YUILL v SPEDLEY SECURITIES LTD (in liq) and OTHERS

SUPREME COURT OF NEW SOUTH WALES – COURT OF APPEAL

KIRBY P, PRIESTLEY and MEAGHER JJA

6 July 1992 – Sydney

Practice and procedure – Criminal law – Stay of civil proceeding pending criminal trial – Applicable principles.

Mr Yuill unsuccessfully sought a stay of substantial civil proceedings in which he was a defendant pending the conclusion of criminal proceedings against him arising from the same or similar subject matter. Mr Yuill sought leave to appeal from the trial judge's refusal of a stay.

Held, refusing leave to appeal:

(i) *Per curiam:* The guidelines to be applied in deciding such applications were set out in *McMahon v Gould* (1982) 7 ACLR 202. His Honour had applied those guidelines in exercising his discretion and therefore leave to appeal should be refused.

Halabi v Westpac Banking Corp (1989) 17 NSWLR 26, applied.

(ii) Per Kirby P, Priestley JA *contra;* Meagher JA expressing no view: It may one day be appropriate to reconsider the guidelines set out in *McMahon v Gould* to take account of additional matters.

Application

This was an application for leave to appeal from an interlocutory decision of Rolfe J declining to grant the claimant a stay of certain civil proceedings pending determination of related criminal proceedings.

C A Sweeney QC and *K Onisforou* instructed by *Webeck Farland Pender* for the claimant.

M H Tobias QC and *N G Rein* instructed by *Dibbs Crowther & Osborne* for the opponent Spedley Securities Ltd (in liq).

P W Gray instructed by *Gilbert & Tobin* for the submitting opponent Maher.

F M Douglas QC and *B R McClintock* instructed by *Mallesons Stephen Jaques* for the intervener Standard Chartered Bank.

Kirby P. Rolfe J has declined to stay substantial civil proceedings concerning Mr Brian Yuill (the claimant). The claimant had sought a stay of those proceedings until certain apparently connected criminal proceedings brought against him are completed. The date of the trial of such criminal proceedings is uncertain. It was asserted for the claimant that it was probable that such proceedings would be heard early in 1993. However, this was disputed by Spedley Securities Ltd (in liq) the contesting opponent. As the court was informed, it is expected that, unless stayed, the hearing of civil

proceedings now before Rolfe J will continue until about October 1992. Those proceedings will then await judgment by his Honour at or after that time.

It may be expected that the hearing of the civil proceedings will attract some media publicity concerning the claimant, as have his activities in the past. His Honour's decision, containing as may be expected findings concerning the claimant, may also attract such publicity.

The claimant submits that such publicity may adversely affect his criminal trial and prejudice him in that respect. Alternatively, it was said that forcing him effectively to withdraw from participation in the civil proceedings (to avoid the risks in the criminal trial which participation in such proceedings might cause) subjected him to a procedural unfairness which warranted the provision of the stay sought but refused by Rolfe J.

From his Honour's order dismissing the application for a stay the claimant, although out of time, has sought leave to appeal to this court. I would readily cure the small lapse in compliance with the requirements as to time. I must therefore turn to the issues of principle which are raised.

Various criticisms have been ventured by the claimant of the way in which Rolfe J dealt, by his reasons, with the application. None of these criticisms, in my view, save possibly one, would be such as to attract leave to appeal. That one concerned the correct approach to be followed in an application for a stay such as was made by the claimant to Rolfe J after the effective abolition of the felony tort rule by the decision of this court in *Halabi v Westpac Banking Corp* (1989) 17 NSWLR 26.

Before *Halabi*, Wootten J in the Supreme Court of this State in *McMahon v Gould* (1982) 7 ACLR 202 at 206 had proposed certain guidelines to direct, in a principled way, the exercise of the judicial discretion to provide, or refuse, a stay of civil proceedings where a party faced a related criminal charge and alleged a risk of prejudice in the trial of that charge from the prior litigation and determination of the civil action.

In *Halabi*, McHugh JA in this court clearly held that the guidelines adopted by Wootten J in *McMahon v Gould* stated the approach to be followed by judges in this State (see *Halabi* at 56). Samuels JA, although adopting in *Halabi* an approach different from that proposed by McHugh JA and adopted by me, also referred to *McMahon v Gould* with approval and indeed admiration (see *Halabi* at 45). Samuels JA joined in the order of this court. His reasons are thus part of the reasons of the court for deriving the court's holding in that case.

I myself refrained from expressing an opinion about the guidelines in *McMahon v Gould* because I considered that they should await specific attention on a later date. The felony tort rule, with its inflexible operation may have gone. But some, at least, of the considerations which lay behind it still remain valid to the exercise of the discretion which this court held still lay in the judges: cf *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) at 1113.

It is to be noted that since *Halabi*, Young CJ in the Supreme Court of Victoria applied *McMahon v Gould* in *Philippine Airlines v Goldair (Aust) Pty Ltd* [1990] VR 385 at 387 (SC) thus bearing out McHugh JA's statement in *Halabi* that the principles in *McMahon v Gould* were now applied not only in this State but elsewhere. Certainly, the decision in *Halabi* must be taken as providing an endorsement by two members of this court of the guidelines

expressed by Wootten J in *McMahon v Gould*. As Rolfe J expressly followed and applied those guidelines, he conformed to the existing law. That is reason for refusing leave to appeal. See also *Southern Star Group Pty Ltd t/as KGC Magnetic Tapes v Taylor* (1991) 4 ACSR 133 at 140 (SC).

There is a further reason for refusing leave in this case. Rolfe J records that, before him, the parties agreed that his Honour should approach the exercise of the discretion by the application of the principles in *Halabi*. Passages of the transcript and argument which have been read before this court today appear to indicate that his Honour's understanding of the argument of the parties was correct. Reference was certainly made in the course of that argument, including argument on behalf of the claimant, to *McMahon v Gould*. This reference can only be understood on the basis that it was the principles stated in that case that his Honour was invited to apply to the claimant's stay application.

In these circumstances, it would in my opinion involve a procedural unfairness, such as is forbidden by the decision of the High Court in *Coulton v Holcombe* (1986) 162 CLR 1 at 7, for this court to allow a different approach to be adopted by the claimant on appeal than that which was adopted before Rolfe J.

One day it may be appropriate for this court to reconsider the guidelines stated by Wootten J in *McMahon v Gould*. There are, in my view, considerations additional to those which are referred to by Wootten J which it would be relevant to consider in proceeding to determine an application for a stay such as was before Rolfe J. For example, it is in my opinion relevant to take specifically into account the public's own interest in the normal primacy of the administration of criminal justice, being a part of the public law of the community relevant to its good order and peaceful government. This consideration might help explain why, ordinarily but not universally, such proceedings should be heard and determined first: cf *Attorney General for New South Wales v John Fairfax & Sons Ltd* (1985) 1 NSWLR 402 at 405 (CA); *Border Morning Mail Pty Ltd v Hansen* (25 November 1987, CA(NSW), unreported); (1987) NSWJB 229; *R v Hargreaves; Ex parte Dill* [1954] Crim LR 54 (DC); *Hinch v Attorney General* [1987] VR 721 at 727 (FCV).

Also relevant is the fact that serious criminal proceedings are still determined, in most cases in this State, by juries. Most civil litigation is now decided by judges sitting alone. Judges, by their training, are conventionally considered to be better able to make the mental adjustments for excluding the prejudicial effect of pretrial publicity than lay jurors are. The sensational and highly personalised presentation of much news by the news media today has become a factor relevant to the fair trial of prominent "personalities". Guarding their right to a manifestly fair criminal trial is as much in the interest of the community and its legal institutions as in the interests of the individuals concerned.

A further consideration in cases of this class is the "deep-rooted" inclination of our law to avoid, directly or indirectly, depriving a person of the right to silence in criminal proceedings. Sometimes the prior litigation of the criminal trial may have that effect, either by its interlocutory procedures or by the need of the accused, in the forensic setting of the civil trial, to give evidence or ask questions, thereby disclosing a defence to the outstanding criminal charge: cf *Lam Chi Ming v R* [1991] 2 AC 212 at 222

(PC); *R v Director of the Serious Fraud Office; Ex parte Smith* (16 June 1992, House of Lords, unreported) *Times Law Report*. More than lip service must be paid by courts to the preservation of these enduring features of the criminal process, whether in the interpretation of apparently inconsistent statutes or in the exercise of a discretion to stay civil proceedings until related criminal proceedings are completed: cf *Baker v Campbell* (1983) 153 CLR 52; *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319; 4 ACSR 624. Such features exist not only to protect the rights of the individual accused but also to help define the relationship between the organised state and citizens generally. In the context of cases such as the present, it is possible that the guidelines in *McMahon v Gould* need to be revised to reflect more accurately such considerations. Basic rights matter most where they seem most painful to accord. See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 124.

Nevertheless, as I read the decision in *McMahon v Gould*, the guidelines proposed by Wootten J were just that: guidelines. They did not purport to be an exclusive or exhaustive list of considerations which the judge should take into account: cf *Norbis v Norbis* (1986) 161 CLR 513 at 518ff. They are expressed in language of great generality.

I have therefore come to the conclusion that this is not the case in which to review *McMahon v Gould*. This case involved, in the end, an exercise by Rolfe J of the discretion which, by law, he undoubtedly had. No error of principle has been shown, sufficient to attract leave to appeal to this court: cf *House v R* (1936) 55 CLR 499 at 505; *R v Glennon* (1992) 66 ALJR 344 at 348 (HC). Accordingly, I would propose that the summons for leave to appeal be dismissed with costs.

Necessarily, this determination does not foreclose any further application which Mr Yuill may be advised to take on fresh grounds, although I say this without wishing to encourage any such application. Nor does the refusal of leave prevent, any more than Rolfe J's decision did, any application which the claimant may make at the time when the decision in the civil proceedings is reserved. He may, at that time, ask Rolfe J to refrain from publishing his reasons before the criminal trial involving the claimant is concluded. Such a request would doubtless be considered by his Honour having regard to his conclusions and to the then state of the evidence concerning the hearing date of the criminal trial.

Priestley JA. I agree generally with the President except as to his reservation concerning *McMahon v Gould*. For my part I am content to treat that decision in the same way as Sir John Young did in *Philippine Airlines v Goldair Australia Pty Ltd* [1990] VR 385 at 389, as a useful guide to the exercise of the court's discretion in cases of this kind.

The only possible criticism that I can see in regard to the guidelines set out by Wootten J in 7 ACLR at 206 is that the use of the words "prima facie" in guideline (a) might possibly be misleading to some readers.

It seems to me to be plain from the context of the whole set of guidelines set out by his Honour that by "prima facie" as he used it there, he meant substantially "unless there is some reason for not doing so". Once the guidelines are read in that way they are in my respectful opinion irreproachable.

It seems to me that Rolfe J's reasoning falls fully within the guidelines so understood and I do not wish to add anything to what the President has said in that regard. I agree with the orders proposed.

Meagher JA. I agree. In my view no error has been demonstrated sufficient to justify leave from Rolfe J's judgment. No occasion has arisen to consider the correctness of *McMahon v Gould*, even if the claimant had not embraced that decision in the proceedings. I agree with the orders proposed.

Kirby P. The order of the court accordingly is that the summons is dismissed. The claimant must pay the contesting opponent's costs.

FRANCOIS KUNC
BARRISTER