Federal Court of Australia

Drummond v Canberra Institute of Technology [2021] FCA 376

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| File number(s): |  |
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| Judgment of: | **KATZMANN J** |
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| Date of judgment: | 16 April 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE —** application for interim suppression order of judgment of Federal Circuit Courtpending hearing and determination of application for extension of time for leave to appeal an interlocutory judgment of that Court in which no such order was made **—** where no formal application made to the Federal Circuit Court and where judgment already published on the internet —on assumption that this Court has jurisdiction, whether there is power to make the order and, if so, whether it should be exercised |
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| Legislation: | *Federal Circuit Court of Australia Act 1999* (Cth) s 88G  *Federal Court of Australia Act 1976* (Cth) ss 37AA, 37AE, 37AF, 37AI |
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| Cases cited: | *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)(No 2)* (2020) 275 FCR 377  *Director of Public Prosecutions (Cth) v Christian* (2019) 268 FCR 84  *DSO18 v Minister for Home Affairs (No 3)* [2020] FCA 640  *ELA18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 230 |
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| Division: | Fair Work Division |
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| Registry: | Australian Capital Territory |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 14 |
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| Date of hearing: | Determined on the papers. |
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| Counsel for the Applicant: | Applicant self-represented |
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| Solicitor for the Respondent: | ACT Government Solicitor |

ORDERS

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|  | | ACD 21 of 2021 |
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| BETWEEN: | MARK LEA DRUMMOND  Applicant | |
| AND: | CANBERRA INSTITUTE OF TECHNOLOGY  Respondent | |

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| order made by: | KATZMANN J |
| DATE OF ORDER: | 16 APRIL 2021 |

THE COURT ORDERS THAT:

1. The application for an interim suppression or non-publication order of the judgment of the Federal Circuit Court in *Drummond v Canberra Institute of Technology (No 2)* [2021] FCCA 556 be dismissed.

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

REASONS FOR JUDGMENT

KATZMANN J:

1. This is an application for an urgent interim order that an interlocutory judgment of the Federal **Circuit Court** of Australia not be published or be suppressed in its entirety (**interim suppression order**). The applicant, Mark Lea Drummond, requested the order in an application for extension of time to seek leave to appeal from that judgement. By consent, the application for an interim suppression order was determined on the papers.
2. The powers of this Court to make suppression and non-publication orders are contained in Pt VAA of the *Federal Court of Australia Act 1976* (Cth) (ss 37AA–37AL). The same powers are conferred on the Federal Circuit Court by Pt 6A of the *Federal Circuit Court of Australia Act 1999* (Cth) (ss 88A–88M).
3. This Court has the power to make an interim suppression or non-publication order under s 37AI. Section 37AI(1) provides that the Court may, without determining the merits of the application, make an interim order which is to have effect until the application is determined or it is revoked by the Court. The purpose of an interim suppression order is to preserve the *status quo* or to lessen the potential damage suffered by an applicant pending the final determination of the application: *DSO18 v Minister for Home Affairs (No 3)* [2020] FCA 640 at [4] (Derrington J).
4. Section 37AF provides:

**37AF Power to make orders**

(1) The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or

(b) information that relates to a proceeding before the Court and is:

(i) information that comprises evidence or information about evidence; or

(ii) information obtained by the process of discovery; or

(iii) information produced under a subpoena; or

(iv) information lodged with or filed in the Court.

(2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).

1. A “non-publication order” is defined in s 37AA to mean “an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)”. “Suppression order” is defined in the same section to mean “an order that prohibits or restricts the disclosure of information (by publication or otherwise)”.
2. In deciding whether to make any suppression or non-publication order, s 37AE provides that the Court is required to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.
3. There are several difficulties with the present application.
4. First, the power to make an interim order is enlivened only when an application is made for a final order under s 37AF: see *Australian Competition and Consumer Commission v Facebook, Inc*. [2021] FCA 244 at [14] (Griffiths J). That is abundantly clear from the terms of s 37AI. Yet no application is made for a final order. Like the application for an interim order, the application for a final suppression or non-publication order is an order contained in the draft notice of appeal. Strictly, the application would not be made until or unless Dr Drummond persuades the Court to grant him an extension of time to seek leave to appeal, the Court grants him leave to appeal, and the draft notice of appeal becomes the notice of appeal.
5. Second and more importantly, the primary judge has made no order refusing to make a suppression or non-publication order. In these circumstances, it is not clear what power this Court has to make any such order even on an interim basis: see *ELA18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 230 at [73] (Besanko and Perry JJ).
6. The first ground of the notice of appeal recites that the respondent consented to a non-publication order “including reasons pursuant to s 88G(1)(c) relating to the safety of the Applicant’s mental health safety and that of his son also”. Section 88G(1)(c) of the FCCA Act provides that the court may make a suppression order or non-publication order on the ground that the order is necessary to protect the safety of any person: compare s 37AG(1)(c) of the FCA Act.
7. While the draft notice of appeal states that an informal request for such an order was made of the primary judge in an email to his chambers, it also states that his Honour informed the parties that “the matter needs to be dealt with by way of (a) formal Application and (b) a hearing in Court”. In the absence of a formal application, the primary judge was not obliged to make an order.
8. Third, assuming the Court has the power and the order sought in the draft notice of appeal can be taken to be “an application …made to the Court” within the meaning of s 37AI, the Court is not bound to make an interim order. The Court has a discretion and I do not consider that the discretion should be exercised in Dr Drummond’s favour when he could and should have a formal application to the Federal Circuit Court and when the judgment has already been published in open court and on the internet. I note that in *Director of Public Prosecutions (Cth) v Christian* (2019) 268 FCR 84 at [115] Flick J remarked that to contemplate the possibility of making a suppression or non-publication order over a judgment which had been published in open court and on the internet “would seem to run contrary to the cherished objective of open justice”.
9. Finally, the evidence upon which Dr Drummond relied is weak. If left as it is, it would be unlikely to satisfy the stringent requirements discussed in the authorities: see, for example, *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)(No 2)* (2020) 275 FCR 377 at 379 (Allsop CJ, Wigney and Abraham JJ). If a formal application is to be made in the Federal Circuit Court, close attention should be paid to those requirements.
10. For these reasons, the application for the interim suppression order should be dismissed.

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| I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann. |

Associate:

Dated: 16 April 2021