IN THE HIGH COURT OF AUSTRALIA

Registry No C20 of 1992

B e t w e e n -

PATRICK LEO CUSACK

Appellant

and

FRANK WILLIAM DUDLEY JONES

Respondent

BRENNAN ACJ
DAWSON J
GAUDRON J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON WEDNESDAY, 1 JULY 1993, AT 2.08 PM

MR P.L. CUSACK: In person, Your Honour.

MR D.J. McGILL: May it please, Your Honour, I appear for the respondent. (instructed by the Australian Government Solicitor)

MR CUSACK: There is one piece of material I will refer to, Your Honour. I have copies here, and I have already given same to my opponent.

BRENNAN ACJ: Thank you.

MR CUSACK: I am not referring to that immediately, Your Honour. I will let you know when I get to that.

My submission will be under, basically, three headings. Your Honour, there will be legal principles; there will be authority, and policy, the terms I have only become aware of since reading this Court's decision in the case referred to in the previous matter in the judgment of Justice Deane. I believe it is the correct way to approach a matter such as this.

The authorities indicate very clearly several things to me in my particular case. Firstly, there is a substantive right of mine involved in access to any court, particularly in a situation where the subject of which I have attempted to litigate involves property and I am in a situation now of dispossession of my most valuable asset, my matrimonial home, which I am attempting to recover through the State Supreme Court.

This substantive right of appeal to this Court must not be barred in my case in view of the nature of the matters which I am attempting to litigate in lower courts and in the course of which I have had recourse to this Court.

In those circumstances, since there is a substantive right and substantive litigation afoot involving substantial property, in my case, practically my entire property, the least onerous interpretation of the rule of this Court must be applied.

The second point I would make: the wording of the Order 63 rule 6, which has been applied by Justice Toohey, clearly contains ambiguity in its wording in so far as the Court has - authorities generally have expressed difficulty in coming to a firm definition of the words "vexatious and oppressive", or "frivilous and vexatious" in this case.

I understand the authorities to be fairly well summarized by Roden J. in the case of *Attorney-General v Wentworth*, (1988) 14 NSWLR 481. I refer to the brief summary at the head of that article on page 481 which sets out what he regards as, and what I agree to be, a fair basis for - assessment of whether the power that the Court has under Order 63 rule 6 ought to be applied in my case - ought to have been applied as it has been.

I admit, initially, that Justice Roden was looking at a statutory provision in the *Supreme Court Act* dealing with vexatious litigants in New South Wales but my reading of his judgment and of other judgments from other jurisdictions even, including overseas, indicates that it is a fair summary of the principles on which vexation and frivolity can be assessed.

The first point Justice Roden made is that there are two possible grounds: one is subjective and the other is objective.

> The relevant test for determining whether proceedings are vexatious is -

threefold. Firstly:

> proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.

I do not believe that has ever been suggested in my case. In fact, I think it has even been admitted on the record that I have not had any intention of deliberately annoying or embarrassing the high authorities whom I have asked to intervene in my case.

The second relevant test, as Justice Roden characterizes it, is that:

> they are brought for collateral purposes -

Classically examples of collateral purposes are found in the 1902 case of *Jones* where the man, apparently, admitted on the record that it was his intention to force people to spend money in defending the action against him. Another classic case would be that of *Solomon* who was in breach, apparently, of the Australian Securities Commission regulations and had, in fact, published a textbook on how to tie the authorities up with legal actions in such a way that they could not proceed to the substance of the matter that they were going to litigate against him.

I accept those two possible valid grounds for declaring actions vexatious or frivilous. The first is obviously vexatious in that he had a deliberate intention to annoy. The second is "collateral purposes" - is also obviously vexatious if not frivolous. I would agree with those two purposes as being objective bases on which vexation can properly be found. Neither of which apply in my case.

The third test which Justice Roden provides is that the case is:

> so obviously untenable or manifestly groundless as to be utterly hopeless.

He goes on in his judgment to say that:

> """If the first two tests fail, if it is neither for the deliberate purpose of annoying and harrasing with malice and so on and if it is not for collateral purposes then the utter hopelessness must be very clearly demonstrated and the case must be completely untenable"""

It is clear in my case that it is the latter test which has been applied. At least, from my perspective, it is deemed that my attempts to obtain relief in the supreme court, the frustrations I have met there by upholding the view I have put to courts about legal tender, by having an appeal denied when the supeme court itself refused to accept my legal tender in the form of gold coin, my attempt to obtain relief from that interference with my substantive rights in the lower court, which is evidenced in the judgment of Justice Byrne, which is unreported, of the - - -

BRENNAN ACJ: Mr Cusack, I think the judgment of Justice Toohey proceeded chiefly upon the proceedings which you had instituted in the High Court. Is that right?

MR CUSACK: Yes, Your Honour, and before I come to Justice Byrne let me make the connection more clear.

Of the actions in this Court which I have conducted, one was a single action which never went any further. That was the action in relation to an election process before Justice Spender. That never went any further as far as I was concerned. That action stopped at that point. All other actions have been related to the attempts, now successful, of the ANZ Banking Group to repossess property under a bank mortgage in my case. Most of my actions have been in the supreme court but in

the very first hearing of my case in the supreme court, the decision of Justice Deane was raised against me as an authority.

My problem at the moment is that I need to address very briefly the substance of some of the submissions I have put in relation to Justice Deane's argument to relate them to my substantial supreme court litigation, to indicate why I believe there is more than a slightly reasonable ground for the actions which I have taken, and for the, what have been seen as vexatious actions, to, as it is said, relitigate Justice Deane's decision.

There are two reasons for all of this having happened, Your Honour. First, I am a lay litigant, unrepresented, unaided. In that situation I have not the expertise to research or understand legal authorities the way professional lawyers do. I have come to a much better understanding of what legal authority means today, and I have,in fact, gone to legal authorities to search for what I believe to be the foundation for what is seen to be an error in Justice Deane's decision.

DAWSON J: Now that is the point, you want to contest Justice Deane's decision.

MR CUSACK: It has come up in my supreme court actions, Your Honour, as a result of, and as I was about to say, a judgment which was given by Justice Byrne - - -

DAWSON J: It may have come up there, but in this Court you want to contest it?

MR CUSACK: Yes.

DAWSON J: It is not open to you to do so.

MR CUSACK: And that is on the basis of an authority which cannot be challenged. May I refer very briefly, Your Honour, to two authorities which I believe do throw some doubt on it. I will not be the challenger in that case, it will be the authorities themselves which do the challenging. This is a very difficult point for me. My attention was drawn to Quick and Garran as the source of the meaning of the *Constitution* which has withstood the test of time. My reading of it in relation to section 115 disclosed a quite simple but very significant error in the reading of the section as Quick and Garran paraphrased it in their commentary. It is the transposition of a word, "shall", for a word, "may". The word "shall" does appear in the section of the *Constitution*, but

Quick and Garran's reading as they comment on it is transformed into "may". That to me sent me searching further for the source of that reading error in Quick and Garran's book, which I must say I have not yet been able to lay hands on a copy of. Every time I have been to the supreme court library all copies of Quick and Garran have been off the shelf. But I did, in this last week, obtain some of the more detailed submissions of Quick and Garran in photocopy form, and I discover that they refer in great detail to the precedent *American Legal Tender cases*. A reading of those *Legal Tender cases*, the complete record of them, had been done previously and I was most surprised to find Quick and Garran's comments in relation to legal tender containing a reference to the unreliability of the US *Legal Tender case* precendent in view of the way two judges were appointed who were known at the time to favour a particular interpretation of one form of money over another. That is being simplistic about it.

I need to just put that on the side, Your Honour. The basis of my doubt as to the veracity of the conclusion being reached, is based on a legal authority in the form of Quick and Garran's reading error, their comments on legal tender in their annotated *Constitution* and on the precedent which Quick and Garran refer to in the American *Legal Tender cases* which rang the death knell of gold money as legal tender in America, and which apparently was transposed into our *Constitution* in the form of our section 115, the counterpart of article 1, section whatever it is, in the American Constitution.

With that background of information about an unsound authority in the American precedent case and with practical experience of attempting to use what is, on judicial authority now, legal tender, and having raised a conflict in the supreme court which has interfered substantially with my rights and, in fact, prevented the filing of an appeal in the court by the refusal of a legal tender, I cannot accept the proposition that the issue is dead at this point.

BRENNAN ACJ: That is the difficulty. You cannot accept that, but this Court has said that the issue is dead.

MR CUSACK: And the consequence, Your Honour, is that I have been denied an appeal in the supreme court by the refusal of legal tender according to the *Constitution*. I may be wrong, I am prepared to admit that. I am prepared to admit that

Justice Deane may be right, but at this moment - - -

BRENNAN ACJ: Once we get to the stage of coming to the conclusion that Justice Deane was right, then we have got to consider all your several applications to this Court in the light of that fact, and the question then is, given that Justice Deane was right and that you were wrong and yet you have continued to bring proceedings in this Court asserting that you were right, is that not asserting something repeatedly which has no foundation?

MR CUSACK: It certainly is frequent, Your Honour. I could make further submissions on the nit-picking aspects of the meaning of the words in the order. I do not believe that is necessary. I do not believe I am frivilous at that level. The argument clearly is the substance of my case, the utter hopelessness of my case.

BRENNAN ACJ: Yes.

MR CUSACK: In the sense that there are authorities on the record - and I cite four Justices of the Supreme Court of America in 1870, who upheld what I propose and when the decision was reversed under extremely dubious circumstances of a reconfiguation of the Bench, not only defended their previous opinion but stated in their opinion that the case was far from settled, but rather that the rehearing of it had unsettled the matter to the point where justice was now seen to depend on who you had appointed to the Bench.

DAWSON J: Mr Cusack, it has been decided against you by Mr Justice Wilson applying the decision of Mr Justice Deane.

MR CUSACK: Very well, Your Honour. Let me go back to my notes. The authority is Ormerod LJ. I accept the Court's authority to use the remedy which they resort to. I believe I had made submissions to you in relation to ambiguity and the substantive right, the least onerous interpretation - and in so far as ambiguity is involved in the terminology, I believe it is just to look at the purpose of the rule. There is authority for that in the cases that were cited in my list of authorities and I do not have the facility to find them now, but looking to - yes, that is why I handed this up to you. The purpose can be looked at where there is uncertainty. In fact, that point comes through in this.

BRENNAN ACJ: What do you say the purpose is?

MR CUSACK: I refer you to the original vexatious mechanism, the foundation of the *Chaffer's case* in England where - I think it may even have been Lord Halsbury who is speaking in the House on the introduction of the bill under which he was - yes, it was Lord Halsbury at page 54 of that article which I have handed up. This is the final paragraph and about the fifth last line.

> The object sought to be secured by the Board was that there be some protection if the person is sued -

and the protection is clearly sought against cost element and inconvenience. On the top of the following page:

> People who succeed against vexatious litigants often succeed at a loss to themselves.

Now, the purpose of the Act is clearly brought about by the very vexatious issue in the public arena at the moment, namely, the cost of justice; the cost of having to defend oneself or to bring actions. Cost of justice, Your Honour, is the vexatious issue, as identified by Lord Halsbury:

> The protection of the person sued -

this same point reoccurs throughout the authorities, that:

> there is an element of harassment for the purpose of inflicting costs on the opposing party. I have even heard it said, "so sue me and I will drag you through the courts until you are broke".

Those sort of statements are not uncommon and they stem from the fact that justice costs, or at least the access to the justice system costs; whether justice costs depends on what the justice system does once you get inside.

BRENNAN ACJ: Mr Cusack, we understand your argument that it is neither of the first two categories to which Justice Roden referred, which affects your case.

MR CUSACK: Which includes the element of costs as I see it.

BRENNAN ACJ: It is the third element and that is the repetitious commencement of proceedings which are manifestly untenable.

MR CUSACK: I see, yes. One thing was said by Your Honour on the left was that Justice Deane's decision is

adverse against me. There are facts which are adverse against - - -

BRENNAN ACJ: No, what was put to you was that Justice Wilson's decision - - -

MR CUSACK: Upholding Justice Deane's decision.

BRENNAN ACJ: - - - which proceeded on the basis of Justice Deane's decision was adverse to you.

MR CUSACK: Was adverse, and that matter never proceeded any further, Your Honour; that matter never proceeded any further.

BRENNAN ACJ: Now, given the conclusiveness of that decision, all your subsequent proceedings have been brought in order to challenge the self-same matter?

MR CUSACK: No, my purpose is not to challenge that matter, Your Honour, my purpose is to enforce my property rights against a financier, who I have accused, in my initial statement of claim, of fraud. Part of my substantive action in the Supreme Court of Queensland has been struck out on the basis that Justice Deane's decision is conclusive against me.

Now, in the matter of the lending of money in a form other than legal tender, the legal tender question has an important bearing. It is not directly the legal tender question which I have been seeking to address. In fact, I am at the point in my life where I am ready to drop that issue because I believe it is, to some extent, a red herring now. My argument is against the creation of credit and the lending of it at interest by banking institutions, and that argument must eventually be reached. My belief in taking the actions which I did in this Court was that the legal tender question was a very direct and concise way of exposing the more difficult arguments in the bigger question in relation to banking, which is the case that I am having difficulty with in the Supreme Court of Queensland.

In that vein, if the issue of legal tender is, in fact, decisively decided and if I accept that decision, then I must alter my argument and the only argument I can now put is that section 115 of the *Constitution* is frivilous and vexatious to me because it has interfered with my rights in the supreme court in relation to the use of legal tender. I have attempted to use what the *Constitution* provides as legal tender, what the *Currency Act* says is legal tender, and the Supreme Court in Queensland has not recognized it.

Now, in that sense, the section of the *Constitution* is vexatious to me. Perhaps my activities in future will be directed to bringing on the republican debate with a view to having that section of the *Constitution* excised, since it is possible also to adopt the view that legal tender is, in fact, the problem; it is, in fact, bankers' money, the goldsmiths' money of the 1600s. And the whole purpose of legal tender Acts is really the signature of the banking system on our legal system. That argument has not yet been advanced, but that may be the way I am being pointed by this Court.

I have followed the directions of this Court in relation to my actions and I have sought to have this matter raised in the supreme court, as I think it was Your Honour directed from the hearing in Canberra. I raised the issue there - at least the Court of Appeal - - -

BRENNAN ACJ: I do not think we need to worry about the supreme court proceedings, Mr Cusack.

MR CUSACK: No, I was going to mention two phrases they used, Your Honour: they were phrases "ipse dixit" and "non sequitur". They were not persuaded either that there was any error in Justice Deane's decision.

BRENNAN ACJ: Yes.

MR CUSACK: That being the case, I have no option but to accept the Court's decision and in view of an undertaking that I do accept that decision, I would ask that the order be removed and that that issue not be litigated further.

BRENNAN ACJ: Yes, Mr Cusack. We need not trouble you, Mr McGill.

No argument has been raised which justifies disturbing the order made by Toohey J. that the appellant should not, without the leave of the Court or a Justice, begin any action, appeal or other proceeding in the Court. The appeal is dismissed.

MR McGILL: Your Honour, I would ask for costs.

BRENNAN ACJ: Anything to say about the application for costs, Mr Cusack.

MR CUSACK: I can say nothing, Your Honour, because I am barred from saying what I wish to say and I believe that that is an injustice in itself.

BRENNAN ACJ: Yes. Very well, the appeal is dismissed with costs.

AT 2.34 PM THE MATTER WAS ADJOURNED SINE DIE