Federal Court of Australia

Lu v Beijing Hua Xin Liu He Investment (Australia) Pty Ltd [2022] FCA 440

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| Appeal from: | Application for leave to appeal: *Beijing Hua Xin Liu He Investment (Australia) Pty Ltd v Lu (No 3)* [2022] FCA 108 |
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| File number: | WAD 44 of 2022 |
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| Judgment of: | **JACKSON J** |
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| Date of judgment: | 14 April 2022 |
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| Date of publication of reasons: | 27 April 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - application for leave to appeal - whether application will be heard by a Full Court |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 24, 25, 31A, 37M |
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| Cases cited: | *Allison v Murphy (No 2)* [2021] FCA 1631  *Allphones Retail Pty Ltd v Weimann* [2009] FCA 849  *Australian Equity Investors, an Arizona Limited Partnership v Colliers International (NSW) Pty Ltd* [2011] FCA 1198  *Decor Corporation Pty Ltd v Dart Industries* *Inc* (1991) 33 FCR 397  *Edwards v Santos Ltd* [2010] FCA 34  *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; (2000) 104 FCR 564  *Oswal v Burrup Fertilisers Pty Ltd (recs and mgrs apptd)* [2011] FCA 536 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 27 |
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| Date of hearing: | 14 April 2022 |
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| Counsel for the Applicant: | Mr MJ McCusker QC |
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| Solicitor for the Applicant: | Irwin Legal |
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| Counsel for the Respondent: | Ms R Heath |
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| Solicitor for the Respondent: | Squire Patton Boggs |

ORDERS

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|  | | WAD 44 of 2022 |
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| BETWEEN: | XIN LU  Applicant | |
| AND: | BEIJING HUA XIN LIU HE INVESTMENT (AUSTRALIA) PTY LTD (ACN 141 548 521)  Respondent | |

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| order made by: | JACKSON J |
| DATE OF ORDER: | 14 APRIL 2022 |

THE COURT ORDERS THAT:

Remote hearing

1. For the purposes of today's hearing, and pursuant to s 47B of the *Federal Court of Australia Act 1976* (Cth), counsel are permitted to deliver oral submissions by way of videolink.
2. Unless the court otherwise orders, and apart from the court's transcript provider, no person, including the parties and members of the public, who is observing the hearing of the proceeding by accessing any audio or video link may make any audio or video recording or photography of the hearing or any part of it.
3. Nothing in the preceding paragraph prevents any person, based on what he or she has seen or heard during the hearing:
   1. making his or her own notes of the proceeding; or
   2. publishing a fair report of the proceeding.

Notice to Produce

1. On or before 4.00 pm AWST on 26 April 2022, both parties must file and serve written submissions of no more than 3 pages in length relating to the respondent's notice to produce.
2. Any issues concerning the respondent's notice to produce are listed for determination at a hearing at 10.15 am on 28 April 2022.

Application for leave to appeal

1. On or before 4.00 pm on 26 April 2022, the respondent must file and serve any affidavits in response to the applicants' application for leave to appeal.
2. On or before 4.00 pm on 3 May 2022, the applicant must file and serve any submissions of no more than 10 pages in length in respect of its application for leave to appeal.
3. On or before 4.00 pm on 10 May 2022, the respondent must file and serve any submissions of no more than 10 pages in length in respect of the applicant’s application for leave to appeal.
4. The application for leave to appeal is listed for hearing at 10.15 am on 1 June 2022.

General

1. Liberty to apply.
2. The costs of and incidental to the case management hearing on 14 April 2022 be in the cause of the leave to appeal application.

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

REASONS FOR JUDGMENT

JACKSON J:

1. In *Beijing Hua Xin Liu He Investment (Australia) Pty Ltd v Lu (No 3)* [2022] FCA 108, the primary judge dismissed an application for summary judgment by Mr Xin Lu, the first respondent in proceeding WAD 563 of 2016. In the current proceeding Mr Lu seeks leave to appeal from that decision. At a hearing on 14 April 2022, Mr Lu sought an order referring the application for leave to appeal to a Full Court the same as that hearing any appeal. The respondent opposed that order. At the hearing I refused to make the order Mr Lu sought, and programmed the application for leave to be heard by a single judge. These are my reasons for doing so.

## Background

1. It appears that in broad terms, there are two areas of dispute in WAD 563 of 2016. One is a claim based on an alleged oral contract (alternatively estoppel by convention), which is brought by the first applicant in that proceeding (respondent in this one), Beijing Hua Xin Liu He Investment (Australia) Pty Ltd (**Beijing**) against the respondents in that proceeding, Mr Lu and Zeus Technology HQB Pty Ltd (**Zeus**). The claim is to the effect that Mr Lu is obliged to transfer his shares in Zeus to Beijing. As well, the second and third applicants in WAD 563 of 2016 seek orders against Mr Lu and Zeus to the effect that a resolution passed to subdivide the shares in Zeus is invalid. The summary judgment application related only to the first of these areas of dispute.
2. It should be noted at the outset that the application for summary judgment was brought unusually late in the course of the proceeding. It was in fact the second such application; a different summary judgment application brought at an earlier time by Mr Lu and Zeus had been allowed by the then docket judge, but that was overturned and the first summary judgment application dismissed by the Full Court. At the time of the second summary judgment application, the matter had been programmed to a trial which was expected to have been heard at some time between December 2021 and February 2022. The parties had complied with orders for the filing of affidavits as evidence in chief, and the provision of outlines of evidence in relation to oral conversations that were not to be the subject of affidavits. The second application for summary judgment was filed on 30 July 2021 and the parties agreed to the Court making orders to stay compliance with further programming orders pending the outcome of the application. But for the application and that stay, it is likely that the trial would have been held by February 2022.
3. Mr Lu has sworn an affidavit in support of the application for leave to appeal. He deposes as to the first summary judgment application, which the Full Court ordered to be dismissed in December 2017. He says that in October 2018, Beijing made significant amendments to the contract claim, including an alteration of the time at which the alleged oral contract was made, from 2010 to early May 2011, and an alteration to the place at which it was made, from China to Singapore. There were also new allegations that persons other than Beijing had paid certain amounts as part of the consideration for the transfer of the shares in Zeus. At the hearing on 14 April 2022, Beijing did not contest this account of the proceeding.
4. Mr Lu also deposes to the circumstances which, he says, led to the second summary judgment application. It is not necessary to go into detail; in summary, his evidence is that three documents or sets of documents that were not before the Full Court show that the contract claim does not have reasonable prospects of success. At [102] of the primary judge's decision, her Honour expressed concern about the timing of the second summary judgment application, notwithstanding that the documents now relied on had been available to Mr Lu from dates in 2018. I make no comment on whether those concerns are well founded, in case that becomes an issue in the application for leave to appeal. But I mention it to note that Mr Lu's affidavit in this proceeding does not say when he became aware of the documents or relevant circumstances, nor does he seek to explain the timing of the second summary judgment application in the affidavit. While his affidavit lists a number of documents in WAD 563 of 2016 to which he wants to refer, I was not taken to any of them at the hearing on 14 April 2022.
5. Most of Mr Lu's affidavit deposes to the merits of the application for summary judgment and so the merits of the proposed appeal. It is not necessary to go into detail about that because, appropriately, neither party addressed submissions to those merits at this preliminary stage of deciding the constitution of the court that will hear the application for leave to appeal.
6. Mr Lu's affidavit also asserts that the second area of dispute I have mentioned, as to the subdivision of the shares in Zeus, is of little consequence because the relative proportions of each shareholder's holding remains the same. On the face of things that is so, and Beijing has as yet addressed no evidence or submissions to the contrary in this proceeding. So while Beijing relied on the fact that determining the proposed appeal in Mr Lu's favour will not dispose of the whole proceeding, I place little weight on that.
7. Mr Lu says that if leave to appeal is refused, the matter will proceed to a substantial hearing, and that will take five days and will involve witnesses from different parts of the world, each of whom will require interpreters. The trial could take even longer because of what Mr Lu says has been Beijing's unwillingness to make admissions. Save for that last point, which may well be contentious, for present purposes (and, again, in the absence of submissions or evidence to the contrary), I am prepared to accept Mr Lu's estimate of what will be involved in the hearing.
8. Mr Lu's affidavit then contained some evidence about the financial consequences for him of the costs of proceeding WAD 563 of 2016 and of a trial. For reasons I do not need to go into, I was not inclined to put much weight on that particular evidence. I do not need to go into those reasons because, subsequent to the hearing on 14 April 2022, the parties agreed that those particular passages could be struck out. Evidence which remains in the affidavit after those passages are excised is as follows:

The trial would impose huge emotional burden [sic] and stress on me and my family. The stress of what appears to be an unnecessary trial is compounded by the continuing stress I face every day.

He also says that a costs order arising out of the first summary judgment application 'has adversely affected my health, my family's health [sic]'. While this evidence is at a high level of generality, it can be accepted for present purposes that proceeding to a five day trial will be stressful for Mr Lu.

## Mr Lu's submissions as to why the application should be heard by a Full Court

1. Mr McCusker QC, who appeared as counsel for Mr Lu in this proceeding, submitted that the application for leave to appeal should be heard by the same Full Court hearing any appeal. He noted that the appeal from the first summary judgment proceeded in that way. He pointed to an observation by Gilmour J at a hearing preceding the hearing of the appeal from that first summary judgment that 'one of the practical reasons why the court will often concertina the two is that what it takes to argue the leave application is effectively what's required to argue the substantive appeal'. Consistent with that, Mr McCusker submitted that it would consume the Court's time unnecessarily, and be expensive, to hear argument as to the merits of the appeal in the course of an application for leave to appeal and then for a Full Court to hear that argument again.
2. Mr McCusker also submitted that if a Full Court heard the application, that would reduce delay. He said that Mr Lu wanted the application and any appeal to be resolved expeditiously, although he did not point to any particular need for expedition other than concern about wasted effort and expenditure, if WAD 563 of 2016 was not stayed in the meantime.
3. While acknowledging, of course, the possibility that the application for leave to appeal might be dismissed, Mr Lu submits that a lot of factual material would need to be traversed in the course of the application, increasing the likely waste of time and cost if that material does, in fact, then need to be considered at a subsequent appeal. Also, if leave is granted and the appeal is successful, there will be potential prejudice to Mr Lu in the form of the ongoing costs of preparing for trial in WAD 563 of 2016 (assuming no stay is granted).

## Principles

1. Section 24(1A) of the *Federal Court of Australia Act 1976* (Cth) read with s 24(1)(a) provides that appeals from interlocutory judgments of this Court constituted by a single judge in the original jurisdiction of the Court shall not be brought unless the Court or a judge gives leave to appeal. Under s 24(1D)(b), the primary judgment in WAD 563 of 2016 sought to be appealed is taken to be an interlocutory judgment, as it refused summary judgment under s 31A. Section 25(2) relevantly provides that applications for leave to appeal must be heard and determined by a single judge unless a judge directs that the application be heard and determined by a Full Court: see s 25(2)(a) and s 25(2)(e).
2. Section 25(2) makes no provision for the kinds of cases that may merit the making of a direction of that kind. The question is 'largely one of pragmatism in terms of the efficient operations of the Court': *Australian Equity Investors, an Arizona Limited Partnership v Colliers International (NSW) Pty Ltd* [2011] FCA 1198 at [2] (Robertson J). That question must be answered with a view to exercising the discretion in a way that best promotes the overarching purpose of the civil practice and procedure provisions to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: *Federal Court Act* s 37M.
3. It has been suggested that it might be said that s 25(2) of the *Federal Court Act* 'creates the expectation that an application for leave to appeal to the Court will be heard and determined by a single judge, unless some good reason is advanced to suggest that there is some value, some benefit or advantage to be gained by having a Full Court determine the leave application': *Oswal v Burrup Fertilisers Pty Ltd (recs and mgrs apptd)* [2011] FCA 536 at [12] (Barker J); see also ***Edwards*** *v Santos Ltd* [2010] FCA 34 at [10] (Collier J). It would be wrong to speak of this in terms of an onus of proof, but since a party who wants such a direction to be made is seeking the favourable exercise of a discretion (see *Allison v Murphy (No 2)* [2021] FCA 1631 at [19] (Allsop CJ)), it does seem that the party must establish some good reason why it should be exercised.
4. Factors which are often relevant to deciding whether good reason has been shown were usefully collected by Collier J in *Edwards* at [10] (albeit in relation to the previous rules of court, rather than the current s 25(2) of the *Federal Court Act*). To summarise, they include:
5. Efficiency - as a general rule applications that are relatively straightforward will be more efficiently dealt with by a single judge than by a Full Court.
6. The importance and finality of the consequences for the parties that follow from the orders against which leave to appeal is sought.
7. Whether the issues are novel or of general importance and so should be the subject of consideration by a Full Court.
8. Whether there are arguments of substance in favour of the grant of leave to appeal, although it is obviously undesirable to give the merits of the application detailed consideration.
9. The costs that will possibly be incurred, and possibly wasted, depending on which course is taken.
10. Any reasons for urgency.
11. In relation to the fourth of those considerations, it has been suggested that at least a superficial examination of the merits of the application for leave to appeal should be conducted, if only to ensure that a hopeless application is not referred to a Full Court: *Allphones Retail Pty Ltd v Weimann* [2009] FCA 849 at [13] (McKerracher J).
12. These factors are not presented as a checklist and should not be applied as one; they are illustrations of the kinds of matters that can be relevant to the overall determination of what is the most pragmatic disposition of the Court's business having regard to the overarching purpose in s 37M. That requires the Court to balance the risks. In every case there will be a risk that, if a direction is made under s 25(2), the resources of the Court associated with the constitution of a bench of three judges, and associated resources of the parties, are expended on an application for leave to appeal, often accompanied by full argument of the merits of the appeal, where the application is ultimately dismissed. On the other hand there is the risk that if the application is not referred to a Full Court, resources may be expended on two occasions, because the merits of the proposed appeal are canvassed before a single judge and then before a Full Court if leave is granted.
13. The factors I have set out above provide guidance as to where the appropriate balance of risks may lie in the different circumstances of each case. In finding that balance it is necessary, in my view, to have regard to the evident policy of the legislature that is reflected in the need for leave to appeal, that the 'time and resources of the Court and the parties should not lightly be taken up with appeals about decisions in connection with proceedings which do not finally determine the rights of the parties': *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2000] FCA 1572; (2000) 104 FCR 564 at [42] (French J, Beaumont and Finkelstein JJ agreeing).

## Consideration

1. With those considerations in mind, it was my view that Mr Lu had not established good reason to make a direction that this application be heard by a Full Court. While I do not suggest that a case must be unusual or exceptional to warrant a direction, it is nevertheless relevant that the factors on which Mr Lu relies are likely to be features of most, if not all, applications for leave to appeal. If they warrant a direction under s 25(2)(e) then nearly every case will.
2. While the observation of Gilmour J in the course of the appeal from the first summary judgment application identifies a relevant factor it was an observation made in a very different context. As Mr McCusker acknowledged, the situation was different; the first summary judgment decision sought to be appealed against had the practical effect of finally dismissing Beijing's claim, and (Beijing's counsel submitted before me and Mr McCusker did not dispute) there was no opposition to referring the matter to a Full Court. Now the situation is the reverse, as if the primary judge's decision is undisturbed, the matter will proceed to trial.
3. The concern that it will consume resources unnecessarily to canvass the merits of the appeal twice will only be a concern if the application for leave to appeal is granted. That is one reason why a preliminary assessment of the merits of the application for leave must be undertaken; it is part of assessing the risk that resources will be wasted if the same issues are canvassed twice. It is well established that the two major considerations in deciding whether to grant leave to appeal are: (1) whether the decision sought to be appealed from is attended with sufficient doubt to warrant its being reconsidered by the appellate court; and (2) whether substantial injustice would result if leave were refused, supposing the decision to be wrong: *Decor Corporation Pty Ltd v Dart Industries* *Inc* (1991) 33 FCR 397 at 398‑399. Since no real submissions have been directed to the question of whether the primary judge fell into error, I can make no assessment of the chance that Mr Lu will satisfy the Court of that aspect of his application for leave to appeal. For the purposes of the first major consideration, and favourably to Mr Lu's position, I proceeded on the assumption that it is reasonably arguable that her Honour did err.
4. As for the second major consideration, counsel for Beijing submitted that it is hard to identify any substantial injustice to Mr Lu in this case where, even if the primary judge did err, the consequence of dismissing the application for leave will merely be that the matter proceeds to trial, in circumstances where it is nearly ready for trial. That submission will no doubt be considered in the course of the application for leave to appeal, so it was not appropriate to address it in any depth for the purposes of the hearing on 14 April 2022.
5. As a result I am not in a position to say that the case for or against granting leave is clear cut. But it can be said that the general requirement that an applicant for leave must demonstrate substantial injustice is an aspect of the evident policy I have described above. Beijing's submission on this presents a real and not remote chance that if the application for leave is heard by a Full Court, then the policy will not be served.
6. As for other relevant factors, the issues on any appeal will not be of any particular novelty, difficulty or general importance. Nor was I persuaded that referring the application for leave to appeal to a Full Court would be likely to reduce delay. Mr Lu put no case for pressing urgency which would have justified having a Full Court hear the matter in the upcoming May sittings, and there will be time to determine the application by a single judge and, if appropriate, list any appeal for hearing in the August sittings.
7. In effect what will be 'wasted' if a single judge hears, and grants, the application for leave is the costs of that single judge hearing. Despite the submission that a lot of factual material will need to be canvassed on the leave application, it was not possible to form a real view as to the extent to which that is so. In any event, that cuts both ways, as it will be undesirable to canvass all that material before a bench of three judges if, in the end, leave to appeal should not be granted.
8. Given how the other factors lie as outlined above, I did not consider that good reason has been shown for making the direction sought. That is why I made orders programming the application for leave to appeal for hearing before a single judge.

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

Associate:

Dated: 27 April 2022