patent's validity may arise in other proceedings and upon other material, and so I express no concluded opinion upon the subject.

The appeal should be dismissed.

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Appeal dismissed with costs excluding any additional costs occasioned by the cross-appeal. Cross-appeal dismissed.

Solicitor for the appellant, *Douglas S. Ritchie.*

Solicitors for the respondent, *Shaw & Turner.*

H. D. W.

Appl *Daemar* v *Industrial Commission of NSW* (1988) 12 NSWLR 45 | Appl *Daemar* v *Industrial Commission of NSW* 90 FLR 469 | Appl *Pluteus (No8) Pty Ltd* v *GJ Coles & Co Ltd* 77 FLR 423 | Appl *Daemar* v *Industrial Commission of NSW* 79 ALR 591 | Cons *Bullock* v *Goodluck* [1983] TasR 226 | Appl *Rajski* v *Wood* (1989) 18 NSWLR 512 | Appl *Commonwealth Trading Bank* v *Inglis* (1974) 131 CLR 311 | Foll *Dosanjh; Ex parte Duus (Trustee of the Estate of Dosanjh)* (1995) 56 FCR 521

Cons *Madden* v *Madden* (1996) 65 FCR 354 | Appl *Minerals Evaluation Network* v *Brosnan* (2002) 31 SR(WA) 225

Appl *Batistatos* v *RTA (NSW)* (2006) 227 ALR 425

[HIGH COURT OF AUSTRALIA.]

COX . . . . . RESPONDENT;

PLAINTIFF,

AND

JOURNEAUX AND OTHERS . . . . APPLICANTS.

DEFENDANTS,

[No. 2.]

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June 21; *July* 1.

DIXON J.

Action—Frivolous and vexatious—Stay of action—Inherent jurisdiction of Court.

Bankruptcy—Action by bankrupt prior to bankruptcy for "personal injury or wrong done to himself"—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *sec.* 63 (3).

The inherent jurisdiction of the High Court to stay an action as vexatious is to be exercised only when the action is clearly without foundation and when to allow it to proceed would impose a hardship upon the defendants which may be avoided without risk of injustice to the plaintiff. In exercising its power to stay an action on the ground that it is frivolous and vexatious the Court is not concluded by the manner in which the litigant formulates his case in his pleadings. Such power may be exercised not only where the facts are undisputed, but also in cases where there is a dispute as to the facts.

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The test whether, under sec. 63 (3) of the *Bankruptcy Act* 1924-1933, a bankrupt may continue in his own name and for his own benefit an action commenced by him previous to his bankruptcy for a personal injury or wrong done to himself is whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property.

Wilson v. *United Counties Bank Ltd.*, (1920) A.C. 102, at pp. 111 and 128-133, applied.

SUMMONSES.

In an action in the High Court brought by Benjamin John Cox against Herbert Fogelstrom Journeaux, Horace Frank Richardson, Thomas Allan McKay and Arthur Vesey Walker for conspiracy to injure him in the minds of the business community and the public generally, the defendants took out summonses seeking orders that the action be dismissed or struck out or that all further proceedings therein be stayed on the grounds :—

1. That the estate of the plaintiff having since the commencement of the action been sequestrated under the Federal *Bankruptcy Act* 1924-1934 and the action not being one for personal injury or wrong done to the plaintiff or to any member of his family, the action had been abandoned or should be deemed to have been abandoned by the trustee in such bankruptcy.

2. That there was no reasonable or probable cause of action or suit disclosed by the statement of claim.

3. That the action, in so far as it had not been abandoned, was frivolous, vexatious and oppressive and an abuse of the process of the Court.

The summonses were heard by *Dixon* J., from whose judgment the following facts have been abstracted :—

The action, which was based on conspiracy, was commenced on 29th November 1933. The original jurisdiction of the Court was invoked by the plaintiff upon the ground that he had become a resident of Queensland, while the six defendants were residents of Victoria. Two of the defendants, however, were incorporated companies and had already been dismissed from the action in accordance with the view that a corporation cannot be a resident within the meaning of sec. 75 (iv.) of the Constitution (*Cox* v. *Journeaux* (1)).

(1) *Ante*, p. 282.

A sequestration order was made against the plaintiff on 13th November 1934, and the remaining defendants now sought a summary termination of the action on the grounds that there never was enough colour for the plaintiff's claim to entitle him to prosecute it at their expense, and that, in any case, it was not an "action . . . for any personal injury or wrong done to himself" which, under sec. 63 (3) of the *Bankruptcy Act* 1924-1933 a bankrupt could continue in his own name. The plaintiff had founded a drapery and furnishing business, which was subsequently formed into a company called Cox Brothers Ltd. Subsequently, a holding company called Cox Investments Ltd. was formed. Later Cox Brothers (Adelaide) Ltd. and Cox Brothers (Hobart) Ltd. were formed to conduct the business in those States. And later still another company, called Cox Brothers (Australia) Ltd., was formed to take over the whole business of Cox Brothers Ltd., Cox Brothers (Adelaide) Ltd. and Cox Brothers (Hobart) Ltd. and to conduct the business as an entirety. The plaintiff held a majority of the ordinary shares in Cox Investments Ltd., and that company in turn held all the ordinary shares in Cox Brothers (Australia) Ltd. On 17th August 1929 the plaintiff transferred to a company called Malvern Investment Trust Pty. Ltd. 44,000 contributing shares and 22,000 paid up shares in Cox Investments Ltd. and also his deposit of about £7,000 which he had made with Cox Brothers (Australia) Ltd. In October 1930 Malvern Investment Trust Pty. Ltd. resolved to wind up. On 10th March 1931 Cox Investments Ltd. resolved to make a call of 3s. 4d. per share. At this time Malvern Investment Trust Pty. Ltd., which was in liquidation, held 44,550 contributing shares in Cox Investments Ltd. and the call amounted to £7,425. The liquidator of Malvern Investment Trust Pty. Ltd. directed Cox Brothers (Australia) Ltd. to apply the deposit of £7,000 held by that company in satisfaction of the call made by Cox Investments Ltd. On 11th May 1931 Cox Investments Ltd. made another call of 5s. a share. On 16th July 1931 the plaintiff took from the liquidator transfers of the 44,000 contributing shares in Cox Investments Ltd., which he had originally vested in that company, and of 18,000 fully paid up shares. The plaintiff said that he did this on the

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advice of the liquidator, that the latter had come to some understanding with the defendant Richardson, and that the defendant Journeaux, before the calls were made, had assured him, the plaintiff, that they would not be enforced against him and in any case he, the defendant Journeaux, could sell enough shares to meet the calls. However, when the board of Cox Investments Ltd. met on 24th August 1931, the plaintiff's failure to pay the call was relied upon as vacating his seat as managing director and the defendant McKay was chosen to preside in his place. On 17th October 1931, the plaintiff resigned his office of managing director and of director both of Cox Brothers (Australia) Ltd. and Cox Investments Ltd. The plaintiff then entered into an agreement with Cox Brothers (Australia) Ltd. and Cox Investments Ltd. which recited that he owed Cox Investments Ltd. £14,666 13s. 4d. for calls on 44,000 contributing shares and required immediate payment of that amount, which was extended over five years on condition that the whole should become due if default were made in payment of an instalment. The plaintiff commenced this action on 29th November 1933. On 13th December 1933 the two companies issued a writ against the plaintiff for £14,666 13s. 4d. less a small credit, the plaintiff having made default in payment of an instalment. Judgment was obtained against the plaintiff on 21st February 1934 (*Cox Brothers (Australia) Ltd.* v. *Cox* (1)), and on 13th November 1934 the plaintiff's estate was sequestrated.

D. Claude Robertson, for the plaintiff.

Hudson, for the defendants Journeaux and McKay.

Tait, for the defendants Richardson and Walker.

Cur. adv. vult.

July 1.

DIXON J. delivered a written judgment, which, after stating the facts, continued as follows :—

His statement of claim alleges that they combined and conspired together to punish and ruin the plaintiff and to inflict injury and damage upon him personally and to discredit him in the minds of

(1) (1934) 50 C.L.R. 314.

the shareholders of the company, the business community and the public generally. This states the cause of action as conspiracy to injure. The nature and ingredients of this cause of action have been the subject of recent decisions in the House of Lords and in this Court; *Sorrell* v. *Smith* (1), and *McKernan* v. *Fraser* (2), where the whole subject received a full examination in the judgment of *Evatt* J. I refer particularly to *McKernan* v. *Fraser* (3).

To succeed in an action for conspiracy to injure where there is no illegality actual or threatened in the end in view or the means adopted by the defendants, a plaintiff must establish that, in combining, the defendants were animated by a desire to harm him. In the present case the only conspiracy which is distinctly alleged in the pleadings is of this character. But the overt acts alleged in the paragraph which follows that allegation include fraud and what the pleading treats as illegal acts, although they are rather *ultra vires* than unlawful. The case which the pleading seeks to make, briefly stated, is that the defendants, as the plaintiff's co-directors, in pursuance of a concerted plan to injure him, persuaded him to take a transfer back into his own name of the contributing shares in Cox Investments Ltd. by falsely representing that they had no intention to call upon him to meet any of the liability upon the shares, and by dishonestly procuring him to abstain from independent advice and then, by calls made irregularly and with no bona fide purpose of benefiting the company but to enable them to take measures against him, they obtained the deposit of £7,000 held by Cox Brothers (Australia) Ltd., caused him to resign, to submit to the forfeiture of the 44,000 contributing shares, to authorize the sale of the 22,000 fully paid up shares, or part of them and to assume a responsibility he could not discharge, and afterwards, by further misrepresentations made to shareholders and others carried through a scheme of amalgamation of the two companies. This scheme was in fact one of compromise, which was formulated early in 1932, that is, after the plaintiff's departure, and adopted in July 1932 by the various groups of shareholders and sanctioned by the Supreme Court in August 1932. It seems to me to have little bearing on the actual cause of action set up by the plaintiff.

(1) (1925) A.C. 700.
(2) (1931) 46 C.L.R. 343.
(3) (1931) 46 C.L.R., at pp. 399 et seq.

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I do not propose to go in detail through the overt acts alleged. Some of them contain mere mistakes as to the course of events; e.g., that the deposit of £7,000 was transferred back into the plaintiff's name (par. 6 (1)) and that it was the defendants who caused it to be used in reducing the liability upon the shares (par. 6 (8)). Some are incredible; e.g., (1) that the plaintiff lacked independent advice (par. 6 (3)): he had consulted at least two firms of solicitors of standing; (2) that he was overborne by the defendants through ill health and mental strain (par. 6 (13)). Some allege, as if they were misdeeds, acts quite innocent and proper; e.g., (1) that the defendant, Journeaux, induced the plaintiff to seek the advice of a solicitor who acted for that defendant (par. 6 (2)); (2) that the transfer of the 44,000 shares to him by the Malvern Investment Trust Pty. Ltd. was resolved on at a meeting of that company from which he was absent (par. 6 (9)); he executed the transfers. Some contain irrelevancies; e.g., that the meetings of shareholders who adopted the scheme of amalgamation or compromise and the Court which confirmed it were induced to do so by concealment and misrepresentation. But I think that I have summarized so much of the overt acts alleged as directly contribute to the constitution of a cause of action. It is apparent from that summary that, independently of other ingredients, no cause of action in the plaintiff exists unless either (1) the object of the supposed combination among the defendants was to achieve his injury; or (2) representations were made by or on behalf of the defendants to the plaintiff of a dishonest character in furtherance of a common end; or (3) an illegality was committed in relation to the making of calls, again in furtherance of a common end. I consider that it is quite clear that no one of these alternative elements can be established in point of fact.

(1) Even if the plaintiff could show that the defendants or some of them did combine for a common end involving injury to him, it is absurd to suppose that they were not impelled to do so by their desire to protect or secure the interests of themselves and other shareholders in the companies. It is no new thing for directors of a trading company to revolt against the control of a chairman or managing director when it suddenly appears that its once prosperous

business is approaching a collapse. In the steps taken to cast off such a control, unwisdom and even impropriety may appear. But it would be absurd to regard the directors as predominantly actuated by a desire to injure. In the present case many reasons may be found why it should have seemed desirable that the plaintiff's control should cease. As the situation developed, the opposition grew between his interests and those of the other shareholders in the companies. The facts do not support the allegation that the uncalled capital was called up with a view of embarrassing him. Nor is there anything but the plaintiff's vaguely expressed assertion to support the further allegation that, with such a purpose in view, the defendants induced him to assume ownership and responsibility for the contributing shares. But, even if it were so, the inference would be that they were pursuing their own interests and those of other shareholders, not that they were combining with the object of inflicting wanton or malicious injury upon him.

(2) Allegations of fraud are made in many parts of the statement of overt acts. But, apart from the making of the calls, the only relevant allegation which is made with any definiteness is that contained in par. 6 (2), which, it was not disputed, expounds and limits par. 6 (1). The allegation is, in effect, that the defendants or one of them falsely represented their then present intention regarding their use of the responsibility the plaintiff would incur if he became holder of the contributing shares. Upon the materials placed before me, there is nothing to establish the making of the representation except the vague statement of the plaintiff which I have set out in the course of narrating the facts. On the other hand, there is nothing to disprove the allegation that some representation or assurance was made or given. But whatever may be the precise statement by the defendants to which the plaintiff is prepared to depose, and that is left to speculation, I am satisfied that he will be quite unable to show that it was made fraudulently in furtherance of a common design.

(3) The illegality set up arises upon two allegations relating to the making of calls, viz., (*a*) the procedure adopted; (*b*) mala fides in the purpose of making them. As to the first, there appears to be nothing to support the suggestion that they were invalidly made.

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In any case, if these calls had been invalid, no unlawful act would have been committed. As to the second, it is clear upon the facts that every reason existed for calling up the capital and that experts advised and a shareholder exhorted the directors to do so. Nothing has been advanced to support the allegation of a collateral object.

There are some minor matters in the statement of claim which it is unnecessary to deal with in detail, e.g., allegations of threats to use bankruptcy proceedings. I do not think the plaintiff can make out any case by means of these matters, more especially having regard to the facts which lie behind the allegations.

The inherent jurisdiction of the Court to stay an action as vexatious is to be exercised only when the action is clearly without foundation and when to allow it to proceed would impose a hardship upon the defendants which may be avoided without risk of injustice to the plaintiff. The principle, in general paramount, that a claim honestly made by a suitor for judicial relief must be investigated and decided in the manner appointed, must be observed. A litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender. It is only when to permit it to proceed would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party that a suit should be stopped. But the Court is not concluded by the manner in which the litigant formulates his case in his pleadings. It may consider the undisputed facts. Further, it is not limited to cases where there is no dispute of fact. (See *Remmington* v. *Scoles* (1); *Salaman* v. *Secretary of State for India* (2); *Goodson* v. *Grierson* (3); *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario* (4); *Lawrance* v. *Lord Norreys* (5); *Willis* v. *Earl Howe* (6); *McHenry* v. *Lewis* (7); *Crompton & Son and Wilcox Mofflin* v. *The Commonwealth* (8).)

In the present case I am satisfied that the Court should exercise its power to stop the action summarily. The plaintiff's case is

(1) (1897) 2 Ch. 1.
(2) (1906) 1 K.B. 613.
(3) (1908) 1 K.B. 761, at p. 764.
(4) (1919) A.C. 687, at p. 694.
(5) (1888) 39 Ch. D. 213; (1890) 15 App. Cas. 210.
(6) (1893) 2 Ch. 545, at pp. 554-555.
(7) (1882) 22 Ch. D. 397, at p. 407.
(8) (1924, July 25) Unreported. [1921 No. 34 (*Starke* J.).]

clearly hopeless. It is true that some examination of the facts is necessary before this appears. But the necessity arises from two causes, neither of which aids the plaintiff. The transactions preceding and attending the very few occurrences that are critical present some complexity as a result of the manner in which the plaintiff had used the company law. This makes a trial a lengthy and expensive proceeding. In the second place, the plaintiff in his pleadings and in his affidavit has done little to reduce his claim to clearness and definiteness—perhaps wisely. Much litigation has already taken place ; the plaintiff has appealed unsuccessfully three times to the Full Court of this Court. He has agitated his claim twice already. Certainly the occasions were not very appropriate, but in each proceeding judicial opinions were expressed of the merits of his claim which accord with mine. He is a bankrupt and there is no prospect of his satisfying any order for costs made against him in this, or as I infer, in previous litigation. Notice was given under sec. 63 (3) of the *Bankruptcy Act* 1924-1933 to the official receiver requiring him to elect to prosecute or discontinue the action and he has elected not to prosecute it. The plaintiff says that he himself is entitled to prosecute it under the proviso as an action for personal injury or wrong done to himself. The test appears to be whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property (*Wilson* v. *United Counties Bank Ltd.* (1)).

The plaintiff's pleader has done his best to bring the claim within the description of injury which remains actionable at the suit of a bankrupt. An attempt to go behind the formulation of the claim for damages and look at the actual facts inevitably leads back to an examination of the cause of action, and, as my conclusion is that none exists or could be discovered, I have felt it better not to engage in a futile consideration of the hypothetical question which classification it would fall under if it had a real or colourable existence.

The order will be that the action be for ever stayed and that the plaintiff do pay the defendants' costs of the action, including the costs of the summonses. The order will be drawn up as an order of

(1) (1920) A.C. 102, at pp. 111 and 128-133.

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the Court reciting the adjournment of the summonses into Court and the documents read will be scheduled as follows :—The order of this Court made 25th May 1935. The statement of claim filed pursuant thereto on 17th June 1935. The summons of the defendants Richardson and Walker, issued 18th June 1935. The summons of the defendants Journeaux and McKay, issued 18th June 1935. The notice to the official receiver, dated 14th March 1935 and filed 19th June 1935. The affidavit of J. A. Nimmo, sworn 19th June 1935, and the exhibits thereto, viz., two transcripts marked respectively " A " and " B ". The affidavit of the defendant Richardson, sworn 19th June 1935 and the exhibits thereto, viz., three share certificates and transfers marked " A," " B " and " C," a copy of a deed poll or power of attorney marked " D," a copy letter from the plaintiff to one Black, marked " E," and a circular marked " F." The affidavit of W. C. Greaves, sworn 19th June 1935. Copy of memorandum and articles of association of Cox Investments Ltd., put in evidence and marked " Ex. 1." Copy of memorandum and articles of association of Cox Brothers (Australia) Ltd., put in evidence and marked " Ex. 2." Certify for counsel.

Action stayed for ever; the plaintiff to pay the defendants' costs of the action including the costs of the summonses.

Solicitor for the plaintiff, *J. Woolf.*

Solicitors for the defendants Journeaux and McKay, *Arthur Phillips & Just.*

Solicitors for the defendants Richardson and Walker, *Henderson & Ball.*

H. D. W.