FEDERAL COURT OF AUSTRALIA

SunshineLoans Pty Ltd v Australian Securities and Investments Commission [2023] FCA 707

File number:	QUD 254 of 2023
Judgment of:	**YATES J**
Date of judgment:	27 June 2023
Catchwords:	**PRACTICE AND PROCEDURE** – application for leave to appeal from a judgment of a single judge of the Court – where primary judge dismissed an application for certain questions to be heard separately by a Full Court pursuant to r 30.01(1) of the *Federal Court Rules 2011* (Cth) – where the questions concern the respondents standing to bring proceedings seeking relief under ss 166, 167 and 177 of the *National Consumer Credit Protection Act 2009* (Cth) for contravention of s 24(1A) of *National Credit Code* and for declaratory relief under s 21 of the *Federal Court of Australia Act 1976* (Cth) – where the application before the primary judge was made after fixing the date for trial contrary to r 30.01(2) and less than seven weeks before the trial was due to commence – where the grant of leave to appeal would require the vacation of the trial dates – application for leave dismissed
Legislation:	*Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) *Federal Court of Australia Act 1976* (Cth) ss 21, 24 *Judiciary Act 1903* (Cth) s 39B *National Consumer Credit Protection Act 2009* (Cth) ss 3, 5, 47, 166, 167, 177, 186, 187, Sch 1 (*National Credit Code*) ss 24, 204 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) *Federal Court Rules 2011* (Cth) r 30.01 Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth)
Cases cited:	*Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2023] FCA 640 *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; 118 FCR 1 *Cabcharge Australia Ltd v Australian Competition and*

	Consumer Commission [2010] FCAFC 111 *Civil Air Operations Officers Association of Australia v Airservices Australia* [2020] FCA 1665 *Commonwealth v Lyon* [2003] FCAFC 284; 133 FCR 265 *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; 399 ALR 214 *Khatri v Price* [1999] FCA 1289; 95 FCR 287 *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (No 2)* [2014] FCA 1378; 146 ALD 59 *Sharpe v Deputy Commissioner of Taxation (NSW)* (1988) 19 ATR 908 *Truthful Endeavour Pty Ltd v Condon* [2015] FCAFC 70; 233 FCR 174 *Vicinity Funds RE Ltd v Commissioner of State Revenue* [2021] VSC 200
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	78
Date of hearing:	26 June 2023
Counsel for the Applicant:	Mr M Wyles KC and Mr A Collins
Solicitor for the Applicant:	O'Shea Lawyers
Counsel for the Respondent:	Mr M Brady KC and Mr S Cleary
Solicitor for the Respondent:	Gadens Lawyers

ORDERS

QUD 254 of 2023

BETWEEN:	**SUNSHINELOANS PTY LTD (ACN 092 821 960)** Applicant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY: **YATES J**

DATE OF ORDER: **27 JUNE 2023**

THE COURT ORDERS THAT:

1. The application for leave to appeal be dismissed with costs reserved.
2. Within 7 days, the parties inform the Court through the Associate to Yates J whether there is any reason why the costs of and incidental to the application for leave to appeal should not follow the event.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 On 1 June 2023, the primary judge dismissed an interlocutory application, brought by the present applicant, SunshineLoans Pty Ltd (the respondent below), for orders pursuant to r 30.01(1) of the *Federal Court Rules 2011* (Cth) that certain questions be heard separately by a Full Court: *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [2023] FCA 640.

2 Rule 30.01 provides:

> **30.01 Application for separate trials**
>
> (1) A party may apply to the Court for an order that a question arising in the proceeding be heard separately from any other questions.
>
> (2) The application must be made before a date is fixed for trial of the proceeding.
>
> Note 1: The Court may order that a party state a case and the question for decision.
>
> Note 2: The Court will give any directions that are necessary for the hearing of the separate question.

3 The application before the primary judge was filed on 18 May 2023 at a time well after the proceeding had been commenced and, contrary to r 30.01(2), after the date for the trial of the proceeding had been fixed. In that regard I note that, on 6 February 2023, the trial was fixed for a five-day hearing to commence on 17 July 2023. At the time the primary judge heard and determined the applicant's application, the trial was less than seven weeks away and preparations for it were well-advanced. The trial remains fixed for hearing. It will commence in three weeks.

4 The applicant seeks leave to appeal from the primary judge's interlocutory judgment. Leave is required by dint of s 24(1A) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**). Section 25(2) of the FCA Act provides that an application for leave to appeal must be heard and determined by a single Judge unless a Judge directs that the application be heard and determined by a Full Court, or the application is made in a proceeding that has already been assigned to a Full Court and the Full Court considers it is appropriate for it to hear and determine the application.

5 Not only is the judgment below an interlocutory judgment, it is one dealing with a matter of practice and procedure involving the exercise of judicial discretion. In relation to such judgments, the consistent practice of the Court in relation to whether the leave to appeal should be granted is to address the two interrelated questions posed in *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 (***Decor Corporation***): (a) whether, in all the circumstances, the decision under review is attended with sufficient doubt to warrant it being reconsidered by a Full Court; and (b) whether substantial injustice would result if leave to appeal were refused, supposing the decision to be wrong.

6 The application for leave to appeal was heard on 26 June 2023.

THE PRIMARY JUDGE'S REASONS

7 In the proceeding below, the respondent seeks relief by way of declarations (under s 166 of the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) and s 21 of the FCA Act), an order for the payment of pecuniary penalties (under s 167 of the NCCP Act), and an injunction (under s 177 of the NCCP Act) for the alleged contravention by the applicant of various provisions of the *National Credit Code* (Sch 1 to the NCCP Act) (the **Code**) and s 47(1)(d) of the NCCP Act. Section 3 of the NCCP Act provides that the Code has effect as a law of the Commonwealth.

8 One of the provisions of the Code which the respondent alleges has been contravened is s 24(1A). In substance, this provision provides that a credit provider must not enter into a small amount credit contract on terms imposing a prohibited monetary liability, or require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with the Code.

9 One point taken by the applicant is that the respondent does not have standing to bring proceedings for a declaration under s 166, or for pecuniary penalties under s 167, of the NCCP Act for a contravention of s 24(1A) of the Code.

10 This contention is based on the definition of "civil penalty provision" in s 5 of the NCCP Act:

> **5 The Dictionary**
>
> (1) In this Act (other than the National Credit Code):
>
> …
>
> ***civil penalty provision***: a subsection of this Act (or a section of this Act that is not divided into subsections) is a ***civil penalty provision*** if:

(a) the words "civil penalty" and one or more amounts in penalty units are set out at the foot of the subsection (or section); or

(b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

11 The nub of the contention is that the definition of "civil penalty provision" in the NCCP Act does not extend to the provisions of the Code because of the words in the quote above: "(other than the National Credit Code)". As I understand it, the applicant contends that these parenthetical words substantively limit the definitions in the Dictionary. Therefore, references to, for example, "civil penalty provision" in the NCCP Act exclude references to "civil penalty provision" in the Code. As the applicant put it in the course of oral submissions in the present application for leave to appeal, there is no such thing as a "civil penalty provision" of the Code. Accordingly, so the argument runs, ss 166 and 167 of the NCCP Act do not provide authority to the respondent to seek relief under those provisions for a contravention of s 24(1A) of the Code.

12 Without delving too deeply into the applicant's argument, the primary judge said that there may be "some" force in it. His Honour remarked that the argument was "not untenable".

13 The primary judge then turned to the respondent's contention that it *did* have the authority under ss 166 and 167 of the NCCP Act to apply for the relief referred to in those provisions for contravention of s 24(1A) of the Code. The respondent contends that the chapeau to s 5(1) simply functions to express the reach of the Dictionary to the NCCP Act. The Code has its own dictionary. Section 5(1) of the NCCP Act does not expressly or impliedly limit the definitions themselves.

14 The primary judge was satisfied that there were reasonable arguments that the respondent does have standing under ss 166 and 167 of the NCCP Act to pursue the orders it seeks.

15 The questions which the applicant sought to have determined as separate questions by a Full Court were:

1. Does s 5 of the *Credit Act* define the term "civil penalty provision" in ss 166 and 167 of the *Credit Act*?

2. Is s 24(1A) of the *Credit Code*, a "civil penalty provision" within s 5 of the Act?

3. Does s 166 of the *Credit Act* confer standing on ASIC to apply to the Court for a declaration that Sunshine Loans contravened s 24(1A) of the *Credit Code*?

4. Does s 167 of the *Credit Act* confer standing on ASIC to apply to the Court for an order that Sunshine Loans pay the Commonwealth a pecuniary penalty if

Sunshine Loans has contravened s 24(1A) of the *Credit Code*.

16 The primary judge accepted that it would be "useful" if a Full Court were to resolve the difficult issues presented by these questions. However, he was not persuaded that the applicant's application should be granted. His Honour considered two important matters in coming to his conclusion: (a) whether a trial would be required in any event even if the questions were to be heard separately; and (b) the purpose and effect of r 30.01(2).

17 As to the first matter, the primary judge noted the respondent's contention that the proceeding could and should continue to trial because, regardless of the position with respect to standing under ss 166 and 167 of the NCCP Act, the respondent has a claim for injunctive relief under s 177. The evidence on which the respondent seeks to rely in that regard is the same as the evidence on which it seeks to rely for declarations under s 166 and the imposition of pecuniary penalties under s 167 for the alleged contraventions of s 24(1A) of the Code. The primary judge was not persuaded to the contrary view by the applicant offering an undertaking not to engage in any conduct of which the respondent complains in the proceeding.

18 The primary judge also noted the respondent's contention that, regardless of s 166 of the NCCP Act, the Court has general power under s 21 of the FCA Act to grant declarations in civil proceedings. The primary judge recognised that there may be a question whether, in the present case, the respondent does have standing to rely on s 21. However, his Honour reasoned that, notwithstanding that there may be some argument about that matter, it was not possible to conclude, at the time of the interlocutory application, that the respondent had no standing to seek at least some of the orders in the amended originating application. Ultimately, the primary judge concluded that questions of standing, whether under ss 166 and 167 of the NCCP Act, or under s 21 of the FCA Act, can be determined finally at the trial.

19 As to the second matter, the primary judge noted the difficulty presented by the applicant's late application under r 30.01, considered against the background of key events in the preparation of the matter for trial. The primary judge referred to the applicant's unexplained failure to comply with timetabling orders, and observed that this left the applicant in a "difficult position when it seeks the indulgence of the Court to waive compliance with r 30.01(2)".

20 Even so, the primary judge said:

> 26 The point to be emphasised is that, even leaving aside the non-compliance, the matter appears to be too far advanced for an order now to be made that certain questions be heard separately by the Full Court. The matter is set down for hearing across five days in seven weeks' time. It is largely prepared. The

> Court's time will have been, and may stand to be, wasted if these proceedings do not progress on the dates fixed in the orders made on 6 February 2023. At this relatively late stage, it is not in the interests of efficient case management for the questions posed by Sunshine Loans to be determined separately by the Full Court.

21 The primary judge also noted that, by referring the questions for separate determination by a Full Court, one party would be deprived of a level of appeal. His Honour noted, further, that there was potentially some benefit in having the questions determined in a factual context that has been established at trial. This would remove any doubt about whether the questions sought to be referred to a Full Court were "ripe" for determination.

22 Finally, the primary judge considered the policy behind r 30.01(2). He noted the observation in *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd (No 2)* [2014] FCA 1378; 146 ALD 59 (***Latteria***) at [55] that the sub-rule was designed "to ensure that, if there is to be a separate question determined, it occurs at a time well before trial". The primary judge reasoned that, if it were otherwise, the policy behind the determination of separate questions, being the saving of resources and the promotion of settlement, would be lost.

CHRONOLOGY

23 The application for leave to appeal should be considered in the context of the following brief chronology.

24 The respondent commenced its proceeding against the applicant on 6 June 2022. It filed a concise statement in support of its originating application.

25 On 17 August 2022, the applicant filed it response to the concise statement. In that response, the applicant raised its argument that the chapeau to s 5(1) of the NCCP Act means that the definition of "civil penalty provision" is limited and does not apply to the Code. The applicant noted, correspondingly, that s 204 of the Code does not include a definition of "civil penalty provision".

26 In January 2023, the applicant filed an interlocutory application seeking the separate determination of two questions. These questions were *not* the questions with which the present application is concerned.

27 On 6 February 2023, the Court refused the applicant's application to have the questions determined separately, and set down the proceeding for a trial to commence from 17 July 2023.

28 On 7 February 2023, the respondent filed an amended concise statement. On 13 March 2023, the applicant filed an amended response. In that response, the applicant raised, in terms, the issue of the respondent's standing to rely on ss 166 and 167 of the NCCP Act and whether the respondent could rely on the power conferred by s 21 of the FCA Act. The applicant did not challenge the respondent's standing to seek relief under s 177 of the NCCP Act.

29 Correspondence passed between the applicant and the respondent in March and early April 2023 in respect of the issues of standing and the questions of jurisdiction that the applicant had raised.

30 On 5 April 2023, the respondent filed an amended reply in which it joined issue with the applicant's allegation that it (the respondent) lacked standing under ss 166 and 167 of the NCCP Act to seek relief against the application. Further, the respondent denied that the power under s 21 of the FCA Act was not available in the present case.

31 At a case management hearing on 19 April 2023, the primary judge made an order, at the applicant's request, that written submissions be filed addressing the applicant's complaint concerning the respondent's standing under ss 166 and 167 of the NCCP Act.

32 As I have noted, on 18 May 2023, the applicant filed its interlocutory application seeking the separate determination, by a Full Court, of the questions with which these reasons are concerned.

THE PRESENT APPLICATION

33 In its application for leave to appeal, the applicant seeks the following orders:

1. This application be heard as a matter of urgency.
2. Leave to appeal order 1 of the orders made by the Federal Court on 1 June 2023 is granted.
3. The trial of proceeding QUD190/2022 be stayed pending the determination of this application.
4. Orders 4, 5, 6, 7 and 8 made by the Court in proceeding QUD190/2022 on 1 June 2023 be vacated pending the determination of this application.

34 The draft notice of appeal accompanying the application for leave to appeal contains the following grounds:

1. The primary judge erred in dismissing the application accepted for filing on 18 May 2023.
2. The primary judge ought properly to have held:

(a) If s 166 of the *Credit Act* does not confer power on ASIC to seek declarations of contravention of the *Credit Code* (which appears at schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth) (***Credit Act***)) there is not a "*matter*" before the Court which attracts federal judicial power such that the Court does not have jurisdiction in proceeding QUD190 of 2022.

(b) The question of this Court's jurisdiction having been legitimately raised, the grant of jurisdiction made by s 19 of the *Federal Court of Australia Act 1976* (Cth); s 398(1A)(c) of the *Judiciary Act 1903* (Cth) and s 187 of the *Credit Act* is limited to the power to determine those facts upon which the Court's jurisdiction depends.

(c) The "*facts*" upon which the Court's jurisdiction depends are limited to those set out in the Amended Originating Application filed 4 April 2023.

(d) The question of jurisdiction is properly to be determined before the conduct of a trial, which the Court may not have jurisdiction to hear.

(e) The just resolution of the question of jurisdiction – according to law and as quickly, inexpensively, and efficiently as possible – required the appellant to pursue the issue in correspondence with ASIC. The Court made orders on 19 April 2023 that the parties file written submissions on the issue such that, the question of jurisdiction having been distilled by 12 May 2023 and it being a question of this Court's jurisdiction, it is in the interests of justice that in the circumstances of this case, compliance with r 30.01(2) of the *Rules* be dispensed with.

35 The orders sought in the draft notice of appeal are:

1. Pursuant to r 30.01 of the Federal Court Rules 2011 (***Rules***) , the questions stated in the Case Stated (see below) be heard separately.

2. The trial of proceeding QUD 190 of 2022 be stayed pending the separate hearing of the questions stated in the Case Stated (see below).

3. Orders 1, 4, 5, 6, 7 and 8 made by the Federal Court on 1 June 2023 be vacated.

4. Compliance with 30.01(2) of the Rules is dispensed with, pursuant to r 1.34 of the Rules.

36 The Case Stated reserves questions for consideration by a Full Court substantially in the form of the questions referred to at [15] above.

37 It will be observed that these questions do not address the question of jurisdiction arising under s 177 of the NCCP Act. This is consistent with the way in which the applicant has advanced the question of jurisdiction until very recently.

38 The application for leave to appeal is supported by the following affidavits: (a) Paul Michael O'Shea sworn 7 June 2023; (b) Paul Michael O'Shea sworn 22 June 2023; and (c) Shane William James Powe sworn 7 June 2023.

39 The respondent relied on the affidavit of Scott Couper sworn 22 June 2023.

40 In the course of the application for leave to appeal, the applicant rehearsed the basis on which it contends that the Court does not have jurisdiction to entertain an application for declaratory relief under s 166 of the NCCP Act. It is not necessary for me to repeat the arguments that were advanced. They were based on the contention noted at [11] above and were directed to the proposition that there is a "bright line" between the provisions of the NCCP Act and the provisions of the Code. I refer, in particular, to paragraphs 8 to 27 of the applicant's written submissions dated 22 June 2023.

41 In oral submissions, I was taken to a number of provisions of the NCCP Act and the Code as informed by the legislative amendments made by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) and the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). I was also taken to the Revised Explanatory Memorandum to the Consumer Credit Legislation Amendment (Enhancements) Bill 2012.

42 In addition to its submissions in respect of s 166 of the NCCP Act, the applicant contended that s 21 of the FCA Act cannot, of itself, confer jurisdiction of the Court. Section 21 only confers power to grant declaratory relief where the Court already has jurisdiction.

43 Further, the applicant contended, for the first time, that the Court does not have jurisdiction to entertain the respondent's claim for injunctive relief under s 177 of the NCCP Act. Principally, this is because s 5(2) of the NCCP Act provides:

> In this Act (other than the National Credit Code), a reference to a provision is a reference to a provision of this Act, unless the contrary intention appears.

44 The argument appears to be that when s 177(1) confers the power to grant an injunction restraining conduct that "constitutes or would constitute … a contravention of this Act", the power is confined to contraventions of the NCCP Act, not the Code, even though the Code is Sch 1 to the NCCP Act. Importantly, the applicant did not advance this contention before the primary judge. Rather, the applicant sought to avoid the operation of s 177 by proffering an undertaking to the Court in respect of its future conduct.

45 The applicant contended that the Court's civil jurisdiction under the NCCP Act is only conferred by s 187 thereof. By dint of s 186(1) of the NCCP Act, the respondent cannot rely on any conferral of jurisdiction by s 39B(1A) of the *Judiciary Act 1903* (Cth). Thus, absent the conferral of jurisdiction under s 166 of the NCCP Act, and now the applicant would argue s 177, there is no civil matter arising under the NCCP Act to engage s 187.

46 The applicant contended, further, that, absent constitutional power having been conferred on the respondent to commence this proceeding, there is no "justiciable controversy" before the Court which can attract the exercise of federal judicial power: *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; 399 ALR 214 at [29] and [47].

47 The applicant submitted that, in refusing its application, the primary judge did not refer to, or distinguish, "the High Court authorities" (referred to in the applicant's written submissions in the present application) and erred in failing to find that the question of the Court's jurisdiction should be heard and determined before the conduct of the trial—a matter which, the applicant argued, was a basic principle that was "better kept separate from questions of the applicable law".

48 The applicant submitted that the separate questions it has framed are "entirely discrete", and that the material presently before the Court (including "extensive written submissions pertaining only to the separate question") would enable those questions to be determined by "a final decision based on established facts". In other words, there are no other jurisdictional facts that need to be established in order for the Court to decide the questions of jurisdiction which the applicant seeks to raise.

49 The applicant submitted that the primary judge erred in refusing its application to dispense with the requirement of r 30.01(2). The applicant submitted (in effect) that the primary judge's reliance on *Latteria* was misplaced because different circumstances pertain in the present case.

50 The applicant submitted, further, that the primary judge erred in the exercise of his discretion by finding that the applicant had not filed its interlocutory application in a timely manner. This submission was made with specific reference to [22] of the primary judge's reasons, where his Honour said:

> 22 ASIC relied on the fact that it has duly performed its obligations flowing from the timetabling orders made on 6 February 2023. The concise statements have been finalised and both parties have put on not insubstantial evidence, although there is some suggestion that further evidence may be required. ASIC has notified Sunshine Loans, in accordance with the orders of 6 February 2023, of its objections to Sunshine Loans' affidavit material. It has also sent to Sunshine Loans its proposed list of issues in dispute. It appears, on the other hand, that Sunshine Loans has not taken any objection to ASIC's affidavit material and has not notified ASIC that it requires any of its deponents for cross-examination. The Court was informed that, although it has not complied with the orders of the Court to take such steps before particular dates in the lead up to the trial, it intends to take those steps in the future.

51 The applicant relied on the fact that, on 13 March 2023, it had filed and served an amended response (to the respondent's amended concise statement) in which it alleged that the respondent did not have standing to seek orders under ss 166 and 167 of the NCCP Act.

52 It also relied on the fact that, notwithstanding that it had written to the respondent on the question of jurisdiction in March 2023, the respondent "did not explain in any detail the basis upon which [it] asserted power to bring the proceeding"—a matter which the respondent disputes.

53 It also relied on the fact that the absence of jurisdiction was "agitated in some detail" at a directions hearing on 19 April 2023 and that the primary judge made orders for an exchange of written submissions (with the respondent's submissions to be filed on 11 May 2023). The applicant argues that, the issue of jurisdiction having been distilled by 11 May 2023, it filed the interlocutory application on 17 May 2023.

54 As to the question of substantial injustice, the applicant says (on evidence from Mr Powe) that "substantial additional internal work" will be necessary in order for it to prepare the matter for trial. This has been quantified as an additional 200 – 300 hours of staff time at a cost of $20,000 – $30,000 (including contractors). Further, the applicant contended that the respondent has raised new allegations (in an affidavit filed on 19 April 2023) which will require it (the applicant) to analyse 9,367 contracts to ascertain the dates on which certain payments were made. Finally, the applicant submitted that it has suffered adverse publicity in relation to the proceeding and that a trial will likely subject it to further adverse publicity.

ANALYSIS

55 The application before the primary judge raised a number of questions. The first and primary question was whether there should be a separate and prior determination of the questions posed by the applicant. Embedded in this question was the additional question whether the requirement of r 30.01(2) should be waived. A further question was, if there should be a separate and determination of the questions posed by the applicant, should that determination be made by a Full Court?

56 The primary judge considered those questions by reference to the framework advanced by the applicant. That framework was confined to a challenge to the respondent's standing to seek relief under ss 166 and 167 of the NCCP Act (not s 177) and s 21 of the FCA Act.

57 As filed, the application for leave to appeal is framed in the same way, as is the applicant's draft notice of appeal: see [33] and [34] above.

58 If leave to appeal were to be granted, the issue before the Full Court would be whether the primary judge erred in the exercise of his discretion to refuse the application for a separate determination, or a separate determination by a Full Court, of the questions that had then been raised by the applicant. The appeal to the Full Court would not be the determination of the questions themselves. This is recognised in the draft notice of appeal.

59 The question of the jurisdiction conferred under s 177 of the NCCP Act was raised for the first time on the evening of 22 June 2023, when the applicant filed its written submissions on the present leave application. This is a somewhat complicating development. I propose to consider the present leave application on the basis on which it was originally framed and then consider whether the late introduction of the challenge to jurisdiction in respect of s 177 of the NCCP mandates a different outcome.

60 The Court, whether constituted by a single Judge or a Full Court, necessarily has the limited jurisdiction to determine whether it has the jurisdiction purportedly invoked in any proceeding: *Commonwealth v Lyon* [2003] FCAFC 284; 133 FCR 265 (***Lyon***) at [8]. Neither party disputes this principle.

61 In *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398, Griffith CJ at 415 observed that "the first duty of every judicial officer is to satisfy himself that he has jurisdiction". However, as explained by Katz J in *Khatri v Price* [1999] FCA 1289; 95 FCR 287 (***Khatri***) at [14]:

> … The duty has been generally understood … as permitting the court concerned to exercise a discretion … to postpone determining the question of its jurisdiction until after it has heard the whole case, provided, however, that having done so, it then "first" determines that question. …

62 This statement in *Khatri* has been approved on numerous occasions: for example, *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; 118 FCR 1 at [186] – [187] and *Lyon* at [8]; more recently, *Truthful Endeavour Pty Ltd v Condon* [2015] FCAFC 70; 233 FCR 174 at [32]; *Vicinity Funds RE Ltd v Commissioner of State Revenue* [2021] VSC 200 at [16] – [17] and *Civil Air Operations Officers Association of Australia v Airservices Australia* [2020] FCA 1665 at [31]. This approach is not inconsistent with the High Court authorities that are referred to in the applicant's written submissions.

63 As I understand it, the applicant does not contend that, as a general matter, disputed questions of jurisdiction cannot be dealt with in that way: see transcript of the application before the primary judge at page 9 lines 14–44. However, the applicant contends that, in the present case, the primary judge, as a minimum, should have exercised the power contemplated by r 30.01(1) to have the disputed questions of jurisdiction determined separately before seeking to embark on any trial of the action and that his Honour's failure to adopt that course constitutes an appealable error. Indeed, the present application for leave includes an application for orders that the primary judge's pre-trial orders be vacated, and that the trial itself be stayed.

64 The two questions posed in *Decor Corporation* are, as I have said, interrelated. In *Cabcharge Australia Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 111 at [20], the Full Court approved the following observation of Burchett J in *Sharpe v Deputy Commissioner of Taxation (NSW)* (1988) 19 ATR 908 at 910:

> [T]he sufficiency of the doubt in respect of the decision and the question of substantial injustice should not be isolated in separate compartments. They bear upon each other, so that the degree of doubt which is sufficient in one case may be different from that required in another. Ultimately, a discretion must be exercised on what may be a fine balancing of considerations.

65 The decision under review is the primary judge's decision not to order that the jurisdictional questions raised by the applicant be determined separately by a Full Court in advance of the impending trial, but to hear and determine those questions himself in the course of the trial. I am not persuaded that the correctness of that decision is attended by sufficient doubt to warrant its reconsideration by a Full Court now. I am also not persuaded that substantial injustice would result by refusing leave to appeal. The following matters inform both conclusions.

66 First, on present authority, the primary judge's approach was entirely orthodox. There was nothing that compelled the primary judge to order that the questions—then posed by the applicant—be considered and determined in advance of the trial, let alone considered and determined by a Full Court.

67 Secondly, the applicant's contentions that the primary judge's discretion miscarried are not persuasive.

68 The question of the meaning of "civil penalty provision", and thus the question of the respondent's standing to bring its proceeding against the application, have their genesis in the applicant's response filed on 17 August 2022. However, it was only after the trial had been set down for hearing that the applicant commenced to agitate the respondent's standing under

ss 166 and 167 of the NCCP Act. This was a matter within the applicant's control, and could have been brought to the fore much earlier. As the primary judge remarked at [21], the applicant has not given an explanation for its omission to bring its application as required by r 30.01(2). The primary judge also remarked that the applicant had not brought its application in a "timely fashion". I discern no error in the primary judge's finding in that regard: see [23] – [32] above.

69 Moreover, the challenge made by the applicant did not involve any challenge to the respondent's standing to seek relief under s 177 of the NCCP Act. To the contrary, the applicant sought to avoid the problems for its application that were posed by s 177 by offering an undertaking in respect of its future conduct. Thus, as presented to the primary judge, the case was not one where it was apparent that there was a complete absence of jurisdiction. On its face, the case could proceed to trial for at least some of the relief sought in the amended originating application.

70 Further, the primary judge had formed the view that the proceeding was far too advanced in its preparation for trial, and too close to trial, for the identified questions to be heard by a Full Court. That assessment was open to the primary judge. The application had been made at a relatively late stage and inevitably carried with it a vacation of the trial dates in circumstances where the matter had been "largely prepared". His Honour's reasonable concern was that acceding to the applicant's application meant that time would have been wasted, and possibly would be wasted, if the trial dates did not remain. His Honour reasoned that this would not be efficient case management. Once again, that assessment was open to the primary judge.

71 In support of the leave application, the applicant called in aid the fact that further preparation for the trial, on its part, is necessary and that this will involve not inconsiderable time and cost.

72 So much can be accepted on the evidence before me. However, this is, undoubtedly, a matter which the primary judge weighed in the balance when coming to his decision. On 1 June 2023, when the primary judge dismissed the applicant's interlocutory application, he also extended time for: (a) the applicant to notify the respondent of its objections to the respondent's affidavit evidence and to notify the respondent of the deponents it required for cross-examination (to 8 June 2023); (b) counsel to confer in relation to objections (to 15 June 2023); (c) the applicant to provide the respondent with a list of issues, including a response to the respondent's list of issues (to 8 June 2023); and (d) for the parties to file a joint list of issues (to 26 June 2023). In that regard, I refer to [22] – [25] of the primary judge's reasons. The time for taking these steps

has now passed and the parties' costs of complying with those orders have already been incurred. The preparation of the matter for trial is even more advanced than it was before the primary judge.

73 Further in this regard, on 1 June 2023 the primary judge appointed a hearing on 3 July 2023 (next Monday) to deal with the objections to evidence. Previously, on 6 February 2023, his Honour had ordered that a trial bundle (or separate trial bundles) be filed (7 days before the commencement of the trial), and that written outlines of opening submissions be filed (14 days before the commencement of the trial by the respondent and 7 days before the commencement of the trial by the applicant).

74 Thirdly, if leave to appeal were to be granted, it is inevitable that substantial delay in bringing the matter to trial will result. The parties accept that a grant of leave to appeal would inevitably bring with it a vacation of the trial dates. The date of a future alternative listing for trial is uncertain. Presently, it is also uncertain when a Full Court could be convened to hear the very limited appeal question that is proposed.

75 On the other hand, the parties have a certain fixture in three weeks' time when the primary judge can deal with the questions of jurisdiction that the applicant wishes to raise. Allowing the trial to proceed with the primary judge determining all questions of jurisdiction is the most timely and efficient course that will achieve appropriate expedition in the all the circumstances. In the event of any appeal, it would also provide a Full Court with the not inconsiderable benefit of the primary judge's reasoned analysis of, and conclusions on, those questions.

76 Does the fact that the applicant now wishes to also agitate the question of the respondent's standing to seek relief under s 177 of the NCCP Act, and hence the Court's jurisdiction to entertain the whole proceeding, affect this conclusion? I am not persuaded that it does. The resolution of that question of standing appears to raise the same arguments as the resolution of the questions of standing concerning ss 166 and 167. Although I accept that the issues raised in the applicant's written and oral submissions in the present application involve genuine questions, and that the construction of the NCCP Act and the Code for which the applicant contends is arguable (including in respect of s 177), I am not persuaded that the strength of the applicant's case (including in respect of s 177) is such as to warrant a departure from the view I have expressed above.

CONCLUSION AND DISPOSITION

77 For these reasons the application for leave to appeal will be dismissed.

78 At the hearing, I was asked to reserve the question of costs. I am prepared to do so. However, I will require the parties to inform the Court, within 7 days, if there is any reason why costs should not follow the event. If there is no reason, I will order the applicant to pay the respondent's costs of an incidental to the application for leave to appeal.

I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate: 

Dated: 27 June 2023