HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

VICTORIA INTERNATIONAL CONTAINER TERMINAL LIMITED — APPELLANT

AND

RICHARD SIMON LUNT & ORS — RESPONDENTS

Victoria International Container Terminal Limited v Lunt
[2021] HCA 11
Date of Hearing: 9 February 2021
Date of Judgment: 7 April 2021
M96/2020

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

S J Wood QC with N Burmeister for the appellant (instructed by Seyfarth Shaw Australia)

N J Williams SC with C Tran and N K Kam for the first respondent (instructed by Maurice Blackburn Lawyers)

Submitting appearances for the second, third and fourth respondents

CATCHWORDS

Victoria International Container Terminal Limited v Lunt

Courts – Abuse of process – Where Fair Work Commission approved enterprise agreement – Where approval of enterprise agreement supported by union – Where first respondent was longstanding member of union – Where first respondent brought proceedings seeking to quash approval of enterprise agreement – Where appellant sought summary dismissal of proceedings on basis they were abuse of process – Where proceedings funded by union – Where union unwilling to bring proceedings in own name because of risk of discretionary refusal of relief – Whether deployment of first respondent as "front man" for union amounted to abuse of process by bringing administration of justice into disrepute – Whether choice of first respondent as plaintiff prevented scrutiny of union's acquiescence in approval of enterprise agreement – Whether power to stay or summarily dismiss proceedings informed by considerations of deterrence or punishment.

Words and phrases – "abuse of process", "administration of justice", "bring the administration of justice into disrepute", "deterrence", "discretionary grounds for the refusal of relief", "enterprise agreement", "forensic or juridical advantage", "front man", "illegitimate or improper purpose", "integrity of the court's own processes", "lack of candour", "motive", "punishment", "stay of proceedings", "summary dismissal", "trade union", "true moving party".

1 KIEFEL CJ, GAGELER, KEANE AND GORDON JJ. On 19 October 2016, the Fair Work Commission ("the Commission") approved an enterprise agreement upon an application by the appellant, Victoria International Container Terminal Limited. The application to the Commission was made with the support of the Maritime Union of Australia ("the MUA"), the trade union that later amalgamated with the Construction, Forestry, Mining and Energy Union ("the CFMEU") to form the fourth respondent, the Construction, Forestry, Maritime, Mining and Energy Union ("the CFMMEU"). More than a year later, the CFMMEU arranged for the first respondent, Mr Lunt, to bring proceedings in the Federal Court of Australia seeking an order in the nature of certiorari to quash the Commission's approval of the enterprise agreement on the ground that the Commission's approval was beyond its jurisdiction.

2 On an application by the appellant, the primary judge (Rangiah J) concluded that the proceedings brought by Mr Lunt should be summarily dismissed as an abuse of process because they were brought for the improper purpose of benefiting the CFMMEU. The Full Court of the Federal Court of Australia reversed the decision of the primary judge. For the reasons that follow, the decision of the Full Court was correct and should be upheld, and the appeal dismissed.

The Enterprise Agreement

3 On 6 October 2016, the appellant applied to the Commission for approval of the *Victoria International Container Operations Agreement 2016* ("the Enterprise Agreement")[1]. On 10 October 2016, the MUA filed with the Commission a statutory declaration in support of the application for approval of the Enterprise Agreement, and a notice pursuant to the *Fair Work Act 2009* (Cth) ("the Act") that it wished to be covered by the Enterprise Agreement[2]. On

---

1 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 544 [11].

2 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 544 [13].

19 October 2016, the Commission approved the Enterprise Agreement[3]. Thereafter, the MUA did not apply for permission to appeal against that approval[4].

4 Following the approval of the Enterprise Agreement, the MUA brought several proceedings against the appellant in reliance upon the Enterprise Agreement[5]. However, from November 2017, the MUA became dissatisfied with the Enterprise Agreement and began publicly to criticise it[6].

5 The MUA merged with the CFMEU in March 2018 to form the CFMMEU[7].

Mr Lunt's proceedings

6 Mr Lunt had been a member of the MUA for more than two decades before it amalgamated with the CFMEU[8]. Mr Lunt, while a member of the MUA, was employed by the appellant from about 21 June 2017 until his dismissal on 23 November 2017[9].

7 On 14 December 2017, Mr Lunt commenced proceedings against the appellant in the Federal Court, claiming that the appellant had contravened the Act by, among other things, breaching the Enterprise Agreement ("the first

---

3 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 545 [16].

4 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 545 [17].

5 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 545 [18], 547 [32].

6 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 545-546 [19]-[28].

7 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 543 [5].

8 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 547 [29].

9 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 543 [6].

proceedings")[10]. On 1 February 2018, Mr Lunt sought leave to amend the originating application in the first proceedings, among other things, to seek an order in the nature of certiorari quashing the Commission's approval of the Enterprise Agreement on the ground that the approval was beyond the jurisdiction of the Commission[11]. On 23 April 2018, the primary judge refused leave to amend[12].

8 On 4 May 2018, Mr Lunt commenced fresh proceedings in the Federal Court, being the proceedings to which this appeal relates ("the current proceedings"), in which he sought the same relief as that sought by the leave to amend application[13]. The appellant countered by filing an application seeking the summary dismissal of the current proceedings as an abuse of process.

9 Before the primary judge, the appellant argued that the CFMMEU was the true moving party behind the current proceedings, with Mr Lunt being deployed to conceal the CFMMEU's role[14]. Mr Lunt denied this allegation. He maintained that he sought the quashing of the Commission's approval of the Enterprise Agreement by reason of his concerns about its conditions and the manner in which it was made[15]. The appellant also argued that Mr Lunt's evidence should be rejected as unreliable. In this regard, the appellant relied on Mr Lunt's intentional destruction

---

10 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 543-544 [7].

11 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 544 [8].

12 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 544 [10].

13 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 544 [10].

14 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 543 [2].

15 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 543 [3].

of his mobile phone as going to the credibility of his account of the nature of his involvement in the proceedings[16].

The decisions below

10 The primary judge allowed the appellant's application for summary dismissal of the current proceedings[17]. His Honour found that the MUA and the CFMMEU respectively funded the first proceedings and the current proceedings[18]. His Honour also found that the MUA was heavily involved in obtaining and communicating Mr Lunt's instructions to apply for leave to amend in relation to the first proceedings[19], that Mr Lunt allowed himself to be used by the CFMMEU as a "front man" to bring the current proceedings under its control, and that the MUA and the CFMMEU were unwilling to bring the first proceedings or the current proceedings in their own names[20]. Further, as to this last point, the primary judge found that the MUA and the CFMMEU were not willing to bring proceedings in their own names because of the risk that they would be refused relief on the discretionary grounds that the MUA had acquiesced in the approval of the Enterprise Agreement by the Commission, failed to exercise its right to apply for permission to appeal against the approval, and thereafter delayed in bringing any challenge for over a year[21].

11 The primary judge concluded that to deny the appellant the opportunity to resist Mr Lunt's challenge to the approval of the Enterprise Agreement on

---

16 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 549 [43], 550-551 [54], 556-557 [85]-[86].

17 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542.

18 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 563 [125].

19 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 560 [113].

20 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 563 [129].

21 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 562-563 [121], [123]-[124].

discretionary grounds would be unjustifiably oppressive to the appellant[22]. His Honour also concluded that Mr Lunt brought the current proceedings for the predominant purpose of enabling the CFMMEU to obtain relief which it was unlikely to obtain if the proceedings were brought in its own name, rather than for the predominant purpose of vindicating his own legal rights[23]. Although Mr Lunt may have had his own concerns about the merits of the Enterprise Agreement and the circumstances in which it was made, those concerns were not sufficient to motivate him to commence proceedings to have it quashed[24]. On that basis, the primary judge held that the proceedings were brought by Mr Lunt for an "illegitimate and collateral purpose"[25]. His Honour reasoned that it would bring the administration of justice into disrepute if the CFMMEU were permitted, by deploying Mr Lunt as a "front man", to bring the current proceedings to challenge the approval of the Enterprise Agreement while avoiding scrutiny by the Court of its acquiescence in the approval of, and reliance upon, the Enterprise Agreement[26].

12 Mr Lunt appealed to the Full Court of the Federal Court. The Full Court (Bromberg, Kerr and Wheelahan JJ) allowed Mr Lunt's appeal[27]. The Full Court reasoned that "where a person has commenced or maintained a proceeding desiring to obtain a result within the scope of the remedy sought, the presence of a motive or reason for pursuing a proceeding which may be fulfilled as a consequence of obtaining the legal remedy which the proceeding is intended to produce, does not ground an abuse of process"[28]. The Full Court concluded that, because Mr Lunt

---

22 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 564 [133].

23 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 562 [119], 564 [131].

24 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 560 [111].

25 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 564 [131].

26 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 564 [134].

27 *Lunt v Victoria International Container Terminal Ltd* [2020] FCAFC 40.

28 *Lunt v Victoria International Container Terminal Ltd* [2020] FCAFC 40 at [16].

sought to obtain a result within the scope of the remedy sought by the current proceedings, there was no impropriety of purpose and hence no abuse of process. The circumstance that Mr Lunt may have been motivated by the desire that the CFMMEU should benefit from the relief sought did not alter that conclusion[29].

The appellant's argument

13 In this Court, the appellant submitted that the Full Court's conclusion that Mr Lunt did not bring the current proceedings for an illegitimate or improper purpose was not a sufficient basis on which to reverse the decision of the primary judge. It submitted that, whatever conclusion was reached regarding the impropriety of Mr Lunt's purpose, the current proceedings could still amount to an abuse of process for other, independent, reasons.

14 In *PNJ v The Queen*[30], French CJ, Gummow, Hayne, Crennan and Kiefel JJ said:

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

15 Focusing upon the third of the characteristics referred to in *PNJ*, the appellant submitted that, in the circumstances, to permit the pursuit of the current proceedings by Mr Lunt would bring the administration of justice into disrepute. The appellant argued that the Full Court had failed to appreciate the force of the findings of the primary judge that the purpose of Mr Lunt was to allow the CFMMEU to obtain relief "which it could not, or might not, obtain if the

---

29 *Lunt v Victoria International Container Terminal Ltd* [2020] FCAFC 40 at [17]-[18].

30 (2009) 83 ALJR 384 at 385-386 [3]; 252 ALR 612 at 613 (footnotes omitted).

proceeding were brought in its own name"[31] or "which it was unlikely to obtain if the proceeding were brought in its own name"[32] because of the acquiescence of the MUA in the approval by the Commission of the Enterprise Agreement. In this regard, the appellant emphasised the lack of candour involved in Mr Lunt's attempt to conceal the role of the CFMMEU in promoting the proceedings and in his destruction of potential evidence.

Mr Lunt's argument

16 Mr Lunt submitted that the Full Court was correct to hold that, even though his motive in bringing the current proceedings may have been to obtain a benefit for the CFMMEU, his predominant purpose was truly to seek the quashing of the Commission's approval. That being so, the circumstance that he was motivated to benefit the CFMMEU was immaterial. Further, it was said that concealment of an immaterial motive was no basis for finding an abuse of process.

17 Mr Lunt submitted that the current proceedings should be allowed to be determined on their merits rather than summarily dismissed as an abuse of process. It was said that the Enterprise Agreement is an important instrument that affects the rights of many employees, and the court has available to it other remedies to deal with misconduct by a party that are more appropriate than granting a summary dismissal by reason of an abuse of process. Those remedies might include the making of an appropriate costs order against Mr Lunt or the CFMMEU[33].

The courts and abuse of process

18 The fundamental responsibility of a court is to do justice between the parties to the matters that come before it. In the performance of that function, the doing of justice may require the court to protect the due administration of justice by protecting itself from abuse of its processes[34]. The power to stay, or summarily dismiss, proceedings because one party has abused the processes of the court is

---

31 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 562 [119].

32 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 564 [131].

33 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 190.

34 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266 [12].

concerned to prevent injustice[35], and that power is properly exercised where the conduct of the moving party is such that the abuse of process on its part may prevent or stultify the fair and just determination of a matter.

19 In *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*[36], Gageler J explained that the concern which engages a court's power to order a stay of proceedings is the need to protect the integrity of its own processes. His Honour said:

> "The power of a superior court to stay its own proceedings as an abuse of process is a power to protect the integrity of its own processes. The power is in that limited respect and to that limited extent a power to 'safeguard the administration of justice'[37]."

20 In cases where proceedings are brought for an improper purpose, "no remedy is likely to be appropriate other than a stay of the proceedings"[38] because, in such cases, the abuse of the court's processes cannot be remedied in any other way. But where a court is able, by means less draconian than summary termination, to cure any apprehended prejudice to a fair trial so as to ensure that justice is done, the court's responsibility to the parties, and to the community, requires that those other means be deployed so that the matter before the court is heard and determined in accordance with the justice of the case. So, for example, where a party has engaged in sharp practice apt to delay the fair trial of a matter, an order for costs may be sufficient to cure the prejudice to the other party. Where a party's misconduct amounts to a contempt of court, such as the destruction of material evidence, the vindication of the court's authority may require the punishment of the miscreant. The remedy of a stay of proceedings, however, is concerned not with the punishment of the miscreant but with the protection of the integrity of the court's ability fairly and justly to determine the matter in dispute.

---

35 *Barton v The Queen* (1980) 147 CLR 75 at 96. See also *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301-1302, 1347; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25]; *UBS AG v Tyne* (2018) 265 CLR 77 at 83 [1].

36 (2018) 266 CLR 325 at 372-373 [113].

37 *Moti v The Queen* (2011) 245 CLR 456 at 464 [11].

38 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 71.

21 In *Strickland*[39], Kiefel CJ, Bell and Nettle JJ held that a stay of proceedings was warranted in the circumstances of that case because the abuse of process on the part of the prosecution so affected the prospects of a fair hearing that "the prejudice to a fair trial is at least to a significant extent incurable". Edelman J[40], who concurred with the plurality, explained that an order for a permanent stay is "a measure of last resort" which will be ordered "where there is no other way to protect the integrity of the system of justice administered by the court". His Honour went on to say:

> "Before a permanent stay can be ordered, it is necessary to consider whether there are any other curial measures that could be taken to address any systemic incoherence that would be caused by a trial of the accused. This must be considered because the court's ability to protect its integrity is not confined to orders that grant a permanent stay of proceedings."

22 Gageler J, who dissented as to the result of the case, was also of the opinion that a permanent stay of proceedings cannot properly be ordered where the substantial unfairness in the conduct of proceedings is capable "of being averted through the adoption ... of measures less drastic than ordering a permanent stay"[41]. And Gordon J, who also dissented as to the result of the case, agreed that there is no occasion to order a permanent stay of proceedings where the prejudice resulting from an abuse of process is curable by less drastic means. Her Honour said[42]:

> "[I]f a fair trial can be had, or if it is not possible to say now that a fair trial cannot be had, why would the administration of justice be brought into disrepute if the prosecutions were permitted to proceed?"

Illegitimate or improper purpose

23 While the thrust of the appellant's argument in this Court shifted away from an argument about illegitimacy of purpose, it is desirable to be clear that the Full Court was right to conclude that, while Mr Lunt may have been motivated to bring the current proceedings out of loyalty to the CFMMEU or to avoid a possible

---

39 (2018) 266 CLR 325 at 360 [85].

40 (2018) 266 CLR 325 at 409 [248], 415 [264].

41 (2018) 266 CLR 325 at 373 [115].

42 (2018) 266 CLR 325 at 408 [244].

forensic disadvantage to the CFMMEU, that does not mean that the proceedings were brought for an improper purpose. In this context the distinction between motive and purpose is of crucial importance. In *Williams v Spautz*[43], the plurality (Mason CJ, Dawson, Toohey and McHugh JJ) said:

> "To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.
>
> Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.
>
> It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers."

24 In the present case, the desired result – the quashing of the Enterprise Agreement – was squarely within the scope of the remedy sought by the current proceedings. That Mr Lunt did not desire the result for himself, or desired the CFMMEU to take the benefit, does not change this fact[44].

---

43 (1992) 174 CLR 509 at 526-527 (footnotes omitted). See also at 535 per Brennan J.

44 *Lunt v Victoria International Container Terminal Ltd* [2020] FCAFC 40 at [17]-[18].

Administration of justice

Substance of the arrangements between Mr Lunt and the CFMMEU

25 Before turning to address the appellant's principal argument as to Mr Lunt's alleged lack of candour, it is also desirable to say that there could not be any substantive objection to the arrangements between Mr Lunt and the CFMMEU. It is well settled that "a plaintiff who has regularly invoked the jurisdiction of a court has a prima facie right to insist upon its exercise"[45]. Where the applicable rules as to standing are so broad as to enable a number of plaintiffs to bring proceedings, the choice of a plaintiff who is likely to enjoy some legitimate forensic or juridical advantage over other candidates is not an abuse of process. Rather, it is a use of the processes made available by the law. To the extent that Mr Lunt, as a person whose standing to bring his claim was and is undisputed by the appellant, may have enjoyed some forensic or juridical advantage over the CFMMEU as an applicant for the relief he sought in the current proceedings, there was nothing improper in taking advantage of what the law allows.

26 Mr Lunt and the CFMMEU having made a choice between themselves as plaintiffs, there was similarly nothing objectionable in the CFMMEU's funding and direction of the proceedings brought by Mr Lunt. The decision of this Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*[46], relied on by Mr Lunt, is instructive in this regard. In that case, the plaintiff entered into an arrangement with a litigation funder and the plaintiff's action was determined in favour of the defendant. Because the defendant was left with a shortfall of costs, it sought to recover costs from the litigation funder, who was not a party, on the basis that the litigation funder had caused an abuse of process. The majority of this Court (French CJ, Gummow, Hayne and Crennan JJ) held that "an agreement by a non-party, for reward, to pay or contribute to the costs of a party in instituting and conducting proceedings is not, of itself, an abuse of the court's processes"[47].

Concealing the arrangements between Mr Lunt and the CFMMEU

27 The appellant's argument focused upon what was said to be Mr Lunt's lack of candour in attempting to conceal the nature and extent of the involvement of the CFMMEU in promoting and maintaining the current proceedings. The appellant's

---

45 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

46 (2009) 239 CLR 75.

47 (2009) 239 CLR 75 at 94 [30].

concern was that the administration of justice had been brought into disrepute because the deployment of Mr Lunt as a "front man" for the CFMMEU was likely to avoid or minimise the possibility that the court would refuse to quash the approval of the Enterprise Agreement on discretionary grounds because of the MUA's longstanding acquiescence in and reliance upon the agreement.

28 The use of colourful and pejorative language to describe Mr Lunt's actions and the CFMMEU's promotion of the current proceedings should not be allowed to obscure the mundane reality of the situation. First, it bears repeating that there is no basis for any substantive objection to the arrangements between Mr Lunt and the CFMMEU. Secondly, it should be understood that it was not incumbent on Mr Lunt to disclose the nature and extent of the CFMMEU's involvement in the current proceedings when they were brought. At that stage of the proceedings the relationship between Mr Lunt and the CFMMEU was not material to Mr Lunt's claim. Of course, once an issue was raised by the appellant in relation to the role of the CFMMEU, if Mr Lunt were to respond to that issue, he was obliged to do so honestly. In this regard, it may be noted that Mr Lunt admitted in his reply in the current proceedings that the MUA and the CFMMEU had borne the legal costs of the first proceedings and the current proceedings. Thirdly, insofar as Mr Lunt had concealed his ultimate purpose or motive through the destruction of his mobile phone, the appellant had relied on that evidence only as going to his credit rather than as proof of participation in a "sham" proceeding, or some other form of misconduct which should disentitle Mr Lunt to a determination of the current proceedings on their merits.

29 Moreover, the concern voiced by the appellant as to its purported inability to rely on discretionary grounds for the refusal of relief was always illusory. If Mr Lunt had been able to satisfy the court that the approval was given in excess of the Commission's jurisdiction, the court might nevertheless have refused relief in the exercise of its discretion by viewing Mr Lunt as an officious intermeddler in the affairs of other persons who, on the face of things, appeared to be perfectly content with the Enterprise Agreement, at least in the absence of any suggestion that the union which had approved its terms now repented of its bargain and sought to change its position.

30 Whatever result might have eventuated in this regard, it is inconceivable that the court asked to quash the approval of the Enterprise Agreement would do so without noting that the approval was supported by the MUA as the representative of affected employees and that the Enterprise Agreement had been invoked by it in proceedings before the Commission. The circumstance that Mr Lunt was the person who brought the proceedings would not have prevented, in any real way, scrutiny of the role played by the CFMMEU's predecessor union

in the making of the Enterprise Agreement. None of the parties to the Enterprise Agreement other than Mr Lunt were disposed to complain of it.

31 In any event, with the arrangements between Mr Lunt and the CFMMEU now being well known, it is not possible to say that a fair trial cannot be had. That being so, the administration of justice could not be brought into disrepute by allowing the current proceedings to continue to a determination on their merits.

32 In the course of the hearing of the appeal, the appellant's argument reduced to the proposition that failure to stay or summarily dismiss would bring the administration of justice into disrepute because the court should be astute to deter or punish a want of candour on the part of a litigant of the kind revealed in this case irrespective of whether a fair trial can now be had. The appellant was not able to cite any authority in support of the proposition that considerations of deterrence or punishment are relevant to the exercise of the court's powers in relation to abuse of process. That is not surprising because, as has been noted above, the court's powers in relation to abuse of process are not informed by considerations of deterrence or punishment. Rather, they are exercised in order to protect the integrity of the court's own processes[48].

Conclusion

33 Whether or not Mr Lunt understood that there was nothing improper in the bringing of the current proceedings in his name, that was in truth the case. Any misunderstanding on Mr Lunt's part that may have prompted him to attempt to conceal the CFMMEU's involvement does not change that. That being so, to permit the current proceedings to continue to a conclusion on their merits would not be to allow the pursuit of an illegitimate or improper purpose. Nor would it bring the administration of justice into disrepute.

34 For these reasons, in the circumstances found by the primary judge, there was no basis for the making of an order summarily to dismiss the current proceedings[49]. The CFMMEU's involvement in the current proceedings is not a reason why the merits of the case should not be determined by the Federal Court. The appeal should be dismissed.

---

48 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325.

49 *Barton v The Queen* (1980) 147 CLR 75 at 111; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34, 49, 74.

Mr Lunt does not seek an order for his costs of the appeal to this Court. There should therefore be no order in relation to those costs. As to the costs of the proceedings before the primary judge, an application in relation to those costs is before the primary judge and is for his Honour to determine.

36 EDELMAN J. I have had the considerable benefit of reading in draft the joint reasons for decision of the other members of this Court. I agree with those reasons and wish to add only the following brief remarks.

37 The sole category of abuse of process with which this appeal was concerned is the category loosely described in the ground of appeal as one where the proceeding brings "the administration of justice into disrepute". This expression is loose because the concern is not with the public reputation of the court, nor with public confidence in the court, in any real sense. The concern is with the integrity of the court, including its processes[50].

38 It was not alleged on appeal to this Court that the abuse of process arose from Mr Lunt bringing the proceeding for an improper purpose. A difficulty that can arise in relation to claims of improper purpose is the ambiguity of "purpose". When lawyers speak of legislative purpose, their concern is with purpose in its sense in "ordinary parlance"[51] as the legislative motive or goal – the mischief to which the Act is directed – and not merely the immediate purpose of enacting statutory provisions by which that motive or goal is to be achieved[52]. By contrast, in areas such as the exercise of fiduciary power, the focus is upon the immediate purpose rather than the motive: "the exercise of a power for an ulterior or impermissible purpose is bad notwithstanding that the motives of the donee of the power in so exercising it are substantially altruistic"[53]. Similarly, when considering an abuse of process constituted by an improper purpose, "the existence of an unworthy or reprehensible motive for bringing the action [is] not enough"; rather, the issue is whether the immediate purpose "sought to be effected by the litigant in bringing the proceedings was not within its scope and was improper"[54].

39 Mr Lunt's action in bringing a proceeding for the immediate purpose of setting aside the Enterprise Agreement was not improper merely because his

---

50 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 411-415 [256]-[263].

51 *Zaburoni v The Queen* (2016) 256 CLR 482 at 490 [17].

52 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132]; *Brown v Tasmania* (2017) 261 CLR 328 at 363 [101], 391-392 [208]-[209], 432 [321]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171].

53 *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 293.

54 *Williams v Spautz* (1992) 174 CLR 509 at 525, explaining the reasoning of the Privy Council in *King v Henderson* [1898] AC 720 at 731.

motive or "ultimate purpose"[55] was to obtain a benefit for the union which, after merger, became the Construction, Forestry, Maritime, Mining and Energy Union ("the CFMMEU")[56]. Since Mr Lunt had the immediate purpose of setting aside the Enterprise Agreement, and since the law would not be stultified by him bringing the proceeding for the benefit of the CFMMEU[57], his motive did not render that purpose improper for the same reason that it would not be improper for an action to be brought by a union with the motive of obtaining a benefit for its members[58]. As senior counsel for Victoria International Container Terminal Limited properly conceded in this Court, if Mr Lunt had been wholly transparent about the role of the CFMMEU, there would not have been an abuse of process.

40 The focus of submissions in this Court was not, therefore, upon Mr Lunt's motive or upon the role of the CFMMEU. It was upon Mr Lunt's attempt to conceal those matters. The primary judge found that Mr Lunt conducted his case "on the basis that he has brought the proceeding for his own benefit, and not to represent the CFMMEU"[59]. The primary judge concluded that there was "a substantial risk that ... an application would have failed"[60] if it had been brought in the name of the CFMMEU. The motive for concealing the role of the CFMMEU as the driving force of the proceeding, and for Mr Lunt conducting his case on the basis that he was not representing the interests of the CFMMEU, was to reduce that risk.

41 The forensic strategy adopted by Mr Lunt and the CFMMEU was a gamble. Without revealing the principal role of the CFMMEU, Mr Lunt might have needed to provide evidence of a more widespread concern with the Enterprise Agreement, particularly from employees, such as himself, who were not relevantly employed in 2016 and therefore were not represented in the bargaining process. Otherwise the court might have exercised its residual discretion to refuse prerogative relief to

---

55 *Williams v Spautz* (1992) 174 CLR 509 at 526.

56 See also *Lunt v Victoria International Container Terminal Ltd* [2020] FCAFC 40 at [18].

57 Compare *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 523-524, citing *In re Dashwood; Ex parte Kirk* (1886) 3 Morr 257.

58 See, for example, *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456.

59 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 564 [132].

60 *Lunt v Victoria International Container Terminal Ltd [No 2]* (2019) 165 ALD 542 at 562 [123].

Mr Lunt as a single, disaffected employee. On the other hand, if the full role of the CFMMEU as the driving force for the proceeding had been revealed, Victoria International Container Terminal Limited at trial might have relied upon the change of position by the CFMMEU in seeking to set aside an Enterprise Agreement to which the union had acquiesced and upon its delay of 15 months in doing so, a period within which many employees might have relied upon the agreement.

42 Let it be supposed that the gamble had succeeded and that the proceeding had been resolved at first instance in favour of Mr Lunt. In those circumstances, if the discretionary factors arising from the role of the CFMMEU and weighing against relief had been concealed, but were later discovered, then the decision might be set aside on appeal[61]. If there were evidence of a "fraud on the court", it could even be set aside by the primary judge[62]. But in either case the remedy would be a new trial. The court would not permanently stay proceedings and thereby deprive a party such as Mr Lunt of the liberty of a fair adjudication of their rights.

43 The reason that a permanent stay of proceedings would not be appropriate is that any successful concealment of the CFMMEU's role is of a different nature from a tortious abuse of process, such as where the purpose of bringing the proceedings is not to prosecute them to a conclusion but "some [ultimate] purpose other than the attainment of the claim in the action"[63]. In the latter case, concerns of deterrence might arise but, more significantly, without a permanent stay the wrongful action would continue. In the former case, the remedial responses to the concealment are limited to those necessary to achieve the function of protecting the integrity of the court. If the integrity of the court can be protected by remedies less drastic than a permanent stay of proceedings then there is no justification for a court to go further than necessary to protect its processes by denying a party the liberty of a fair hearing.

44 The same approach is also taken by courts applying remedies for illegality[64], where courts do the minimum necessary to avoid self-stultification of the law.

---

61 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 142-143; *Clone Pty Ltd v Players Pty Ltd (In liq) (Receivers and Managers Appointed)* (2018) 264 CLR 165 at 187-191 [45]-[51].

62 *Clone Pty Ltd v Players Pty Ltd (In liq) (Receivers and Managers Appointed)* (2018) 264 CLR 165 at 191-192 [53].

63 *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91.

64 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 416 [267].

An example is the decision of this Court in *Nelson v Nelson*[65]. In that case, Mrs Nelson engaged in fraudulent conduct by transferring land to her children in order to obtain a Commonwealth subsidy for a later purchase of land. The remedial response to her claim for a resulting trust of the land was not to deny her rights but to condition her relief upon payment to the Commonwealth of an amount that would deny Mrs Nelson the benefit of the subsidy that she had fraudulently obtained. Such a remedy was sufficient to avoid "self-stultification in the law"; in positive terms, it served the objective of "maintaining coherence in the law"[66].

45 The judicial response where it is alleged prior to trial that relevant matters are being concealed cannot be stronger than the judicial response where those matters are discovered after trial. Just as a court which is confronted with obstacles to a fair trial should usually protect its processes by "flexible use of the power to control procedure and by the giving of forthright directions"[67] rather than "refusing to exercise the jurisdiction to hear and determine the issues"[68], so too should a court use its processes to prevent any threat to its integrity such as that which might be suggested by allegations of concealment. But, in this case, once the extent of the role of the CFMMEU had been revealed, there was no threat to the integrity of the court's processes. Putting to one side any issues concerning costs, no further remedial response, including the extreme measure of a stay of proceedings, was necessary.

46 Orders should be made as proposed in the joint reasons.

---

65 (1995) 184 CLR 538.

66 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 520 [38].

67 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49.

68 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 47.