HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

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

APPELLANT'S REPLY TO THE FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply to the First Respondent's submissions

2. The real question is whether, on the basis of *all* the unchallenged facts, the proceeding is an abuse of process.[1] The answer is "*yes*". The first respondent (**'Mr Lunt'**) proffers five arguments in support of the contrary. For the following reasons, they should be rejected.

3. The first argument (in **RS [27]**) is a straw person. This controversy should not be decided by reference to a hypothetical whereby the fourth respondent (**'union'**) brought the proceeding in its own name. The fact that it did not is precisely why we are here.

4. It may indeed be correct that the substantive application, had it been brought in the union's name, would not have been dismissed. It may also be true that, as Mr Lunt submits, the refusal of relief in such an application would involve *"a significant step for*

[1] Cf the question posed in **RS [4]**, which is limited to a sub-section of the trial judge's factual findings.

the court".[2] The point is that the court must decide, fully informed of the circumstances. It should not first be required to ascertain identities; and they should not be obscured.

5. The second argument (**RS [28]-[29]**) is similar. Mr Lunt says that there is no abuse of process because the union has not been allowed to avoid scrutiny and consequences of its conduct. He argues that *"a persuasive discretionary reason [for declining to grant relief] that applies to the union could readily be applied to [Mr Lunt]…"* and that – as such – *"[t]he Federal Court need not determine whether to exercise its discretion to refuse relief blind to the realities of the situation."*[3]

6. The second argument is another straw person because *blindness* is precisely what was intended in the present case. The purpose of the sham was to prevent the Court from being in a position to weigh the competing discretionary factors. Neither Mr Lunt nor the union disclosed the sham. When VICT alleged it, nothing was conceded. Mr Lunt maintained throughout that he was the true moving party.[4] Despite being a party to the proceeding, the union did not correct the record. Instead, it stayed silent.

7. The Court *would* have been *blind* had it not been for VICT's substantial efforts to expose the truth.[5] Aside from putting VICT and the Court to substantial costs, this reality informs another flaw in the second argument. This Court is asked to countenance a subterfuge on the basis that the subterfuge *might* be exposed (in which case the mischief abates). Such an argument is misconceived: the subterfuge *might not* be exposed. The process of exposure is costly to the parties and the courts. And even *if* a court were to come to know the truth, residual complications as to proof and finality would persist.[6]

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2 **RS [27(b)]**.

3 **RS [28]**.

4 See PJ [85]-[86] [CAB 19-20], [97] [CAB 21], [99] [CAB 21]. For the efforts to conceal the arrangement from the Court, see PJ [29]-[58] [CAB 10-14].

5 See PJ [41]-[58] [CAB 11-14] and [82]-[97] [CAB 19-21]. VICT spent seven months attempting to obtain from Mr Lunt documents relevant to his assertion that he was the true moving party. He filed numerous inconsistent discovery affidavits. VICT applied for, and was denied, production of Mr Lunt's phones. Ultimately, under cross-examination, Mr Lunt confessed that he had destroyed and disposed of a mobile phone despite his discovery obligations. The primary judge inferred that Mr Lunt destroyed the mobile phone because he feared that production of messages he had sent would tell against his case.

6 Noting that in many cases the *"true party"* will not be a party, questions arise in relation to, inter alia, discovery and interrogatories. Questions also arise as to whether a court may make adverse findings about the conduct of a non-party. Relatedly, there is the question of whether any decision in the proceeding would bind the *"true party"* (especially if they are not a party to the proceeding).

8. Mr Lunt's third argument (**RS [30]**) is that a proceeding brought by a *"front man"* to enable a person to obtain relief *"...which it could not, or might not, obtain if the proceeding were brought in its own name"*[7] is *"far from enough"* to amount to an abuse of process. Judgments of this Court are cited in apparent support of that proposition (see **RS n 33**). None of them go any further than confirming that the power to grant a permanent stay is one to be exercised *"only in the most exceptional circumstances"*.

9. Having found no support in doctrine, the third argument devolves to an argument from analogy.[8] There are three flaws in the analogy. Each flaw renders it false: First, each of the hypothetical litigants are said to be *"willing"* to commence the hypothetical proceeding. The primary judge found Mr Lunt would not have commenced the proceeding but for being enlisted by the union.[9] Second, no hypothetical litigant is said to have induced or contributed to the hypothetical state of affairs. As such, none of them are analogous to the union.[10] Third, there is no suggestion that any hypothetical litigant would also engage in a subterfuge to obscure the role of one or more of them from a court. Contrast this with what occurred in the present case.[11]

10. The fourth argument (**RS [31]**) is that the proceeding cannot be an abuse of process because the courts have the power to order the third parties to pay costs. True might it be that a third-party costs order is one appropriate judicial response where the third party is the "true" party in a proceeding. But to say that, therefore, no such proceeding can amount to an abuse is a false exclusionary disjunct. Indeed, as VICT argues, the proceeding should be dismissed as an abuse *and* the union should pay VICT's costs.

11. Further, if correct, Mr Lunt's contention that the Court's ability to order that the *"real"* party to a proceeding pay costs means that *"the litigant's proceeding is not at risk of dismissal for abuse of process"*[12] would close the categories of abuse of process.[13]

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7 PJ [119] [CAB 25].

8 The analogy assumes one litigant has a substantive disadvantage viz the others (cf the first argument).

9 PJ [111] [CAB 23], [125] [CAB 26].

10 PJ [11]-[17] [CAB 7-8]. See also PJ [134] [CAB 27].

11 See PJ [85]-[86] [CAB 19-20], [97] [CAB 21], [99] [CAB 21]. For the efforts to conceal the arrangement from the Court, see PJ [29]-[58] [CAB 10-14].

12 **RS [31]**, third sentence.

13 Contra *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 [9]-[15] (Gleeson CJ, Gummow, Hayne, Crennan JJ); *PNJ v The Queen* (2009) 252 ALR 612 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

12. Moreover, the fourth argument is another person of straw. It misstates VICT's contention. VICT does *not* argue that the proceeding is an abuse *merely* because the union is funding and controlling it. Limiting VICT's contention obscures key facts found by the primary judge, including the union's conduct in inducing the making of the enterprise agreement, failing to appeal its making, and delaying in applying to the Court.[14]

13. Consistent with this misstatement of VICT's argument, none of the five cases cited in support of the fourth argument involve a front man used as a device to avoid a substantive defence (nor for that matter any attempt to obscure the true party).[15]

14. The fourth argument echoes what Mr Lunt says in **RS [21]**. The proposition he paraphrases is correct. But the key word is "merely". VICT does *not* argue, and the primary judge did not find, that the proceeding is an abuse *merely* because Mr Lunt's purpose was to obtain relief for another person. Such a myopic focus on part of a factual finding is precisely what VICT complains about in this Court.

15. Mr Lunt's fifth argument (**RS [33]**) is yet another straw person. VICT has never contended that the destruction by Mr Lunt of his mobile phone (a fact that was only exposed after lengthy cross-examination) was of itself a basis for a finding of abuse.

Further matters in reply

16. As has been illustrated, Mr Lunt presents a straw army. Another example is at **RS [14]**. As did the Full Court, Mr Lunt conflates the *fact* of his predominant purpose with its *"illegitimacy"* (a *legal conclusion*). The latter legal conclusion does not, *contra* **RS [14]**, underpin VICT's argument that the proceeding brings the administration of justice into disrepute (nor, more importantly, the primary judge's finding as such).

17. Mr Lunt's further materials do not assist this Court, not least because the final 17 pages of VICT's closing submissions are omitted.[16] Those mislaid pages confirm that VICT,

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14 PJ [133]-[134] [CAB 27]. See also PJ [11]-[17] [CAB 7-8].

15 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 concerned the costs liability of receivers in a suit brought in the company's name; in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 a developer maintained a construction company's suit; in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 the plaintiff's secured creditor funded the proceeding; in *PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM* [2018] NSWCA 168 the *"real party"* was said to be the named company's controlling mind; and *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406 involved maintenance and champerty.

16 VICT is able to provide the Court with the full document (including the omitted pages 21-37).

contra **RS [19]**, argued that the union *"...ought not be permitted to use [Mr] Lunt as a front to avoid having to explain its delay and change of position in any challenge to the VICT Agreement. It is notable that there is nothing to stop the [union] launching a challenge to the VICT Agreement in its own name, where they will be properly made to account for their tardiness and change of position."*[17]

18. Mr Lunt also refers to various matters not found by the primary judge.[18] This Court should have no regard to them. In contrast, and *contra* **RS [6]**, VICT's submissions are limited to the facts as found.

19. Finally, *contra* **RS [35]-[36]**, VICT does not ask this Court to uphold an appeal ground in respect of which special leave was not granted. Rather, the **AS [29]-[33]** analysis is offered to help this Court understand how the Full Court did not consider properly whether the proceeding brings the administration of justice into disrepute.

Costs

20. Mr Lunt and the union acted unreasonably in bringing and maintaining the proceeding. Appealing the proceeding's dismissal does not change that fact. It follows that, if the appeal to this Court is successful, VICT should have its costs here. It also follows that this Court should modify the Full Court's judgment to include costs orders in VICT's favour. Finally, this Court should give such judgment as the primary judge ought to have given (including costs orders). Remitting the question of costs to the primary judge would cause avoidable costs and delay.

Dated: 18 December 2020

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17 First Respondent's Closing Submissions in the Abuse Application, [126]. VICT is able to provide the full document (including the omitted pages 21-37) if it would assist the Court. Cf **RS [19]**.

18 **RS [2]** (first sentence), **RS [3(d)]** (final sentence) and **RS [28]** (final sentence).