

SUPREME COURT OF QUEENSLAND

CITATION: *Remely v Vandenberg & Anor* [2010] QCA 51

PARTIES: **OTTO REMELY**
(applicant)
v
ACTING REGISTRAR SANNA
(first respondent)
GEOFF AND LARAINA VANDENBERG
(second respondent)

FILE NO/S: Appeal No 522 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Court of Appeal

DELIVERED ON: 12 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 24 February 2010

JUDGES: McMurdo P, Muir JA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **The appeal is dismissed with costs to be assessed on the indemnity basis.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – STAY OF PROCEEDINGS – WHEN REFUSED – applicant applied for a stay of execution of an order committing the applicant to six months imprisonment for contempt of court – application for stay refused by a single judge of the Court of Appeal – whether refusal of application for stay was unreasonable
Uniform Civil Procedure Rules 1999 (Qld), r 815(3)
Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57, considered
Remely v O'Shea & Another [2007] QSC 225, cited
Remely v O'Shea & Anor [\[2008\] QCA 78](#), cited

COUNSEL: The applicant appeared on his own behalf
R Dickson for the respondent

SOLICITORS: The applicant appeared on his own behalf
Payne Butler Lang for the respondent

- [1] **McMURDO P:** On 22 December 2009, Byrne SJA committed the applicant, Otto Remely, to prison for six months for contempt of court. Mr Remely has appealed against that order and subsequently applied for a stay of it. Chesterman JA refused Mr Remely's application for a stay on 3 February 2010. Mr Remely's appeal was listed for hearing on 15 February 2010 but was adjourned on that day at Mr Remely's request. This appeal is from Chesterman JA's order.
- [2] In all these matters, and some others, Mr Remely, who is not a lawyer, has represented himself, as he did in this hearing. He has not been a successful litigant. He lost a dispute in the Small Claims Tribunal with Geoff Vandenberg and Laraine Vandenberg, who are the second respondents in this appeal. The dispute concerned a \$200 electricity bill. He unsuccessfully applied for review of that decision to a judge of the trial division of this Court.¹ He was then unsuccessful in his attempt to appeal from that order to this Court.² A number of costs orders were made against him, some on an indemnity basis. In time, the Vandenberg's sought to enforce some of their costs orders. An enforcement hearing ultimately proceeded before the first respondent, Acting Supreme Court Registrar Sanna, on 10 July 2009.³
- [3] At that hearing, Mr Remely did not produce all the documents he had been ordered to produce. He refused to answer relevant questions put to him by counsel on behalf of the Vandenberg's. Mr Remely deposed in an affidavit that he did not intend to provide the court with further information and that he intended to refuse to comply with the court's orders.
- [4] Ultimately, Byrne SJA was required on 22 December 2009 to determine whether Mr Remely was in contempt of court for non-compliance with the summons to produce documents and with Mr Sanna's directions to answer questions, especially about Mr Remely's property, put to him at the hearing on 10 July 2009. His *ex tempore* reasons were as follows. Mr Remely told Mr Sanna that he would not answer questions about his financial circumstances. Mr Sanna directed him to answer a specific question and any other questions asked of him that day. Mr Remely refused to answer questions about his financial position and, in particular, the state of his bank accounts between July 2007 and September 2008; borrowed money used to satisfy an enforcement warrant; and his dealings with \$87,010.97 which he had sworn, for the purpose of proceedings in the Court of Appeal in September 2007, that he held in a bank account. Mr Remely stated that he would not answer any more questions and invited an officer to take him to the watch house. There was no lawful excuse for Mr Remely's intransigent refusal to answer questions. Mr Remely contended that he was not in contempt because the enforcement hearing summons was a "nullity"; the warrant of enforcement was delivered to a bailiff rather than to the judgment creditor in respect of an earlier enforcement warrant. Further, Mr Remely contended that the Vandenberg's could have taken other steps to enforce their costs orders. These matters were irrelevant. The summons which brought Mr Remely before Mr Sanna involved an order of the Supreme Court. He ought to have complied with it. He did, in fact, comply to the extent of appearing before Mr Sanna. Byrne SJA found that Mr Remely persistently and clearly refused to answer questions about his assets and what may have become of about \$87,000 cash that had been formerly under his control. Under *Uniform*

¹ *Remely v O'Shea & Anor* [2007] QSC 225.

² *Remely v O'Shea & Anor* [2008] QCA 78.

³ Mr Sanna is the first respondent to this appeal but has indicated he does not wish to take a role in it and will abide the order of the Court.

Civil Procedure Rules 1999 (Qld) (UCPR) r 815(3), Mr Remely's refusal to answer those questions was a contempt of court. Mr Remely's contentions did not excuse his contempt of court in refusing without lawful excuse to answer the questions put to him. After hearing submissions as to the appropriate sentence, Byrne SJA ordered that Mr Remely be imprisoned for six months with an order under UCPR r 931(2) that he be discharged from imprisonment on 22 April 2010. He refused Mr Remely's application to "defer" the order pending appeal.

- [5] As I have noted, Chesterman JA subsequently refused Mr Remely's application to stay Byrne SJA's orders and this appeal is from that refusal. Mr Remely contends that Chesterman JA should have granted a stay for these reasons. Chesterman JA did not give sufficient weight to the following matters. Mr Remely should have his incarceration suspended so that he can prepare his appeal against the six month sentence imposed. He is unable to prepare his appeal whilst in prison. He has poor eyesight. He has a severely damaged retina in one eye and a cataract in the other. As a result, he can only read with bright lighting and large or magnified print. He has no access in prison to the internet to seek legal assistance and information such as references to case law and legislation. His telephone access and his ability to print and serve documents are limited. He has torn and damaged tendons in both shoulders making typing painful and difficult. His home computer has speech recognition and is configured to make it easier to read the screen.
- [6] He contends that the Court of Appeal's efforts to bring forward his case for an early hearing on 15 February 2010 have not resolved his difficulty in preparing his appeal from Byrne SJA. He contends that Chesterman JA gave insufficient weight to this factor. He refers to *Dietrich v The Queen*,⁴ emphasising that Dietrich obtained a stay on the grounds that he could not obtain legal assistance. He urges this Court to grant a stay of Byrne SJA's order committing him to prison so that he can seek legal assistance, fully prepare his appeal and obtain a fair hearing of it. If his appeal is unsuccessful and he is again committed to prison, he argues that none of the respondents will have been disadvantaged. The balance of convenience, he submits, favours the granting of the stay.
- [7] Before returning to Mr Remely's contentions, I will summarise Chesterman JA's *ex tempore* reasons for refusing the stay. Mr Remely bore the onus of establishing why the stay should be granted. It was true that, if Mr Remely had to serve the whole of his sentence before the hearing of his appeal, the appeal would be for nothing. Mr Remely must also establish reasonable grounds for arguing that Byrne SJA's order committing him to prison for contempt ought not to have been made. Mr Remely contended that the proceedings in the course of which he refused to answer questions and which constituted the contempt, were a nullity. Contrary to Mr Remely's contentions, Byrne SJA did deal with the point but, in any case, it was without substance. Mr Remely had not demonstrated that the order requiring him to attend the enforcement hearing and be examined, and in the course of which he refused to answer questions, was ineffective. Mr Remely had not demonstrated any arguable point to undermine the correctness of Byrne SJA's finding of contempt. It was arguable that the sentence imposed may be excessive. This Court had agreed to hear the appeal on 15 February, a mere 12 days after the hearing of Mr Remely's application for a stay. Whilst Mr Remely was refusing to accept that date for a hearing of his appeal because he claimed he would not be ready, the question of

⁴ (1992) 177 CLR 292; [1992] HCA 57.

whether the sentence was excessive was not a complex matter. For those reasons, Chesterman JA refused Mr Remely's application for a stay.

- [8] In considering Mr Remely's submissions in this appeal, it is highly relevant that this Court expedited the hearing of his appeal from Byrne SJA's order to 15 February 2010. Mr Remely refused to prosecute his appeal on 15 February 2010. He contended that he needed an adjournment to prepare his case thoroughly, even though that would mean he would have served his sentence by the time the appeal was heard.
- [9] Mr Remely has not demonstrated any error in Chesterman JA's reasoning for refusing the stay. On the material in this appeal, the case against Mr Remely for contempt seems compelling. His claim that the proceedings before Mr Sanna were a nullity has not been established in this appeal. It follows that his prospects, of demonstrating in his appeal from Byrne SJA's order, that he is not guilty of contempt are not promising. As to sentence, it is concerning that an elderly man, without a criminal history and apparently with health problems, should be serving a prison sentence over what commenced as a dispute about a \$200 electricity bill. But Mr Remely is presently in prison because he has flagrantly refused to comply with court orders and has directly challenged the authority of the justice system. Such conduct must be met with firm penalties to deter Mr Remely and others who might be tempted to act in a like way. To date, Mr Remely continues to deny the contempt. He has made no effort to remedy it. It follows that his present prospects of success in an appeal against the severity of his sentence are not promising.
- [10] Chesterman JA's reasoned exercise of discretion in refusing the stay was unexceptional. This Court has given Mr Remely the opportunity of an early hearing in the appeal from Byrne SJA. There is no evidence supporting Mr Remely's claims of ill-health and that it is more difficult for him to prepare his appeal in custody. But even accepting those claims, the issues in the appeal from Byrne SJA are not complex. A record has been prepared. Mr Remely has made coherent written submissions. As this Court noted on 15 February 2010 in granting Mr Remely's application for an adjournment of his appeal from Byrne SJA, his conduct in adjourning that appeal was, in those circumstances, unreasonable. He should not be entitled to obtain a stay because of his unreasonable conduct when he could not have obtained the stay if he had acted reasonably.
- [11] Mr Remely has not produced any evidence to show that he has prospects of obtaining legal advice or legal representation in this matter if a stay were granted. In any case, I do not consider that Mr Remely will have an unfair hearing if he is not legally represented at his appeal from Byrne SJA's order. *Dietrich* has no relevance in the circumstances of this case. The appeal from Chesterman JA's order must be refused.
- [12] Counsel for the Vandenberg asks for their costs of this appeal on an indemnity basis. Byrne SJA, Chesterman JA and this Court on 15 February 2010 awarded them costs on an indemnity basis. This appeal arises out of Mr Remely's conviction for contempt of court. The Vandenberg have a legitimate interest in defending this appeal. There remains the possibility, perhaps an unlikely one, that Mr Remely may remedy his contempt so that they might yet obtain something from the enforcement proceedings for costs orders in their favour. In circumstances where Mr Remely is a self-represented contemnor, their counsel's submissions have been of some

assistance to the Court. In those circumstances, the Vandenberges should be fully recompensed in this appeal by way of indemnity costs in their favour.

ORDER:

The appeal is dismissed with costs to be assessed on the indemnity basis.

[13] **MUIR JA:** I agree with the reasons of McMurdo P and with her proposed orders.

[14] **DAUBNEY J:** I respectfully agree with the reasons of the President, and would also dismiss the appeal with costs to be assessed on the indemnity basis.