
HUTCHISON

V.

BIENVENU

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on TUESDAY, 19th OCTOBER 1971

HUTCHISON v. BIENVENU

JUDGMENT

WALSH J.

HUTCHISON v. BIENVENU

This is an application by the Crown Solicitor for the Commonwealth for an order, pursuant to O. 63 r. 6 of the High Court Rules, that the respondent Mrs. Bienvenu shall not without the leave of this Court or a Justice begin any action, appeal or other proceeding in the Court.

In affidavits in support of the application reference is made to fourteen proceedings by the respondent in this Court. But the applicant does not rely upon all of them. I propose to refer separately to each proceeding upon which the applicant does rely. But before doing that I shall state the events which preceded the making of a sequestration order against the respondent's estate, for it is the existence of that order which has led to many of the subsequent proceedings with which this application is concerned.

In 1965, the respondent issued a writ (No. 1720 of 1965) in the Supreme Court of Victoria against the Royal Society for the Prevention of Cruelty to Animals (previously called the Victorian Society for the Protection of Animals). She sought declarations that the society had no valid by-laws. In a decision given on 9th March 1967, Starke J. gave judgment in the action for the defendant and ordered that the defendant's costs be paid by the plaintiff. His Honour's judgment is reported as Bienvenu v. Royal Society for Protection of Animals [1967] V.R. 656. His Honour held that the society had no valid by-laws, but

he held for reasons stated in his judgment which I need not repeat that the plaintiff in the action was precluded by an earlier action which she had brought and by her reliance in that action upon the validity of the by-laws from asserting their invalidity and he held also that she had no sufficient interest to maintain the action.

In subsequent proceedings and by affidavit and submissions in the present application, the respondent has sought repeatedly to contend that because the society had no members and no properly appointed officers who could act for it or who could receive money on its behalf, the order for costs made against her could not be effective and that bankruptcy proceedings founded upon her failure to pay the costs could not be maintained. She has sought to contend, also, that the Act No. 7690 of 1968 of the Victorian Parliament was not effective to make good against her the order for costs or any proceedings founded upon it. But these are questions into which I cannot inquire. I mention them because they supply in part the reason for the bringing by the respondent of many of the proceedings with which I am now concerned. She refuses to accept as binding judgments and orders, which have not been set aside and which remain in force as judgments and orders by which she is bound, whatever arguments might have been advanced against them before they were made, or, subsequently, on appeal from them. I have said that I cannot inquire into the questions raised by the contentions of the respondent to which I have referred. The reason is that the questions have been determined as a result of the following proceedings. An application (No. 33 of 1970) by

the respondent for special leave to appeal against the judgment of Starke J. was refused by this Court on 14th May 1971. An application by the respondent to set aside a bankruptcy notice served upon her was dismissed by the Bankruptcy Court and an appeal (No. 10 of 1969) by her to this Court against that order was on 25th February 1970 dismissed as incompetent. A sequestration order was made against the respondent's estate and an appeal (No. 22 of 1969) against that order was dismissed by this Court on 15th October 1969.

The notice of motion in the present application was filed on 13th November 1970. Some applications instituted after that date by the respondent should be mentioned. On 30th November 1970 she caused to be filed a notice of motion (No. 44 of 1970) which asks that the order of this Court of 25th February 1970 dismissing the appeal (No. 10 of 1969) be set aside and that the appeal be reheard. When this application was heard by me that motion was pending in the Full Court list. Counsel for the applicant did not rely upon it. On 7th December 1970 the respondent filed a notice of motion (No. 46 of 1970) which sought special leave to appeal against an order of the Supreme Court of Victoria (Gillard J.). That was an order made under s. 33 of the Supreme Court Act 1958 (Vict.), by which the respondent was precluded from instituting or continuing, without leave of the Supreme Court or a judge thereof, legal proceedings in any court of competent jurisdiction in the State of Victoria. The present applicant places some reliance upon the fact that in that notice of motion no reference was made to an earlier appeal

(No. 44 of 1969) relating to the order of Gillard J., which appeal was dismissed by this Court on 25th February 1970.

On 29th June 1971 the respondent filed a notice of motion to the Full Court (No. 18 of 1971) asking that the application with which I am now dealing should be dismissed. That motion was heard by the Full Court on 5th October 1971 and was dismissed. The present applicant does not rely upon it.

In addition to the matters already mentioned (No. 44 and No. 46 of 1970), there was pending in the Full Court list, at the time when this application was heard by me, an application (No. 39 of 1970) which asked that the order which dismissed an appeal (No. 22 of 1969) against the order sequestrating the respondent's estate be set aside or that that appeal be reheard. Certain other declarations and orders were also sought. The applicant relies upon the filing by the respondent of that application but only because it sought those additional declarations and orders.

There were also pending in the Full Court list demurrers in an action brought by the respondent (No. 3 of 1970). The bringing of that action is relied upon in the present application to a limited extent which will be explained later.

During the hearing of this application, I indicated that it was possible that the decisions of the Full Court in the pending matters and the reasons given by the Court for its decisions might have some relevance to the determination of this application. I stated that it was my intention to consider whether I should defer the giving of a decision in this application until the matters presently pending in the Full Court list had been heard and decided.

I asked the parties whether they wished to have an opportunity to make further submissions to me after the Full Court had dealt with those matters. Both the respondent and counsel for the applicant said that they did not wish to be heard further.

I shall now examine the matters upon which the applicant relies in order to establish the claim that the respondent "frequently and without reasonable ground has instituted vexatious legal proceedings".

(1) No. 8 of 1970.

According to an amended statement of claim filed by the respondent in action No. 3 of 1970, she attended in April 1970 at the Registry of this Court in Melbourne and sought to file a document entitled: "Notice/Affidavit and Application". She claims that the Principal Registrar and a Deputy Registrar refused to file it, both when it was first tendered and, again, when it was tendered later in an amended form. These refusals are alleged in action No. 3 of 1970 to have been wrongful. The evidence before me does not reveal exactly what happened in relation to the document, but it is now contained in a file which has been numbered No. 8 of 1970 and on which there is a note "Application dismissed by C.J. 13th May 1970". The document uses scurrilous and intemperate language, which is quite unlike the language ordinarily used in documents prepared by the respondent. She has given an explanation for that fact which counsel for the applicant was willing to accept. The applicant contends that this proceeding was vexatious and was instituted without reasonable ground, because it was based upon a challenge to the validity of the

bankruptcy notice and of the sequestration order, in respect of which proceedings by way of appeal had already been taken and had been disposed of by this Court.

(2) Action No. 6 of 1970.

This was an action brought by the respondent against many defendants claiming damages for fraud, conspiracy and other alleged wrongful acts. The writ was issued on 27th April 1970. The statement of claim included lengthy allegations asserting the invalidity of the bankruptcy notice and of the sequestration order. This action came to an end when Menzies J. on 10th August 1970 ordered that judgment be entered for the defendants. In his reasons for judgment his Honour said that the fundamental contention of the respondent upon which the action was based was that the sequestration order was a nullity and he said that the order of this Court dismissing the appeal against the making of the sequestration order was conclusive against that contention.

(3) Action No. 11 of 1970.

This was a separate action by the respondent against the same defendants. The writ was issued on 25th May 1970. The statement of the respondent's claim endorsed on the writ of summons claimed damages against the defendants severally and "jointly as joint tortfeasors acting in concert with a common design" for what were described as actionable wrongs and torts, including fraud, conspiracy and breach of statutory duty. In addition to claiming \$500,000 (the amount which was claimed also in action No. 6 of 1970), the respondent sought orders declaring that the sequestration order was null and void and she sought

orders and declarations relating to certain proceedings and actions taken and done in pursuance or in reliance upon the sequestration order. In this action Menzies J. ordered on 10th August 1970 that judgment be entered for the defendants. An application relating to this action had been heard by his Honour, together with applications relating to actions No. 3 of 1970 and No. 6 of 1970 and to matter No. 18 of 1970, and in the same reasons for judgment his Honour dealt with all those applications. His statement, which I have mentioned above, concerning the fundamental contention of the present respondent, applied to this action, as well as to action No. 6 of 1970 and to matter No. 18 of 1970.

(4) No. 18 of 1970.

This was a proceeding instituted by notice of motion filed on 19th May 1970, that is, after the institution of action No. 6 of 1970 and before the institution of action No. 11 of 1970. It was a notice of motion to be made to the Full Court of this Court. The respondents were the same persons as the defendants in those two actions. The notice of motion asked for orders which included injunctions against the Judge of the Bankruptcy Court and against certain officers of that Court and orders declaring the sequestration order to be null and void and invalid and the bankruptcy notice to be void and invalid ab initio. In setting out grounds upon which the orders were sought, the notice of motion made allegations very similar to those which were shortly afterwards set out in the statement of claim filed on 1st June 1970 in action No. 6 of 1970. Although this notice of action was made returnable before the Full Court,

the parties requested Menzies J., at a hearing of the applications relating to the other matters already mentioned, to deal with this motion on its merits. In this matter his Honour ordered that there should be judgment for the defendants. What I have said above concerning his Honour's reasons applies to this matter also.

(5) Action No. 12 of 1970.

This was an action instituted by writ of summons on 19th June 1970 by the respondent against certain members of the legal profession and the Royal Society for the Prevention of Cruelty to Animals. All the defendants were defendants in the actions No. 6 and No. 11 of 1970 but in those actions there were other defendants as well. This action included claims that the defendants had obtained by fraud a judgment of this Court being a dismissal of appeal No. 10 of 1969 and a judgment of this Court being a dismissal of appeal No. 22 of 1969. It sought damages against the defendants for actionable wrongs, including the obtaining of the said judgments by fraud. In an endorsement upon the writ there was, in addition to a claim for damages, a claim for orders that the appeals No. 10 of 1969 and No. 22 of 1969 "be re-instated and re-heard by the High Court". That claim was not included in the relief sought in the statement of claim subsequently filed in the action. The statement of claim included allegations to the effect that the bankruptcy notice and the sequestration order were invalid upon various grounds, including matters of law not dependent upon any fraud by the defendants. Some of these allegations were essentially of the same character as the contention upon which the

proceedings No. 6 of 1970, No. 11 of 1970 and No. 18 of 1970 were based, with the result that the orders of this Court in the appeals No. 10 of 1969 and No. 22 of 1969 were, so long as those orders stood, conclusive, in this action as in the others, against the allegations of invalidity of the bankruptcy notice and the sequestration order. In action No. 1 of 1970 there was a notice of motion on behalf of the present respondent for judgment in default of defence and there were notices of motion on behalf of the defendants asking that the action be stayed or dismissed as frivolous and vexatious and an abuse of the process of the Court or that it be struck out on the ground that the matters alleged were not within the original jurisdiction of this Court, and certain other orders were asked on alternative grounds. These matters came before the Full Court, pursuant to an order under s. 18 of the Judiciary Act. The Full Court held on 23rd October 1970 that this Court had no jurisdiction to entertain the action or any motion in it. The action was struck out for want of jurisdiction. The Court left open the questions whether this Court has jurisdiction to entertain appropriate proceedings to set aside an order of the Court alleged to have been obtained by fraud and whether in a properly framed proceeding a challenge to the application of the Bankruptcy Act to an inter-State trader would raise a question involving the interpretation of the Constitution. It held that the action, as framed, did not raise these matters for decision.

(6) Action No. 3 of 1970.

This was an action brought by the respondent on 6th April 1970 against two officers of this Court and

against Mr. T. E. F. Hughes who was then the Attorney-General of the Commonwealth. The only matter upon which the present applicant sought to rely, in relation to the institution of this action, was that Mr. Hughes was joined in it as a defendant. On 10th August 1970 Menzies J. made an order that the name of Mr. Hughes be struck out as a defendant. His Honour said that the only basis for joining that defendant was a claim that he was responsible for the administration of the Principal Registry of this Court and for the conduct of its servants and officers. His Honour held that that did not afford any basis for vicarious liability in damages for the acts of the officers whose conduct was impugned in the action.

(7) Action No. 39 of 1970.

It has already been stated that this is a notice of motion to the Full Court for an order that the order dismissing the appeal No. 22 of 1969 be set aside and reversed or that the said appeal be reheard. The ground upon which counsel for the applicant complains of it is that, in addition to making that application, the notice of motion seeks certain declarations and orders. It alleges that Albert Henry John Bienvenu is the equitable mortgagee of certain land and it seeks injunctions restraining the Official Receiver in Bankruptcy from doing any act or thing "which vitiates or ignores or constitutes a breach or violation of the said equitable mortgage" and from falsely representing to prospective purchasers of the land that there is no equitable mortgage on it. The notice of motion seeks also an order and declaration that Albert Henry John Bienvenu is a tenant with exclusive possession of part of the land and an injunction

restraining the Official Receiver from committing a breach of the lease or trespassing on the land. It is submitted that these claims for relief are plainly without any reasonable ground and are vexatious.

(8) No. 46 of 1970.

As already mentioned, this is a motion for special leave to appeal against an order made by Gillard J. in 1969. The complaint which the present applicant makes is that the notice of motion does not refer to the fact that an earlier appeal against that order (No. 44 of 1969) was dismissed by this Court on 25th February 1970.

Having set out the matters upon which the applicant relies it is necessary now to consider whether any of them was a vexatious proceeding instituted by the respondent without reasonable ground, whether I am satisfied that she has "frequently" instituted such proceedings and, if so satisfied whether I should make the order sought.

I am satisfied that the proceedings mentioned in pars. (2), (3) and (4) above (No. 6 of 1970, No. 11 of 1970 and No. 18 of 1970) were instituted without reasonable ground. I am satisfied, also, that they were vexatious proceedings within the meaning of O. 63 r. 6. In In re Vernazza [1960] 1 Q.B. 197, at p. 208, Ormerod L.J. rejected a submission that the question whether proceedings were vexatious was a subjective one which had to be decided by considering whether the person instituting the proceedings was acting maliciously or otherwise than in good faith. I agree that the question is not simply a subjective one. Proceedings may be vexatious whether or not the person who institutes them believes that they are justified.

The three proceedings with which I am dealing now were vexatious, in my opinion, not only because they sought to treat as null and void the bankruptcy notice and the sequestration order, notwithstanding that earlier attempts to have them set aside had failed, but also because in three separate proceedings instituted within a short period similar claims were repeated; because there were joined as defendants or respondents a large number of persons who could not have been regarded upon any reasonable view as having all acted in concert; and because serious charges of conspiracy and fraud were made indiscriminately against all those persons, although there could not have been the slightest foundation for those charges against some of the persons named.

In my opinion the proceeding mentioned in par. (1) above (No. 8 of 1970) was also a vexatious proceeding which the respondent instituted without reasonable ground. The document which the respondent presented for filing and which was called "Notice of intended application for certiorari or prohibition mandamus injunction or the like writ and other orders" may be judged for present purposes merely by a perusal of its contents. The nature of the orders sought, the selection of the parties against whom relief was sought and the grounds upon which it was sought, demonstrate in my opinion that this was a vexatious proceeding.

The proceedings mentioned in par. (5) above (No. 12 of 1970) have been described already and it has been pointed out that they included two sets of allegations. I am of opinion that in so far as the action sought to litigate again contentions of law already precluded by previous

proceedings the action could be regarded as vexatious. But it was not limited to that and it did attempt, I think, to raise matters which possibly the respondent may have been entitled to raise in appropriate proceedings properly framed. Although those attempts were ineffectual and it was held that the action was misconceived in that this Court had no jurisdiction to entertain it, I think that I should leave this proceeding out of account in this application.

As to the proceedings mentioned in par.(6) above (action No. 3 of 1970) I have said that the only way in which the applicant asked me to take it into account in the present matter was that a defendant was joined in the action whose name was afterwards ordered to be struck out. But if it is to be assumed for present purposes that that is the only ground upon which this action could be taken into account, I am of opinion that it ought not to be counted as a proceeding of the kind described in the rule.

As to the proceeding mentioned in par. (7) above (No. 39 of 1970), the basis upon which I am asked to use it adversely to the respondent in the present matter has already been stated. I am of opinion that a proceeding may be described in some circumstances as a vexatious proceeding instituted without reasonable ground if it includes a separate claim or claims that obviously cannot be supported and which ought not to be joined with the other claim or claims made in the proceedings. I think that even if the other claims in this action be assumed for present purposes to have been reasonably instituted, the claims referring to the equitable mortgage were without any reasonable foundation and were vexatious.

As to the matter mentioned in par. (8) above (No. 46 of 1970), I am not satisfied that my decision in the present application should be affected in any way merely by the fact that the notice of motion does not mention an earlier appeal and its dismissal.

I have found that the four proceedings mentioned in pars. (1), (2), (3) and (4), which were brought within a fairly short period of time, were vexatious proceedings instituted without reasonable ground and, in addition, that claims for which there was no reasonable ground were included in the matter mentioned in par. (7). I find that in the circumstances of this case the number of proceedings, which I have found to fall within the description contained in O. 63 r. 6, is a sufficient number to warrant a finding that the respondent has "frequently" and without reasonable ground instituted vexatious legal proceedings. I make that finding.

I have reached the conclusion that I should make an order pursuant to the Rule. In my opinion, taking into consideration the interests of those who are made parties to vexatious litigation and the interests of the proper administration and conduct of the judicial business of the Court, I should make an order. In my opinion the material which has been placed before me in this application does not indicate that it is unlikely that there will be a repetition of the institution of similar proceedings. The order that the respondent shall not without leave begin any action appeal or other proceeding in the Court will follow the terms of the Rule. Upon my understanding of it, an order in those terms will make it necessary to obtain leave for the

institution in this Court of any new proceeding by any form of originating process and also for the institution of an appeal, but if leave be given to institute an action it may not be necessary to obtain leave for every interlocutory proceeding in that action. But, in my opinion, the way in which the order will operate in the future is not a matter which I should seek to determine in advance. The Court or the Justice to whom any application for leave is made will be in a position to consider the terms in which a grant of leave, if made, should be expressed.

I think that I should except from the operation of this order an appeal against the order itself.

Since I prepared the foregoing reasons, the Full Court has heard and upheld demurrers by the defendants in action No. 3 of 1970 and has heard and dismissed the applications No. 39 of 1970, No. 44 of 1970 and No. 46 of 1970, to which I have referred above. In my opinion if this application had been heard after those matters had been decided by the Full Court, the applicant would have been able to establish that the respondent had instituted without reasonable ground several vexatious proceedings in addition to those which I have found to have been vexatious proceedings instituted without reasonable ground.

In the proceedings which have taken place in the Full Court since I heard this application, nothing has occurred to require me to reverse or to modify any findings favourable to the present applicant contained in the foregoing reasons or to require me to refuse as a matter of discretion to make

the order sought.

I order that the respondent Constance May Bienvenu shall not without the leave of the Court or a Justice begin any action appeal (other than an appeal against this order) or other proceeding in the Court.