FEDERAL COURT OF AUSTRALIA

Palmer v State of Western Australia [2020] FCA 962

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| File number: |  |
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| Judge: | **RANGIAH J** |
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| Date of judgment: | 9 July 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for adjournment of hearing – where parties agreed that hearing should be expedited because of national importance of case – where respondents’ expert called in to assist with management of COVID-19 outbreak in Victoria and has become unavailable – adjournment allowed |
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| Legislation: | *Constitution* s 92 |
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| Date of hearing: | 8 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 27 |
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| Counsel for the Respondents: | Mr J Thomson SC with Mr J Berson |
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ORDERS

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|  | | QUD 183 of 2020 |
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| BETWEEN: | CLIVE FREDERICK PALMER  First Applicant  MINERALOGY PTY LTD (ACN 010 582 680)  Second Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA  First Respondent  CHRISTOPHER JOHN DAWSON  Second Respondent | |

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| JUDGE: | RANGIAH J |
| DATE OF ORDER: | 9 JULY 2020 |

THE COURT ORDERS THAT:

1. The trial dates on 13 and 14 July 2020 be vacated, and the trial be re-listed for 27, 28 and 30 July 2020 in the Sydney Registry.
2. Associate Professor Kamalini Lokuge and Professor Tony Blakely have leave to give evidence at the trial by video-link from a location to be approved by the Court.
3. The Western Australian Chief Health Officer have leave to give evidence at the trial by video-link from the Commonwealth Law Courts Building at 1 Victoria Avenue, Perth, Western Australia.
4. The respondents have leave to file and serve a supplementary expert report of Associate Professor Kamalini Lokuge by 5 pm AEST on 21 July 2020.
5. The orders made on 24 June 2020, as amended on 29 June 2020 and 2 July 2020, be amended as follows:
   1. The date in Order 13 be amended to 23 July 2020.
   2. The date in Order 15 be amended to 23 July 2020.
6. By 4 pm AEST on 15 July 2020 the parties are to:
   1. confer and seek to reach agreement in relation to whether the evidence should be concurrent or consecutive, the appropriate composition(s) of any conclave of experts, and other necessary matters for the giving of evidence; or
   2. failing agreement, file and serve submissions of no more than 2 pages as to these matters.
7. A Registrar of the Federal Court be appointed to act as a facilitator of the conference of experts.
8. There be liberty to apply on 3 hours written notice.
9. Costs be reserved.

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

REASONS FOR JUDGMENT

(DELIVERED EX TEMPORE AND REVISED)

RANGIAH J:

1. The hearing of this matter has been set down for Monday, 13 and Tuesday, 14 July 2020. The respondents have applied for an adjournment of the hearing.
2. The applicants commenced the proceedings in the High Court of Australia on 25 May 2020. The applicants seek, inter alia, a declaration that directions made by the second respondent prohibiting entry into Western Australia by persons other than “exempt travellers” are invalid on the basis that the directions contravene s 92 of the *Constitution*.
3. On 18 June 2020, the High Court remitted the following question for determination by a judge of the Federal Court of Australia:

Pursuant to section 44 of the *Judiciary Act 1903* (Cth) so much of this matter as concerns the claim by the defendants of the reasonable need for and efficacy of the community isolation measures contained in the Quarantine (Closing the Border) Directions … made on 5 April 2020 be remitted to the Federal Court of Australia for hearing and determination.

1. The matter was listed for case management hearings before me on 22 and 24 June 2020. The parties agreed that the matter has substantial national significance and should be dealt with expeditiously. The applicants indicated that they had hoped to have the matter heard and determined by the Federal Court in sufficient time to allow the matter to be listed in the High Court sittings for August 2020.
2. Taking into account the need for expedition, I made orders on 24 June 2020 (varied on 29 June 2020) requiring that:

* By 5.00 pm on 26 June 2020, the respondents file and serve their expert’s report.
* By 4.00 pm on 7 July 2020, the applicants and the Commonwealth file and serve any expert’s reports.
* By 4.00 pm on 9 July 2020, the experts confer and deliver a joint report.

1. On 25 June 2020 the parties were notified that the hearing had been set down for 13 and 14 July 2020.
2. In accordance with the orders, the respondents filed and served an expert report of Associate Professor Kamalini Lokuge, and the applicants filed and served an expert report of Associate Professor Sanjaya Senanayake. The Commonwealth, an intervener, filed and served an expert report of Professor Peter Collignon on 7 July 2020 in accordance with the orders, but filed another expert report of Professor Tony Blakely on 8 July 2020, the day after the required date.
3. On 2 July 2020, the respondents applied for an adjournment of the hearing for two weeks on the basis that Associate Professor Lokuge had been asked to travel to Melbourne to assist with the recent outbreak of COVID-19 and would no longer be able to give evidence in person. I indicated that I was not prepared to adjourn the hearing on the basis of the evidence before me, but that I would allow the respondents to re-open their application at a further case management hearing scheduled for Wednesday, 8 July 2020.
4. The respondents have re-opened their application for an adjournment. The respondents rely on:

* The unavailability of Associate Professor Lokuge to prepare for and attend a conference with the other experts.
* The failure of the Commonwealth to file the report of Professor Blakely in accordance with the orders.
* That they seek an opportunity to consider and respond to the report of Professor Collignon, which raised the issue of whether adequate control could be achieved by “targeted quarantine measures”.
* The unlikelihood of the cross-examination being completed on the first day of the hearing, in circumstances where Associate Professor Senanayake is not available on the second day.

1. The applicants and the Commonwealth oppose any adjournment. They emphasise the constitutional significance of the case and the national interest in its expeditious determination.
2. Associate Professor Lokuge has affirmed an affidavit deposing as to work she is currently carrying out in Melbourne. She has not been cross-examined and I accept her evidence.
3. Associate Professor Lokuge is a public health physician and medical epidemiologist. On 1 July 2020, she was asked by the Chief Health Officer of Victoria to travel to Melbourne to assist with the recent COVID-19 outbreak. Her role is to identify how the public health response to the outbreak can be strengthened. She has experience in handling other high-risk infectious disease outbreaks, including Ebola outbreaks in West Africa, and believes that she is one of a very small number of people in Australia who can provide such assistance.
4. There is in evidence a letter from Professor Brett Sutton, the Victorian Chief Health Officer, addressed to Associate Professor Lokuge stating that:

Your many decades experience in responding to high-risk pathogen outbreaks such as that which we are currently experiencing will be of great value in supporting our response in areas including effective engagement with communities affected by the current outbreak, and strengthening surveillance systems for detecting COVID-19 in these communities.

Your assistance at this critical stage of the response will benefit not only those communities directly affected in Victoria, but the wider Australian community that will undoubtedly also benefit from control of transmission here.

1. Associate Professor Lokuge deposes that the number of cases in Melbourne is increasing, creating a very challenging situation to control. She considers that her work is time-critical and that each week of delay has the potential to make the control of the outbreak more difficult.
2. Associate Professor Lokuge deposes that she is working long hours. She estimates that it would take eight to ten hours to prepare for, and participate in, a conference of experts and contribute to a joint experts’ report. She deposes that she will be unable to find that length of time to devote to those tasks prior to the presently scheduled hearing because of her current workload. She considers that the earliest that she would be able to attend to these tasks would be in the week commencing 20 July 2020, when the most intensive and immediate work in Melbourne has been completed.
3. The numbers of new cases of COVID-19 in Victoria through community transmission have been increasing rapidly. Professor Collignon’s report states that the issue of greatest concern is uncontrolled community transmission. The importance of controlling the outbreak can readily be understood. The work that Associate Professor Lokuge is engaged in has the potential to save lives. I am satisfied that her work is of considerable importance to the Victorian community, and the Australian community generally.
4. If the trial were to proceed on 13 and 14 July 2020, Associate Professor Lokuge would be placed in the invidious position of having to choose between the critical work she is performing and finding the time to prepare for, and give, expert evidence on those days. On the applicants’ proposed method of conducting the hearing, there appears to be a strong possibility that Associate Professor Lokuge will be required to give evidence over both days. Accordingly, if the trial proceeds as scheduled, Associate Professor Lokuge will be taken away from her work for up to three days in total. If she does not voluntarily give evidence, the respondents will have to choose between applying for the issue of a subpoena and proceeding without their witness.
5. On the other hand, the applicants and the Commonwealth emphasise the considerable constitutional and national importance of the case. Substantial weight must be given to that factor, but the importance of the case cannot outweigh the need for fairness to all parties in the conduct of the proceeding.
6. Further, while recognising the broader public importance of the proceedings, the immediate context in which it is brought cannot be ignored. That context is that the applicants plead that the border closure affects the ability of the first applicant and senior management staff of the second applicant to enter Western Australia, which affects their ability to carry on their business. Their underlying concern seems to be that it is detrimental to manage the business only through remote technology, rather than through personal presence in Western Australia. While I accept that the restrictions placed upon the ability of the first applicant and senior management staff to manage their business may be substantial, the consequences for the applicants of a two week delay in hearing the matter appear less significant than the potential consequences for the broader community of removing Associate Professor Lokuge from her work in Victoria at a critical time.
7. In my opinion, an adjournment of the hearing for two weeks is warranted by the difficulties attending Associate Professor Lokuge’s preparation for and attendance at the presently scheduled hearing.
8. There are other matters that also influence my view that an adjournment should be granted, although by themselves they may not have warranted an adjournment in the absence of the difficulties in Associate Professor Lokuge’s availability. The respondents claim to have been taken by surprise by Professor Collignon’s opinion that a “targeted quarantine regime” is likely to be as, or even more, effective, than State border closures. I understand the term “targeted quarantine measures” to refer to isolation of regions or areas within the State, rather than the entirety of the State. This was an issue that I understand to have been touched on by Associate Professor Lokuge and Associate Professor Senanayake, but not addressed in the detail that it has been addressed by Professor Collignon. The respondents made some criticism of the failure of the applicants’ amended reply to expressly raise this issue, but it seems to me that it was open to produce this evidence on the basis of the issues raised in the pleadings.
9. However, I accept that Professor Collignon’s report raised an issue not addressed, or not addressed in the same depth, by the other experts. In the normal course, there would be sufficient time for the respondents to either have their existing expert address the issue or obtain a report from another expert. In view of the expedited nature of the proceeding and the unavailability of Associate Professor Lokuge, that cannot be done. The report of Professor Collignon was filed and served only three business days before the proposed hearing. I say that, not to criticise the Commonwealth, which complied in that respect with the orders made, but to demonstrate that the respondents have had little opportunity to meet the evidence of Professor Collignon. They should be allowed that opportunity.
10. The Commonwealth has said that the High Court’s sittings in August 2020 have now been filled, but that the parties hope to have the matter listed in the September sittings. The Commonwealth indicated that the parties would want a period of three weeks prior to the listing date before the High Court to exchange submissions. Two matters arise from those submissions. First, the initial urgency in listing the matter was that it was hoped the matter could be listed in the High Court’s August sittings, but that possibility seems to have gone. Second, the seemingly leisurely pace of exchanging submissions over a three week period appears inconsistent with the urgency the applicants and the Commonwealth are urging. If there is to be a saving of time, I would have thought that the interests of justice are better served by allowing the parties an adequate opportunity to present evidence before this Court and leaving the parties to deal with the exchange of submissions before the High Court in a more urgent manner.
11. I accept that the evidence is unlikely to be completed on the first day of the hearing. As things stand, Associate Professor Senanayake is unavailable for the second day, 14 July 2020. That creates a further difficulty with the hearing proceeding on the scheduled dates.
12. Although it is most unfortunate that the Commonwealth filed and served the report of Professor Blakely half-a-day late in circumstances where time was of the essence, it has not been demonstrated that the delay has contributed to the need for an adjournment.
13. Finally, I have considered whether an adjournment should be allowed for a shorter period of time than two weeks. However, that would merely risk a further application for an adjournment.
14. In all the circumstances, I consider that the hearing should be adjourned and relisted for 27 and 28 July 2020. In view of the length of time each interlocutory hearing has taken so far, I am not confident that the evidence and submissions will be finished within those two days and propose to set aside a third day.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah. |

Associate:

Dated: 10 July 2020