

HIGH COURT OF AUSTRALIA

JAGOT J

FERNAN

PLAINTIFF

AND

MINA & ANOR

DEFENDANTS

[2025] HCASJ 50

Date of Judgment: 17 December 2025

M96 of 2025

ORDERS

- 1. Pursuant to rr 25.09.1 and 13.03.1 of the High Court Rules 2004 (Cth) respectively the application for a constitutional or other writ filed on 25 November 2025 and the interlocutory application for "urgent interim and preservative relief" also filed on 25 November 2025 respectively be determined without listing the application for hearing.*
- 2. Pursuant to each of r 28.01.2(c) and (d) of the High Court Rules 2004 (Cth) the application for a constitutional or other writ filed on 25 November 2025 is summarily dismissed.*
- 3. Pursuant to each of r 28.01.2(c) and (d) of the High Court Rules 2004 (Cth) the interlocutory application for "urgent interim and preservative relief" filed on 25 November 2025 is summarily dismissed.*

Representation

The plaintiff is unrepresented

No appearance for the defendants

1 JAGOT J. These reasons for judgment explain why I have concluded that an order should be made under r 28.01.2(c) and (d) of the *High Court Rules 2004* (Cth) summarily dismissing the application for a constitutional or other writ filed on 25 November 2025 (the "constitutional writ application") and the application for "urgent interim and preservative relief" pending determination of the constitutional writ application also filed on 25 November 2025 (the "interlocutory application"). I have also decided that orders should be made under rr 25.09.1 and 13.03.1 of the *High Court Rules* respectively that the constitutional writ application and the interlocutory application respectively be determined without listing the application for hearing.

2 Rule 28.01.2(c) and (d) of the *High Court Rules* provides that if a proceeding generally, or any claim in a proceeding, "is an abuse of ... process" or has "no reasonable prospect of success" the Court or a Justice "may stay the proceeding or a claim made in the proceeding or may give judgment in the proceeding or in relation to a claim made in the proceeding". By r 28.01.3(b) the Court or a Justice may make such an order "of the Court's or the Justice's own motion after notice has been given by the Registrar to each plaintiff or applicant". In this case, the Registrar gave such notice to the plaintiff on 8 December 2025 and invited the plaintiff to file such further material as the plaintiff saw fit in respect of the making of an order summarily dismissing the constitutional writ application (and, therefore, also dismissing the interlocutory application) on the basis that the proceeding is an abuse of process and has no reasonable prospect of success. The plaintiff filed a further affidavit in response to the notice.

3 In respect of r 28.01.2(c) of the *High Court Rules*, the class of potential abuses of process is not closed. Abuse of process is "capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute".¹ Further, "[a]lthough the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute".²

4 In respect of r 28.01.2(d) of the *High Court Rules*, for a proceeding to have no reasonable prospect of success it need not be hopeless or doomed to fail, irrespective of the presence or absence of an express statement to that effect in the provision empowering summary dismissal. It has been said, however, that in every case the "power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real

1 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25].

2 *Rogers v The Queen* (1994) 181 CLR 251 at 286.

question to be tried" and the "test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way".³

- 5 The constitutional writ application is an abuse of process. In terms of recognisably substantive (in contrast to interlocutory and procedural) relief, the application seeks:

"20. A writ of certiorari quashing the orders made on 10 October 2025, on the basis that they are affected by jurisdictional error, including constructive failure to exercise jurisdiction, legal unreasonableness, apprehended bias, and denial of procedural fairness.

21. A writ of prohibition restraining further enforcement action based on the impugned orders.

... ."

- 6 The orders made on 10 October 2025 are orders of the Federal Circuit and Family Court of Australia (Division 1) (the "Division 1 Court") amending final orders made on 3 April 2025 pursuant to s 79A(1)(c) of the *Family Law Act 1975* (Cth). Section 79A(1)(c) enables the Division 1 Court "in its discretion, [to] vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside" where "a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order".

- 7 By the amended orders dated 10 October 2025, the Division 1 Court, amongst other things: (1) required the plaintiff (the former husband) to give vacant possession of specified property to his former wife; (2) restrained the plaintiff, in effect, from devaluing, destroying or damaging the specified property; (3) if the plaintiff failed to give vacant possession, authorised the issue of a warrant of possession of the specified property; (4) dismissed all extant applications by the plaintiff; (5) ordered that if the plaintiff makes an application for leave to proceed against the former wife under s 102QAE of the *Family Law Act* then the former wife was not to be notified of the application or its dismissal pursuant to

3 *Spencer v The Commonwealth* (2010) 241 CLR 118 at 131-132 [24], quoting *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99 and *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 275 [46]. See, to the same effect, *Rapallino v The Federal Circuit and Family Court of Australia Division 1* [2025] HCASJ 49 at [2]-[4].

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s 102QAC(7) of that Act; and (6) required the plaintiff to make payments in accordance with a home loan relating to the specified property, failing which such unpaid amounts would be deducted from the plaintiff's entitlements under the orders.

8 Section 102QAE of the *Family Law Act* concerns a person who is subject to a "harmful proceedings order prohibiting the person from instituting further proceedings" under the *Family Law Act*. Such a person may only institute proceedings in a court exercising jurisdiction under that Act with leave. A "harmful proceedings order" is made under s 102QAC(1) of the *Family Law Act* which provides that a court exercising jurisdiction under that Act "may make an order (a harmful proceedings order) prohibiting a party (the first party) to the proceedings from instituting proceedings under this Act against another party to the proceedings without the leave of the court under section 102QAG, if the court is satisfied that there are reasonable grounds to believe that" either: "(a) the other party would suffer harm if the first party instituted further proceedings against the other party; or (b) in the case of child-related proceedings (within the meaning of Part VII) – the child who is the subject of the proceedings would suffer harm if the first party instituted further proceedings against the other party". By s 102QAC(2) of the *Family Law Act* "harm" includes psychological harm or oppression, major mental distress, a detrimental effect on the other party's capacity to care for a child, and financial harm.

9 In making the 10 October 2025 orders McNab J said that the plaintiff's application against the enforcement of the final property orders was an abuse of process on the grounds of estoppel and ulterior purpose (inferentially, to intimidate and abuse the former wife, being a "species of family violence"), with the plaintiff's supporting evidence being "incoherent and argumentative", and concluded that:⁴

"The husband is simply seeking to undermine the final orders of this Court and I find that it is not appropriate or in the interests of justice, that the wife be subjected to further proceedings in their current form. It runs entirely contrary to the overarching purposes of this Court which is set out in s 67 of the [*Federal Circuit and Family Court of Australia Act 2021* (Cth)]."

10 The plaintiff sought to appeal against the 10 October 2025 orders. The alleged grounds of appeal before the Full Court of the Division 1 Court included: (1) jurisdictional error – breach of Supreme Court transfer orders; (2) unlawful revival of finalised proceedings; (3) denial of procedural fairness – inability to test evidence; (4) constructive bias and selective use of evidence; (5) suppression of premeditated misconduct evidence/abuse of process; (6) parenting orders procured by false pretence; ignored expert findings; (7) financial oppression and unjust

4 Fernan [2025] FedCFamC1F 733 at [23].

enrichment; (8) unlawful enforcement within appeal period; (9) material prejudice and economic loss from unlawful enforcement; (10) failure to assist a self-represented litigant; (11) need for forensic accounting and disclosure of records; (12) restoration of parental contact and recognition as primary carer; and (13) cumulative effects of each of these matters.

11 The Full Court held that the plaintiff required leave to institute the appeal and noted that, as the application was for leave under s 102QAE of the *Family Law Act* by s 102QAF(2), the court must dismiss the application if it considers the proposed proceedings to be vexatious. Vexatious proceedings include (s 102Q): (a) proceedings that are an abuse of the process of a court or tribunal; and (b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and (c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and (d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

12 The Full Court dismissed what it treated as the plaintiff's application for leave to appeal on 28 November 2025 and, in so doing, unequivocally rejected each proposed ground of appeal saying, amongst other things, that one or other of the grounds had "no prospect of success at all"; "cannot succeed"; was "doomed to failure"; "are not competent"; could not be understood; and involved "bald assertion". According to the Full Court "[n]one of the proposed grounds of appeal has any prospect of success, let alone a reasonable one. It necessarily follows that the proposed proceedings are vexatious. The application for leave must be dismissed."⁵

13 The grounds identified in the plaintiff's constitutional writ application repeats the grounds rejected as vexatious by the Full Court and otherwise overlooks the entire procedural history of the proceedings below. Moreover, the context is an application for a constitutional writ in circumstances where: (a) the plaintiff could apply for special leave to appeal against the orders of the Full Court but has not done so, (b) the Division 1 Court and the Full Court of the Division 1 Court both dismissed the plaintiff's claims below as vexatious and an abuse of process, and (c) the plaintiff's further attempt to raise the same complaints by way of a misguided constitutional writ application is itself an abuse of process, as the plaintiff is attempting to by-pass the requirements to seek and obtain special leave to appeal by the filing of the constitutional writ application. Nothing in the material filed by the plaintiff supports any different conclusion.

14 For these reasons the constitutional writ application is an abuse of process and also has no reasonable prospect of success. It follows that the interlocutory application for "urgent interim and preservative relief" filed on 25 November 2025

5 Fernan [2025] FedCFamC1A 220 at [29].

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is also an abuse of process and has no reasonable prospects of success. Both applications are to be summarily dismissed.

15 The orders made are:

- (1) Pursuant to rr 25.09.1 and 13.03.1 of the *High Court Rules 2004* (Cth) respectively the application for a constitutional or other writ filed on 25 November 2025 and the interlocutory application for "urgent interim and preservative relief" also filed on 25 November 2025 respectively be determined without listing the application for hearing.
- (2) Pursuant to each of r 28.01.2(c) and (d) of the *High Court Rules 2004* (Cth) the application for a constitutional or other writ filed on 25 November 2025 is summarily dismissed.
- (3) Pursuant to each of r 28.01.2(c) and (d) of the *High Court Rules 2004* (Cth) the interlocutory application for "urgent interim and preservative relief" filed on 25 November 2025 is summarily dismissed.