

FEDERAL COURT OF AUSTRALIA

Gunter v Doogan [1999] FCA 1648

PRACTICE & PROCEDURE – application not accepted for filing by Registrar of the Court – where Judge of the Court directed Registrar to refuse to accept application for filing on the grounds of being frivolous or vexatious – whether leave to appeal required in respect of a direction given under Order 46 rule 7A of *Federal Court Rules* – whether the application to the Court is an attempt to interfere with the process of the High Court

Judiciary Act 1903 (Cth), s39B

Federal Court of Australia Act 1976 (Cth), s4, s24(1), s24(1A)

Federal Court Rules, O 46 r 7A

Re Jarman; ex parte Cook (1996-1997) 188 CLR 595, cited

**RICHARD STEPHEN GUNTER v CHRISTOPHER DOOGAN, REGISTRAR OF
THE HIGH COURT OF AUSTRALIA**

Q220 OF 1999

SPENDER, EMMETT & DOWSETT JJ

17 NOVEMBER 1999

BRISBANE

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Q 220 OF 1999

**ON APPEAL FROM A SINGLE JUDGE OF THE
FEDERAL COURT OF AUSTRALIA**

**BETWEEN: RICHARD STEPHEN GUNTER
 Appellant**

**AND: CHRISTOPHER DOOGAN,
 REGISTRAR of the HIGH COURT OF AUSTRALIA
 Respondent**

JUDGES: SPENDER, EMMETT & DOWSETT JJ

DATE OF ORDER: 17 NOVEMBER 1999

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The notice of appeal be dismissed as incompetent.
2. The other relief sought be refused.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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DATE: 17 NOVEMBER 1999

PLACE: BRISBANE

REASONS FOR JUDGMENT

EMMETT J:

1 We have before us three matters, all arising out of a direction given by Drummond J on 26 February 1999. The first matter is an appeal from that direction. The second matter is an application for extension of time to file and serve notice of that appeal. The third matter is an application for leave to file an amended notice of appeal.

2 On 15 February 1999, Mr Richard Stephen Gunter sought to file with the Registry an application said to be under section 39B of the *Judiciary Act 1903* (“the Rejected Application”). The respondent is Mr Christopher Doogan, the Registrar of the High Court of Australia. Mr Doogan has informed the registry of this Court that he does not wish to participate in this hearing.

3 The Rejected Application is difficult to follow in that it does not comply with Form 5. It makes no claim for final relief, but seeks orders by way of interlocutory relief as follows:

“(1) [An order] *restraining the respondent from invoking the ‘vexatious litigation’ provisions of the High Court Rules against [Mr Gunter]...*

- (2) [An order] *compelling the respondent to discharge his public duty in a correct manner by taking the necessary steps to –*
- (i) *have the applicant's writ of summons B112 of 1996 listed forthwith for formal hearing in open Court by the Full High Court of Australia, [...] and*
 - (ii) *have the actual hearing of the application implemented as soon as this can be physically done.”*

4 On 26 February 1999, pursuant to Order 46, rule 7A, Drummond J directed Deputy Registrar Reynolds not to accept the Rejected Application for filing. Order 46, rule 7A, provides as follows:

“If a document presented to a Registrar in any proceeding, including any document which is or will if issued become an originating document, appears to a Registrar on its face to be an abuse of the process of the Court or to be frivolous or vexatious, the Registrar may refuse to accept or issue it or may seek the direction of a Judge who may direct him:

- (a) *to accept or issue it; or*
- (b) *to refuse to accept or issue it; or*
- (c) *to refuse to accept or issue it without the leave of a Judge first had and obtained.”*

5 In a memorandum of 26 February 1999 to Deputy Registrar Reynolds, Drummond J said:

“The relief that Mr Gunter seeks from this Court is set out in paras 1 and 2 [...] on p 3 of his application [being the orders set out above]. This comprises orders under s 39B of the Judiciary Act 1903 (Cth), directed to the Registrar of the High Court and designed to override the Registrar’s refusal to accept the writ of summons which Mr Gunter sought to file in the High Court.

Mr Gunter’s material shows that the Registrar acted in accordance with a decision of 27 February 1998 from Callinan J to refuse to issue Mr Gunter’s writ without the prior leave of a Justice of the High Court. This direction was given under High Court O. 58, r 4(3), empowering a Justice of that Court to give a direction of the kind given by Callinan J where the document presented for filing appears on its face to be an abuse of the process of the court or a frivolous or vexatious proceeding. Mr Gunter has not attempted to seek leave from a Justice of the High Court to file his writ in that Court, as he is entitled to do.

Even though the Registrar of the High Court is no doubt an officer of the Commonwealth, all remedies provided for by s 39B(1) are discretionary. An action brought in this Court in these circumstances seeking to circumvent a

direction given by a Justice of the High Court under the High Court Rules to the Registrar of that Court is so clearly doomed to fail as to be plainly frivolous and vexatious.”

6 It seems, from the material which Mr Gunter sought to file in support of the Rejected Application, that his complaint against the Registrar of the High Court concerns various proceedings which Mr Gunter has purported to commence in the High Court. It appears that Mr Gunter sought to file a writ in which the claims for relief were as follows:

- “(1) the declaration of a series of provisions in Commonwealth statutes pertaining to family Law, ‘legal aid’, and the ‘financing of the Crown’s purposes’ generally - as well as provisions of the High Court Rules which have hitherto been interpreted and applied in a manner which have effectively prevented these matters of vital social importance from being openly and properly discussed in public debate - as being ultra vires the Commonwealth Constitution; and,*
- (2) compensation by the Commonwealth and State authorities for actions wrongly taken against him by the Courts and other authorities of the Commonwealth and State of Queensland, based on these unconstitutional provisions.”*

The defendant shown in the writ, which bears proceeding number B112 of 1996 in the High Court, is the Attorney-General of the Commonwealth.

7 On 1 July 1999, the Deputy Registrar of the High Court wrote to Mr Gunter referring to a writ that had been presented for filing in the Canberra Registry of the High Court in May 1999. The letter went on to say:

“I advise that on 16 June, 1999 Justice Callinan directed the Registrar to refuse to issue this process without the leave of a Justice first had and obtained [by the party seeking to issue it].

.....

In the event that you wish to seek leave to file the Writ you should complete the enclosed form and prepare an affidavit in support. Applications under Order 58 Rule 4(3) for leave to commence proceedings are determined by the Court or a Justice on the basis of written material and without an oral hearing.”

There was attached to that letter a form of *ex parte* application for leave to issue a proceeding. It appears that no step has been taken by Mr Gunter to seek that leave.

8 There is, however, in the materials referred to in an affidavit that Mr Gunter sought to file in this Court, an application for leave to appeal from the whole of that direction. That application for leave to appeal does not appear to have been filed. The material provided by Mr Gunter indicates that he has made several attempts in the past to file a writ in the High Court seeking the relief shown in the writ in B 112 of 1996.

9 The direction given by Drummond J on 26 February 1999 was, according to Mr Gunter, invoked again by the Deputy District Registrar on 2 August 1999 when a second form of application was sought to be lodged by Mr Gunter in the Queensland Registry of this Court. That application was in very similar terms to the Rejected Application, although additional material is contained in it. It is subject to the same defect in that there is no claim for final relief. The interlocutory relief claimed is the same.

10 The second application was lodged for filing on or about 28 July 1999. On 2 August 1999 the Deputy District Registrar wrote to Mr Gunter saying, after referring to the documents, as follows:

“They are identical to those sought to be filed by you in February 1999. The February documents were referred to a judge for a direction as to whether or not they should be accepted for filing. I was directed not to accept them and the documents were returned to you with a copy of the judge’s written reasons for the direction.

In the circumstances, I am returning the documents you lodged last week unfiled. For your information, I am enclosing a fresh copy of the reasons for refusing to accept the documents that were prepared when you attempted to file the same application earlier in the year.”

In the notice of appeal filed on 17 August 1999, Mr Gunter says that he appeals from the whole of the direction given by Drummond J on 26 February 1999:

“invoked again in respect of his ‘revised’ application presented on 28 July 1999.”

11 The orders sought in the notice of appeal were as follows:

“That the direction delivered by Drummond J on 26 February 1999 in respect of the initial presentation of the Applicant’s application under FC O. 54A, made circa 15 February 1999, and again invoked in respect of his ‘revised’ Application made circa 28 July 1999, that:

the Registrar under O 46, r 7A, not accept the Applicant's application be set aside, and in lieu thereof, the Applicant's Application made circa 28 July 1999 under FC O. 54A be accepted, filed, a date for Directions hearing be set, and the matter listed for hearing accordingly."

Order 54A of the Federal Court Rules is concerned with mandamus, prohibition and injunctions against an officer of the Commonwealth under section 39B of the *Judiciary Act*.

12 Clearly, the notice of appeal in that form, having regard to the time that it was filed, was incompetent because it was out of time. Further, assuming that there is a right of appeal from a direction given under Order 46, rule 7A, such a direction is clearly an interlocutory judgment. Accordingly, under section 24(1A) of the *Federal Court of Australia Act 1976* (Cth) ("*Federal Court Act*"), leave to appeal is required before any right of appeal arises. There may be a question as to whether a direction under Order 46, rule 7A, is a "*judgment, decree, or order*", within section 24(1) of the *Federal Court Act*. Without expressing any view, I will assume for the present purposes that it is a "*judgment, decree or order*" within the meaning of the definition of "*judgment*" in section 4.

13 The third matter presently before us is Mr Gunter's application for leave to file an amended notice of appeal. This application was prompted following Mr Gunter's reconsideration of his first notice of appeal. He says in an affidavit that when he framed his notice of appeal he thought he had properly covered the two decisions actually involved. However, it now appears to him that he did not. Accordingly, he seeks leave to file the amended notice of appeal to clarify the situation and to leave no doubt that two decisions are being challenged, namely, those of Drummond J of 26 February 1999, when the Rejected Application was first lodged, and secondly, the decision of Deputy District Registrar Reynolds of 2 August 1999, when the second application was lodged by Mr Gunter. The only changes to the form of notice of appeal relate to the preamble to make clear that the subject matter of the appeal includes the decision of the Deputy Registrar.

14 A question may arise as to whether or not there is a right of appeal to a Full Court from a direction or a decision of a Registrar. It may well be that there is a right of review to a single justice of the Court. For the moment, I will again assume that there would be a right of appeal to a Full Court. Whether or not we treat this proceeding as involving an application for leave to appeal, and assuming we were disposed to grant leave and to extend the time for

filing the notice of appeal, and to grant leave to file the amended notice of appeal, it will be necessary for some attention to be given to the merits of the question that would be raised if the appeal were properly before us.

15 The background to Mr Gunter's proceedings in the High Court is not entirely clear from the material before us. However, it does not seem to me to be necessary for us to have a full understanding of the background. The question is whether a proceeding brought in this Court to compel the Registrar of the High Court to accept a writ in circumstances where he has been directed by a Justice of the High Court not to do so, could ever succeed. Section 39B of the *Judiciary Act* may well authorise this Court to order a Commonwealth officer who is failing to perform his duty to perform that duty. However, there cannot be any basis, in my opinion, for a conclusion that the Registrar is acting otherwise than in accordance with his duty. He is bound to comply with a direction of a Justice of the High Court. Mr Doogan is in fact complying with that direction by refusing to accept the proposed writ. To require the Registrar to do what Mr Gunter asks this Court to order him to do would be to require the Registrar to act in defiance of a direction of a Justice of the High Court. It is in my opinion quite frivolous and vexatious for Mr Gunter to ask this Court to interfere with the process of the High Court in the circumstances that I have briefly described.

16 Any case which Mr Gunter seeks to raise in the Rejected Application and in the second application must, of necessity, fail. I cannot even see any argument that could rationally be mounted in favour of the orders sought. Even if there were some possible argument to be mounted, as a matter of discretion, this Court would refuse relief at this stage when Mr Gunter has failed to pursue whatever rights he has. That is to say, the only direction that has been given by Callinan J is that the Registrar should not accept the writ without the leave of the Court. Mr Gunter has made no effort to seek the High Court's leave to file a writ which he asks us to order the Registrar to accept.

17 In my view, the appeal is incompetent. It should be dismissed as incompetent, as should the notices of motion filed for an extension of time and for leave to file the amended notice of appeal. In any event, even if the appeal were not incompetent, I would dismiss it on the merits.

SPENDER J:

18 I agree with the reasons for judgment of Emmett J.

DOWSETT J:

19 I also agree, and wish only to add one brief comment. The effect of the proposed relief would be to send prerogative writs to a member of the High Court. It seems that the High Court itself cannot do that. See *Re Jarman; ex parte Cook* (1996-1997) 188 CLR 595, per Brennan CJ at 604 and per Dawson J at 610. In any event it is clear that this Court cannot do so.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Judges constituting the Full Court.

Associate:

Dated: 24 November 1999

Solicitor for the Appellant: The appellant appeared in person.

Solicitor for the Respondent: The respondent entered a submitting appearance.

Date of Hearing: 17 November 1999

Date of Judgment: 17 November 1999