

IN THE HIGH COURT OF AUSTRALIA

THE AUSTRALIAN BUILDING CONSTRUCTION
EMPLOYEES AND BUILDERS LABOURERS
FEDERATION

v.

THE STATE OF VICTORIA AND JOHN
SPENCE WINNEKE

REASONS FOR JUDGMENT

Judgment delivered at Melbourne
on Tuesday, 17 November 1981

RM74/30574

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THE AUSTRALIAN BUILDING CONSTRUCTION EMPLOYEES AND BUILDERS
LABOURERS FEDERATION

v.

THE STATE OF VICTORIA AND JOHN SPENCE WINNEKE

JUDGMENT

(In Chambers)

STEPHEN J.

THE AUSTRALIAN BUILDING CONSTRUCTION EMPLOYEES AND BUILDERS
LABOURERS FEDERATION

v.

THE STATE OF VICTORIA AND JOHN SPENCE WINNEKE

This is an application under Order 70, Rule 12 of the Rules of this Court by what I shall call, as a matter of shorthand, the Builders Labourers Federation for removal of a stay of the judgment pronounced by the Full Court of the Federal Court of Australia.

The stay at present in existence applies by virtue of Order 70, Rule 12(2), the appellants, the State of Victoria and Mr Winneke having given security for costs pursuant to Rule 10 of Order 70. It may be noted in passing that it is not contended that the proceedings here in question were criminal proceedings such as are referred to in Order 70, Rule 12(2).

A removal of the existing stay may, under the Rules of this Court, only be ordered under Rule 12(3) which, so far as relevant, provides that in the case of any appeal the High Court (or a Justice) may

"make an order removing the stay wholly or in part and upon such terms and conditions as appear just, unless the appellant gives such further security within such time, in such manner and in such amount as appears to the Court, Justice or Judge to be just, to satisfy or obey the judgment appealed from".

The scope of Rule 12(3) is far from clear. It is at least arguable that it only applies to, and hence that the power it confers is confined to, those cases to which the nature of the order to be made as contemplated by the rule is appropriate; namely, cases where an order might be made for the removal of the stay unless the appellant gives further security to satisfy or obey the judgment appealed from. Such an order would seem inappropriate in the present case.

If the power conferred by Rule 12(3) to remove a stay is indeed so confined there nevertheless exists, in my view, an inherent power in the Court to, so act as to preserve the subject matter of proceedings pending the outcome of an appeal - see Tait v. The Queen (1962) 108 C.L.R. 620, the observations of Mr Justice Mason in Ex parte Builders Labourers Federation 55 A.L.J.R. 391 and the observations of the New South Wales Court of Appeal in Tringali v. Stewardson Stubbs & Collett Ltd (1966) 66 S.R. (N.S.W.) 335 and especially at p.344 where, in the judgment of the Court comprised of the President and Mr Justice Jacobs and Mr Justice Asprey, it was said:

"there can be no doubt that this Court has an inherent jurisdiction to endeavour to ensure that the pursuit of its ordinary procedures by litigants does not lead to injustice and for this purpose to grant in the exercise of its discretion a stay of proceedings, whether permanent or temporary, upon such conditions or terms (if any) as may seem appropriate in the particular circumstances and that this is a jurisdiction which may be exercised at any stage of the proceedings where it appears to be demanded by the justice of the case".

Usually, of course, it will be by granting a stay of a judgment that the subject matter of proceedings will be preserved. But the principle, in my view, is a broad one, broad enough to apply more generally than to the ordinary case of the granting of a stay. In the peculiar circumstances of this case the subject matter being litigated involves the proceedings of a Royal Commission, said to constitute a contempt of court in the sense that what may occur in the course of its proceedings may prejudice the fair hearing and disposal of deregistration proceedings brought against the Builders Labourers Federation in the Federal Court of Australia. The Full Court of the Federal Court of Australia has concluded on a successful appeal from Mr Justice Northrop that in order to avoid prejudice to those deregistration proceedings the proceedings of the Royal Commission should be conducted in private. To stay the judgment of the Full Court of the Federal Court would be to allow the proceedings once more, as they previously were, to be conducted in public. Hence what may loosely be called

the subject matter, the preservation of the proper conduct of the deregistration proceedings, free of whatever adverse effect upon them might result from public proceedings before the Royal Commission, may be said to be imperilled by the imposition of the stay.

The question is then should I, in all the circumstances, exercise the power to remove this stay of the judgment of the Full Court of the Federal Court.

The applicant no doubt carries the onus of showing that the power should be exercised. It relies upon the harm that may result should the Royal Commission resume public hearings and it seeks support for its submission in the reasons for the judgment of Mr Justice Deane in the case now under appeal, the decision of the Full Court of the Federal Court. There is to be found in passages of the judgment of Mr Justice Deane, speaking as he was for the Full Court, weighty support for that submission.

The Solicitor-General for Victoria points, on the other hand, to the harm that may flow from the proceedings of the Royal Commission being conducted in private, the substantial interference this causes to its proper conduct amounting, it is said, to the possible frustration of the very aim of the Commission. Were I to make an order which

was to have effect over a lengthy period of time I would feel obliged to weigh very carefully these two competing and substantial considerations.

However, I would regard it as unfortunate if I, as a single judge, should make an order which might well determine for all practical purposes the subject matter of the proceedings now under appeal to this Court. If I were simply to refuse, for example, the removal of the stay then, subject only to any appeal, as to which it may be noted, Rule 12(2) would seem not to apply, the Royal Commission would be free to proceed in public, perhaps resulting in the consequences which the Full Court of the Federal Court apprehends. If I were, on the contrary, simply to order removal of the stay, subject again to any appeal, the consequences which have been foreshadowed by the Solicitor-General might well come to pass. In either event the ultimate decision of this Court in the appeal which is to come before it in December and for which special leave has been granted, while it might resolve important questions of constitutional law, might otherwise have little practical effect.

It is for this reason that I have decided that I should confine the operation of any order which I might make to the period until this matter comes before the Full Court

of this Court as it will on the first day of its December sittings. Not only will any question of a further extension of any order I make then be a matter upon which all members of this Court will have a voice but, if made otherwise than in an interim way after hearing the argument on the appeal, it will be made with the benefit of having heard that argument.

Having made that decision it seems to me that all else follows: if my order is to be thus confined and is one removing the stay, it may in the meanwhile prejudice the conduct of the proceedings of the Royal Commission; but that prejudice, flowing from my order, will at least be limited to a matter of some days. If, on the contrary, I were to refuse removal of the stay for those ten days or so the prejudice apprehended by the judgment of the Full Court of the Federal Court might well occur, perhaps irretrievably, in the course of public hearings of the Commission during that period of ten days.

It is for these reasons that I conclude that I should order the removal of the stay of the judgment of the Full Court of the Federal Court of Australia.