

# Abuse of process in bringing proceedings for the benefit of another

Parisa Hart reports on *Victoria International Container Terminal Limited v Lunt* [2021] HCA 11

The High Court of Australia has unanimously held that proceedings commenced by an employee should not have been summarily dismissed as an abuse of process because they were brought for the improper purpose of benefitting his trade union.

## Background

In 2016, Victoria International Container Terminal Limited (VICT), applied to the Fair Work Commission ('the Commission') for an approval of the *Victoria International Container Operations Agreement 2016* ('the Enterprise Agreement'). The application was made with the support of the Maritime Union of Australia ('the MUA'), which later merged with the Construction, Forestry, Maritime, Mining and Energy Union ('the CFMEU') and formed the fourth respondent ('the CFMMEU'). The Commission approved the Enterprise Agreement. Following the approval, the MUA brought several proceedings against the appellant in reliance on the Enterprise Agreement. However, in 2017, the MUA became dissatisfied with the Enterprise Agreement and started publicly criticising it.

## Mr Lunt's proceedings

The first respondent, Mr Lunt, was a longstanding member of the MUA for more than two decades before it merged with the CFMEU. Mr Lunt was employed by the appellant until his dismissal in 2017. Mr Lunt commenced the first proceeding in the Federal Court against the appellant claiming that the appellant had contravened the *Fair Work Act 2009* (Cth) by, inter alia, breaching the Enterprise Agreement.

Mr Lunt later sought leave to amend the originating application in the first proceeding to seek an order of certiorari quashing the Commission's approval of the Enterprise Agreement on the grounds that the approval was beyond its jurisdiction. The court refused leave to amend, and Mr Lunt commenced fresh proceedings in the Federal Court (the second proceedings) and sought the same relief as sought in his leave application in the first proceedings.



*If the integrity of the court can be protected by remedies less drastic than a permanent stay of proceedings then there is no justification for a court to go further than necessary to protect its processes by denying a party the liberty of a fair hearing'*

The appellant sought summary dismissal of the second proceedings on the basis that it was an abuse of process. It contended that the CFMMEU was the true moving party behind the proceedings, with Mr Lunt being deployed as a 'front man' to conceal the CFMMEU's role. The appellant further argued that Mr Lunt's evidence was unreliable, relying on Mr Lunt's intentional destruction of his mobile phone as going to the credibility of his account of the nature of his involvement in the proceedings.

The respondent denied this allegation and argued that he sought an order to quash the Commission's approval of the Enterprise Agreement by reason of his concerns about its conditions and the manner in which it was made.

## The decision of the Federal Court

Rangiah J found that the MUA and CFMMEU had funded both proceedings and that the MUA 'was heavily involved in obtaining and communicating Mr Lunt's instructions in application seeking leave to amend the originating process in the first proceedings.' His Honour also found that the MUA and CFMMEU were unwilling to bring proceedings in their own names because of the perceived risk that they would be refused relief on discretionary grounds because the MUA acquiesced in approving the Enterprise Agreement and delayed in bringing an action against the appellant. His Honour concluded that Mr Lunt may have had his own concerns about the merits of the Enterprise Agreement, but those concerns were not sufficient to motivate him to commence proceedings to have it quashed.

For these reasons, his Honour formed the view that the CFMMEU had engaged Mr Lunt as the 'front man' in both proceedings and that it would bring the 'administration of justice into disrepute' to permit the CFMMEU to employ Mr Lunt as a 'front man' to bring the second proceedings 'to challenge the approval of the Enterprise Agreement while avoiding scrutiny by the court of its acquiescence in the approval of, and reliance upon, the Enterprise Agreement'. His Honour allowed the appellant's application, and summarily dismissed the proceedings on the basis that Mr Lunt had brought the proceedings not to vindicate his own right but rather for an 'illegitimate and collateral purpose'.

## Full Court of the Federal Court's decision

Mr Lunt successfully appealed to the Full Court of the Federal Court. The Full Court considered that 'where a person has commenced or maintained a proceeding desiring to obtain a result within the scope of the remedy sought, the presence of a motive or reason for pursuing a proceeding which may be fulfilled as a consequence of obtaining the legal remedy which the proceeding is intended to produce, does not ground an abuse of process'. The Full Court held that because Mr Lunt sought

to obtain a result within the scope of the remedy sought by the second proceedings, *'there was no impropriety of purpose and hence no abuse of process'*. The Full Court further concluded that the circumstance that Mr Lunt may have been motivated by the desire to benefit the CFMMEU with the relief sought did not change that decision.

### The High Court's decision

The High Court unanimously upheld the Full Court's decision.

The appellant argued that the Full Court's decision that Mr Lunt did not bring the second proceedings for an *'illegitimate or improper purpose'* was not a sufficient reason to reverse Rangiah J's decision. The appellant relied on *PNJ v The Queen* [2009] HCA 6 and submitted that in these circumstances, permitting Mr Lunt to pursue the second proceedings would bring the administration of justice into disrepute (at [14]). The appellant further contended that the Full Court had failed to fully consider the findings of the primary judge that the purpose of Mr Lunt was to allow the CFMMEU *'to obtain relief "which it could not, or might not, obtain if the proceeding were brought in its own name" or "which it was unlikely to obtain if the proceeding were brought in its own name" because of the acquiescence of the MUA in the approval by the Commission of the Enterprise Agreement.'* The appellant emphasised the lack of candour

involved in Mr Lunt's attempt to conceal the role of the CFMMEU in advancing the proceedings and his destruction of mobile phone (at [15]).

Mr Lunt argued that his predominant purpose was truly to seek to quash the Commission's approval as the Enterprise Agreement was an important instrument that affected the rights of many employees (at [17]). Mr Lunt further contended that the Full Court was correct in finding that it was immaterial that he was motivated to benefit the CFMMEU, therefore, concealment of an immaterial motive was no basis to establish an abuse of process (at [16]).

The plurality consisted of Keifel CJ and Gageler, Keane and Gordon JJ. Edelman J agreed with the plurality but added further observations. The High Court stated that it was of crucial importance to draw a distinction between motive and purpose and cited the decision in *Williams v Spautz* (1992) 174 CLR 509: *'To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept...when the purpose of bringing proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers.'* (at [23]).

The High Court held that Mr Lunt's motive to bring the second proceedings to

benefit the CFMMEU or *'to avoid a possible forensic disadvantage to the CFMMEU'* did not mean that the proceedings were brought for *'an improper purpose'* (at [23]). The majority further stated that there was no basis to object to the arrangements between Mr Lunt and the CFMMEU as Mr Lunt was not obliged to disclose the nature and extent of the CFMMEU's involvement in the second proceedings (at [28]). The majority of the High Court also formed the view that Mr Lunt's lack of candour in concealing his relationship with the CFMMEU did not bring the administration of justice into disrepute and did not warrant the summary dismissal of the second proceedings (at [32-33]). Therefore, the majority found that the quashing of the Enterprise Agreement fell squarely within the scope of the remedy sought by second proceedings and Mr Lunt's motive to benefit himself or the CFMMEU was irrelevant (at [24]).

The court further held that courts' powers relating to abuse of process are not to be exercised to deter or punish want of candour on the part of a litigant but rather to be exercised *'to protect the integrity of the courts' own processes'* (at [32]).

Edelman J stated a new trial would be the remedy if there were evidence of a *'fraud on the court'* and concealment (at [42]). Edelman J considered that Mr Lunt's lack of candour in concealing CFMMEU's role was of a different nature from a tortious abuse of process, therefore, a permanent stay of the second proceedings was not an inappropriate response in the circumstances (at [43]). His Honour further explained that in case of abuse of process considerations of deterrence might arise but without a permanent stay the wrongful action will continue. However, the remedy for concealment is limited to protection of the integrity of the court. His Honour further stated that *'If the integrity of the court can be protected by remedies less drastic than a permanent stay of proceedings then there is no justification for a court to go further than necessary to protect its processes by denying a party the liberty of a fair hearing'* (at [43]). His Honour further stated that same approach applied to remedy illegality. His Honour formed the view that these are examples where courts do the *'minimum necessary'* to avoid *'self-stultification of the law'* and serve the objective of *'maintaining coherence in the law'*. Therefore, in the second proceedings where CFMMEU's role had been revealed, there was *'no threat to the integrity of the court's process'* and the extreme measure of a stay of proceedings was unnecessary (at [45]).

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