided against him on 6 February 1985.

15. By notice of appeal dated 2 July 1986 (B25/86) Mr Skyring appealed from the judgment of Deane J. of 24 June 1986 in so far as it concerned the summons dated 9 May 1986 (B11/86). By notice of appeal also dated 2 July 1986 (B26/86) Mr Skyring appealed from the same judgment in so far as it concerned the summons dated 18 June 1986 (B22/86). By summons dated 31 July 1986 (B25/86) Mr Skyring sought a direction that the Attorney-General for the Commonwealth be joined as a party to these appeals. On 18 September 1986 Wilson J. directed that "this application be made to the Full Court when the appeals are heard". On 28 November 1986 a Full Court (Mason, Wilson, Brennan and Dawson JJ.) refused the application and dismissed both appeals.

16. In concluding the Court's reasons for dismissing the appeals, Mason J. pointed out that the directions which had been given by Gibbs C.J. and Wilson J. were given pursuant to a sub-rule "which is designed to protect both litigants and the Court from the dangers of frivolous and vexatious litigation, a protection which is as necessary for a plaintiff as for a defendant".

17. On 23 October 1986 Mr Skyring applied for leave to issue a writ of certiorari "to quash a ruling of the Director-General of Social Security ... refusing further payment of social security benefits" (B66/86). It is apparent from the affidavit filed in support of the application that this was but one more attempt by Mr Skyring to re-argue his case on legal tender. On 29 October 1986, after a hearing, Gibbs C.J. refused the application.

18. By notice of motion dated 17 November 1987 Mr Skyring applied to remove into the High Court "the whole cause pending in the Supreme Court of Queensland in Action No. W2292" (B66/87). The affidavit filed in support of the notice of motion makes it clear that this was to be another vehicle for canvassing arguments previously rejected by the Court. The same may be said of a notice of motion dated 17 November 1987 seeking to remove into the High Court "the whole cause in the Supreme Court of Queensland in Action No.W3358" (B67/87). On 1 July 1988 a Court, comprising Mason C.J., Wilson and Gaudron JJ., refused both applications. Delivering the judgment of the Court, Mason C.J. said:
"Having regard to the judgment of this Court delivered on 28 November 1986 affirming the judgment of Justice Deane at first instance rejecting Mr Skyring's challenge to the validity of section 36(1) of the Reserve Bank Act, we do not consider that there is sufficient substance in the points which Mr Skyring seeks to agitate in each of these proceedings to warrant the making of orders removing them into this Court."

19. In November 1988 Mr Skyring lodged with the Court a document he sought to have issued as a writ against the Attorney-General of Queensland (C5/89). On 21 November 1988 Wilson J. gave the direction under O.58 r.4(3) of the Rules which had become customary.

20. Some time between 15 December 1988 and 7 February 1989 Mr Skyring lodged with the Court still more documents he wished to have issued as writs (C5/89). At the same time he lodged a summons by which he sought to apply for an order nisi "to issue a Writ of Certiorari to remove into the High Court for review to determine the constitutional validity of certain Commonwealth statutory provisions" and to apply for a stay of certain proceedings in the Federal Court. On 7 February 1989 Wilson J. once again directed under O.58 r.4(3) of the Rules that "this process not issue without the leave of a Justice first had and obtained".

21. By summons dated 20 February 1989 Mr Skyring sought leave to issue the process the subject of Wilson J.'s direction. On 28 February 1989 McHugh J. refused the application. It is unnecessary to refer to his Honour's reasons except to note that Mr Skyring was still raising s.115 of the Constitution.

22. By notice of motion dated 20 March 1989 Mr Skyring sought leave to appeal from the judgment of McHugh J. (C7/89). On 30 June 1989 Brennan and Dawson JJ. refused leave to appeal. It may be noted that, in the course of his argument, Mr Skyring referred to a "joint effort" on the part of Mr Cusack and himself to have upheld "cardinal principles". I mention Mr Cusack only because a similar application against him by the Registrar will be dealt with after delivery of the present judgment.

23. By summons dated 10 May 1990 (C101/90) Mr Skyring applied for an order waiving payment of "fees or charges" in relation to a matter in which he was involved in the Court of Disputed Returns. It is clear from the affidavit filed in support of the summons and from the transcript of the hearing before Gaudron J. that the matter in question was one in which Mr Skyring wished to argue once more the question of legal tender. On 17 May 1990 Gaudron J. dismissed the application (4) Re Skyring (1990) 64 ALJR 461.

24. By petition dated 8 May 1990 (B19/90) Mr Skyring sought, inter alia, to have declared invalid the election of

John Colinton Moore to the House of Representatives. His attack on the election of Mr Moore centred on the question of legal tender in regard to the nomination deposit payable by a candidate. By summons dated 20 June 1990 Mr Skyring asked that "fees, costs and charges" associated with the petition be waived. On 26 June 1990 Dawson J. refused the application for a waiver of fees and adjourned the petition.

25. By notice of motion dated 4 December 1990 (B43/90) Mr Skyring applied for the removal of "the whole cause pending in the Federal Court of Australia in QB351 of 1989" into this Court. On 22 April 1991 he lodged a notice of motion that he be "accorded standing to participate in the argument of the fundamental points of constitutional law" involved in the Federal Court matter. The affidavit filed in support of this notice of motion indicates that removal was sought as a further opportunity to argue questions of constitutional law relating to currency.

26. By notice of motion dated 8 May 1991 (B11/91) Mr Skyring applied to have removed into this Court "the whole cause pending in the District Court in Brisbane in FT628/91". The affidavit filed in support of the notice of motion makes it clear that this was merely another episode in the refusal of Mr Skyring to accept the decision of Deane J. of 6 February 1985 and the Full Court's dismissal of his appeal from that decision on 9 July 1985.

27. On 27 June 1991 Mason C.J. refused both applications for removal and dismissed the motion that Mr Skyring be accorded standing. In doing so his Honour made it clear that the applications were simply part of the history already described in this judgment.

28. On 16 July 1991 Mr Skyring lodged a notice of motion for leave to appeal from the judgment of the Chief Justice (B24/91). On 6 November 1991 a Full Court (Brennan, Gaudron and McHugh JJ.) refused the application.

29. I have set out the history of Mr Skyring's approaches to the Court in considerable detail for several reasons. To begin with, as a matter of quantification, counsel for the Registrar said that the matters dealt with by Deane J. and the Full Court:
"are the selfsame points that in substance have been
attempted to be relitigated, or relitigated on the application of
Mr Skyring, in, on a conservative count, 22 applications to the
Court and, in relation to which, 11 judgments, both at first
instance by single Justices and on appeal, have been given".
Now, there may be a question whether a matter in respect of which a direction under O.58 r.4(3) of the Rules has been given and leave to issue subsequently refused involves the institution of legal proceedings for the purposes of O.63 r.6(1) of the Rules; I shall deal with that question later. But, as a pointer to the volume of applications made by Mr Skyring, Mr Robertson's calculation provides a reasonable basis.

30. Next, the history detailed in this judgment makes it clear beyond argument that Mr Skyring has persisted over a number of years in seeking to re-argue the constitutional questions that were resolved against him in 1985. Indeed he sought to do so in response to the present application.

31. Again, Mr Skyring has used a variety of methods to get before the Court, often in the form of an application for a writ of certiorari. But they are variations on the same theme; that must be clearly understood.

32. And it is clear that Mr Skyring is relentless in his pursuit. Far from accepting that the matters he wishes to bring before the Court have long since been decided against him, he is determined to seize every opportunity, however fanciful, to approach the Court. That is the background against which the present application must be resolved.

33. Before an order may be made under O.63 r.6(1) of the Rules, I must be satisfied that Mr Skyring "frequently and without reasonable ground has instituted vexatious legal proceedings". There is perhaps some tautology in this expression in so far as proceedings commenced frequently and without reasonable ground might be thought thereby to be vexatious. If that is not so, what does "vexatious" add to the words preceding it? In Hutchison v.

Bienvenu (5) Unreported, High Court of Australia, 19 October 1971, at p 11. Walsh J. spoke of "a vexatious proceeding instituted ... without reasonable ground", thereby suggesting a distinction. But his Honour did not elaborate on this aspect. What does appear from the judgment is that the test whether proceedings are vexatious "is not simply a subjective one" (6) ibid. In expressing that view Walsh J. endorsed (7) ibid. what Ormerod L.J. had said in In re Vernazza (8) (1960) 1 QB 197, at p 208.:

"(T)he question is not whether (legal proceedings) have been
instituted vexatiously but whether the legal proceedings are in
fact vexatious".

That question is one for the Court to decide on the facts; it is not decided by reference to whether the person against whom an order is sought was acting maliciously or in bad faith. So, in deciding the present application, it is not to the point that Mr Skyring may believe and believe strongly in his view of s.115 of the Constitution and the associated points he wishes to agitate.

34. Another relevant aspect of In re Vernazza bears on what is meant by "instituted". There was, of course, no doubt in the minds of the members of the Court of Appeal (Ormerod, Willmer and Harman L.JJ.) that the issue of a writ was the institution of a proceeding. Harman L.J. also stated that the issue of an originating summons constituted the institution of a proceeding (9) ibid., at p 216. Ormerod L.J. expressed some reservation about a petition for leave to appeal to the House of Lords(10) ibid., at p 209. though he and Willmer L.J. seem to have had little doubt that an appeal in an action already disposed of involved the institution of proceedings(11) ibid., at pp 209-210, 215.

35. As appears from the recital of the history of Mr Skyring's involvement with the Court, there have been many occasions on which a Justice has given a direction pursuant to O.58 r.4(3) that the Registrar refuse to issue a writ or other process without the leave of a Justice and that, on application by Mr Skyring, a Justice has refused leave and some occasions when no step has been taken after such a direction. Can it be said that Mr Skyring "issued" a writ or other process if the matter proceeded no further than a direction given under O.58 r.4(3)? Did he "institute" a proceeding for the purposes of O.63 r.6(1)? In my view, the answer to those questions must be no. However, there is no reason why an application to a Justice made consequent upon a direction under O.58 r.4(3) should not itself be regarded as the institution of a legal proceeding. If that were not so, a most extraordinary situation could develop. A person might deluge the Registry of the Court with writs or other process that were patently an abuse of process or frivolous or, indeed, vexatious. A direction to the Registrar under O.58 r.4(3) might be given, a subsequent application for leave to issue might be refused by a Justice, yet the application for leave to issue the writ or process would not count in deciding whether the person had "frequently" instituted legal proceedings.

36. Putting to one side writs or process for which a direction was given under O.58 r.4(3) and no subsequent application for leave to issue was made, the conclusion must be that Mr Skyring frequently instituted legal proceedings in the Court. The notice of motion dated 3 May 1984, the summons dated 26 July 1984, the summons dated 23 January 1985, the notice of appeal dated 7 February 1985, the applications made on 21 May 1985, the summons dated 9 May 1986, the summons dated 18 June 1986, the notices of appeal dated 2 July 1986, the summons dated 31 July 1986, the summons dated 23 October 1986, the notices of motion dated 17 November 1987, the summons dated 20 February 1989, the notice of motion dated 20 March 1989, the summons dated 10 May 1990, the petition dated 8 May 1990, the summons dated 20 June 1990, the notices of motion dated 4 December 1990, 22 April 1991 and 8 May 1991 and the notice of motion dated 16 July 1991 all constituted the institution of legal proceedings.

37. The overall picture is one of persistent attempts by Mr Skyring to argue questions which the Court has determined against him. Mr Skyring contended that Deane J.'s judgment of 6 February 1985 contained no reasons and was not a final judgment in that it did not ultimately define the rights of the parties. He claimed that to treat it thereafter as a final judgment was to misuse it and that therefore he was justified in returning to the Court to seek a final determination of those questions. However, the fact is that the Court did determine those questions against him. Once those questions had been determined by Deane J. and a Full Court, there was no reasonable ground for employing a variety of mechanisms to get the questions before the Court again. The absence of any reasonable ground for employing these mechanisms and the persistent institution of proceedings

for the purpose of re-agitating the questions already determined point unequivocally to a situation in which Mr Skyring has, frequently and without reasonable ground, instituted vexatious legal proceedings in the Court. Subject to one matter, with which I shall now deal, the application must succeed.

38. Mr Skyring did not question the validity of O.63 r.6 of the Rules but I raised with Mr Robertson the source of authority for the rule. In Commonwealth Trading Bank v. Inglis(12) (1974) 131 CLR 311. the Court (Barwick C.J., McTiernan and Walsh JJ.) held that a court has no inherent jurisdiction to restrain a person from commencing new proceedings against any person without leave of the court but that a court does have inherent jurisdiction to restrain a person from making unwarranted and vexatious applications in an action which is pending in the court without the leave of the court. In the case of the High Court, it was held, that power has not been superseded by O.63 r.6(1). That decision does not resolve the matter raised with counsel. However, Mr Robertson referred to the unreported decision of this Court in Bienvenu v. R.B. Hutchison(13) 5 October 1971. Delivering judgment, in which McTiernan, Menzies, Windeyer and Owen JJ. agreed, Barwick C.J. said that there was no substance in a challenge to the validity of O.63 r.6(1), adding(14) ibid., at p 2.:
"The rule is made in pursuance of the rule-making power of
the court which is ample to sustain it and not in conflict with
any constitutional or statutory provision."

39. Mr Robertson drew attention to s.86 of the Judiciary Act 1903 (Cth), the rule-making provision, and in particular par.(h):
"Generally regulating all matters of practice and procedure
in the High Court."
It might be said that an order precluding the bringing of any further action by a person goes beyond practice and procedure. But an order under O.63 r.6(1) does not have that effect. The rule sustains an order that the person shall not, without the leave of the Court or a Justice, begin any action, appeal or other proceeding in the Court; that leave shall not be given unless the Court or a Justice "is satisfied that the proceedings are not an abuse of the process of the Court and that there is prima facie ground for the proceedings". Read in its entirety, the rule is concerned with practice and procedure, reinforcing the power of the Court to protect its own process against unwarranted usurpation of its time and resources and to avoid the loss caused to those who have to face actions which lack any substance. The recent decision of this Court in Williams v. Spautz(15) (1992) 66 ALJR 585; 107 ALR 635. gives effect to the philosophy underlying provisions such as O.63 r.6.

40. There will be an order in terms of the Registrar's notice of motion.

Orders

The respondent shall not, without the leave of the Court or a Justice, begin any action, appeal or other proceeding in the Court other than an appeal against this Order.

Reserve the costs of the notice of motion.