[2019] QCA 146

COURT OF APPEAL

FRASER JA

CA No 188 of 2019
DC No 4392 of 2018

UNITED PETROLEUM PTY LTD **Applicant**
ACN 085 779 255

v

CAMERON JAMES SARGENT **Respondent**

BRISBANE

MONDAY, 29 JULY 2019

JUDGMENT

FRASER JA: The applicant applies for orders that the hearing of its application for leave to appeal and any appeal be expedited and that the prosecution of the applicant in the Magistrates Court for alleged breaches of the *Environmental Protection Act* 1994 (Qld) be stayed, pending the determination of proceedings in this Court. As to the first application, I have fixed the date for hearing of the application for leave to appeal and the appeal, if leave is granted, for 18 September 2019 and made directions which should easily accommodate that date.

The proceedings in the Magistrates Court have a long history. In October 2014, a complaint naming the respondent as complainant was made and served on the applicant. Fourteen

witnesses were called in the prosecution case, all of them except for the complainant being cross-examined, and that case occupied about eight days between February and June 2016.

In December 2016, the magistrate rejected a no case submission that had been made by the applicant when the prosecution case closed in June. In December 2017, the applicant opened the defence case. The opening address by counsel indicated that evidence would be led from three witnesses. During the cross-examination of the first witness, a Mr Fernando, by counsel for the prosecution, the matter was adjourned because of what a lawyer in the litigation branch of the Department of Environment and Science describes as "discrepancies in documents", to which the witness referred in evidence. That same lawyer deposes that, at a review in March 2018, counsel for the applicant tendered an affidavit by an in-house lawyer for the applicant, which "exhibited documents indicating that Mr Fernando had created false documents". In September 2018, the applicant applied in the Magistrates Court for a permanent stay of the prosecution, on the basis that the complaint had been commenced out of time. The magistrate dismissed the application in November 2018.

In December of the same year, the applicant commenced an appeal against that decision in the District Court, pursuant to s 222 of the *Justices Act* 1886 (Qld). The appeal was heard and judgment was reserved in May 2019, and on 14 June 2019 a judge of the District Court dismissed the appeal. The applicant filed its application to appeal in this Court on 12 July 2019. A dispute then arose between the parties upon the question whether the further prosecution of the complaint in the Magistrates Court should be stayed, pending determination of the proceeding in this Court. The matter was mentioned in the Magistrates Court on 18 July 2019. On that occasion, the magistrate indicated that dates were available for the further hearing of the prosecution, between 11 and 15 November 2019. In the course of the mention, the magistrate expressed a concern that the longer the matter went on, the more difficult would be the task of finding the facts; and accepting that each party was entitled to pursue the party's legal rights, the magistrate was keen to do prompt and good justice to both parties because the delay was potentially prejudicial to both.

As Keane JA observed in *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453, a stay should not be granted unless the applicant establishes a sufficient basis to outweigh the considerations that the judgment should not be treated as merely provisional and courts generally should not be disposed to delay the enforcement of court orders. The fundamental justification for staying judicial orders pending an appeal is to ensure that the orders which might ultimately be made by the courts are fully effective. Keane JA added that, where the Court is able to make a preliminary assessment of the strength of the appellant's case, the prospects of success on appeal might be significant and would favour refusal of a stay if they were seen to be very poor. The applicant argues in this respect that it has good prospects of obtaining leave to appeal and succeeding in the appeal. In oral submissions, it was put that the prospects are at least not insubstantial. The respondent contends to the contrary.

The arguments involved two points, one upon which the applicant succeeded in the District Court and one upon which it failed in that Court. The first point is whether or not the applicant had a right of appeal to the District Court under s 222 of the *Justices Act* 1886. The primary judge held that it did. The respondent has given notice of its contention that the primary judge erred in that respect. The parties have addressed arguments upon the point. Section 222(1) confers a right of appeal to a District Court judge upon a person who "feels aggrieved as a complainant, defendant or otherwise by an order made … in a summary way on a complaint for an offence or breach of duty". In *Schneider v Curtis* [1967] Qd R 300, the Full Court decided that s 222 did not confer a right of appeal from a magistrate's ruling at the close of the complainant's case that there was a case for the defendant to answer. Gibbs J accepted that by making the ruling the magistrate refused to dismiss the complaint at that stage, and expressed the tentative opinion that the ruling was an "order" within the definition of that word in the *Justices Act* 1886. Gibbs J concluded, however, that the order was not one "made… upon a complaint for an offence or breach of duty" because that expression referred only to an order "disposing of the complaint itself" and did not comprehend an order made upon an application during the course of the proceedings instituted by the complaint.

As the primary judge noted, that decision has been followed and cited on many occasions. In particular, as the primary judge observed, *Schneider* was held in *Paulger v Hall* [2003] 2 Qd R 294, to be "authority for the proposition that no appeal lies under s 222 from a ruling made on an incidental application during the hearing of the complaint" because the words "any order made… upon a complaint… refer to an order "disposing of the complaint itself"'." In that case Holmes J, as the Chief Justice then was, referred both to the construction question addressed in *Schneider* and to policy grounds for prohibiting the bringing of appeals under s 222 against interlocutory rulings: "Such appeals may lead to fragmentation of the criminal process, may in the long run prove to have been pointless, and are capable of being misused to exhaust the resources of a less well-heeled opponent." As her Honour also observed, in an appeal against the final judgment an appellant may challenge an interlocutory order which has affected the result.

The primary judge held that a no case submission such as that considered in *Schneider* differed from the application made in the Magistrates Court by the applicant because that application "raised the question of the right of it not to be prosecuted … the learned magistrate was required to embark upon was the crushing of that right not to be prosecuted, and the learned magistrate determined that that right did not exist." The primary judge considered for those reasons that there was no fragmentation of the criminal process and "the order sought" concerned the substantive right of the matter to be determined once and for all; the final orders determined against the applicant its right not to be prosecuted. The applicant submits that this analysis is correct.

The primary judge's reliance upon "the order sought" involves in my respectful opinion a departure from the terms of s 222(1), which confers a right of appeal in respect of "an order made" on a complaint. The order made by the magistrate did not dispose of the complaint. The description of the applicant's right as a substantive right not to be prosecuted, which appears to have been drawn from authorities concerning the different question whether an amendment to a statutory time limit would operate retrospectively, appears to be a distraction from the question whether the order was made on a complaint in terms of s 222(1).

The ultimate decision upon this question will, of course, be for the Court hearing the application for leave to appeal. It may well be the case that the parties' arguments at the hearing of that application will be considerably more developed than in this application before me. Nevertheless for today's purpose I act upon my provisional opinion that as a result of this point the applicant's prospects of obtaining leave to appeal are very poor.

The second point concerns the substantive question of whether or not the primary judge was correct in holding that the magistrate did not err in concluding that the complaint was not out of time. Upon this point, the primary judge considered that the case was governed by *Cross Country Realty Pty Ltd v Peebles* [2007] 2 Qd R 254 and decisions which followed and applied that decision. The relevant time limit is in s 497 of the *Environmental Protection Act* 1994 (Qld). It provides, relevantly, that a proceeding for an offence against that Act by way of summary proceeding under the *Justices Act* 1886 must start within one year after the offence comes to the complainant's knowledge but within two years after the commission of the offence.

It was common ground at least in the proceedings before the primary judge and in this matter that if the knowledge of a different officer of the Department responsible for the issue of an Environmental Protection Order could be taken into account then the time limit had expired because, upon that footing, the offence had come to the complainant's knowledge more than one year before the prosecution of the complaint. The thesis developed in some detail on behalf of the applicant is that the complainant is not Mr Sargent, who is named as complainant, but is the Department (or perhaps, I interpolate, the State). Contrary to a submission made before me today on behalf of the applicant, it does not seem to me, at least in my provisional view, that *Cross Country Realty Pty Ltd v Peebles* is distinguishable upon that ground.

As the primary judge considered, in that case the then President, with whom Keane JA and Chesterman J agreed, rejected a submission that the time to commence a prosecution under the *Property Agents and Motor Dealers Act* 2000 (Qld), s 589(1)(b) commenced to run as

soon as anyone in the Office of Fair Trading entitled to lay the complaint had reasonable grounds to believe that the applicants had committed an offence under the Act. The wording of that section was very similar to that in issue in the present matter. The President referred to the circumstance that complaints under the *Justices Act* 1886 could be brought by a public officer and to the fact that both Mr Peebles and the other relevant officer in that case were public officers entitled to bring complaints under the Act. Her Honour concluded, nonetheless, that the complainant was not the other officer, but was Mr Peebles. The 'complainant', being given the ordinary meaning of the word 'complainant' in the relevant provision in that Act, meant the complainant who brought the proceedings for an offence or offences under the Act – Mr Peebles, in that case.

The applicant's argument to the contrary is to the effect that, having regard to the constitutional principles concerning responsible government, a variety of statutory provisions, the terms of the complaint itself – particularly that Mr Sargent is described as a public officer under the *Justices Act* 1886 – and that Mr Sargent acts only as agent for the Department, the Department should be regarded as the complainant. I have not done justice to the argument, which is developed in more intricate terms than that of course. All I will say about it at this stage is that my provisional view is that it does not have particularly good prospects of success. I am not prepared to say, however, that the prospects are so insubstantial as to justify disregard of the argument.

Returning to the discretionary considerations, the applicant submits that its appeal against what is described as the loss of its substantial right not to be prosecuted is likely to be rendered nugatory, in effect, if this stay is not granted. It is put that the applicant will incur costs and expense in running a defence in preparation for trial and also that the applicant will suffer adverse impact, in terms of management time and diverting resources. It is said that if it succeeds in the appeal those consequences could not be reversed. It is also said on behalf of the applicant that there is no countervailing prejudice. As the respondent points out, however, the evidence upon these points is very sparse.

It also must be recalled that the current dates available in Magistrates Court are in November, and the hearing of this appeal will be in September. But even apart from that, taking into account my view about the prospects of the success of the application and how the "right not to be prosecuted" should really be characterised, I would not be prepared to grant a stay having regard to its prejudicial effect referred to by the magistrate in the recent mention. What is really at stake here is not a right not to be prosecuted. The question whether or not such a right existed fell within the jurisdiction of the magistrate to determine. What is really at stake is whether or not the applicant should not be convicted upon the current prosecution because it is brought out of time. The application made in the Magistrates Court was interlocutory, the principal proceeding being the prosecution. That prosecution continues unaffected. If for some reason the prosecution continues before a decision has been given in the application and the appeal, the applicant might or might not be convicted. If convicted, the applicant would have a right to seek to appeal to the District Court, and its ultimate rights can be determined by the usual appellate processes.

I accept that there is some prejudice which may potentially be suffered but having regard to the countervailing considerations involving the fragmentation of the criminal justice system, and particularly the effect of delay referred to by the magistrate, I would not exercise my discretion to grant a stay.

I therefore order that the application for a stay be refused. The costs of this application are reserved.