



QUEENSLAND COURTS AND TRIBUNALS
TRANSCRIPT OF PROCEEDINGS

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DISTRICT COURT OF QUEENSLAND

CIVIL JURISDICTION

JUDGE PORTER KC

No 1907 of 2022

DREW PAVLOU

Appellant

and

XU JIE

Respondent

BRISBANE

4.34 PM, TUESDAY, 8 NOVEMBER 2022

DAY 1

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HIS HONOUR: Mr Stumer.

MR A.C. STUMER: May it please the court. Stumer, initials A.C. I appear for the applicant-appellant. I'm instructed by Mark Tarrant Lawyers.

5

HIS HONOUR: Thank you, Mr Stumer. It'd be mischievous to ask my Associate to call on Mr Xu, wouldn't it?

MR STUMER: I think it might be, your Honour.

10

HIS HONOUR: I won't do it then, Mr Stumer. Now, thank you for coming in at short notice. I picked this up this morning and started reading and something occurred to me that I wanted to try and speak to you about as soon as I could.

15

MR STUMER: Yes.

HIS HONOUR: Would you just hand that – a copy of that to Mr Stumer?

MR STUMER: Thank you.

20

HIS HONOUR: I'll just let you read it. It's kind of self-explanatory, but then you might know lots of things you can tell me about this.

MR STUMER: Yes.

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HIS HONOUR: This is not a fait accompli, Mr Stumer. I just didn't want to come down here, talking about hypotheticals with you.

MR STUMER: Yes. Your Honour, I understand.

30

HIS HONOUR: I read your submissions.

MR STUMER: Yes.

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HIS HONOUR: On the consular official point.

MR STUMER: Yes.

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HIS HONOUR: Whether I would ultimately persuaded of them or not, I say respectfully they're not self-evidently easily disregarded and that means that the character of the challenge to the consular immunity is substantially greater than it was before her Honour below.

MR STUMER: Yes. I understand, your Honour. Yes.

45

HIS HONOUR: And – well, Mr Morris – I don't say this critical of him – but didn't really advance a contrary proposition to the application of the consular immunity.

MR STUMER: No, your Honour, and if your Honour's read the transcript, he says that he was appearing as amicus curiae in that proceeding and - - -

HIS HONOUR: Yes.

5

MR STUMER: Yes.

HIS HONOUR: But you – your submission takes a – if I – if you don't mind me saying – a much more sophisticated and detailed stick to the idea that the jurisdiction's excluded by the Consular Officials Act or whatever it's called.

10

MR STUMER: Yes.

HIS HONOUR: Now, what I'm a little bit worried about, Mr Stumer, having read it – as I say, I don't know what I'll end up with but the – it might not be realised in places where these things matter that there is a – at least a serious argument that Mr Xu's going to come second in this appeal - - -

15

MR STUMER: Yes.

20

HIS HONOUR: - - - and that if that happened without the people who have an interest in these matters knowing there might be much weeping and gnashing of teeth.

MR STUMER: Yes. Again, I understand.

25

HIS HONOUR: Yes. Well – so I read Zhang v Zemin, the New South Wales Court of Appeal decision that I'm sure you're familiar with.

MR STUMER: Yes.

30

HIS HONOUR: And that identified, authoritatively, a number of matters about this case, including the cases that identify that the Commonwealth Crown has an interest and standing to be heard on these kinds of issues. I would have thought, given the analogous language of the jurisdiction provisions, that they would have as much standing or interest in this matter as they had in the Foreign State Immunities Act provision and they should be given an opportunity to become involved if they want.

35

MR STUMER: Yes. I confess I hadn't expressly considered that question, your Honour. So I can't disagree with your Honour - - -

40

HIS HONOUR: Yes.

MR STUMER: - - - and your Honour may well be correct - - -

45

HIS HONOUR: Well, Mr - - -

MR STUMER: - - - in my respectful submission.

HIS HONOUR: - - - Stumer, I'm content to hold off doing this while you have
5 some time to think about it because at the moment – I mean, I know you're doing it
pro bono. You've got a fixed hearing date on Friday.

MR STUMER: Yes.

HIS HONOUR: The effect of this is we have to give them some time to consider it.
10 Ms – the principal Registrar tells me she'll find the right person and get it off to them
within a day or two - - -

MR STUMER: Yes.

15 HIS HONOUR: - - - but, even then, it really involves an adjournment. Now, it's
not a pressing matter. I don't think there's any - - -

MR STUMER: There isn't any urgency.

20 HIS HONOUR: - - - suggestion of that.

MR STUMER: [indistinct]

HIS HONOUR: But, equally, I haven't even seen the Magistrates Court file, Mr
25 Stumer. So – Stumer – so I don't know if something like this has already been done
and the Commonwealth Attorney or DFAT or whoever it went to said, "We're just
not interested". I have a feeling if they read your submissions they might be more
interested, but - - -

30 MR STUMER: Has your Honour seen the memorandum from the Chinese
Embassy?

HIS HONOUR: I have.

35 MR STUMER: Yes. So - - -

HIS HONOUR: I've read that.

40 MR STUMER: Yes. So as far as I know, that is the only involvement that anybody
from the Commonwealth had below, which was to transmit that submission - - -

HIS HONOUR: Did that come - - -

45 MR STUMER: - - - through the - - -

HIS HONOUR: Did that come under that letter from DFAT - - -

MR STUMER: It - - -

HIS HONOUR: - - - that's in front of it?

5 MR STUMER: Yes. So - - -

HIS HONOUR: That's why you referred to annexure E, because that's the letter from DFAT and then - - -

10 MR STUMER: Yes.

HIS HONOUR: - - - annexure F is the letter from the Chinese – so they actually sent it to - - -

15 MR STUMER: That – that's correct. So because the respondent was disputing jurisdiction - - -

HIS HONOUR: Yes.

20 MR STUMER: - - - and, presumably, didn't want to take any step that would be seen as exceeding - - -

HIS HONOUR: Yes.

25 MR STUMER: - - - to the jurisdiction of the court - - -

HIS HONOUR: Yes.

30 MR STUMER: - - - the Chinese Embassy sent the memorandum to the Department of Foreign Affairs and Trade, which then transmitted it to the court on behalf of the embassy.

HIS HONOUR: So that's the point of that covering letter.

35 MR STUMER: Yes.

HIS HONOUR: I didn't realise it was a covering letter.

40 MR STUMER: Yes, your Honour. I - - -

HIS HONOUR: It's all right, Mr Stumer.

MR STUMER: I'm sure that's - - -

45 HIS HONOUR: I accept that - - -

MR STUMER: I'm sure that's correct, your Honour.

HIS HONOUR: I accept that that's so.

MR STUMER: Yes.

5 HIS HONOUR: I accept that that's so.

MR STUMER: Yes. That is correct. So there has been that level of involvement, at least.

10 HIS HONOUR: Yes. Yes.

MR STUMER: But I couldn't say that it's come to the atten – that this appeal or application of extension of time to appeal has come to the attention of the Commonwealth.

15

HIS HONOUR: Yes. Well, as I said, I read your submissions and I read what was said against it. In a sense, the state actor committed itself to a position which you were then free to attack on appeal. There's nothing wrong with that.

20 MR STUMER: Yes.

HIS HONOUR: But I thought it was open for you to succeed and I suspect there isn't an awareness of that in circumstances where, for the reasons in Zhang v Zemin, at 28 – just show Mr Stumer this so he can - - -

25

MR STUMER: Yes. Sorry. I just don't have Zhang v Zemin - - -

HIS HONOUR: I'm going to give it you.

30 MR STUMER: - - - with me at the moment, your Honour.

HIS HONOUR: Would you just show that to Mr Stumer? Just the pink highlighted bit.

35 MR STUMER: Thank you.

HIS HONOUR: Just by way of context, the Attorney-General applied to become a party in Zhang v Zemin and sought a cross-declaration – sought – cross applied for a declaration that the conduct was – there was no jurisdiction to hear the matter because the conduct fell within the scope of that particular immunity.

40

MR STUMER: Yes.

45 HIS HONOUR: And Mr Gleeson ma – said something about claiming the immunity and that was the response.

MR STUMER: Yes, I see. Yes.

HIS HONOUR: So they seemed to have standing and – at general law and understandable interest in upholding their own treaties.

MR STUMER: Yes. Yes.

5

HIS HONOUR: And, as I say, once I realise that the arguments advanced were positive and not unpersuasive, the ground seems to have changed a bit.

MR STUMER: Yes. So, respectfully, it must be right that the Commonwealth
10 would have a standing to appear if it chose to.

HIS HONOUR: Yes.

MR STUMER: A separate question would be whether it's a necessary party. It's
15 probably a complicated question and given that there isn't any urgency in having the matter heard on this Friday, perhaps the course that your Honour proposes is, respectfully, a sensible course to take because if the Commonwealth decides that it wants to say something, it should probably have the opportunity to do that.

HIS HONOUR: I thought so, and I couldn't see a reason not to at least give them
20 the chance - - -

MR STUMER: Yes.

HIS HONOUR: - - - but I didn't want to do it without giving you the chance to tell
25 me if there's something I don't know about this which makes this unnecessary or pointless or inadvisable or whatever else you think of, Mr Stumer. I've only been looking at it for three hours. So there could be things I don't know.

MR STUMER: Your Honour, as I stand here, I can't see any reason why that –
30 what your Honour is proposition shouldn't be done, and if the Commonwealth takes the view that it doesn't need to appear - - -

HIS HONOUR: Matter for them.

35

MR STUMER: - - - then that's a matter for them.

HIS HONOUR: Yes.

MR STUMER: But if they take the view that it is a matter they have an interest in,
40 then they would have an opportunity to appear, and so, respectfully, the course your Honour proposes is a sensible course.

HIS HONOUR: Yes, because there are international tensions that we all know
45 about in this relationship - - -

MR STUMER: Yes.

HIS HONOUR: - - - that might make the Commonwealth – well, actually, you know what? It’s – frankly, Mr Stumer, it’s got nothing to do with that. If it was a consul general of the United Kingdom, I’d take the same view or - - -

5 MR STUMER: Yes. It’s - - -

HIS HONOUR: Or Norway or - - -

MR STUMER: It - - -

10

HIS HONOUR: - - - Kenya.

MR STUMER: As your Honour put it a few moments ago, it’s the interest of the Commonwealth in the enforcement or the standing by of its own treaty that gives the
15 –gives rise to the interest. Yes. Or potentially gives rise to the interest.

HIS HONOUR: Potentially.

20

MR STUMER: Yes.

HIS HONOUR: It’s a case of opportunity to be heard and if, given the chance, on mature reflection, they’re happy to leave it in your hands and mine, then that’s what we’ll do.

25

MR STUMER: Yes.

HIS HONOUR: I’m not worried about that.

30

MR STUMER: Yes.

HIS HONOUR: All right. Do you want to think about it overnight or have you made your mind up?

35

MR STUMER: I might just – I ought to take some time to receive instructions - - -

HIS HONOUR: Yes. Yes.

MR STUMER: - - - on the point - - -

40

HIS HONOUR: I know – I think your - - -

MR STUMER: - - - your Honour.

45

HIS HONOUR: - - - solicitor’s listening, but - - -

MR STUMER: My solicitor’s listening, but he may not have apprehended the course that’s proposed yet, and I would - - -

HIS HONOUR: He certainly didn't. That was the point of our meeting, but what – what we'll do when we get out of court, my Associate will email you a soft copy of that so you can forward it to your solicitor easily.

5 MR STUMER: Yes. Thank you, your Honour. And I am available at 9 tomorrow. I imagine I could obtain instructions by 9 tomorrow.

HIS HONOUR: Yes. Well, we can get to – do that at 9 tomorrow, Mr Stumer, or if
10 your position is, "We have no objection to this", or, alternatively, "We have no objection in principle but could you tweak it in this way or that way" - - -

MR STUMER: Yeah.

HIS HONOUR: - - - you can send through an email and if I've got nothing to add
15 - - -

MR STUMER: Yes.

HIS HONOUR: - - - then I'll just do it and I'll put the orders on the file and you
20 don't have to come in.

MR STUMER: Yes. Thank you, your Honour.

HIS HONOUR: It's up to you. I'll be here on something else anyway.
25

MR STUMER: Yes. All right. I'll take instructions - - -

HIS HONOUR: Yes.

30 MR STUMER: - - - and we'll be in contact with your Honour's Associate.

HIS HONOUR: Can I flag one other matter, Mr Stumer, that occurred to me in reading the material.

35 MR STUMER: Yes, your - - -

HIS HONOUR: The submission, if I can call it that, from the state actor – it says, "Look, in any event, this is, in effect, an abuse of process because it's hopeless." There's a General Steel submission. The last 10 paragraphs or so of their
40 submissions.

MR STUMER: Yes.

HIS HONOUR: And you grapple with that to a degree in your outline. Now, I see
45 that you say in your outline as well, "Look, the evidence is a man's been served as required. He hasn't appeared. It's open to you to make the substantive orders."

MR STUMER: Yes.

HIS HONOUR: Now, I just want to flag two things that come up about that. The first thing is this: you need leave because you're a long time out of time probably.

5

MR STUMER: Yes, that's correct.

HIS HONOUR: Because I saw it was 2020. I mean, I see there's reasons given. It's not like the reasons aren't addressed – the delay's not addressed; right? But a factor on whether I grant leave might be whether there's any point granting leave because I think, as a matter of substance, the case has insufficient prospects of success to justify the grant of leave.

10

MR STUMER: Yes.

15

HIS HONOUR: Do you – just to think about – not going to hold you to it – cavil with the proposition that prospects would arise on the leave application?

MR STUMER: They would, but only in the sense that if your Honour were minded to dismiss the appeal, you might also dismiss the application for leave, so - - -

20

HIS HONOUR: I'm just wondering whether if the ultimate prospect seems sufficiently poor. And I'm not – there are some obvious problems, but I don't have anything like a final view about it.

25

MR STUMER: Yes.

HIS HONOUR: I might refuse leave without engaging on the substantive points raised on the jurisdiction appeal at all.

30

MR STUMER: Yes. I might take some time to consider that - - -

HIS HONOUR: Please do.

35

MR STUMER: - - - your Honour.

HIS HONOUR: Please do.

MR STUMER: Yes.

40

HIS HONOUR: And, then, it seemed to me, another matter – well, that's one. Sorry to do this, Mr Stumer, but there are – there are some issues that come up in this case, and I'm very, very grateful that you decided to take the matter on through your – the other matter is that if presently before me is an appeal from her Honour's decision to dismiss the appeal on the basis that she didn't have jurisdiction to hear and determine - - -

45

MR STUMER: Yes.

HIS HONOUR: So there hasn't been – and the respondent hasn't appeared but hasn't grappled with the substance of the case fully because they were relying on
5 immunity, which - - -

MR STUMER: Yes.

HIS HONOUR: - - - was a strategy that worked before her Honour.
10

MR STUMER: Yes.

HIS HONOUR: And might work in front of me. I don't know. But it might not. Now, if I granted you leave because I thought there was a sufficiently arguable case
15 to justify the grant and I upheld the appeal because I determined that the Magistrates Court had jurisdiction and should hear and determine the matter, then it would seem to me – whether as a matter of law or a matter of procedural fairness – it would have to go back so that Mr Xu can then have a full opportunity to appear and argue the
20 toss on the substance of the matter.

MR STUMER: Yes. Respectfully, I don't agree, in my submission, with that, your Honour.

HIS HONOUR: Right. Okay.
25

MR STUMER: Your Honour would have power to make any order that the Magistrate could have made.

HIS HONOUR: True.
30

MR STUMER: And the convenient course would be for your Honour to decide it. The respondent having had every opportunity to appear if he wanted to – so in my respectful submission, it wouldn't be a denial of procedural fairness for your Honour to decide the matter. Assuming that you allow the appeal - - -
35

HIS HONOUR: Yes.

MR STUMER: - - - on the jurisdiction point.

HIS HONOUR: Yes.
40

MR STUMER: - - - it would be open to your Honour fairly and in accordance with normal appeal procedures to determine the substance of the Peace and Good Behaviour order.
45

HIS HONOUR: Pending the inevitable appeal from my decision. Don't - - -

MR STUMER: Well - - -

HIS HONOUR: - - - worry about it, Mr Stumer.

5 MR STUMER: In matters of this kind, sometimes even when matters go against the party claiming immunity, they don't [indistinct] because they don't want to take any step at all that - - -

HIS HONOUR: Yes, yes.

10

MR STUMER: - - - accedes to the - - -

HIS HONOUR: Yes. No, fair point.

15 MR STUMER: - - - jurisdiction of the court.

HIS HONOUR: Fair point, Mr Stumer. Fair point. Anyway, I'm not going to do anything in - on the basis that there might or might not be an appeal. You can't do things like that.

20

MR STUMER: Yes.

HIS HONOUR: Right. Well, in that case, thank you for that. That's orientated me a little bit as to a couple of issues that came up. So I'll adjourn, and you can take instructions.

25

MR STUMER: Yes.

HIS HONOUR: If at some time before 9 o'clock, you are content for me to make these directions and then put it in the hands of the Principal Registrar, then just let Lynette know - - -

30

MR STUMER: Yes.

35 HIS HONOUR: - - - and we'll do that. If you want to talk to me about anything at all to do with this or anything else that occurs to you about this appeal, I'll see you at 9 o'clock.

35

MR STUMER: Yes. Thank you, your Honour. As I say, we'll be in touch with your Honour's Associate. Your Honour, I do have - - -

40

HIS HONOUR: Oh, yes.

MR STUMER: - - - some - - -

45

HIS HONOUR: You've got the stuff - - -

MR STUMER: I have – the - - -

HIS HONOUR: The material?

5 MR STUMER: - - - material that was - - -

HIS HONOUR: Great.

10 MR STUMER: - - - promised tomorrow is – was, in fact, ready a little bit earlier
- - -

HIS HONOUR: Yes. Thanks.

15 MR STUMER: - - - so I have it now.

HIS HONOUR: Would you grab that for me, please. I was right on the edge of getting Lynette to do it all, and I thought you might have been in a position to - - -

20 MR STUMER: Yes.

HIS HONOUR: - - - save us the time.

MR STUMER: It was being prepared over the course of today, your Honour, so - - -

25 HIS HONOUR: I gathered that. Yes.

MR STUMER: The materials are divided into a part A and a part B.

30 HIS HONOUR: Yes.

MR STUMER: Part A is the material that was before the Magistrates Court - - -

HIS HONOUR: Yes.

35 MR STUMER: - - - and part B is the material on the appeal.

HIS HONOUR: Yes.

40 MR STUMER: I have not had an opportunity to view the record that I think is document 7 on the court file in this matter. I'm - - -

HIS HONOUR: Which is what, Mr Stumer? The - - -

45 MR STUMER: It's the material that was before the Magistrate.

HIS HONOUR: Oh, yes.

MR STUMER: I think I know what's in it - - -

HIS HONOUR: Yes.

5 MR STUMER: - - - because I'm instructed about what was before the Magistrate.

HIS HONOUR: Yes.

10 MR STUMER: But if there's some error in that, I will try to find that out before any hearing in the matter.

HIS HONOUR: Yes.

15 MR STUMER: That - - -

HIS HONOUR: Well, I've asked my Associate to get the Magistrates Court file back. Oh, is that it?

20 ASSOCIATE: Yeah.

HIS HONOUR: Do you want to look at it, Mr - can - - -

MR STUMER: I would - - -

25 HIS HONOUR: Can you just look at it and find out what you want to know?

MR STUMER: I would - I - yes, your - - -

30 HIS HONOUR: All right. Well - - -

MR STUMER: - - - Honour, if that's convenient.

HIS HONOUR: - - - give the file to Mr Stumer.

35 MR STUMER: Thank you.

HIS HONOUR: Is this something you can do easily, Mr Stumer, or do you want me to adjourn and Lynette can just stay here until you're finished with the file?

40 MR STUMER: If your Honour adjourns, and then I'll hand the file back to your Honour's Associate.

HIS HONOUR: Yes, that's right.

45 MR STUMER: Yes.

HIS HONOUR: My Associate will just stay until you're finished.

MR STUMER: Yes.

HIS HONOUR: Good. Okay. Well, in that case, unless it's unnecessary, I'll see you at 9 o'clock.

5

MR STUMER: Yes. Sorry, I have - - -

HIS HONOUR: Oh, the case.

10 MR STUMER: - - - your Honour's copy of - - -

HIS HONOUR: Yes. I'll take that one - - -

MR STUMER: - - - Zhang v Zemin.

15

HIS HONOUR: - - - back, thanks. Yes.

MR STUMER: I'll hand that back as well.

20 HIS HONOUR: Yes. The point to – not without interest. I'm not disappointed I ended up hearing this. It was supposed to be heard by somebody else, but my trial settled and theirs didn't, so I said, "I'll do your Friday matter."

MR STUMER: I see.

25

HIS HONOUR: It was described by the Chief Judge as a – not a hospital pass, but a hospital steal.

MR STUMER: There are many matters of interest in this, your Honour.

30

HIS HONOUR: There are, which reminded me of something else I wanted to mention. I've forgotten. Oh, yes. I thought there might be – going to be a constitutional argument that the immunity created by the Federal Parliament is actually constitutionally invalid because it's inconsistent with the implied freedom of political communication, but I see you didn't go there.

35

MR STUMER: I didn't.

HIS HONOUR: No. Just construction arguments.

40

MR STUMER: I did consider it.

HIS HONOUR: Yes.

45 MR STUMER: But - - -

HIS HONOUR: You stopped short. It would've made things more complicated.

MR STUMER: It would've made things more complicated.

HIS HONOUR: Yes.

5 MR STUMER: But it's also – in my respectful submission, it wouldn't be a correct submission to make.

HIS HONOUR: No. No. Well, look, it's only been a thought bubble to me - - -

10 MR STUMER: Yes.

HIS HONOUR: - - - Mr Stumer. When I saw that you hadn't done that, I thought, "Oh, well, there's probably many good reasons for it."

15 MR STUMER: Yes.

HIS HONOUR: All right. Well, thank you very much again for attending at short notice, and we'll either see each other at 9 or we'll see each other next time we're on.

20 MR STUMER: Thank you, your Honour.

HIS HONOUR: Thank you. Adjourn the court.

25 **MATTER ADJOURNED at 4.59 pm UNTIL
WEDNESDAY, 9 NOVEMBER 2022**