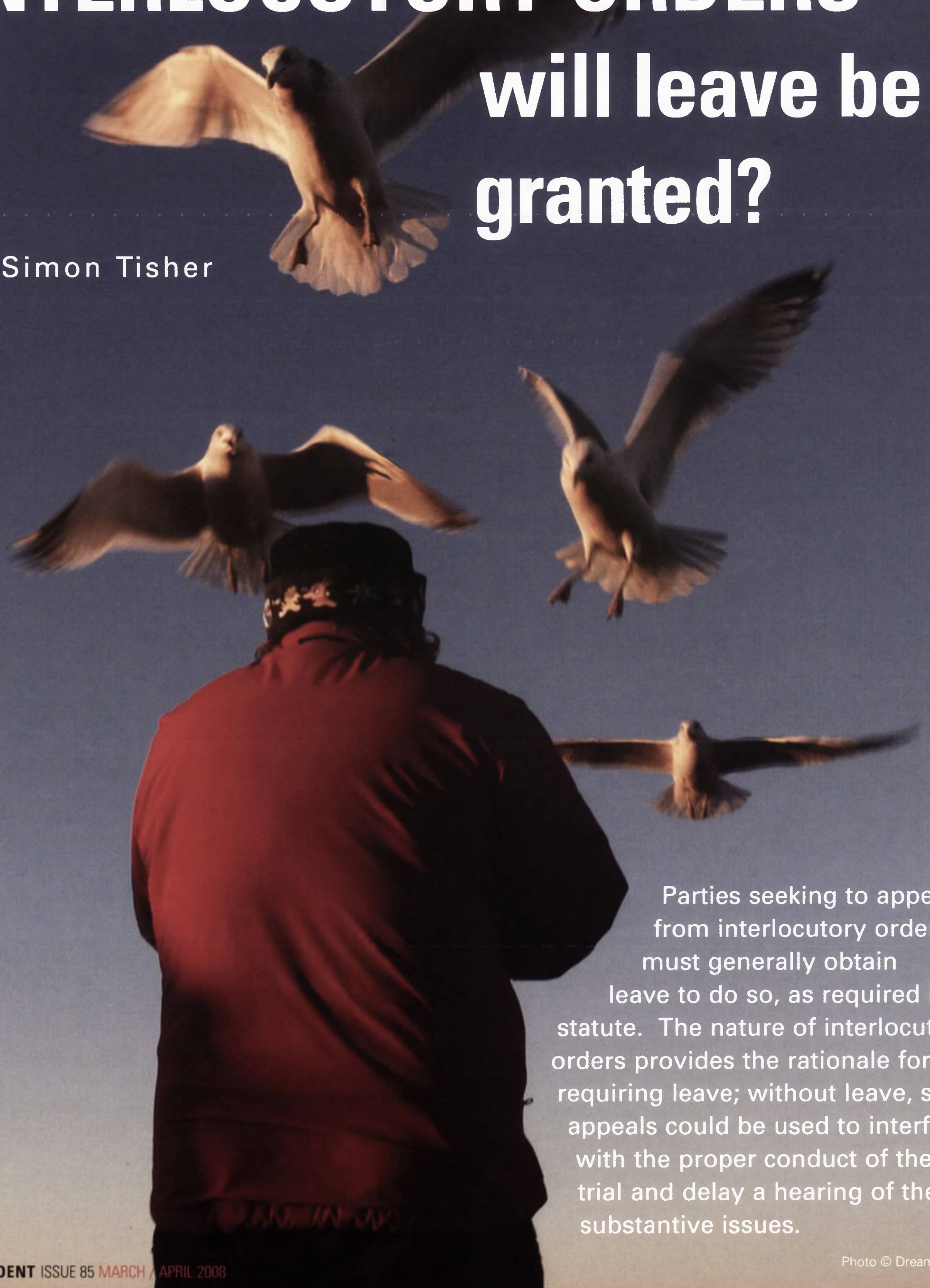
APPEALS from INTERLOCUTORY ORDERS – will leave be granted?

By Simon Tisher



Parties seeking to appeal from interlocutory orders must generally obtain leave to do so, as required by statute. The nature of interlocutory orders provides the rationale for requiring leave; without leave, such appeals could be used to interfere with the proper conduct of the trial and delay a hearing of the substantive issues.

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This article outlines the legislative basis for requiring leave to appeal from interlocutory orders. It describes the difference between interlocutory orders and final orders, the balancing act required by courts that consider applications for leave, and discusses the scenarios that are likely to be most conducive to the granting of leave, and therefore where and when leave should be sought. It will be seen that interlocutory orders that would cause a substantial injustice were they not reversed are most likely to be the subject of leave being granted. Similarly, interlocutory orders that are effectively final in the relief they provide, that determine substantive rights, or that otherwise raise an issue of importance are also likely to have the best prospects of success in obtaining leave to appeal.

All Australian jurisdictions are covered, including the federal jurisdiction, with a primary focus on Victoria. Interlocutory decisions made by courts below the supreme courts of the states and territories are outside the scope of this article.

> Requiring leave to appeal **reduces** the likelihood that such appeals will be deployed as **delay** tactics.

THE LAW

The requirement, common to most Australian jurisdictions, for leave to appeal against interlocutory orders is sourced in statute.[1]

At a federal level, an appeal from an interlocutory judgment of a High Court judge exercising the original jurisdiction of the High Court cannot be made without the Court's leave.[2] Special leave of the High Court is required to permit an appeal from an order of a supreme court of a state or territory, whether interlocutory or final.[3]

Similarly, an appeal cannot be brought from an interlocutory judgment made in the Federal Court, unless leave is obtained.[4] Applications for leave may be heard either by a single judge or a Full Court.[5] In the Family Court, leave is required to appeal from an interlocutory decree (with the exception of a decree in relation to a child welfare matter).[6] Such leave may only be granted by a Full Court of the Family Court.

At the state/territory level, leave to appeal against an interlocutory order made by a judge of a supreme court is similarly required, with the exceptions of Tasmania and Queensland.[7]

In some jurisdictions, exceptions have been created to the requirement for leave to be obtained to appeal from interlocutory orders. In Victoria and Western Australia, for example, an appeal can be brought without leave where an injunction is granted or refused, or where a receiver is appointed.[8] Like the requirement to obtain leave itself, the exceptions differ from one jurisdiction to another.

INTERLOCUTORY OR FINAL ORDERS?

An understanding of the distinction between interlocutory orders and final orders is central to understanding why leave is ordinarily required to appeal from interlocutory decisions. In many instances, the distinction is by no means straightforward. In *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd [No 2]*, Kirby P stated 'no golden thread of logic runs through the cases'.[9]

The established test is whether the order as made finally determines or disposes of the rights of the parties.[10] An interlocutory order affects only the course of proceedings in litigation, not the substantive rights of the parties.[11] In *Adam P Brown Male Fashions Pty Ltd v Philip Morris Incorporated and Another*, the High Court affirmed the statement in *Salmond on Jurisprudence* that:

> 'substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.'[12]

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Whether an order is interlocutory or final is determined having regard to the nature of the order, not the nature of the application.[13] The fact that the order may determine the fate of the application does not render it final rather than interlocutory.[14]

The court is to have regard to the legal rather than the practical effect of the judgment.[15] For example, the refusal of an application that has the practical effect of precluding the applicant from making another application on the basis that it will 'inevitably fail' is interlocutory. Were the court required to consider the practical effect of the order, the distinction between interlocutory and final orders would therefore be even more difficult to ascertain.

It is not my purpose here to provide an exhaustive list of orders that are interlocutory. However, examples include the following:

- an order granting or refusing to set aside a default judgment;
- an order for preliminary discovery or for discovery from a non-party;
- an order as to the mode of the trial;
- an order refusing an application that a proceeding be refused for want of prosecution;
- an order refusing to grant an interlocutory injunction; and
- an order granting or refusing to grant a stay of execution of judgment.

An order granting or refusing leave to appeal from an interlocutory order is also an interlocutory order.[16]

RATIONALE FOR REQUIRING LEAVE

Once the distinction between interlocutory and final orders has been made, the reason for requiring leave to appeal from an interlocutory order becomes apparent. It is to reduce appeals from such orders as much as possible, to ensure that the hearing of the substantive and non-interlocutory issues in the case is expedited.[17]

A major difficulty with permitting all appeals from interlocutory orders is that such appeals could be used as delay tactics. In *Thomas Borthwick & Sons (Pacific Holdings) Ltd and Others v Trade Practices Commission*, Bowen CJ, Lockhart and Sheppard JJ stated that, prior to introducing the need for leave to be granted:

> 'parties could, as they sometimes did in practice, bring a string of appeals from interlocutory judgments of a single judge given in the course of a trial. Such appeals delayed and interfered with the proper conduct of the trial and hampered the proper administration of justice.'[18]

The requirement that leave be obtained reduces the opportunity for such tactics to be employed.

WHEN SHOULD LEAVE BE GRANTED?

Although some basic principles regarding the granting of leave are accepted in all Australian jurisdictions, courts are empowered with a substantial discretion in considering when to grant leave. The factors that courts consider in granting leave are discussed below.

Federal level

The High Court has stated that appellate courts exercise 'particular caution' when reviewing decisions pertaining to practice and procedure, and that the question of injustice flowing from an appealed order will be a relevant and necessary consideration.[19] The High Court in *Adam P Brown* stated that it was 'unnecessary and indeed unwise to lay down rigid and exhaustive criteria'.[20] The Court approved the statement in *In re the Will of F B Gilbert (dec.)* (1946) 46 SR (NSW) 318 that if a 'tight rein were not kept upon interference with the orders [in relation to practice and procedure] of judges of first instance, the result would be disastrous to the proper administration of justice'.[21]

In *Ex parte Bucknell*, the High Court stated that orders that determined the rights of parties raised little difficulty:

> 'If the interlocutory order … has the practical effect of finally determining the rights of the parties, though it is interlocutory in form, a *prima facie* case exists for granting leave to appeal. For example, a judgment for either party on a demurrer might, in effect, be decisive of the whole litigation. Although such a judgment would often be interlocutory, it might be final in determining the issue between the parties, and, in such a case, leave would be granted almost as of course.'[22]

The Full Federal Court in *Decor Corp Pty Ltd v Dart Industries Inc*[23] endorsed the distinction drawn by the High Court in *Adam P Brown* between those interlocutory decisions on a

point of practice and those involving substantive rights. In *Decor*, the Full Federal Court stated that although a 'tight rein' should be kept on appeals involving the former scenario, leave was more likely to be granted in the case of the latter. In granting leave to appeal in *Decor*, the Court noted that the correctness of the interlocutory decisions in that case was open to dispute and that the applicants would suffer 'significant consequences' if the decisions were wrong.[24]

In *Decor*, the Full Federal Court also noted that in *National Mutual Holdings Pty Ltd v Sentry Corp*[25] and *United States Tobacco Co v Minister for Consumer Affairs*,[26] leave was granted on the basis that an issue of importance was raised, which it was appropriate should be determined by a Full Federal Court.[27]

The approach taken by the Federal Court in *Decor* continues to be followed.[28]

State/territory level

In Victoria, the established approach is that leave to appeal from an interlocutory decision should be granted only where:

a) the decision was wrong, or at least attended with sufficient doubt to justify granting leave; and, in addition,

b) substantial injustice would be done if the decision was not reversed.[29]

In determining whether the decision was wrong or attended with sufficient doubt to justify granting leave, attention is focused on the decision itself and not the reasons for it.[30] Ascertaining whether a decision is attended with sufficient doubt to warrant the grant of leave to appeal is the same thing as asking whether the proposed appeal has sufficient prospects of success.[31]

Although the requirements of the test outlined above are cumulative, the court in *Niemann* stated that greater emphasis must be given to the issue of substantial injustice. Leave will not be granted against a wrong decision if it causes no injustice. In *Niemann*, Murphy J stated:

> 'If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation.'[32]

The court is given considerable discretion in ascertaining whether the decision, left unreversed, causes substantial injustice. Fullagar J in *BHP Petroleum Pty Ltd v Oil Basins Ltd* stated:

> 'It must not be forgotten that the general requirement of showing substantial injustice is an expression of judges, not of a statute, and that it was expressed simply as a guideline for the exercise of what must necessarily be and remain a broad discretion to grant or withhold leave to appeal. What is a substantial injustice must depend upon all the circumstances of the case.'[33]

The party seeking leave to appeal bears the burden of establishing that justice does require that leave to appeal be granted.[34]

The approach taken in Victoria has been accepted in other states.[35] However, courts in other state jurisdictions have provided further guidance about when leave should be granted, some noting that they are granted a substantial discretion.[36] Further, in NSW, the Court of Appeal has stated that its practice remains one of not giving reasons for a grant or refusal of leave to appeal, save in special cases.[37]

WHERE AND WHEN TO SEEK LEAVE

The provisions regulating when appeals from interlocutory orders may be sought differ from one jurisdiction to another. A party seeking leave to appeal from an interlocutory order made in the Federal Court may apply to any judge or to a Full Court.[38] If the applicant applies for leave to appeal to a single judge of the Federal Court, that judge's grant or refusal cannot be appealed to a Full Court.[39] Applicants may request that an application for leave to appeal be listed either before a single judge or a Full Court, but they cannot require a Full Court to hear the application.[40] If the registry does not accede to the applicant's request, the applicant may ask the court or judge before whom the matter is listed to consider referring it to a Full Court or a single judge (as the case may be). It is then for the judge or the Full Court before whom the matter is listed to consider whether the matter is more appropriately dealt with in the manner suggested by the applicant.[41] >>

> The party seeking leave to appeal must establish that justice requires it.

At state/territory level, some jurisdictions – such as Victoria, Western Australia, South Australia and Tasmania – provide that where leave is required, it may be granted either by the judge at first instance or by the appellate court. By way of contrast, leave may only be granted by the Court of Appeal or Full Court as applicable in NSW, the Northern Territory and the ACT.

Where applicants have a choice to seek leave from either the judge at first instance or from the appellate court, it is very often preferable to seek leave from the appellate court. In *Niemann*, Murphy J stated:

> 'It also seems to me important to note that the judge who makes the interlocutory order or judgment may be in a different position, when considering whether to grant leave to appeal from his order or judgment from that in which the Full Court finds itself when considering a similar application.
>
> He has tried the case, whatever it may be. He has made the interlocutory order or given the interlocutory judgment. He could not be expected, when considering whether or not to grant an application for leave to appeal, to say that his order or judgment was clearly wrong and that substantial injustice would follow if it went undisturbed. If those criteria had in all cases to be established, leave would never be granted by the primary judge.'[42]

The rules of court in the relevant jurisdiction set out the timeframe within which leave must be sought, and the procedure for doing so. In the Federal Court, an application for leave to appeal from an interlocutory judgment of the court may be made orally to the trial judge at the time of its pronouncement, or by motion on notice either to any judge of the Court or a Full Court.[43] If an application is made by motion on notice, it must be filed within 21 days after the decision was pronounced, if the interlocutory judgment is a decision on a question under Order 29. In any other case, the notice on motion must be filed within seven days after the date that the interlocutory judgment was pronounced.[44]

In Victoria, an application for leave must be made to the judge constituting the Trial Division from whose decision an appeal is sought to be brought, or to the Court of Appeal, within 14 days after the day the decision was given, unless the Court of Appeal or the judge otherwise orders.[45]

The rules of court also set out how applications for leave must be sought. In Victoria, the application, whether on notice or not, must be made by summons supported by affidavit.[46] The application is taken to be made when the summons is filed.[47]

CONCLUSION

Interlocutory orders have become an everyday feature of litigation across Australian jurisdictions. Accordingly, it is no surprise that dissatisfied litigants often seek to appeal unfavourable interlocutory orders. Requiring leave before such decisions can be appealed ensures that the trial of the substantive issues does not become mired by interminable delays. Although courts retain a substantial discretion in deciding when leave should be granted, statements from Australian courts at state and federal level indicate that a wrong decision in and of itself is unlikely to suffice. Rather, the granting of leave is confined to wrong decisions that cause substantial injustice, which determine substantive rights or which otherwise deal with a matter of importance. ■

Notes: **1** *Scheggia v Fasano* [1980] VR 664. **2** *Judiciary Act* 1903 (Cth), s34. **3** *Judiciary Act* 1903, ss35(2), 35A(2). **4** *Federal Court of Australia Act* 1976 (Cth), s24. **5** *Ibid*, s25(2). **6** *Family Law Act* 1975 (Cth), s94AA, *Family Law Regulations* 1984, reg 15A. **7** *Supreme Court Act* 1986 (Vic), s17A(4)(b); *Supreme Court Act* 1970 (NSW), s101; *Supreme Court Act* 1935 (WA), s60(1)(f); *Supreme Court Act* 1953 (NT), s53; *Supreme Court Act* 1933 (ACT), s37E; *Supreme Court Act* 1935 (SA), s50, see also *Supreme Court Civil Rules* 2006 (SA), r281(a)(i). **8** *Supreme Court Act* 1986 (Vic), s17A(4)(b)(ii); *Supreme Court Act* 1935 (WA), s60(1)(f). **9** (1990) 21 NSWLR 200 at 207. **10** *Hall v Nominal Defendant* (1966) 117 CLR 423; *Licul v Corney* (1976) 180 CLR 213; *Carr Finance Corp of Aust Ltd (No 1)* (1981) 147 CLR 246. **11** *Ex parte Bucknell* (1936) 56 CLR 221. **12** (1981) 148 CLR 170 at 176. **13** *Niemann v Electronic Industries Ltd* [1978] VR 431. **14** *MZWQH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1491. **15** *Carr Finance*, above note 11, per Gibbs CJ at 248; *Debis Financial Services (Aust) Pty Ltd v Allied Bellambi Collieries Pty Ltd (Rec apptd) and Others* [2000] NSWCA 274. **16** *Reid v Nairn* (1985) 60 ALR 419. **17** *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Aust Ltd* [1969] VR 401; *Wilson v Metaxas* [1989] WAR 285. **18** (1988) 18 FCR 424 at 431. See also *Chapmans Ltd v Yandell (t/as Yandells)* [1999] NSWCA 361. **19** *Adam P Brown*, above note 12. **20** *Ibid* at 177. **21** *Ibid*. **22** *Ex parte Bucknell*, above note 11 at 225, 226. **23** (1991) 33 FCR 397. **24** *Ibid* at 400. **25** (1988) 19 FCR 155. **26** (1988) 20 FCR 520. **27** See also *Niemann*, above note 13, at 440. **28** *Minogue v Williams* [2000] FCA 125; *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572; *Yap v Granich & Associates* [2001] FCA 1735; *Lawrance v Commonwealth of Australia* [2007] FCA 1524. **29** *Niemann*, above note 13; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 756; *King v Lintrose Nominees Pty Ltd* (2001) 4 VR 619. **30** *King*, above note 29. **31** *Ibid*. **32** *Niemann*, above note 13, at 441. **33** [1985] VR 756 at 759. **34** *Chapmans*, above note 18; *Montgomery v Egan Simpson Solicitors* [2005] NSWSC 886. **35** See *South Australian Government Financing Authority v Bank of New Zealand and BT Australia (HK) Ltd* [2002] SASC 56; *Wilson v Metaxas*, above note 17; *Southern Cross Exploration*, above note 9. **36** *Wilson*, above note 17. **37** *Southern Cross Exploration*, above note 9. **38** *Federal Court of Australia Act* 1976, s25(2). **39** *Reid v Nairn*, above note 16; *Thomas Borthwick & Sons*, above note 18. **40** *Wati v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 543; *Minister for Immigration and Multicultural and Indigenous Affairs v WAKX* [2005] FCA 227. **41** *Wati*, above note 40. **42** Above note 13, at 441. **43** *Federal Court Rules*, Order 52, rule 10. **44** *Ibid*, Order 52, rule 10(2A). **45** *Supreme Court (General Civil Procedure) Rules* 2005, Order 64.03(3). **46** *Ibid*, Order 65.02(1). **47** *Ibid*, Order 65.02(2).

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