Court of Appeal
Supreme Court

New South Wales

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| Case Name: | 711 Hogben Pty Ltd v Tadros |
| Medium Neutral Citation: | [2016] NSWCA 244 |
| Hearing Date(s): | 1 September 2016 |
| Decision Date: | 1 September 2016 |
| Before: | Meagher JA at [1] and [21];<br>Leeming JA at [2] |
| Decision: | 1. The summons seeking leave to appeal filed 1 July 2016 be dismissed.<br><br>2. The applicant pay the respondents' costs of the summons. |
| Catchwords: | APPLICATION FOR LEAVE TO APPEAL – primary judge determined some but not all issues ordered for separate determination – application for leave to appeal – where parties will enjoy appeal as of right when all issues determined at first instance – whether undetermined issue should be determined by the Court of Appeal – whether sufficiently strong case of error made out – leave refused |
| Legislation Cited: | Uniform Civil Procedure Rules 2005 (NSW), Pt 28 |
| Category: | Principal judgment |
| Parties: | 711 Hogben Pty Ltd ACN 157 911 745 (Applicant)<br>Anthony Tadros (First Respondent)<br>Sharon Tadros (Second Respondent)<br>George Tadros (Third Respondent)<br>Dennis Bluth (Fourth Respondent) |
| Representation: | Counsel:<br>CJ Bevan (Applicant)<br>M Hadley (First, Second and Third Respondents) |

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| | Submitting Appearance (Fourth Respondent) |
| | Solicitors:<br>One Group Legal Pty Ltd (Applicant)<br>Harrington Maguire & O'Brien (First, Second and Third Respondents) |
| File Number(s): | 2016/200160 |
| Decision under appeal: | |
| Court or Tribunal: | Supreme Court of New South Wales |
| Jurisdiction: | Equity Division |
| Citation: | [2016] NSWSC 697 |
| Date of Decision: | 01 June 2016 |
| Before: | Stevenson J |
| File Number(s): | 2015/330101 |

*[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.]*

## EX TEMPORE JUDGMENT

1 **MEAGHER JA**: I will ask Leeming JA to deliver the first judgment.

2 **LEEMING JA**: This is an application for leave to appeal from the interlocutory, reserved decision of the primary judge given on 1 June 2016: *711 Hogben Pty Ltd v Tadros; Tadros v 711 Hogben Ptd Ltd* [2016] NSWSC 697. It is convenient to say something of the underlying dispute and procedural history of the litigation.

3 The applicant for leave, 711 Hogben, and two of the respondents, Mr and Ms Tadros, entered into a Deed of Agreement for Lease in respect of two levels of a strata development in Kogarah. Clause 14 of the Deed provides that proceedings may not be commenced until a dispute has first been decided by

expert determination. There is a dispute between the parties. It arises because 711 Hogben undertook to use its reasonable endeavours to complete the "Landlord's Works" by 26 May 2014. "Landlord's Works" was defined to mean:

> "[T]he building work to be carried out by the Landlord to build the Premises including shop front, walls, concrete slab ceiling and floor, external window frames and window panels, entry door and verandah door(s), waterproofing to all wet areas, electrical power board to each floor, standard gas pipe to each floor of the Premises, and hot and cold water outlet to each floor of the Premises and numbering or labelling of car spaces."

4 The dispute between the parties was as to the Commencing Date and as to the nature of the Landlord's obligations so far as concerns "Landlord's Works".

5 The Expert determined that:

(1) the Commencing Date was 18 May 2015 (rather than 12 February 2015, as the Landlord contended); and

(2) the Landlord's obligation, so far as concerned Landlord's Works, was to build the premises in accordance with plan CD1231 lodged by the Landlord with Kogarah City Council as part of a development application to use the Premises as a "long day care centre".

6 The primary judge accepted, and no issue is raised in these respects, that:

(1) if the expert was correct in his conclusion concerning plan CD1231, his conclusion concerning the Commencing Date was also correct; and

(2) the significance of the building work as undertaken by 711 Hogben was that a particular window on the first floor of the premises has not been constructed in accordance with plan CD1231, which in turn prevents the respondents from obtaining approval to use the premises as a childcare centre.

7 The principal question determined by the expert was whether the definition of Landlord's Works was to be read as including plan CD1231. The expert considered that it was.

8 Thereafter Mr and Ms Tadros commenced proceedings in the General List of the Equity Division seeking declaratory relief, orders that 711 Hogben do all things necessary to bring the premises into compliance with the plan, and damages. Shortly thereafter, 711 Hogben filed a Commercial List Summons in the Commercial List seeking orders including that the expert determination be set aside, that there be a fresh expert determination, and that there be orders for specific performance of the parties' obligations following that determination.

9 It seems that the original Statement of Claim was ordered to be treated as a cross-summons in the Commercial List. On 11 December 2015, a judge ordered that:

> "there be heard before all other issues in these proceedings, all issues arising on the plaintiff's Commercial List Summons and Statement, that is, in substance whether the expert determination of Dennis Blooth who is an expert determination in accordance with the deed of agreement for lease and whether any part [or all] of the defendants' cross claim should be stayed because of clause 14 of that agreement."

10 The parties and the primary judge have proceeded on the basis that two questions have been ordered for separate determination. Strictly speaking, that is not so. Instead, what has been ordered for separate determination is all *issues* arising on the Commercial List Summons and Statement (it is important when reading Pt 28 of the Uniform Civil Procedure Rules 2005 (NSW) to have regard to the breadth of the definition of "question", which includes any issue in the proceedings). This is a matter I return to below.

11 The primary judge went directly to the proper construction of the contract, and concluded that no error had been shown in the approach taken in the expert determination. The primary judge then stated, at the conclusion of his reasons, in relation to whether any part or all of the cross claim should be stayed because of clause 14, that "I will invite counsel to confer and agree on what should now happen in the proceedings". That reflected the second issue identified in the order made on 11 December 2015, which had been treated by the parties as the second separate question. It is not clear what happened when judgment was delivered, or when, a few days later, it was ordered that the hearing of the second separate question be remitted to the List Judge for allocation of a hearing date. As it happens, the matter is listed for further directions before the primary judge at 10am tomorrow. This Court was told that a hearing date had not yet been allocated for the balance of the issues which were the subject of the order made on 11 December 2015.

12 711 Hogben seeks leave to appeal. The draft Notice of Appeal contains nine proposed grounds. Proposed grounds 1-6 are all premised on identifying error in the construction of the Deed. Proposed ground 7 alleges error by the primary judge proceeding to answer, as obiter, a further question, namely, whether

there was "manifest error" within the meaning of cl 14. Proposed ground 8 asserts error by the primary judge declining to give separate answer to question 2. Proposed ground 9 asserts jurisdictional error by the List Judge who ordered 711 Hogben to pay the costs of the first separate question.

13 It is to be recalled that when the entirety of the litigation at first instance is determined, at least one, and perhaps both, parties will have a *right* of appeal to this Court, and that the occasion for an interlocutory appeal with leave is the parties' choice in splitting the litigation. Indeed, it appears that it was 711 Hogben which initiated the splitting of the litigation which has occurred.

14 The unchallenged evidence before the primary judge was that plan CD1231 was submitted with the development application to the local council via the principals of 711 Hogben, and that the development approval granted by the council on 6 February 2013 was on the basis of CD1231. This Court was told, without opposition, that the deed was executed before Mr and Ms Tadros went into possession.

15 Only if there were a very clear case of error would there be warrant to grant leave at this interlocutory stage. No such clear case is made out. Plainly enough, the Landord's Works must have been referable to some plan, and CD1231 is the only plan in evidence which was the subject of evidence of agreement between the parties. 711 Hogben pointed to the heads of agreement, which appear not to have been placed before the expert; that does not displace the force of what has been said above.

16 In expressing those views, no determination is being made of the proper construction of the deed. To the contrary, what is being conveyed is merely the absence of sufficiently strong prospects to warrant a grant of leave. That is enough to deal with proposed grounds 1-6.

17 In relation to proposed ground 7, it is far from clear, having regard to what in fact was ordered for separate determination, that there could be any error in the primary judge saying anything about "manifest error". In reply, this Court was taken to some passages of the transcript where it appeared that the case advanced excluded claims of manifest error, although, on one view at least, it is not clear that these points can be separated in the way in which 711 Hogben

contends. But in any event, appeals are from orders, and nothing that was said about manifest error affected the order from which 711 Hogben seeks leave to appeal.

18 In relation to proposed ground 8, 711 Hogben invites this Court to determine that matter itself, because it "involves a discrete inquiry into whether the issues raised by the cross claim involve an impermissible attempt to circumvent the compulsory expert determination procedure in cl 14(d)". It seems likely that that course will produce delay, especially in circumstances where the matter is listed for directions tomorrow and the primary judge had intended the remaining issues be set down for hearing almost 3 months ago. Further, no reason is made out to subvert the ordinary processes of determination at first instance by the Equity Division, with a right of appeal to this Court once that has occurred.

19 Finally, in relation to proposed ground 9, it is said that the fact that the primary judge reserved costs on 6 June 2016 "operated to deprive the List Judge of the jurisdiction to determine those costs". There is nothing in that point, in respect of which no submissions were advanced orally. Any judge of the Court had jurisdiction to exercise the discretion as to costs. In any event, 711 Hogben having been wholly unsuccessful on a separate question, it is difficult to see that there could be any scope for contending that there has been substantial injustice in the order which in fact was made.

20 For those reasons, leave to appeal should in my view be refused, with costs. The parties should take steps to ensure that the orders made in the Equity Division for the future conduct of these proceedings reflect what in fact was ordered on 11 December 2015.

21 **MEAGHER JA**: I agree with Leeming JA. The formal orders of the Court will be:

(1) The summons seeking leave to appeal filed 1 July 2016 be dismissed.

(2) The applicant pay the respondents' costs of the summons.

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**Amendments**

02 September 2016 - [Heading] - "Ex tempore" inserted before "judgment".