

CITATION: *Christopher John Shiels and Bradbury Park Pty Ltd v Sharyn Dunstan* [2024] NTSC 69

PARTIES: SHIELS, Christopher John, and
BRADBURY PARK PTY LTD

v

DUNSTAN, Sharyn,

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2022-03457-SC

DELIVERED: 22 August 2024

HEARING DATE: 2 August 2024, 8 August 2024

JUDGMENT OF: Luppino AsJ

CATCHWORDS:

Practice And Procedure – Stay of Proceedings – Whether civil proceedings should be stayed pending determination of related criminal proceedings – Court has inherent power to stay proceedings – The grant of a stay is in the discretion of the Court and depends on the interests of justice – Principles relevant to the exercise of the discretion – Threshold question of whether there is a reasonable possibility of charges being laid – Finding of no reasonable possibility of charges – Stay refused

Criminal Code Act 1983 (NT), s 227.
Supreme Court Rules 1987 (NT) rr 43.03(2).

Adelaide Brighton Cement v Burgess (2018) SASC 134.
Australian Competition and Consumer Commission v Meta Platforms Inc
(No 2) (2023) FCA 1234.
*Australian Securities and Investment Commission v Australian and New
Zealand Banking Group Ltd* (2019) 138 ACSR 42.
Beecee Group v Barton (1980) 5 ACLR 33.
Caesar v Somner [1980] 2 NSWLR 929.
CC Containers Pty Ltd v Lee (No 2) [2012] VSC 149.
Citation Resources Ltd v Landau (2016) 116 ACSR 410.
Commissioner of the Australian Federal Police v Zhao (2015) 255 CLR 331.
Hardie Rubber Co Pty Ltd v General Tire & Rubber Co (1973) 129 CLR
521.
*Construction Forestry Mining and Energy Union v Australian Competition
and Consumer Commission* (2016) 242 FCR 153.
Gypsy Fire v Truth Newspapers Pty Ltd (1987) 9 NWLR 382.
Jefferson Ltd v Bhetcha [1979] 1 WLR 898.
Lee (No 2) v The Queen (2014) 253 CLR 455.
McMahon v Gould (1982) 7 ACLR 202.
Re AWB Ltd (No 1) (2008) 21 VR 252.
Re Saltergate Insurance Co Ltd (1980) 4 ACLR 733.
Reid v Howard & Ors (1995) 184 CLR 1.
Rochfort v John Fairfax & Sons Ltd [1972] 1 NSWLR 16.
Sorby v Commonwealth (1983) 152 CLR 281.
Strickland & Ors v Commonwealth Director of Public Prosecutions (2018)
266 CLR 325.
Websyte Corporation Pty Ltd v Alexander (No 2) [2012] FCA 562.
X7 v Australian Crime Commission & Anor [2013] HCA 29.

REPRESENTATION:

Counsel:

Plaintiff:	D McDonald
Defendant:	D McConnel SC and D Kelly

Solicitors:

Plaintiff:	Taylor Rose
Defendant:	Hunt & Hunt Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Christopher John Shiels and Bradbury Park Pty Ltd v Sharyn Dunstan
[2024] NTSC 69

No. 2022-03457-SC

BETWEEN:

CHRISTOPHER JOHN SHIELS

and

BRADBURY PARK PTY LTD

Plaintiffs

AND:

SHARYN DUNSTAN

Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 22 August 2024)

- [1] The Defendant has sought a stay of these proceedings until further order. The application was based on possible criminal charges being laid against the Defendant relating to the same subject matter as the substantive proceedings.
- [2] The evidence before the Court reveals that the first Plaintiff made a report to Northern Territory Police which was broadly based on the same

allegations as are made in the substantive proceedings. A criminal investigation then followed leading to consideration of the laying of charges in the nature of criminal deception, likely section 227 of the *Criminal Code Act 1983* (NT) against the Defendant, the Defendant's former husband, Peter Dunstan, and one other person.

[3] The Court has, incidental to the general power of a court to control its own proceedings,¹ an inherent power to stay civil proceedings where there is a real possibility of criminal proceedings for an offence constituted by substantially the same conduct as for the civil proceedings.²

[4] There have been relatively recent developments in the law in this area.³ *McMahon v Gould*⁴ is a seminal decision and the most recent High Court authorities I was referred to are *Commissioner of the Australian Federal Police v Zhao*⁵ and *Strickland & Ors v Commonwealth Director of Public*

¹ *Australian Securities and Investment Commission v Australian and New Zealand Banking Group Ltd* (2019) 138 ACSR 42.

² *Re AWB Ltd (No 1)* (2008) 21 VR 252.

³ For example see *Sorby v Commonwealth* (1983) 152 CLR 281; *Adelaide Brighton Cement v Burgess* (2018) SASC 134; *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898; *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16; *Caesar v Somner* [1980] 2 NSWLR 929; *Beecee Group v Barton* (1980) 5 ACLR 33; *Re Saltergate Insurance Co Ltd* (1980) 4 ACLR 733; *Australian Competition and Consumer Commission v Meta Platforms Inc* (No 2) (2023) FCA 1234; *X7 v Australian Crime Commission & Anor* [2013] HCA 29; *Construction Forestry Mining and Energy Union v Australian Competition and Consumer Commission* (2016) 242 FCR 153; *Australian Securities and Investment Commission v Australian and New Zealand Banking Group Ltd* (2019) 138 ACSR 42.

⁴ (1982) 7 ACLR 202.

⁵ (2015) 255 CLR 331.

Prosecutions.⁶ Principles, and factors relevant to the exercise of the

Court's discretion, which can be distilled from the cases are:-

- *prima facie* a plaintiff is entitled to have a claim tried in the ordinary course and proceedings should not be stayed absent justification on proper grounds;
- the party seeking the stay has the burden to show that a stay is appropriate;
- there is no entitlement to a stay as of right simply because of the possibility of, or the existence of, related criminal proceedings;
- in determining whether to grant a stay, the Court is to consider whether or not there is a real danger of injustice in the criminal proceedings or if the accused is at risk of prejudice in defending the criminal proceedings;
- a defendant is not required to point to specific matters of prejudice before a stay can be contemplated;
- the prejudice to all parties is to be taken into account;
- the possibility of publicity reaching and influencing jurors is a potential form of prejudice;
- the extent to which an accused has already disclosed his or her defence is a relevant consideration;
- in appropriate cases, the proceedings may be allowed to proceed to a certain stage before a stay is ordered to operate;
- if granted, a stay should operate only for the minimum time required in the interests of justice;
- protective orders, such as suppression orders, may be utilised to ameliorate any prejudice in lieu of granting a stay;
- the determination of whether a stay should be granted depends on the facts of each case and factors considered relevant in authorities are not exhaustive and are a guide only.

6 (2018) 266 CLR 325.

- [5] Consideration of the factor of prejudice to an accused in any criminal proceedings involves, in broad terms, the assessment of the risk of prejudice to the accused's right of silence and/or the privilege against self-incrimination. The right to silence and the related privilege against self-incrimination are fundamental principles which protect an accused from not only incriminating themselves, whether by complying with compulsory processes or otherwise, but from making disclosures which may lead to incrimination or discovery of evidence of an incriminating nature.⁷
- [6] The core difference between the cases of the Plaintiff and the Defendant in respect of this factor is in respect of the Defendant's submission that High Court authorities⁸ establish the increased primacy of the right to silence and the privilege against self-incrimination. I broadly agree that recent authorities, although not necessarily elevating the factor of an accused's right to silence and privilege against self-incrimination to paramountcy, adds emphasis to these fundamental rights of an accused. Notwithstanding that, it remains the position that all relevant considerations are to be taken into account for the purposes of the exercise of the Court's discretion.
- [7] I do not think that anything turns on that controversy in the current case because I am of the view that there is no reasonable likelihood of charges being laid. The laying of charges is a threshold question because the power

⁷ *Sorby v Commonwealth* (1983) 152 CLR 281.

⁸ *Reid v Howard & Ors* (1995) 184 CLR 1; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee (No 2) v The Queen* (2014) 253 CLR 455; *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 331; *Strickland & Ors v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325.

to grant a stay in the current circumstances only arises due to the existence of, or the possibility of, related criminal charges. The inherent power of the Court to do so is predicated on that.⁹

[8] Relevantly, no charges have actually been laid against the Defendant, nor against any other persons as far as I can tell from the evidence. The evidence is clear that an investigation by Northern Territory Police was near complete as at approximately 26 April 2024. Correspondence from the Director of Public Prosecutions (“DPP”) dated 26 April 2024 addressed to legal representatives of Peter Dunstan advised that Northern Territory Police were awaiting the results of a warrant issued in Queensland to be completed and that a set of charges under section 227 of the *Criminal Code 1983* (NT) would be laid against Mr Dunstan. The correspondence added “*Ms Sharon Dunstan and Ms Maria Lynn will also be charged*”.

[9] Although not entirely clear from that correspondence, I think it likely that, if charges were laid, the Defendant would be charged jointly with Peter Dunstan. Therefore, and although charges had not then been laid, the prospect of criminal proceedings against the Defendant was, at that time at least, certainly “*on the cards*”.¹⁰

[10] By affidavit made 30 July 2024 the first Plaintiff deposed to discussions with Detective Raeburn of the Northern Territory Police where he was

⁹ *Australian Securities and Investment Commission v Australian and New Zealand Banking Group Ltd* (2019) 138 ACSR 42.

¹⁰ See para 18 below.

informed that the Northern Territory Police would end the criminal investigations against the Defendant if the first Plaintiff made a written request for the complaint to be withdrawn. That affidavit annexed an email from the first Plaintiff to Northern Territory Police dated 24 July 2024 where the first Plaintiff requested the criminal complaint to be withdrawn. In that email the first Plaintiff stated that he would prefer to pursue the current civil proceedings because he had been informed by Detective Raeburn that the criminal investigation might take some time to progress. Following that, by email dated 25 July 2024, Detective Raeburn indicated that the investigation would be finalised with no further action.

- [11] An email from the DPP dated 29 July 2024 was annexed to an affidavit of the Defendant's solicitor made 1 August 2024. In that email Mr Ledek, a Senior Prosecutor at the DPP, stated that the decision to lay charges in respect of the first Plaintiff's complaint was then under review. That appears to be a reference to the request by the first Plaintiff to have the charges withdrawn. In a separate affidavit of the Defendant's solicitor, also made 1 August 2024, it was deposed that Mr Ledek advised that the first Plaintiff withdrew his complaint when the DPP was about to file charges against the Defendant and that at that time the first Plaintiff advised Detective Raeburn that "*..the withdrawal of the criminal complaint was because he wants to put the criminal proceedings on hold until after the current civil proceedings finish*". (Emphasis added).

[12] That evidence is hearsay upon hearsay. Rule 43.03(2) of the *Supreme Court Rules* permits evidence based on information and belief in interlocutory applications if the grounds are set out. That also applies to hearsay on hearsay¹¹ although there remains the question of the weight to be given to the statement of belief. As that evidence alleges deliberately manipulative conduct on the part of the first Plaintiff, I invited the parties to obtain more direct affidavit evidence and I adjourned the hearing for a short time for that purpose.

[13] That led to a further affidavit of the first Plaintiff made 7 August 2024, and of the Defendant's solicitor made 8 August 2024. The further affidavit of the first Plaintiff did not address, in any meaningful way, the suggestion that the first Plaintiff was attempting to reserve the criminal proceedings until the conclusion of the civil proceedings.

[14] Moreover, the first Plaintiff alleged that it was Detective Raeburn that advised him that he could revisit the criminal charges after the civil proceedings if he wished to, which is a significant change of emphasis. There was no mention of that having been said in the affidavit of the first Plaintiff made 30 July 2024 when he referred to that same conversation. There was also no reference to that in an email from Detective Raeburn dated 5 August 2024 where she said that the first Plaintiff indicated he would reactivate the criminal complaint, but not before the civil

11 *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521 at 536.

proceedings had been completed. Detective Raeburn added that she was later advised by the first Plaintiff's lawyer in the civil proceedings that the first Plaintiff would "...consider his options with regard to continuing the criminal matter."

[15] Lastly, the further affidavit of the Defendant's solicitor annexed correspondence from the DPP advising that if the first Plaintiff, having now withdrawn his complaint, sought to resubmit it, and if Northern Territory Police were then to submit a brief to the DPP, whether the Director would prefer charges would depend on a number of considerations including the circumstances of the previous withdrawal of the complaint.

[16] In his affidavit of 7 August 2024, the first Plaintiff positively asserts that he has no intention to revisit the complaint. Counsel for the Defendant challenged the first Plaintiff's credibility concerning that and urged me to disregard that evidence given the evidence suggesting that the withdrawal of the criminal complaint was a deliberate strategy to secure an advantage on the current application. That submission was well founded in the circumstances. However, the positive statement that the first Plaintiff has no intention to pursue criminal charges in the future, shored up by the undertaking he gave to the Court, through his counsel, that he will not resubmit his complaint, has a dramatic impact on the prospect of criminal charges. The evidence that the DPP would take the circumstances of the withdrawal of the complaint into account if asked to lay charges in the future strengthens that position.

[17] I accept that the DPP could lay charges independently of the wishes of the first Plaintiff. However, it would appear that as matters currently stand, the DPP will not lay charges as the evidence is that the DPP would only consider charges if a brief was resubmitted by Northern Territory Police. If that occurred then the DPP would take into account the circumstances of the recent withdrawal. If regard was then had to the effect of that withdrawal on the substantive proceedings, it would appear unlikely that charges would be laid whenever they might be considered.

[18] As a result, although it cannot be said conclusively that the Defendant will never face related criminal charges, that is not the test. The test is whether it can be said that criminal charges are "*on the cards*", more precisely whether there is a reasonable possibility that criminal proceedings will be instituted.¹² In my view, that is not the case.

[19] That finding makes it unnecessary for me to consider the application of the principles previously referred to. There were disputes between the parties concerning the application of those principles. There was also a number of challenges by the Defendant to the credibility of the first Plaintiff in respect of his claim of not intending to pursue the criminal charges in the future and of his claims to prejudice. Other than to say that many of the challenges made to the evidence of the first Plaintiff were appropriate,

¹² *Adelaide Brighton Cement v Burgess* (2018) SASC 134; *Citation Resources Ltd v Landau* (2016) 116 ACSR 410; *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562; *CC Containers Pty Ltd v Lee (No 2)* [2012] VSC 149; *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NWLR 382.

nonetheless my finding in respect of the threshold question renders those considerations otiose.

[20] For these reasons I refuse the Defendant's application for a stay. I will hear the parties as to any ancillary matters including directions for the future case management of the substantive proceedings.
