HIGH COURT OF AUSTRALIA

GAGELER J

Matter No S12/2020

IN THE MATTER OF AN APPLICATION BY
MAUREEN MARY YOUNG FOR LEAVE TO
ISSUE OR FILE

Matter No S13/2020

IN THE MATTER OF AN APPLICATION BY
MAUREEN MARY YOUNG FOR LEAVE TO
ISSUE OR FILE

Re Young
Re Young
[2020] HCA 13
Date of Judgment: 15 April 2020
S12/2020 & S13/2020

ORDER

1. Application for leave to issue or file the proposed application for leave to appeal in Matter No S12 of 2020 refused.

2. Application for leave to issue or file the proposed application for leave to appeal in Matter No S13 of 2020 refused.

3. Application for leave to issue or file the proposed writ of summons in Matter No S13 of 2020 refused.

CATCHWORDS

Re Young
Re Young

High Court – Leave to issue or file proceeding – Removal of proceedings – Where causes said to be pending in Supreme Court of New South Wales said to involve matter "arising under any treaty" within meaning of s 75(i) of *Constitution* – Where applications for removal of causes into High Court under s 40 of *Judiciary Act 1903* (Cth) were refused – Where applicant sought to file documents in the form of applications for leave to appeal and accompanying summons – Where Registrar directed to refuse to issue or file documents without leave of a Justice first had and obtained – Whether appellate jurisdiction of High Court extends to hearing and determining appeal from order granting or refusing removal of cause – Whether order is under implied exception to appellate jurisdiction prescribed by Parliament within meaning of s 73(i) of *Constitution* – Whether conditions for grant of leave to appeal established.

Words and phrases – "abuse of process", "appellate jurisdiction", "cause", "exception", "federal jurisdiction", "incidental judicial power", "leave to issue or file", "order granting or refusing removal of a cause", "original jurisdiction", "preliminary and discretionary nature", "proceedings inter partes", "removal", "special leave", "substantial injustice", "treaty".

Constitution, ss 51(xxxix), 73(i), (ii), 75, 76, 77(iii).
High Court Rules 2004 (Cth), rr 6.07.1, 6.07.2, 6.07.3, 26.07.1.
Judiciary Act 1903 (Cth), ss 2, 30(a), 34(1), (2), 35(2), 40(1), (2)(b), 42, 78B.

1 GAGELER J. For much of the past 25 years, Ms Maureen Young has been engaged in disputes with Roads and Maritime Services or its statutory predecessors ("RMS") concerning a mooring at Pearl Bay near Mosman in Sydney at which she has berthed a houseboat in which she has lived. From 2009 until 2018, she occupied the mooring under a registered Lease from RMS. The Lease was entered into pursuant to a Deed of Release under which she agreed to forgo claims to pre-existing interests in the mooring.

2 In proceedings commenced in the Local Court of New South Wales in 2013 which were later transferred to the Supreme Court of New South Wales, RMS claimed from Ms Young unpaid rent under the Lease and Ms Young cross-claimed against RMS and the State of New South Wales for damages ("the 2013 proceedings"). In 2016, the cross-claim was struck out. In 2017, RMS obtained default judgment. On 21 May 2018, the Court of Appeal refused Ms Young leave to appeal from the striking out of the cross-claim and the dismissal of an application to set aside the default judgment in a decision[1] from which special leave to appeal to the High Court was refused[2].

3 Following termination of the Lease for unpaid rent in 2018, RMS commenced further proceedings against Ms Young in the Supreme Court claiming possession of the mooring, further unpaid rent to the date of termination, and an occupation fee in respect of her occupation of the mooring from the date of termination until the date of vacating possession ("the 2018 proceedings"). On 13 August 2019, RMS obtained summary judgment in a decision from which Ms Young was refused leave to appeal by the Court of Appeal on 31 October 2019[3].

4 Earlier in 2019, Registrars of the Supreme Court had made orders having the effect of precluding Ms Young from filing amended cross-claims in the 2013 proceedings. The Court of Appeal on 31 October 2019 also refused her leave to appeal from those orders. The Court of Appeal commented, however, that the 2013 proceedings had arguably not been concluded so far as they related to Ms Young's cross-claim and that it remained open to her to apply for leave to file an amended cross-claim in those proceedings[4].

5 Prior to the Court of Appeal delivering its decision, Ms Young filed two applications in the High Court seeking orders under s 40(1) or (2)(b) of the

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1 *Young v Roads and Maritime Services [No 3]* [2018] NSWCA 106.

2 *Young v Roads and Maritime Services* [2019] HCASL 17.

3 *Young v Roads and Maritime Services* [2019] NSWCA 266.

4 *Young v Roads and Maritime Services* [2019] NSWCA 266 at [18], [20]-[21].

Judiciary Act 1903 (Cth). By the first application, filed on 29 July 2019, she sought an order removing "the interlocutory causes" then said to be pending in the Supreme Court in the 2018 proceedings. By the second application, filed on 30 September 2019, she sought an order removing into the High Court "the whole of the causes" then pending in the Court of Appeal.

6 Pursuant to r 26.07.1 of the *High Court Rules 2004* (Cth), Keane and Edelman JJ on 13 November 2019 directed the Registrar of the High Court to draw up, sign and seal an order dismissing each of those applications for removal. In respect of each application, their Honours' published reasons stated that "[i]t is not appropriate in this matter to fragment the ordinary judicial process by an order for removal"[5].

7 Ms Young subsequently sought to file documents in the form of applications under s 34(2) of the *Judiciary Act* for leave to appeal from the orders entered at the direction of Keane and Edelman JJ. In connection with one of those applications, she also sought to file an "urgent summons" by which she sought interlocutory relief against RMS. Pursuant to r 6.07.2 of the *High Court Rules*, Nettle J on 23 December 2019 directed the Registrar to refuse to issue or file each of the three documents without the leave of a Justice first had and obtained by Ms Young.

8 By applications pursuant to r 6.07.3 of the *High Court Rules* filed on 14 and 17 February 2020 respectively, Ms Young now seeks leave to file and issue the two applications for leave to appeal together with the accompanying summons in relation to the second of them. Although the grounds on which she relies are not easy to decipher, the gravamen of her complaint appears to be that Keane and Edelman JJ failed to appreciate that the causes she sought to have removed involve a matter "arising under [a] treaty" within the meaning of s 75(i) of the *Constitution* and a matter "arising directly under [a] treaty" within the meaning of s 38(a) of the *Judiciary Act*. Her contention is that the matter is therefore within the original jurisdiction of the High Court under s 75(i) of the *Constitution* and excluded from the jurisdiction of the Supreme Court by s 38(a) of the *Judiciary Act*.

9 The "treaty" under which the matter arises is said by Ms Young to be an "internal treaty": the Commonwealth and State Housing Agreement entered into by the Commonwealth and each of the States on 19 November 1945, execution of which by the Executive Government of the Commonwealth was authorised by the *Commonwealth and State Housing Agreement Act 1945* (Cth), since repealed by the *Omnibus Repeal Day (Autumn 2014) Act 2014* (Cth). Her contention is that, notwithstanding the Deed of Release and the Lease, she is the successor to rights and interests in the mooring which were "granted by the Executive Government of

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5 *Young v Roads and Maritime Services* [2019] HCASL 363; *Young v Roads and Maritime Services* [2019] HCASL 364.

the day in the 1940's" in fulfilment of the Commonwealth and State Housing Agreement.

Grant or refusal of leave

10 The direction of a Justice pursuant to r 6.07.2 of the *High Court Rules* is available to be sought by the Registrar under r 6.07.1 of the *High Court Rules* in respect of a document which "appears" to the Registrar "on its face" to be "an abuse of the process of the Court, to be frivolous or vexatious or to fall outside the jurisdiction of the Court".

11 The discretion to refuse leave on an application made under r 6.07.3 of the *High Court Rules* falls to be exercised by a Justice by reference to the same criteria as those which inform the action of the Registrar under r 6.07.1. The discretion will ordinarily be exercised to refuse leave to issue or file a document where the document appears to the Justice determining the application "on its face" to be an abuse of the process of the Court, to be frivolous or vexatious or to fall outside the jurisdiction of the Court.

12 As Edelman J has recently emphasised, it is implicit in the requirement that a document the subject of an application under r 6.07.3 be considered "on its face" that the application falls to be determined without an oral hearing[6]. Unlike an interlocutory application governed by Pt 13 of the *High Court Rules*, in respect of which r 13.03.1 provides that the Court or a Justice may direct that the application is to be determined without listing it for hearing, no direction of a Justice is needed for an application under r 6.07.3 to be determined without listing it for hearing.

13 The concept of abuse of process cannot be confined within closed categories. Sufficiently for present purposes, it encompasses an attempt to invoke the original or appellate jurisdiction of the High Court on a basis that is confused or manifestly untenable. Needless to say, exercise of the discretion to nip a proceeding in the bud is appropriate only in the clearest of cases.

Jurisdiction

14 Section 73(i) of the *Constitution* confers appellate jurisdiction on the High Court to hear and determine appeals from all orders "of any Justice or Justices exercising the original jurisdiction of the High Court". That jurisdiction is constitutionally conferred "with such exceptions and subject to such regulations as the Parliament prescribes".

15 The scope of the appellate jurisdiction conferred by s 73(i) of the *Constitution* and not excluded by parliamentary prescription is amplified by the

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6 *Re Simmonds* [2020] HCATrans 034 at 3/53-72.

prescription in s 34(1) of the *Judiciary Act* that, except as provided by that Act, the High Court has "jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers". Absent an express or implied contrary intention, the term "judgment" in the context of the *Judiciary Act* includes "any ... order"[7].

16 The only "exception" within the meaning of s 34(1) for which the *Judiciary Act* makes express provision is more precisely a "regulation" within the meaning of s 73(i) of the *Constitution*[8]. It is that by force of s 34(2) "[a]n 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".

17 Despite the amplitude of s 34(1) of the *Judiciary Act*, there are in my opinion real questions as to whether the appellate jurisdiction of the High Court extends to hearing and determining an appeal from an order under s 40(1) or (2)(b) of the *Judiciary Act*.

18 Section 40(1) and (2)(b) of the *Judiciary Act* respectively authorise the High Court to order that a cause "arising under the Constitution or involving its interpretation" or "involving the exercise of federal jurisdiction" that is pending in a State court be "removed into the High Court". An order for removal of such a cause, if made, simultaneously divests the State court of such federal jurisdiction to hear and determine the cause as is invested in it under s 77(iii) of the *Constitution* and enlivens such original jurisdiction with respect to that cause as the High Court may have under s 75 of the *Constitution* or as may be conferred on it under s 76(i) of the *Constitution* by s 30(a) of the *Judiciary Act* (in the case of an order under s 40(1)) as supplemented by s 40(3) of the *Judiciary Act* (in the case of an order under s 40(2)(b))[9]. Granting or refusing an application for an order for removal, other than on the application of an Attorney-General, involves the exercise of a broad judicial discretion the object of the conferral of which is "to secure early resolution of constitutional questions and other issues of public importance"[10]. Making an order for removal enlivens an ability on the part of the High Court to exercise the equally broad discretion, conferred by s 42 of the *Judiciary Act*, at any stage to remit the whole or part of the cause to the court from

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7 Section 2 of the *Judiciary Act*.

8 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 217.

9 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 72-73, 125, 129.

10 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 248.

which it was removed. Refusing an order for removal creates no impediment to making a later application for removal of the same cause that is not frivolous or vexatious.

19 There is a real question as to whether an order granting or refusing removal of a cause under s 40(1) or (2)(b) of the *Judiciary Act* involves an exercise of the original jurisdiction of the High Court so as to fall within the ambit of s 73(i) of the *Constitution*. Arguably, an order granting or refusing removal of a cause is an exercise of an incidental judicial power conferred on the High Court under s 51(xxxix) of the *Constitution* exercise of which is distinct from, and antecedent to, exercise of such original jurisdiction conferred by s 75 or under s 76 of the *Constitution* as would be enlivened by the making of an order for removal. There might be thought in that respect to be an analogy between an order granting or refusing removal of a cause in the exercise of the power conferred by s 40(1) or (2)(b) of the *Judiciary Act* and an order granting or refusing special leave to appeal in the exercise of the power conferred by s 35(2) of the *Judiciary Act* as an incident of the power of the Parliament to regulate the appellate jurisdiction conferred on the High Court by s 73(ii) of the *Constitution*. The grant or refusal of special leave to appeal is not itself an exercise of appellate jurisdiction[11]. Rather, grant "is an essential preliminary condition to the existence of the appeal" and refusal "denies the existence of an appeal"[12]. The result is that "[u]ntil the grant of special leave there are no proceedings inter partes before the Court"[13].

20 If an order granting or refusing removal of a cause under s 40(1) or (2)(b) of the *Judiciary Act* does involve an exercise of the original jurisdiction of the High Court from which an appeal can lie under s 73(i) of the *Constitution*, there might be thought to be a further question as to whether the preliminary and discretionary nature of such an order and the context of s 42 of the *Judiciary Act* imply an "exception" within the meaning of s 73(i) of the *Constitution* of a kind the potential existence of which is acknowledged in s 34(1) of the *Judiciary Act*[14].

21 Those questions, which are of some complexity, do not lend themselves to determination in the context of the present applications. Neither of them could be

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11 *Attorney-General (Cth) v Finch [No 2]* (1984) 155 CLR 107 at 115.

12 *Attorney-General (Cth) v Finch [No 1]* (1984) 155 CLR 102 at 105.

13 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 133 [112].

14 cf *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 78-81 [11]-[19].

determined without full argument and without notice having been given to Attorneys-General under s 78B of the *Judiciary Act*.

22 In *Bienstein v Bienstein*[15], the Full Court of the High Court assumed that an appeal would lie under s 73(i) of the *Constitution* from the refusal of an application for removal under s 40(1) of the *Judiciary Act*. The Full Court did so in the course of holding that the purported appeal in that case was incompetent in the absence of an application for, and grant of, leave to appeal under s 34(2) of the *Judiciary Act*. It is open to me to proceed in the context of the present applications on the same assumption[16], and appropriate that I do so.

23 Proceeding on the assumption that the purported applications for leave to appeal are not on their face outside the jurisdiction of the Court, I therefore turn to consider their merits.

Abuse of process

24 As the Full Court pointed out in *Bienstein v Bienstein*[17]:

> "The principles that govern the grant of leave to appeal are well established. An applicant for leave must establish that the decision in question is attended with sufficient doubt to warrant the grant of leave. The applicant must also show that substantial injustice will result from a refusal of leave to appeal."

25 Neither of those standard conditions for the grant of leave to appeal is capable of being established here.

26 There is no doubt whatsoever as to the soundness of the discretionary decisions of Keane and Edelman JJ. Their Honours' reasons for each of those orders reflected the observation in *Bienstein v Bienstein* that "[o]rders for removal interfere with the processes of the courts hearing the proceedings sought to be removed" and that "[o]nly where the issues are important and require this court's urgent decision should the court make an order for removal"[18].

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15 (2003) 195 ALR 225.

16 cf *Wilkie v The Commonwealth* (2017) 263 CLR 487 at 522 [57]-[58].

17 (2003) 195 ALR 225 at 231 [29].

18 (2003) 195 ALR 225 at 234 [45].

27 There is no reason to consider that their Honours failed to appreciate the nature of the jurisdictional argument which Ms Young sought to propound. The Supreme Court of New South Wales has jurisdiction to determine its own jurisdiction. Subject to the grant of special leave, an appeal lies to the High Court under s 73(ii) of the *Constitution* from a judgment or order of the Supreme Court on the ground that the judgment or order was rendered without jurisdiction[19]. The mere circumstance that an applicant for removal raises a jurisdictional issue therefore provides no basis for departure from the general approach to removal articulated in *Bienstein v Bienstein* and reflected in their Honours' reasons.

28 Nor is there any reason to consider that substantial injustice might result to Ms Young from a failure to obtain leave to appeal from the orders refusing removal.

29 In relation to Ms Young's attempt to obtain leave to appeal from the order refusing removal of "the whole of the causes" pending in the Court of Appeal, it is important to recognise that those causes were concluded by the decision of the Court of Appeal on 31 October 2019. The causes are no longer pending. Indeed, the causes were no longer pending at the time she sought leave to file the application for leave to appeal on 14 February 2020. There is now and was then nothing left to remove. Ms Young has instead the decision of the Court of Appeal from which she is entitled to apply for special leave to appeal albeit that she might now be required to seek and show justification for an extension of time to do so.

30 Similarly, in relation to Ms Young's attempt to obtain leave to appeal from the order refusing removal of "the interlocutory causes" then said to be pending in the Supreme Court in the 2018 proceedings, the material filed in support of her application for leave to appeal on 17 February 2020 does not establish that any such causes then remained undetermined.

31 Lest I be taken to suggest otherwise, it is appropriate that I record my rejection of Ms Young's contention that s 38(a) of the *Judiciary Act* presents or presented an impediment to the exercise of jurisdiction by the Supreme Court. There may be room for debate about the nature and degree of the connection required to justify characterisation of a justiciable controversy as a matter "arising under" and "arising directly under" a treaty[20]. There can be no doubt, however, that the term "treaty" in s 75(i) of the *Constitution* and in s 38(a) of the *Judiciary Act* refers to an international agreement[21] – "a contract between two or more

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19 *New South Wales v Kable* (2013) 252 CLR 118 at 133 [31], 140 [55].

20 cf *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361-362 [16]-[18].

21 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 644.

independent nations"[22]. The term has no application to an agreement made between the Executive Government of the Commonwealth and the Executive Government of one or more Australian States.

Disposition

32 Each ex parte application for leave to issue or file will be refused.

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22 *Whitney v Robertson* (1888) 124 US 190 at 194, quoted in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 769.