

# HIGH COURT OF AUSTRALIA

BEECH-JONES J

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MONFORT

PLAINTIFF

AND

BADE & ORS

DEFENDANTS

2024 HCASJ 37

*Date of Judgment: 3 October 2024*

B29 of 2024

## ORDERS

- 1. Pursuant to r 25.09.1 of the High Court Rules 2004 (Cth), the application for a constitutional or other writ filed on 7 June 2024 is dismissed without being listed for hearing.*
- 2. The plaintiff is to pay the first and second defendants' costs of the proceedings.*

## Representation

The plaintiff is unrepresented

The first defendant is unrepresented

The second defendant is unrepresented

Submitting appearances for the third, fourth and fifth defendants



1 BEECH-JONES J. On 7 June 2024, the plaintiff, Ms Monfort (a pseudonym), filed an application for a constitutional or other writ in this Court seeking an injunction, a writ of prohibition and writs of certiorari. These remedies are directed to quashing orders made and a warrant of possession issued by the Federal Circuit and Family Court of Australia (Division 1), the effect of which require vacant possession and sale of a property the subject of proceedings under the *Family Law Act* 1975 (Cth).

2 Rule 25.09.1 of the *High Court Rules 2004* (Cth) provides that an application filed in this Court may be dismissed without being listed for a hearing on the ground that the application does not disclose an arguable basis for the relief sought or is an abuse of process of the Court. An abuse of process "encompasses an attempt to invoke the original or appellate jurisdiction of the High Court on a basis that is confused or manifestly untenable"<sup>1</sup> or, in other words, "manifestly hopeless".<sup>2</sup> For the reasons that follow, that rule should be invoked in this case.

### Background

3 The plaintiff and the first defendant, Mr Bade (a pseudonym), commenced cohabitation in 1991 and married in 1992. Between 2012 and 2014, the plaintiff and first defendant separated on a final basis. In May 2014, the plaintiff filed an application for property settlement under s 79 of the *Family Law Act* in the Federal Circuit Court of Australia (as it then was). By the time final orders were made, there remained two properties ("Property A" and "Property B") jointly owned by the plaintiff and first defendant.

4 On 13 October 2017, a Judge of the Federal Circuit Court (Willis J) made final property adjustment orders.<sup>3</sup> Her Honour ordered that Property A and Property B be divided between the plaintiff (75%) and the first defendant (25%), and that a firm of lawyers be appointed to act as trustee for the sale of the properties ("the 2017 Orders"). That firm refused to act as trustee. Instead, the plaintiff and first defendant provided consent orders on 1 February 2019 which, inter alia, made provision for the appointment of the second defendant, Mr Flannan, as a trustee to effect the sale of Property A and Property B. In the meantime, the plaintiff appealed the 2017 Orders to the Full Court of the Family Court of Australia. On 24 August 2018, the appeal was dismissed.<sup>4</sup>

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1 *Re Young* (2020) 94 ALJR 448 at 451 [13]; 376 ALR 567 at 570.

2 *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at 246-247 [73].

3 *Monfort v Bade (No 2)* [2017] FCCA 1673.

4 *Monfort v Bade* [2018] FamCAFC 163.

5       The second defendant sold Property A in late 2019. Issues arose between the parties in executing the sale of Property B. In February 2020, the parties agreed to an order for a stay against the second defendant in relation to Property B. Between 2019 and 2023, several applications were filed in the Federal Circuit Court in relation to such disputes in executing the 2017 Orders. These included an application filed by the plaintiff on 15 November 2022 under s 79A of the *Family Law Act* to set aside the previous orders made under s 79 and an application for, inter alia, a declaration that the plaintiff is a vexatious litigant which was filed by the first defendant on 10 January 2023.

6       The plaintiff filed an application in this Court in March 2022 seeking special leave to appeal against the appointment of the second defendant as trustee. The application was refused in July 2022.<sup>5</sup>

7       On 25 January 2024, the third defendant, Howard J, a judge of the Federal Circuit and Family Court of Australia (Division 1), dismissed the outstanding application made by the plaintiff under s 79A, dismissed all extant applications instituted by the plaintiff against the first and second defendant and also made orders declaring the plaintiff as vexatious and requiring leave of the court to institute future, related proceedings ("the January 2024 Orders").<sup>6</sup> His Honour directed the second defendant to prepare draft orders to:<sup>7</sup>

"effect the sale of Property B and to enable the [second defendant] to complete his obligations pursuant to the relevant Orders of this Court. The [plaintiff] is to be given 45 days (from the date that the proposed orders/directions are finalised by this Court in the form of formal orders) to vacate the Property B. In addition, the [second defendant] should include in the draft orders/directions any other orders or directions that are appropriate – having regard to these Reasons for Judgment."

8       His Honour also directed the second defendant to provide a copy of the proposed orders to the plaintiff and the first defendant and to give them the opportunity to provide any suggested variations.<sup>8</sup>

9       On 1 March 2024, Howard J made further orders declaring, inter alia, the plaintiff to be in default of some of the 2017 Orders and requiring the plaintiff to

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5     *Monfort v Bade* [2022] HCASL 112.

6     *Monfort v Bade* [2024] FedCFamC1F 16.

7     *Monfort v Bade* [2024] FedCFamC1F 16 at [175].

8     *Monfort v Bade* [2024] FedCFamC1F 16 at [178].

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deliver to the second defendant vacant possession of Property B within 45 days. These were amended pursuant to the slip rule on 20 March 2024.

10 The plaintiff repeatedly sought leave to appeal from the January 2024 Orders and other orders of Howard J. It suffices to note that on 8 March 2024, Aldridge, Austin and Harper JJ in the Federal Circuit and Family Court of Australia (Division 1) (Appellant jurisdiction) delivered reasons refusing leave.<sup>9</sup> Their Honours were "not satisfied that the proposed appeal [was] not vexatious" and found that the plaintiff "ha[d] not demonstrated her proposed appeal would be brought on reasonable grounds".<sup>10</sup>

11 The plaintiff applied for special leave to appeal to this Court from that decision and sought a stay of the orders made by Howard J, including those made on 25 January 2024, 1 March 2024 and 20 March 2024. The application for a stay was refused by Edelman J on 16 April 2024.<sup>11</sup> The application for special leave to appeal to this Court was refused by Gordon and Steward JJ on 8 August 2024.<sup>12</sup>

12 On 16 April 2024, the second defendant filed an affidavit in the Federal Circuit and Family Court of Australia seeking a warrant of possession pursuant to the 1 March 2024 orders, which was granted on 3 May 2024. The warrant was issued on 3 May 2024 under the hand of the fourth defendant, a Deputy Registrar of the Federal Circuit and Family Court of Australia. On 22 May 2024, the fifth defendant, an enforcement officer of the Federal Circuit and Family Court of Australia, left a notice to the plaintiff demanding she vacate Property B. The warrant was executed on 10 June 2024 and the plaintiff left the property.

### The Application

13 The plaintiff's application for a constitutional or other writ has four principal prayers for relief. The first is a writ of prohibition or injunction against each of the second, third, fourth and fifth defendants from enforcing or acting on the warrant for possession. The second prayer for relief is a writ of certiorari to quash so much of the orders of Howard J made on 1 March 2024, as amended on 20 March 2024, that support the warrant, the taking of the possession of Property B and its enforced sale. The third prayer for relief seeks a writ of certiorari to quash

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9 *Re Monfort* [2024] FedCFamC1A 23.

10 *Re Monfort* [2024] FedCFamC1A 23 at [41].

11 *In the matter of an application by Ms Monfort for special leave to appeal* [2024] HCASJ 15.

12 *In the matter of an application by Ms Monfort for special leave to appeal* [2024] HCASL 171.

the warrant. The fourth prayer seeks a writ of certiorari to quash the "decision" of the fifth defendant "dated 17 May 2024 to order the Plaintiff to vacate" Property B.

14       The application seeks to invoke this Court's jurisdiction under ss 75(v) of the *Constitution* and that which is conferred or confirmed by s 30(a) of the *Judiciary Act 1903* (Cth). Insofar as it invokes s 75(v) of the *Constitution* to obtain final relief in the form sought, the plaintiff must establish jurisdictional error affecting either the orders of Howard J or the issue of the warrant.<sup>13</sup> The so-called "decision" of the enforcement officer on 17 May 2024 is not described in any detail in the evidence, but it appears to be no more than the ministerial act of informing the plaintiff about the timing of the execution of the warrant.

15       The facts and circumstances pleaded in the application are discursive and largely incoherent. However, it identifies three grounds for the relief sought.

16       The first is a claim of apprehended bias possibly against Howard J. This claim appears to arise out of the manner in which his Honour dealt with an issue that arose on the sixth day of a hearing that resulted in the January 2024 Orders. On that day, the plaintiff apparently complained that, prior to the proceedings, her former solicitor had contacted counsel for the second defendant about the possibility of briefing her to act, but had not done so.<sup>14</sup> After taking various steps to ascertain what information may have been disclosed in the exchange between the solicitor and counsel for the second defendant, Howard J refused to grant leave to allow the plaintiff to bring an application seeking to have the counsel disqualified as that application had no proper basis.<sup>15</sup>

17       To the extent that this complaint concerns some conflict of interest on the part of counsel for the second defendant, it is meritless. Howard J's jurisdiction to hear and determine proceedings involving the plaintiff was not dependent on counsel appearing for the second defendant or any other party being free from any possible conflict of interest. To the extent that this complaint might be taken to be a complaint of apprehended bias on the part of Howard J, it is also baseless. Nothing in the material raises the possibility that his Honour acted other than impartially in dealing with this issue when it arose. Further, the plaintiff has had numerous opportunities to raise this issue on appeal if she has not in fact done so. The appeal structure should not be subverted by an application of this kind. Even if this complaint had any merit, which it does not, it would be dismissed as a matter of discretion.

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13   *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

14   *Monfort & Bade* [2024] FedCFamC1F 16 at [150].

15   *Monfort & Bade* [2024] FedCFamC1F 16 at [150].

18       The second ground of the application contends that the orders made by Howard J on 1 March 2024, as amended on 20 March 2024 were affected by jurisdictional error, made in breach of the hearing rule of procedural fairness or "made in error of law". The only intelligible particular that emerges from the application in support of this ground appears to be a contention that it was a jurisdictional prerequisite to making orders under s 79 of the *Family Law Act* that the orders be "just and equitable", and Howard J's orders supposedly did not have that quality.

19       Section 79(2) precludes the making of an order under s 79 "unless [the court] *is satisfied* that, in all the circumstances, it is just and equitable to make the order"(emphasis added). Assuming without deciding that s 79(2) raises a matter that goes to the jurisdiction of any court making orders under s 79, nothing in the matters pointed to by the applicant are capable of supporting the contention that Howard J was not properly *satisfied* that it was just and equitable to make them. In addition, as with the previous ground, the plaintiff has had numerous opportunities to raise this issue on appeal if she has not done so already. Even if this complaint had any merit, which it does not, it would be dismissed as a matter of discretion.

20       The third ground contends that the order made by Howard J to appoint the second defendant as trustee to supervise the sale of Property B was contrary to Ch III of the *Constitution* and involved an acquisition of property other than on just terms contrary to s 51(xxxi) of the *Constitution*. This contention is baseless. The second defendant was not conferred with the judicial power of the Commonwealth. As the trustee for sale, he did not acquire property.

21       In light of these findings, it is not necessary to determine the consequences for the relief sought of the execution of the warrant on 10 June 2024.

## **Conclusion**

22       The application is confused, manifestly untenable and thus, an abuse of process. Pursuant to r 25.09.1 of the *High Court Rules*, the application is dismissed without being listed for hearing. Pursuant to r 25.09.2 of the *High Court Rules*, these reasons need not be published in open court. The plaintiff must pay the first and second defendants' costs.