

HIGH COURT OF AUSTRALIA

GAGELER J

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY
LTD & ORS

APPLICANTS

AND

RIAD ALLAM & ORS

RESPONDENTS

Aristocrat Technologies Australia Pty Ltd v Allam
[2016] HCA 3
17 February 2016
S169/2012

ORDER

1. *Set aside the writ for levy of property issued on 23 December 2015.*
2. *Remit the matter of the claim of the first and sixth respondents pursuant to s 77M of the Judiciary Act 1903 (Cth) for remedies for enforcement of the judgment of the High Court of Australia given on 2 May 2013 and the certificate of taxation of costs issued on 2 December 2015 to the Federal Court of Australia, New South Wales Registry.*
3. *The matter be dealt with in the Federal Court as if the steps already taken in this Court had been taken in that Court.*
4. *The Registrar of this Court forward to the proper officer of the Federal Court photocopies of the following documents filed in this Court:*
 - (a) *the application for special leave to appeal filed on 22 June 2012;*
 - (b) *the order of the High Court of Australia made on 2 May 2013;*

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- (c) *the certificate of taxation issued on 2 December 2015 in respect of costs of \$100,229.05;*
- (d) *the first and sixth respondents' application for a writ for levy of property filed on 17 December 2015;*
- (e) *the affidavit of Robert Gorczyca sworn on 17 December 2015;*
- (f) *the writ for levy of property issued on 23 December 2015;*
- (g) *the first and sixth respondents' application for a garnishee order filed on 21 January 2016;*
- (h) *the affidavit of Robert Gorczyca sworn on 21 January 2016;*
- (i) *the submissions filed by the parties on 5 February 2016;*
- (j) *the applicants' summons filed on 5 February 2016;*
- (k) *the affidavit of Michael John Williams sworn on 5 February 2016;*
- (l) *the submissions filed by the first and sixth respondents on 10 February 2016;*
- (m) *the affidavit of Robert Gorczyca sworn on 10 February 2016;*
and
- (n) *these orders and reasons for judgment.*

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Aristocrat Technologies Australia Pty Ltd v Allam

Practice and procedure – High Court of Australia – Enforcement of judgments – Remittal of matters – Costs – Ex parte application for remedies for enforcement of judgment of High Court under s 77M of *Judiciary Act* 1903 (Cth) – Costs order in special leave application – Writ for levy of property and garnishee order – Judgment debtor claimed set-off for costs to be taxed in proceedings in Federal Court of Australia – Whether claim for remedies for enforcement of costs order should be remitted to Federal Court.

Practice and procedure – High Court of Australia – Ex parte application – Material non-disclosure on application for writ for levy of property – Whether writ should be set aside.

Judiciary Act 1903 (Cth), ss 39B(1A)(c), 44, 77M.

1 GAGELER J. On 2 May 2013, the Full Court of the High Court¹ dismissed with costs an application for special leave to appeal from a decision of the Full Court of the Federal Court² which had set aside a judgment of a single judge of that Court and remitted to that judge the determination of a number of issues including as to the costs of the proceedings in the Federal Court. The applicants in the application for special leave to appeal were Aristocrat Technologies Australia Pty Ltd ("Aristocrat") and two associated companies. The respondents included Mr Allam and Tonita Enterprise Pty Ltd ("Tonita"). Mr Allam's and Tonita's costs of the special leave application were subsequently taxed in the amount of \$100,229.05. The certificate of taxation was issued by a Taxing Officer of the High Court on 2 December 2015.

2 On 17 December 2015, Mr Allam and Tonita applied ex parte to the High Court for a writ for levy of the property of Aristocrat to the amount of the taxed costs together with statutory interest and the costs of execution. A writ in that form was issued by a Deputy Registrar of the High Court on 23 December 2015.

3 On 21 January 2016, Mr Allam and Tonita made a further ex parte application to the High Court for a garnishee order. That further application having been brought to my attention, I directed a Deputy Registrar, on 1 February 2016, to invite submissions from the parties as to why the matter of the enforcement of the costs order made on the application for special leave to appeal should not be remitted to another court under s 44(1) of the *Judiciary Act* 1903 (Cth).

4 Following the issuing of that invitation, the applicants filed, on 5 February 2016, a summons seeking, amongst other things, to set aside or to stay the execution of the writ for levy of the property of Aristocrat and to stay the certificate of taxation. The affidavit filed in support of that summons reveals a number of significant facts which were not disclosed in the evidence filed on behalf of Mr Allam and Tonita in support of the applications made by them ex parte on 17 December 2015 and 21 January 2016.

5 The previously undisclosed facts include that the primary judge in the Federal Court determined the substantive issues remitted to him on 30 September 2013³ and that the primary judge went on to determine on 25 November 2013

1 *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* [2013] HCATrans 94.

2 *Allam v Aristocrat Technologies Australia Pty Ltd* (2012) 95 IPR 242; *Allam v Aristocrat Technologies Australia Pty Ltd (No 2)* [2012] FCAFC 75.

3 *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd* (2013) 102 IPR 400.

that Mr Allam pay a specified proportion of the applicants' costs⁴. The Full Court of the Federal Court on 31 March and 1 April 2014 heard appeals and cross-appeals from the orders of the primary judge embodying those determinations, and its judgment remains reserved. The certificate of taxation in respect of the costs of the application for special leave to appeal having been issued by a Taxing Officer of the High Court on 2 December 2015, the solicitors for Aristocrat indicated in correspondence with the solicitors for Mr Allam and Tonita, on 9 December 2015, that they were in the process of finalising a bill of costs to be filed in the Federal Court in relation to the order for costs which had been made by the primary judge, that the amount of those costs was likely to exceed the amount of the taxed costs of the application for special leave to appeal, and that Aristocrat resisted immediate payment of the costs of the special leave application on the basis that there would need to be a set-off when the taxation of costs in the Federal Court was finalised. Other than a response on the same day from the solicitors for Mr Allam and Tonita, there was no further correspondence between the parties on the topic of costs between then and 17 December 2015.

6 The previously undisclosed facts also include that Tonita was deregistered by the Australian Securities and Investments Commission on 6 December 2015.

7 The affidavit filed in support of the applicants' summons goes on to reveal that the applicants became aware that Mr Allam and Tonita had taken steps to enforce the costs order made on the application for special leave to appeal only on 21 January 2016 when property of Aristocrat was seized in the execution of the writ. On 2 February 2016, Aristocrat filed in the Federal Court a bill of costs which seeks to recover from Mr Allam an amount in excess of \$900,000. The bill of costs is likely to be assessed in late March or early April 2016. In the meantime, on 4 February 2016, Aristocrat paid the amount of \$100,229.05 into its solicitors' trust account with instructions to undertake to hold those moneys pending the determination of the applicants' summons and its right to set off the costs of the application for special leave to appeal against the costs in the Federal Court.

8 In response to that affidavit, the solicitors for Mr Allam and Tonita filed on 10 February 2016 an affidavit which criticises the form, and disputes the amount, of Aristocrat's bill of costs. That affidavit goes on to offer an explanation for the deregistration of Tonita, but not to dispute the fact of

4 *Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd (No 2)* [2013] FCA 1253.

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deregistration or to dispute the other previously undisclosed facts revealed by the affidavit in support of the applicants' summons.

9 Mr Allam and Tonita oppose remitter of the matter of the enforcement of the costs order made on the application for special leave to appeal, and dispute the High Court's power to order remitter. The applicants oppose remitter on discretionary grounds. They point to the well-established discretionary power of a superior court to order set-off of costs orders when it is equitable to do so, even if the orders have been made in different proceedings⁵, and argue that the High Court is well-placed itself to consider the exercise of that power in the present case. The applicants argue in the alternative that any remitter should only occur if the High Court first grants at least an interim stay.

10 The High Court undoubtedly has power under s 44(1) of the *Judiciary Act* to order remitter to another court of the matter of the enforcement of a costs order made on an application for special leave to appeal. The power to grant or refuse special leave to appeal legislatively conferred on the High Court, relevantly by s 33 of the *Federal Court of Australia Act* 1976 (Cth), is a judicial power⁶. An order for costs made in its exercise⁷ takes effect as a "judgment" of the Court⁸. As a judgment of the Court, such an order for costs attracts the operation of s 77M(1) of the *Judiciary Act*, which provides:

"Subject to the Rules of Court, a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given."

11 A claim by a party to an application for special leave to appeal in whose favour a costs order has been made to exercise the entitlement conferred by s 77M(1) gives rise to a "matter" in which original jurisdiction may be conferred on the High Court under s 76(ii) of the Constitution. Because that matter is within the jurisdiction of the High Court, it is also within the jurisdiction of a State court under s 39(2) of the *Judiciary Act* and, because it arises under a law

5 Eg *Miller v Director of Public Prosecutions [No 2]* [2004] NSWCA 249.

6 *Smith Kline & French Laboratories (Australia) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218; [1991] HCA 43.

7 Section 26 of the *Judiciary Act* read with the definition of "Matter" in s 2.

8 Section 2 of the *Judiciary Act*, "Judgment".

of the Commonwealth, it is also within the jurisdiction of the Federal Court under s 39B(1A)(c) of the *Judiciary Act*. Each State Supreme Court and the Federal Court is, on that basis, a court which "has jurisdiction with respect to the subject-matter and the parties" so as to be capable of determining the matter remitted to it under s 44(1) of the *Judiciary Act* "subject to any directions of the High Court".

12 The power of remitter being so available, it should ordinarily be exercised in a case where enforcement of a costs order made on an application for special leave to appeal is or is likely to be contested, lest the High Court be distracted from performance of its ultimate appellate role by what are quintessentially questions of practice and procedure. Such remitter would neither enhance nor diminish nor otherwise alter the rights or obligations of the parties⁹, and could ordinarily be expected to result in procedural efficiencies.

13 In this case, remitter to the Federal Court is especially appropriate to allow all of the issues between the parties as to the costs of their ongoing litigation ultimately to be determined in a single forum. The Federal Court will be best placed to determine issues of set-off if and when they arise and will be best placed to consider and give effect to such interim measures as may appear to it to be warranted in the interests of a just, cheap and quick resolution of the matter.

14 There remains the question of whether it is appropriate to consider making any order on the applicants' summons in advance of remitter. Were it not for the material non-disclosure in the evidence filed on behalf of Mr Allam and Tonita in support of the applications made by them ex parte on 17 December 2015 and 21 January 2016, I would consider it a sound exercise of discretion to defer all issues between the parties or putative parties for consideration of the Federal Court. That non-disclosure having been noticed, however, it cannot go unremedied.

15 It is an elementary principle of our ordinarily adversarial system of justice that full and fair disclosure must be made by any person who seeks an order from a court ex parte, with the result that failure to make such disclosure is ordinarily sufficient to warrant discharge of such order as might be made¹⁰. The principle is not confined to particular types of interlocutory orders¹¹. Its rationale lies in the

9 *Robinson v Shirley* (1982) 149 CLR 132 at 136; [1982] HCA 1.

10 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682; [1912] HCA 72; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 376-377 [130]-[133]; [2009] HCA 49.

11 Eg *Garrard (t/as Arthur Anderson & Co) v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 677.

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importance to the administration of justice of the courts and the public being able to have confidence that an order will not be made in the absence of a person whose rights are immediately to be affected by that order unless the court making the order has first been informed by the applicant of all facts known to the applicant which that absent person could be expected to have sought to place before the court had the application for the order been contested¹².

16 No reason has been advanced as to why that principle of candour did not apply in relation to the ex parte order for which Mr Allam and Tonita applied on 17 December 2015 and as to why its vindication should not result in the writ for levy of the property of Aristocrat issued on 23 December 2015 being immediately set aside. That is the order I propose to make, leaving the Federal Court on remitter to consider what other orders are to be made on the summons filed by the applicants (including as to costs) and on the outstanding application by Mr Allam and Tonita for a garnishee order.

17 Accordingly, I make the following orders and directions:

1. Set aside the writ for levy of property issued on 23 December 2015.
2. Remit the matter of the claim of the first and sixth respondents pursuant to s 77M of the *Judiciary Act* 1903 (Cth) for remedies for enforcement of the judgment of the High Court of Australia given on 2 May 2013 and the certificate of taxation of costs issued on 2 December 2015 to the Federal Court of Australia, New South Wales Registry.
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 - c) the certificate of taxation issued on 2 December 2015 in respect of costs of \$100,229.05;

12 *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 543.

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- d) the first and sixth respondents' application for a writ for levy of property filed on 17 December 2015;
- e) the affidavit of Robert Gorczyca sworn on 17 December 2015;
- f) the writ for levy of property issued on 23 December 2015;
- g) the first and sixth respondents' application for a garnishee order filed on 21 January 2016;
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