HIGH COURT OF AUSTRALIA

EDELMAN J

RAYMOND ELZAIN & ORS PLAINTIFFS

AND

DEPUTY COMMISSIONER OF TAXATION & ANOR DEFENDANTS

[2024] HCASJ 45
Date of Judgment: 20 December 2024
M90 of 2024

ORDERS

1. *The plaintiffs' amended application filed on 16 December 2024 be determined without being listed for hearing under r 25.09.1 of the High Court Rules 2004 (Cth).*

2. *The plaintiffs' amended application filed on 16 December 2024 be dismissed under r 25.09.1 and r 25.09.3(b) of the High Court Rules 2004 (Cth).*

3. *The plaintiffs pay the first defendant's costs of the plaintiffs' interlocutory application dated 7 November 2024 and the plaintiffs' amended application dated 16 December 2024.*

4. *The plaintiffs' interlocutory application filed on 7 November 2024 be dismissed, without being listed for hearing, under r 25.09.1 of the High Court Rules 2004 (Cth).*

5. *Other than in relation to dispensing with compliance with r 25.07.1 and dismissal of the plaintiffs' applications under r 25.09.1 of the High Court Rules 2004 (Cth), the first defendant's application filed on 7 November 2024 be dismissed.*

6. *The plaintiffs pay the first defendant's costs of the affidavit of Mr Logan filed on 7 November 2024.*

7. *There be no costs otherwise of the first defendant's application.*

8. *These orders be made, and reasons for decision published, in accordance with rr 13.04 and 25.09.2 of the High Court Rules 2004 (Cth).*

Representation

The plaintiffs are represented by Diakou Faigen

The first defendant is represented by Craddock Murray Neumann Lawyers

Submitting appearance for the second defendant

EDELMAN J.

The parties, the applications and the result

1 The applications before this Court can best be described as part of an over-litigated matter. The underlying matter concerned an application in the Federal Court of Australia by the first defendant, the Deputy Commissioner of Taxation, for freezing orders and summary judgment with respect to tax liabilities of some of the plaintiffs, who are family members and a family company. Although one of the respondents in the underlying proceedings before the Federal Court of Australia (the fourth respondent, Joanne Elzain) is not a party to the applications in this Court, it is convenient to refer interchangeably to the respondents in the Federal Court proceedings and the plaintiffs in this Court as the "plaintiffs". The second defendant in this Court, named as the Federal Court of Australia, has filed a submitting appearance in this Court.

2 The plaintiffs' first application is brought in the original jurisdiction of this Court in circumstances in which the plaintiffs have exhausted all avenues of appeal.[1] The first application is a misconceived application for a writ of certiorari, filed on 22 October 2024, to quash the decision of Moshinsky J in *Elzain v Deputy Commissioner of Taxation* [2024] FCA 873 (***Elzain (No 3)***) and to substitute more favourable orders. The first of the procedural and substantive missteps in the plaintiffs' first application is that a writ of certiorari is available to remove legal consequences or apparent legal consequences but not to substitute more favourable orders.[2]

3 The second of the procedural and substantive missteps is that the plaintiffs' first application was filed without the required brief statement of argument in support of the application (a statement required to be contained in Part V of Form 12).[3] The Court provided the plaintiffs with an opportunity for the brief statement to be filed by 5:00pm on 5 December 2024. The plaintiffs still failed to file their brief statement of argument. At the plaintiffs' request, they were provided with a further seven days to file their brief statement of argument. They still failed to file their brief statement in time. Nevertheless, on 16 December 2024 this Court provisionally accepted an amended Form 12 application filed by the plaintiffs which contained their brief statement of argument and an affidavit exhibiting the plaintiffs' outline of submissions dated 16 July 2024, filed in their application for

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1 *Federal Court of Australia Act 1976* (Cth), ss 33(4A), 33 (4B).

2 See *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 492 [25].

3 See *High Court Rules 2004* (Cth), r 25.01.1(a).

leave to appeal before Moshinsky J in *Elzain (No 3)*, which the plaintiffs assert was not "tak[en] into account".

4 It is unnecessary to consider whether the plaintiffs' amended Form 12 application should be rejected due to incompleteness and delay, with the consequence that the plaintiffs' first application would be dismissed as not disclosing an arguable basis for relief. It suffices to accept the plaintiffs' amended Form 12 application because, for the reasons below, the first application is manifestly hopeless.

5 The second of the plaintiffs' applications before this Court is an application pursuant to s 77RE of the *Judiciary Act 1903* (Cth), filed on 7 November 2024, seeking interlocutory non-publication and suppression orders in relation to the decisions of the Federal Court of Australia in *Deputy Commissioner of Taxation v Elzain* [2024] FCA 342 (***Elzain (No 1)***), *Deputy Commissioner of Taxation v Elzain [No 2]* [2024] FCA 346 (***Elzain (No 2)***) and *Elzain (No 3)*, as well as suppression orders in relation to the "whole of the Federal Court of Australia file" in proceedings VID339/2024 and VID1082/2023. The plaintiffs additionally seek an order to stay the operation of one of the orders of Moshinsky J made on 25 October 2024 that permitted the publication of the decisions in *Elzain (No 1)*, *Elzain (No 2)* and *Elzain (No 3)*, in redacted form. The plaintiffs' second application is interlocutory, pending disposal of the plaintiffs' first application. It is appropriate that the plaintiffs' second application be dismissed in circumstances in which the plaintiffs' first application is manifestly hopeless.

6 The first defendant filed a helpful affidavit from Mr Logan dated 7 November 2024, deposing to the relevant procedural history and correspondence relating to the applications. In addition to filing the affidavit from Mr Logan, and in light of the manifestly hopeless nature of the plaintiffs' first application, the simplest course for the first defendant to take would have been to file a short response to the first application seeking to have this Court dismiss the first application under r 25.09.1 of the *High Court Rules 2004* (Cth), without listing the application for hearing, on the ground that the application does not disclose an arguable basis for the relief sought or is an abuse of the process of the Court.

7 The first defendant, however, brought a further application seeking numerous orders, not merely orders dismissing the plaintiffs' first application under r 25.09.1, but also orders dispensing with the need for compliance with the requirement to file a response to the first application, orders dismissing the first application under rr 2.03.2, 28.01.1 and/or 28.01.2 of the *High Court Rules*, and orders for indemnity costs. Some of these further orders that were sought may have required directions, further submissions or an oral hearing, and further delays and expense.

8 The appropriate course is to consider first whether the plaintiffs' first application should be dismissed under r 25.09.1 of the *High Court Rules* before

considering any further orders sought by the first defendant. Since, for the reasons below, the plaintiffs' first application is manifestly hopeless, the first defendant's application generally falls away, other than in respect of dispensing with the first defendant's need to file a response, dismissal of the plaintiffs' first application under r 25.09.1, and the first defendant's application for costs in respect of the plaintiffs' first application (which in all the circumstances, including the assessment of the applications on the papers, should be standard, not indemnity, costs).

The plaintiffs' first application is manifestly hopeless

9 As explained above, the plaintiffs' first application for a writ of certiorari erroneously seeks not merely to quash the decision of Moshinsky J in *Elzain (No 3)* but to substitute alternative orders. It is necessary to set out the background to *Elzain (No 3)* before considering the manner in which it is challenged by the plaintiffs. Although the first defendant does not contend that the background reveals the vexatious conduct of litigation by the plaintiffs, the background as set out in the affidavit of Mr Logan, as well as in an affidavit prepared by the plaintiffs' solicitor on 7 November 2024, reveals a pattern of potentially significant wastage of legal costs. The proceedings have so far involved at least 23 sets of court orders, 11 hearings, and four sets of reasons. In a generous and polite euphemism, McElwaine J aptly described the proceedings as "a drawn-out and torturous process".[4]

10 The underlying matter involved applications for ex parte freezing orders and summary judgment in favour of the first defendant in respect of tax liabilities of the first, third, fourth and fifth plaintiffs in the proceedings before this Court, amounting to more than $16 million. Following the making of ex parte freezing orders against each of the plaintiffs, the plaintiffs applied for suppression and non-publication orders concerning large parts of the material that had been relied upon in the freezing orders application.

11 In his reasons for decision in *Elzain (No 1)*, McElwaine J made suppression orders in relation to a substantial portion of the material that had been relied upon in the freezing orders application. The plaintiffs then applied for McElwaine J to refrain from publishing his reasons for decision in *Elzain (No 1)*. In his reasons for decision in *Elzain (No 2)*, McElwaine J refused to withhold the publication of his reasons for decision in *Elzain (No 1)*.

12 In *Elzain (No 3)*, Moshinsky J dismissed the plaintiffs' application for leave to appeal from *Elzain (No 1)* and *Elzain (No 2)*. The application for leave to appeal contained six proposed grounds of appeal. Two of them were not pressed and were properly treated by Moshinsky J as abandoned. Two of the remaining proposed

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4 *Deputy Commissioner of Taxation v Elzain [No 2]* [2024] FCA 346 at [22].

grounds concerned the decision by McElwaine J not to make suppression orders in relation to the whole of a position paper and reasons for decision of the first defendant. The final two of the proposed grounds, as modified during the hearing before Moshinsky J, concerned the decisions by McElwaine J not to redact the words "serious misconduct" and "misconduct" from his reasons in *Elzain (No 1)* and *Elzain (No 2)*.

13 An application for leave to appeal requires that: (i) the decision which is sought to be appealed is attended with sufficient doubt to warrant its reconsideration on appeal; and (ii) substantial injustice would result from the refusal of leave, on the assumption that the decision is wrong.[5] The sufficiency of doubt that must attend the decision, and the extent of injustice that will be substantial assuming the decision to be wrong, are not always independent considerations, and will depend upon all the circumstances. For instance, the potential for grave injustice[6] can mean that the sufficiency of doubt will be more easily satisfied.

14 In his reasons for decision in *Elzain (No 3)*, refusing the plaintiffs' application for leave to appeal, Moshinsky J carefully set out the submissions of the plaintiffs. He addressed those submissions and concluded that there was not even an arguable error in the decision by McElwaine J not to make suppression orders in relation to the position paper and reasons for decision of the first defendant. As to the final two proposed grounds of appeal, concerning the decisions by McElwaine J not to redact the words "serious misconduct" and "misconduct" from his reasons in *Elzain (No 1)* and *Elzain (No 2)*, Moshinsky J explained that before McElwaine J senior counsel for the plaintiffs had been confronted with authority which could not be distinguished and McElwaine J had asked senior counsel: "So do you press that?". Senior counsel responded: "No, your Honour". That was plainly an abandonment of those grounds. Moshinsky J concluded that even if the subject matter of the final two proposed grounds had not been abandoned before McElwaine J, there was no arguable error in the decision of McElwaine J in relation to those grounds.

15 In this Court, the grounds of the plaintiffs' first application are that Moshinsky J's decision in *Elzain (No 3)*: (i) was beyond power and involved an error of law or was otherwise contrary to law; (ii) contravened the rules of natural justice; (iii) was affected by irrelevant considerations; (iv) involved the application of the wrong legal test and/or an exercise of discretionary power without regard to the merits of the case; and (v) was manifestly unreasonable and irrational.

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5 *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399, quoting *Sharp v Deputy Commissioner of Taxation* (1988) 88 ATC 4,184 at 4,186.

6 See *The Commonwealth v Sanofi (formerly Sanofi-Aventis)* [2024] HCA 47 at [29].

16 None of those grounds is materially supported by any of the submissions in the plaintiffs' brief statement of argument. None appear to be capable of rational argument. The plaintiffs' brief statement instead asserts that Moshinsky J made eighteen errors in his reasons in *Elzain (No 3)*. Almost all of the errors asserted are non-jurisdictional errors which would not support a writ of certiorari, such as allegations of a failure to give adequate weight to some matter or submission. One assertion that might be seen as being made in support of an allegation of jurisdictional error is the assertion that Moshinsky J failed to take into account the arguments raised in the plaintiffs' outline of submissions before his Honour. But it is unclear how that assertion could be properly made in circumstances in which the reasons of Moshinsky J repeatedly refer to the submissions of the plaintiffs, specifically address the authorities relied upon by the plaintiffs, and address arguments made in the plaintiffs' written submissions which were provided by the plaintiffs in an affidavit filed in this Court. In any event, the plaintiffs' alleged errors by Moshinsky J involve either bald assertions of error with no basis in fact or law or contentions that have no arguable prospect of success.

17 The plaintiffs also claim to have an intention to file "further evidence in support of the application" and to "broaden the scope of the documents and material they wish to have sup[p]ressed". In circumstances in which the plaintiffs' first application is manifestly hopeless, no such liberty should be afforded to them.

18 The plaintiffs' first application discloses no arguable basis for any relief by this Court. Orders should be made as follows, in accordance with rr 13.04 and 25.09.2 of the *High Court Rules*, with references to the plaintiffs in the orders being only to those plaintiffs in this Court:

1. The plaintiffs' amended application filed on 16 December 2024 be determined without being listed for hearing under r 25.09.1 of the *High Court Rules 2004* (Cth).

2. The plaintiffs' amended application filed on 16 December 2024 be dismissed under r 25.09.1 and r 25.09.3(b) of the *High Court Rules 2004* (Cth).

3. The plaintiffs pay the first defendant's costs of the plaintiffs' interlocutory application dated 7 November 2024 and the plaintiffs' amended application dated 16 December 2024.

4. The plaintiffs' interlocutory application filed on 7 November 2024 be dismissed, without being listed for hearing, under r 25.09.1 of the *High Court Rules 2004* (Cth).

5. Other than in relation to dispensing with compliance with r 25.07.1 and dismissal of the plaintiffs' applications under r 25.09.1 of the

High Court Rules 2004 (Cth), the first defendant's application filed on 7 November 2024 be dismissed.

6. The plaintiffs pay the first defendant's costs of the affidavit of Mr Logan filed on 7 November 2024.

7. There be no costs otherwise of the first defendant's application.

8. These orders be made, and reasons for decision published, in accordance with rr 13.04 and 25.09.2 of the *High Court Rules 2004 (Cth)*.