Federal Court of Australia

Ausin Group (Australia) Pty Ltd v Zhao [2021] FCA 1601

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| File number(s): |  |
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| Judgment of: | **ANDERSON J** |
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| Date of judgment: | 17 December 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to appeal – where the primary judge made orders for discovery of documents of the applicant – whether primary judge had no power under s 79 of the *Judiciary Act 1903* (Cth) to apply New South Wales laws or exercise jurisdiction over a justiciable controversy that arises solely under New South Wales law – where the applicant did not raise the jurisdictional issue before the primary judge – whether primary judge erred in the exercise of her discretion under r 20.11 of the *Federal Court Rules 2011* (Cth) in making the Discovery Order – where the application is dismissed |
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| Legislation: | *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011*(Cth)  *Judiciary Act 1903* (Cth)  *Conveyancing Act 1919* (NSW) |
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| Cases cited: | *House v The King* [1936] HCA 40  *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70  *Rana v Google Inc* (2017) 254 FCR 1  *Rizeq v The State of Western Australia* (2017) 262 CLR 1  *Zhao v Ausin Group (Australia) Pty Ltd* [2020] FCA 1659 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 24 |
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| Date of hearing: | 16 December 2021 |
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| Counsel for the Applicant: | Mr I Waller QC appearing with Mr D Parish |
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| Solicitor for the Applicant: | MDW Law |
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| Counsel for the Respondent | Mr L Wirth appearing with Mr Frauenfelder |
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| Solicitor for the Respondent: | Prudentia Legal Pty Ltd |

ORDERS

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|  | | VID 240 of 2021 |
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| BETWEEN: | AUSIN GROUP (AUSTRALIA) PTY LTD  Applicant | |
| AND: | SONG ZHAO  Respondent | |

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| order made by: | ANDERSON J |
| DATE OF ORDER: | 17 DECEMBER 2021 |

THE COURT ORDERS THAT:

1. Leave to appeal is refused.
2. The applicant will pay the respondent’s costs on a lump sum basis in an amount to be agreed or such amount as determined by a Registrar of the Court.

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

REASONS FOR JUDGMENT

ANDERSON J:

# introduction

1. The applicant, Ausin Group (Australia) Pty Ltd (**Ausin**) seeks leave to appeal from the discovery order made by the primary judge on 23 April 2021 (**Discovery Order**) in proceedings brought against it by the respondent (**Mr Zhao**) seeking relief under s 37A of the *Conveyancing Act 1919* (NSW).
2. The Discovery Order required Ausin to discover and produce to Mr Zhao certain documents described in the schedule attached to the orders made on 23 April 2021. That schedule contained 14 categories of financial documents.
3. The substantive proceeding was commenced by originating application filed on 31 October 2019.
4. On 11 June 2020, Ausin served an application for summary judgment. The primary judge heard that application on 29 October 2020 and made orders disposing of it on 17 November 2020: *Zhao v Ausin Group (Australia) Pty Ltd* [2020] FCA 1659.
5. The proceeding returned before the primary judge on 23 April 2021, where the primary judge made the Discovery Order, the subject of this application for leave to appeal.
6. The draft notice of appeal raises the following proposed grounds:
7. Ground 1 - The primary judge had no power under s 79 of the *Judiciary Act 1903* (Cth) to apply New South Wales laws or exercise jurisdiction over a justiciable controversy that arises solely under New South Wales law.
8. Ground 2 – The primary judge erred in the exercise of her discretion under r 20.11 of the *Federal Court Rules 2011* (Cth) in making the Discovery Order.

# legal principles

1. Section 24 of the *Federal Court of Australia Act 1976* (Cth) (**Act**) confers jurisdiction upon this Court to hear and determine appeals from judgments of the Court constituted by a single judge, but pursuant to s 24(1A) of the Act, leave is required from an interlocutory judgment.
2. The Discovery Order is both interlocutory and in respect of a matter of practice and procedure.
3. In *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70 at [2] to [4] and at [6] Lee J stated:

The starting point is that in exercising the power to grant leave, regard must be had to the statutory charge in s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) that the power must be exercised or carried out in the way that best promotes the overarching purpose, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

Consistently with the facilitation of a just resolution, an applicant must usually show that: (a) in all the circumstances, the decision to be appealed is attended with sufficient doubt to warrant its reconsideration on appeal; and (b) supposing the decision to be wrong, substantial injustice would result if leave were refused*: Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCAFC 844; (1991) 33 FCR 397 at 398-399 (Sheppard, Burchett and Heerey JJ). The sufficiency of the doubt in respect of the decision to be appealed and the question of substantial injustice bear upon each other so that the degree of doubt which is sufficient in one case may be different from that required in another. It has also been said that the considerations are cumulative such that leave ought not be granted unless each limb is made out: *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCAFC 139; (2010) 81 ATR 36 at 38 [5] (Ryan, Stone and Jagot JJ); *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98; (2017) 252 FCR 1 at 4 [3] (Jagot, Yates and Murphy JJ).

Additionally, consistent with the facilitation of a quick, inexpensive and efficient resolution is the principle which emerges from the oft-cited warning of Jordan CJ in *In re the Will of F. B. Gilbert (Deceased)* [1946] NSWStRp 24; (1946) 46 SR (NSW) 318 at 323, that if a tight rein is not kept upon the interference with orders of judges at first instance in the exercise of discretion on a point of practice and procedure, the result will be “disastrous to the proper administration of justice”.

…

Even if it was reasonably arguable that the primary judge’s discretion miscarried, that would not, in and of itself, be a sufficient basis for the grant of leave.

1. These legal principles were not in dispute between the parties.

# proposed ground 1

1. Ground 1 of the draft notice of appeal raises a jurisdictional error alleged to arise out of the application of s 79 of the *Judiciary Act 1903* (Cth). Ausin did not raise the jurisdictional issue before the primary judge. Ausin submits that the law of the State where the federal jurisdiction was exercised was Victoria. However, in Ausin’s submission, the only justiciable controversy between Mr Zhao and Ausin arises out of claims under the *Conveyancing Act 1919* (NSW). The expressed purpose of the discovery sought was to obtain a valuation of Mr Jin’s shares in Ausin and another company, Thrivero Pty Ltd, for the purpose of establishing Mr Zhao’s case under s 37A of the *Conveyancing Act 1919* (NSW).
2. Ausin submits the Discovery Order was made in aid of a claim in respect of which the primary judge had no jurisdiction.
3. Ausin submits that the provisions of the *Conveyancing Act 1919* (NSW) have no application to proceedings commenced in the Federal Court of Australia in a State other than New South Wales. Ausin submits that the primary judge had no power under s 79 of the *Judiciary Act 1903* (Cth) to apply New South Wales law or to exercise jurisdiction over a justiciable controversy that arises solely under New South Wales law.
4. I am satisfied, for the reasons that follow, that the Discovery Order is not attended with sufficient doubt based on the issue of jurisdiction and refusing leave to appeal would not occasion a substantial injustice.
5. I am satisfied that the Court has jurisdiction to hear this matter. After the determination of the strike-out application, the only claim remaining concerns the application of s 37A of the *Conveyancing Act 1919* (NSW). That claim is, in my view, part of the same “single justiciable controversy” as the now-deleted claim under s 1324 of the *Corporations Act 2001* (Cth) because they arose out of the same “sub-stratum of facts and claims”: *Rana v Google Inc* (2017) 254 FCR 1 (***Rana***) per Allsop CJ, Besanko and White JJ at [17]. That is demonstrated by the fact that Mr Zhao’s claim under s 37A of the *Conveyancing Act 1919* (NSW) arises from the same special resolutions passed on 30 August 2018 as formed the basis of the now-deleted s 1324 claim.
6. Given it is a single justiciable controversy, the matter remains a matter within the Court’s jurisdiction even though the federal claim has been struck out: *Rana* at [21]-[22].
7. In resolving a matter within its jurisdiction, the Federal Court may apply Commonwealth law, State law or both. A matter within the Federal Court’s jurisdiction can be resolved entirely through the application of State law. A court exercising federal jurisdiction will apply State laws directly unless and to the extent they are rendered invalid by reason of inconsistency with Commonwealth law or are beyond the State’s legislative capacity: *Rizeq v The State of Western Australia* (2017) 262 CLR 1, 24 [41] and [55] per Bell, Gageler, Keane, Nettle and Gordon JJ.
8. I reject Ausin’s submission that the Court lacks power to order final relief in this case. The question of whether the Federal Court sitting in Victoria has power to order relief that concerns a transaction voided pursuant to s 37A of the *Conveyancing Act 1919* (NSW) has not yet arisen in this proceeding. The Court has not made any such order and has not considered whether it ought to do so. The only relevant order that has been made is the Discovery Order, which was within the Court’s power to make.
9. The source of the power to make the Discovery Order was s 23 of the *Federal Court of Australia Act 1976* (Cth) (**Act**) which confers upon the Court a broad power to make orders of such kinds, including interlocutory orders, as the Court “thinks appropriate”. Section 59(2)(c) of the Act confers on the Court power to make rules for discovery in proceedings over which the Court has jurisdiction.
10. The primary judge in making the Discovery Order was not exercising power under s 37A of the *Conveyancing Act 1919* (NSW). The Court having been seized of the matter made the Discovery Order pursuant to the power conferred by s 23 of the Act.

# Proposed ground 2

1. I reject Ausin’s submission that the primary judge’s discretion has been miscarried. In my view, the primary judge properly exercised the power to make discovery by identifying the issues in dispute to which the material sought was relevant and then considered whether the breadth of discovery sought was appropriate. The primary judge then, in the circumstances of this case, ordered discovery of 14 categories out of the 17 categories that were sought.
2. For the reasons given at [21]-[26] of Mr Zhao’s written submissions, I am satisfied that the primary judgment did not make a *House v The King* [1936] HCA 40 error in exercising her discretion in making the Discovery Order.
3. The decision of the primary judge to make the Discovery Order is not attended with sufficient doubt to warrant its reconsideration on appeal for the reasons given. The Discovery Order has not occasioned demonstrable injustice such as would warrant the Court of Appeal interfering with the exercise of the primary judge’s discretionary decision on a matter of practice and procedure.

# disposition

1. For the reasons given, leave to appeal will be refused. The applicant will pay the respondent’s costs on a lump sum basis in an amount to be agreed or such amount as determined by a Registrar of the Court.

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| I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 17 December 2021