

CANADA / JUDGMENT

First Majestic Silver Corp. v. Davila

2014 BCCA 11

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 11 First Majestic Silver Corp. v. Davila

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

First Majestic Silver Corp. v. Davila,

2014 BCCA 11

Date: 20140113

Dockets: CA041279; CA041285

Docket No.: CA041279

Between:

First Majestic Silver Corp.,

First Silver Reserve Inc., and

Minera El Pilon, S.A. de C.V.

Respondents

(Plaintiffs)

And

Hector Davila Santos and

Minerales y Minas Mexicanas, S.A. de C.V.

Appellants

(Defendants)

- and -

Docket No.: CA041285

Between:

First Majestic Silver Corp.

Appellant

(Plaintiff)

And

Hector Davila Santos and

Minerales y Minas Mexicanas, S.A. de C.V.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Neilson

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 13, 2013 (First Majestic Silver Corp. v. Davila, 2013 BCSC 1704, Vancouver Docket No. S078106).

Counsel for First Majestic Silver Corp.

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M. Buhler

Place and Date of Hearing:

Vancouver, British Columbia

December 4, 2013

Further Submissions Received:

December 17 and 19, 2013

Place and Date of Judgment:

Vancouver, British Columbia

January 13, 2014

Summary:

Applications for leave to appeal the terms of a post-judgment Mareva injunction are dismissed. The situation is fluid and the Supreme Court is the proper venue for further variation proceedings. Neither party meets the criteria for granting leave to appeal.

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] Both the plaintiffs (in file CA041285) and the defendants (in file CA041279) in the action below apply for leave to appeal the terms of a worldwide post-judgment Mareva injunction imposed against the defendants on September 13, 2013. For the following reasons, I would dismiss both applications for leave.
- [2] The original dispute between the parties involved proprietary rights over the Bolaños mining property in Mexico, operated by the Mexican defendants, Mr. H. D. Santos and Minerales Y Minas Mexicanas, S.A. de C.V. ("MMM"). At trial, the plaintiffs' primary allegation was that, by acquiring the Bolaños property, Mr. H. D. Santos, the former president, CEO, and director of the plaintiff First Silver Reserve Inc., appropriated a corporate opportunity that belonged to First Silver and breached his fiduciary duty to that company. The plaintiff First Majestic Silver Corp. is the parent company and assignee of First Silver's claim.
- [3] On April 24, 2013, following a 60-day trial, Mr. Justice Myers granted judgment for the plaintiffs. As they had elected damages in lieu of a proprietary remedy, he awarded equitable compensation of USD 93.84 million for the lost opportunity: 2013 BCSC 717.
- [4] On May 23, 2013, the defendants filed a notice of appeal, and on June 10, 2013, the plaintiffs filed a cross appeal. The appeal precludes execution proceedings in Mexico, which is not a reciprocating state.
- [5] The plaintiffs scheduled an examination in aid of execution of Mr. H.D. Santos in Vancouver for June 11 and 12, 2013, but he failed to attend.
- [6] On June 13, 2013, the plaintiffs brought an application before Madam Justice Dickson for a worldwide post-judgment Mareva injunction against the defendants. Dickson J. issued a status quo interim order at the hearing, and delivered reasons on June 24, 2013 granting the injunction: 2013 BCSC 1209. She found that there was "a strong prima facie case and a real risk of irreparable harm" if the injunction was not granted, as the defendants did not have sufficient assets in British Columbia to satisfy the judgment and the Bolaños mine was their only other known asset. She also noted there was uncontradicted evidence that the defendants might sell the mine before execution could be achieved. She rejected Mr. H. D. Santos' explanation for his failure to appear at the examination in aid of execution, and found the balance of convenience tipped in favour of the plaintiffs, as there was no evidence the defendants would be prejudiced by the injunction.

- [7] On June 25, 2013, Myers J. issued supplementary reasons for judgment that included an order that CAD 14.85 million held in trust for the defendants by their British Columbia solicitors be paid to the plaintiffs in partial satisfaction of the judgment: 2013 BCSC 1126.
- [8] On June 27, 2013, Madam Justice D. Smith granted the plaintiffs' application in this Court for security for the trial judgment and ordered the defendants to post security of USD 79 million within 90 days, failing which the plaintiffs would be at liberty to apply for an order dismissing the defendants' appeal as abandoned: 2013 BCCA 312.
- [9] The parties were unable to settle the terms of Madam Justice Dickson's June 24 order, and appeared before her again on June 28, 2013 for that purpose. Their disagreement centred on the extent to which the defendants should be able to continue to operate the mine. The plaintiffs maintained that the caveat proposed by the defendants, which would permit the mine to operate "in the ordinary course of business" should not be included in the order as this could significantly diminish the value of the mine during what might be an extended appeal period. Dickson J. affirmed that her order was intended to provide security for the outstanding judgment, but held the defendants could operate the mine as long as they did not diminish its value beyond a de minimis level: 2013 BCSC 1212. She stated:
- [9] Despite counsel's able submissions, I am not persuaded the reference to the "ordinary course of business" should be deleted from the June 24 Order, at least at this juncture. In my view, it would be unduly cumbersome and inconvenient to require the defendants to seek a variation in order to permit the conduct of mining operations of any kind. Although I accept there is a theoretical possibility the injunction could continue well into the future, that is by no means certain or even a substantial likelihood. If, however, the plaintiffs' concerns are borne out and the defendants operate the mine in a manner that diminishes its value beyond the de minimis level an application to vary the June 24 Order can be made.
- [10] Madam Justice Dickson's order, to which I will refer as the "Initial Order", ultimately included these terms:
2. Until further order of this court, each of the defendants ... shall not dispose of, pledge, mortgage, transfer, diminish (save and except in the ordinary course of business) or assign the ownership and/or value of the mineral concessions, surface land and infrastructure known collectively as the "Bolaños Mine", and which was the subject matter in part of this action (the "Proposed Disposition") save and except that these prohibitions shall not apply if as part of any such Proposed Disposition or otherwise the sum of US \$79 million is deposited in the trust account of Church & Company, counsel for the defendants, and not released therefrom until further order of the court or pursuant to a written agreement between the parties.
 3. Insofar as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement, unless they are: (a) either of the defendants or (b) persons who

are subject to the jurisdiction of this Court and (i) have been given written notice of this order at their residence or place of business within British Columbia, and (ii) are able to prevent acts or omissions outside British Columbia which assist in the breach of the terms of this Order.

4. Any of the parties hereto and any other person affected by this Order are at liberty to apply to this Court for further directions.

[11] On September 4, 2013, the plaintiffs brought an application before Madam Justice Griffin to vary the Initial Order by removing the caveat, and adding terms requiring the defendants to pay any net cash flow generated by the mine to the plaintiffs' lawyers in trust, and to produce documents detailing mine production and net cash flow. In support, they presented new evidence suggesting the defendants were extracting as much as 800 tons per day (tpd) of ore from the Bolaños mine, which could deplete two of the mine's key veins in two years if the defendants are "high-grade mining" those veins. The defendants opposed the application. They argued the Court had no jurisdiction to make such orders against Mexican defendants. As well, they produced second-hand evidence, through an employee of their counsel's firm, that they were only mining 400 to 500 tpd, and contended this was not a change in circumstances that would justify variation of the Initial Order.

[12] On September 13, 2013, in reasons indexed at 2013 BCSC 1704, Griffin J. found circumstances had changed because there had been no evidence of the defendants' operations at the mine at the hearing before Madam Justice Dickson. Madam Justice Griffin affirmed the Court's intention was to preserve the value of the mine as security for the plaintiffs' judgment, and accepted the plaintiffs could suffer irreparable harm if operations at the mine diminish its value below the unpaid portion of the judgment. While she found the defendants' disclosure was "less than impressive", and the plaintiffs' new evidence raised concerns, she concluded the plaintiffs' evidence was speculative and insufficient to justify an order that all mining must cease. She therefore declined to remove the caveat, but as an "interim solution" she ordered the defendants to produce monthly reports about the mine's operations and limit MMM's mining to 500 tpd, its current level of operations according to the defendants' evidence:

[59] In my view the plaintiff's counsel has more work to do to organize a submission which fairly and objectively presents the evidence of the Mine's overall value, and the impact of estimated ongoing mining on that value, in order that the Court may fairly draw conclusions as to whether current mining operations in the short term do or do not materially impair the security available to satisfy the plaintiff's judgment.

- [60] I conclude that in weighing the prejudice to both sides there is an interim solution which will allow the Mine to be carried on at the level which the defendants say is their current level of operations, 400 to 500 tons of ore per day, but will provide security for the plaintiff's judgment and allow the plaintiff to come back to court for the further relief it seeks or alternative relief if it is not given sufficient information to provide confidence that its security is being protected.
- [61] I am going to grant the plaintiff an order requiring the defendants to provide information regarding the Mine's operations and cash flow generated from those operations, with liberty to the plaintiff to return to court once this information is provided, or on the defendants' failure to provide it. This is the type of information which the plaintiff would be entitled to in ordinary judgment enforcement proceedings and there is no prejudice in requiring the defendants to produce it now. Failure to produce this information will of course raise the possibility of an adverse inference being drawn against the defendants on any future application.
- [13] As to the defendants' argument that she did not have jurisdiction to make orders affecting the operations of a Mexican mine, Madam Justice Griffin observed that the personal defendant was a former director of the plaintiffs, which were BC companies, that both defendants had attorned to the jurisdiction of the courts of this province, and that they had not raised this issue in the proceedings before Madam Justice Dickson. She pointed out the Initial Order was an in personam order, as was her intended order, and both simply directed the defendants to do or refrain from doing certain actions. As well, she noted paragraph 3 of the Initial Order, which prevented it having effect beyond the Supreme Court's jurisdiction, would continue to apply.
- [14] Her order, to which I will refer as the "Variation Order", added these terms to the Initial Order:

In carrying on mining at the Bolaños Mine in the ordinary course of business, the defendants are required:

- (a) to limit mining operations such that they do not exceed mining of 500 tons of ore per day;
 - (b) to limit the nature of the mining operations such that they not engage in high grade mining;
 - (c) to preserve all Net Cash Flow, such preservation to be in a location and place disclosed to First Majestic
- [15] The Variation Order also required the defendants to provide the plaintiffs with monthly reports detailing the scale and type of mining activity at the Bolaños mine and the amount and location of its monthly net cash flow. The other terms of the Initial Order remained in place.

- [16] When the defendants failed to post security in compliance with the order of D. Smith J.A., the plaintiffs brought an application in this Court to have the appeal dismissed, which was granted on October 23, 2013: 2013 BCCA 458.
- [17] The defendants sought a review of the order dismissing their appeal under s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, which was heard on December 10, 2013. Judgment has been reserved.

The Issues Arising from the Applications for Leave

- [18] These applications raise four issues:
- (a) Should this Court refuse to hear the defendants' application for leave because they are in violation of the Variation Order?
 - (b) Should the defendants have leave to appeal the issue of whether Madam Justice Griffin lacked jurisdiction to make the orders in paras. 1(a) and (c) of the Variation Order?
 - (c) Should the defendants have leave to appeal the issue of whether Madam Justice Griffin erred by giving no, or insufficient, weight to the balance of convenience underlying the terms of the Initial Order?
 - (d) Should the plaintiffs have leave to appeal Madam Justice Griffin's decision to permit the caveat to remain in place?

Analysis

- [19] I begin with the preliminary issue of whether the defendants' application should be heard at all.
- [20] On the morning of this hearing, the plaintiffs sought to introduce an affidavit sworn by an employee of their counsel the day before, which exhibited MMM's monthly operation reports for the Bolaños mine for October 2013, which had just been delivered to plaintiffs' counsel, as well as reports for March to August, 2013, which had been delivered to them in October. The plaintiffs argue these reports clearly demonstrate that MMM is mining more than 500 tpd at the Bolaños mine and is therefore in violation of the Variation Order. They contend this Court should therefore refuse to hear the defendants' application for leave.
- [21] This Court's general practice is to refuse to hear an appeal if the appellant has failed to comply with the order under appeal without a good explanation. This is not a rule of universal application, however, as the Court retains a discretion to proceed in appropriate circumstances: *Mazara v. Mazara*, 2010 BCCA 287 at para. 8.
- [22] Because the affidavit was sworn and delivered to the defendants on the eve of this hearing, the parties were permitted to submit supplementary arguments as to its import. These suggest the records of the mine's operations exhibited to the affidavit may be selective, and invite the Court to make findings of fact and credibility on what may be an incomplete

evidentiary record. This Court is ill-equipped to undertake such an analysis. The proper venue for such submissions is the Supreme Court, particularly since the Variation Order specifically contemplates that the parties will return to that Court if information received from the defendants is unsatisfactory and indicates further variation should be considered. I am persuaded the affidavit should not be admitted, and does not preclude me from hearing the defendants' application for leave.

[23] I turn to the criteria for leave to appeal. These were summarized in *V.F. v. E.B.*, 2011 BCCA 238, at paras. 19-21:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

[24] The onus rests on the party seeking leave to establish these criteria. The over-riding concern will be whether granting leave will serve the interests of justice.

[25] This Court is reluctant to grant leave to appeal a discretionary order, unless the party seeking leave can establish the order was clearly wrong or creates serious injustice: *V.F.* at paras. 22-23.

[26] While the parties have brought separate applications for leave, their positions on items 1, 2, and 4 of the leave criteria are similar, and I will therefore address these in both applications at the same time. I will then consider the merits of each of the proposed grounds of appeal, and will conclude by considering whether the interests of justice favour granting leave to either applicant.

Is an appeal of significance to the practice?

[27] Both parties rely on the rarity and severity of post-judgment *Mareva* injunctions to support the contention that an appeal would be significant to the practice. The defendants say this Court to date has not considered such an order and so this would be a matter of first instance. As well, they assert that the question of whether a British Columbia court has jurisdiction to restrict the operations of a foreign business asset by virtue of a post-judgment injunction is a grey area and a novel issue of interest to the profession.

[28] The plaintiffs emphasize the differences between a *Mareva* injunction made prior to trial and one made after judgment has been rendered. They argue it is important for an appellate court to address this, and affirm that the judicial cautions associated with a pre-judgment order are no longer a concern here as there is no uncertainty as to the outcome of the action, and the injunction issues in favour of a judgment creditor.

[29] A Mareva injunction is in essence a discretionary order, based on the particular facts of each case. I am not persuaded an appeal of the Variation Order would produce a result of general interest to the practice.

Is an appeal of significance to the action?

[30] At this post-judgment stage, the present value of the Bolaños mine, its ongoing level of operations, and the disposition of its net profit are central issues for both parties. From the plaintiffs' perspective, the mine is the only known asset of the defendants, and there is contradictory evidence as to whether it is capable of satisfying the judgment. On the defendants' side, any restriction of MMM's mining operations and cash flow may jeopardize its facility and the jobs of its 390 workers.

[31] It is thus apparent that any change to paragraphs 1(a) and (c) of the Variation Order would be significant to the action. I am concerned, however, that a change arising from these contemplated appeals may not be significant, given the fluidity of the situation and the fact the Supreme Court represents a more efficacious means of accomplishing a variation. Madam Justice Griffin stated the Variation Order was an interim order, pending proper disclosure of production information by the defendants and greater certainty as to any appeal period. She anticipated a further application to vary in the Supreme Court once these matters had crystallized. As previously stated, that is the proper court to consider a further change in the Variation Order. An appeal of that order, if it is outdated by proceedings in the Supreme Court, will be of little significance to the parties.

Will an appeal unduly hinder the course of the action?

[32] The parties maintain an appeal will not hinder the course of the action since final judgment has been given. As I have just observed, however, if a further application to vary in the Supreme Court is successful an appeal taken from the Variation Order may become an unnecessary hindrance.

Do the proposed grounds of appeal have merit?

1. Did the chambers judge have jurisdiction to make the Variation Order?

[33] The defendants maintain Griffin J. erred by failing to recognize the difference between ordering preservation of the asset, and intervening to interfere in its operations. They say she also erred in limiting her analysis to personal jurisdiction. Had she considered whether she had subject matter or territorial jurisdiction to order the terms in paragraphs 1(a) and (c) of the Variation Order, she would have recognized that the restriction on mining operations intrudes on the exclusive jurisdiction of the Mexican courts over mineral resources in Mexico. In support, they point to expert opinion that the operations of Mexican mines are subject only to Mexican laws governing exploitation of mineral resources, and are beyond the jurisdiction of the courts of this province.

- [34] The defendants express similar concerns about the order precluding MMM from accessing its net cash flow, arguing it intrudes on Mexican mining operations and it is directed not at preservation, but is a step in execution in a foreign country. They submit that for both reasons this term lies beyond the Supreme Court's jurisdiction.
- [35] In my view, this ground of appeal has little merit. The defendants' arguments fail to appreciate that a Mareva injunction is an equitable remedy, and equity acts in personam. The court's in personam jurisdiction to enjoin conduct abroad is not founded on any assertion of judicial or administrative rights in the foreign territory but on its powers over the parties against whom the injunction is ordered. It is clear the Supreme Court had in personam jurisdiction over the defendants here, which afforded the basis for an order freezing their ex juris assets.
- [36] Both Madam Justice Dickson and Madam Justice Griffin were clearly sensitive to the limits on their extra-territorial jurisdiction. This is exemplified by the "Babanaft proviso" that appears in para. 3 of both orders, in a form derived from *Derby & Co. v. Weldon* (Nos. 3 & 4) (1988), [1990] 1 Ch. 65 (C.A.), and adopted in this province in *Mooney v. Orr* (No. 1) (1994), 98 B.C.L.R. (2d) 318 (S.C.), which is clearly directed to limiting the extraterritorial effect of the injunction on third parties.
- [37] Moreover, I am not persuaded the defendants' Mexican law evidence strengthens their argument. This is directed to the question of whether Mexican authorities would recognize and enforce an order from a British Columbia court that directs the defendants to cease all mining operations at the Bolaños property. That is not the order that was made. The Variation Order simply limited mining to what the defendants said was the present level of operations. Moreover, there is no evidence it has forced the defendants to act in contravention of Mexican law. The Order simply binds the defendants personally to preserve their assets. Its enforceability in Mexico is unrelated to these personal obligations, which stem from their participation in litigation in this province.
2. Did the chambers judge err by ignoring the purpose and balance of convenience established by the Initial Order?
- [38] The defendants say the clear purpose of the Initial Order was to provide security for the unpaid portion of the trial judgment. In that context, Madam Justice Dickson found the balance of convenience supported an order that permitted MMM to continue to operate the Bolaños mine in the ordinary course of business. Her decision was supported by projections that indicated the mine's production would be more than adequate to pay the balance of the judgment. The defendants argue there were no new circumstances to justify Madam Justice Griffin's decision to reassess the balance of convenience and, on her own initiative, vary the Initial Order by capping production at 500 tpd and restricting the defendants' access to any net cash flow received by MMM.

[39] I see little merit in this ground of appeal. There was evidence before Griffin J. to support a finding that there had been a change of circumstances since the Initial Order, and that a reassessment of the balance of convenience was required. Madam Justice Dickson had no evidence before her about the extent of the defendants' ongoing mining, due primarily to their resistance to disclosure. The focus of concern when she made the Initial Order was a possible sale of the mine. By contrast, the defendants presented second-hand evidence before Madam Justice Griffin that they were mining 400-500 tpd at the Bolaños mine. She found the defendants' disclosure was "less than impressive" and rendered the plaintiffs' concerns about dissipation "speculative". The available projections of the mine's future production capability diverged, with some indicating it could easily satisfy the judgment. In my view, there is little likelihood this Court would interfere with her decision to exercise her discretion by reassessing the balance of convenience in order to maintain the objective of preserving the asset, and by striking a reasonable balance until the parties were in a position to return with more reliable information. The defendants cannot claim prejudice as the Variation Order capped mining at what they said was MMM's present level of operations, and the direction to preserve the mine's net cash flow permitted expenditures in the normal course of business.

3. Did the chambers judge err in failing to remove the caveat?

[40] This proposed ground of appeal, advanced by the plaintiffs, is in effect a mirror image of the defendants' second proposed ground. The plaintiffs rely on the more pessimistic projections of the mine's value, and argue Griffin J. erred by failing to find the balance of convenience favoured a cessation of all mining until the judgment is satisfied. They assert that the caveat was only included in paragraph 2 of the Initial Order as an afterthought, in response to the defendants' concern the order would preclude de minimis mining. Now evidence led before Griffin J. demonstrates MMM is mining up to 500 tpd, well beyond de minimis mining. As well, the plaintiffs point to findings at trial as to the defendants' misconduct, misrepresentation, and breach of fiduciary duty, and their ongoing recalcitrance in producing satisfactory information about the mine's operations.

[41] The plaintiffs also argue that, in placing the onus of proof on them, Madam Justice Griffin failed to appreciate the significant distinctions between pre-judgment and post-judgment Mareva injunctions. They maintain that, in the post-judgment context, the defendants should be required to make full disclosure of their activities and intentions with respect to the mining at the Bolaños property, and should bear the onus of establishing this is necessary and will not diminish the mine's value. They say that prejudice to the defendants should not be a relevant consideration at this stage unless they can establish the injunction freezes assets that are disproportionate to the judgment.

[42] The defendants respond that the plaintiffs did not appeal Madam Justice Dickson's decision to permit the caveat, and say this ground is an impermissible collateral attack on the Initial Order. Madam Justice Griffin also rejected such a term. They maintain that, having failed twice, the plaintiffs should not be permitted to use an appeal as a third attempt to shut down

the mine when there has been no material change that would justify the removal of the caveat. Finally, they point out the plaintiffs elected equitable damages rather than a proprietary remedy, and so should not be permitted to interfere with the mine's operations.

- [43] For similar reasons to those expressed with respect to the defendants' second proposed ground of appeal, I am not persuaded there is merit to this ground. The Variation Order was an interim discretionary order based on Madam Justice Griffin's factual findings, and it is unlikely this Court would interfere to substitute its own view of the appropriate level of mining operations, particularly when the Supreme Court provides a more appropriate forum for regulating this issue as new evidence emerges.
- [44] As to the differences between pre-judgment and post-judgment Mareva orders, the authorities recognize a distinction, observing the courts will more readily make post-judgment orders: *Republic of Haiti v. Duvalier* (1988), [1989] 1 All. E.R. 456 (C.A.) at 465E; and *Babanaft International v. Bassatne* (1988), [1990] 1 Ch. 13 (C.A.), at 37C, 40D. A Mareva injunction remains an exceptional remedy, however, even in the post-judgment context, and I do not read these decisions as going so far as to shift the onus of proof. Instead, they appear to apply a lower burden on the plaintiff.
- [45] In my view, Madam Justice Griffin acknowledged this by adopting, at para. 35 of her reasons, Madam Justice Dickson's earlier review of the law in which she stated (2013 BCSC 1209 at para. 39):

As is apparent from the foregoing, the overarching consideration in each and every case is the balance of justice and convenience between the parties. This is true whether a Mareva injunction is sought in a pre or post-judgment context. As to the latter, however, the concern noted in *Tracey* about tying up a defendant's assets to provide security for a judgment that may never be obtained is obviously no longer a factor for consideration. In my view, this is a significant difference which should be weighed in the balance where, as here, the application is brought after an award has been made in favour of the plaintiff.

- [46] I am not convinced Griffin J. failed to recognize this principle in weighing the limited evidence before her, and making an interim order directed to facilitate expansion of the evidentiary record for future applications.

Do the interests of justice favour granting either application?

- [47] As is evident from my analysis, I am of the view the Variation Order strikes a reasonable balance in a fluid situation, pending further disclosure by the defendants and greater certainty as to whether their appeal will proceed. As more information becomes available, the Supreme Court is the proper forum to deal with an application to vary that order. I am not persuaded the interests of justice would be served by granting either application for leave to appeal the Variation Order.

Conclusion

[48] Both applications for leave to appeal are dismissed.

"The Honourable Madam Justice Neilson"

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