FEDERAL COURT OF AUSTRALIA

Lunt v Victoria International Container Terminal Limited [2019] FCA 1599

File number:	VID 777 of 2019
Judge:	**KERR J**
Date of judgment:	30 September 2019
Catchwords:	**PRACTICE AND PROCEDURE** – application for extension of time and leave to appeal decision of the Federal Court of Australia summarily dismissing proceedings as an abuse of process – application granted in part
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 24(1)(a) *Federal Court Rules 2011* (Cth) rr 35.13, 36.05
Cases cited:	*Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; 148 CLR 170 *BLD16 v Minister for Immigration and Border Protection* [2017] FCA 1400 *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 *Décor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 844; 33 FCR 397 *Jackamarra (an Infant) v Krakouer* [1998] HCA 27; 195 CLR 516 *Lunt v Victoria International Container Terminal Limited (No 2)* [2019] FCA 1016 *PNJ v The Queen* [2009] HCA 6; 252 ALR 612 *Samsung Electronics Co Ltd v Apple Inc* [2013] FCAFC 138 *Williams v Spautz* [1992] HCA 34; 174 CLR 509
Date of hearing:	Determined on the papers
Date of last submissions:	23 September 2019
Registry:	Victoria
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords

Number of paragraphs: 61

Table of Corrections

1 October 2019 In catchwords, court has changed to Federal Court of Australia.

ORDERS

VID 777 of 2019

BETWEEN:	**RICHARD SIMON LUNT** Applicant
AND:	**VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED** First Respondent
	FAIR WORK COMMISSION Second Respondent
	AUSTRALIAN MARITIME OFFICERS UNION (and another named in the Schedule) Third Respondent

JUDGE:	**KERR J**
DATE OF ORDER:	**30 SEPTEMBER 2019**

THE COURT ORDERS THAT:

1. The date by which the Applicant is required to seek leave to appeal, on the ground articulated in proposed Ground 1 of his Draft Notice of Appeal, be extended to 9:00am 24 July 2019.
2. The Applicant have leave to appeal from the decision of the Federal Court of Australia in *Lunt v Victoria International Container Terminal Limited (No 2)* [2019] FCA 1016 on the ground articulated in proposed Ground 1 of his Draft Notice of Appeal. The Applicant's application for leave to appeal be otherwise dismissed.
3. The costs of the Applicant's application for an extension of time to seek leave to appeal, and for leave to appeal, be costs in the appeal.
4. The appeal be listed before a Full Court in Melbourne during the February 2020 Full Court and Appellate sitting period for a hearing of the appeal.
5. The hearing of the appeal be listed for an estimate of one day.
6. The Applicant submit to the Respondents drafts of the Part A index and Part B index of the proposed Appeal Book for the agreement of the Respondents within 10 business days of the making of these orders in accordance with Practice Note APP2.

7. The parties to agree the Part A index and Part B index of the Appeal Book within 5 business days of the Applicant submitting the drafts of the Part A index and the draft of the part B index to the Respondents.

8. In accordance with Practice Note APP2, the Applicant submit to the Registrar the agreed drafts of the Part A index and the Part B index of the proposed appeal book within 5 business days of agreement of the Respondents to the draft indexes.

9. In accordance with Practice Note APP2, within ten business days of approval by the Registrar, the Applicant:

   (a) file four hard copies and an electronic copy; and

   (b) serve on the Respondents an appropriate number of copies

   of Parts A and B of the Appeal Book.

10. In accordance with Practice Note APP2, not later than 4:00pm 20 business days before the hearing of the appeal, the Applicant file and serve on the Respondents an outline of submissions and chronology of relevant events.

11. In accordance with Practice Note APP2, not later than 4:00pm 15 business days before the hearing, the Respondents file and serve on the Applicant an outline of submissions, a chronology of the relevant events and a list of materials to be included in Part C of the Appeal Book.

12. In accordance with Practice Note APP2, not later than 4:00pm 10 business days before the hearing, the Applicant file and serve on the Respondents any submissions in reply.

13. In accordance with Practice Note APP2, not later than 4:00pm 5 business days before the hearing, the Applicant:

   (a) file four hard copies and an electronic copy; and

   (b) serve on the Respondent an appropriate number of copies

   of Part C of the Appeal Book.

14. Outlines of submissions are not to exceed 10 pages in length, including any annexures, and are to be easily legible using a font size of at least 12 points and one and a half line spacing through, including in footnotes and annexures. Italics or underlining must be used for legislation and case citations and boldface or italics may be used for occasional emphasis.

15. Each party file and serve a list of authorities and legislation in accordance with the List of Authorities and Citation Practice Note (GPN-AUTH).

16. Liberty to apply.

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

REASONS FOR JUDGMENT

KERR J:

1 This is an application for extension of time to seek leave to appeal and for leave to appeal, should an extension of time be granted, from the judgment of the Federal Court of Australia in *Lunt v Victoria International Container Terminal Limited (No 2)* [2019] FCA 1016.

2 In that proceeding the Applicant, Mr Lunt, had sought an order in the nature of certiorari quashing the approval by the Second Respondent, the Fair Work Commission, of the *Victoria International Container Operations Agreement 2016* (**Enterprise Agreement**) and other related orders.

3 By way of an interlocutory application the First Respondent, Victoria International Container Terminal Ltd, sought dismissal of the proceedings on the ground that they were an abuse of the processes of the Court. It contended that the proceedings were not truly those of Mr Lunt. Instead, the First Respondent submitted, the Fourth Respondent the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) was the true moving party in the proceeding. The action had been in Mr Lunt's name only because the CFMMEU would inevitably have failed had it brought the proceeding in its own name. It would have failed, the First Respondent submitted, because, inter-alia, the CFMMEU's predecessor in law, the Maritime Union of Australia (**MUA)** had prior to its amalgamation with the former Construction Forestry Mining and Energy Union (to form the larger CFMMEU) acquiesced in the approval of the very enterprise agreement that was then sought to be challenged.

4 Mr Lunt did not deny that he and the CFMMEU might share a common interest in contesting the validity of the Enterprise Agreement. However, he maintained that he himself had a distinct interest as a former employee whose rights were contingently affected and that he was the true moving party.

5 The primary judge heard evidence, made findings and ultimately accepted the premise upon which the First Respondent had based its interlocutory application. His Honour rejected much of Mr Lunt's evidence for want of credit. His Honour concluded that Mr Lunt had allowed himself to be used as the "front man" to enable the MUA and the CFMMEU to effectively conduct proceedings that they were not willing to bring in their own names.

6 The primary judge concluded that that amounted to an abuse of process, finding (at [130]):

> That is so because it has each of the characteristics described in *PJN v The Queen* [[2009] HCA 6; 252 ALR 612], 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.

7 For that reason his Honour summarily dismissed the proceeding on the basis that it was an abuse of process. His Honour's judgment was given on 2 July 2019.

8 On 22 July 2019 Mr Lunt made the applications referred to in [1] above. The grounds of his applications were stated as follows:

> 1. An application for leave to appeal was not filed within the time prescribed by the *Federal Court Rules 2011* by reason of inadvertent error.
>
> 2. The period of delay is short, and the applicant has moved expeditiously after realising the error.
>
> 3. No prejudice has been caused to the respondents by reason of the delay.
>
> 4. The trial judge's decision is attended by sufficient doubt to warrant its being reconsidered. The proposed grounds of appeal, if an extension of time and leave to appeal are granted, are strong.
>
> 5. The order causes serious prejudice to the applicant's rights and interests, because (a) the order made by the trial judge is final in effect and (b) the trial judge made serious adverse findings against the applicant.

9 The AMU and the Fair Work Commission (the Second and Third Respondents) both filed submitting notices.

10 Mr Lunt's applications were supported by the affidavit of Ms Dawson-Field, a solicitor employed by Maurice Blackburn Lawyers having conduct of Mr Lunt's matter. In that affidavit Ms Dawson-Field deposes to the circumstances on which Mr Lunt relies as the explanation for his delay in commencing his appeal.

11 They are as follows:

> 10. On 17 July 2019, I received instructions to appeal the orders of the Honourable Justice Rangiah.
>
> 11. Until 19 July, I had believed that the applicable time limit was either 21 or 28 days, on the basis that rule 36.03 of the *Federal Court Rules 2011* (Cth) applied. Until then, I had been concerned about whether rule 36.03 in its present form applied or not, having been amended by the *Federal Court Amendment (Court Administration and Other Measures) Rules 2019* (Cth).
>
> 12. On 19 July 2019, counsel brought to my attention that the trial judge's order was interlocutory even though it resulted in a dismissal of the proceeding, and that for this reason a different time limit applied under rule 35.13 of the

Federal Court Rules 2011. The time within which to seek leave to appeal expired on 16 July 2019.

13. After this was brought to my attention, on the same day (19 July 2019), I sent a letter to the solicitors for the first respondent informing them of the mistake and of my instructions to seek leave to appeal. Annexed to this affidavit and marked **"JDF-1"** is a copy of this letter.

14. I regret and apologise for the error made, which was entirely inadvertent. I recognise the importance of meeting court deadlines.

15. Upon this error being identified, the applicant's legal team has acted expeditiously to seek leave to commence an appeal.

12 As an annexure to her affidavit Ms Dawson-Field supplies a draft notice of appeal which sets out the proposed Grounds of Appeal upon which Mr Lunt would wish to rely if leave is granted.

13 His proposed Grounds are as follows:

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.

2. The trial judge mistook the facts in finding that:

(a) the appellant destroyed the Samsung phone with the intention of destroying evidence (at [91]); and

(b) the appellant destroyed the Samsung phone because he feared that production of text messages he had sent to Mr Tracey would tell against his case (at [97]),

in that these findings were not open to the trial judge on the evidence.

Particulars

(a) Findings that a party has destroyed evidence and that he has done so because the evidence would harm his case must be made based on more than inexact proofs, indefinite testimony or indirect inferences having regard to the seriousness of the allegations, the inherent unlikelihood of the occurrences described and the gravity of the consequences flowing from such findings: *Evidence Act 1995* (Cth) s 140(2); *Briginshaw v Briginshaw (*1938) 60 CLR 336 at 361-362. See written submissions of the appellant dated 25 March 2019 at [30]; T189.5-8.

(b) Contrary to *Browne v Dunn* (1893) 6 R 67, neither of the impugned findings was put to the appellant in cross-examination. See T193.12-13.

(c) The trial judge at [91] mistook the evidence quoted at [90]. At [91], the trial judge quoted the appellant's evidence that "I could never destroy that evidence—evidence if it existed". But the trial judge left out his evidence that "There's another party involved that could have been - their phones could have been provided to prove that there was no communications between me and the MUA". Fairly understood, the appellant's evidence was that there was no reason for him to destroy evidence because the first respondent could obtain any such evidence from the recipient of any communication anyway. It was for this reason that the appellant said "no, you just want my phone".

(d) If the appellant had sought to destroy evidence, that evidence would have been of communications between him and Mr Tracey of the fourth respondent. Such communications could be obtained from Mr Tracey in any event. Mr Tracey had affirmed an affidavit of discovery on behalf of the fourth respondent that went unchallenged: see CB 527. This was drawn to the trial judge's attention: see T193.45-47.

(e) The impugned finding was material to the trial judge's overall decision. It contributed to inferences adverse to the appellant being drawn: at [92], [117]. It also undermined his credibility: at [97],

3. The trial judge's conclusion that the proceeding involves an abuse of process was not open on the facts, or was unreasonable or plainly unjust.

Particulars

(a) There is a "heavy" onus on the party alleging an abuse of process.

(b) The onus could not have been discharged in this case.

(i) While the trial judge found that the fourth respondent organised, orchestrated and funded the current proceeding (at [129]) the trial judge also did not accept that the appellant did not give instructions to the solicitors on the record (at [113]).

(ii) The trial judge did not accept that obtaining the relief sought would necessarily undermine the appellant's claim in an associated proceeding (at [115]). That it would do so was a critical step in any contention that the appellant could not in fact have wanted the relief sought: of written submissions of the respondent dated 3 April 2019 at [94]-[95]; T175.35-37; T202.41-43. No other matters of substance were relied upon by the fourth respondent to discharge the onus.

(c) The trial judge implicitly accepted that the appellant wanted the relief sought in this proceeding, albeit the trial judge found that the appellant did so for the reason that this is what the fourth respondent wanted (at [119], [131]).

14 On 15 August 2019 I made orders by consent requiring the parties to file and serve their respective written submissions and providing for both the application for an extension of time and the application for leave to appeal to be heard and determined on the papers.

15 It is convenient first to note that Ms Dawson-Field subsequently filed a further affidavit on 30 August 2019 in which she briefly supplements her previously advised explanation for the delay. In that affidavit she deposes:

3. This is the second affidavit I have affirmed in support of the applicant's application for an extension of time and leave to appeal. The purpose of this second affidavit is to explain the attempts made by the applicant to file the application.

4. On Monday 22 July 2019, I instructed my legal assistant, Stephanie Nedelkovska, to file the Application for Leave to Appeal and Extension of Time (Application) and my supporting affidavit (Affidavit).

5. Ms Nedelkovska informs me that:

a. She filed the Application and Affidavit at 4:12 pm on 22 July 2019 electronically;

b. At around 4:50pm on the 23 July 2019, she called the Federal Court Registry and spoke with someone by the name of "Aastha" at the Melbourne Registry Aastha advised her that the documents would be rejected as the Fair Work Act 2009 (Cth) Part 2.4 exemption had been selected upon filing. The applicant was not entitled to that exemption.

c. At around 5pm on 23 July 2019, Ms Nedelkovska refiled the Application and the Affidavit and this time did not select the Part 2.4 exemption.

d. During the afternoon of 24 July 2019, a sealed copy of the Application and the Affidavit was received from the Registry.

Extension of time

The Applicant's submissions

16 The Applicant submits that he should be granted an extension of time for the following reasons:

10. *First*, the delay is short. Time within which to seek leave to appeal expired on 16 July 2019, and the application is taken to have been filed on 24 July 2019 (it was filed electronically after business hours on 23 July 2019). The applicant's solicitors attempted to file on 22 July 2019 but the material was rejected for efiling.

11. *Second*, the delay is fully explained. Ms Dawson-Field is the solicitor with the care and conduct of this matter subject to the supervision of her principals. She explains how and why she only realised that the trial judge's orders were interlocutory, and that a shorter time period therefore applied, on Friday 19 July 2019. Her attention had previously been focused on the question whether the Court's new rules changing the time limit for appealing final orders applied. Ms Dawson-Field then promptly corresponded with the respondents, and the applicant acted promptly to file these applications. The error was inadvertent and she has apologised to the Court.

12. *Third*, the applicant is aware of no prejudice to the first respondent, who is the only party to oppose the grant of an extension of time.

13. *Fourth*, for the reasons in Part F below, the proposed grounds of appeal have sufficient prospects to warrant the grant of an extension of time.

(Footnotes omitted).

The First Respondent's submissions

17 The First Respondent submits that time should not be extended for two reasons. The first reason that it advances in opposition to an extension of time is that the proposed appeal (and ipso facto the leave application) is weakly based and lacks any reasonable prospects of success. The second is that the Applicant has failed to explain his delay. With respect to that second reason, the First Respondent submits:

24. **Second,** and more fundamentally, the Applicant has failed to explain his delay. The explanation must be "satisfactory" and cover every part of the delay. Contrary to the Applicant's submissions, the delay is not "fully explained". Despite two attempts to explain himself, his evidentiary narrative begins on 17 July 2019 (the day <u>after</u> the expiry of the fixed period). The evidence is conspicuously silent as to why the operative part of the delay occurred; what the Applicant was told by his solicitors and counsel; and what he told them.

25. The observation of Wigney J in *Kennedy v Secretary, Department of Industry* [2016] FCA 1251, citing Lindgren J in *Sharman License Holdings Ltd v Universal Music Aust Pty Ltd* [2005] FCA 802, is apposite: (citations omitted)

> "It is generally not sufficient to simply explain the delay following the expiry of that period. Failure to explain why the application was not filed within the fixed period may alone justify the refusal of an application for an extension of time."

> 26. A *"full and frank"* explanation for the delay was required. The Applicant's explanation is neither full nor frank. This alone justifies the Court refusing to extend time.
>
> (Footnotes omitted).

18 The Applicant's reply submissions join issue with several of the propositions advanced by the First Respondent, and advance a request for leave to add a further particular to proposed Ground 3. I address that question under that heading.

Consideration

19 The principles governing the grant of leave to appeal out of time where an application is lodged pursuant to r 36.05 of the *Federal Court Rules 2011* (Cth) (**Rules)** are well established. They are not in dispute. Each party properly proceeds on the basis that the considerations going towards an ultimately evaluative conclusion as to whether a judge will be positively satisfied that it is proper to grant such leave are those (a) relating to the length of the delay and the adequacy of the explanation for it; (b) any potential prejudice to a party; and (c) the merits of the proposed appeal.

20 I accept the First Respondent's submission that Mr Lunt has not explained any delay prior to 17 July 2019. There is no reason to doubt Ms Dawson-Field's explanation that she received instructions from Mr Lunt to file his appeal on that day (one day late) and that any further delay was a result of her having made an inadvertent mistake regarding the time permitted to lodge an appeal against an interlocutory decision (14 days under r 35.13 of the Rules) as opposed to the longer period allowed for an appeal against final orders. However, as the First Respondent points out, had Ms Dawson-Field sought to initiate Mr Lunt's appeal immediately on the day she was instructed he would have, on that premise, nonetheless still been out of time by one day. Leave to appeal out of time would therefore still have been required. No explanation is advanced for Mr Lunt not providing instructions earlier to his solicitors. In the event, Mr Lunt's application for leave to appeal out of time was accepted for filing on 24 July: eight days late.

21 That is not a trivial matter. It may be accepted that: the delay in the present matter is quite short; the interlocutory order made by the primary judge dismissing Mr Lunt's proceeding as an abuse of process was effectively final; the time to appeal had his Honour's decision been final rather than interlocutory would not have expired at the time the application was filed; and no prejudice is asserted by the First Respondent as would affect the conduct of any appeal. However, even in those circumstances the First Respondent was entitled to expect that

litigation would be at an end following the expiration of the relevant appeal period. Mere absence of prejudice in those circumstances is not a sufficient reason to extend time.

22 As Derrington J observed in *BLD16 v Minister for Immigration and Border Protection* [2017] FCA 1400 at [3] the time limits for lodgement of appeals in the *Federal Court Rules 2011* (Cth) are not to be ignored; they are "not mere aspirational guidelines":

> Once [the prescribed] period expires without any appeal being lodged the parties are entitled to assume that the litigation as at an end and that they may move on with their affairs as defined by the judgment at first instance. The court should not readily disturb that established state of affairs.

23 The delay of eight days after the date on which the application was required to be filed, and Mr Lunt's want of adequate explanation in respect of the first 15 days of the overall period for filing, clearly weighs against the grant of leave. However, where leave to appeal out of time is sought no single factor will be necessarily determinative.

24 I therefore turn to the question of potential merit of the proposed appeal grounds as might in those circumstances support my being positively satisfied that that it would be proper to grant leave.

25 Where an application for leave to appeal out of time is sought, the potential merit of any proposed ground of appeal is necessarily to be assessed on a reasonably impressionistic basis. The Court is not required to, and should not purport to, determine the ultimate merits of any proposed ground: see for example, *Jackamarra (an Infant) v Krakouer* [1998] HCA 27; 195 CLR 516 per Brennan CJ and McHugh J at 521-522, [9].

26 In that regard I am unpersuaded there is sufficient merit in either proposed Grounds 2 or 3 as might tip the balance against that delay.

The Merits: Proposed Ground 2

27 In respect of proposed Ground 2 the Applicant submits:

> 23. The trial judge made grave findings against the applicant that he destroyed a phone with the intention of destroying evidence that he feared would harm his case. The applicant will contend that these findings were not open for two reasons.
>
> 24. *First*, the trial judge mistook the evidence. The trial judge emphasised the applicant's evidence that "I could never destroy that evidence—evidence if it existed", but omitted the evidence that "There's another party involved that could have been – their phones could have been provided to prove that there was no communications between me and the MUA". Far from effectively admitting that he had destroyed harmful evidence, the applicant was explaining

that he did not do so because it would have been futile. It would have been futile because the communications with the fourth respondent would be discoverable in their hands in any event. Indeed, no complaint was made about the fourth respondent's discovery in this case.

25. *Second*, the Court could not proceed on inexact proofs, indefinite testimony or indirect inferences having regard to the seriousness of the allegation, the inherent unlikelihood of its occurrence and the gravity of the consequences. This makes it all the more telling that it was never put to the applicant in cross-examination that he destroyed the phone because it contained harmful evidence. During closing address, the trial judge noted that he had not been re-examined on the subject. But the cross-examination not having gone far enough, there was no need to do so.

(Footnotes omitted).

28 The learned trial judge dealt with the relevant evidence as follows:

83 Mr Lunt destroyed his Samsung mobile phone sometime between 7 and 31 December 2018. I had made an order on 18 September 2018 that Mr Lunt give discovery of documents, including text messages between him and officers of the MUA in relation to the purported invalidity of the Enterprise Agreement, the decision to seek to amend the originating application in the First Proceeding and the decision to institute the Current Proceeding. Mr Lunt was aware of the requirements of the order.

84 Under cross-examination, Mr Lunt admitted that he had communicated with Mr Tracey by text message on occasions. In his affidavit of 2 October 2018, he deposed that it was possible, but he did not know, that there may have been messages between him and the MUA that were deleted during the repair of his Samsung phone, and that he did not know whether such deleted documents were discoverable. In my opinion, Mr Lunt raised, and admitted to, at least the possibility that there were messages that had been stored on the Samsung phone that were discoverable.

85 Mr Lunt was aware that VICT was alleging that he was doing the bidding of the MUA by commencing the Current Proceeding. He was aware of VICT's solicitors had taken issue with the adequacy of his discovery, including by asking about steps he had taken to retrieve data from his Samsung phone.

86 It was against that background that Mr Lunt "smashed and turfed" his Samsung phone in December 2018.

87 On 6 February 2019, in response to VICT's solicitors request that Mr Lunt provide the Samsung phone for examination, Mr Lunt's solicitors wrote saying that, "Our client instructs that he is not able to provide the phone as it is no longer in his possession". I infer that Mr Lunt gave his solicitors instructions that the Samsung phone was no longer in his possession. Those instructions, and their communication to VICT's solicitors, omitted a relevant and important fact—that Mr Lunt had destroyed the phone. That omission was disingenuous.

88 Later, in his affidavit of 6 March 2019, Mr Lunt deposed that, "The Samsung itself no longer exists". Even at that stage, he was not willing to admit the whole of the true circumstances. He did not disclose that the Samsung phone no longer existed because he had destroyed it.

> 89 It was not until Mr Lunt was cross-examined that he admitted that he had destroyed the phone. Even then, the admission was made with a grudging reluctance consistent with the lack of frankness evident in his instructions to his solicitors and his subsequent affidavit. In my opinion, he dissembled when asked about his own statement in his most recent list of documents that the Samsung phone no longer existed. His initial response was, "What does that mean?". He then indicated that the messages had been deleted when the phone was repaired. Finally, he admitted that he had "smashed it and turfed it".
>
> 90 Mr Lunt was asked to explain why he had destroyed the phone:
>
> > Why did you smash it and turf it?---What was on there that you want – reckon is so important that you think – you're saying – you're going to say here that I destroyed evidence between myself and the MUA, yes? Because I could never destroy that evidence – evidence if it existed. There's another party involved that could have been – their phones could have been provided to prove that there was no communications between me and the MUA. But, no, you just want my phone.
> >
> > I want to know why you smashed it and turfed it?---Because there were things on that phone that I didn't want anyone else to see.
>
> 91 Mr Lunt's first answer was not responsive and, again, reveals a lack of frankness. I do not accept Mr Lunt's evidence that, "I could never destroy that evidence—evidence if it existed". Mr Lunt said that, "there were things on the phone that I didn't want anyone else to see", but did not explain what those things were, if not evidence. In circumstances where he admitted that he had sent text messages to Mr Tracey and that messages deleted from his phone may have been within the scope of the order for discovery, where he evidently understood that VICT's solicitors might seek to have the phone examined and where he has provided no evidence of anything else he feared would be found, I infer that Mr Lunt destroyed the phone with the intention of destroying evidence. He attempted to conceal what he had done by telling half-truths in his instructions to his solicitors and in his affidavit of 6 March 2019.

29 The learned trial judge is not to be assumed to have made those findings in disregard of their gravity. As the draft notice of appeal reveals, it is not in dispute that the Applicant's legal representatives had made submissions to his Honour referring to what was said by Dixon J (as he then was) in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 at 361-362. The Applicant's submissions do not identify a plausible basis on which to conclude that his Honour proceeded without awareness of those principles.

30 On the impressionistic basis on which I apprehend I am required to assess the issue, notwithstanding the submissions the Applicant advances in support of the proposed ground I am not satisfied that there is a reasonable prospect of an appeal court accepting that those factual findings were not open to the primary judge because he had acted on inexact proofs, indefinite testimony or indirect inferences having regard to the seriousness of the allegation, the inherent unlikelihood of its occurring and the gravity of the consequences. The primary

judge clearly identified the evidence he was relying upon and such inferences as his Honour drew were, on their face, direct and compelling.

31 Nor given the passages of Mr Lunt's testimony quoted by the primary judge at [90] am I satisfied there is any reasonable prospect that an appeal court might conclude that the primary judge had mistaken the evidence Mr Lunt gave or misunderstood its import for the reasons pressed in the Applicant's written submissions.

32 To the contrary, I am affirmatively satisfied that proposed Ground 2 is without merit.

The Merits: Proposed Ground 3

33 In respect of proposed Ground 3 the Applicant submits:

> 26. At first instance, a critical step in the first respondent's argument that the proceeding involved an abuse of process was that the applicant could not credibly want the relief that he ostensibly sought, because obtaining that relief would undermine his claim against the first respondent in another proceeding that is on foot before the trial judge. The trial judge did not accept that success in this proceeding would necessarily undermine the applicant's case in the other proceeding.
>
> 27. The consequence is that the trial judge did not accept a critical step in the case mounted by the moving party, who bears a heavy onus in establishing an abuse of process. The applicant will contend that, in that circumstance, the trial judge cannot properly have found there to be an abuse of process. That is especially so when the trial judge also found that the applicant provided instructions to commence the proceeding, and no finding was made that the applicant did not want the relief sought. As explained in ground one, the trial judge's focus was impermissibly on the reasons for wanting that relief.
>
> (Footnotes omitted).

34 In my view the First Respondent is correct to submit in response that, on the law as the primary judge found it to be, proposed Ground 3 raises a mere irrelevancy. No proposition advanced by the Applicant as falls under that proposed ground was critical to the primary judge's findings.

35 Indeed, insofar as proposed Ground 3 relates to the primary judge's finding at [115], that finding was that his Honour did not accept the Respondent's argument that to quash the Enterprise Agreement would necessarily have a detrimental effect on a claim Mr Lunt had advanced in a related proceeding. That was a finding capable of supporting Mr Lunt's broader contentions, rather than one which on his case requires appellate review.

36 That favourable finding will be open to be relied on by Mr Lunt, assuming he is granted leave to rely on proposed Ground 1.

37 I am satisfied that proposed Ground 3 lacks any merit as a distinct basis for leave to be granted to appeal out of time.

38 I am unpersuaded that leave should be granted to now permit the Applicant to advance a fourth particular to proposed Ground 3 as, by implication, he seeks in his reply submissions.

The Merits: Proposed Ground 1

39 In respect of proposed Ground 1 the Applicant submits:

> 18. When a claim is made of an abuse of process, a leading statement of principle of particular relevance to the application before the trial judge was to be found in the reasons of Brennan J in *Williams v Spautz*, where his Honour said:
>
> > 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.
>
> 19. If granted an extension of time and leave to appeal, the applicant will contend that the trial judge failed to apply the principle in this passage, although his Honour did advert to it. That the trial judge failed to do so is to be inferred from the fact that his Honour found an abuse of process on the basis that the applicant's predominant purpose in bringing the proceeding was not to vindicate his own rights but to obtain relief that was desired by the fourth respondent. The difficulty with this reasoning is that, on its own terms, the trial judge necessarily and implicitly found that the applicant did genuinely seek to obtain the relief sought in the proceeding. The trial judge focused on his reasons for seeking that relief rather than on whether that relief was truly sought, yet it is the latter which bespeaks an abuse of process.
>
> 20. In this way, the applicant will contend that the trial judge mistook the distinction between purpose and motive, which is sometimes referred to as the distinction between immediate and ultimate purpose.
>
> 21. The trial judge may have been led into this error by relying on *Walsh v WorleyParsons Ltd [No 4]*. In that case, Cameron J dismissed a proceeding as an abuse of process after finding that the plaintiff was a "front man" for Melbourne City Investments Pty Ltd, which was a company that the Supreme Court had already held lacked standing and had no real interest in bringing the claim. Cameron J described it thus:
>
> > MCI, as a moving party to this proceeding, initiated and maintained this proceeding for the purpose of sustaining a proceeding that MCI had failed to maintain in its own name. By doing so, MCI was able to continue its modus operandi in bringing proceedings against listed companies, as part of its business model, to obtain a financial gain for itself, its legal representative, when this proceeding was issued. Therefore this proceeding is tainted by a predominant purpose that is

> irrelevant to the vindication of legal rights of Ms Walsh or the group members, notwithstanding that Ms Walsh may ultimately benefit from the litigation.
>
> 22. Here, by contrast, on no view did the fourth respondent lack standing to challenge the enterprise agreement in its own right. Certainly, no court had already found it lacked standing. That there might be discretionary impediments to it obtaining judicial review remedies in its own name does not bring this case within the territory of *Walsh* where Ms Walsh was found to be acting on behalf of an entity that could not, at the threshold, bring a claim.
>
> (Footnotes omitted).

40 The First Respondent submits that the proposed appeal is fundamentally misconceived and bound to fail:

> 9. The proposed appeal proceeds on a misunderstanding of the judgment. The primary judge found that the proceeding exhibited three independent grounds that warranted a finding that the proceeding was an abuse of process.
>
> 10. That his Honour found these grounds to be independent (and neither cumulative nor co-dependent) is clear on the face of the judgment: (emphases added)
>
> (i) Following his summary of the three *PNJ* grounds at [130], the primary judge explains his finding of illegitimate and collateral purpose at [131] and [132] *(PNJ* ground (a));
>
> (ii) his Honour goes on to state, at [133], "I <u>also</u> find that the CFMMEU is the true moving party" and that "the CFMMEU's use of the Court's procedures to bring the proceeding in Mr Lunt's name is unjustifiably oppressive to VICT" *(PNJ* ground (b)); and
>
> (iii) at [134], he states, that <u>"Further,</u> it would bring the administration of justice into disrepute if the CFMMEU were permitted, by using... a "front man", to bring the proceeding to challenge the approval of the Enterprise Agreement while avoiding scrutiny of its acquiescence to that approval" *(PNJ* ground (c)).
>
> 11. Moreover, the primary judge's decision in this respect is entirely consistent with his reliance on the High Court's decision in *PNJ,* in which five members of the High Court, in a unanimous judgment, held that: (emphasis added)
>
> > "It is not possible to describe exhaustively what will constitute an abuse of process. It may be accepted, however, that <u>many cases of abuse of process will</u> <u>exhibit at least one of three characteristics</u> [and then listed the characteristics noted by the primary judge at [130] of the Judgment.]"
>
> 12. Conspicuously, the Applicant makes no mention of *PNJ* in his submissions, despite the primary judge's reliance on it in his judgment.
>
> 13. Further, the plurality in Walton v Gardiner (1993) 177 CLR 378 observed that "*there is nothing in [the Court's comments in Williams v Spautz] which supports the proposition that a permanent stay of proceedings can only be ordered on the ground of either improper purpose or no possibility of a fair hearing.."*

> 14. The appeal proceeds on the basis that the *PNJ* grounds are either cumulative (or dependent on *PNJ* ground (a)). For the reasons above, this is incorrect. That mistake renders all three grounds of appeal redundant because it leaves two independent bases (i.e. *PNJ* grounds (b) and (c)) to justify the conclusion that the proceeding is an abuse of process.
>
> (Footnotes omitted).

41 The First Respondent further submits that even if it is wrong in those regards and all of the "*PNJ* grounds" (in reference to *PNJ v The Queen* [2009] HCA 6; 252 ALR 612) must be present to found an abuse of process, proposed Ground 1 is destined to fail:

> 16. The Applicant effectively says that, because *he* commenced the proceeding for a purpose the end of which was the granting of the relief (albeit in truth obtained *by the CFMMEU), his* purpose was necessarily proper and not an abuse. This ignores the uncontested finding that his predominant purpose was to allow the CFMMEU to obtain the relief which it could not, or might not, obtain if the proceeding were brought in its own name.
>
> 17. The Applicant relies on obiter dicta of Brennan J in *Williams v Spautz* (1992) 174 CLR 509 **(Spautz).** His Honour observed, in the context of that case: *"[t]o amount to an abuse of process, the commencement of 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".*
>
> 18. Brennan J's dicta in *Spautz* does not support the Applicant's argument. It is obiter. It is not facultative. And in any event *Spautz* was not a "stalking horse" case. What the Applicant suggests is that his species of stalking horse is welcome in any Court. That is not supported by *Spautz* (or any authority), and cannot as a matter of principle be correct.
>
> (Citations omitted).

42 It is convenient therefore to set out the critical passages of the primary judge's 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.

43 Contrary to the submissions of the First Respondent I am not satisfied, at least on the necessarily impressionistic basis that is to be given to this question, that a fair reading of the primary judge's reasons necessarily requires the conclusion that his Honour made separate and distinct findings with respect to each of the "three *PNJ* grounds". It seems at least arguable that his Honour's ultimate satisfaction that the *PNJ* criteria or criterion were or was met was contingent on the critical finding the primary judge made which his Honour set out at [131].

44 I am equally not persuaded, again at least on the impressionistic basis appropriate for the disposition of a question of leave to appeal out of time, that there is not an arguable basis for the submission advanced by the Applicant that the learned trial judge erred for the reasons particularised in proposed Ground 1. I refer in that regard to the written submissions of the Applicant as set out at [39] above. The First Respondent submits that what Brennan J (as he then was) stated in *Williams v Spautz* [1992] HCA 34; 174 CLR 509 (***Williams***) at 535 is strictly obiter. However, it is the clearly enunciated obiter of a justice of the High Court with respect to a matter of principle which would have at least potential bearing on the disposition of proposed Ground 1.

45 The relevant passage in *Williams* is as follows:

> 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.
>
> (Footnotes removed).

46 Whether those observations accurately reflect the law or might be subject to exception, notwithstanding the generality of their expression, in a "stalking horse" case, as the First Respondent submits they must be, would be a question in any appeal were leave to be granted.

47 Having regard to those observations, I am satisfied that proposed Ground 1 cannot be concluded to be without merit.

48 I am satisfied that the Applicant advances an arguable contention based on plausible grounds that the learned trial judge acted on a wrong principle when his Honour concluded that it was an abuse of process for Mr Lunt to bring a proceeding for the purpose or predominant purpose of seeking relief wanted by the CFMMEU when the relief Mr Lunt sought was within the scope of the remedy he was seeking.

49 While the Applicant's delay is partially unexplained, to the degree to which I have referred above, its extent of 8 days beyond the date after which the First Respondent was entitled to move on with its affairs as defined by the judgment at first instance was relatively brief. The First Respondent asserts no prejudice arising from those circumstances. I am satisfied that proposed Ground 1 advances at least a good arguable contention that the primary judge acted on a wrong principle in finding that Mr Lunt's proceedings were an abuse of process and should be summarily dismissed.

50 In my view the latter factor in those circumstances tips the balance in favour of my being positively satisfied that that it is proper to grant leave to the Applicant to file his appeal, but limited to proposed Ground 1, out of time.

51 I will order accordingly.

Should leave be granted to appeal?

52 The grant of leave to appeal out of time with respect to proposed Ground 1 does not dispose of the question of whether leave to appeal itself should be granted. The primary judge's decision, although final in consequence, was in law interlocutory. A party requires leave to appeal against an interlocutory decision.

53 Although the discretion to grant leave to appeal conferred by s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth) is in terms unfettered, the approach to its exercise taken by the Full Court in *Décor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 844; 33 FCR 397 has been influential. The approach applied by the Full Court (Sheppard, Burchett and Heerey JJ) was to enquire, first, whether in all the circumstances, the judgment of the primary judge was attended by sufficient doubt to warrant it being reconsidered by the Full Court and, secondly, whether substantial injustice would result if leave were refused, supposing the decision to be wrong.

54 That approach is not to be applied in a rigid way, having regard to the variety of interlocutory decisions which may be made. The Full Court (Jacobson, Flick and Griffiths JJ) in *Samsung Electronics Co Ltd v Apple Inc* [2013] FCAFC 138 at [19] spoke of the need for flexibility as follows:

> The very width of the discretion and the prudence in not seeking to confine the manner in which it is to be exercised is a necessary corollary of the myriad of interlocutory decisions which may be made – ranging from interlocutory decisions affecting the substantive rights of parties (and effectively being final orders) to matters of practice and procedure (including decisions to extend time, the granting or refusal of adjournments and the filing of evidence). The different character of interlocutory decisions which may be made and the different factual and forensic circumstances in play when such decisions are made nevertheless have occasioned a different emphasis from one judgment to another upon one particular factor or factors rather than others.

55 In a circumstance in which an order, whilst interlocutory in form, is final in effect, some lesser significance attaches to the restraint which the High Court identified in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; 148 CLR 170 at 177 is appropriate with regard to judgments concerning practice and procedure. The restraint remains, but the character of a decision where the orders are effectively final entitles the court to put some greater emphasis on the other factors.

56 I have previously discussed the contentions the parties advance with respect to the merits of proposed Ground 1 in the earlier context of whether leave to appeal out of time should be granted at [39]-[48] above. I need not repeat that analysis. I incorporate my reasoning as is relevant to whether leave to appeal should be granted by reference.

57 I am satisfied that the judgment, if wrong with respect to proposed Ground 1, substantially affects the Applicant's interests. Self-evidently, unless set aside, the proceeding stands dismissed.

58 I am satisfied, for the reasons I have given earlier, that the decision of the primary judge is attended by sufficient doubt as to warrant it being reconsidered by a Full Court. I would grant leave to appeal, notwithstanding that the judgment is interlocutory.

59 The leave granted is confined to proposed Ground 1.

60 I will make orders accordingly.

61 As neither party has been wholly successful I will order that the costs of this application be costs in the appeal.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr.

Associate:

Dated: 30 September 2019

SCHEDULE OF PARTIES

VID 777 of 2019

Respondents

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