CASE NOTE*

WALTON v GARDINER[1]

It is now well established that Australian superior courts have inherent jurisdiction to stay proceedings that are an abuse of their process.[2] It has been held that such an abuse of process may occur where a defendant to an action is subjected to an unfair trial[3] or where a prosecution is brought for an improper purpose.[4] In the recent decision of the High Court of Australia in *Walton v Gardiner* the Court indicated that the categories of cases where it was appropriate that proceedings be stayed on the grounds of abuse of process were not closed. In the process, however, the Court failed to offer any clear guidance as to the principles underlying a court's power to stay proceedings.

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1 (1993) 112 ALR 289.

2 *Williams v Spautz* (1992) 174 CLR 509 at 518; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 46; *Barton v The Queen* (1980) 147 CLR 75 at 95-6.

3 *Dietrich v R* (1992) 109 ALR 385; *Jago v District Court (NSW)* note 2 *supra*.

4 *Williams v Spautz* note 2 *supra*.

I. THE FACTS

The circumstances out of which the case arises were described by the High Court as "tragic, and now notorious".[5] The three respondents, Drs Gardiner, Gill and Herron, were associates of Dr Harry Bailey. Dr Bailey was the leading exponent in New South Wales of Deep Sleep Therapy (DST) who, facing criminal charges, took his own life in 1985. All were associated with the administration of DST to psychiatric patients at the Chelmsford Private Hospital in Sydney between 1970 and 1978.

The treatment of patients at the hospital was the cause of considerable public disquiet. In 1978 the Attorney-General referred the matter to the Department of Health, officers of which carried out an investigation. In March 1982, following the death of one patient, a prima facie case of negligence was found by the coroner against Drs Herron, Gardiner and Bailey. Another patient, Mr Hart, successfully instituted civil proceedings, resulting in a verdict against Dr Herron in 1980. However, it was not until 1986 that proceedings under the *Medical Practitioners Act* 1938 (NSW) were commenced before the Medical Tribunal in relation to the treatment of particular patients.

Drs Herron and Gill applied to the NSW Court of Appeal for an order staying those proceedings, an order which the Court granted: *Herron v McGregor*.[6] Typical of the Court's approach was the following description of the ordeal faced by Dr Herron:

> Civil proceedings for damages against Dr Herron over the subject matter of the complaint took four years to come to trial. The hearing of the action took sixty-four days. It resulted in a large verdict for Mr Hart. Those proceedings must have been traumatic... [Dr Herron] had to endure the ordeal of a long trial and cross-examination and a sustained, successful and no doubt well publicised attack on his professional reputation. It may be that in the initial stages after the jury's verdict in July 1980 he feared that disciplinary action for professional misconduct would be taken against him in respect of this matter. But by April 1982 he could surely be forgiven for thinking that these events, then nearly ten years old, were at last behind him. It must have been a cruel blow to Dr Herron to receive a complaint... concerning Mr Hart in April 1982 on top of the Coroner's finding on 4 March 1982 that there was a prima facie case of manslaughter against him [in relation to the treatment of another patient]. From March 1982 until December 1983 Dr Herron had... to endure the terrible anxiety of whether an indictment for manslaughter... would be presented against him. Then when he had not heard anything... for twenty months, he received Mr Hart's complaint in December 1983. In April 1984 Dr Herron submitted that the complaint should be dismissed. Yet it was not until September 1985, he was informed that the matter would proceed.[7]

5 *Walton v Gardiner* note 1 *supra* at 290.

6 (1986) 6 NSWLR 246.

7 *Ibid* at 256-7.

McHugh JA (Street CJ and Priestley JA agreeing) held that the delay in lodging the complaints was so great, and the institution and continuation of the proceedings so unfair and oppressive, that the proceedings were an abuse of the right to lodge a complaint.[8] In so doing, the Court rejected the view of the tribunal that there was "an overriding public interest in the inquiry proceeding, even if [the tribunal] had found that delay may have caused substantial prejudice and unfairness to the applicants".[9] The tribunal then stayed proceedings against Dr Gardiner.

Public outrage continued, however, until a Royal Commission into the treatment of patients at Chelmsford was announced in September 1988. The commission, in a twelve volume report delivered in December 1990, was highly condemnatory of DST and its administration at the hospital, and considered it to be an extremely dangerous and therapeutically ineffective treatment.[10] As a consequence, in March 1991, further complaints were referred to the Medical Tribunal. A conscious effort was made by the tribunal to distinguish these complaints from those previously stayed in 1986. Unlike those earlier complaints, the present matters related not to the treatment of certain named patients, but were directed more toward general allegations of malpractice.

The respondents applied to the Court of Appeal at first instance for a stay of the proceedings of the Medical Tribunal. The Court of Appeal, by majority, granted this stay on the grounds that a continuation of the proceedings in the tribunal would be so unfairly and unjustifiably oppressive as to constitute an abuse of the tribunal's process, especially given that another five years had intervened since the last proceedings, on substantially the same subject matter, were stayed.[11]

II. THE APPEAL

On appeal, a majority of the High Court[12] upheld the decision of the New South Wales Court of Appeal.

A. THE JUDGMENT OF THE MAJORITY

The first question with which the majority dealt was an application by the appellant for leave to amend the notice of appeal in order to deny the jurisdiction of the Supreme Court to stay proceedings of the Medical Tribunal. Though the appellant had not challenged this jurisdiction before the Court of Appeal, the issue

8 *Ibid* at 258, 260, 266, 267, 268, 269, 271.

9 *Ibid* at 249, 266.

10 *Report of the Royal Commission into Deep Sleep Therapy* vol 1 at 59.

11 *Gill v Walton* (1991) 25 NSWLR 190 per Gleeson CJ and Kirby P, Mahoney JA dissenting.

12 Mason CJ, Deane and Dawson JJ.

was raised in response to questions put to the appellant by Brennan J in the course of argument. The majority refused the application. The jurisdiction had been left undisturbed by the legislature and regarded (and exercised) by the Supreme Court as "well-established".[13] The precise question the respondents now sought to reopen had been resolved against the appellant in *Herron v McGregor*.[14] Special leave to appeal to the High Court from that decision on the question of jurisdiction had been refused. To allow the application would have been oppressive, unsettling rights and liabilities regarded as long since resolved.[15]

Having accepted the jurisdiction of the Court of Appeal, the majority turned to consider the circumstances in which a court may stay proceedings on the grounds of abuse of process. The appellant sought to limit the jurisdiction only to those situations where a hearing before the tribunal will necessarily be unfair, or where the proceedings before the tribunal are brought for an improper purpose. However, the majority rejected the appellant's proposition, noting that this "narrower view" had not been accepted by the Court in *Jago v District Court (NSW)*.[16] Their Honours held that the jurisdiction extends:

> ...to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.[17]

This may occur:

(a) when it can be clearly seen that the proceedings are doomed to fail;
(b) when the court is an inappropriate forum to entertain the proceedings; or
(c) when a party seeks to litigate anew a case which has already been disposed of by earlier proceedings.[18]

The supervisory jurisdiction was only qualified if the *Medical Practitioners Act* 1938 (NSW) expressly or impliedly narrowed the scope of the jurisdiction; the majority held that it did not.

In this case, where the tribunal's disciplinary power extended to ordering the removal of the respondent's names from the Register and the imposition of substantial fines, there arose a plain analogy between the concept of abuse of a court's process in relation to criminal proceedings and the concept of abuse of the tribunal's process in relation to disciplinary proceedings. Thus, the question before

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13 *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173 at 184-5, 197, 208-11; *Cooke v Purcell* (1988) 14 NSWLR 51 at 60, 63-7; *Herron v McGregor* note 6 *supra* at 252.
14 Note 6 *supra* at 252.
15 *Walton v Gardiner* note 1 *supra* at 297.
16 Note 2 *supra* per Mason CJ at 28-9; per Deane J at 58; per Gaudron J at 74.
17 *Walton v Gardiner* note 1 *supra* at 298.
18 *Id.*

the Court of Appeal fell to be determined by a weighing process involving a subjective balancing of:

(a) fairness to the accused;
(b) the legitimate public interest in the disposition of charges of serious offences; and
(c) the need to maintain public confidence in the administration of justice.

Essential to this reasoning process was a recognition that the proceedings before the Tribunal were protective in nature, and that the courts had to give effect to the importance of protecting the public from incompetence and professional misconduct on the part of medical practitioners. In their Honours' opinion, the Court of Appeal had correctly applied this weighing process.

In relation to determining the fairness to the accused, the majority held that the Court of Appeal was fully justified in paying regard to the notions of fairness to an accused person that underlie the common law principle against double jeopardy. Thus, whilst the complaints here at issue were not the same as those which had been involved in *Herron v McGregor*, and even though there had been no full hearing on the merits of the earlier proceedings, there was a considerable degree of correspondence in substance between the two sets of complaints. The jeopardy to which the respondents had earlier been subjected was here renewed in proceedings based on wider and more generalised, but in substance essentially similar, complaints.

B. THE JUDGMENT OF THE MINORITY

In the minority, Brennan J (with whom Toohey J agreed generally) adopted a different approach to that of the majority. He held that in order to determine the legal correctness of the decision of the Court of Appeal, one had to examine the jurisdiction in exercise of which the stay order was purportedly made. The majority had defined the broad supervisory power of the Supreme Court, and then examined the Act to determine whether this power was qualified by the statute. The minority, on the other hand, began by examining the jurisdiction and powers the Medical Tribunal was called upon to exercise, and then examined the jurisdiction of the Supreme Court to direct or affect the exercise by the tribunal of its jurisdiction and powers.[19]

The minority found that in the circumstances of the case the Medical Tribunal was under a statutory duty to conduct an inquiry into the complaints referred to it

19 *Ibid* per Brennan J at 306; per Toohey J at 319-20.

under the Act.[20] It was not for the Court of Appeal to prohibit the tribunal from exercising the jurisdiction it was directed to exercise by the statute.

Reflecting a view expounded in a similar context,[21] Brennan J was of the opinion that where a tribunal was properly seised of jurisdiction to hear a matter, it could not decline to hear and determine the matter, nor could a superior court prohibit the tribunal from hearing and determining the matter:

> The administration of justice is not contingent on judicial satisfaction that the prosecution of a proceeding is not unfair and not unjustifiable – provided the proceeding is instituted on reasonable grounds for a proper purpose and is prosecuted in due compliance with the court's procedure.[22]

His Honour warned against aggrandisement by the courts:

> When judicial notions of justice or fairness are offended, there is a tendency, perhaps unconscious, for a court to see its jurisdiction as wide enough to authorise the granting of a remedy.[23]

Terms such as 'unfair' and 'unjustified' "import no more definite criterion than idiosyncratic opinion".[24] Accordingly, the minority held that the Court of Appeal was in error in staying proceedings on the ground that the prosecution of those proceedings was, as a matter of subjective evaluation, 'oppressive'.

The minority examined the jurisdiction conferred upon the Supreme Court by virtue of s 23 of the *Supreme Court Act* 1970 (NSW).[25] This section confers upon the Supreme Court "all jurisdiction which may be necessary for the administration of justice in New South Wales". The minority held that this section conferred upon the Supreme Court jurisdiction to ensure that the tribunal acts within its jurisdiction and according to its powers, and that the tribunal's jurisdiction has not been invoked for an impermissible purpose. This much was uncontroversial.

The point of departure between the majority and the minority was in consideration of whether process may be abused when proceedings are instituted for a legitimate purpose but result in oppression and unfairness. The minority were prepared to accept the authority of the majority decision in *Williams v Spautz* which had been relied upon by counsel for both parties in the course of argument. The majority were of the opinion that *Williams v Spautz* supported a denial of the narrow view of abuse of process propounded by the appellant. On the other hand, the minority viewed the decision as lending support to the argument that an abuse

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20 *Ibid* per Brennan J at 307, 309; per Toohey J at 320.

21 See *Dietrich v R* note 3 *supra* at 406-7.

22 *Walton v Gardiner* note 1 *supra* at 315.

23 *Ibid* at 309.

24 *Ibid* at 316.

25 The power under s 23 is exercisable by the Court of Appeal by virtue of s 44 of the *Supreme Court Act* 1970 (NSW).

of process may occur in two situations: firstly, when the prosecution of the proceedings is manipulated in such a way as to impose an exceptional burden additional to the burden necessarily imposed upon a party properly subject to litigation; and secondly, when the 'oppression' of the defendants *must* result in an unfair trial.

In this case, there was no additional burden upon the defendants. The proceedings had been instituted in accordance with the procedures outlined in the *Medical Practitioners Act* 1938 (NSW), and had been instituted for a purpose that lay at the very heart of the Act; the protection of the public against medical malpractice through the enforcement of proper professional standards. The conduct of the proceedings themselves could not be considered unfair.[26] Whilst the respondents were at a significant disadvantage in defending themselves, the tribunal was able to fashion its procedures so as to ensure that the hearing of the 1991 complaints was fair.

The minority rejected the argument of the respondents that *Herron v McGregor* presented an obstacle to the appellant in this case. The respondents had never been put in jeopardy; all disciplinary proceedings against them had been stayed, and there had never been an opportunity to investigate the complaints against them.[27] In any event, Brennan J was of the opinion that *Herron v McGregor* was wrongly decided.[28]

III. COMMENT

The decision of the majority in *Walton v Gardiner* is highly unsatisfactory. The decision fails to identify with any clarity the source of a superior court's power to stay proceedings of an inferior court or tribunal on the grounds that they are an abuse of process. Similarly, there is no clear enunciation of the circumstances in which such a stay should be granted.

The members of the lead judgment in *Williams v Spautz* who deliberated in the present case could not agree as to the meaning of that judgment. Mason CJ and Dawson J were of the opinion that the decision supported an expansive notion of abuse of process, whilst Toohey J considered the decision authority for the argument put by the appellant in the present case, that the proceedings must either be brought and maintained for an improper purpose, or they must result in oppression giving rise to an unfair trial.

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26 See the findings of fact in *Gill v Walton* note 11 *supra* per Gleeson CJ at 200, per Kirby P at 205-6, per Mahoney JA at 222.

27 *Walton v Gardiner* note 1 *supra* 319.

28 *Id.*

It is submitted that the approach of the minority is preferable. The circumstances in which the minority admit of a power to stay proceedings provide a principled basis upon which to exercise that power. A prosecution is brought for an improper purpose when the court's process is invoked for a purpose which it is not intended to serve, or when the court's process is incapable of serving the purpose it is intended to serve.[29] An unfair trial (as opposed to 'unfairness' generally) results when proceedings do not conform with the principles underlying the accusatorial system of justice.[30]

The lack of clarity and guidance provided by the High Court in respect of the power to stay proceedings was further exemplified by the decision of the New South Wales Court of Appeal in *DPP v Gill*,[31] a decision dealing with an application for a stay of criminal proceedings against Dr Gill. In that case, the Court of Appeal was once again divided over the appropriate principle to apply.

With only five members of the court sitting in the present case, and with there being no clear division within the Court as to the appropriate bounds of a court's power to stay proceedings, or the circumstances in which such a power may or should be invoked, the only certainty to arise from *Walton v Gardiner* is that the last word is yet to come on abuse of process.

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29 *Ibid* at 312. The specific examples given by His Honour correspond with circumstances which the majority consider constitute an abuse of process: at 298.

30 "A fair trial is a public hearing in which the Crown makes a specific allegation, for which the accused has never before been convicted or acquitted, that the accused has violated a pre-existing rule of law, during which trial the Crown bears the burden of establishing the allegation against him until a case to meet has been established, and in which the accused is provided with a reasonable opportunity to make full answer and defence. It is only where the conduct of those responsible for the prosecution of an offence has jeopardised one or more of those accusatorial principles that the power to act to ensure a fair trial should arise": David Paciocco "Stay of Proceedings as a Remedy in Criminal Cases: Abusing the abuse of process concept" (1991) 15 *Criminal Law Journal* 315 at 332-3.

31 Unreported, 20 May 1993, per Gleeson CJ, Mahoney and Meagher JJA.