FEDERAL COURT OF AUSTRALIA

Lunt v Victoria International Container Terminal Limited [2020] FCAFC 40

Appeal from:	*Lunt v Victoria International Container Terminal Limited (No 2)* [2019] FCA 1016
File number:	VID 777 of 2019
Judges:	**BROMBERG, KERR AND WHEELAHAN JJ**
Date of judgment:	18 March 2020
Catchwords:	**PRACTICE AND PROCEDURE** – appeal from order dismissing appellant's proceeding as an abuse of process – where primary judge held that it was an abuse of process for the appellant to institute the proceeding for the predominant purpose of seeking relief because a third person wanted that relief – whether appeal inutile – whether primary judge misapplied the distinction between the purpose and the motive for instituting a proceeding made in *Williams v Spautz* (1992) 174 CLR 509 – where neither the appellant's or third party's predominant purpose was held to be a purpose for which the proceeding was not designed, the proceeding was not an abuse of process – appeal allowed.
Cases cited:	*Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 *House v The King* (1936) 55 CLR 499 *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* (2017) 53 VR 709 *PNJ v The Queen* [2009] HCA 6 *Walsh v Worley-Parsons Ltd (No 4)* [2017] VSC 292 *Williams v Spautz* (1992) 174 CLR 509
Date of hearing:	17 February 2020
Registry:	Victoria
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	26

Counsel for the Appellant:	Mr C Dowling SC with Mr D Foster
Solicitor for the Appellant:	Maurice Blackburn Lawyers
Counsel for the First Respondent:	Mr S Wood AM QC with Ms R Sweet and Mr N Burmeister
Solicitor for the First Respondent:	Seyfarth Shaw Australia
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice
Counsel for the Third Respondent:	The Third Respondent filed a submitting notice
Counsel for the Fourth Respondent:	The Fourth Respondent filed a submitting notice

ORDERS

VID 777 of 2019

BETWEEN:	**RICHARD SIMON LUNT** Appellant
AND:	**VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED (ACN 164 915 655)** First Respondent
	FAIR WORK COMMISSION Second Respondent
	THE AUSTRALIAN MARITIME OFFICERS' UNION (and another named in the Schedule) Third Respondent
JUDGES:	**BROMBERG, KERR AND WHEELAHAN JJ**
DATE OF ORDER:	**18 MARCH 2020**

THE COURT ORDERS THAT:

1. The appeal is upheld.
2. The order made on 2 July 2019 dismissing the proceeding is set aside, and in lieu thereof the First Respondent's application to dismiss the proceeding as an abuse of process is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 In the proceeding before the primary judge, the appellant ("**Mr Lunt**") sought an order in the nature of certiorari quashing the approval by the Fair Work Commission of the *Victoria International Container Operations Agreement 2016* ("**Enterprise Agreement**"). In that proceeding the first respondent to the appeal ("**VICT**") made an application for the dismissal of the proceeding on the ground that it was an abuse of process. On 2 July 2019, the primary judge acceded to the application made by VICT and dismissed the proceeding as an abuse of process: *Lunt v Victoria International Container Terminal Limited (No 2)* [2019] FCA 1016.

2 Mr Lunt appeals from the order made by the primary judge dismissing his proceeding as an abuse of process. As that order was an interlocutory order, leave to appeal was required and was granted, as was an extension of time in which to file the appeal: see *Lunt v Victoria International Container Terminal Ltd* [2019] FCA 1599.

3 The procedural history and background to the proceeding before the primary judge is set out at [6]-[18] of the primary judge's reasons for judgment. For present purposes, it is not necessary to here record that history. It is sufficient to set out, in full, the primary judge's conclusions. The primary judge concluded that the proceeding brought by Mr Lunt was an abuse of process for the following reasons:

> [130] In my opinion, the Current Proceeding is an abuse of process. That is so because it has each of the characteristics described in *PNJ v The Queen*, namely, the invoking of the Court's process for an illegitimate and collateral purpose and that the use of the Court procedures would be unjustifiably oppressive to a party and would bring the administration of justice into disrepute. In reaching that conclusion, I have borne in mind that the onus of proof upon VICT is a heavy one.
>
> [131] I am satisfied that Mr Lunt has not brought the Current Proceeding for the predominant purpose of vindicating his own legal rights. Instead, Mr Lunt has brought the proceeding for the predominant purpose of enabling the CFMMEU to obtain relief which it was unlikely to obtain if the proceeding were brought in its own name. In my opinion, that is an illegitimate and collateral purpose.
>
> [132] It is true that a representative proceeding may be brought not only for the benefit of the lead applicant, but the benefit of others in the class. In *Melbourne City Investments Pty Ltd v Myer Holdings Ltd*, Ferguson and Osborn JJ held that, 'the proper purpose of such an action looks to enforcing the substantive rights of the plaintiff and laying the groundwork for enforcing the substantive rights of the group members.' However, I have concluded that Mr Lunt's predominant purpose in bringing the Current Proceeding did not encompass enforcing his own substantive rights. Mr Lunt has brought the proceeding for

the predominant purpose of enforcing the claim of the CFMMEU, but his case has been conducted on the basis that he has brought the proceeding for his own benefit, and not to represent the CFMMEU.

[133] I also find that the CFMMEU is the true moving party. It is the true moving party because it has used Mr Lunt to seek the relief that it fears it would not obtain if it brought the proceeding in its own name. Through the device of the CFMMEU using Mr Lunt as a 'front man', VICT has been deprived of the opportunity to defend the proceeding on the basis that the MUA acquiesced in the approval that is now sought to be quashed, failed to exercise its right to apply for permission to appeal and delayed in bringing the proceeding in circumstances where VICT, its employees and the MUA were acting under the terms of the Enterprise Agreement. In my opinion, the CFMMEU's use of the Court's procedures to bring the proceeding in Mr Lunt's name is unjustifiably oppressive to VICT.

[134] Further, it would bring the administration of justice into disrepute if the CFMMEU were permitted, by using the device of having a 'front man', to bring the proceeding to challenge the approval of the Enterprise Agreement while avoiding scrutiny of its acquiescence to that approval.

4 The challenge made to the judgment of the primary judge by the Notice of Appeal was expressed in the following terms:

1. The trial judge acted upon a wrong principle in concluding that it was an abuse of process for the appellant to bring a proceeding for the predominant purpose of seeking relief because another person (here, the fourth respondent) wanted that relief (see at [116], [119], [131]-[132]).

Particulars

(a) To amount to an abuse of process, the commencement or maintenance of the proceeding must be for a purpose which does not include, at least to any substantial extent, the obtaining of relief within the scope of the remedy claimed. See written submissions of the appellant dated 25 March 2019 at [25].

(b) Whether the appellant wanted the relief sought because the fourth respondent wanted that relief is unimportant. To hold otherwise is to fail to distinguish between (i) purpose and motive or between (ii) the immediate and ultimate purpose. See written submissions of the appellant dated 25 March 2019 at [25], [38]-[39], [54]; T188.37-43. The trial judge merely said, but did not explain, that his Honour took the distinction between purpose and motive into account: see at [119].

(c) Whether the appellant is the 'front man' for the fourth respondent as 'the true moving party' is unimportant where (i) no finding was made that the applicant brought the proceeding otherwise than to obtain the relief sought and (ii) the fourth respondent has a genuine interest in obtaining, and standing itself to seek, the relief sought in the proceeding (as to (ii), see T195.37-41; see also written submissions of the respondent dated 3 April 2019 at [126]). *Walsh v WorleyParsons Ltd [No 4]* [2017] VSC 292 upon which the trial judge relied is distinguishable. See T188.35-37.

5 VICT contended that, even if the challenge made by Mr Lunt's Notice of Appeal succeeded, the appeal was inutile because the sole ground in the Notice of Appeal "is directed only at the Category 1 conclusion", a reference to the primary judge's conclusion at [131]-[132]. The submission was premised on the proposition that the primary judge "found, separately, each category of abuse". In other words, that beyond the finding of an abuse of process made at [131] of his Honour's reasons, two separate and unchallenged findings of an abuse of process were made by the primary judge at [133] and [134].

6 That submissions calls for a consideration of what the primary judge actually found. In our view, it is tolerably clear that the primary judge found one instance of abuse of process and not three. There was only one instance of conduct upon which the abuse of process found by the primary judge was based. That was that Mr Lunt had instituted the proceeding for an illegitimate purpose. That single instance of what the primary judge considered to be an abuse of process was regarded by his Honour as exhibiting each of the three characteristics described in ***PNJ*** *v The Queen* [2009] HCA 6, where at [3], French CJ, Gummow, Hayne, Crennan and Kiefel JJ said (emphasis added):

> It is not possible to describe exhaustively what will constitute an abuse of process. It may be accepted, however, that many cases of abuse of process *will exhibit at least one of three characteristics*:
>
> (a) the invoking of a court's processes for an illegitimate or collateral purpose;
>
> (b) the use of the court's procedures would be unjustifiably oppressive to a party; or
>
> (c) the use of the court's procedures would bring the administration of justice into disrepute.

7 That the primary judge concluded that the abuse of process found by him exhibited each of the three characteristics of an abuse of process referred to in *PNJ* does not suggest a conclusion of three separate instances of abuse of process. What the primary judge did was find one instance of abuse of process which, by reference to its cause and by reference to its consequences, was exhibited or demonstrated in three different ways.

8 Absent that instance of abuse – that the proceeding was brought for an illegitimate purpose – no abuse of process would have or could have been found by the primary judge on the factual findings his Honour made.

9 Consistently with the primary judge's finding of a single instance of an abuse of process, the Notice of Appeal challenges that single finding. It seeks to do that by challenging the premise

upon which that finding was made – that Mr Lunt brought the proceeding for an illegitimate purpose. If by that challenge appealable error is demonstrated, the single finding of an abuse of process which the Notice of Appeal impugns must fall and each of the various manifestations of it considered by the primary judge to have been exhibited must fall with it.

10 True it is that Mr Lunt's Notice of Appeal could have been framed more clearly. Whilst Mr Lunt sought leave to make a minor amendment to his Notice of Appeal to clarify its intent, that intent seems sufficiently apparent. The proposed amendment is unnecessary and leave to effectuate it need not be further addressed.

11 It is necessary then to turn to the challenge made by the Notice of Appeal to the primary judge's conclusion that the proceeding was brought for an illegitimate purpose.

12 It was not in contest that, in relation to abuse of process, appellate intervention depends upon satisfaction of the *House v The King* principles (*House v The King* (1936) 55 CLR 499) applicable in respect of discretionary decisions: see *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [7] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

13 Mr Lunt contended that the primary judge acted upon a wrong principle in concluding that it was an abuse of process for him to bring the proceeding for the predominant purpose of seeking relief because another person – the Fourth Respondent ("**CFMMEU**") – wanted that relief. Mr Lunt submitted that although the primary judge adverted (at [67]) to the following statement of principle by Brennan J in *Williams v* ***Spautz*** (1992) 174 CLR 509, his Honour erroneously misapplied it. At 535 of *Spautz*, Brennan J said this:

> There is no impropriety of purpose (whatever may be said of motive) when a plaintiff commences or maintains a proceeding desiring to obtain a result within the scope of the remedy, even though the plaintiff has an ulterior purpose – or motive – which will be fulfilled in consequence of obtaining the legal remedy which the proceeding is intended to produce. To amount to an abuse of process, the commencement or maintenance of the proceeding must be for a purpose which does not include – at least to any substantial extent – the obtaining of relief within the scope of the remedy.

14 With respect to the learned primary judge, we agree that his Honour erred in the manner contended for by Mr Lunt.

15 The primary judge concluded at [131]-[132] that Mr Lunt's predominant purpose was not "vindicating his own legal rights" and "did not encompass enforcing his own substantive rights". In other words, the primary judge found that Mr Lunt's predominant purpose did not

encompass obtaining the relief he sought – an order quashing the Enterprise Agreement – for his own personal benefit. The primary judge held at [131]-[132] that Mr Lunt's predominant purpose was, instead, the purpose of "enabling the CFMMEU to obtain relief". That purpose was regarded by the primary judge to be an illegitimate or collateral purpose which grounded an abuse of process.

16 As is made clear by the observations of Brennan J in *Spautz*, 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

17 Necessarily implicit in the primary judge's findings at [131]-[132] – that Mr Lunt's predominant purpose was to enable the CFMMEU to obtain the benefit of the relief sought by his proceeding – was a finding, to adopt the language of Brennan J in *Spautz*, that Mr Lunt had commenced or maintained his proceeding "desiring to obtain a result within the scope of the remedy" pursued by the proceeding. That Mr Lunt wanted the CFMMEU to take the benefit of the relief sought, confirms rather than denies the fact that Mr Lunt desired to obtain a result within the scope of the remedy that the proceeding sought. That Mr Lunt did not desire the benefit of a result for himself does not deny the fact that he nevertheless sought a result – an order quashing the Enterprise Agreement – which was within the scope of the remedy sought by the proceeding.

18 Mr Lunt's desire to see the CFMMEU take the entirety of the benefit of the result sought was a motive or reason which would be fulfilled in consequence of Mr Lunt obtaining the legal remedy which his proceeding was intended to produce. That he held that motive did not deny, but served to confirm, that his purpose in commencing and maintaining the proceeding was to obtain a result within the scope of the remedy which his proceeding sought. There was therefore "no impropriety of purpose" and no abuse of process.

19 Mr Lunt was correct to contend that the primary judge mistook the distinction between purpose and motive referred to by Brennan J in *Spautz* and, that by focusing on Mr Lunt's motive for seeking relief and mischaracterising that motive as his purpose, the primary judge failed to appreciate that Mr Lunt's purpose for commencing and maintaining his proceeding was the legitimate purpose of desiring to obtain a result within the scope of the remedy pursued by the proceeding.

20 It is not the case, as VICT submitted, that the reasoning of Brennan J in *Spautz* was obiter. Indeed, the reasoning of Brennan J in question is consistent with the reasoning of the plurality (Mason CJ, Dawson, Toohey and McHugh JJ), albeit, that the plurality employed different terminology to describe the same distinction. Whilst Brennan J referred to the distinction between purpose and motive, the plurality used the language of immediate purpose (purpose) and ultimate purpose (motive). The plurality (at 526) found that where the immediate purpose in bringing a proceeding is to bring about a result for which the law provides, the existence of an ultimate purpose would not constitute an abuse of process:

> 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. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
>
> Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.
>
> It is otherwise when the purpose of bringing the proceeding 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.

21 The statement of principle expressed by Brennan J is clearly aligned with that of the plurality. In the terminology of the plurality, Mr Lunt had the ultimate purpose of providing the CFMMEU with the benefit of the remedy sought. However, his immediate purpose was to bring about a result within the scope of the proceeding he instituted, and thereby a result for which the law provides. There was no basis for concluding that Mr Lunt's immediate purpose for bringing the proceeding was "not to prosecute [it] to a conclusion but to use [it] as a means of obtaining some advantage for which [it is] not designed or some collateral advantage beyond what the law offers".

22 VICT contended that Mr Lunt did not have a proper purpose because, to be reasonably proper, the protection or vindication of the right he pursued by the proceeding "must be personal" to him. For that proposition VICT referred to the following observations made by Osborn and

Ferguson JJA in ***Melbourne City Investments*** *Pty Ltd v Myer Holdings Ltd* (2017) 53 VR 709 at [46]:

> Consequently, in the class action sphere, the question of whether the proceeding has been brought for an improper purpose cannot be determined simply by asking whether the lead plaintiff would have brought the proceeding as a sole plaintiff. Nevertheless, the proper purpose of such an action looks to enforcing the substantive rights of the plaintiff and laying the groundwork for enforcing the substantive rights of the group members. Picking up on the language used by Lord Evershed MR in *Re Marjory* (as adopted by the plurality and Brennan J in *Williams v Spautz),* class actions are not designed, nor do they exist for the purpose of the lead plaintiff obtaining ancillary orders of the type which MCI wishes to seek under ss 33ZF and 33V. Here, MCI was created for the purpose of bringing class actions to earn income of that type and its predominant purpose in commencing the present proceeding was to obtain such orders. As the judge found, it is not interested in pursuing the claim for recovery of the damages it alleges it has sustained or for a settlement in respect of that claim. In short, it has no substantial interest in recovering money in silo 1. Rather, its focus is on silos 2 and 3. Nor is MCI's predominant purpose in bringing the proceeding to have the common questions determined for the benefit of group members or to settle the litigation for their benefit.

23 *Melbourne City Investments* concerned whether a class action had been brought for an improper purpose by its lead applicant. The proceeding was not dismissed as an abuse of process because the lead applicant was not pursuing the protection or vindication of a substantive right personal to it. Describing *Spautz* as the leading authority on abuse of process of the improper purpose kind (at [8]), Osborn and Ferguson JJA applied *Spautz* to conclude at [48] that there was an abuse of process because the lead applicant had not brought the proceeding "for the purpose for which the proceeding is designed". The lead applicant's predominant purpose – of seeking to generate income or profit by reason of its representation of group members (referred to as "silo 2") and as a funder of the class action (referred to as "silo 3") – was held to be a predominant purpose ulterior to the proper purpose of the proceeding. In reaching its conclusion as to the applicant's predominant purpose, Osborn and Ferguson JJA relied on a finding that the applicant had no substantial interest in recovering for itself the compensation sought by the proceeding (referred to as "silo 1"). However, the basis for the finding of an abuse of process was that the applicant's predominant purpose was not a purpose for which the proceeding was designed. The finding that the applicant was disinterested in recovering compensation for itself was not the basis for the finding of an abuse of process. Nor are the observations relied upon by VICT suggestive of a statement of principle that an applicant's disinterest in obtaining the benefit of a remedy for itself is sufficient of itself to exhibit an abuse of process. Such a disinterest may suggest the existence of an improper predominant purpose, but the existence of a proper purpose consistent with the purpose for which the proceeding is

designed does not depend upon the applicant's interest in taking the benefit of the remedy the proceeding is designed to achieve for itself.

24 Although before the primary judge reliance was placed by VICT on the judgment of Cameron J in ***Walsh*** *v Worley-Parsons Ltd (No 4)* [2017] VSC 292, on the appeal VICT did not directly rely on that case. The basis for VICT's reliance on that judgment before the primary judge is not clear from the primary judge's reasons for judgment. Nor is the basis or extent of the reliance placed upon that judgment by the primary judge. Nevertheless, because we suspect that the primary judge may have been led into error by the reliance placed on *Walsh* by VICT, it is helpful to record that whilst *Walsh* is authority for the proposition that a predominant purpose may be assessed by reference to the purpose of the moving party to the proceeding (at [130]), *Walsh* is not authority for the general proposition that where a third party is the moving party, a proceeding may be struck out as an abuse of process. The material feature of *Walsh* is that the moving party was maintaining the proceeding for an improper purpose. In *Walsh*, Cameron J held that the proceeding was an abuse of process because, in circumstances not dissimilar to those of *Melbourne City Investments*, the predominant purpose of the moving party (a lawyer involved in and a funder of the representative proceeding) was to maintain the proceeding in order to generate financial gain for himself (at [233]). In that case, the predominant purpose was not a purpose for which the proceeding was designed. In contrast and for reasons already explained, in this case neither the predominant purpose of Mr Lunt or of the CFMMEU was held to be a purpose for which the proceeding was not designed.

25 For those reasons the appeal must be allowed, the order made by the trial judge on 2 July 2019 should be set aside and in lieu thereof an order should be made that VICT's application to dismiss the proceeding as an abuse of process be dismissed.

26 No order as to costs was pressed at the hearing and we presume that to be the case because of the operation of s 570 of the *Fair Work Act 2009* (Cth). If despite the costs hurdle imposed by that provision an order for costs is pressed, the party so pressing should file and serve a short written submission of no more than 2 pages within 7 days of the publication of these reasons. Any response (of no more than 2 pages) should be filed and served within 7 days thereafter. The Court will deal with any application on the papers.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bromberg, Kerr and Wheelahan.

Associate:

Dated: 18 March 2020

SCHEDULE OF PARTIES

VID 777 of 2019

Respondents

Fourth Respondent:	CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION