FEDERAL COURT OF AUSTRALIA

Sandhurst Trustees Limited v Clarke [2014] FCA 841

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| Citation: | Sandhurst Trustees Limited v Clarke [2014] FCA 841 |
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| Appeal from: | Application for leave to appeal: Clarke v Sandhurst Trustees Limited [2014] FCA 580 |
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| Parties: | **SANDHURST TRUSTEES LIMITED ABN 16 004 030 737 v GRAEME CLARKE and MARION CLARKE** |
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| File numbers: | QUD 294 of 2014 |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 24 July 2014 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to appeal decision of Federal Court granting discovery to prospective applicant pursuant to r 7.23 of the *Federal Court Rules 2011* (Cth) – whether orders granting preliminary discovery are final in substance – whether question of leave to appeal ought to be heard and determined by a Full Court |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 25(1A) and 25(2)(e)  *Federal Court Rules 2011* (Cth) r 7.23 |
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| Cases cited: | *Adam P Brown Male Fashions* *Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 cited  *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397cited  *Echo Tasmania Pty Ltd v Imperial Chemical Industries PLC* [2008] FCAFC 58cited  *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564cited  *Malouf v Malouf* (1999) 86 FCR 134cited  *Minogue v Williams* [2009] FCA 125cited  *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* (2007) 163 FCR 554cited  *Petroulias v Commissioner of Taxation* [2011] FCA 795 cited  *Wills v Australian Broadcasting Commission* (2009) 173 FCR 284 cited  *Zoia v Commonwealth Ombudsman Department* (2007) 240 ALR 624cited |
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| Date of hearing: | 24 July 2014 | |
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| Place: |  | |
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| Division: |  | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 10 | |
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| Counsel for the Applicant: | Mr M Hoffmann QC with Mr M Trim | |
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| Solicitor for the Applicant: | Group Legal Bendigo and Adelaide Bank Limited | |
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| Counsel for the Respondents: | Mr T Martin SC with Mr G Drew | |
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| Solicitor for the Respondents: | Shine Lawyers | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 294 of 2014 |

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| BETWEEN: | SANDHURST TRUSTEES LIMITED ABN 16 004 030 737  Applicant |
| AND: | GRAEME CLARKE  First Respondent  MARION CLARKE  Second Respondent |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 24 JULY 2014 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. Pursuant to s 25(2)(e) of the *Federal Court of Australia Act 1976* (Cth), the application for leave to appeal be heard and determined by a Full Court.
2. The application for leave to appeal be heard concurrently with or immediately before the hearing of the appeal if leave is granted.
3. The appeal be listed for hearing in Brisbane on a date to be fixed during the Full Court and appellate sitting period from 3 – 28 November 2014.
4. The hearing be listed for an estimate of one day.
5. The appellant within 28 days of today submit to the Registrar a draft of the index to Part A of the appeal book and Part B of the appeal book.
6. In accordance with Practice Note APP2, not later than 4.00 pm 20 business days before the hearing of the appeal, the applicant must file and serve on the respondents its outline of submissions.
7. In accordance with Practice Note APP2, not later than 4.00 pm 15 business days before the hearing of the appeal, the respondents must file and serve on the applicant a copy of its outline of submissions together with a list of materials it requires to be included in Part C of the Appeal Book.
8. In accordance with Practice Note APP2, not later than 4.00 pm 10 business days before the hearing of the appeal, the applicant must file and serve on the respondents a copy of any submissions in reply.
9. In accordance with Practice Note APP2, not later than 4.00 pm 5 business days before the hearing of the appeal, the applicant must:
   1. file four copies; and
   2. serve on the respondents an appropriate number of copies

of Part C of the Appeal Book.

1. Outlines of submissions are not to exceed 15 pages in length, including any annexures, and must be easily legible using a font size of at least 12 points and one and a half line spacing throughout, including in any footnotes and annexures. Italics or underlining must be used for legislation and case citations and boldface or italics may be used for occasional emphasis.
2. Each party file and serve a list of authorities and legislation in accordance with Practice Note CM 2.
3. Costs be reserved to the Full Court.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 294 of 2014 |

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| BETWEEN: | SANDHURST TRUSTEES LIMITED ABN 16 004 030 737  Applicant |
| AND: | GRAEME CLARKE  First Respondent  MARION CLARKE  Second Respondent |

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| JUDGE: | RANGIAH J |
| DATE: | 24 JULY 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. This is an application made pursuant to s 25(1A) of the *Federal Court of Australia Act 1976* (Cth) for leave to appeal against the judgment of a single judge of this Court.
2. His Honour ordered that the applicant for leave to appeal (“the applicant”) give preliminary discovery pursuant to r 7.23 of the *Federal Court Rules 2011* (Cth). The parties agree that the judgment in question is interlocutory and that leave to appeal is required: *Malouf v Malouf* (1999) 86 FCR 134 at [36].
3. The Court has a wide discretion as to whether to grant leave to appeal but such leave will not usually be granted unless the judgment is attended by sufficient doubt to warrant the grant of leave and substantial injustice would result from the refusal of leave to appeal: *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399; *Minogue v Williams* [2009] FCA 125 at [19]. Leave will be more readily granted where the interlocutory decision affects substantive rights: *Décor Corporation Pty Ltd v Dart Industries Inc* at 400; *Minogue v Williams* at [19]. In such a case, leave will generally be granted if there is any doubt about the decision at first instance: *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564 at [43].
4. The parties differ, however, on the question of whether the judgment is one that affects the applicant’s substantive rights. The applicant submits that although orders made under r 7.23 are interlocutory, they, in effect, provide final relief. The applicant relies, in particular, on *Echo Tasmania Pty Ltd v Imperial Chemical Industries PLC* [2008] FCAFC 58 where Black CJ and Sackville J said, in relation to the predecessor of r 7.23, at [40]:

Moreover, while the orders made by his Honour were technically interlocutory, they effectively required Echo to produce documents for inspection that otherwise it was entitled to keep to itself.

1. The applicant then relies on authority to the effect that if an order is final in substance then the threshold for a grant of leave to appeal is not high: *Wills v Australian Broadcasting Commission* (2009) 173 FCR 284 at [14] per Emmett J, at [31], per Rares J; *Zoia v Commonwealth Ombudsman Department* (2007) 240 ALR 624 at [26] per French J; *Petroulias v Commissioner of Taxation* [2011] FCA 795 at [43]-[44] per Reeves J.
2. On the other hand, the respondents rely on *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* (2007) 163 FCR 554 at [20], where Tamberlin J decided in relation to the predecessor of r 7.23 that:

[N]o substantive rights are finally determined until a decision is made in the contemplated substantive application.

1. The respondents submit that the passage taken from *Echo Tasmania* does not squarely address the issue. They argue that as the orders are not final in substance, the approach taken in cases such as *Adam P Brown Male Fashions* *Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 should be applied and that the Court should be reluctant to grant leave to appeal concerning a matter of practice or procedure.
2. I consider that the applicant has demonstrated an arguable case on issues including: whether the scope of an order for preliminary discovery is required to be limited to documents directly relevant to the question of whether the prospective applicant has a right to obtain the relief; and whether the prospective applicant is required to depose as to the grounds on which he or she believes that he or she has a right to obtain relief.
3. However, I consider that the question of whether the orders affect substantive rights is one that should be decided by the Full Court in view of what appear to be conflicting authorities. That question has relevance to the degree to which the applicant is required to demonstrate that it has an arguable case. I think that the Full Court is in the best position to consider the question of whether leave to appeal should be granted.
4. Accordingly, I will direct, pursuant to s 25(2)(e) of the *Federal Court of Australia Act*, that the application for leave to appeal is to be heard and determined by a Full Court.

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| I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 12 August 2014