SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0026

FAÇADE TREATMENT ENGINEERING PTY LTD (IN LIQUIDATION) (ACN 147 328 443) — Applicant

v

BROOKFIELD MULTIPLEX CONSTRUCTIONS PTY LTD (ACN 107 007 527) — Respondent

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JUDGES:	TATE and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 June 2015
DATE OF JUDGMENT:	19 June 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 170

PRACTICE AND PROCEDURE – Application to adduce further evidence – Further evidence not shown to assist with constitutional issues sought to be raised on appeal – Exceptional circumstances not shown – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr I W Upjohn QC with Mr B G Mason	Aitken Partners
For the Respondent	Mr M G Roberts QC with Mr L J Connolly	Norton Rose Fulbright

TATE JA:

1 An application has been brought by Façade Treatment Engineering Pty Ltd (in liquidation) ('Façade') for leave to introduce further evidence at the hearing of the application for leave to appeal, and any appeal, which is to be heard later this year.

2 The further evidence that Façade seeks to rely upon are two documents exhibited to the affidavit of Philip Eric Fox, sworn 14 May 2015. Mr Fox is a solicitor and consultant to Aitken Partners, solicitors for Façade. The documents are:

(a) Façade's Payment Claim 19A for $3,209,300.73 which its liquidator, Mr John Potts, submitted to the respondent, Brookfield Multiplex Constructions Pty Ltd ('Multiplex'), on 20 February 2015 ('PEF-1')[1]; and

(b) Multiplex's response to Payment Claim 19A, being a letter from Multiplex to Mr Potts and a payment schedule in which Multiplex said that the amount it proposed to pay was 'nil' ('PEF-2'). The letter and payment schedule were dated 6 March 2015.

3 Multiplex opposes the application.

4 As explained in the judgment of McLeish JA, the appeal that is sought to be brought from the judgment of Vickery J arises from a dispute between Façade and Multiplex with respect to Payment Claims 18 and 19.[2] The Payment Claims were made pursuant to a sub-contract dated 7 September 2011 whereby Façade became a sub-contractor of Multiplex for a building project known as the Upper West Side Redevelopment — Stage 1 in Lonsdale St, Melbourne. The sub-contract involved the design, supply and installation of façade and curtain wall works on the building being constructed on the site.

5 Multiplex argued before his Honour, and his Honour agreed,[3] that insofar as

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1 Payment Claim 19A was referred to as a 'progress claim' in PEF-2.

2 This judgment assumes familiarity with the judgment of McLeish JA in response to an application for security for costs brought by Multiplex: *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSCA 169.

3 *Façade Treatment Engineering v Brookfield Multiplex Constructions* [2015] VSC 41 ('Reasons') [85].

Façade had an entitlement to payment under s 16 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the State Act'), it is precluded from entering any judgment against Multiplex (pursuant to s 16(2)(a)(i) of the State Act) in respect of the debt due to it under that Act, and is precluded from relying on s 16(4)(b) of the State Act as a bar to Multiplex bringing any cross-claim against it or raising any defence by way of set-off. Multiplex is thus entitled to set off any claims it has under the sub-contract under s 553C of the *Corporations Act 2001* (Cth) ('the Commonwealth Act') to any debt remaining under Payment Claim 18 despite s 16(4)(b) of the State Act which precludes cross-claims. This was so because, his Honour held, there is an inconsistency under s 109 of the *Constitution* between the State Act[4] and the Commonwealth Act and the State Act is invalid to the extent of the inconsistency.

6 In its written submissions in support of its application to adduce further evidence Façade submits that Payment Claim 19A and Multiplex's letter and payment schedule in response are relevant to the issue of whether the State Act permits the assertion of a set-off under the State Act. In particular, Façade contends that PEF-1 and PEF-2 are relevant to the submission it will make on the application for leave to appeal that the State Act permits the assertion of a set-off by means of a payment schedule served within the time permitted by s 15(4) of the State Act.[5] It also contends that it is relevant to the submission that it will make that s 16(2)(a)(i) and s 16(4)(b) of the State Act are consistent with the Commonwealth Act's mechanism for setting off mutual debts, credits and other dealings under s 553C and the judge ought to have applied a construction of the State and Commonwealth Acts which enabled them to operate side by side.[6]

7 Mr Fox, in the affidavit mentioned, describes Payment Claim 19A as including an amount of $2,126,408.25 in respect of variation orders 'VO1' to 'VO11'. This sum

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4 In particular, his Honour held that there was an inconsistency between s 553C of the Commonwealth Act and s 16(2)(a)(i) and s 16(4) of the State Act.

5 Ground of appeal 3(a).

6 Ground of appeal 3(b).

includes an amount not previously claimed in respect of variation orders 'VO5' to 'VO11' which Façade claims was either due or related to work performed before Façade had finished working at the site.[7]

8 The letter from Multiplex delivered in response (PEF-2) denied that Payment Claim 19A is a valid claim but without prejudice enclosed a payment schedule including 'Schedule 4 — Other Deductions'. Schedule 4 includes 8 items with a total gross amount of $12,271,552.50. It includes an amount for works not performed to required standard (item 2) and not accepted by Multiplex, amounts for costs incurred associated with Façade rectifying its defective work, and an item for liquidated damages at the sub-contract rate to the date of Practical Completion under the head contract (item 7). Mr Fox swears that sch 4 consists of items in respect of which Multiplex asserts a right of set-off of its costs to complete the sub-contract works and liquidated damages.[8]

9 Façade seeks leave to rely on PEF-1 and PEF-2 pursuant to r 64.13 and r 64.36 of the *Supreme Court (General Civil Procedure) Rules 2005*. Rule 64.13 provides that:

> **64.13 Further evidence in application for leave to appeal or appeal**
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> (1) Unless the Court of Appeal otherwise orders, in an application for leave to appeal or an appeal, oral evidence shall not be adduced and evidence which was not before the court or tribunal whose decision is sought to be appealed or is being appealed shall not be relied upon.
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> (2) A party may apply for the Court of Appeal to receive oral evidence or further evidence, as the case may be.
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> (3) The application shall—
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> (a) be in accordance with Form 64B;
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> (b) be filed and served at least 28 days before the hearing of the application or the appeal;
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> (c) be accompanied by an affidavit stating—
>
> (i) briefly but specifically, the facts on which the party relies;

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7 Affidavit sworn by Philip Eric Fox sworn 14 May 2015, [5].

8 Ibid [6].

(ii) the grounds of the application for leave to appeal or the appeal to which the application relates;

(iii) the evidence that the party wants the Court of Appeal to receive; and

(iv) why the evidence was not adduced in the court or tribunal the decision of which is the subject of the application or appeal; and

(d) be accompanied by any additional document required by any applicable practice direction to be filed at the time of commencing the application.

(4) Where an application is made under paragraph (2), any other party who seeks to adduce further evidence —

(a) shall make an application in accordance with Form 64B; and

(b) shall file and serve the application and an affidavit addressing the requirements of this Rule at least 21 days before the hearing of the application for leave to appeal or appeal.

10 Rule 64.36 relevantly provides:

64.36 Powers of the Court of Appeal

…

(3) Subject to Rule 64.13, the Court of Appeal has power to receive further evidence upon questions of fact —

(a) by oral examination in court;

(b) by affidavit; or

(c) by deposition taken before an examiner.

11 In *Foody v Horewood*[9] Chernov JA noted that the Court of Appeal, in the exercise of its general and wide discretion to receive further evidence, is concerned to reconcile the demands of justice, on the one hand, and the need for finality of litigation, on the other. He further observed that different considerations arise depending on whether the further evidence relates to matters in existence *before* (or at the time of) the trial, or to matters that arose *after* the trial.[10] He noted that

the discretion to receive evidence of events *after* trial is exercised only rarely,

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9 [2007] VSCA 130.

10 Ibid [60].

> and generally only if it bears upon matters falling within the field or area of uncertainty, in respect of which the trial court had made an estimate on an assumption that was then common to both parties and that that assumption has clearly been falsified by subsequent events, such that the refusal to admit the further evidence would affront common sense.[11]

12 In relation to evidence relevant to matters arising *after* trial, Chernov JA quoted Lord Wilberforce's speech in *Mulholland v Mitchell*,[12] noting that the test was not exhaustive but was largely one of discretion and degree:

> I do not think that, in the end, much more can usefully be said than, in the words of my noble and learned friend, Lord Pearson, that the matter is one of discretion and degree. Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too it may be expected that the Courts will allow fresh evidence where to refuse it would affront common sense, or a sense of justice. All these are only non-exhaustive indications; the application of them, and their like, must be left to the Court of Appeal. The exceptional character of cases in which fresh evidence is allowed is fully recognised by that court.[13]

13 Façade submits by reference to r 64.13(3)(c)(iv) that the reason the further evidence could not have been adduced at the trial was because it did not then exist. The hearing before Vickery J took place on 10 and 11 February 2015. His Honour delivered his judgment on 24 February 2015. Both PEF-1 and PEF-2 came into existence after the hearing below. PEF-1 was created between the hearing and the delivery of judgment.

14 Façade argues that it is plainly relevant to the issues raised and it would be contrary to logic and common sense to refuse leave to adduce the evidence, and possibly be a source of injustice for the Court to consider the constitutional issues having regard to a hypothetical right to set-off and not to its actual exercise by

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11 [2007] VSCA 130, [66] (emphasis in original). See also *Mobilio v Balliotis* [1998] 3 VR 833, 852 (Brooking JA) ('*Mobilio*').

12 [1971] AC 666.

13 *Foody v Horewood* [2007] VSCA 130, [62], quoting Lord Wilberforce at [1971] AC 666, 679-80 (citations omitted). See also *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284, 296 (Gleeson CJ with whom Meagher and Handley JJA agreed) ('*Doherty*').

Multiplex. It is not seeking to rely on the further evidence to call into question any factual findings of the judge below.[14]

15 Mr Upjohn QC properly conceded that the further evidence does not demonstrate the falsity of a common assumption made at trial. Rather, he submits that it shows in concrete form the manner in which Multiplex now seeks to assert its right of set-off.

16 Multiplex submits that Façade's application is fundamentally misconceived and must fail. It contends that neither PEF-1 nor PEF-2 has any bearing on or relevance to the issues sought to be raised by Façade on the appeal. Mr Roberts QC relied particularly on [67] and [69] of his Honour's judgment to show that Multiplex had provided his Honour with a detailed substantiation of the quantum claimed and that Multiplex remained well within time to commence its counterclaim.

17 Multiplex's written submissions refer to statements of principle set out in *Clark v Stingel*[15] where the Court said that leave to introduce fresh evidence under r 64.22(3)[16] would only be given if:

- By the exercise of reasonable diligence such evidence could not have been discovered in time to be used in the original trial.
- It is reasonably clear that if the evidence had been available at the trial, and had been adduced, an opposite result would have been produced.
- The evidence proposed to be adduced is reasonably credible.[17]

18 With respect to the second of these indicia, Multiplex submits that even if the

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14 Façade thus seeks to distinguish *Doherty* and *Mobilio*.

15 [2007] VSCA 292.

16 Rule 64.22(3) has been repealed and replaced by r 64.13. Although the wording is not the same, for present purposes the statements made in respect of the latter still apply to the extent that they are relevant.

17 *Clark v Stingel* [2007] VSCA 292, [25]. See also *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2013] VSCA 237, [522]-[523]; *Merhi v Ford Motor Company of Australia Ltd* [2014] VSCA 328, [121].

judge had PEF-1 and PEF-2 before him, it is not reasonably clear that, if adduced, the further evidence would have produced an opposite result. Façade has therefore failed to establish that this application has the 'exceptional character'[18] to warrant leave being granted for further evidence to be adduced.

19 Multiplex submits that the issues that would be before the Court on any appeal (if leave is granted) are essentially matters of statutory construction, as acknowledged by Façade, and that the exchange evidenced by PEF-1 and PEF-2 is irrelevant to that question.

20 In my view, it is this final submission of Multiplex that has real merit. In the first place, Payment Claim 19A post-dated the hearing before the trial judge and, self-evidently, the legal effect of the exchange with respect to it formed no part of the matters in dispute. In so far as it is sought to rely upon the exchange in support of the constitutional argument, the Court that is to hear and determine the application for leave to appeal, and any appeal, will focus upon the scope and operation of s 16 of the State Act and s 553C of the Commonwealth Act to determine if there is an inconsistency between them for the purposes of s 109 of the Constitution. That issue will be determined by the applicable principles of law, both as to construction and as to constitutional validity. In my view, no assistance could be gained by reference to an asserted set-off by Multiplex in sch 4 of PEF-2 that amounts, at most, to evidence of an opinion by Multiplex that it enjoys such a right without any clear identification of the basis of that right. The expression of such an opinion in PEF-2 has no probative value on the constitutional issue. Nor does PEF-1, which is relevant only because it elicited the response.

21 I am not persuaded that the further evidence satisfies the test of exceptional circumstances, nor, as properly conceded, that it falsifies a common assumption upon which the proceedings were based. I am also not persuaded that the refusal to admit the further evidence in the application for leave to appeal, or any appeal,

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18 See para [12] above.

would be an affront to common sense or a sense of justice. Moreover, in my view, there is no reason to think that if the evidence had been available at the trial, and had been adduced, an opposite result would have been produced.

22 I would refuse the application for leave to adduce further evidence.

McLEISH JA:

23 I would also refuse the application for the reasons given by Tate JA.

TATE JA:

24 The proposed order with respect to the application by Façade is that the application to adduce further evidence is dismissed.

25 (Discussion re costs.)

26 With respect to the application by Façade, the orders of the Court will be:

(1) The application to adduce further evidence is dismissed.

(2) The applicant (Façade) to pay the respondent (Multiplex) costs of the application save for the costs of the appearance today.

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