Federal Court of Australia

Stasiuk v Monster Energy Au Pty Ltd (No 2) [2024] FCA 237

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| File number: |  |
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| Judgment of: | **NICHOLAS J** |
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| Date of judgment: | 11 March 2024 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for order dismissing proceeding on account of applicant’s non-compliance with orders – where applicant resident outside Australia – where continuing non-compliance with orders not explained  Held: self-executing order for dismissal pursuant to r 5.21 of the *Federal Court Rules 2011* (Cth) made |
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| Legislation: | *Federal Court Rules 2011* (Cth) r 5.21 and r 11.01 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 17 |
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| Date of hearing: | 11 March 2024 |
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| Counsel for the Applicant: | The applicant appeared in person via audio-link |
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| Counsel for the Respondents: | Ms F St John |
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| Solicitor for the Respondents: | King & Wood Mallesons |

ORDERS

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|  | | NSD 317 of 2023 |
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| BETWEEN: | JOSEPH STASIUK  Applicant | |
| AND: | MONSTER ENERGY AU PTY LTD (ACN 132 571 638)  First Respondent  MONSTER ENERGY COMPANY  Second Respondent | |

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| order made by: | NICHOLAS J |
| DATE OF ORDER: | 11 March 2024 |

THE COURT ORDERS THAT:

1. The originating application be dismissed pursuant to r 5.21 of the *Federal Court Rules 2011* (Cth) (“FCR”) if within 14 days the applicant fails to:
2. provide further security for costs in the amount of $350,000 as was required by order 1 made on 5 February 2024 (“the 5 February orders”);
3. file and serve a notice of address for service in accordance with r 11.01 of the FCR as was required by order 2 of the 5 February orders; and
4. file and serve his affidavit evidence in chief in relation to infringement as was required by order 7 made on 8 August 2023.
5. The respondents’ solicitors have leave to withdraw from Court the amount of $50,000 (plus interest if applicable) previously paid into Court by the applicant on account of costs incurred by the respondents to date.
6. The applicant pay the respondents’ costs of the interlocutory application filed 14 February 2024.
7. Each party be granted liberty to apply on 3 days’ notice.

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

REASONS FOR JUDGMENT

(Revised from Transcript)

NICHOLAS J:

1. The applicant in this matter is a Canadian citizen who resides in the Cayman Islands. He commenced this proceeding for patent infringement after his patent expired, so the relief claimed by him is declaratory and pecuniary. On 27 July 2023, the applicant was ordered to provide security for costs in the amount of $50,000 in respect of the respondents’ costs up to the close of proceeding. Pursuant to that order, the applicant paid $50,000 into Court.
2. On 8 August 2023 an order was made requiring the respondents to provide a product and process description in relation to their product, which they did. On the same day an order was made requiring the applicant to file and serve his evidence-in-chief by 8 November 2023.
3. On 1 September 2023, the applicant’s solicitors filed a notice of ceasing to act. On 5 September 2023, an order was made requiring the applicant to file a notice of address for service within seven days, and leave was granted to the respondents to apply for dismissal of the proceeding if he did not do so. On the same day, new solicitors were appointed by the applicant and a notice of acting filed by them. On 18 December 2023, those solicitors filed a notice of ceasing to act.
4. On 13 November 2023, I made an order extending the time within which the applicant could file his evidence-in-chief to 25 January 2024. No evidence-in-chief has been filed by the applicant and apart from reference made by him in his submissions to the Court today to some without prejudice settlement negotiations, there is no explanation as to why that order has not been complied with.
5. On 8 December 2023, the respondents filed another application for security for costs. On 19 December 2023, the applicant appeared via video-link and told the Court that arrangements were being made for another firm of solicitors to act on his behalf. He was ordered to file and serve a notice of address for service by 2 January 2024. That did not occur. On 3 January 2024, the applicant filed a notice of address for service specifying his address in the Cayman Islands as his address for service. The notice stated that it was filed on a temporary basis “pending engagement of counsel”. It is clear the notice did not comply with r 11.01 of the *Federal Court Rules 2011* (Cth) (“FCR”) in that it did not specify a place for service within Australia.
6. The matter came back before me on 5 February 2024 for the hearing of the second application for security for costs. Although the applicant was required to file any affidavit evidence to be relied on in respect of that application by 18 January 2024, nothing was filed and the hearing of the application proceeded without him having filed or served any evidence in opposition to the application.
7. The applicant appeared at the hearing of the security for costs application by video-link, and sought an adjournment. The adjournment application was refused and the applicant was ordered to provide security for costs in the amount of $350,000 by 26 February 2024. He was also ordered to file by 12 February 2024 a notice of address for service that complied with r 11.01 of the FCR. The respondents were given leave to apply for an order for dismissal if the applicant did not comply with either of those orders. He was also ordered to pay the respondents’ costs of the application for security for costs.
8. The respondents now apply for an order dismissing the proceeding on account of the applicant’s failure to comply with the Court’s previous orders.
9. As at today’s date the applicant has not filed his evidence-in-chief as required by the order of the Court made on 8 August 2023, as varied by the order of 13 November 2023, nor has he provided security in accordance with the order made on 5 February 2024. The applicant also has not filed a notice of address for service which complies with r 11.01 of the FCR, a matter of significance in circumstances where he resides in the Cayman Islands and, apparently, has no assets within the jurisdiction.
10. There is no suggestion that the applicant has not had more than adequate notice of today’s application and that the respondents would move for dismissal of the proceeding by reason of his non-compliance with the Court’s previous orders. The applicant told me he is hopeful that he may be able to settle the proceeding with the respondents during the course of the next 14 days. There is a dispute, which I do not propose to resolve, as to the status of the without prejudice settlement negotiations to which the applicant referred in the course of his submissions.
11. The applicant’s failure to comply with the orders that have been made in relation to the filing of his evidence, the order requiring him to file a proper notice of address for service, and the most recent order for security for costs is not explained by any evidence. I regard the breaches of the orders that have been made as significant. They tend to suggest that the applicant has no serious intention to prosecute the proceeding or to comply with the Court’s orders except on his own terms.
12. I am mindful that an order for dismissal would very likely preclude the applicant from bringing another proceeding against the respondents for the same relief and, in that respect, it may have a significant effect on his rights. He informed me that he needs a further 14 days. Precisely what he seeks to achieve in those 14 days aside from a possible settlement of the proceeding with the respondents is not at all clear to me. He did not indicate to me, at least not in any clear terms, that he is willing and able to comply with the orders previously made if the proceeding is not settled.
13. It is apparent that the security for costs previously provided by the applicant in the amount of $50,000 will have been exhausted some time ago given the costs that have been incurred by the respondents since the proceeding was commenced. The respondents are in the invidious position where costs that they continue to incur in seeking to compel the applicant to comply with orders previously made may not be recoverable in circumstances where the applicant is a resident of the Cayman Islands and has no assets in this jurisdiction.
14. In the circumstances I will make a self-executing order pursuant to r 5.21 of the FCR providing for the dismissal of the proceeding should the applicant not comply with the various orders of which the applicant remains in breach within 14 days.
15. The applicant must pay the respondents’ costs of the interlocutory application filed 14 February 2024.
16. I will also make an order (which the applicant did not oppose) granting the respondents leave to withdraw from Court the amount of $50,000 (plus any interest) previously paid into Court by the applicant on account of costs already incurred by them, some proportion of which is already the subject of a costs order made in their favour.
17. Orders accordingly.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Nicholas. |

Associate:

Dated: 13 March 2024