



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: M96/2020
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Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Scope of the appeal

2. The grant of leave was expressly limited to one ground: **CAB 72**. That ground, which the appellant was directed to reformulate, concerned **PJ[134] (CAB 26)**, being “the administration of justice ground”, and its substantive correctness: **[2020] HCATrans 143 at p10 L355 (JBA Vol 7, Tab 26)**. That question, not **AS [29]-[33]** (which replicates “Proposed Ground 1 – The appeal was inutile” in the special leave application: **FABFM 86 [1(a)], 90-94 [19]-[38]**), is what is in issue: cf **AS [10] fn 23, [21]-[28], [29]-[33]**.

No abuse of process

3. The union could have brought the same action as Mr Lunt. No “defence” was available against it that was not available against Mr Lunt. Its appeal “right” to a Full Bench of the Commission is contingent on permission of the Fair Work Commission to appeal: *Fair Work Act 2009* (Cth) s 604(1), and Mr Lunt has the same right: cf **CAB 24 [121]**. Such a contingent “right” does not preclude prerogative relief: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1093 [33].
4. *Certiorari* is discretionary, and will be refused if good reason is shown. The union’s acquiescence in the approval, and delay in bringing a challenge, as well as its funding of the proceedings, will be relevant on Mr Lunt’s application. **PJ[134]** is misconceived: there will be no avoidance of scrutiny on relief.
 - *R v Kelly; Ex parte Victorian Chamber of Manufactures* (1953) 88 CLR 285 at 309.6.
 - *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1198 [28] (JBA Vol 6, Tab 24).
5. It is not obvious that either the union or Mr Lunt would be refused discretionary relief. It is to be assumed that there is a *prima facie* case (and therefore that the approval was

vitiated by jurisdictional error): **CAB 18 [81]**. And acquiescence depends on knowledge of the key facts.

6. It is not an abuse to litigate through others if (as here) they seek relief that is within the scope of the proceeding: **CAB 15 [67]** (quoting *Williams v Spautz (1992) 174 CLR 509 at 535*) and **CAB 15 [70]** (*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386 at [89]*). Courts are not concerned with a party's motive for seeking relief. There was no illegitimate purpose because, as the Full Court found (and which was not the subject of any grant of leave), Mr Lunt wanted the relief sought, albeit predominantly because the union also wanted the relief: **CAB 45 [16]-[18]; RS [13], [23]-[24]**.

- *Williams v Spautz (1992) 174 CLR 509 at 526, 534-535, 543-544 (JBA Vol 5, Tab 19)*
- *Treasury Wine Estate v Melbourne City Investments Pty Ltd (2014) 45 VR 585 at 588 [11] (JBA Vol 6, Tab 25)*

7. There is no abuse in choosing, among potential litigants, the person or entity that has the clearest standing, the most sympathetic case or the best discretionary claim to relief, provided that party seeks relief within the scope of the proceeding, even if the party seeks it for the benefit of others.

8. Since courts are not concerned with the motive for seeking relief, "concealment" of that motive is irrelevant. The court's processes are available to obtain evidence going to relief and third party costs issues. Here it was admitted on the pleadings that the union had funded Mr Lunt's proceedings.

9. That Mr Lunt resisted the application for summary judgment and resisted the factual allegations made by VICT as to the nature and degree of the union's involvement does not make the proceeding an abuse of process. There was no finding or suggestion that the denial was itself inappropriate: **RS [33]**.

10. Destruction of evidence which prevents a fair trial from taking place, even where the appropriate inferences are drawn against the party destroying the evidence, can result in a stay: **CAB 19 [92]**. But the appellant did not make that submission to the trial judge, and has never suggested it. It expressly eschews it now: **Appellant's Reply [15]**.

Destruction of evidence after the case was commenced cannot make the initiation of proceedings an abuse of process.

11. It is a drastic remedy to stay a proceeding. The matters VICT relies on would inform the Court's discretion to refuse relief if jurisdictional error is shown. Such matters should generally be determined after the evidence has been heard and in light of the full factual matrix.

- ***Strickland v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 360 [85], 372-373 [113], [115], 398 [203]-[204], 414-415 [263]-[266] (JBA Vol 5, Tab 17).**

Costs

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12. VICT seeks costs of the proceeding before Rangiah J, the Full Court and this Court on the basis that s 570(2)(b) of the *Fair Work Act 2009* (Cth) is engaged: **AS [34]-[40]; Reply [20]**.

- (a) No unreasonable act by Mr Lunt caused VICT to incur costs before the Full Court and this Court, and the application for those costs should therefore be refused.
- (b) A costs application is extant before Rangiah J and his Honour should be left to rule on it: see **RS [39]-[40]; FABFM 84**.

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- (c) If this Court is to determine costs at first instance, then it was not "unreasonable" to bring the proceeding; cf **AS [37(a)]; Reply [20]**. Nor was it unreasonable to bring the proceeding while denying that the union was controlling the litigation; Rangiah J made no finding that it was unreasonable to resist the summary judgment application.

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9 February 2021

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