Federal Court of Australia

 Sunshine Energy Australia Pty Ltd v Youssef [2023] FCA 549

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| File number(s): | QUD 106 of 2023 |
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| Judgment of: | **SARAH C DERRINGTON J** |
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| Date of judgment: | 29 May 2023 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – interlocutory application seeking leave to claim same relief in new proceedings pursuant to r 39.03(1)(b) of the *Federal Court Rules 2011* (Cth) – where previous proceedings were dismissed for failure to comply with security for costs order – where there has been no material change in circumstances – where the applicant remains impecunious – where applicant has outstanding costs orders – where respondent suffers prejudice – whether applicant should be shut out from making a proper claim – where new application for same relief may be brought in different circumstances – application dismissed  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 56(4)*Federal Court Rules* *2011* (Cth) r 39.03  |
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| Cases cited: | *Idoport Pty Limited v National Australia Bank Ltd* [2002] NSWSC 18*Skinner v Commonwealth of Australia* [2012] FCA 1194*Sunshine Energy Australia Pty Ltd v Youssef* [2023] FCA 189 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 33 |
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| Date of hearing: | 29 May 2023  |
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| Counsel for the Applicants: | Mr B Hall  |
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| Solicitor for the Applicants: | Niren Raj Law Pty Ltd |
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| Counsel for the First Respondent: | Mr N Furlan |
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| Solicitor for the First Respondent: | Watson Webb |
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| Counsel for the Fifth Respondent: | Ms A Nicholas |
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| Solicitor for the Fifth Respondent: | Norton Rose Fulbright  |
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ORDERS

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|  | QUD 106 of 2023 |
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| BETWEEN: | SUNSHINE ENERGY AUSTRALIA PTY LTD (ACN 617 880 752)First Applicant  |
|  | AUSTRALIA ENERGY GROUP PTY LTD (ACN 627 978 689)Second Applicant  |
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| AND: | ANTHONY JOHN YOUSSEFFirst Respondent  |
|  | KEPPEL RENEWABLE ENERGY PTY LTD COMPANY REGISTRATION NUMBER 201907077RSecond Respondent |
|  | KEPPEL RENEWABLE ENERGY AUSTRALIA PTY LTD ACN 659 726 468Third Respondent |
|  | KRE ANCHORAGE PTE LTDFourth Respondent  |
|  | HARLIN SOLAR PTY LTD ACN 643 351 044Fifth Respondent  |

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| order made by: | SARAH C DERRINGTON J |
| DATE OF ORDER: | 29 May 2023 |

THE COURT ORDERS THAT:

1. The Interlocutory Application filed 3 May 2023 be dismissed.
2. The Applicants pay the First Respondent’s costs in proceeding QUD 183 of 2022 in the lump sum of $138,000.00.
3. The Applicants pay the First Respondent’s costs of and incidental to the Interlocutory Application.
4. The Applicants pay the Fifth Respondent’s costs in proceeding QUD 183 of 2022 in the lump sum of $140,599.71.
5. The Applicants be granted leave to claim the same relief as sought in this proceeding and QUD 183 of 2022 upon the conditions that:
	1. they have paid the sums as ordered in Orders 2, 3 and 4 above prior to the date of filing any new proceeding; and
	2. they provide security for the costs of each of the First and Fifth Respondents’ costs in the sums of $350,000.00 and $337,000.00 respectively by payment of funds into Court or by providing a bank guarantee in a form acceptable to the Court on the date of filing any new proceeding.

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

REASONS FOR JUDGMENT

(Revised from the transcript)

SARAH C DERRINGTON J:

1. The matter for determination is whether the Court should grant leave to the applicants (**Sunshine Energy**) pursuant to r 39.03(1)(b) of the *Federal Court* ***Rules*** *2011* (Cth) to claim against the first and fifth respondents (**Mr Youssef** and **Harlin** Solar Pty Ltd respectively, and collectively **the respondents**) in this proceeding for the same relief as claimed in QUD 183 of 2022 (**Former Proceedings**).
2. On 9 March 2023, I dismissed the Former Proceedings under s 56(4) of the *Federal Court of Australia Act 1976* (Cth) (***FCA******Act***) for Sunshine Energy’s failure to comply with a security for costs order: *Sunshine Energy Australia Pty Ltd v Youssef* [2023] FCA 189 (***Sunshine Energy***).
3. On 22 March 2023, Sunshine Energy filed an originating application and statement of claim in the present proceedings, which are substantially in the same form, and claim the same breaches, as in the Former Proceedings. The matter was listed for first case management hearing on 20 April 2023, at which point Sunshine Energy sought and was granted orders to file and serve an interlocutory application to seek leave to claim the same relief in a new proceeding.
4. Mr Youssef and Harlin oppose the application on five grounds:
5. the continuing, and admitted, impecuniosity of the Sunshine Energy;
6. the unlikelihood of security being provided if leave were to be granted;
7. Sunshine Energy’s continuing non-compliance with orders of the Court;
8. the relative weakness of the claim as pleaded;
9. the prejudice sustained by each of Mr Youssef and Harlin.
10. In support of its interlocutory application filed on 3 May 2023 seeking leave to commence proceedings, Sunshine Energy relied on an affidavit of Mr Chi Man Li filed on 3 May 2023 (**CML-Aff**) and three affidavits of Mr Niren Raj filed on 16 May 2023 (**First NR-Aff**), 26 May 2023 (**Second NR-Aff**), and 29 May 2023 (**Third NR-Aff**).

## Legislative framework

1. Rule 39.03 of the *Rules* provides:

**Dismissal of proceedings and stay of further proceedings**

1. If the Court makes an order dismissing a proceeding or part of a proceeding, the applicant may apply to the Court:

(a) for an order that the dismissal be without prejudice to any right of the applicant to bring fresh proceedings; or

(b) *for leave to claim the same relief in a new proceeding*.

(2) If:

(a) a proceeding has been dismissed in whole or in part; and

(b) the Court has ordered the applicant to pay another party’s (the second party’s) costs;

the second party may apply to the Court for an order staying any further proceedings brought by the applicant against the second party on the same or substantially the same cause of action or relief, until the costs have been paid.

(Emphasis added.)

1. As the parties noted, there is a paucity of case law on the interpretation of this rule, but I was referred to the decision of Flick J in *Skinner v Commonwealth of Australia* [2012] FCA 1194at [44] where his Honour held:

The discretion conferred by r 39.03(1) is not confined by criteria which are expressly stated. It is a discretion, it is considered, which should be exercised by reference primarily to the competing rights of the parties. In circumstances where the dismissal of a proceeding occurs at the outset and in advance of any defence or any other step in the proceeding having been taken, it may be difficult for a respondent to point to any prejudice which would preclude the discretion being exercised in an applicant’s favour. Indeed, it may well be the case that in such circumstances irrevocable prejudice would be occasioned to an applicant if an order were not made permitting him to “*bring fresh proceedings*”.

1. Counsel for the respondents submitted the purpose of r 39.03(1) of the *Rules* is to act as a brake on the re-commencement of proceedings for the same relief against the same party absent any change in circumstances. Acceptance of that submission would import a criteria into r 39.03(1) that is not apparent on its face. Nevertheless, I accept that the absence of a change in circumstances *may* be relevant, as it is in this case, when balancing the competing rights of the parties and assessing the likely prejudice to all parties in the context of the reasons underpinning the dismissal of the Former Proceedings.
2. This is particularly so where, as was submitted by Sunshine Energy at the hearing in the Former Proceedings, and reiterated in the hearing of the interlocutory application in the present proceedings, no *res judicata* or issue estoppel arose consequent upon the dismissal of the Former Proceedings, nor that the proceeding is time barred: *Sunshine Energy* at [46]; *Idoport Pty Limited v National Australia Bank Ltd* [2002] NSWSC 18.
3. In the present circumstances, the Former Proceedings were dismissed for the failure to comply with an order for security costs that was materially in the same terms as the order now sought by Sunshine Energy to justify leave being granted, that is:

The applicants to provide security for the First Respondent’s costs by payment of funds into Court or by providing a bank guarantee in a form acceptable to the Queensland District Registrar, as follows:

1. $150,000 by 4pm on 26 June 2023; and
2. $200,000 by 4pm on the day that it is 3 business days after the date by which the Court order the Applicants to file and serve any affidavits of lay and/or expert witnesses in support of their proceedings.
3. Sunshine Energy also proposed an order that the applicants pay the sum of $66,000 to Harlin representing payment in full of Harlin’s costs of the Former Proceedings, the costs order having been made on 9 March 2023. It posited that the proceedings could be stayed pending the payment of the first tranche of security and the costs.

## The Respondents’ case

1. It is against that background that the respondents submit that the circumstances they now face in the present proceedings are materially the same, if not worse, than those they encountered in the Former Proceedings. In particular, the case as pleaded against the respondents remains essentially identical, security has not been provided and the likelihood of its being provided remains somewhat elusive, costs orders have not been met, and further costs have been incurred in the present proceedings.
2. Mr Yousseff relied on an affidavit of Mr Robert David Webb filed on 10 May 2023 (**Aff-RDW**). Harlin relied on three affidavits of Mr Joshua Henderson filed on 10 May 2023 (**First JH-Aff**), 25 May 2023, and 29 May 2023 (**Third JH-Aff**).

### Impecuniosity and security for costs

1. As to the first ground of opposition to leave being granted, it was accepted that Sunshine Energy is impecunious. As Sunshine Energy rightly submitted, impecuniosity is not a basis for shutting a plaintiff out of a legitimate claim. Nevertheless, in circumstances where Sunshine Energy concedes that it will be required to pay security in the present proceedings, and in circumstances where the amount of security contemplated already appears inadequate given the costs orders to date, its impecuniosity remains a factor to be weighed in the exercise of the discretion.
2. As to the second ground, the respondents submitted that it appears increasingly unlikely (as compared to the circumstances presented in the Former Proceedings) that Sunshine Energy will be able to provide security.
3. Sunshine Energy submitted, essentially, that it should have the benefit of the doubt given their proposed orders and the evidence provided by Mr Raj on Sunshine Energy’s steps to source funds.
4. Sunshine Energy sought orders to stay the proceedings until payment of $150,000 and $66,000 to Mr Youssef and Harlin is made in payment of the costs orders arising from *Sunshine Energy.* Sunshine Energy submits this proposed order negates the respondents’ concern of prejudice or of incurring further costs in the present proceedings and provides Sunshine Energy with one final opportunity to prosecute its case, and on the basis of the evidence.
5. Further, Sunshine Energy has proposed a self-executing order such that if the first tranche of security is not provided by 4pm on 26 June 2023, the proceedings are dismissed as against Mr Youssef. A similar self-executing order is proposed with respect to any failure to pay Harlin’s costs by the specified date.
6. Whilst at first blush there may appear to be little objection to granting Sunshine Energy an additional period of time to “get their house in order”, the respondents submitted that the time for so doing has passed. They ought to have brought the application for leave only once the security was in place and capacity to meet the costs orders had been evidenced. Neither occurred. As I observed in *Sunshine Energy* at [47], “the applicants have had sufficient time and notice to organise their financial affairs to enable them to comply with the order for security for costs. They have not done so, nor have they provided any reasonable or plausible explanation for their delay”. That observation remains apposite.
7. Indeed, Sunshine Energy’s prospects of obtaining security appear to have deteriorated. At the time of the hearing in *Sunshine Energy*, Mr Li deposed to seeking security from HSBC. Some details of that evidence is extracted in *Sunshine Energy* at [18]-[21]. On the hearing of this application, Mr Raj, solicitor for Sunshine Energy, deposed to his being aware of two funding arrangements being arranged in relation to the security for costs ordered to be paid to Mr Youssef and Harlin in *Sunshine Energy* and any anticipated costs order in the present proceedings. He deposes (Third NR-Aff at [6] – [8]):

Both funding arrangements will be available within the 30 days as set out in my earlier Affidavit. I am aware of this because I have spoken to the source of the Funder, Umesh Dawra and confirmed the Funding will be in place within the 28 days set out in my earlier Affidavit.

I have spoken to a Umesh Dawra who resides [redacted] in the State of New South Wales and he advises me and I verily believe he is in India, *sourcing the funding.*

Annexed hereto and marked NR1 is a true copy of the Driver Licence and Passport of Umesh Dawra.

(Emphasis added.)

1. In his affidavit, affirmed the previous day, Mr Raj deposed to having been informed by Mr Li, and believing, that (Second NR-Aff at [6]):

[h]e has taken steps to have funding for the security sum previously ordered in favour of the First Respondent ($350,000) to be available and *this has been confirmed as [he] has access to additional funding to fund any security* in favour of the other Respondents (should application be made). I am further informed by Mr Li and verily believe that these funding arrangements will be in place in accordance with any Order of this Honourable Court, being 28 days from the date of the Order.

(Emphasis added.)

1. It should also be observed that on 30 March 2023, Mr Raj wrote to the solicitors for Mr Youssef informing them that “Our clients *will be able to provide security* for your client’s costs in proceeding no. QUD106/23 subject only to an appropriate form of order being agreed and the amount of security to be provided”. (Emphasis added.)
2. As is evident, Sunshine Energy has not secured funding to provide security. This is despite assurances since January 2023 that security would be forthcoming. As has already been observed, Sunshine Energy was initially pursing a bank guarantee from HSBC. Such was not forthcoming and no explanation for that has been proffered. Subsequently, Sunshine Energy, through its solicitor, has indicated variously that it “will be able to provide security”, and that “access to additional funding to fund any security” has been confirmed. This relatively optimistic set of representations is apparently directly contradicted by Mr Raj’s most recent affidavit, filed this morning, which makes clear funding is still being sought by a person whose connection to Sunshine Energy and whose means of sourcing the funding are not disclosed. Nor is there any evidence as to the form any security sourced by the funder would be likely to take.

### Non-compliance and weakness of applicants’ case

1. The respondents submitted that it is relevant to the exercise of the discretion as to whether to grant leave that Sunshine Energy have persisted in non-compliance with the *Rules* despite the admonishment expressed in *Sunshine Energy* at [44], and despite Mr Li’s assurances to the Court on the hearing of the Former Proceedings: at *Sunshine Energy* at [43]. As concerns the present proceedings, Sunshine Energy failed to obtain leave as required by r 39.03 of the *Rules* before commencing the proceedings - a matter which has been explained by its solicitors and on which I place little weight in the circumstances. Nevertheless, Sunshine Energy has also failed to file a Genuine Steps Statement in accordance with r 8.02 of the *Rules* in the present proceedings and failed to comply with costs orders in the Former Proceedings. I accept that Sunshine Energy seeks to have one set of orders taxed, but has taken no steps to do so.
2. Sunshine Energy has also persisted with refiling a statement of claim with serious deficiencies, as had been identified by an application on 14 November 2022 to strike out parts of the statement of claim. That fact raises the question of the merits of claim. The respondents did not suggest that this was an appropriate occasion to embark on a close examination of the merits of the claim but some of the deficiencies, it was submitted, ought to be taken into account when considering whether leave should be granted. In particular, there was no objection raised by counsel for Sunshine Energy to Mr Youssef’s submission that, at the time when the alleged breach of fiduciary duty occurred, Mr Youssef was not in fact a director of Sunshine Energy. Further, as to the allegation of breach of confidence, it also seemed to be accepted that the relevant confidential information was publicly available, being contained in a development approval.
3. Mr Li has once again sought to assure the Court that he will not revert to recalcitrance and “will ensure that the Applicants meet all requirements under the Court Rules and also comply with all Court orders in a timely manner”: CML-Aff at [16]. It is difficult to place any weight on this assurance given the history of the matter.

### Prejudice

1. As to the prejudice to the respondents, Mr Youssef submitted that an individual ought not to be vexed by the same proceedings all over again by parties that have not paid his costs of the Former Proceedings, are hopelessly impecunious, and are unable or unwilling to comply with Court orders or the *Rules* and to prosecute their claims consistently with the dictates of ss 37M-37N of the *FCA Act*. Mr Youssef submitted further that his costs of the present proceedings are likely to be exacerbated by what he submits is the unreasonable conduct of Sunshine Energy in serving over 4000 pages of material on Mr Youssef’s solicitors in support of this application, none of which appear to have any relevance to the application: Aff-RDW at [25]-[27]. I observe that this material was not put before the Court by Sunshine Energy in support of its application and so I infer it was not in fact relevant to the application.
2. The prejudice to Mr Youssef was explained in *Sunshine Energy* at [37]-[40]. I do not propose to repeat those observations. There is no material change to the nature of the prejudice suffered by Mr Youssef.
3. As to Harlin, it was submitted, and I accept, that the reputational risk to a company with a claim against it of $66.5 million is significant. I also accept the evidence as to the negative of impact of the litigation on Harlin’s engagement with financiers, off-takers and contractors for the Project, and that it is impeding communication between Harlin and Somerset Regional Council: First JH-Aff at [34]-[38] and [39]-[42].
4. As to the prejudice to Sunshine Energy in not granting leave, I am acutely aware that it would be a grave matter to preclude Sunshine Energy from bringing what it maintains are proper and significant claims against the respondents. I am equally concerned, however, that Sunshine Energy has had every opportunity to “put its house in order” before commencing the present proceedings. It did not. It has not complied with previous orders, nor has it complied with the *Rules* in commencing these proceedings. Mr Youssef and Harlin continue to suffer the prejudice of defending a $66.5 million claim against them in circumstances where the pleading is deficient and the manner in which the proceedings are being conducted is beset with unnecessary processes which are increasing the irrecoverable costs of the respondents. Further, in circumstances where Sunshine Energy has not provided the security which it was ordered to provide, and which it accepts must be forthcoming, and where no reasonable prospect of that security ever being provided has been established, I am not persuaded that leave should be granted to Sunshine Energy to claim in these proceedings the same relief claimed against Mr Youssef and Harlin in the Former Proceedings.
5. Nevertheless, I do not consider it appropriate that Sunshine Energy be shut out for all time from making a proper claim.

## Disposition

1. The Interlocutory Application is dismissed. Sunshine Energy is to pay Mr Youssef’s costs of the Former Proceedings in a lump sum of $138,000. Sunshine Energy to is to pay Harlin’s costs in a lump sum of $140,599.71 being the sum of $66,000 in respect of the Former proceedings and the balance in respect of these proceedings.
2. I will grant Sunshine Energy leave to claim the same relief in new proceedings upon the condition that Sunshine Energy provide security for the costs of each of Mr Youssef’s and Harlin’s costs in the sums of $350,000 and $337,800 respectively by payment of funds into Court or by providing a bank guarantee in a form acceptable to the Queensland District Registrar and on condition of payment of Mr Youssef’s and Harlin’s costs as ordered above.

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| I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Sarah C Derrington. |

Associate:

Dated: 9 June 2023