# Court of Appeal
# Supreme Court
## New South Wales

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| Case Name: | **Capilano Honey Ltd v Dowling (No 1)** |
| Medium Neutral Citation: | [2018] NSWCA 128 |
| Hearing Date(s): | 15 June 2018 |
| Date of Orders: | 15 June 2018 |
| Date of Decision: | 15 June 2018 |
| Before: | Basten JA |
| Decision: | (1) Stay the operation of orders 2, 3 and 4 made and entered by McCallum J on 8 June 2018 until the determination of the proceedings in this Court.<br>(2) Direct that the application for leave to appeal and the proposed appeal be heard concurrently.<br>(3) Order that the costs of this motion be costs in the application for leave to appeal or, if leave be granted, the appeal.<br>(4) Direct that a timetable be fixed in relation to the summons, which is listed before the Registrar on Monday 25 June, that will accommodate a concurrent hearing in late July 2018. |
| Catchwords: | CIVIL PROCEDURE – appeal – stay of orders – brief stay granted by primary judge – continuation of stay pending hearing of leave application and appeal – whether appeal entirely without merit – whether failure to grant stay would significantly diminish value of appeal – effect of stay on respondent's freedom of speech – whether stay futile |
| Legislation Cited: | *Court Suppression and Non-publication Orders Act 2010* (NSW) |
| Cases Cited: | *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681; [1986] HCA 84 |
| Category: | Procedural and other rulings |

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| Parties: | Capilano Honey Limited (First Applicant)<br>Ben McKee (Second Applicant)<br>Shane Dowling (Respondent) |
| Representation: | Counsel:<br>A T S Dawson SC (Applicants)<br>Respondent self-represented<br><br>Solicitors:<br>Addisons (Applicants)<br>Respondent self-represented |
| File Number(s): | 2018/184407 |

**Decision under appeal**

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| Court or Tribunal: | Supreme Court of NSW |
| Jurisdiction: | Common Law Division |
| Medium Neutral Citation: | [2018] NSWSC 865 |
| Date of Decision: | 8 June 2018 |
| Before: | McCallum J |
| File Number(s): | 2016/299522 |

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

## JUDGMENT

1 **BASTEN JA**: On 8 June 2018 the primary judge (McCallum J) made interlocutory orders in proceedings presently pending in the Common Law Division. Shortly stated, the applicants commenced proceedings in relation to certain publications posted by the respondent on various websites. The causes of action pursued by the corporate applicant are for the publication of injurious falsehoods and, by the individual applicant, for defamation.

2 On the day the substantive proceedings were commenced, being 7 October 2016, Hall J made orders ex parte which fell into three categories, namely:

(a) orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) prohibiting publication of the matters addressed in the proceedings on 7 October 2016 and in the pleadings and evidence;

(b) take-down orders with respect to material displayed on certain identified websites, and

(c) interlocutory injunctive relief restraining the defendant from publishing identified articles or "posts".

3 The suppression order with respect to the proceedings before Hall J (order 1) was expressly formulated as an interim order. However, a further suppression order (order 7) which prohibited disclosure of the pleadings, evidence and orders of the court, was in the form of interlocutory injunctive relief. Similarly, the orders restraining publication, said to operate "until further order of the court", were also in the form of interlocutory injunctions.

4 Because the orders were made ex parte, they should not have been formulated in these terms. Whether they were intended to operate as interim orders is unclear; however, the orders were made on Friday, 7 October and the "return of summons" was stood over to 3pm on the following Monday, 10 October 2016 before the duty judge. Notice of the orders and the listing was directed to be given to the respondent.

5 The matter came back before the Common Law Duty judge (Davies J) on 10 October 2016, at which time a number of procedural orders were made. Two orders were made having substantive effect: first, order 1 made by Hall J on 7 October (which was expressed as an interim order) was "extended" so as to operate "until further order." (That was order 3 made by Davies J.) The orders of Hall J were not otherwise varied.

6 Secondly, Davies J made a new take-down order (order 4) in relation to a further article published by the defendant on a website apparently controlled by him, which was identified as the "9 October article" and had therefore been uploaded following the orders made by Hall J. No orders were made with respect to the further conduct of the proceedings.

7 The next step taken by the applicants was to file a statement of claim on 15 May 2017, which was served two days later. Although the respondent did not file a notice of motion, he indicated in about April 2017 that he sought the lifting of the non-publication orders and injunctions and also sought to have the proceedings against him dismissed for want of prosecution. It appears from the reasons of the primary judge that there were exchanges of submissions in July 2017 completed by a submission in reply by the respondent dated 6 August 2017. It was originally intended that the applications be dealt with on the papers. However, the respondent's motions were listed for hearing, but not until 6 April 2018. The hearing proceeded over two days, being completed on 19 April 2018.

8 Judgment was delivered on the afternoon of Friday 8 June, at which stage orders were announced, but reasons were not provided. The orders of the primary judge in effect vacated the various interlocutory orders made by Hall J and Davies J. Counsel for the applicants sought a "stay of the execution" of the judgment for 28 days to allow the applicants to consider an appeal.[1] Although the reasons for judgment were not then available, and were not provided to the applicants until 5.41pm on Saturday 9 June, by email, the judge declined to stay the operation of her orders for more than seven days.

[1] Tcpt, 08/06/18, p 3(27).

A final version of the reasons was delivered, again by email, on Tuesday, 12 June 2018 (Monday 11 June having been a public holiday).

9 In the course of the hearing on Friday, 8 June, counsel for the applicants had modified her request from 28 days to consider whether to file an appeal to a plea for 14 days.[2] The primary judge expressed the view that it was a question of "the appropriateness of anything more than a short stay", the question of any further stay being a matter for this Court.

10 While there is much to be said for steps which maintain the expeditious pursuit of proceedings by a moving party, the allowance of two clear working days between the receipt of reasons for judgment and the expiration of a stay of orders would only be warranted in circumstances of real urgency. Given the desultory manner in which the matter had been allowed to proceed in the Common Law Division, that degree of urgency may be doubted. The refusal of a longer period necessitated the listing of the application for an extension of the stay in this Court at short notice, the result of which has been that a further interim stay will be necessary, at some inconvenience to the Court and expense to the parties.

11 Before leaving the matter, it may be noted that mistakes are inevitable when difficult matters proceed with greater emphasis on haste than on deliberation.

12 First, it was irregular to grant interlocutory injunctive relief upon an ex parte application. Accepting that ex parte relief was appropriate in the circumstances which faced the applicants, there was no call for interlocutory (as opposed to interim) orders in the first instance. When the matter came before the duty judge on Monday, 10 October 2016, the respondent was not present, although he had received notice of the further hearing at some point over the previous weekend. Nevertheless, it is apparent that the applicants were never put to the test in an inter partes application, or required to justify a continuation of the relief obtained ex parte, until the matter was listed before McCallum J in April 2018. At that stage it appears that the respondent

[2] Tcpt, p 8(20).

(perhaps unnecessarily) shouldered the burden of demonstrating that the relief originally granted ex parte should not continue.

13 Secondly, when the matter came before the duty judge on 10 October 2016, an order was made extending the interim suppression order made the previous Friday, which was limited to "publication of the hearing of the proceedings today, 7 October 2016". Although the respondent may have absented himself from the further hearing, it is surprising that such an interim order was extended in circumstances where the duty judge published his own judgment, recounting the proceedings that had occurred before him on 10 October.

14 Thirdly, there were quite significant differences between the orders proposed by the primary judge at the end of her reasons for judgment dated 8 June 2018 and the orders recorded on the coversheet of the judgment. Subject to a typographical error, the orders entered on JusticeLink on Friday, 8 June reflected the orders on the coversheet, together with three further orders, two of which were procedural and one of which (order 5) stayed the substantive orders 1-4. Order 1 dismissed the respondent's application for summary dismissal of the proceedings; it cannot have been intended to be stayed.

15 In dealing with circumstances relating to an application for special leave to appeal to the High Court, Brennan J stated in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]*:[3]

> "When an application for special leave to appeal is made to this Court, a jurisdiction to stay may be exercised by the court below and it is to that court — the court in which the matter is pending and which is familiar with the matter — that an application to stay should first be made. In this case the Court of Appeal, not wishing to pre-empt the view that may be expressed in this Court, tailored its order accordingly. In future, there should be no inhibition on the court in which the matter is pending framing a stay order, if a stay be appropriate, to avoid the necessity for application to this Court."

16 This Court is more readily able to deal with stay applications pending appeals than is the High Court; nevertheless similar principles apply to a trial court,

[3] (1986) 161 CLR 681 at 684-685; [1986] HCA 84.

albeit in more muted form. In a trial court, as in this Court, the matters relevant to a stay will include (a) whether there are reasonable prospects of a grant of leave to appeal (if leave be required); (b) whether a failure to stay the orders made at trial could render the appeal nugatory or the benefits of success uncertain and (c) the effect of a stay on the rights and interests of the respondent.

17 In this case, little need be said about the prospects of a grant of leave to appeal. Because the matter is one which should be dealt with expeditiously, I propose to direct that there be a concurrent hearing of the application for leave and the proposed appeal.

18 There is no information before the Court as to the respondent's assets which would be available if the applicants were ultimately successful in obtaining a judgment against the respondent, but given the nature of their claims and the fact that the respondent is a litigant in person, it may be assumed that the likelihood of full recovery is not high. On the other hand, continuing publication of the offending material, if it were to be found defamatory or to involve injurious falsehoods, pending the trial of the substantive proceedings, might well inflict continuing economic harm on the corporate applicant and continuing harm to the reputation of the individual applicant. In a real sense, the subject matter of the appeal will be significantly diminished in value if no stay is granted.

19 On the other side of the record, the stay will involve an intrusion on the freedom of speech enjoyed by the respondent. However, that constraint is limited to a particular topic, namely the business of the applicants, and is for a limited period of time. Non-publication orders and interlocutory injunctive relief having been in place for almost two years, the continuation of the constraining regime for what is likely to be no more than a further two to four months is a limited intrusion on the right of free speech.

20 The applicants correctly anticipated that the respondent would rely on a claim of futility, based at least in part on the fact that the take-down orders have not

been complied with. The applicants submitted, first, that the Court should not allow a flagrant breach of court orders to justify a non-continuation of the orders. Secondly, they said there was utility in continuing the orders because they prevent wider dissemination of the material. There is force in the applicants' submission. It is supported by the respondent's objection to the continuation of the constraining orders.

21 It is clear that there was material before the primary judge which is not before this Court. That material included a transcript of the hearing before Davies J, various written submissions prepared by the parties, evidence of prior publication of the allegations made by the respondent, a copy of a recorded conversation between the second applicant and a third party which formed the basis of the second main publication by the respondent and, it may be assumed, transcripts of the allegedly defamatory and false material. The respondent sought to tender parts of the evidence (and a further document), but it is not appropriate to assess a selection of evidence that was before the primary judge and which can now be directed to the merits of the appeal.

22 This Court has been provided with a draft notice of appeal indicating the grounds on which the proposed appeal is sought to be based. It cannot be said that the grounds are entirely without merit.

23 Inquiries of the Registrar indicate that the matter can probably be listed in the second half of July. The Court will take account of the convenience of the respondent, but the continuation of the stay will be contingent upon the applicants moving expeditiously to have the proceedings in this Court resolved.

24 It is clear that the interim stay granted by the primary judge, which expires today, should be extended (except with respect to order 1 made on 8 June). I propose to extend the stay until the determination of the proceedings in this Court.

25 The Court makes the following orders:

(1) Stay the operation of orders 2, 3 and 4 made and entered by McCallum J on 8 June 2018 until the determination of the proceedings in this Court.

(2) Direct that the application for leave to appeal and the proposed appeal be heard concurrently.

(3) Order that the costs of this motion be costs in the application for leave to appeal or, if leave be granted, the appeal.

(4) Direct that a timetable be fixed in relation to the summons, which is listed before the Registrar on Monday 25 June, that will accommodate a concurrent hearing in late July 2018.

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