

HIGH COURT OF AUSTRALIA

HAYNE J

BRIAN CHARLES FYFFE

APPLICANT

AND

STATE OF VICTORIA

RESPONDENT

Fyffe v State of Victoria [2000] HCA 31
16 May 2000
M123/1999

ORDER

Summons dismissed with costs.

Representation:

Applicant represented himself

G L Meehan for the respondent (instructed by Victorian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 HAYNE J. The applicant, Mr Brian Charles Fyffe, has applied for special leave to appeal to this Court from the judgment of the Court of Appeal of the Supreme Court of Victoria given on 18 November 1999. The Court of Appeal dismissed Mr Fyffe's appeal from an order of a single judge of the Supreme Court of Victoria, Justice Mandie, dismissing his appeal from an order of a Master that the respondent, the State of Victoria, recover possession of certain land, together with mesne profits, damages to be assessed and costs. In its reasons for judgment the Court of Appeal recorded the facts which give rise to the action instituted by the State of Victoria and it is convenient to adopt the description given in those reasons.

2 The State of Victoria contends that it acquired the subject land in 1989 through the Ministry for Conservation, Forests and Lands. That Ministry is alleged to have bought the land at a mortgagee's sale. The State alleges that in about June or July 1989 it leased the land, including the residence built on it, to Mr Fyffe. This lease, or it may only have been a licence to occupy the land, was oral and required the payment of rent at a rate of \$40 per week. By his defence in the action, Mr Fyffe admitted that the State of Victoria was registered as proprietor of the subject land but alleged that the lease that had been granted was a lease to himself and his two sons. The State contended that the tenancy (and any licence to occupy) was terminated for non-payment of rent.

3 On 8 May 1998, a Master ordered that the State have summary judgment in the action. As I have earlier indicated, Mr Fyffe appealed from that order to a single judge of the Supreme Court but his appeal was dismissed. In its reasons for judgment, the Court of Appeal identified the issues between the parties on the appeal by reference to a summary of issues which had been filed by Mr Fyffe's then solicitor. That summary of issues said that:

"Mr Fyffe contends that the judge misapprehended the historical and legal significance of Mr Fyffe's conviction on criminal charges in 1989 and the fraud which lay behind the sale of the land and the significance of the matters raised in two constitutional notices filed on 5 May and 2 June 1998. Mr Fyffe claims to have seceded from the State of Victoria and to have received international recognition of the fact of secession and that he has entered into treaties with other principalities. The notice asserts that Mr Fyffe intends to argue that the principles enshrined in Magna Carta continue to apply in Victoria and that there has been a fraud committed against Mr Fyffe by the mortgagees of the land who conspired to bring about the sale of the land, and by the State of Victoria itself."

The Court of Appeal dealt with these issues but dismissed the appeal.

4 Mr Fyffe's application for special leave to appeal to that Court gives 14 grounds of appeal. It is as well to set them out. They are:

"The Court of Appeal erred in failing to hold that Mr Justice Mandie erred in Law by placing credence upon the outstanding conviction recorded against the Appellant.

The Court of Appeal erred in failing to hold that the Supreme Court of Victoria was stripped of its jurisdiction by operation of Law, by virtue of the application of the *Habeas Corpus Act* 1640, before Mr Justice Mandie gave judgement against the appellant.

The Court of Appeal lied when it found that there was no evidence that the Appellant had owned the subject land, and thereby failed to uphold the law, justice and judgement of God.

The Court of Appeal erred in failing to hold that the judgement of Mr Justice Mandie was void in the law; as being in contravention of Magna Carta, 1297, by virtue of the application of the Bill of Rights, 1688.

The Court of Appeal erred in holding that Section 16 of the Victorian *Constitution Act* 1975, conferred Plenary Powers upon the Parliament of Victoria.

The Court of Appeal erred in purporting to overrule the Supreme Court of the United States in *Inglis v The Trustees of the Sailors Snug Harbour*, The County Court of Victoria in *HRH Prince Joseph Rigoli v The Minister for Agriculture*, and the Supreme Court of Victoria in *HRH Prince Joseph Rigoli v The Minister for Agriculture*.

The Court of Appeal erred in holding that the Appellant could not secede as a citizen of the Commonwealth of [sic] Victoria.

The Court of Appeal erred in rejecting the legal efficacy of the Treaties of Recognition.

The Court of Appeal erred in rejecting the Sovereign status of HRH Prince Joseph Rigoli to execute diplomatic papers in favour of the Appellant.

The Court of Appeal erred in rejecting the sovereign status of the Government of Tyrone, and of the Sovereign Territory of Tyrone, and the Diplomatic immunity of the Appellant and of the subject land.

The Applicant says that the trial in respect of the outstanding conviction recorded against the Appellant, referred to in the first ground of appeal, was a travesty of justice wherein the conviction was obtained by the prosecution in reliance upon the perjured evidence of the expert crown witness, one Robert Colin Barnes.

3.

The Court of Appeal erred in failing to order a re-trial before Mr Justice Mandie, with an order against the Respondent for accounts.

The Court of Appeal erred in holding that section 77 of the *Transfer of Land Act* 1958, authorised the purchase or transfer to the Respondent, of the subject land.

The Court of Appeal erred in holding that the Pleadings and Section 78B Notices did not raise any constitutional issue."

5 Mr Fyffe now seeks orders (among other things) restraining the State from acting upon, or giving effect to, in any way, the order of the Master made on 8 May 1998. He previously applied to the Court of Appeal for orders staying further proceeding on the judgment which the Master had ordered, but that application was refused.

6 In support of his application for a stay Mr Fyffe has put his argument in ways that may conveniently be summarised under six headings. First, he contends that he was wrongly convicted of an offence which he did not commit or which either was not, or should not have been, known to the law of Victoria.

7 Secondly, he submitted that the disposition of the land by the mortgagee was a disposition made irregularly because the sale was made contrary to the announced manner in which the auction of the land would be conducted and was, in any event, made at an undervalue. He contends that the acquisition of the land by the State of Victoria at this sale contravened rights which he has pursuant to Magna Carta, the Bill of Rights and a number of other historical instruments entrenching the rights embodied in Magna Carta and the Bill of Rights.

8 The third head of his argument concerned the possible interest which his wife may have in the subject land. As I understood it, he contends that the warrant for possession having been directed, among others, to the removal of his wife from the property as tenant, his wife may have an equitable interest in the land.

9 The fourth head of argument concerned the validity of the Victorian Constitution and the powers given to the State of Victoria by that Constitution. Mr Fyffe contended that, so far as his researches had gone, the Victorian *Constitution Act*, enacted when Victoria was a colony, was not shown to have been duly assented to and that it followed, so he said, that there is no valid constituent document for the State of Victoria.

10 The fifth head of argument concerned the manner in which the State of Victoria may have paid for the land which it bought following the mortgagee's sale. Mr Fyffe contended that the State either may not have, or did not, lawfully

pay for the land because it did not pay in the manner prescribed by s 115 of the Commonwealth Constitution.

11 The last group of arguments concerned the alleged secession to which reference was made in that part of the summary of issues before the Court of Appeal which I have already mentioned.

12 Before turning to deal with these heads of argument, it is as well to say something of the principles which the Court should apply in determining an application of the kind now before it. Mr Fyffe's application is cast in terms of seeking an injunction presumably pending hearing and determination of his application for special leave and any appeal that may follow from it. It may be that a stay of the judgment which was given by the Master would achieve the same effect as that which he seeks by the injunction the subject of his application. For present purposes, I do not think it is of much significance to determine whether the application is better cast as one seeking injunction or one seeking stay. In either event, the power of the Court to make an order of the kind sought is not in issue. Nor did I understand there to be any controversy about the kinds of principle which should be applied in determining such an application.

13 Without intending in any way to limit the wide discretion which the Court has in disposing of an application of the present kind, it is convenient for present purposes to refer to the judgment of Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]*¹ for a statement of the operative considerations, namely:

"In each case when the Court is satisfied a stay is required to preserve the subject-matter of the litigation, it is relevant to consider: first, whether there is a substantial prospect that special leave to appeal will be granted; secondly, whether the applicant has failed to take whatever steps are necessary to seek a stay from the court in which the matter is pending; thirdly, whether the grant of a stay will cause loss to the respondent; and fourthly, where the balance of convenience lies."

14 For the purposes of dealing with the present application, I am prepared to assume that a stay, or the injunction which Mr Fyffe seeks, is required if the subject matter of the application for special leave to appeal is to be preserved. Further, I am prepared to assume, without deciding, that the grant of a stay is not shown to be likely to cause any, or at least any significant, loss to the respondent State of Victoria and that, in this and any other relevant respect, the balance of convenience may lie with the applicant for the stay. Given that Mr Fyffe took the steps necessary to seek a stay from the court in which the matter was

1 (1986) 161 CLR 681 at 685.

pending, namely the Court of Appeal of Victoria, attention must be focused upon whether there is a substantial prospect that special leave to appeal will be granted. It is for that purpose that I turn to consider the six heads of argument that I earlier identified.

15 Mr Fyffe's complaints about his conviction related to his conviction for an offence against the then provisions of s 317 of the *Crimes Act* 1958 (Vic), namely that he, together with others, knowingly had in his possession or under his control certain explosive substances, namely a number of modified clocks and a number of briefcases, under such circumstances as to give rise to a reasonable suspicion he did not have them in his possession or under his control for a lawful object. The propriety of Mr Fyffe's conviction for that offence was the subject of an appeal by him to the Court of Criminal Appeal of Victoria which was heard and determined adversely to him in June 1989. It is enough to say of the fact of conviction and the circumstances surrounding it that it is, in my view, wholly irrelevant to any issue which Mr Fyffe may have with the State of Victoria concerning the land now in question. Mr Fyffe sought to identify its relevance as being that, by his charging and conviction, he was in effect precluded from taking whatever steps would have otherwise been necessary to prevent his dispossession of the land.

16 In my view, that argument is an argument which does not relate to the issues now in question. It is, therefore, strictly unnecessary to go on to consider whether the offence of which he was convicted was an offence that was known to law, or should have been known to law, in Victoria. It is appropriate, however, to notice that that is an issue which, if it was to be raised, fell to be raised in his appeal to the Court of Criminal Appeal and it is a point which I consider now concluded against him, even if otherwise it were to be regarded as arguable, which I do not consider it to be.

17 Much of the weight of Mr Fyffe's argument was thrown on the second of the areas of argument which I earlier identified, namely that he had been wrongfully dispossessed of his land contrary to rights which he has under Magna Carta or the Bill of Rights. The dispossession asserted is, it is necessary to record, a dispossession following a sale by a mortgagee. Mr Fyffe contends that that sale was at an undervalue and was made irregularly. If those complaints have validity, and upon them I express no view, they are complaints that are to be made against the party that was conducting the sale as vendor, namely the mortgagee, not against the party which bought the property by agreement from that mortgagee. The fact that in this case the purchaser of the land was, in effect, the State of Victoria does not, in my opinion, lead to some different conclusion. In particular, whatever may have been the irregularities in the manner of sale or the price at which the land was sold, they are not matters which, in my opinion, give rise to any arguable right in Mr Fyffe under any of the several instruments to which he referred, chief among which were Magna Carta and the Bill of Rights.

18 The third aspect which Mr Fyffe mentioned was his wife's possible interest in the land. This, as Mr Fyffe freely acknowledged, was a point which has emerged only recently. It is a point which, when raised in the Court of Appeal, Mr Fyffe, wrongly as he would now say, said was not a subject of relevance or concern. The course of events in the proceedings having been as they are, in my opinion it is unlikely in the extreme that this is a matter which would found any grant of special leave.

19 It is convenient to deal with the three last heads of argument together, namely that Victoria has no Constitution, that the State did not, or may not have, lawfully paid for the land which it bought and, lastly, that the applicant has seceded from the State of Victoria or the Commonwealth of Australia. Covering cl 5 of the Constitution relevantly provides that:

"This Act [the Constitution], and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State."

Section 106 provides that:

"The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

Section 108 provides for the saving of State law, that is of "Every law in force in a Colony which has become or becomes a State". There is, then, no merit in the contention that Victoria has no Constitution.

20 It is, in my view, neither necessary nor appropriate that I record in these reasons the steps which Mr Fyffe contends have been taken to secede from the Commonwealth, nor is it appropriate to record the steps which it is submitted have been taken in recognition of that secession. Mr Fyffe comes to this Court seeking an order in aid of his rights. He may have such an order if, but only if, the sovereign power which applies relevantly to the land in question and/or the parties concerned is that which is embodied in the Constitution. The submission of secession is fundamentally antithetical to such a contention. It is therefore a point which, if it were to be accepted, would fly in the face of granting the order which Mr Fyffe seeks. It should, in my opinion, be put wholly to one side.

21 As for the contention that the State did not, or may not have, lawfully paid for the land, that is a contention founded upon s 115 of the Constitution which provides that:

7.

"A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts."

It is enough to say of this point that, in my opinion, it is wholly without substance².

22 In my opinion, this is a case where the prospects of a grant of special leave to appeal to this Court are so insubstantial that even if all of the other considerations which I have mentioned were to be assumed in favour of the applicant, the application should nevertheless be refused.

23 The order is summons dismissed with costs.

2 cf *Re Skyring's Application (No 2)* (1985) 59 ALJR 561; 58 ALR 629.