IN THE HIGH COURT OF AUSTRALIA

Registry No C6 of 1989

In the matter of -

An application for leave to appeal pursuant to section 34(2) of the Judiciary Act 1903 by

PATRICK LEO CUSACK

BRENNAN J
DAWSON J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON FRIDAY, 30 JUNE 1989, AT 12.32 PM

BRENNAN J: Yes, Mr Cusack?

MR P.L. CUSACK: Thank you, Your Honour. The vision in my mind at the moment is of a television advertisement for a particular brand of socks, Your Honours. I do not know whether you have seen it. It is set in Holland beside a dyke where a tiny, young gentleman has his finger in a hole in the dyke and suddenly has a call of nature thrust upon him. How does he save the dyke from collapsing without taking his finger out of the hole? He reaches down, manages to take a sock off, plugs the hole in the dyke with the sock and then proceeds to attend to his call of nature. I feel just a little like that boy in that television commercial, Your Honours. The finger in the dyke cannot be removed, but the dyke does have a leak in it. I do not know whether my sock will be adequate to the task of holding that flood but it seems that that is my task today.

Having seen my colleague refused before me in an application which is essentially the same as mine, the onus upon me is doubly difficult. Doubly because I have seen Mr Skyring refused on essentially the same grounds on which I will apply. It therefore appears that it is reduced to my talents with the spoken word to sway you to give a different judgment in my case. I shall initially do exactly as I understood you to instruct Mr Skyring to do and address Mr Justice McHugh's judgment. It has been my practice at most of these situations, Your Honours, to prepare written submissions but in this situation I have done none and this is completely off the cuff.

The crucial portion of Mr Justice McHugh's judgment which is sought to be challenged reads as follows: "Mr Skyring sought to distinguish the judgment of the Full Court by suggesting that it had been overruled by implication." Further on, "I was not referred to any remarks of this Court specifically reversing that decision". Now, I believe, Your Honours, the wording itself is - the crucial wording is "distinguish" in the first portion I quoted, and the crucial wording in the second part is "remarks of this Court specifically reversing that decision".

In relation to distinction, this is one of the fundamental characteristics of human beings is their ability to distinguish. The process involves drawing a boundary. A distinction in the case of law has apparently some special meaning which for myself, and for Mr Skyring, is a little difficult to comprehend, perhaps because the words

tend to adopt special meanings for the legal profession, whereas we common people are stuck with the ordinary meaning of words as we use them every day.

BRENNAN J: Lest there be any misunderstanding about it, the usual meaning attributed to the term in law is that the cases are so different that the first case which was decided a particular way provides no precedent for the second.

MR CUSACK: Thank you, Your Honour. I have seen this word before in one earlier stage of my own matters before the supreme court. In fact, in OS713 before the supreme court which was a matter I initiated myself and took through the appeal process to the Full Court. I believe on that occasion I sought and succeeded to make a distinction between my particular case as I now find it developing around me and the cases which have preceded me in time, the historical precedents in this matter now brought by Mr Skyring and myself on various other matters.

I do not need to refer to the particulars of my most recent matters in the supreme court; you have read that material in the record, Your Honour?

BRENNAN J: I have not read the material of the proceedings in the supreme court; I have read the judgment of Mr Justice McHugh in this Court, which is the relevant matter for our consideration.

MR CUSACK: Since distinction is important, Your Honour, in relation to the portion of his judgment which I wish to challenge, it would perhaps be worth my while in drawing your attention to the essential matters of the supreme court proceedings most recently affecting me prior to this incident.

BRENNAN J: Why is that, Mr Cusack?

MR CUSACK: In terms of distinction, Your Honour. The distinction of - - -

BRENNAN J: But we are distinguishing - the question of distinction that is relevant here is whether the case before Mr Justice McHugh was to be distinguished from the case which was before the Full Court in the matter which you cited.

MR CUSACK: Of SKYRING?

BRENNAN J: Yes.

MR CUSACK: The matters which Mr Skyring litigated in the first instance were quite simply categorized,

I think, Your Honour, as being put in the abstract in relation to the legal tender issue, the currency question. The currency question had up to the point of Mr Justice McHugh's judgment always been placed in an abstract context. The abstract propositions were dealt with as abstract propositions. The situation which I presented to Mr Justice McHugh was in fact a concrete situation which involved a serious denial of justice on a very practical and demonstrable issue, which issue apparently was discounted in favour of placing emphasis on theoretical and abstract propositions which had been put by Mr Skyring.

The present situation, Your Honour, has extended the seriousness of the distinction which I sought to draw at that stage one step further and has resulted in one of the most gross denials of justice which can possibly be comprehended in a judicial system under common law. I have been denied an appeal in the supreme court because the Reserve Bank of Australia refused to accept the Queen's money from the court itself. I tendered money to the supreme court to pay what I regard as an unjust impost for the mounting of an appeal. I placed seven gold coins on the table in the Registry and after about one hour's consideration the supreme court refused to accept that money, that money being a legal tender in the strictest sense of section 16 and 22 of the CURRENCY ACT and section 115 of the CONSTITUTION. I actually made a legal tender in the supreme court. The court itself, the Queen speaking through the court, refused to recognize the Queen's own warrant in money - - -

BRENNAN J: Mr Cusack - - -

MR CUSACK: - - - denying me an appeal.

BRENNAN J: You will concentrate upon the matters we have to deal with, will you not?

MR CUSACK: I am attempting to concentrate of the word, and focus on the word "distinction", Your Honour, and the distinction I am attempting to make is that the abstract concepts which were judged on in the first instance by Justice Deane were, as Mr Skyring has said before me, fairly judged. That is a statement of the status quo. The status quo in law is not what I am confronted with. I am confronted by physical realities of denials of justice which were put to Justice McHugh and he sees no distinction - there is no distinction between the two cases in his mind at the time he makes his judgment. The overruling of the previous judgment by

implication has occurred in so far as the arguments sought to be put in the physical context were put and no demur was made against the propositions put, that there is a constitutional bar and an explanation of how the bar operates.

The physical evidence which has been effectively discounted by the judgments given to date in my own case, particularly by Justice McHugh, the discounting of that evidence prevents him from properly comprehending the distinction which needs to be made between the later judgments and the earlier judgments. It is extremely difficult to find specific remarks specifically reversing the earlier decision because the point of an overruling by implication is that there is no specific wording overruling the determination. It is in fact a masterful statement of the situation. As I said, Mr Justice McHugh quite masterfully stated the situation. The overruling to be done is an overruling by implication and it is impossible to give specific words or remarks which do allow me to cause that overruling to occur.

The overruling of a judgment by implication must be one of the most difficult things for a Queen's Counsel to achieve, Your Honour, let alone for a layman. I am reduced to my understanding of the ordinary meaning of words without the benefit of experience or precedent searches through history and I really can only repeat myself in relation to that particular matter. I believe that the - - -

BRENNAN J: Mr Cusack, the basic problem that confronts both you and Mr Skyring perhaps consists in this: that the courts are able to deal with challenges made to the validity of statutes only when proceedings are in such a form as to allow them to apply their traditional methods of reasoning to the question of whether the statute is valid or not. However serious the problem may be of an invalid statute and however much it may impinge upon the interests of particular people, the only way that the courts are able to deal with it is if the proceedings are cast in such a form that the relevant issues for determination, that is the issues of validity, constitutional validity, are produced so that the Court can apply its traditional methods of reasoning to come to a judgment. The problem with the proceedings in this case, as in Mr Skyring's, is that they are not even remotely like the kind of proceedings which allow us to do that. So that however much you wish to challenge these statutes, the form in which it is done is quite inappropriate.

Now there is not much that we can do to be of assistance to you in this field. We cannot,

as it were, take over the reins of a litigation for a litigant who wishes to appear in person. He either gets it right, or he does not.

MR CUSACK: I appreciate your point, Your Honour. Let me perhaps address that very briefly. Traditional practices and traditional methods in my own particular case would not be practical or realistic. I would require solicitor, Queen's Counsel and more money than I am ever likely to see again in my lifetime, Your Honour. The point of taking a step in a new direction, an initiative, is to demonstrate that these things can be done differently from the traditional manner in which they have been done, not only because it is a correct way to do it but because it is more economical of time, it is more economical of resources and it is quite often a refreshing change to see a little initiative shown in what can otherwise become a very stultified and therefore inefficient process. Our income is innovation and initiative. In fact, I find myself in this problem to some extent because I was attempting to take an initiative and was effectively stepped on by circumstances over which I had no control.

Yes, I have sensed all along in all of my efforts to address this issue, Your Honour, that I am up against a very large inertia. Speaking as an engineer, that concept is very, very close to my understanding of nature. The point with a large inertia is that you do not attempt to suddenly reverse its direction, as for example, by standing in front of a steam-roller in the hope of making it go backwards all of a sudden. It is more likely than not to be disastrous; you will end up squashed by the inertia. But likewise, with an ocean-going oil tanker, you do not even venture anywhere near the path it is travelling, let alone step in front of it and ask it to stop and not run over you.

Neither Mr Skyring, nor I, is attempting to stand in front of the steam-roller, nor in front of the ocean-going oil tanker, but we are asking the captain to have a care for the iceberg which lies ahead. In a sense, you might cast us in the role of the pilot who calls the attention of the master to an obstacle dead ahead. If cost of justice inquiries are to be set up by the Senate and are to have any effect, I would suggest they change their name, to begin with. The very name of the inquiry, "cost of justice" is a self-contradiction. If you have to pay, then you are not getting justice. This sort of concept, the naming of that commission, itself demonstrates why Mr Skyring and I have both in our own inimitable way maintained our unusual

approach to the courts by seeking to adopt a new process, for which there is valid precedent, I might add, as outlined in de Smith's Judicial Review of Administrative Proceedures . The fact that something has been done before, and has not been done for a long time, certainly is not an excuse for not doing it now. The reason why such a process is adopted by ourselves in these cases is effectively because it allows a message to be got to the captain to look a little further ahead and not allow the tanker, which might be Australia, crashing into the iceberg which is fairly easily foreseeable ahead of us.

This is getting way of the subject you asked me to confine myself to, Your Honour, but I sense that there is not much point in going further into the argument on McHugh's judgment unless some valid case can be put for some change in what you have called the traditional method of operation of yourself and your brothers.

How is the sock holding up? Is the water about to burst through? Is the dyke about to collapse on me? I have no way of knowing, Your Honour, but I can tell you one thing. I will not be relying entirely upon the mercy of the Court in this matter. There are other avenues by which correction of this issue can be achieved. I have been experimenting with the public arena myself over the years, first as a candidate for Parliament. which I find a completely demoralizing and self-defeating attitude for issues like this. That having been attempted and failed miserably, I believe there are other avenues by which this question can be addressed. One method I have already insituted, namely, in advising people how this issue can be turned to their advantage by using the contradiction of the law to reduce their taxation liability in any taxable transaction. If you are not aware of that, I will outline it briefly to see just what the potential for damage to the national revenues may be if my propositions are taken out into the public arena.

I had, prior to McHugh's judgment - - -

BRENNAN J: That is not our concern, Mr Cusack.

MR CUSACK: I understand that, Your Honour, but I think I will say this, if I may, to give you an indication of the alternatives that face me if I cannot convince you.

BRENNAN J: Then those are alternatives which you must think about yourself. The problem - - -

MR CUSACK: With respect, Your Honour, I believe that I

will be taking those actions, if I take them, by virtue of, and effectively upon the direction of, the High Court of Australia because by implication - - -

BRENNAN J: There will be no directions - - -

MR CUSACK: - - - refusal to grant my leave to appeal this issue in a controlled atmosphere will be authority to take the issue to the public arena.

BRENNAN J: Mr Cusack, the decisions that this Court reaches provide no authority to anybody to take courses which are other than those directed by the judgments themselves. If they - - -

MR CUSACK: In the sense, Your Honour, that a law is deemed valid - - -

BRENNAN J: Mr Cusack - - -

MR CUSACK: I am sorry, Your Honour.

BRENNAN J: - - - hear me out. If you choose to take a course of conduct because you find that the access to this Court is not what you had hoped it to be, that is a matter for you, but the course that you take is by no means authorized by this Court.

MR CUSACK: Except in so far, Your Honour, as the action of the Court, or the decision of the Court, effectively upholds a contradiction in our statutes. If this Court cannot see the social implications of a statutory conflict which can be published at large, then I believe the Court, as Mr Skyring went very close to saying, is derelict in its duty to society at large. I see an opportunity, because of this conflict, to cause the executive powers of this State great trouble, not because I wish to, but because the nature and the effect of a statutory conflict is to allow chaos in a society. If there is no other way of correcting or addressing a conflict in the statute through the courts, then it seems that there will be little option but to take this to the public arena.

BRENNAN J: Mr Cusack - - -

MR CUSACK: If the effect of that is chaos, then it is the statutes - - -

BRENNAN J: - - - we have been through that aspect now and I think perhaps if you give us any further submissions you have relevant to the matter that we have to consider.

MR CUSACK: Since this probably is the last opportunity, may I just pause for a moment, Your Honour? I think I need to say, and my final word will be, Your Honour, that the distinction may not be easy to see. But the overruling by implication definitely did exist. The fact that one is not able to point to a specific overturning of an earlier judgment is not sufficient grounds for dismissing a distinction - the possible existence of a distinction which is fully capable of overruling a judgment by implication. I do not believe that the two parts of that crucial portion of McHugh's judgment are necessarily sufficient to stand as a bar against proceeding to an appeal against him - against his judgment.

My final point then is that the overruling by implication does in fact exist. Part of the reason why this is difficult to prove is that the judgments which do overrule by implication have not been published, to my knowledge. These judgments were given by voice, as far as I am aware. I have not seen a published judgment of the more recent one which did overrule by implication. In the absence of a written judgment, or a written statement of the findings of those later courts which we believe very sincerely do overrule the earlier judgment by implication, the task of proving that overruling - or the implication - is doubly difficult. We are relying on recall of what was said and trying to pit that recall against the written word. But the seriousness of the matter, the difficulty confronting us in proving the implication, because of the absence of a written judgment, I believe is sufficient grounds for leave to be granted to have a final determination of that issue as to whether the constitutional bar does exist as argued and to which there was no demur.

BRENNAN J: Thank you, Mr Cusack. The judgment of Mr Justice McHugh continues to appear to us, as it appeared on the last occasion, to be clearly right. No error has been shown in the reasoning which underlies it and the decision which His Honour arrived at seems to us to be beyond question. For those reasons, leave to appeal will be refused.

AT 12.58 PM THE MATTER WAS ADJOURNED SINE DIE