HIGH COURT OF AUSTRALIA

KIRBY J

IN THE MATTER OF AN EX PARTE
APPLICATION BY ANTHONY GILBERT MARTIN
FOR LEAVE TO ISSUE A PROCEEDING

Re Martin's Application
[2001] HCA 41
Date of Order: 28 May 2001
Date of Publication of Reasons: 11 July 2001
C9/2001

ORDER

Application refused.

Representation:

The applicant appeared in person.

CATCHWORDS

Re Martin's Application

High Court Practice - Leave to issue summons - Earlier direction by a Justice that Registrar refuse to issue summons without leave - Purposes of provisions in O 58 r 4(3) High Court Rules - Whether proposed summons clearly meritless or futile - Relevance of history of previous litigation and terms of relief sought - Applicable principles for grant of leave.

Practice and procedure - Frivolous and vexatious proceedings - High Court Practice - Direction of a Justice that Registrar should refuse to issue summons without leave of a Justice first had and obtained - Principles governing provision of such leave - Whether, if issued, relief claimed in summons meritless or futile

High Court Rules, O 58 r 4(3).

1 KIRBY J. For many years Mr Anthony Martin ("the applicant") and Mrs Sue Martin, his wife, have been in dispute with the liquidator of Individual Homes Pty Limited (In Liq). Mr and Mrs Martin wish to issue a summons out of this Court in which they have named that company in liquidation as the first respondent. In the summons they have also named the partners of a firm of solicitors, who have acted for the first respondent, as the second respondent. This is a course that was criticised in the court below. The applicant and his wife are not legally represented.

The summons propounded by the applicant

2 In the summons which the applicant presented to the Registrar for filing, he sought the following orders:

> "1. The Registrar General of the Australian Capital Territory is to take no action regarding his notice dated the 10th of April 2001 to Anthony Gilbert Martin in relation to caveat No 1201331 until further court orders.
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> 2. In the alternative to Order 1 above, the Registrar General of the Australian Capital Territory is to forthwith restore caveat No 1201331 if it has been removed from the land known as block 11 section 320 Kambah in the Australian Capital Territory.
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> 3. The orders of the 20th of April 2001 in SC 150 of 1993 & SC 590 of 1994 of Justice Crispin of the Supreme Court of the Australian Capital Territory be set aside and the subject matter of the said notices of motion dated the 17th of April 2001 be heard by the ACT Supreme Court without any orders for security for cost from Anthony Gilbert Martin."

Direction under the High Court Rules and application for leave

3 On 2 May 2001 a Justice of this Court (Callinan J), acting pursuant to O 58 r 4(3) of the High Court Rules, directed that the Registrar refuse to issue the proposed summons without the leave of a Justice first had and obtained.

4 Being notified of that order, on 14 May 2001, the applicant applied for leave to issue the summons. Normally, such applications are dealt with by another Justice on the papers. However, because the ultimate subject matter of the dispute between the company in liquidation and the applicant concerned a home which the applicant and his wife had built, and in which they had lived for many years, and because, in his affidavit, the applicant had made a number of complaints about his treatment (including having to pay a filing fee of $1,052 for the filing of the summons and supporting documents, which were not then returned before the Court), I directed that the application for leave be returned

before me in public chambers. I also directed that the liquidator and the solicitors named should be notified, in case they wished to be heard on the return of the proceedings. I am informed by the Deputy Registrar that the respondents were duly notified. They have chosen not to attend the Court today, as is their right. Accordingly, the proceedings have been heard *ex parte*.

The decision of the first Full Federal Court

5 I disregard various irrelevant matters which were stated in the applicant's affidavits. The general history of the dispute between the parties may be conveniently found in two places. The first is in the joint reasons of Einfeld and Kenny JJ in *Martin v Taylor*[1] (with which reasons Miles J, sitting as a judge of the Federal Court, agreed). The second source is found in a brief summary of the tortuous course of the litigation contained in par 8 of the summary of argument in special leave application C3 of 2001, filed in other proceedings to which I will shortly refer.

6 After the decision of the Full Court of the Federal Court of 27 July 2000[2], the applicant and his wife sought a stay of proceedings in this Court pending an application for special leave to appeal from that decision. The application for a stay came before Gaudron ACJ on 20 July 2000. It was resumed before her Honour on 31 July 2000. On the last-mentioned day she granted a stay in order to defend the utility of the special leave application which was then pending. She made no substantive observations about the merits of the proceedings. However, she did allow herself to say:

> "[I]t is clear beyond argument that this litigation is a mess, absolutely clear beyond argument."

7 I have some sympathy for her Honour's observations. They might also be made in relation to the proceedings before me. However, the applicant persisted with a careful and lengthy explanation of the nature of the proceedings that he wishes to bring. Ultimately, their character and purpose was made clear.

The High Court earlier refuses special leave

8 Following the order made by Gaudron ACJ, the special leave application in respect of the first Full Court's decision of 27 July 2000 came before a Full Court of this Court on 12 September 2000. The Court was then constituted by McHugh, Hayne and Callinan JJ. As the applicant observed, in opening his oral

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1 [2000] FCA 1002.

2 *Martin v Taylor* [2000] FCA 1002 ("the first Full Court").

argument in support of his then application, it was the sixth time that the applicant and his wife had approached this Court for special leave in connection with their litigation. On each earlier occasion the applicant and his wife had failed. The sixth occasion was to prove no more successful.

9 The company in liquidation was the registered proprietor of the property at Kambah referred to in the applicant's proposed summons. The applicant and his wife had lived in the house on the property since 1979. The applicant was at one stage an officer of the company before it went into liquidation. The applicant and his wife had sought to protect their alleged interests in possession of the property by the lodgment of caveats and by the bringing of various claims to the courts. However, by refusing special leave to appeal, as this Court did on 12 September 2000, it confirmed the judgment of the Full Federal Court of 27 July 2000. This Court held that the unanimous decision of the first Full Court was "not attended by any doubt".

Eviction from the property and commencement of new proceedings

10 On the next day, 13 September 2000, by action taken on behalf of the company in liquidation, the applicant and his wife were evicted from the property. The applicant acknowledged before me that, so far as possession was concerned, the fight was over. As he put it, he had rolled his dice and he had lost. However, the applicant made one further bid to protect the interest which he and his wife claim to have had in the Kambah property. They attended an auction for the sale of the property which was held on 4 April 2001. They made a bid for the property; but ultimately they were not successful.

11 At the auction, the property was sold by the first respondent to Mr George James and others ("the new registered proprietors"). According to the applicant, prior to the transfer, the new registered proprietors were on notice of the applicant's claim to an interest in the property. The applicant's case in the courts has, therefore, shifted from a claim to prevent the loss of *possession* to one to prevent the *transfer* of title to a purchaser who might have no notice of the assertion of an interest in the property.

The decision of the second Full Federal Court

12 The fresh application was determined by Miles CJ in the Supreme Court of the Australian Capital Territory adversely to the applicant and his wife. However, the applicant and his wife then again appealed, purportedly as of right, to the Full Court of the Federal Court of Australia. That Court, comprising Drummond, Dowsett and Gyles JJ, heard their purported appeal on 9 February

2001[3]. Their Honours dismissed the "appeal". In effect, as I read their reasons, the second Full Court held that the "appeal" was incompetent and that it required leave to appeal. However, they concluded that leave should not be granted as the appeal could not succeed.

13 Giving the leading judgment on behalf of the second Full Court, Drummond J said, in part, that the appeal could be characterised as frivolous or vexatious. The applicant complains that that issue was not before the second Full Court. However, I do not understand that Drummond J and the second Full Court purported to dispose of the "appeal" on that ground. Rather, it was disposed of upon the basis that no foundation was established for disturbing the decision of Miles CJ. Whilst Gyles J was critical of the addition of the solicitors for the first respondent as the second respondent, I am not called upon today to consider the correctness of his Honour's observations about which the applicant also complained vehemently.

14 Nothing daunted, the applicant and his wife have now filed a further, seventh, application for special leave to appeal to this Court against the judgment of the second Full Court. The written arguments of the parties have been filed in relation to that application. I have read those arguments. Without presuming to foreclose the applicant's rights in this Court, it is my opinion (as I expressed it during argument to the applicant) that the chances of him and his wife securing special leave to appeal from the judgment of the second Full Court appear to be very slender indeed.

The issue and the proposed reformulated summons

15 I remind myself that I am not now determining the fate of this seventh special leave application. Nor, indeed, am I determining, as such, what the fate of the summons would be, were leave to be granted by me to the applicant to file such summons. In argument, the applicant, who spoke with the knowledge and in the presence of his wife, narrowed the relief that he would actually seek on the summons if he were permitted to issue it, to the second stated ground. The second ground, I remind myself, related to an order to the Registrar-General of the Australian Capital Territory to restore a caveat which had been removed from the title in relation to the land on which the former home of the applicant and his wife in Kambah was situated.

16 In effect, the applicant said that, if he were permitted to file the summons, he would submit to the directions of this Court to reformulate this second ground. He would also re-express the ground in terms to seek an order that the

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3 *Martin v Individual Homes Pty Limited (In Liq)* [2001] FCA 91 ("the second Full Court").

Registrar-General be permitted to accept an application from him for a caveat in respect of the subject property.

17 The Deputy Registrar has informed me that the special leave hearing in respect of the second Full Court judgment would not be heard, in the normal course of events, until 2002. Even if the special leave application were granted an order for expedition (which would be difficult to justify) and even if it were returned in Sydney rather than Canberra, it appears unlikely that it would be heard for several months at the earliest. The application books have not yet been completed. That step would be necessary before a hearing date could be assigned.

Confining O 58 r 4(3) of the High Court Rules to manifestly clear cases

18 To give meaning to the requirement for leave, it is necessary to consider the words used in O 58 r 4(3) of the High Court Rules. The rule appears in an Order concerned with the Registries of this Court. It is in such registries that the documents initiating proceedings in the Court are presented for filing. The primary purpose of r 4(3) is to confer a power on a Registrar. That power is to seek a "direction of a Justice". In relation to a particular process presented for filing, the initiating event is that a Registrar has formed a specified opinion. This is that "on its face" the document ("writ, process or commission") appears to be "a frivolous or vexatious proceeding". Elsewhere in the High Court Rules, power is conferred on the Court (and it exists anyway in the Court's implied or inherent powers) to terminate frivolous or vexatious proceedings[4]. Accordingly, the exercise of power by a Justice is enlivened by an exercise of power by the Registrar. As an officer of the Court it will be expected that, acting lawfully and reasonably, no such "direction" would be sought without good cause. However, the action of the Registrar is not conclusive. It occasions the possibility (not the necessity) of a direction by a Justice and, if leave is then sought, a decision on the point by a Justice (usually a different one) who hears the application for leave.

19 In the context, the focus of the attention of the Justice is obviously that of the propounded frivolousness or vexatiousness of the process. This means that, at both stages (the giving of the direction and the consideration of leave) the Justice exercising the applicable powers must decide whether the process is frivolous or vexatious. It will be so if the process cannot be supported as arguable having regard to the state of law, is futile because it is bound to fail on the facts pleaded or where it is a wrongful or repeated invocation of the Court's

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4 See High Court Rules, O 26 r 2(3), O 26 r 18; cf *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720.

process that is sought for extraneous purposes which would "inflict unnecessary injustice upon the opposite party"[5].

20 With this analysis in mind I must consider the utility and justice of permitting the applicant to issue the summons, confined as now proposed, in order to permit argument to proceed on the entry of a caveat in respect of the subject property. Tending in favour of that course are two principal considerations. The first is that the purpose of O 58 r 4(3) of the High Court Rules is not needlessly or unreasonably to bar access of a party to the process of the Court. Filing process is a necessary prerequisite to enlivening the jurisdiction and powers of the Court as contemplated by the Constitution and applicable federal law. Only clearly meritless or futile process should be the subject of directions under that sub-rule. Secondly, this Court will always defend the utility of viable proceedings in the Court. Its power to do so derives from the Constitution itself[6]. The applicant and his wife have initiated proceedings in the Court by way of their seventh special leave application. That is the foundation upon which they base their right to argue for an order to protect the utility of such proceedings.

Reasons for refusing leave

21 Against taking the course of permitting the summons to be received are the following considerations. First, the applicant conceded before me that no interest in possession in the property is now asserted. The applicant and his wife are long since out of possession. Accordingly, any legal or equitable claims they may have in respect of the improvements which they once made to the house on the property in Kambah would appear to be such that they must be proceeded for separately, if at all, perhaps against the first respondent, perhaps against others.

22 Secondly, there is an extremely long history to this litigation. For the reasons that I have stated, there appear to be rather small prospects of success to the grant of special leave given that history, the premise upon which this Court's last decision stands, the reasons of the second Full Court and the fact that the proceedings in that Court were themselves proceedings that required the leave of that Court.

23 Thirdly, if the summons were issued and if the caveat were sought, it would be necessary to give notice to those who would be principally affected,

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5 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720; see also *Gunn v Hudsons Bay Co* (1915) 25 DLR 173; *Bock v Bock* [1955] 1 WLR 843 at 846; [1955] 2 All ER 793 at 796.

6 *Tait v The Queen* (1962) 108 CLR 620 at 623.

namely, the new registered proprietors. If an order were made permitting or requiring a caveat to be entered (assuming that to be possible and lawful) any such order would impose, possibly for six months or more, serious burdens on the title and rights of the new registered proprietors. Such an order would only be made for very good reason and to protect arguable rights which might otherwise be lost or irretrievably diminished. That precondition is not, even arguably, present in this case.

Conclusions: application refused

24 To grant leave to the applicant to issue the summons could, therefore, only be justified if, on balance, such a grant of leave would have utility and be just and lawful. Despite the endeavours of the applicant, I have not been persuaded that such relief would have utility in the circumstances as I have explained them or that the other requirements would be met. Accordingly, I refuse the application.

25 Necessarily, in doing so, I do not pre-judge the rights of the applicant and his wife to have special leave on the seventh application to this Court. That question will be determined by the Court which hears that application. Nor do I make any adverse conclusion about any relief to which the applicant and his wife may be entitled outside the proceedings on the application for special leave before this Court in relation to the interests which the applicant and his wife claim to have in the property in which they had lived since 1979 but from which they have now been evicted.

Order

26 The order of the Court is the application is refused.