HIGH COURT OF AUSTRALIA

EDELMAN J

PLAINTIFF S164/2018 APPELLANT

AND

MINISTER FOR HOME AFFAIRS RESPONDENT

Plaintiff S164/2018 v Minister for Home Affairs
[2018] HCA 51
7 November 2018
S229/2018

ORDER

1. *The appeal be dismissed.*

2. *The summons filed on 24 September 2018 be dismissed.*

3. *The costs of the appeal be reserved.*

4. *The appellant pay the respondent's costs of the summons filed on 19 September 2018 and of the summons filed on 24 September 2018.*

Representation

V A Kline for the appellant (instructed by Victor Alan Kline, Barrister)

C L Lenehan with K N Pham for the respondent (instructed by Australian Government Solicitor)

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

CATCHWORDS

Plaintiff S164/2018 v Minister for Home Affairs

High Court – Appellate jurisdiction – Leave to appeal – Circumstances when leave necessary – Distinction between interlocutory and final judgment – Where *Judiciary Act 1903* (Cth) s 34(2) requires leave to appeal from interlocutory judgment of High Court exercising original jurisdiction – Where single Justice dismissed application for order to show cause – Where appellant filed notice of appeal without seeking leave to appeal – Whether judgment appealed from interlocutory or final – Whether appeal incompetent.

Courts – Jurisdiction – Different dimensions of jurisdiction – Where respondent entered unconditional appearance to the appeal – Whether submission to personal dimension of jurisdiction precludes respondent from impugning competency of appeal based on lack of subject matter jurisdiction.

Words and phrases – "application for an order nisi", "application for an order to show cause", "finally determines", "incompetent", "interlocutory judgment", "leave to appeal", "personal dimension of jurisdiction", "subject matter dimension of jurisdiction".

Judiciary Act 1903 (Cth), s 34(2).
High Court Rules 1952 (Cth), O 55 r 1(2).
High Court Rules 2004 (Cth), r 25.03.3(a).

1 EDELMAN J. Each party to this proceeding has brought an application by summons. Both relate to an appeal that has been filed against a decision of a single Justice of this Court dismissing an application for an order to show cause[1]. The first application, by the Minister for Home Affairs, seeks to have the appeal dismissed as incompetent because it should have been brought as an application for leave to appeal. The second application, by Plaintiff S164/2018 ("Plaintiff S164"), seeks to have the first application dismissed as incompetent on the basis that the Minister had submitted to the jurisdiction of this Court in the appeal.

2 On 11 November 2016, Plaintiff S164 was taken into immigration detention following the cancellation of his visa. On 20 June 2018, Plaintiff S164 filed an application for an order to show cause in the original jurisdiction of this Court. He sought writs of prohibition and habeas corpus directed to the Minister requiring his release from immigration detention, and declarations to the effect that ss 189(1) and 196(1) and (3) of the *Migration Act 1958* (Cth) are invalid and that his detention under those sections is illegal. The sole ground on which that relief was claimed was that the impugned provisions of the *Migration Act* "so limit the right or ability of affected persons to seek relief under s 75(v) of the Constitution as to be inconsistent with the place of that provision in the Constitutional structure".

3 On 30 August 2018, Gageler J ordered that the application for an order to show cause be dismissed pursuant to r 25.03.3(a) of the *High Court Rules 2004* (Cth) and Plaintiff S164 pay the Minister's costs. On 5 September 2018, Plaintiff S164 filed a notice of appeal in this Court, appealing from the whole of the judgment of Gageler J. The appeal purported to be brought as of right. Plaintiff S164 did not apply to the Court for leave to appeal. No leave to appeal has been granted by the Court.

4 The Minister filed a notice of appearance on 14 September 2018. Subsequently, on 19 September 2018, the Minister filed a summons in this Court seeking orders that the appeal be dismissed as incompetent and that Plaintiff S164 pay the Minister's costs. The issue raised by the Minister's summons is whether the order made by Gageler J on 30 August 2018 is interlocutory so that leave is required to bring an appeal to the Full Court. Section 34(2) of the *Judiciary Act 1903* (Cth) provides:

> "An appeal shall not be brought without the leave of the High Court from an interlocutory judgment of a Justice or Justices exercising the original jurisdiction of the High Court whether in Court or Chambers."

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1 *Plaintiff S164/2018 v Minister for Home Affairs* [2018] HCATrans 172.

5 On 24 September 2018, Plaintiff S164 filed a summons seeking orders that the Minister's summons be dismissed as incompetent and that the Minister pay Plaintiff S164's costs. The issue raised by Plaintiff S164's summons is whether, by filing the notice of appearance, the Minister's submission to the jurisdiction of this Court precludes him from impugning the competency of the appeal.

6 Plaintiff S164's summons is based upon an erroneous conflation of the different dimensions of jurisdiction. Jurisdiction has a geographic dimension (venue), a personal dimension, and a subject matter dimension[2]. One usual requirement for the personal dimension of jurisdiction is that the person has been properly served with the court's process or the person has submitted to the court's authority. As Brandeis J said, "jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or [proper] service of process upon him"[3]. An unconditional appearance filed by a defendant generally amounts to "a submission to the jurisdiction of the court and to a waiver of irregularity, eg in the manner of service"[4]. By submitting to the jurisdiction over her or him, the defendant will generally have waived irregularities in the manner in which the process was served[5].

7 The distinction relevant to Plaintiff S164's summons is between the "personal" dimension of the court's jurisdiction over a defendant, in relation to which the defendant can generally waive irregularities of service, and the "subject matter" dimension of the court's jurisdiction. Unless a statute permits, a defendant cannot waive a statutory requirement concerning subject matter jurisdiction.

8 Section 34(2) of the *Judiciary Act* creates a jurisdictional requirement of leave to appeal concerned with the subject matter of interlocutory judgments. The jurisdictional requirement is not concerned with the person over whom the Court exercises authority. The requirement for leave cannot be waived by a defendant. Nor can a defendant submit to a hearing in the absence of leave. Nor could the act of filing an appearance in the appeal somehow create an estoppel

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2 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 733 [129]; 344 ALR 421 at 452; [2017] HCA 23; Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824) at 21-22.

3 *Robertson v Railroad Labor Board* (1925) 268 US 619 at 622. See *The Commonwealth v Davis Samuel Pty Ltd [No 11]* (2017) 316 FLR 159 at 184 [118].

4 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 539; [1976] HCA 65.

5 *Boyle v Sacker* (1888) 39 Ch D 249 at 252.

that precludes a defendant from making submissions about the scope of the Court's subject matter jurisdiction. Such a result would be inconsistent with the "first duty" or "threshold" consideration "of any Court, in approaching a cause before it, ... to consider its jurisdiction"[6].

9 Plaintiff S164's summons must be dismissed with costs.

10 Turning to the Minister's summons, s 34(2) of the *Judiciary Act* was introduced by the *Statute Law (Miscellaneous Provisions) Act 1988* (Cth). Prior to the introduction of that sub-section, s 34 enabled a person to appeal as of right to the Full Court of the High Court from a judgment of a Justice or Justices exercising the Court's original jurisdiction. The Explanatory Memorandum for the Bill which introduced s 34(2) said that the introduction of a requirement for leave to appeal from an interlocutory decision[7]:

> "will relieve the Full Court from having to deal with misconceived appeals from rulings on interlocutory matters, such as where a writ appears on its face to be an abuse of the process of the Court or where there is an attempt to institute a frivolous or vexatious proceeding. A refusal of the application for leave will be determinative of the matter. At the same time, a right of appeal will be preserved in respect of final decisions by the Court sitting in its original jurisdiction."

11 The "usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties in a principal cause pending between them"[8]. Whether the rights of the parties are finally determined by the order will depend on whether the legal, not the practical, effect of the judgment is final[9]. If it is open to the parties to bring another application then the legal effect is not final, even if the second application would usually be "doomed to failure because the issues of substance

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6 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446; [1924] HCA 36.

7 Australia, Senate, *Statute Law (Miscellaneous Provisions) Bill 1988*, Explanatory Memorandum at 22.

8 *In the matter of an appeal by Luck* (2003) 78 ALJR 177 at 178 [4]; 203 ALR 1 at 2; [2003] HCA 70, citing *Bienstein v Bienstein* (2003) 195 ALR 225 at 230 [25]; [2003] HCA 7.

9 *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248, 256; [1981] HCA 20; *In the matter of an appeal by Luck* (2003) 78 ALJR 177 at 178 [4]; 203 ALR 1 at 2.

which it raised would have been decided adversely to the defendant in the first application"[10].

12 The settled authority in this Court is that an order refusing an application for an order nisi is interlocutory in nature. In *Re Media, Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd*[11], the applicants instituted two separate proceedings concerning the same issue. They filed a notice of appeal and an application for leave to appeal against a judgment of Toohey J refusing an application for an order nisi for writs of prohibition and certiorari. The two separate proceedings were instituted because the applicants were not sure if the judgment on the order nisi was interlocutory so that leave was required. In a joint judgment, five Justices of this Court said that the applicants "now concede – and rightly so – that the decision was interlocutory. As there is no appeal from an interlocutory decision except by leave of the Court, the notice of appeal must be struck out as incompetent."[12] One case relied upon by their Honours was *Coles v Wood*[13], where Moffitt P (with whom Samuels JA agreed) said:

> "The jurisdiction to grant prerogative relief, for example in the nature of a certiorari, is also discretionary. The refusal of an application for such relief does not determine, finally or otherwise, the rights of any party. Whether the particular reasons given for a refusal of such an order for declaratory or prerogative relief will in a practical sense, be persuasive as to decisions to be given in other proceedings where the existence of the right claimed or its enforcement is at issue, does not stand against the conclusion that the order of dismissal is not final but interlocutory."

13 One reason why an order to show cause does not finally determine the rights of the parties can be seen in the power to refuse to make the order simply on the basis that the application was premature and should be brought at a later time[14].

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10 *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248, see also at 256.

11 (1994) 68 ALJR 179; 119 ALR 206; [1994] HCA 66.

12 (1994) 68 ALJR 179 at 180; 119 ALR 206 at 207 (footnotes omitted).

13 [1981] 1 NSWLR 723 at 724.

14 *Re Griffin; Ex parte Professional Radio and Electronics Institute (Aust)* (1988) 167 CLR 37 at 41; [1988] HCA 72. See also *Coles v Wood* [1981] 1 NSWLR 723 at 727.

14 The decision in *Re Media, Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* has been relied upon on numerous occasions in the Full Court of the Federal Court of Australia[15]. It has the merit of being both longstanding and correct. Contrary to the submissions of Plaintiff S164, it is not inconsistent with the earlier decision of McHugh J in *Gallo v Dawson*[16], which did not involve an application for an order to show cause.

15 It is not possible to distinguish the decision in *Re Media, Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd*, as Plaintiff S164 attempted to do, by contrasting O 55 r 1(2) of the former *High Court Rules 1952* (Cth) and r 25.03.3(a) of the *High Court Rules 2004* (Cth). Under the former, the Court had power to make an order "calling on the proposed respondent to [show] cause why the writ or order should not be issued". This Court commonly made orders, as Toohey J did in the decision from which the incompetent appeal was brought in *Re Media, Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd*[17], that the application was either granted or refused[18]. Contrary to the submissions of Plaintiff S164, there is no relevant difference between "refusing" an application for an order to show cause made under O 55 r 1 and "dismissing" an application for an order to show cause under the later r 25.03.3(a).

16 The order of Gageler J on 30 August 2018 dismissing the application for an order to show cause was interlocutory in nature. Accordingly, leave to appeal is required under s 34(2) of the *Judiciary Act*. The appeal is incompetent and

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15 See, eg, *NAHQ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 377 at 378 [3]; *Applicant S422 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 151 at 163 [35]-[36]; *Applicant S494 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 37 at [8]; *Applicant M182 of 2003 v Minister for Immigration and Multicultural & Indigenous Affairs* [2004] FCAFC 105 at [3]. See also *Applicant M139 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 107 at [9]; *Applicant M90 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 109 at [8]; *Applicant M52 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 111 at [9]; *M111 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 97 at [7].

16 (1990) 64 ALJR 458; 93 ALR 479; [1990] HCA 30.

17 Unreported, High Court of Australia, 7 May 1993 at 16.

18 *Re Australian Nursing Federation; Ex parte Victoria* (1993) 67 ALJR 377 at 382-383; 112 ALR 177 at 183-184; [1993] HCA 8; *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837 at 840; 116 ALR 619 at 624; [1993] HCA 53.

must be dismissed. Plaintiff S164 must pay the Minister's costs of the summons. In these circumstances, where an application for leave may be filed and the Minister accepts that the documents filed in the incompetent appeal might be re-filed in the application for leave, it may be appropriate for costs of the appeal to be costs in a future application for leave. The appropriate order at this stage is that costs of the appeal are reserved.