Federal Court of Australia

Ittyerah v Coles Supermarkets (Australia) Pty Ltd (No 3) [2021] FCA 1117

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| File number: |  |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 16 September 2021 |
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| Catchwords: | **costs** – application for costs under s 570 of the *Fair Work Act 2009* (Cth) – whether the proceedings, viewed objectively at the time they were instituted, were instituted without reasonable cause – whether interlocutory application instituted without reasonable cause – whether persisting with interlocutory application in circumstances where there was no utility in the orders sought constituted an “unreasonable act” – application dismissed |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 570, 570(2), 570(2)(a), 570(2)(b), 394(3)  *Federal Court of Australia Act 1976* (Cth) ss 31A, 37M-37N  *Federal Court Rules 2011* (Cth) r 40.02(b) |
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| Cases cited: | *Australian Workers’ Union v Leighton Contractors Pty Limited & Ors (No 2)* [2013] FCAFC 232; (2013) 232 FCR 428  *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166; (2014) 145 ALD 548  *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 2)* [2015] FCAFC 97;(2015) 230 FCR 337  *Harpham v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (No 2)* [2017] FCA 140  *Hartnett Legal Services Pty Ltd v Ballantyne (No 2)* [2015] FCA 1027  *Ittyerah v Coles Supermarkets (Australia) Pty Ltd (No 2)* [2021] FCA 412  *Ittyerah v Coles Supermarkets (Australia) Pty Ltd* [2020] FCA 1497  *Ittyerah v Coles Supermarkets (Australia) Pty Ltd* [2020] FWCFB 407  *Ittyerah v Coles Supermarkets Australia Pty Ltd* [2019] FWC 7404  *Liu v Stephen Grubits and Associates (No 2)* [2019] FCAFC 42  *Menzies v Fair Work Commission* [2020] FCA 36; (2020) 293 IR 301  *Pal v Commonwealth of Australia (No 2)* [2021] FCA 37  *Reeve v Ramsay Health Care Australia Pty Ltd (No 2)* [2012] FCA 1322  *Sabapathy v Jetstar Airways (No 2)* [[2021] FCAFC 68](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2021/68.html)[2021] FCAFC 68  *Spotless Services Australia Ltd v The Honourable Senior Deputy President Jeanette Marsh* [2004] FCAFC 155  *Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 |
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| Division | Fair Work |
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| Registry | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 35 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Counsel for the First Respondent: | Ms. F Leoncio |
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| Solicitor for the First Respondent: | Lander & Rogers |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |
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| Solicitor for the Second Respondent: | Australian Government Solicitor |

ORDERS

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|  | | NSD 212 of 2020 |
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| BETWEEN: | GEORGE ITTYERAH  Applicant | |
| AND: | COLES SUPERMARKETS (AUSTRALIA) PTY LTD  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| order made by: | ABRAHAM J |
| DATE OF ORDER: | 16 September 2021 |

THE COURT ORDERS THAT:

1. The first respondent’s application for costs is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ABRAHAM J:

1. Coles Supermarkets (Australia) Pty Ltd, the first respondent (respondent), seeks an order pursuant to s 570 of the *Fair Work Act 2009* (Cth) (the FW Act) that the applicant pay its costs in respect of the proceedings that resulted in judgments: *Ittyerah v Coles Supermarkets (Australia) Pty Ltd* [2020] FCA 1497 (interlocutory judgment) and *Ittyerah v Coles Supermarkets (Australia) Pty Ltd (No 2)* [2021] FCA 412 (final judgment). The respondent seeks its costs in relation to both proceedings be fixed in a lump sum of $25,728.38, in accordance with r 40.02(b) of the *Federal Court Rules 2011* (Cth).
2. In the interlocutory judgment, the applicant’s application for an injunction requiring the respondent to retain identified categories of evidence and an order requiring the respondent to submit an affidavit identifying categories of evidence that it had retained was dismissed. In the final judgment, the Court dismissed the applicant’s application for judicial review of two decisions of the Fair Work Commission (FWC) relating to his application for an extension of time to make an unfair dismissal application: *Ittyerah v Coles Supermarkets Australia Pty Ltd* [2019] FWC 7404 (Single Member Decision) and *Ittyerah v Coles Supermarkets (Australia) Pty Ltd* [2020] FWCFB 407 (Full Bench Decision).
3. The applicant opposes the making of the orders, although did not address the issue of a lump sum, or the suggested amount thereof, if the Court were to find against him.
4. For the reasons below, the respondent’s application for costs is refused.

## Legal principles

1. Section 570 of the FW Act is in the following terms:

**570 Costs only if proceedings instituted vexatiously etc.**

(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party’s unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

1. The relevant principles were summarised by the Full Court in *Australian Workers’ Union v Leighton Contractors Pty Ltd & Ors (No 2)* [2013] FCAFC 23; (2013) 232 FCR 428 (*Leighton Contractors*) at [7]:

[…]

1. The purpose or policy of the section is to free parties from the risk of having to pay their opponents’ costs in matters arising under the Act, while at the same time protecting those parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause.
2. It follows from the protection offered by s 570(2) that a person will rarely be ordered to pay the costs of a proceeding. But it is not necessary to prove that there are exceptional circumstances warranting the making of an order.
3. The relevant question is whether the proceeding had reasonable prospects of success at the time it was instituted, not whether it ultimately failed: *R v Moore; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1978) 140 CLR 470 at 473 per Gibbs J; *Kangan* [*Council of Kangan Batman Institute of Technology and Further Education v Australian Industrial Relations Commission* (2006) 156 FCR 275 at [60]. In *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 at 264–5 (approved in *Kangan*) Wilcox J said

If success depends on the resolution in the applicant’s favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding, as being “without reasonable cause”. But where, on the applicant’s own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause.

See also: *Menzies v Fair Work Commission* [2020] FCA 36; (2020) 293 IR 301 (*Menzies*) at [82]-[87] and *Pal v Commonwealth of Australia (No 2)* [2021] FCA 37 (*Pal (No 2)*) at [6]-[14].

1. The relevant question is whether the Court is satisfied, as a matter of objective fact, that the applicant instituted the proceeding without reasonable cause: *Spotless Services Australia Ltd v The Honourable Senior Deputy President Jeanette Marsh* [2004] FCAFC 155 at [13]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 2)* [2015] FCAFC 97;(2015) 230 FCR 337 (*BHP Coal (No 2)*) at [16]-[17].
2. In *Reeve v Ramsay Health Care Australia Pty Ltd (No 2)* [2012] FCA 1322, Barker J observed at [10]:

It is now well accepted that one way of testing whether a proceeding is instituted “without reasonable cause”, for the purpose of a provision such as s 570, is to ask whether upon the facts apparent to the applicant at the time of instituting the proceeding, there were no substantial prospects of success. If success depends upon resolution in the applicant’s favour of one or more arguable points of law, it is inappropriate to say that the proceeding was instituted “without reasonable cause”. But where on the applicant’s own version of the facts it is clear the proceeding must fail, it may be said that it lacks a reasonable cause: see *Kanan v Australian Postal and Telecommunications Union* [1992] FCA 539; (1992) 43 IR 257 (*Kanan*) at 264-265 (Wilcox J).

1. In *Baker v Patrick Projects Pty Ltd (No 2)* [2014] FCAFC 166; (2014) 145 ALD 548 (*Baker*)*,* the Full Court (Dowsett, Tracey and Katzmann JJ) observed at [10]:

This test requires some minor modification when applied to the institution of an appeal or judicial review proceedings. In such proceedings the focus changes to whether, having regard to the facts apparent to the appellant at the time of instituting the appeal or the application for judicial review, there were no reasonable prospects of success. In evaluating these prospects regard may be had to the reasons for judgment or decision under appeal or review, as the case may be, and the grounds relied on to challenge the judgment or decision: see *Imogen Pty Ltd v Sangwin* (1996) 70 IR 254 at 257 (Wilcox CJ).

1. The discretion to award costs under s 570 should be exercised with some caution: *Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 at [8]; *Sabapathy v Jetstar Airways (No 2)* [2021] FCAFC 68 at [14].

## Submissions

1. The respondent’s submission is based on the reasons given in each of the judgments which it submitted reflected that the applicant did not have an arguable case. The respondent submitted that the proceeding was instituted without reasonable cause and the Court’s discretion pursuant to s 570(2)(a) is properly enlivened in respect of the whole proceeding, including the interlocutory application. In the alternative, the respondent submitted that the interlocutory application was instituted without reasonable cause because the applicant did not demonstrate the relevance of the material sought, and given that assurance was given by the respondent that the relevant documents would be retained, there was no utility in the orders. In these circumstances, it was submitted that the applicant’s persistence with the interlocutory application, which resulted in the respondent incurring costs in respect of the submissions filed, was an unreasonable act within the meaning of s 570(2)(b) of the FW Act.
2. The applicant “acknowledge[d] that there were some failings on his part on the presentation of his case”. He accepted that the grounds of review could have been better drafted, but they were not manifestly defective, that he did not notify the respondent or the Court at the earliest opportunity that he would not be pressing the constitutional matter, and that his written and oral submissions were not concise or precise. However, he submitted that does not justify making an order of costs against him. He submitted that in the context of the use of the word “unreasonable” in s 570(2)(b), taking into account the underlying purpose of that provision which includes the promotion of access to justice, a higher standard of unreasonableness is to be adopted.
3. The applicant submitted that his argument as to the interpretation of s 394(3) of the FW Act is based on a question of statutory interpretation that had not been addressed previously by the judiciary. He submitted that the final judgment was indicative of his arguments proving unsuccessful in the end. The applicant’s submission included what he says are criticisms of the final judgment. He submitted that nonetheless, the conclusions on the statutory interpretation issue guided other findings in the judgment. He disputed that his case is analogous to the circumstances in *Menzies* and *Pal (No 2).* The applicant submitted that his conduct of the proceedings, relied on by the respondent, is not relevant to whether the Court’s discretion under s 570 is enlivened, since that question is determined objectively.
4. As to the interlocutory application, the applicant submitted that it was reasonable to make the interlocutory application. He submitted that this application was made because the respondent stated in relation to the applicant’s request for evidence that: “Coles will await a subpoena or court order before actioning”. Therefore, the respondent changed the status quoby willingly bearing the cost of conducting a search for, and retaining, the material in relation to which the applicant had sought an injunction. The respondent assured the Court that it would retain the material sought. The applicant submitted that the Court found in the interlocutory judgment that the material could be relevant in the FWC proceedings, subject to the applicant being successful in all relevant proceedings, and that the relevance of the material was a “live issue” (referring to [19] of the interlocutory judgment). He submitted that there is therefore no basis to assert that his persistence with the interlocutory application was an unreasonable act. He did so due to his concern about deficiencies in the respondent’s affidavit evidence, admissibility of evidence and discretionary exclusions of evidence. Even if it was an unreasonable act, the applicant agreed that the matter could be determined on the papers, and the incremental effort incurred by the respondent was limited to perusal of the applicant’s six page submission. The incremental effort was negligible, and ought not to become the basis for arguments about costs.
5. The applicant submitted that if the discretion in s 570 is enlivened, the Court should consider a number of matters in light of ss 37M-37N of the *Federal Court of Australia Act 1976* (Cth)(FCA Act)*.* That is; (i) whether the respondent had an obligation to seek summary dismissal of the proceedings in accordance with s 31A of the FCA Act if it was of the consistent and genuine view that the application was so devoid of merit so as to be unarguable; (ii) whether the respondent’s submission (which led to certain preliminary issues being argued) that the general approach of the Court was to only permit challenges to FWC Full Bench decisions was correct; and (iii) whether the response to the applicant’s grounds of review in the affidavit of Ms Olivia Bramwell, dated 20 July 2020, at [4]-[8], complied with ss 37M-37N.

## Consideration

### Judicial review application

1. In proceedings such as this, where the application was for judicial review of two decisions of the FWC, the focus is whether, having regard to the facts apparent to the applicant at the time of instituting the application, there were no reasonable prospects of success. As explained in *Baker,* referred to above at [9], whenevaluating those prospects regard may be had to the reasons for judgment or decision under review and the grounds of review. The question is determined objectively.
2. I make two preliminary observations.
3. *First*, when the originating application was filed by the applicant no grounds of review were identified. Rather, in an affidavit filed at that time, the applicant noted, inter alia, that he intended to file a document setting out the grounds of review once he had completed his administrative law exam in late February 2020. The applicant stated that if he was required to file the substantive grounds before he finished the subject, he would be compelled to include every possible ground, for refinement at a later stage, which he was concerned may be an inefficient use of the Court’s resources and could incur additional costs to the respondents. The alleged errors in the FWC decisions were first identified in an affidavit filed some months later by the applicant, in June 2020. As explained in the final judgment at [49], the applicant in his grounds of review identified a number of errors which he submitted exist in the Single Member Decision and the Full Bench Decision, with his submission being concentrated on the Single Member Decision. Although these were not drafted as grounds of review would ordinarily be drafted, the errors were identified by reference to the factors in s 394(3) of the FW Act. The respondent has not advanced any submission based on the absence of grounds when the application was filed as relevant to this assessment.
4. *Second*, as is apparent, there were interlocutory proceedings in this matter, and at that time, although the respondent submitted, inter alia, that there was no serious issue to be tried so as to justify an injunction being ordered, the respondent did not seek to have the proceedings dismissed. Rather, as the applicant submitted, it took the approach of voluntarily doing what the applicant sought by way of the interlocutory application and argued the orders should not be made. The matter then proceeded in the usual course, and the application for costs under s 570 was not flagged by the respondent prior to judgment being reserved. These matters do not prevent s 570 from being enlivened or an order now being made for costs. As explained above, whether the provision is enlivened involves an objective assessment.
5. Against that background I turn to the submissions
6. As noted above at [12], the applicant acknowledges that there were failings on his part on the presentation of his case, namely that his grounds of review could have been better drafted, he did not notify the respondent or the Court at the earliest opportunity that he would not be pressing the constitutional matter, and his written and oral submissions were not concise or precise. To that I would add, as noted in the final judgment at [49], in respect to a number of matters argued, however the applicant characterised them, it is difficult to comprehend how they could found jurisdictional error. At times the submissions were premised on a basis not borne out on a proper reading of the decisions of the FWC.
7. That said, as explained in the final judgment at [25]-[37], underlying the applicant’s grounds (with the exception of the ground alleging procedural fairness) was his argument concerning the statutory interpretation of s 394(3) of the FW Act. There were two separate construction arguments, directed to different aspects of the provision. The outcome of that submission underpinned the applicant’s other grounds of review. The basis and the extent of the argument, and the degree to which the grounds relied on it, was not apparent from the grounds of review and was not clearly articulated at least until the applicant filed his written submission on 25 September 2020. In my view, the applicant’s construction of s 394(3) was not reasonably arguable. The submissions were contrary to the plain words of the text of the provision, considered in its context and given its purpose: see [25]-[37] of the final judgment.
8. As noted above, the applicant submitted that his statutory construction argument was a novel point of law, not previously considered. The applicant relied on *Liu v Stephen Grubits and Associates (No 2)* [2019] FCAFC 42 (*Liu*) at [21], where the Court observed that the “appeal required this Court to give attention to a significant point of statutory construction neither entirely convincingly addressed by the primary judge nor previously the subject of appellate determination”. The Court concluded at [22] that “we are unpersuaded that the appeal [the appellant] advanced as determined by this Court was other than properly advanced on arguable grounds, notwithstanding our emphatic rejection of it”. That the questions of statutory construction the applicant raised had not previously been addressed or been the subject of appellate determination does not necessarily render the submission arguable, as was the situation in *Liu.*
9. Although the relevant principles can be elicited from other cases, there is a limit to the application of factual analogies. Each case is fact specific.
10. The respondent’s argument that the proceeding was instituted without reasonable cause focussed entirely on the result. The submission was that it “is plain from paragraphs [26]-[49], [56]-[63], [65]-[66], [69]-[70], [73]-[76], [82]-[85], [88]-[89], [93]-[102] of the [f]inal [j]udgment, that the application raised no arguable case of jurisdictional error or error of any kind amenable to judicial review”. Those paragraphs reflect the outcome of the application, and refer to the consideration in relation to each ground. It is appropriate to recall in that light that the issue is whether at the time of filing the originating application it has been established that objectively, the proceeding was instituted without reasonable cause. The respondent however, does not address the issue objectively at the time the proceedings were instituted. The respondent has also assumed that the Court’s rejection of the applicant’s arguments, even where emphatic, necessarily meant the application was instituted without reasonable cause. This is also in a statutory context where, although the respondent is not required to establish that there are any exceptional circumstances to enliven the discretion in s 570 to award costs, costs are ordered relatively rarely: see *Leighton Contractors* at [7] (referred to above at [6]). It is also in the context where the respondent bears the onus of establishing that costs should be awarded. It cannot be the case, as the respondent has approached the matter, that because the applicant’s arguments have been rejected, that is necessarily sufficient to justify an award of costs.
11. Having made the submission recited in the preceding paragraph, the respondent submitted that this case was analogous to *Menzies* and *Pal (No. 2)*, without any further explanation. However, as noted above at [24], each case necessarily turns on its own facts and there are factual differences between this case and *Menzies* and *Pal (No 2).* For example, in *Menzie*s, the Court concluded that the grounds as drafted, even if established, could not found jurisdictional error. That is an obvious situation where it is clear at the time the proceedings were commenced that there was no reasonable cause of action. Similarly, in *Pal (No 2)*, where the Court was considering an application for summary judgment, the Court concluded, inter alia, that even if the grounds were established, the relief sought would be beyond the power of the Court.
12. As noted above, there are factual differences between those cases and this case. It may be accepted that the factual scenarios in which the discretion is enlivened are broader than those that existed in *Menzies* and *Pal (No 2).* However, the respondent has not addressed how this case is analogous to those cases and, if not factually so, why the reasoning in those cases applies.
13. In a context where the respondent is seeking an order pursuant to s 570, it is incumbent on them to establish objectively, that the proceedings were commenced without reasonable cause. Although the proceedings were dismissed after full argument (with the underlying statutory construction being rejected) the respondent has not addressed why that should result in a conclusion that the proceedings (in their entirety) were objectively instituted without reasonable cause. Although, as noted above at [21], in dismissing the application I concluded that in relation to some of the matters argued it was difficult to understand how they could have founded jurisdictional error, the respondent has not addressed whether that was patent on the grounds or rather apparent given the submissions made in support, and after argument. In that context, notwithstanding my (at times emphatic) rejection of the applicant’s grounds, the respondent has not persuaded me that the discretion is enlivened.

### Interlocutory application

1. The Court can award costs in relation to an interlocutory application in the circumstances described in s 570(2): *Hartnett Legal Services Pty Ltd v Ballantyne (No 2)* [2015] FCA 1027 at [7]-[11]; *Harpham v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (No 2)* [2017] FCA 140 at [43].
2. The interlocutory proceedings were commenced in this Court, although no application had ever been made to the FWC for retention of the material sought. The application was filed before any grounds of review challenging the decisions of the FWC had been filed. However, the only basis on which the respondent contends that the proceedings were instituted without reasonable cause is that the applicant “did not demonstrate the relevance of the material sought”. The respondent also addressed the issue that the Court concluded there was no utility to the order given the respondent had retained the relevant documents. The respondent contended that in the circumstances where there was no utility to the orders being sought, persisting with the interlocutory application was an “unreasonable act” within the meaning of s 570(2)(b) of the FW Act.
3. In refusing the application, I made no finding as to the materiality of the documents. Contrary to the applicant’s submission, I did not accept that the material sought was relevant, but rather I said at [15]; “the material sought, even accepting for the purposes of argument that it might be relevant for the applicant’s underlying FWC proceedings, in practical terms could not be relevant unless the applicant satisfies this Court on the judicial review proceedings that jurisdictional error is established and the matter is remitted to the FWC to hear the application for an extension of time, and the FWC on reconsideration of the matter grants the applicant permission to appeal the first instance decision, and the applicant succeeded on that appeal”. The reference to there being a “live issue” at [19] in the interlocutory judgment means that there was a dispute between the parties as to the relevance of the documents, clearly not one necessary to decide on that application. The applicant, in his submissions, takes that reference out of context.
4. That said, the test is objective. The respondent could have, but did not, argue that there was no reasonable cause of action because objectively there was no serious question to be tried. Rather, the respondent did not direct any submission to the test to be satisfied relevant for the imposition of a costs order. The context is that the respondent had said to the applicant the material would not be retained without a court order. Once the interlocutory application was served, the respondent voluntarily searched for and retained the material. In the circumstances, the respondent has not established that s 570 has been enlivened.
5. However, the respondent submitted in the alternative that it was unreasonable for the applicant to persist with the action because the material had been retained. In my view, that is plainly the case. As noted at [19] of the interlocutory judgment, there was no utility to the orders sought by the applicant. That said, even though the discretion would be enlivened, it is rather meaningless, as by that time the respondent had already filed its submissions, and apart from reading the applicant’s written submissions in reply, there was no other work to do on the application, given that the parties had agreed for it to be determined on the papers.
6. Given that the discretion in s 570 is not enlivened (and any limited extent to which it may be enlivened in respect of the interlocutory application is meaningless, for the reasons explained above), it is not necessary for me to consider the applicant’s submissions summarised above at [15].

## Conclusion

1. For the reasons above, the application is dismissed.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 16 September 2021