HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 96 OF 2020**

BETWEEN: **VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED**
Applicant

AND: **RICHARD SIMON LUNT**
First Respondent

FAIR WORK COMMISSION
Second Respondent

AUSTRALIAN MARITIME OFFICERS UNION
Third Respondent

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

SUBMISSIONS OF THE FIRST RESPONDENT

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The appellant in 2017 reached an enterprise agreement with 8 of its employees, none of whom was engaged in stevedoring operations and none of whom worked at the time in positions that would be covered by the agreement if it were to be approved.[1] It secured approval from the Fair Work Commission for the agreement, with the support of the third and fourth respondent unions [**CAB 6-7 [11]-[17]**]. The first respondent and the fourth respondent (**the union**) became dissatisfied with the agreement, and the first respondent brought proceedings, initially to enforce aspects of the agreement and then to challenge its approval. The first respondent admitted in the second proceeding that the union funded both proceedings.

3. The primary judge held that:

   (a) the first respondent had concerns about the agreement, but they were insufficient of themselves to cause him to want to commence proceedings to quash it [**CAB 22 [111]**].

   (b) the first respondent brought the proceeding for the predominant, and actuating, purpose of allowing the union to obtain relief which it *could not, or might not*, obtain by proceedings in its own name [**CAB 24 [119]**] (emphasis added).

   (c) the first respondent destroyed a Samsung mobile phone because he feared that production of text messages he had sent to a union official would tell against his case [**CAB 20 [97]**], but summary dismissal was not sought, or ordered, on the basis of deliberate destruction of evidence [**CAB 19 [92]**]. (Notably, the only relevant documents stored on the phone would be communications between the first respondent and the union; the union was a party and made discovery; and no complaint was made about its discovery.)

[1] See Amended Statement of Claim at [12]-[16C] [**BFM 9-10**]; Defence to the Amended Statement of Claim at [16A] [**BFM 23-24**].

4. In those circumstances, does it bring the administration of justice into disrepute for an applicant to bring proceedings in which he seeks relief for the purpose of benefitting another party which funds the proceeding, which other party could bring the proceeding itself without it committing an abuse of process, although it might face greater discretionary barriers in obtaining the relief?

PART III SECTION 78B NOTICE

5. The first respondent considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

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6. There are no factual issues in dispute following the decisions of the primary judge and the Full Court. However, the appellant's submissions misstate and selectively state the facts and findings and employ pejorative characterisations, such that comparison with the actual finding at each point, and a more balanced restatement of the facts, is required. By way of example, the statement of issue in **AS[2]** describes the union as having "induced the approval of an enterprise agreement". But it was the appellant itself that applied for approval of the agreement. The union acquiesced in that course by supporting the approval, but the statement is hardly an accurate characterisation of the key facts. **AS [6]-[7]** are quite selective and do not present those facts in a balanced way.

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7. On 14 December 2017, the first respondent commenced proceedings against the appellant in the Federal Court alleging that (a) it had taken adverse action against him because he had exercised, or proposed to exercise, rights under the *Victoria International Container Operations Agreement 2016* (**Enterprise Agreement)** contrary to s 340 of the *Fair Work Act 2009* (Cth) (**FW Act**), and that (b) it had breached a clause of the Enterprise agreement contrary to s 50 of the FW Act [**CAB 5-6 [7]**] (**First Proceeding**).

8. On 1 February 2018, the first respondent filed an interlocutory application seeking leave to amend his originating application to, among other things, seek an order quashing the Fair Work Commission's approval of the Enterprise Agreement [**CAB 6 [8]**]. The primary judge refused leave to amend and the first respondent commenced the current proceeding seeking that relief (**Current Proceeding**) [**CAB 6 [10]**]. It is that proceeding which the appellant ultimately sought to have dismissed as an abuse of process.

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9. The first respondent made three claims in the Current Proceeding in support of his claim

that the approval of the Enterprise Agreement was affected by jurisdictional error and should be quashed.

(a) *First*, he contended that the Commission did not have jurisdiction to approve the Enterprise Agreement because it had not been "made" within the meaning of s 182(1) of the FW Act.[2] That contention was put on the basis that the appellant had put the proposed Enterprise Agreement to a secret ballot of eight employees, all of whom voted in favour of it, and none of whom was employed in a position that would be covered by the Enterprise Agreement if it were made and approved.[3] If those allegations were proved, the way in which the Enterprise Agreement was made was contrary to the FW Act.

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(b) *Second*, the first respondent contended that the Commission had insufficient material before it to be satisfied that it should approve the Enterprise Agreement.[4]

(c) *Third*, the first respondent contended that the Commission could not have been satisfied of the better off overall test in approving the Enterprise Agreement.[5]

There was no dispute below that the primary judge should proceed on the basis that the first respondent "has a prima facie case in the Current Proceeding" [**CAB 18 [81]**].

10. By its defence to the amended statement of claim, the appellant contended that the Current Proceeding should be dismissed as an abuse of process.[6] The matters alleged in support of that ultimate allegation, found at paragraph 42 of the defence [**BFM 35**], warrant some attention given the arguments put to this Court.

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11. At paragraph 41, it was alleged that the Current Proceeding was "unjustifiably oppressive, manifestly unfair and/or otherwise brings the administration of justice into disrepute among right-thinking people" by reason of the matters in paragraphs 23 to 40 of the defence [**BFM 35**]. The Court will notice here the three common features of an abuse of

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2 Amended Statement of Claim at [16B]-[16C] [**BFM 10**].

3 Amended Statement of Claim at [12]-[16A] [**BFM 9-10**].

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4 Amended Statement of Claim at [17A]-[17C] [**BFM 10-11**].

5 Amended Statement of Claim at [18]-[22] [**BFM 11-12**].

6 See Defence to the Amended Statement of Claim at Recitals A, B and C [**BFM 19**].

process described by this Court in *PNJ v The Queen*.[7]

12. One of the matters in paragraphs 23 to 40 was the first respondent's alleged illegitimate predominant purpose of furthering the union's "campaign of illegitimate industrial activity" against the appellant.[8] This illegitimate purpose was to be inferred, it was said, from the fact that the first respondent had previously sought to rely on the Enterprise Agreement.[9] As to this matter, the primary judge accepted that the first respondent "may have had some concerns about the Enterprise Agreement … but not that they were sufficient to cause him to want to commence proceedings to quash it" [**CAB 22 [111], 24 [119]**]. His "predominant purpose" was not "his own desire to have the Enterprise Agreement set aside" but rather his "preparedness to bring proceedings to enable the [union] to achieve the outcome they desire, namely the quashing of the approval of the Enterprise Agreement", which the union "could not, or might not, obtain if the proceeding were brought in its own name" [**CAB 23 [116], 562 [119]**].

13. It is convenient to interpose here that the primary judge reasoned that the first respondent therefore had an illegitimate purpose [**CAB 26 [131]**], but this was overturned on appeal and is not the subject of a grant of special leave. The Full Court held that the first respondent did not have an illegitimate purpose: he wanted the relief sought, because obtaining that relief was the only way to achieve his ultimate goal of helping the union achieve what it wanted to achieve [**CAB 45 [16]-[18]**].

14. It is also useful to observe that illegitimacy of purpose underpinned each way in which the appellant pleaded its case at first instance. By reason of the structure of its defence, and in particular paragraphs 37, 41 and 42 [**BFM 35**], there was no allegation of abuse that did not depend, at least in part, on the question of the first respondent's predominant purpose.

15. Another of the matters in paragraphs 23 to 40 was the allegation that his claims in the Current Proceeding, if successful, would defeat his own claims in the First Proceeding.[10] The primary judge did not accept this [**CAB 23 [115]**].

[7] (2009) 83 ALJR 384 at [3].

[8] Defence to the Amended Statement of Claim at [37] [**BFM 35**].

[9] See Defence to the Amended Statement of Claim at [23] [**BFM 32-33**].

[10] Defence to the Amended Statement of Claim at [24]-[26], [31] [**BFM 33-34**].

16. Another of the matters in paragraphs 23 to 40 was the allegation that the union was funding both proceedings.[11] This was admitted in the reply:[12] see also **CAB 10 [40]**.

17. Another of the matters in paragraphs 23 to 40 was the allegation that the union would be disentitled, by reason of acquiescence in approval of the Enterprise Agreement and delay, to equivalent relief had it brought the Current Proceeding itself.[13] Thus, it was said that the union was "the true moving party" and the first respondent a "stalking horse".[14] And as a result, the appellant was prejudiced.[15]

18. As to these matters, the primary judge accepted that the union was "the true moving party" [**CAB 562 [118]**]. But this did not mean it alone gave instructions: the primary judge was "unwilling to draw an inference that [the first respondent's] solicitors obtained instructions solely from [the union] and not from [the first respondent]", rather, the union "was heavily involved in obtaining and communicating [the first respondent's] instructions" in commencing the proceeding [**CAB 560 [113]**]. And the primary judge did not determine that the union would necessarily have failed had it commenced the Current Proceeding itself [**CAB 24 [123]**]. So much was only "a substantial risk" [**CAB 24 [123]**].

19. It is convenient to interpose here that the appellant's argument that the union was the true moving party was simply the other side of the coin of its argument about the first respondent's illegitimate purpose. Thus, in its written opening submissions, it said that the question for determination was "whether the agitation of the named party's claim is the predominant (not sole) purpose of the institution of the proceeding".[16] It submitted that the material demonstrated that the union "is the true moving party in this proceeding and has recruited [the first respondent] as a stalking horse".[17] The alleged predominant

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[11] Defence to the Amended Statement of Claim at [29]-[30] [**BFM 33-34**].

[12] See Reply at [8] [**BFM 43**].

[13] Defence to the Amended Statement of Claim at [35] [**BFM 35**].

[14] Defence to the Amended Statement of Claim at [36] [**BFM 35**].

[15] Defence to the Amended Statement of Claim at [38]-[39] [**BFM 35**].

[16] Appellant's outline of submissions in the abuse application at [24] [**BFM 52**]. See also at [58] [**BFM 61**].

[17] Appellant's outline of submissions in the abuse application at [27] [**BFM 53**].

purpose of this proceeding was referred to on other occasions,[18] and it accused the union of "us[ing] [the first respondent] as a front"[19] and as a "front man".[20]

20. Finally, the first respondent gave evidence that he destroyed a mobile phone "[b]ecause there were things on that phone that I didn't want anyone else to see" [**CAB 12 [54]**], and the primary judge found that this was to destroy evidence which he feared might count against his case [**CAB 19 [91], [97]**]. Plainly that is not to the first respondent's credit and cannot be condoned. But the appellant put this only as a matter going to credit.[21]

PART V ARGUMENT

A. ABUSE OF PROCESS

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21. It is settled that a party does not commit an abuse of process merely by bringing a case seeking relief within the scope of the remedy available in a case on behalf of another, even if conferring that benefit on the other is the ultimate predominant purpose or motive for bringing the case, and the actuating purpose, in the sense that the case would not have been brought but for that purpose: *Williams v Spautz*;[22] *Treasury Wine Estate v Melbourne City Investment.*[23]

22. If it were otherwise, proceedings could only be brought by those whose ultimate motivation for litigating is predominantly selfish. An environmental case brought by an applicant who is personally indifferent but who brings it for the motivating purpose of protecting an area for the benefit of his or her children would be an abuse of process. So too would an action brought by a union (which would not derive any direct benefit for itself from the relief) for the benefit of current or future members,[24] or a misleading or

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18 Appellant's outline of submissions in the abuse application at [61] [**BFM 61-62**].

19 Appellant's outline of submissions in the abuse application at [62] [**BFM 62**].

20 Appellant's outline of submissions in the abuse application at [58] [**BFM 61**].

21 See Appellant's closing submissions at [17]-[28] [**BFM 67-70**]. See also **CAB 19 [92]**.

22 (1992) 174 CLR 509 at 526.8 (Mason CJ, Dawson, Toohey and McHugh JJ), 534-535 (Brennan J), 543-544 (Deane J).

23 (2014) 45 VR 585 at 588 [11] (Maxwell P and Nettle JA).

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24 See *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 71; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456.

deceptive conduct case concerning dangerous goods brought by a consumer organisation on behalf of consumers.

23. Here the primary judge found that the first respondent brought the proceeding for the predominant purpose of quashing the agreement because the union wanted that relief [**CAB 22 [111]**; **CAB 23 [115]** last sentence; **CAB 24 [119]**]. But since the first respondent sought relief that was within the scope of the proceeding, albeit that he sought it on behalf of the union, his ultimate purpose or motive of benefitting the union did not render the proceeding an abuse. Nor did his concealment of his motive or ultimate purpose render the proceeding an abuse: courts do not investigate the ultimate purpose or motive of litigants for seeking the relief claimed in a proceeding.

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24. Thus there was no illegitimacy of purpose, and leave to challenge the Full Court's finding in that respect was not granted. It was not contended that destruction of evidence could be the basis for finding an abuse [**CAB 19 [92]**]. Concealment of the first respondent's motive or ultimate purpose could not constitute an abuse within any conventional principle. Nor could the fact that the first respondent was allegedly better placed than the union in relation to the exercise of the remedial discretion, as is demonstrated further below. It follows that there is no basis on which the proceeding could be held to be an abuse.

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25. There is no doubt that courts can dismiss a proceeding (or permanently stay it) as an abuse of process where use of the court's procedures serves to bring the administration of justice into disrepute.[25] Further, there is no doubt that previous cases should not be understood as "attempting to chart the boundaries of abuse of process".[26] It is a concept that is "insusceptible of a formulation which comprises closed categories".[27] **AS [11]-[14]** restate these well-established basal principles, although they also endeavour to lay the

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[25] See, eg, *UBS AG v Tyne as Trustee of the Argot Trust* (2018) 265 CLR 77 at 83 [1] (Kiefel CJ, Bell and Keane JJ).

[26] *Moti v The Queen* (2011) 245 CLR 456 at 479 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Strickland v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 367 [99] (Kiefel CJ, Bell and Nettle JJ).

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[27] *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518 [25] (French CJ, Bell, Gageler and Keane JJ).

foundation for an approach which is untethered from fundamental principle and the decided cases.

26. The appellant contends that the first respondent's proceeding is an abuse of process for reasons set out in **AS [15]-[16], [24]** and **[28]**. Those contentions do not withstand scrutiny.

27. *First*, the appellant contends that, had the union brought the proceeding as applicant, such a proceeding "would be susceptible to refusal on discretionary grounds" [**AS [15]**]. Even assuming that to be so, the point does not assist the appellant.

(a) Where an applicant seeks judicial review of a decision and his or her entitlement to relief is imperilled for some discretionary reason, that circumstance does not justify characterising the proceeding as a whole as an abuse of process so as not to permit the grounds of review to be litigated at all. Nor was any suggestion made below that any such hypothetical proceeding by the union would have been an abuse of process.

(b) The primary judge did not find that the union would necessarily have been disentitled to relief in such a hypothetical proceeding, only that it was at substantial risk of a discretionary refusal of relief [**CAB 24 [123]**]. That tentatively expressed holding was less than what the appellant sought, and appropriately so given the nature of an enterprise agreement. "[I]t is not difficult to share in the perception that an enterprise agreement approved under the FW Act has a legislative character."[28] It is "a statutory artefact made by persons specifically empowered in that regard, and under conditions specifically set down, by the FW Act".[29] It would therefore be a significant step for a court to refuse relief in its discretion where jurisdictional error was otherwise shown affecting the decision to approve such an important instrument, one which affects the rights of many persons other than the union. And

[28] *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at 179-180 [89].

[29] *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at 180 [90].

as a matter of general principle, "the discretion … is not to be exercised lightly against the grant of a final remedy".[30]

28. *Second and relatedly*, the appellant contends that, by the first respondent bringing this proceeding, "the union will be allowed to avoid scrutiny and consequences" [**AS [16]**]. The submission is misconceived: it assumes that the Federal Court cannot evaluate its discretion to refuse relief with eyes open to the fact that the first respondent is essentially bringing the case on the union's behalf. That assumption is incorrect. The Federal Court need not determine whether to exercise its discretion to refuse relief blind to the realities of the situation. Thus, a persuasive discretionary reason that applies to the union could readily be applied to the first respondent, who is a member of the union. In this way, there is a remedial response to any perceived improper conduct of the litigation that falls well short of dismissing it without a determination on the merits. In determining whether a proceeding should be dismissed, or permanently stayed, without adjudication on the merits, "it is necessary to consider whether there are any other curial measures that could be taken to address any systemic incoherence".[31] That is especially so here, where the manner in which the appellant secured the approval of employees who were at that time working in positions that were remote from positions that would be covered by the agreement raised large questions about the validity of the decision to approve it, a decision with implications for significant numbers of employees.

29. In so far as the appellant complains that, had the first respondent and the union raised their complaints before the Commission, the appellant could have attempted to respond to them, that is a matter that does not demonstrate that this proceeding brings the administration of justice into disrepute. That conflates what occurred in the Commission approval process with public confidence in the administration of justice in this case and other cases.[32] And in any event, any perceived potential unfairness in the Commission

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[30] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 107 [55] (Gaudron and Gummow JJ).

[31] To adopt *Strickland v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 415 [264] (Edelman J).

[32] See *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 384 [154] (Gageler J); *Director of Public Prosecutions (NSW) v Hamzy* (2019) 101 NSWLR 405 at [52] (Gleeson JA; Payne and Brereton JJA agreeing).

process flowing from the judicial review proceeding is accommodated by application of the traditional discretionary factors for refusing relief, not through summary dismissal for abuse of process.

30. *Third*, the appellant contends that it is an abuse of process for the first respondent to bring the proceeding to attempt to avoid the problems the union might face in obtaining relief [**AS [28]**]. "Therein lies", it says, "the abuse of process" [**AS [28]**]. But that is far from enough to warrant such a serious finding as an abuse of process and such an exceptional remedy[33] as a dismissal of a prima facie case challenging the validity of an enterprise agreement. It is commonplace that where several potential applicants are willing to bring a case, a litigant will be selected who has (or is perceived to have) less procedural or substantive difficulties (for example, in relation to standing in an environmental case) attending their case than another litigant. That cannot be enough to warrant an abuse finding, even leaving aside the two points made above.

31. *Fourth*, the appellant contends that the union (a) funding a person to bring the proceeding rather than present it itself and (b) being heavily involved (but not, on the findings made, solely involved) in the giving of instructions to commence the proceeding is a "sham" of "a type not previously detected in a decided Australian case" [**AS [14]**]. It is not correct that such features have not before been considered, although it is certainly the case (as the appellant is forced to acknowledge) that no decided case has found such features to constitute an abuse warranting summary dismissal. There are, in fact, many cases where the litigant before the court is not the "real party", or not the only "real party", behind it. In such cases, the (other) real party is exposed to a non-party costs order;[34] the litigant's proceeding is not at risk of dismissal as an abuse of process. It is that risk and that remedial response which is what is novel about this case. Previous authorities identify a costs order

[33] See generally *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 31, 34 (Mason CJ), 60 (Deane J), 76 (Gaudron J); *Williams v Spautz* (1992) 174 CLR 509 at 529 (Mason CJ, Dawson, Toohey and McHugh JJ); *UBS AG v Tyne as Trustee of the Argot Trust* (2018) 265 CLR 77 at 127 [136] (Gordon J).

[34] See generally *Knight v FP Special Assets* (1992) 174 CLR 178 at 192-193 (Mason CJ and Deane J), 202 (Dawson J); *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406 at 414 [37] (Callinan J); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 at 2815-2816 [25(3)] (Privy Council); *PM Works Pty Ltd v Management Services Australia Pty Ltd* [2018] NSWCA 168 at [27]-[35] (Leeming JA; McColl and Basten JJA agreeing).

as the appropriate means of protecting the processes of the court. And here, the union is actually a party.

32. In *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*, the joint judgment said that "[t]he cases [on non-party costs orders] all concerned the power of the courts to order that the "real party" pay the costs. The only direct reference to the characterisation of such arrangements as an abuse of process appeared in *Hutchinson v Greenwood*, a case involving a nominal defendant".[35] As Mason CJ and Deane J remarked in *Knight v FP Special Assets*, this is "taking a very broad view of what constitutes an abuse of process".[36] But the appellant seeks to take it even further by going further than a non-party costs order as the appropriate sanction.

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33. *Fifth*, the appellant observes that the first respondent denied that the union was controlling the litigation and that he destroyed his mobile phone [**AS [15]**]. The former does not justify a finding of abuse, in circumstances where (a) no finding was made that the denial was itself hopeless or inappropriate (noting that there is no abuse merely because a party lost an argument or is not accepted in evidence); (b) the primary judge was unwilling to accept that the union solely gave instructions; and (c) the first respondent was concerned about the Enterprise Agreement and did want the relief sought (albeit because obtaining the relief was the means to get what the union wanted also). The destruction of his mobile phone cannot be condoned, but it was not a matter sought to be relied upon by the appellant other than as going to credit. Further, there is no finding that, in fact, there was any adverse impact on the application to dismiss, or the substantive issues for determination.

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34. Given the matters advanced by the appellant at first instance in favour of a finding of abuse, and the factual findings made by the primary judge, the Full Court was correct to conclude that absent 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" [**CAB 43 [8]**].

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[35] (2009) 239 CLR 75 at 95 [34] (French CJ, Gummow, Hayne and Crennan JJ).

[36] (1992) 174 CLR 178 at 190.

B. INUTILITY OF THE FULL COURT APPEAL

35. **AS [29]-[33]** seek to challenge the Full Court's holding at **CAB 43 [6]** that the primary judge's conclusion that the first respondent instituted this proceeding for an illegitimate purpose was relevant to each of his Honour's findings at **CAB 26 [131], [133] and [134]**, such that his Honour's misapprehension as to the scope of the doctrine on illegitimate purpose affected all of his Honour's conclusions. The appellant seeks to argue that the Full Court should have dismissed the appeal because the notice of appeal to that Court impugned only one of multiple independent bases for decision.

36. The Court should neither receive these submissions nor act upon them. They repeat the very argument on "Proposed ground 1 – The appeal was inutile" which was in the appellant's application for special leave [**BFM 90-94**] and which was not the subject of the carefully confined grant of special leave by Kiefel CJ and Nettle J.[37] Had special leave been granted to pursue this argument (which it plainly was not, as the transcript and the order make clear), and an appropriate notice of appeal filed foreshadowing it as a ground of appeal, the first respondent would have filed a notice of contention contending that the Full Court ought to have granted leave to amend the notice of appeal so as to cure any perceived inutility. The appellant ought not continue to press an argument that plainly goes beyond the limited grant of special leave, and should it do so in defiance of the terms of the Court's grant then special leave should be revoked.

C. COSTS

37. Section 570(1) of the FW Act restricts the award of costs in proceedings in relation to a matter arising under the FW Act:

> **570 Costs only if proceedings instituted vexatiously etc.**
>
> (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

[37] See *Victoria International Container Terminal Ltd v Lunt* [2020] HCATrans 143 at lines 354-357 (Kiefel CJ).

Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

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(ii) the matter arose from the same facts as the proceedings.

38. The first respondent's position is that: (a) the costs before Rangiah J are a matter for his Honour; (b) no unreasonable act by the first respondent caused the appellant to incur the costs of the appeal to the Full Court; and (c) s 570(1) applies to the award of costs in this Court, and no unreasonable act by the first respondent caused the appellant to incur those costs.

C.1 Costs before Rangiah J

39. The appellant seeks its costs before the primary judge: see **CAB 75; AS [41(c)(i)]**. The Court should not make that order, because to do so would usurp the jurisdiction of the primary judge. The appellant has an undetermined application for costs before the primary judge [**BFM 84**]. The determination of that application was paused while awaiting the outcome of the first respondent's appeal to the Full Court.

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40. The primary judge not having determined that application, and the Full Court not having been asked to determine it for him (had that even been possible), this Court should not entertain the matter. Given this procedural history, the costs of proceeding at first instance cannot come within "such judgment as ought to have been given in the first instance" within the meaning of s 37 of the *Judiciary Act 1903* (Cth). Even if they did, this Court on final appeal should not hasten ahead of the primary judge who is best placed to determine (and has been asked to determine) the question of costs in the proceeding before his Honour.

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C.2 Costs before the Full Court of the Federal Court

41. The appellant has conceded that s 570(1) applies to the appeal before the Full Court: **AS [36]**. That concession is rightly made, for reasons we explain below in respect of the costs in this Court. The appellant therefore relies on s 570(2)(b): **AS [35]-[40]**. It contends that the first respondent acted unreasonably by bringing this proceeding in circumstances amounting to an abuse of process, and that he should therefore pay the costs of the appeal to the Full Court.

42. The appellant's argument should be rejected. Leaving aside whether the appellant committed an unreasonable act by commencing the proceeding, the argument pays insufficient attention to what a Full Court of the Federal Court has accurately described as "[t]he second criterion" in s 570(2)(b), namely that the unreasonable act "caused another party to the proceeding to incur costs in connection with the proceeding".[38] It was not unreasonable for the first respondent to have appealed the decision of the primary judge. That appeal was not improper or hopeless or unrealistic.[39] Whether on the basis that the criterion is not satisfied, or in the exercise of the Court's discretion should it be satisfied, no order as to costs should be made as to the appeal. To do so would be contrary to the legislative intention embodied by s 570.[40]

C.3 Costs in this Court

43. While the appellant has made no concession that s 570(1) applies in respect of costs in this Court, the first respondent submits that it does so apply. So much is clear from the legislative history of s 570(1) and from the recent practice of this Court.

44. As originally enacted, s 570(1) applied to proceedings in a court "exercising jurisdiction under" the FW Act. That language was held not to apply to appeal proceedings in the Full

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[38] *Construction, Forestry, Mining and Energy Union v Clarke* (2018) 170 FCR 574 at [28] (Tamberlin, Gyles and Gilmour JJ).

[39] See, in respect of a respondent, *Jamsek v ZG Operations Australia Pty Ltd [No 2]* [2020] FCAFC 179 at [3] (Perram, Wigney and Anderson JJ).

[40] See generally *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194 at [103]-[107] (White J; Allsop CJ agreeing).

Court of the Federal Court[41] and in this Court,[42] on the basis that appellate jurisdiction did not derive from or under the FW Act. The *Fair Work Amendment Act 2012* (Cth) then amended s 570 to employ the words "in relation to" to overcome the result of these cases. So much is evident from the explanatory memorandum accompanying the Bill that became that Act.[43] This language is deliberately broad. While the meaning and scope of the expression "in relation to" depends upon the statutory context,[44] it is a broad expression[45] that "should not be read down in the absence of some compelling reason for doing so".[46] An appeal in the High Court is a proceeding in relation to a matter arising under the FW Act. While the point does not appear to have been argued in previous cases, the first respondent notes that this Court has not made costs orders in recent FW Act
10 cases.[47]

45. On the basis that s 570(1) applies, there is then no basis for this Court to make costs orders against the first respondent. He relies upon his submissions at paragraph 42 above. The position is of course stronger as to the costs in this Court. There is nothing unreasonable about his having defended this appeal, and the costs of this appeal cannot be said to have been caused by any unreasonable conduct. Accordingly, either s 570(2)(b) is not satisfied,

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41 *Construction, Forestry, Mining and Energy Union v CSBP [No 2]* [2012] FCAFC 64.

42 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]* (2012) 248 CLR 549.

20 43 Explanatory Memorandum, Fair Work Amendment Bill 2012 (Cth) at 10, 56.

44 See *Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1998) 165 CLR 642 at 653; *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at [25] (French CJ and Hayne J).

45 *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 365 (Brennan J), 367 (Dawson J), 374 (Toohey and Gaudron JJ), 376 (McHugh J); *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 478 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 387 [87] (McHugh, Gummow, Kirby and Hayne JJ).

46 *Kennon v Spry* (2008) 238 CLR 366 at 440 [217] (Kiefel J); *Fountain v Alexander* (1982) 150 CLR 615 at 629 (Mason J); *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 310 at 330 (Toohey and Gummow JJ).

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47 See *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551; *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818.

or if it is satisfied by reason of some anterior unreasonable conduct then in the Court's discretion no costs order should be made for the costs of this appeal.

PART VI ESTIMATED HOURS

46. The first respondent seeks 1 hour and 15 mins to present his oral argument.

Dated: 27 November 2020

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ANNEXURE

Legislative provisions referred to in written submissions (Practice Direction No 1/2019)

1. *Judiciary Act 1903* (Cth), s37 (current)
2. *Fair Work Act 2009* (Cth):
    a. compilation 28 (13 October 2016), s 182(1);
    b. compilation 33 (3 October 2017), s 50 and 340; and
    c. compilation 40 (current), s 570.