

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
STEWART AND JAGOT JJ

---

F. GENESALIO & ANOR

PLAINTIFFS

AND

JUSTICE JOHNS AND OTHER JUDGES OF THE  
FEDERAL CIRCUIT AND FAMILY COURT  
OF AUSTRALIA (DIVISION 1) & ORS

DEFENDANTS

*Genesalio v Justice Johns and other Judges of the Federal Circuit and  
Family Court of Australia (Division 1)*

[2025] HCA 45

*Date of Order: 28 November 2025*

*Date of Publication of Reasons: 3 December 2025*

M58/2025

## ORDER

- 1. The application for a constitutional or other writ (as amended) and the application for a stay be determined without listing them for hearing, pursuant to rr 13.03.1 and 25.09.1 of the High Court Rules 2004 (Cth).*
- 2. The application for a constitutional or other writ (as amended) is dismissed with costs.*
- 3. The application for a stay is dismissed with costs.*

## Representation

The plaintiffs are unrepresented

The second defendant is represented by Mazzeo Lawyers

Submitting appearance for the first defendant



No appearance for the third to seventh defendants

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Genesalio v Justice Johns and other Judges of the Federal Circuit and Family Court of Australia (Division 1)**

High Court – Original jurisdiction – Application for constitutional or other writ – Application for stay – Where orders made by Federal Circuit and Family Court of Australia (Division 1) ("Division 1 Court") – Where plaintiffs sought writs of certiorari quashing orders of Division 1 Court – Where plaintiffs sought writs of prohibition, mandamus and declarations – Whether extension of time should be granted to seek constitutional or other writ – Whether application for stay should be granted.

Words and phrases – "certiorari", "constitutional or other writ", "declarations", "exceptional cases", "extension of time", "interests of justice", "joinder orders", "mandamus", "orders by consent", "prohibition", "property settlement", "stay".

*Constitution*, s 51(xxii).

*Family Law Act 1975* (Cth), ss 4, 39, 78, 79, 90AF, 114.

*Federal Circuit and Family Court of Australia Act 2021* (Cth), s 26.

*Judiciary Act 1903* (Cth), s 44.



GAGELER CJ, STEWARD AND JAGOT JJ.

### **The orders**

1           On 28 November 2025 Gageler CJ, Steward and Jagot JJ, convened as a Full Court to determine the application for a constitutional or other writ and the related application for a stay of certain orders, made these orders:

- (1)   The application for a constitutional or other writ (as amended) and the application for a stay be determined without listing them for hearing, pursuant to rr 13.03.1 and 25.09.1 of the *High Court Rules 2004* (Cth).
- (2)   The application for a constitutional or other writ (as amended) is dismissed with costs.
- (3)   The application for a stay is dismissed with costs.

2           These reasons for judgment explain why we made those orders.

### **The applications**

3           The application for a constitutional or other writ seeks an order for an extension of time to permit the plaintiffs to seek: writs of certiorari quashing orders made by Johns J in the Federal Circuit and Family Court of Australia (Division 1) (the "Division 1 Court") on 26 April 2023, 28 June 2024 and 30 August 2024 in proceedings MLC7657/2018 (the "proceedings"); writs of prohibition restraining the enforcement of those orders; a writ of mandamus compelling any future orders in the proceedings to be made according to law; and declarations that the orders of 26 April 2023 and 28 June 2024, by which parties other than the parties to the marriage in the matrimonial cause the subject of the proceedings were joined as parties to the proceedings, are "(i) void for jurisdictional error and [are] constitutionally invalid, [and] (ii) [are] beyond the subject matter jurisdiction conferred by the *Family Law Act 1975*".

4           The grounds on which the constitutional writs were sought were in these terms:

- "1.   The primary judge (PJ) erred by failing to accord procedural fairness in making interim orders to join the third parties on the wrong principle in circumstances where the applicant failed to satisfy the precondition to join a party, culminating in final orders which constitute a miscarriage of justice.
2.   The PJ erred in finding a triable cause of action that property held on trust could be property of an (overarching) partnership agreement

2.

pursuant to the declaration sought which disregards the legitimate interests of third parties[.]

3. The claim was instituted and maintained against third parties without a right or a proper basis.
4. The PJ erred in making final orders before being satisfied as to the consent of the parties.
5. The PJ misapprehended the limits of her functions and powers to make final orders, before undertaking the requisite steps to satisfy herself the orders are 'just and equitable' in circumstances where the inclusion of non-matrimonial assets in the division of property, in which neither party to the marriage has an equitable interest or control is contrary to [ss] 79, 90AE & 90AK of the *Family Law Act 1975*."

5 The application for a stay was for a stay of the final orders in the proceedings made on 30 August 2024, and subsequent orders made on 16 June 2025 and 3 July 2025 facilitating enforcement of those orders, including by the sale of property, until the determination of the substantive application in this Court.

6 The application for a constitutional or other writ could not be remitted to the Division 1 Court.<sup>1</sup>

7 As explained below, no extension of time should have been granted to the plaintiffs to apply for the substantive orders sought. Accordingly, both the application for a constitutional or other writ and the application for the stay had to be dismissed with costs.

### **The proceedings**

8 The proceedings were commenced in 2018 by a former wife against a former husband seeking a property settlement under s 79 of the *Family Law Act 1975* (Cth) (the "FLA"). At that time s 39(1A) of the FLA relevantly provided that a matrimonial cause may be instituted in the Federal Circuit Court of Australia. A "matrimonial cause", by s 4(1) of the FLA, means, amongst other things, proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings arising out of the marital relationship. Section 39 of the FLA (including in its current form) has its

---

1 *Judiciary Act 1903* (Cth), s 44; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 627 [54].



3.

source of power in s 51(xxii) of the *Constitution*, which provides that "[t]he Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... divorce and matrimonial causes".

9 By s 78(1) of the FLA, "[i]n proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property". Where such a declaration is made, by s 78(2), the court "may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession". By s 79(2) of the FLA, "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order".

10 At the relevant times for the purpose of the proceedings, s 79(10)(b) of the FLA provided that any person whose interests would be affected by the making of an order under s 79 was entitled to be made a party to the proceeding. In addition, s 90AF(2)(b) of the FLA provided that, in proceedings under s 114 of that Act (including in s 114(1)(e) proceedings for an injunction in relation to the property of a party to the marriage) the court "may make any other order, or grant any other injunction that ... alters the rights, liabilities or property interests of a third party in relation to the marriage".

11 The proceedings were transferred from the Federal Circuit Court of Australia to the Family Court of Australia which came to be reconstituted as the Division 1 Court. In the proceedings, the former wife claimed that the former husband had interests in property held by the former husband's brother. On 26 April 2023, Johns J made orders for the joinder of the former husband's brother as a party to the proceedings for reasons given in *Genesalio & Genesalio* [2023] FedCFamC1F 160. The former husband's brother sought to appeal those orders. At all relevant times, however, s 26(2)(b)(i) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) provided that an appeal must not be brought against a decision to join or remove a party. The former husband's brother's appeal was summarily dismissed by a registrar and then further dismissed on appeal by Austin J for reasons given in *Genesalio & Genesalio* (2023) 67 Fam LR 186.

12 On 28 June 2024, for reasons given in *Genesalio & Genesalio (No 5)* [2024] FedCFamC1F 450, Johns J ordered the joinder of additional parties, being corporations controlled by the former husband's brother in which the former wife claimed the former husband held an interest. No application was made by the former husband, the former husband's brother or those corporations to set aside those joinder orders.

- 13 On 30 August 2024, after nine days of hearing, Johns J made final orders by consent in the proceedings. All parties were legally represented. The final orders provided, amongst other things, for the sale of various properties. The final orders also included a notation to the effect that the former husband and former wife intended to enter into a financial agreement under ss 90D and 90E of the FLA dealing with spousal maintenance. That financial agreement has not been executed. Failing the sale of the properties in accordance with the final orders, the former wife applied for orders to enforce the sales. Following a hearing at which all parties were legally represented, Johns J made orders by consent on 16 June 2025 for the sale of the properties. On 3 July 2025, Johns J made further orders under ss 90AF and 114 of the FLA to facilitate the sale of the properties by restraining the former husband and the former husband's brother from interfering with the sale of the properties for reasons given in *Genesalio & Genesalio (No 6)* [2025] FedCFamC1F 450.

#### **Extension of time – consideration**

- 14 The application for the constitutional or other writ was filed in this Court on 18 July 2025 (and subsequently amended). The time period for filing an application for certiorari in this Court expires six months after the day the decision sought to be quashed was made.<sup>2</sup> The application for a constitutional or other writ, the central aspects of which are the writs of certiorari to quash the impugned orders of the Division 1 Court, was substantially out of time, the time for filing for certioraris having expired in October 2023 for the first joinder order, January 2025 for the second joinder order, and March 2025 for the final orders.
- 15 Given the generous time period in which a writ of certiorari may be sought in this Court, in "all but very exceptional cases", that time limit should be applied.<sup>3</sup> Nothing in the supporting material suggested this was an "exceptional case". To the contrary, "the history of the matter, the conduct of [the] parties, the nature of the litigation and the consequences for the parties of a grant or refusal of the extension"<sup>4</sup> confirmed that it would be against the interests of justice for the extension of time to be granted.

---

2 *High Court Rules 2004* (Cth), r 25.02.2(a).

3 *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 474 [16]; 177 ALR 491 at 495-496.

4 *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 474 [15]; 177 ALR 491 at 495.

5.

16 The plaintiffs provided no persuasive explanation for the delay. The explanation provided, being the medical condition and impecuniosity of the former husband and caring duties of the former husband's brother, were belied by the fact that there was evidence that the plaintiffs continued to be legally represented in the proceedings before the Division 1 Court and had amassed a vast amount of material in support of their applications. The unavoidable inference from the evidence was that the plaintiffs had commenced the proceeding in this Court only after they failed to stymie compliance with the final orders, made by consent on the basis of legal advice, in the Division 1 Court. Moreover, the plaintiffs had done so in circumstances where they had not sought to appeal the final orders in the Division 1 Court. The further unavoidable inference from the evidence was that the plaintiffs were using the application to this Court to avoid the consequences of the decision they had made based on legal advice to settle the proceedings in the Division 1 Court. In these circumstances it could never have been concluded that it was necessary in the interests of justice that the extensions of time required to challenge the impugned orders be granted.

17 To the extent it was necessary to consider the merits of the applications, the interests of justice weighed heavily against the grant of the extensions of time required. The constitutional argument against joinder was not raised or at least not maintained below. The plaintiffs advanced no cogent reason to doubt that the head of power in s 51(xxii) of the *Constitution* with respect to "matrimonial causes" enabled the Commonwealth Parliament to confer jurisdiction on, relevantly, the Division 1 Court in respect of property settlements between the parties to a marriage including property in which a party to the marriage has an interest even if title to that property is vested in another person or body.

18 Otherwise, ground 1 of the application was not arguable in circumstances where the former husband was legally represented before Johns J in respect of the first joinder order against the former husband's brother and the former husband's brother relied on the submissions for the former husband (and had the opportunity to be and had been legally represented before the hearing on the first joinder application) and in circumstances where: (1) no appeal could be brought against the first joinder order; (2) no appeal was sought against the final orders which depended on the first joinder order; and (3) no cogent argument was advanced to the effect that the first joinder order was affected by jurisdictional or any other kind of error. As submitted for the former wife, there could never be a precondition to the Division 1 Court's power of joinder of a third party that the Court in fact find that the existing party's claim in support of the joinder of the third party (an alleged interest of the former husband in property held by the former husband's brother or entities controlled by the former husband's brother) be in fact substantiated. The joinder was necessary to provide natural justice to the former husband and former husband's brother to enable determination of the former wife's

6.

claim which would be substantiated or not depending on all the evidence ultimately adduced.

19 Ground 2 of the application suffered from the same problem. The third parties were joined so that any "legitimate interests" they might have in property in which the former wife claimed the former husband had an interest could be considered in the making of any decision in accordance with the provisions of the FLA including s 79(2).

20 Ground 3 appeared to involve the same contentions, but the contentions extended beyond the joinder orders to the final orders. As noted: (1) the final orders were made by consent in circumstances where the hearing had proceeded for nine days and all parties were legally represented; and (2) the plaintiffs did not seek to appeal or otherwise set aside the final orders in the Division 1 Court. The plaintiffs contended, amongst other things, such matters as: bias on the part of Johns J in saying "I do not accept the submissions made by the [former husband's brother] as to the wife's application being an abuse of process. Those submissions were made without foundation and were not supported by the evidence";<sup>5</sup> misrepresentations amounting to fraud on the court by the former wife and her lawyers to "fabricate" jurisdiction; and unreasonable conduct by the former wife and her lawyers in seeking to join the third parties. None of these contentions had an apparent proper foundation in the law or in any evidence.

21 Ground 4 was similarly unsustainable on its face. The notation on the final orders made by consent as to the intention of the former husband and the former wife to enter into a financial argument about "spousal maintenance", on any view, could not be construed as a condition precedent to the operation of the final orders. The notation merely records a separate intention of the former husband and the former wife about spousal maintenance, being a matter not the subject of the final orders. That counsel for the parties informed Johns J that the former husband and former wife intended to execute the financial agreement before the final orders were made by consent was immaterial in circumstances where the parties were legally represented when those final orders were pronounced and did not object to those orders and no party thereafter sought to set aside or appeal from the final orders as made. Moreover, on the evidence, the former wife remained ready, willing, and able to enter into a financial agreement as contemplated by the notation, but the former husband had refused to do so.

22 Ground 5 was not arguable in circumstances where the final orders were made by consent, nine days into a hearing, where all parties were legally

---

5 *Genesalio & Genesalio* [2023] FedCFamC1F 160 at [111].

7.

represented and had ample opportunity to obtain, and must be inferred to have obtained, legal advice that the orders were just and equitable.

23            Apart from these matters, the plaintiffs' contentions appeared to be no more than asserted disagreements with the factual foundations of the decisions of the Division 1 Court underlying the making of the impugned orders.

24            In circumstances where none of the grounds for the writs of certiorari were reasonably arguable the matter was not one in which any extension of time could be justified. As the balance of the orders sought depended on the writs of certiorari being granted, the application (as amended) had to be dismissed, with costs. It followed that the application for a stay also had to be dismissed, and that it was unnecessary to consider the further submissions filed on behalf of the former wife in response to that application or the affidavit in response filed by the former husband's brother.