# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Palmer Leisure Coolum Pty Ltd & Anor v Magistrates Court of Queensland & Ors* [2019] QSC 8 |
| PARTIES: | **PALMER LEISURE COOLUM PTY LTD**<br>(first plaintiff)<br><br>AND<br><br>**CLIVE FREDERICK PALMER**<br>(second plaintiff)<br><br>**v**<br><br>**MAGISTRATES COURT OF QUEENSLAND**<br>(first defendant)<br><br>and<br><br>**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS**<br>(second defendant)<br><br>and<br><br>**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**<br>(third defendant) |
| FILE NOS: | No 13339 of 2018 and No 10132 of 2018 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court of Queensland at Brisbane |
| DELIVERED ON: | 23 January 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 4 December 2018 |
| JUDGE: | Ryan J |
| ORDERS: | **1. That the plaintiffs' claims be set aside.**<br><br>**2. That the accompanying statements of claim be struck out.**<br><br>**3. Written submissions from the plaintiffs and the first** |

**defendant about appropriate costs orders to be provided by 4 pm on 31 January 2019.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where the first and second plaintiffs were charged with an offence under the *Corporations Act* 2001 (Cth) – where the charges are at the pre-committal stage – where the first and second plaintiffs sought a stay of proceedings in the Supreme Court of Queensland for abuse of process – where the second and third defendants applied for orders that the plaintiffs' claims in the Supreme Court be set aside under r 16(e) of the *Uniform Civil Procedure Rules* or stayed under r 16(g) and that the statements of claim be struck out under r 171 – whether the plaintiffs' claims in the Supreme Court result in an impermissible fragmenting of proceedings or an unacceptable multiplicity of proceedings – whether the plaintiffs' claims in the Supreme Court are an abuse of process – whether the plaintiffs' claims and statements of claim ought to be struck out

**Cases**

*Alqudsi v Commonwealth; Alquidsi v The Queen* (2015) 327 ALR 1
*Barac v Director of Public Prosecutions* [2009] 1 Qd R 112
*Briginshaw v Briginshaw* (1938) 60 CLR 336
*Clayton v Ralphs and Manos* [1987] 45 SASR 347
*Clyne v Director of Public Prosecutions and another* (1984) 154 CLR 640
*Coco v Shaw* (1991) 104 FLR 1
*Di Carlo v Dubois* [2007] QCA 316
*Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211
*Fernando v Commonwealth and Another* (2014) 231 FCR 251
*Flynn v Suncorp Metway Limited* [2009] QSC 175
*Frugtniet v Victoria* (1997) 96 A Crim R 189
*GAD v DPP (Qld) and Anor* [2008] QCA 27
*Goldsmith v Newman* (1992) 59 SASR 404
*Grassby v The Queen* (1989) 168 CLR 1
*Jago v The District Court of New South Wales and Others* (1986) 168 CLR 23
*Lamb v Moss* (1983) 76 FLR 298
*Lee v Abedian* [2016] QSC 92
*Moore v Inglis* (1979) 9 ALR 509
*O'Donovan v Vereker and Others* (1987 – 1988) ALR 97
*Obeid v The Queen* (2016) 329 ALR 372
*Pan Laboratories Pty Ltd v Commonwealth* (1999) 73 ALJR 464
*Pharm-a-care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 67 ALR 494

*Rajski v Bainton* (1990) 22 NSWLR 125
*Re Rozenes; ex parte Burd* (1994) 120 ALR 193
*Sankey v Whitlam* (1978) 142 CLR 1
*Sino Iron Pty Ltd v Palmer* [2014] QSC 259
*UBS AG v Tyne* [2018] HCA 45
*Vereker & Ors v Rodda & Anor* (1987) 26 A Crim R 25
*Vereker v O'Donovan* (1988) 6 Leg rep SL 3
*Williams v Spautz* (1992) 174 CLR 509
*Yates v Wilson* (1989) 168 CLR 338

COUNSEL: Dr C Ward SC with M Karam and E Robinson for the first plaintiff
C Palmer in person
S J Carvolth for the first defendant
T Begbie for the second and third defendants

SOLICITORS: Alexander Law for the first plaintiff
C Palmer in person
Crown Law for the first defendant
Australian Government Solicitor for the second and third defendants

**Table of Contents**

**Overview of matter and summary of decision**

[1] Clive Palmer is a director of Palmer Leisure Coolum Pty Ltd. Both he and the company have been charged, on complaint, with an offence under the *Corporations Act* 2001 (Cth). The charges are in the Magistrates Court at pre-committal stage. Originally as joint plaintiffs, but later as separate plaintiffs, they filed claims in the Supreme Court seeking, essentially, a stay of the criminal proceedings as an abuse of process.

[2] The defendants to those claims are the Magistrates Court (as first defendant), the Commonwealth Director of Public Prosecutions (the **CDPP**) (as second defendant) and the Australian Securities and Investment Commission (**ASIC**) (as third defendant).

[3] The first defendant indicated that it would abide by the order of the court but reserved its right to be heard on certain questions. The second and third defendants filed a conditional notice of intention to defend, on the basis that the proceedings were irregular for reasons which included that they were an abuse of process. The second and third defendants then applied for orders that the claims be set aside (rule 16(e) *Uniform Civil Procedure Rules* (**UCPR**)) or stayed (r 16(g)) and that the statements of claim be struck out (r 171).

[4] The applicants – that is, the second and third defendants – based their application on arguments about the impermissibility of fragmenting criminal proceedings, and the unacceptability of a multiplicity of proceedings. They argued that the plaintiffs' claims were an abuse of process.

[5] The plaintiffs argued that the applicants' approach was misconceived. Only one aspect of the plaintiffs' claims could be said to raise issues of fragmentation and there was no inappropriate multiplicity of proceedings. The plaintiffs were seeking, primarily, the Supreme Court's intervention, in its supervisory jurisdiction, to prevent what they contend is the abuse of process inherent in the continuation of the criminal proceedings against them, which were, they submit, commenced for an improper purpose and regardless "doomed to fail". The question for the court, the plaintiffs contended, was whether their serious claim for the Supreme Court's intervention ought to be brought to an end without a hearing.

[6] I considered the critical issue to be whether this court should fragment or intervene in the criminal proceedings which have commenced in the Magistrates Court. The authorities make it plain that the administration of the criminal law should be left to the criminal courts and that it is only rarely and in truly exceptional circumstances that this court should intervene.

[7] I found nothing exceptional in this case.

[8] For the reasons which follow, I order that the claims be set aside and their accompanying statements of claim be struck out.

**Background facts**

[9] Clive Frederick Palmer is a director of Palmer Leisure Coolum Pty Ltd (**PLC**). On 22 February 2018, he and PLC were separately charged (on complaint) with a Federal offence arising out of their conduct in 2012. It was alleged that PLC breached section 631(1) of the *Corporations Act* 2001 and that Mr Palmer abetted, counselled or procured PLC to commit the offence. The complaints were served on Mr Palmer and PLC on 2 March 2018.

[10] The circumstances said to give rise to the offences are these: In April 2012, PLC lodged a bidder's statement with ASIC, offering to purchase shares, and corresponding occupancy rights to villas at the Palmer Coolum Resort, from shareholders in a company called The President's Club by way of a takeover bid. It is an offence under section 631(1) to publicly propose a takeover bid and not to make offers for the shares/securities within 2 months.[1] PLC did not make offers within that time, and that conduct, and Mr Palmer's alleged involvement in it, is the subject of the complaints.

[11] From 26 June 2012 until early 2016, there were several proceedings concerning PLC's conduct more broadly (that is, not only in relation to the time limit for making an offer) in the Takeovers Panel and Federal Court.

[12] Very briefly, The President's Club sought a declaration of unacceptable circumstances from the Takeovers Panel, submitting *inter alia* that PLC had lodged a bidder's statement which did not comply with a certain requirement of the *Corporations Act* and was deficient in other ways. It also submitted that PLC appeared to be in breach of section 631(1) as the time for making a complying bid had passed. After much litigation, including reviews and appeals, the declaration was made.

[13] In April 2013, Mr Palmer became the leader of the Palmer United Party. In September 2013, he became a member of the House of Representatives.

[14] In January 2016, ASIC advised PLC that it was investigating PLC's acquisition of an interest in shares issued by The President's Club.

[15] In April 2016, ASIC indicated that it did not consider it in the public interest to further investigate or pursue any action against The President's Club for operating an unregistered time-sharing scheme.

[16] As noted above, the complaints were made on 22 February 2018.

---

[1] **631 Proposing or announcing a bid**

(1) A person contravenes this section if:

(a) Either alone or with other persons, the person publicly proposes to make a takeover bid for securities in a company; and

(b) The person does not make offers for the securities under a takeover bid within 2 months after the proposal.

The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

**Proceedings in the Magistrates Court**

[17] On 6 April 2018, at a mention of the complaints in the Magistrates Court, Mr Palmer and PLC made a "no-case-to-answer" application. Magistrate Howden adjourned the application for a hearing pre-committal (to be held on 13 June 2018), with appropriate directions. On 13 June 2018, there was no Magistrate available to hear the matter and the application was adjourned until 30 August 2018.

[18] On 29 August 2018, Mr Palmer and PLC filed applications in the Magistrates Court for the complaints to be dismissed as an abuse of process. Counsel for Mr Palmer explained that these applications were separate from the no case applications[2] – not just an attempt to re-style them, as counsel for the prosecution had suggested.[3] The abuse of process applications were not pursued once Mr Palmer and PLC appreciated that the Magistrates Court had no power to stay committal proceedings as an abuse of process.

[19] On 30 August 2018, the pre-committal no case application was heard by Magistrate Cull. Counsel for the prosecution argued that the application was premature – all that had occurred was the delivery of the brief of evidence to the defendants. The prosecution wished the matter to proceed by way of a committal hearing and submitted that any no case argument could be dealt with at the committal hearing.

[20] Counsel for Mr Palmer submitted that the no case application involved "a really simple discrete legal point", which he explained in this way: He said it was undisputed that "this is a timeshare. There's a legal argument about whether that is then a managed investment scheme. If it is, and it is not registered, and it's undisputed that it's not registered, it's not a security. If it's not a security, there is no offence". He sought to rely on the prosecution's statement of facts to make the argument, none of which was, he said, in dispute.[4]

[21] Her Honour determined that it was not appropriate to deal with the no case application pre-hearing. Her Honour adjourned the application to be heard in the course of the committal hearing – that is, as usual, at the end of the Crown case. Her Honour set 21 September 2018 as the committal mention date.

[22] On 19 September 2018, Mr Palmer and PLC filed claim 10132/18 in the Supreme Court (that is, the claim for declarations and other relief which is the subject of this application).

[23] On 21 September 2018, at the request of counsel for Mr Palmer, the Magistrate Court proceedings were adjourned for six weeks, until 2 November 2018.

[24] On 2 November 2018, counsel for Mr Palmer informed the Magistrates Court of the Supreme Court proceedings, including this application to set aside or stay the claim and strike out the statement of claim, and the matter was adjourned until 25 January 2018.

---

2 Ibid.
3 Affidavit of Erin Lewis, filed 30 November 2018, exhibits page 58.
4 Ibid 64.

**Proceedings in the Supreme Court**

[25] On 5 April 2018, a day before the attempt to argue the no case submissions in the Magistrates Court pre-hearing, Mr Palmer and PLC filed an originating application (court file number 3721/18) against the CDPP and ASIC seeking declarations and orders to stay the proceedings as an abuse of process.

[26] On 12 April 2018, those Supreme Court proceedings were discontinued. Evidence tendered by PLC revealed that the proceedings were started by way of originating application.[5] The then solicitors for the plaintiffs wrote to the CDPP and ASIC, requesting their consent to continue the matter as if it had been started by claim. The defendants did not consent. Proceedings on file number 3721/18 were discontinued, with the plaintiffs advising ASIC and the DPP that they would take steps to have their concerns addressed by way of a claim.

[27] Accordingly, as the first and second plaintiff, PLC and Mr Palmer filed a joint claim on 19 September 2018 (court file number 10132/18), seeking –

- a declaration that the complaints are an abuse of process;
- alternatively, a declaration that continuing the proceedings would tend to bring the administration of justice into disrepute;
- an order that the proceedings be permanently stayed;
- two declarations concerning elements of the offences charged, namely –
    - "A declaration that the interests in the TPC Time-Sharing Scheme are not, and were not as at on or about 12 June 2012, securities in a company for the purposes of Chapters 6 to 6CA (inclusive) and Part 1.2A of the Corporations Act"; and
    - "A declaration that a bid for interests in the TPC Time-Sharing Scheme, including for shares in TPC, is not, and was not as at on or about 12 June 2012, a takeover bid for securities in a company for the purposes of Chapters 6 to 6CA (inclusive) and Part 1.2A of the Corporations Act";
- costs; and
- other orders for relief which the Court "considers appropriate".

[28] On 17 October 2018, the second and third defendants filed a conditional notice of intention to defend, asserting that the proceedings were irregular for the following reasons –

- There was no reasonable cause of action;
- The proceeding was scandalous;

---

[5] The affidavit of Daniel Jacobson, document 17, filed 3 December 2018.

- The proceeding was frivolous and vexatious; and
- The proceeding was an abuse of the processes of the Court.

[29] The first defendant indicated that it would abide by any order of the Court and reserved its right to be heard on certain matters.

[30] On 31 October 2018, the second and third defendant applied to the Court for an order that the claim and statement of claim filed by the first and second plaintiffs be set aside or stayed:

> "… the Second and Third Defendants are applying to the Court for the following orders:
>
> 1 That the claim filed on 19 September 2018 be set aside pursuant to r 16(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), or alternatively stayed pursuant to r 16(g) of the UCPR, on the basis that the proceeding:
>
> a lacks a reasonable cause of action;
>
> b is scandalous;
>
> c is frivolous or vexatious; and
>
> d is otherwise an abuse of the process of the Court.
>
> 2 That the whole of the statement of claim filed on 19 September 2019, or alternatively, relevant parts of it, be struck out pursuant to r 171 of the UCPR on the basis that the pleading:
>
> a discloses no reasonable cause of action;
>
> b is scandalous;
>
> c is frivolous or vexatious; and
>
> d is otherwise an abuse of process of the Court."

[31] On 16 November 2018, the first and second plaintiffs filed an amended statement of claim – which maintained, and expanded upon, their original claim.

[32] The second and third defendants' application, insofar as it related to the statement of claim, was pressed against the amended statement of claim.

[33] Immediately before the hearing of the applicants' claim, Mr Palmer discontinued his claim on file 10132/18 and filed a new claim.[6] His new claim (on court file 13339/18) is in identical terms to the original joint claim but Mr Palmer also sought damages.

---

[6] A copy of it was exhibited to Mr Palmer's affidavit, filed by leave.

**The plaintiffs' applications for an adjournment of the hearing**

[34] On 3 December 2018, the Registrar of the Supreme Court received a letter, signed by Mr Palmer, indicating that he would be seeking an adjournment of the hearing of the application.

[35] At the hearing itself, I gave Mr Palmer (whom I will also refer to as the "plaintiff") leave to file a discontinuance of the claim which he had made jointly with PLC (which I will also refer to as the "corporate plaintiff"). He explained that, having recently received legal advice, he was no longer legally represented because he wished to separately press his claims. He had, on 3 December 2018, filed a new, separate claim accordingly (that is the claim on 13339/18).

[36] Senior Counsel for the corporate plaintiff explained that the corporate plaintiff did not press certain parts of the amended pleadings which alleged improper purpose in the commencement of the proceedings: but Mr Palmer wished to press those matters.[7]

[37] Mr Palmer sought an adjournment to allow him time to prepare to argue the matter unrepresented. He said he would need seven to 14 days to do so. He relied upon *Nobarani v Mariconte*,[8] a decision of the High Court concerning procedural fairness to an unrepresented litigant; and in particular, the statement by the Court that, while proceedings had to be managed in a just, quick and cheap manner, and that speed and frugality were often closely related, the management of proceedings must be consistent

---

[7] PLC not press the following paragraphs of its amended statement of claim. It maintained reliance on those paragraphs which remained in Section F, entitled "The Commonwealth Criminal Proceedings have been commenced, or have the appearance of being commenced, for an improper purpose".

| Para | Assertion |
|---|---|
| 57 | LNP members of the Commonwealth Parliament drew, or were likely to draw, the inference that Palmer United Party's preferencing caused or assisted the ALP to form government in Queensland. |
| 73 | Members of Parliament made statements regarding an orchestrated plan by the Government against C Palmer. |
| 81 | It is in the interests of LNP members to damage the reputation of C Palmer or the Palmer United Party and/or that C Palmer be convicted of an offence punishable by imprisonment for one year or longer. |
| 82 | LNP members have sought to target damage or procure the prosecution of C Palmer and have attempted to use the mechanisms available to the Government to do so etc. |
| 96 | ASIC caused the criminal proceedings to be commenced for purposes other than those consistent with its policy, or usual practice. |
| 97 | Or – reasonable and fair minded people would perceive that to have been so. |
| 101 | The CDPP has instituted or carried on the criminal proceedings for purposes other than those consistent with prosecution policy. |
| 102 | Or – reasonable and fair minded people would perceive that to have been so. |
| 105 | ASIC was acting under the influence of the Commonwealth Government, including the LNP members. |
| 106 | Or – reasonable and fair minded people would perceive that to have been so. |
| 108 | The continuation of the proceedings is liable to bring the administration of justice into disrepute. |
| 109 | Because relevant statements are privileged, it is impossible for the plaintiffs to fairly defend the criminal proceedings. |

[8] [2018] HCA 36

with justice.[9] Mr Palmer emphasised his position as an unrepresented litigant without legal training. I observe, however, that his reliance on the recent High Court decision and the form and content of his later filed written submissions suggest that he has ready access to legal advice and assistance.[10]

[38] Mr Palmer submitted that his claim and PLC's claim ought to be heard together so that the court's time was used efficiently – in other words, I ought to adjourn the hearing of the application on court file 10132/18.[11] He did not think there would be any prejudice to the Commonwealth and he offered to pay the Commonwealth's costs of the adjourned hearing on an indemnity basis.

[39] The corporate plaintiff also applied for an adjournment – so that it might again amend its statement of claim and because it had filed interrogatories which went to the heart of what it said was "drastically wrong" with the prosecution. Senior Counsel submitted that it would be "unusual in the extreme" for the court to decline to allow that process to take place.[12]

[40] Counsel for the applicants opposed the adjournment applications: Mr Palmer's new claim was virtually identical to the original joint claim. Counsel was ready to respond to it today. This was an "eleventh hour" application by Mr Palmer: he and the corporate plaintiff had been engaging with the CDPP about this application for weeks, and further delays (the claims themselves having delayed the progress of the matter in the Magistrates Court) ought not to be tolerated. Indeed, counsel for the applicants argued that Mr Palmer's attempt to "bail out of one matter and start another" compounded the abuse of process which was inherent in the original joint claim.[13] Counsel referred me to *UBS AG v Tyne*[14] (which is discussed below) in which there was emphasis on the Federal Court's equivalent of rule 5 of the UCPR.

[41] I noted that Mr Palmer's new claim was very similar to the original joint claim and that his interests and the interests of the corporate plaintiff were closely aligned to such an extent that I expected that Mr Palmer, as an unrepresented litigant, would benefit from the written and oral submissions of the corporate plaintiff.

[42] Having considered the submissions of the parties and rule 5 of the UCPR; and with a view to dealing with the matter as efficiently as possible while ensuring no unfairness to the unrepresented plaintiff, I refused the application for an adjournment of the hearing of the claim on file number 10132/18. I granted leave to the second and third defendants to file an application to strike out the claim on file 13339/18; and directed that the evidence tendered by the second and third defendants and the submissions made in support of their application in 10132/18 be the evidence and submissions in support of their application in the 13339/18 proceedings. I heard both of the applications to set aside, stay and strike out the now separate claims and statements of

---

9 Ibid [42].
10 I note also the observations of Jackson J in *Parberry & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 249 at [2] and [3] about Mr Palmer's status as an unrepresented litigant.
11 Transcript of hearing, 1 – 33, line 44 – 1 – 34, line 5.
12 Transcript of the hearing, 1 – 24, lines 33 – 47.
13 Transcript of hearing, 1 – 31, lines 28 – 40.
14 [2018] HCA 45.

claim of Mr Palmer and PLC on 4 December 2018 but allowed Mr Palmer additional time to make his submissions.

[43] Towards the end of the hearing, having made submissions of substance, PLC applied again for an adjournment of the hearing to allow it to file a further amended statement of claim. Senior Counsel asserted that PLC were entitled to amend because a conditional notice of defence had been filed. I was referred to rule 378. Senior Counsel said that the issues of *principle* in the further amended statement of claim would be as he had put them: there would be no change to PLC's submissions about abuse of process and the court's supervisory jurisdiction – but the technicalities of the pleading would *"probably change"*. He indicated that the amended pleadings would be substantially reduced in size, but not in effect – and PLC did not walk away from its primary allegations.[15]

[44] Counsel for the applicants contended that the defects which (I presume) would be rectified by the further amended statement of claim had been brought to the attention of the plaintiffs in correspondence. The court was being asked to rule on the current amended statement of claim and the application for the adjournment was opposed.

[45] I refused the application for the adjournment but indicated that I would bear in mind all that had been said about the way in which the statement of claim was to be further amended.[16]

[46] On 4 December 2018, I received written and oral submissions from the second and third defendants and written and oral submissions from the corporate plaintiff. I allowed Mr Palmer seven days to provide written submissions in response to the application, with the second and third defendants to reply, in writing, within nine days of the hearing.

[47] Written submissions were received in accordance with that timetable. I told Mr Palmer that I would make myself available for further oral submissions from him in the week of 17 December 2018 (he was concerned that he would be disadvantaged were he limited to written submissions) but he later informed my associate that he did not wish to make oral submissions.

**Whether the application should proceed without the second and third defendants filing a defence**

[48] PLC submitted that the rule 16 applications should not be determined until after a defence had been filed. The applicants had filed a conditional notice of intention to defend under rule 144, which is available to a defendant who wishes to challenge the jurisdiction of the court or to assert an irregularity. In those circumstances, there is no requirement for a party to file a defence: rule 144(3).

---

[15] Transcript of hearing, 1 – 91 – 1 – 92.
[16] Transcript of hearing, 1 – 93, lines 10 – 22.

[49] PLC argued that the applicants' arguments (that PLC's pleadings disclosed no reasonable cause of action, were scandalous etc) were complaints as to substantive matters – not as to "irregularities". The applicants had not, therefore, complied with their obligation to file a defence[17] and the court ought not to permit the applicants to bring this application without first doing so. Also PLC argued:[18]

> There is no express requirement on a defendant to file a defence before bringing an application under UCPR r 16 (compare the express obligation to do so before bringing an application for summary judgment under r 293). However where the defendant uses rule 16 to effectively obtain summary judgment, ordinarily the defendant should first file a defence.

[50] PLC referred to the decision of Jackson J in *Sino Iron Pty Ltd v Palmer*.[19] In that case, Mr Palmer, as first defendant, and a second, corporate, defendant, applied for an order that proceedings brought against them be dismissed or stayed as an abuse of process.

[51] The plaintiffs in *Sino Iron* alleged a breach of trust by Mineralogy and, *inter alia*, sought a declaration that Mr Palmer had dishonestly procured, was involved in, or assisted the breaches of trust.

[52] The defendants submitted that Sino's proceedings should be dismissed or stayed as an abuse of process because they were foredoomed to fail. In dismissing the defendants' application, his Honour stated that the Court should be slow to interfere in a proceeding, by way of dismissal or the grant of a stay, in a way which undermined the procedure for summary judgment:[20]

> [11] It should be borne in mind that early statements of principle as to abuse of process as reiterated in the more recent cases, were formulated in the context of civil procedural laws that did not provide for summary judgment on the application of a defendant. In particular, they were made before the enactment of the power to grant summary judgment in favour of a defendant such as that contained in *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), r 293.
>
> [12] Under the UCPR, a defendant may apply for a stay under r 16(g), or apply to strike out a statement of claim as vexatious or an abuse of process under r 17(1)(d) or (e) or apply for summary judgment under r 293. These rules operate in addition to the inherent jurisdiction. They do not repeal the Court's inherent power to deal with a question as an abuse of process.
>
> [13] Nevertheless, the Court should be slow to interfere by dismissal or the grant of a stay on this ground, as an abuse of process, in a way which might undermine the procedure for summary judgment. In the first place, under UCPR r 293 a defendant is required to file a notice of intention to defend attaching a defence before it is entitled to apply

---

17 See chapter 5, UCPR.
18 Written submissions of the corporate plaintiff [43].
19 [2014] QSC 259.
20 Ibid [11] – [13].

> for summary judgment. Second, the standard which is to be applied is that the Court "is satisfied the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim" … Third, a successful summary judgment application will produce judgment for the defendant. The judgment will operate as a final judgment for the principles of res judicata. Against that background, and guided by the principle of finality, in my view it will only be an unusual case where it will be appropriate for the Court to dismiss a proceedings as an abuse of process as being without reasonable grounds in a manner that operates outside the rules and at a stage in the proceeding before the point is reached under the rules for the cognate question to be decided upon summary judgment.

[53] In contending that Sino's application was without reasonable grounds, the defendants argued that Sino's allegation that a certain bank account was impressed with a trust could not succeed. His Honour considered that argument. His Honour noted the complexity of the parties' submissions on this point.[21] In his Honour's view, the allegation, that the bank account was impressed with a trust, was not one that clearly satisfied the threshold that it was made without reasonable grounds.[22] His Honour reached the same conclusion with respect to the other bases upon which the defendants asserted that Sino's claims were bound to fail.[23]

[54] Counsel for the second and third defendants argued that their conditional notice of intention to defend was appropriate because the abuses of process they alleged *were* irregularities. Also, it would be a "waste" for the second and third defendants to plead a specific defence to the corporate plaintiff's sixty-page statement of claim were they to succeed in this application. Counsel submitted that if the applicants did not succeed, then I ought to grant them an extension of time to file their defence.

[55] He submitted that that approach to the matter was consistent with the following statement of principle in *UBS AG v Tyne,*[24] which emphasised the importance of minimising delay and expense in the conduct of civil litigation (footnotes omitted):

> The timely, cost-effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute. These wider interests are reflected in section 37M(2) of the *Federal Court Act*. As the joint reasons in *Aon Risk Services Australia Limited v Australian National University* explain, the "just resolution" of a dispute is to be understood in the light of the purposes and objectives of provisions such as section 37M of the Federal Court Act. Integral to a "just resolution" is the minimalisation of delay and expense.[25]

---

[21] Ibid [23].
[22] Ibid [24].
[23] Ibid [25] – [28].
[24] [2018] HCA 45.
[25] **37M The overarching purpose of civil practice and procedure provisions**
(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
(a) according to law; and
(b) as quickly, inexpensively and efficiently as possible.

[56] The second and third defendants do not raise any *procedural* irregularity (in the sense of a failure to comply with the procedural requirements of the rules) in their conditional notice of intention to defend. I was referred to no authority to support or challenge the contention that a relevant irregularity for the purposes of rule 144 included the impropriety alleged by the defendants/applicants.

[57] I note rule 371, which provides, in effect, that a failure to comply with the rules is an irregularity, not a nullity. However it seems to me that the way in which that rule is expressed characterises a failure to comply with the rules, rather than defines an irregularity.

[58] The statements of Jackson J in *Sino* concerned an application to stay proceedings as an abuse of process *on the basis that the proceedings were without reasonable grounds*, or "*doomed to fail*". There is an obvious similarity between an argument of that kind and a summary judgment application by a defendant. Here, the applications to stay the plaintiffs' claims are based upon contentions that the claims abuse the processes of the courts in several ways, with a focus on the way in which they fragment criminal proceedings.

[59] The applicants do not ask me to consider the merits of the plaintiffs' claims in determining their application (although they say if I were to do so, their application would be strengthened). I note that the plaintiffs' contend otherwise.

---

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
   (a) the just determination of all proceedings before the Court;
   (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
   (c) the efficient disposal of the Court's overall caseload;
   (d) the disposal of all proceedings in a timely manner;
   (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The civil practice and procedure provisions are the following, so far as they apply in relation to civil proceedings:
   (a) the Rules of Court made under this Act;
   (b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

**Rule 5 Philosophy – overriding obligations of parties and court**

(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

*Example –*
The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court.

[60] Bearing in mind the context for the statements made by Jackson J in *Sino Iron*: the fact that the requirement in rule 293 that a defence be first filed does not appear in rule 16; and rule 5, I consider it appropriate and efficient to proceed to determine the applications, even though the applicants, as second and third defendants, have not filed a defence.

**Overview of the applicants' submissions**

[61] The applicants characterised this application as one of three collateral and summary attacks on the criminal proceedings to prevent their progress through the Magistrates Court.[26]

[62] The applicants submitted that the whole of the plaintiffs actions were "bad" for two reasons – they would "disrupt and fragment criminal proceedings in a way that has been soundly and repeatedly deprecated by the High Court"; and they involved "an improper and vexatious use of the processes of the Court in a multiplicity of litigation about the very same issues that are to be dealt with by the prosecution".[27] Exceptional circumstances were required before the Supreme Court would intervene in criminal proceedings:[28]

> The Prosecution is at an early pre-committal stage … The Plaintiffs have every opportunity to test their arguments in the context of the committal and, if unsuccessful there, in the trial in due course. To disrupt the Prosecution at this stage for the purposes of the present collateral attack would be to create a fragmentation of the most serious kind at the outset of the committal proceedings, before even committal evidence is presented.

[63] Even if there were substance in the arguments sought to be raised (and the applicants submitted there was not), the misuse of the Court's processes required the actions be dismissed.

[64] As to the plaintiff's arguments, the applicants contended:[29]

> The complaint that the Prosecution is 'doomed to fail' is no more than a statement of the proposed defence. The alleged 'delay' in prosecution reveals no prejudice and could never warrant the drastic remedy of a permanent stay. The prosecution does not re-litigate earlier proceedings. And the allegations tantamount to a government conspiracy are groundless and scandalous.

---

[26] Written submissions of the applicants, document 9, paragraph 2.
[27] Ibid paragraph 3.
[28] Written submissions of the applicants, paragraph 7.
[29] Ibid paragraph 4.

**Overview of PLC's submissions**

[65] PLC argued that its claim was "not a case of fragmentation of anything". Rather, the Supreme Court was being asked to exercise its supervisory jurisdiction – and the relevant test was whether PLC had a strongly arguable case.[30]

[66] Counsel for PLC submitted that the authorities on fragmentation concerned an attempt to raise in a superior court a particular discrete legal issue about a criminal proceeding. The resolution of a discrete legal issue was a "narrow part" of PLC's submissions, but primarily it sought intervention to prevent an abuse of process. The question for the court was whether it was "appropriate … to even countenance striking out a proceeding which makes very serious and grave allegations, without exposing the allegations to proof, both on our side and on the part of the Commonwealth".[31] PLC submitted (as before) that the application was "in substance" a summary judgment application and that the approach to it "should be no less stringent that that provided under rule 293" – referring to *Edington v Board of Trustees of the State Public Sector Superannuation Scheme*.[32]

[67] In that case, Mullins J set out the approach to be taken on an application for summary judgment (citations omitted):

> Under r 293(2) of the UCPR, the two conditions of which the court must be satisfied before it can give judgment for a defendant is that the plaintiff has no real prospects of succeeding on its claim and there is no need for a trial of the claim. Although r 293 (and its counterpart r 292) are modern procedural rules for applying for summary judgment in the context of the philosophy of the UCPR found in r 5, authoritative statements about exercising caution in terminating a proceeding summarily remain applicable: *Spencer v Commonwealth ...*; *LCR Mining Group Ltd v Ocean Tyres Pty Ltd ...;* and *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd ...* Although the provision considered in *Spencer* was that applying in the Federal Court where the test for summary judgment is "no reasonable prospect" rather than "no real prospect" the comments in the judgments in *Spencer* about the exercise of caution in dismissing an action summarily were intended to apply generally in respect of the procedure of summary judgment.

[68] I note that in *Lee v Abedian,*[33] Bond J observed that the power to strike out is to be used sparingly and only in clear cases, referring to *General Steel Industries Inc v Commission for Railways*[34] (which was a case upon which the plaintiffs relied). His Honour recognised that the power cannot be exercised once it appears that there is a real question to be determined, whether of fact or law, and the rights of the parties depend on it[35] and continued:[36]

---

30 Transcript of hearing, 1 – 70, lines 7 – 12.
31 Transcript of hearing, 1 – 13 line 35 – 1 – 14, line 5.
32 [2012] QSC 211.
33 [2016] QSC 92.
34 (1964) 112 CLR 125 at 129 to 130.
35 Referring to *Dey v Victorian Railways Commission* (1949) 78 CLR 62 at 91 per Dixon J.

> However … the court will not shrink from striking out a pleading which is defective because it does not disclose a reasonable cause of action, has a tendency to prejudice or delay a fair trial, concerns allegations which are unnecessary … scandalous, vexatious or embarrassing … or which is otherwise an abuse of process …

**Overview of Mr Palmer's submissions**

[69] Mr Palmer relied upon the submissions (oral and written) made by PLC as well as his own written submissions.

[70] In his written submissions, Mr Palmer stated that he would meet "head on" the applicants' argument that there was nothing exceptional about the circumstances of the criminal proceedings, such as to warrant their fragmentation.[37] He submitted that the following 11 circumstances were exceptional:[38]

1. This is the first prosecution for an offence under section 631(1) of the *Corporations Act*;

2. ASIC had decided not to prosecute TPC for the more serious offence of operating an unregistered managed investment scheme (under section 601ED of the *Corporations Act*);

3. ASIC's prosecutorial conduct was inconsistent (in deciding not to prosecute TPC, yet deciding to prosecute Mr Palmer and PLC) – utterly extraordinary and incongruous; also, Mr Palmer is the only director of PLC charged with the aiding and abetting offence – even though there were two directors at the relevant time;

4. The prosecution is obviously hopeless;

5. The facts are not in contention: they are set out in the prosecution's summary of facts document, which was part of the prosecution brief (and, therefore, the point about the hopelessness of the prosecution could be determined without a hearing); the doomed to fail argument raised a discrete question of law and the Supreme Court is "perfectly well placed" to determine it;

6. The events said to give rise to the offences occurred in 2012 – there has been unexplained delay in bringing the prosecution;

7. "Approval" to prosecute was given in September 2017 – yet the charges were not brought until February 2018. Mr Palmer submitted that while he publicly announced his intention to contest the next Federal election at the end of the week commencing 19 February 2018, he privately declared his intention to do so,

---

36 [2016] QSC 92 at [38] – [39].
37 Mr Palmer's written submissions, paragraph. 11.
38 Ibid, paragraphs 12 – 72.

including to "senior members of the Liberal National Party, "some time prior to that".

8. The bringing of the prosecution was manifestly inconsistent with ASIC's "Approach to Enforcement Information Sheet" – the prosecution could not be justified by reference to the matters which ASIC said it would consider in determining appropriate enforcement action;

9. The bringing of the prosecution was manifestly inconsistent with the CDPP's published prosecution policy;

10. The CDPP went to extraordinary lengths to seek out an opinion that the prosecution had reasonable prospects of success, having received advice that it would be a "very difficult prosecution"; also, no prosecutor acting reasonably and rationally could have reached the conclusion that there was a reasonable prospect of securing a conviction or that the public interest required the prosecution;

11. Mr Palmer's claim depended on evidence of "two officers of the Court" – that is, two solicitors who depose to their recall and understanding of certain statements made by Stuart Robert.

[71] Mr Palmer submitted that there were far too many "gravely troubling circumstances" to warrant "snuffing out" the case, or "sweeping it under the carpet". He quoted from *Williams v Spautz,*[39] which is discussed in more detail below – implicitly making the point that this court ought to find, at least, that the allegation that the criminal proceedings were vexatious or oppressive ought to be explored fully at a hearing (extracts from Mr Palmer's quote only, citations omitted by me):

> As Lord Scarman said in *Reg v Sang* ... every court is "in duty bound to protect itself" against an abuse of process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings … The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice. As Richardson J observed … the court grants a permanent stay:
>
> > "in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes … that the Court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression."

[39] (1992) 174 CLR 509.

[72] Mr Palmer submitted that he should be entitled to go to the Supreme Court, in its supervisory jurisdiction, to put a stop to a serious abuse of process in the Magistrates Court proceeding. Allowing the proceedings to continue caused Mr Palmer to suffer ongoing prejudice, embarrassment, reputational damage and adverse publicity. A high bar was set for a defendant seeking to strike out a proceeding or secure summary judgment (he referred to *General Steel*).

[73] In response to the fragmentation and multiplicity of proceedings arguments of the applicants, Mr Palmer submitted that the Supreme Court was the only place he could go to have the abuse of process brought to an end "now". He referred to the delay as a particularly important aspect of the case. He claimed that he was not required to show actual prejudice – the delay itself was enough and significant delay was "inevitably prejudicial". He referred to the "super abundantly correct" "cliché"[40] that "justice delayed was justice denied". He also referred to the *Magna Carta* in this context.

**Overview of the applicants' submissions in reply**[41]

[74] The applicants submitted that the plaintiff misconceived the nature of the exceptional circumstances required which would provide the compelling reason for the Supreme Court to interfere in the trial process (see *Obeid* – below). All he had done was set out the basis of his claim for relief. The "exceptional circumstances" did not withstand scrutiny in any event – particularly those which relied upon "wholly unsustainable inferences of serious wrongdoing which should not have been put". Also, some invited the court to examine the exercise of prosecutorial discretion – which the court was "ill-equipped" to do (see *Jago* – below).

[75] The plaintiff avoided the fragmentation argument. His claim for declarations was not seeking supervision of the Magistrates Court – but rather seeking a collateral determination of an issue in the criminal proceedings. It was no answer to the fragmentation argument to say that the plaintiff wished to invoke the supervisory jurisdiction of the court – the question was whether that jurisdiction ought to be exercised. The interference Mr Palmer sought was particularly inappropriate because it was directed at *preventing* the committal hearing in the Magistrates Court. Nothing had been identified which even approached the kind of exceptional circumstances which would warrant interference with the criminal proceedings and further.

[76] Mr Palmer's concerns about his reputation etc were not matters which went to the fairness of the trial (see *Obeid* – below).

[77] His claim offended the principles in *UBS v Tyne*: that he and PLC were now running separate proceedings burdened the court, other litigants, the public and the defendants.

---

[40] Per O'Keefe J in *Keys v Royal & Sun Alliance Insurance* [2000] NSWSC 1122 at [39].

[41] The applicants took no issue with Mr Palmer's references to material on file number 10132/18 or fresh affidavits filed after the hearing.

[78] As to delay – contrary to the plaintiff's submissions, there was no right to a "speedy trial" and without demonstrated incurable prejudice, mere delay cannot be an abuse of process (see *Jago* – below). The delay point was built into the argument about the prosecution having been brought for an improper purpose – but nothing could support the grave and improbable inference that two independent statutory office holders (ASIC and the CDPP) had colluded with members of Parliament for political reasons (which was the effect of the claims made in Mr Palmer's statement of claim). Thus, the applicants argued, the claims disclose no reasonable cause of action.

**No reasonable cause of action**

[79] A "cause of action" is every fact that the plaintiff must prove to establish a right to judgment. "Reasonable" means reasonable according to law, not that the facts are badly or incompletely pleaded … If the facts pleaded conceivably give the plaintiff a right to relief the cause of action is said to be reasonable".[42]

[80] The applicants contend that the plaintiffs have no reasonable cause of action in their claims for a stay on the basis of delay because they allege no specific relevant prejudice; and no reasonable cause of action in their claims for a stay on the basis of improper purpose on the part of the prosecuting authorities (and, as asserted by Mr Palmer's case, to further the goal of the Commonwealth government to target, damage or prosecute him) because the allegations are scandalous and groundless, having regard to the facts pleaded which are said to establish improper purpose.

[81] In support of their arguments that the plaintiffs' claims disclosed no reasonable cause of action, the applicants referred me to several authorities on delay, a permanent stay of proceedings and the standard of proof for allegations of misconduct or bad faith.

**Delay; a stay of proceedings**

[82] The authorities establish that a stay is an extreme remedy which is granted only very rarely on the basis of delay alone.

[83] The principles upon which a permanent stay will be granted are well settled. In *Jago* (discussed in more detail below), Mason CJ said that the test involves a balancing process (my emphasis):[43]

> … the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial. At the same time it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time **after a person has been charged**. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such

---

[42] Cairns, *Australian Civil Procedure* 11th Edition, NSW, 2016.
[43] (1986) 168 CLR 23, at 33.

> matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights **and, of course, the prejudice suffered by the accused …** In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare.

***Jago v The District Court of New South Wales and Others***[44]

[84] Jago was charged with fraud offences in October 1981. He was committed for trial in July 1982. A bill of indictment was found in May 1986. In June 1986, the matter was listed for hearing in the District Court of New South Wales in the week commencing 9 February 1987. The delay Jago complained of was the delay between his being charged and committed for trial and the commencement of his trial – not the delay between the conduct said to give rise to the offences and his being charged. His application for a stay of proceedings because of the delay was refused by the trial judge. His Honour's refusal was upheld in the High Court.

[85] Mason CJ explained[45] that the power to stay criminal proceedings is discretionary; to be exercised in a principled way and only in the most exceptional cases. The Australian common law does not recognise the existence of a special right to a speedy trial, or to trial within a reasonable time, which relies for its operation not upon actual prejudice or unfairness but upon the concept of presumptive prejudice. Because there is no constitutional guarantee of a speedy trial, the remedies are discretionary and necessarily relate to the harm suffered or likely to be suffered if appropriate orders are not made.[46]

[86] To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial of such a nature that nothing a trial judge can do could relieve against its unfair consequences. Where delay is the sole ground of complaint, an accused seeking a permanent stay must be able to show that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.[47]

[87] Brennan J found that the District Court had no jurisdiction to prevent the presentation of an indictment.[48] But there was a clear division between the executive power to present an indictment and the judicial power to hear and determine proceedings founded on indictment. His Honour's statements in this regard are relevant to the plaintiffs' contentions that the criminal proceedings have been commenced for an improper purpose. His Honour said:[49]

> … That division is of great constitutional importance. It ensures that the function of bringing alleged offenders to justice is reposed entirely in the hands of the executive branch of government who must answer politically

---

44 (1989) 168 CLR 23.
45 Ibid 21.
46 Ibid 33.
47 Ibid 34.
48 Ibid 38.
49 Ibid 39.

> for the decisions which they make – not only decisions to prosecute in particular cases but decisions relating to the commitment of resources to the detection, investigation and prosecution of crime generally. These are decisions which courts are ill-equipped to make and, in so far as they relate to the commitment of resources, powerless to enforce. The division of powers in the administration of the criminal law between the executive and judicial branches of government also ensures that the courts do not become concerned by matters extraneous to the fair determination of the issues arising on the indictment and are thus left free to hear and determine charges of criminal offences impartially.

[88] Deane J observed that delay tended to work against the prosecution and that unreasonable delay would not of itself found an order that proceedings be stayed.[50] His Honour found the delay in *Jago* extraordinarily lengthy. The prosecution's efforts to explain it were unpersuasive. But the *effect* of the delay was not such as to render any trial necessarily unfair. Nor was its effect to make the continuation of proceedings so unfairly oppressive as to amount to an abuse of process.[51] His Honour referred to the remarks of Kirby P that the accused:

> "… had lost no witnesses. He claims no special prejudice. And he acknowledges that the case of the prosecution is essentially a simple one: simple to present and therefore, by inference, simple to test, to criticise and possibly to answer."

***Barac v Director of Public Prosecutions***[52]

[89] In this case, there was no delay, but the State Director of Public Prosecutions (the **DPP**) reneged on an agreement not to prosecute the defendant for serious drug offences. It is relevant to the nature of the prejudice or unfairness required to warrant a stay of proceedings.

[90] The appellant was charged with drug offences, including trafficking, supply, production and possession. At his committal hearing, he reached an agreement with the DPP that it would offer no evidence on the trafficking, supply or production charges if the appellant were to plead guilty to charges of possession of a dangerous drug on the basis that his possession was for a commercial purpose. He was (irregularly) committed for sentence on the possession charges and discharged in respect of the charges concerning trafficking, supply and production.

[91] After later receiving new evidence, the DPP charged the appellant with trafficking. While his committal proceedings for that offence were pending in the Magistrates Court, he applied to the Supreme Court for a permanent stay, on the ground that they were an abuse of process because the DPP had resiled from the agreement she had reached with him, which caused him prejudice and which should not be permitted in the public interest.

---

[50] Ibid 59.
[51] Ibid 61.
[52] [2009] 1 Qd R 112.

[92] The primary judge refused to stay the proceedings. Her Honour found that any risk of unfairness in the determination of the new trafficking charge (by way of, for example, the DPP using against the appellant material that he had supplied to them for the purposes of his sentence hearing on the possession charge) had been obviated by undertakings given to the court by the DPP. From that refusal, the appellant appealed to the Court of Appeal.

[93] Emphasising that the decision of the primary judge involved an exercise of discretion which involved questions of degree and balance, the appeal was dismissed. Keane JA, with whom McMurdo P and Jerrard JA agreed, said that the prejudice asserted by the appellant was not the prejudice with which the court was concerned in this context (footnotes omitted, my emphasis):[53]

> [22] … [T]he appellant points to the steps he has taken on the faith of the agreement, including incurring expenditure which will be wasted and **organising his life** on the basis that he would be sentenced only on the possession charges.
>
> [23] These kinds of disadvantage are not the prejudice which is the concern addressed in the authoritative statements of the circumstances in which the discretion to stay proceedings has been held to arise …
>
> [24] **The kind of prejudice which has been regarded as enlivening the discretion to stay a prosecution is that prejudice which detracts from the prospects of a fair trial.** A person accused of crime is put to expense and is made to undergo stress in every prosecution. Sometimes that expense is increased and the stress is exacerbated by inefficiency, and even on occasion, incompetence, on the part of those charged with the responsibility of presenting the case for the Crown. It has never been said that these circumstances, alone and without more, justify a stay of proceedings. The strong public interest in the conviction and punishment of serious offences may be displaced by "the paramount public interest" that the administration of criminal justice proceed fairly in a case where a prosecution is pursued for an improper purpose or with no prospects of success; but in a case where a decision not to prosecute has been reversed simply because the prosecution believes that stronger evidence has become available to it, the paramount public interest is not engaged. In such a case, absent some real and incurable adverse effect upon the accused's prospects of a fair trial, a mere change of mind on the part of the prosecution is not, of itself, a sufficient basis for ordering a stay of proceedings. As Wilson J said in *Barton v The Queen*, in cases where the defect in procedure said to prejudice an accused involves no more than prosecutorial inefficiency, the defect must be "… of such a nature that [there is] nothing that a trial judge can do in the conduct of the trial to relieve against its unfair consequences".

---

[53] Ibid [22] – [24].

[94] There was no absolute rule that the court must grant a stay to prevent the prosecution from resiling from an agreement of the kind in question.[54]

[95] His Honour observed that the discretion to prosecute is a matter exclusively for the DPP as the prosecuting authority established by law for that purpose. His Honour continued:

> [34] There is no occasion for a court to impede or interfere in the exercise of the prosecutorial function unless and until "[c]ourt processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression" [referring to *R v Harris* [1991] 1 HKLR 389 at 402]. There is no suggestion that the decision by the DPP in this case was made otherwise than in good faith ….

[96] His Honour referred to the public interest in bringing the appellant to justice – new evidence having emerged – so as to emphasise that it was important to keep in view the "multi-faceted nature of the public interest in maintaining confidence in the administration of justice, and the exclusivity of the role of the DPP as the officer of the executive government charged by law with the prosecution of serious offences".[55]

***Williams v Spautz***[56]

[97] This case concerned the power of a court to stay criminal proceedings brought for an improper purpose.

[98] Dr Spautz was dismissed from his employment at a university. He brought an action for unfair dismissal and proceedings for criminal conspiracy to defame and other offences against other staff of the university. Some of those persons sought declarations that their prosecution was an abuse of process. The primary judge found that Dr Spautz's predominant purpose in instituting and maintaining the criminal proceedings was to exert pressure on the university to re-instate him, or settle his case for wrongful dismissal favourably to him. His Honour permanently stayed the prosecutions.

[99] On appeal to the High Court, the majority (Mason CJ, Dawson, Toohey and McHugh JJ) held that the prosecutions had been properly stayed: a stay may be ordered, to stop a prosecution which had been instituted and maintained for an improper purpose. An improper purpose need not be the sole purpose for which the proceedings have been instituted and maintained, as long as it is the predominant purpose.[57]

**Where allegations of bad faith are made**

---

54 Ibid [27].
55 Ibid [35].
56 (1991 – 1992) 174 CLR 509.
57 Ibid 529.

[100] The authorities dealing with the evidence required to enable a court to reach a conclusion that there has been bad faith or improper purpose or other serious conduct establish that a person is not to be "condemned casually": Serious allegations must be pleaded specifically on the basis of evidence of higher quality than "inexact proofs, indefinite testimony or indirect inferences".

***Briginshaw v Briginshaw***[58]

[101] This well-known case concerned the degree to which a court had to be satisfied of an allegation of adultery. Dixon J explained that reasonable satisfaction was not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved and stressed the need for caution when an allegation is a serious one:[59]

> … [W]hen the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found … Except upon criminal issues to be proved by the prosecution it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgement if the question was whether some act had been done involving grave moral delinquency … This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

[102] His Honour said, of the issue in that case:[60]

> Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonable satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.

---

58 (1938) 60 CLR 336.
59 Ibid 361 – 362.
60 Ibid 368 – 369.

***Fernando v Commonwealth and Another***[61]

[103] The primary judge in *Fernando* found that the respondents (the Commonwealth and the Acting Minister for Immigration) had committed the tort of wrongful imprisonment. His Honour found that officers of the Minister's Department and the Acting Minister had acted in conscious and contumelious disregard of the rights of the appellant to procedural fairness, and his right not to have his liberty curtailed save by lawful process.[62] Among other things, his Honour found that the officers of the Department had deliberately engaged in certain conduct in furtherance of "the departmental stratagem" to have the appellant detained.

[104] His Honour's conclusion that the Acting Minister had been guilty of malfeasance was overturned by the Full Court of the Federal Court:[63]

> A finding that a Commonwealth Government Minister has deliberately exercised an important statutory power knowing that, in doing so, he was acting unlawfully is properly to be characterised as grave. The legal consequences are potentially serious as too is the effect on the Minister's reputation. In circumstances in which, on the facts found, competing inferences are open and one of those inference is favourable to the respondent, the Court will not be satisfied that the applicant's case has been proved to the necessary standard. For the reasons we have explained this is such a case.

***Pharm-a-care Laboratories Pty Ltd v Commonwealth (No 3)***[64]

[105] This case involved an allegation of misfeasance in public office. As a matter of pleading, the court made the point that a pleading which alleges a particularly serious matter need to be pleaded specifically: a person is not to be "condemned casually" or by "inexact proofs, indefinite testimony, or indirect inferences".[65] The allegation should be pleaded in sufficient detail so that the public officer knows the case mounted against them.[66]

***Rajski v Bainton***[67]

[106] In this case, the statement of claim alleged that a barrister conspired with a partner in a law firm and with other people "to wrongfully harm and injure Raybos and Rajski and to abuse the process of the court and obstruct and prevent, pervert and defeat the course of justice." Among other matters, it asserted that the barrister made false and fraudulent statements to the court in accordance with the conspiracy – conduct which would amount to professional misconduct.

---

61 (2014) 231 FCR 251.
62 Ibid 138.
63 Set out in Ibid at [153].
64 (2010) 67 ALR 494.
65 Ibid [68].
66 Ibid [66].
67 (1990) 22 NSWLR 125.

[107] It was held that the allegations were serious and had to be pleaded precisely. The persons against whom the allegations were made were not to be condemned casually, by inexact proof, indefinite testimony or indirect inferences.[68] Charges of this kind are not to be made unless the person who makes them, in a pleading or otherwise, is satisfied that there is expected to be available the evidence to prove them. Counsel must take scrupulous care in written and oral attacks on character and should insist on being provided with information which is thought by his client to justify the attack – but he or she must decide for himself or herself what charges can be made. "It is for counsel to see that no man's good name is wantonly attacked".[69]

**This Court's jurisdiction over committal proceedings**

[108] PLC referred me to *Clayton v Ralphs and Manos,*[70] a South Australian decision, in support of its submission that this court had jurisdiction in relation to the committal process. The applicants did not suggest otherwise – their point being that this court should not exercise its jurisdiction in the present case. However, a close consideration of *Clayton v Ralphs* is useful for its approach to the question whether a 14 year delay between the relevant conduct and charge, in the unique circumstances of that case, warranted a stay of proceedings, and for its response to arguments raised about the Magna Carta and a right to a speedy trial.

***Clayton v Ralphs and Manos***

[109] The members of the court in *Clayton v Ralphs* expressed different views about the extent of the court's supervisory jurisdiction over committal proceedings. Jacobs J was of the view that it did not extend to granting a permanent stay of proceedings. Legoe and Olsson JJ were of the view that it did.

[110] On 10 May 1972, Dr Duncan and a man called James met at a location on the bank of the River Torrens, which was, at the time, a meeting place for homosexual men. They were attacked by a group of men and thrown into the river. James managed to scramble out. Dr Duncan drowned. Three police officers, including the plaintiff, were suspects in his killing. The coroner, who conducted an inquest in June and July 1972, was unable to identify the persons who killed Dr Duncan. An inquiry by two Scotland Yard detectives into the death, which was completed in October 1972, did not identify a killer or killers. However, many years later, a new witness came forward, and persons who were witnesses at the inquest indicated that they had lied to the coroner. On the strength of this new evidence, the three original suspects were charged with manslaughter on 25 February 1986 – about 14 years after Dr Duncan was killed.

[111] A committal hearing was held by the Chief Magistrate. At the end of the evidence, he heard submissions from counsel about (a) the admissibility of evidence; (b) whether the proceedings ought to be stayed or dismissed as an abuse of process (because of the delay); and (c) whether the defendants had a case to answer. His Honour made certain

---

[68] Ibid 135.
[69] Ibid 136 – 137.
[70] [1987] 45 SASR 347 at 387 and 403.

rulings about the evidence; found that two of the three defendants (the plaintiff and one Cawley) had a case to answer; and refused to stay or dismiss the proceedings.

[112] His Honour committed Cawley for trial, but "deferred" committing the plaintiff to allow him to bring proceedings in the Supreme Court in banco challenging the magistrate's evidential rulings and seeking an order staying proceedings on the information or dismissing it as an abuse of process. A majority of the court held that the Supreme Court had jurisdiction to stay committal proceedings, but determined (by majority) that a stay was not warranted.

[113] In the introductory paragraphs of his judgment, Jacobs J, referring to the magistrate's decision to adjourn the committal for the purpose of the plaintiff's application, said that he doubted whether he would have allowed the application to proceed: "All of the matters that have been debated before us could have been properly raised in this Court in its criminal jurisdiction".[71]

[114] As to the jurisdiction of the court in this context, Jacobs J found that committal proceedings were *in principle* amenable to judicial review.[72] He found ample authority for the view that rulings on evidence should not be subject to declaratory orders unless the circumstances were quite exceptional, referring to *Sankey v Whitlam* (discussed below).[73] He held that the plaintiff's claim for relief – of whatever kind – in respect of the magistrates ruling on evidence and a case to answer must fail and the declarations sought (about errors made by the magistrate) ought to be denied on discretionary grounds.[74]

[115] Jacobs J found that the magistrate had no power to stay or dismiss the information as an abuse of process.[75] His Honour then examined the power of the Supreme Court to stay or dismiss an information for a serious criminal offence at committal stage on the ground that it was an abuse of process. His Honour found authority, in Australia and England, to support the general proposition that the court had a general supervisory and protective power to protect inferior courts from abuse of their procedures in criminal matters. However, his Honour did not consider that its exercise extended to the *permanent* stay of committal proceedings.[76]

[116] His Honour found support for his conclusion in dicta to the effect that, in principle, the administration of the criminal law should be left to the criminal courts, and that to entertain the plaintiff's application "can only lead to a multiplicity of process, and exacerbate the very delay of which the plaintiff complains, and which was the subject of pungent comment by Murphy J in *Barton v The Queen* at 108".

[117] The plaintiff in *Clayton* relied on the Magna Carta, as did Mr Palmer, asserting, in effect, a constitutional right to be brought to trial quickly. Jacobs J agreed with

---

71 Ibid 349.
72 Ibid 357.
73 Ibid 359.
74 Ibid 361.
75 Ibid 361.
76 Ibid 363 - 365.

McHugh JA (as his Honour then was) in *Herron v McGregor* that the provisions of the Magna Carta dealt only with the question of delay between arrest and hearing (a period during which an accused person may be denied bail).[77] His Honour held that the "true" delay test was that which was stated in *R v Derby Crown Court; Ex parte Brooks*:[78]

> " … [whether] on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable …We doubt whether the other epithets which are sometimes used in relation to delay, such as 'unconscionable', 'inordinate' or 'oppressive' do more than add an emotive tone to an already sufficiently difficult problem."

[118] Even if it were (contrary to his Honour's view) open to the court to make an order for a permanent stay of proceedings, his Honour would not have done so.[79]

[119] Legoe J was of the view that the court had jurisdiction to inquire into and determine the nature of the process and the jurisdictional or other errors or matters which may be appropriate for remedy by way of judicial review or declaration or some other appropriate order.[80]

[120] As to whether charging Clayton after the 14-year delay was an abuse of process, Legoe J observed that time did not run against the Crown; there was no suggestion of mala fides; and nothing else had been established that warranted the relief sought.[81]

[121] Olsson J was of the view that the power to stay committal proceedings was an adjunct to the general declaratory and injunctive power of the court. The court would protect a person's "right" not to be exposed to potential or actual committal for trial without lawful justification. In that context, the abuse of process to be prevented, in appropriate cases, was not only the institution of proceedings by information but also their continuation.[82] Olsson J found that the plaintiff could not receive a fair trial, because of the delay and other circumstances, and the plaintiff was entitled to a declaration to that effect.[83] In reaching that conclusion, his Honour made it clear that he considered the circumstances of the case to be most unusual, if not unique.[84]

[122] South Australian courts have proceeded on the basis that they have an inherent jurisdiction to stay committal proceedings,[85] while noting that the jurisdiction should only be invoked on rare occasions and that the court will be slow to grant such remedies where to do so would hold up criminal proceedings.[86] In *Goldsmith v*

---

77 Ibid 369.
78 (1984) 80 Cr App R 164 at 169.
79 Ibid 369.
80 Ibid 380.
81 (1987) 45 SASR 347, at 386.
82 Ibid 404 – 405.
83 Ibid 415.
84 Ibid 417.
85 E.g. *Zollo v National Australia Bank Ltd v Anor* [2009] SASC 38.
86 E.g. *Polly v Bright &* Anor (1995) 79 A Crim R 562 at 565 – 566; *Mountford v Magistrates Court of South Australia and another* [2006] SASR 103 [106]; *Heinrich v Curtis & Ors* [2006] SASC 264 [36].

*Newman,*[87]
King CJ (with whom Perry and Duggan concurred) agreed with the dicta of Jacobs J that, in principle, the administration of the criminal law should be left to the criminal courts.

***The position in Queensland***

[123] *Clayton v Ralphs* was referred to in Queensland in *GAD v DPP (Qld) and Anor.*[88]

[124] The plaintiff in *GAD v DPP* sought an order in the Supreme Court for a permanent stay of proceedings in the Magistrates Court, on the ground that the proceedings were an abuse of process because they were contrary to an agreement he had reached with the Director of Public Prosecutions. The primary judge refused to order a stay. Her Honour's decision was upheld on appeal. Even if the proceedings were contrary to the agreement, GAD's right to a fair trial had not been affected.[89]

[125] On appeal, the DPP had contended that the court had no jurisdiction to make the orders sought even if it were disposed to do so, but the Court did not determine that point. Keane JA, with whom McMurdo P and Atkinson J agreed, said:[90]

> … The respondent's contention is that the power of this Court to supervise the proceedings of inferior tribunals does not extend to preventing the presentation of criminal charges by the executive government, or the administrative processes involved in committal proceedings. [Footnote: *cf Barton v The Queen* (1980) 147 CLR 75 at 88 – 94.] In relation to this contention, different views were taken in the Full Court of the Supreme Court of South Australia in *Clayton v Ralphs and Manos*. It is unnecessary and undesirable to seek to resolve the difference of opinion in order to dispose of this appeal.

[126] In *Barac v Director of Public Prosecutions* (discussed above), a later decision of the Court of Appeal constituted by McMurdo P, Jerrard JA and Keane JA, those appearing for the DPP conceded that the Supreme Court had jurisdiction to grant a stay of committal proceedings in the Magistrates Court if the prosecution of those proceedings constituted an abuse of process. It was conceded that the jurisdiction was part of the Supreme Court's supervisory role over inferior courts and tribunals. That is, implicitly, the position of the present applicants.

[127] I turn now to the applicants' primary argument.

---

87 (1992) 59 SASR 404.
88 [2008] QCA 27.
89 Ibid [21].
90 Ibid [22].

**Fragmentation**

***The applicants' argument***

[128] The applicants argued that the plaintiffs' proceedings were an "[i]nappropriate attempt to interfere with the criminal process".[91]

***The plaintiffs' response***

[129] The plaintiffs submitted that the applicants' argument was "misconceived". The Magistrates Court has no power to stay committal proceedings on the basis that the proceedings are an abuse of process: *Grassby v The Queen*;[92] *Higgins v Comans.*[93] With the exception of the "doomed to fail" argument, the other matters raised in the plaintiffs' amended/statements of claim – that is, that the prosecution was an abuse of process – "could not be advanced in the committal proceeding or even in a trial following an indictment". The plaintiffs submitted that their claims raised a "strongly triable question of fact for this court in its supervisory jurisdiction". PLC submitted, in effect, that the delay in bringing the prosecution was "unreasonable because it was inexplicable" other than as demonstrating that the prosecution had been brought for an improper purpose.[94] Mr Palmer went further, and submitted that his and PLC's prosecution was part of the implementation of a plan by the Commonwealth government to bring him down. Also, Mr Palmer claimed that his circumstances were so exceptional as to warrant the fragmentation of the criminal proceedings.

**Whether the applicants' arguments about fragmentation are misconceived**

[130] The applicants' arguments about fragmentation are not misconceived.

[131] For obvious reasons, the plaintiffs want the criminal proceedings halted "now". They do not want the proceedings to run their usual course. The plaintiffs' claims for declarations about elements of the offences seek to fragment the criminal proceedings and the plaintiffs do not appear to seriously suggest otherwise.

[132] Plainly, the plaintiffs hope for declarations by this court, favourable to them, to support their assertion that the criminal proceedings are doomed to fail. Undoubtedly, were favourable declarations made, the plaintiffs would rely upon them in the course of the committal hearing – perhaps pre-committal (although that would be unorthodox) but certainly in support of their foreshadowed no case submission. Thus, the plaintiffs seek to have determined in the Supreme Court matters relevant to decisions to be made by the Magistrates Court in its criminal jurisdiction – thereby disrupting or fragmenting the criminal proceedings.

---

91 Ibid page 3.
92 (1989) 168 CLR 1.
93 (2005) 153 A Crim R 565.
94 Written submissions [64 ] – [66]; Transcript of hearing, 1 – 74, lines 39 – 44.

[133] On one view, the plaintiffs' claims for declarations or orders which would bring the criminal proceedings to an end (as an abuse of process) do not fragment the criminal proceedings in the same way as declarations concerning matters of evidence or law which would again fall for consideration by the magistrate. Perhaps what is sought in those claims is more accurately described as an intervention in criminal proceedings, rather than a fragmentation. But that claim also involves fragmentation of the criminal proceedings because the criminal trial court may deal with an application to stay an indictment as an abuse of process.

[134] The authorities use the language of "fracturing", "fragmenting", "intervening" and "interfering" and I can see no reason why the same principles would not apply to the claims for orders which would end the criminal proceedings as those which apply to the plaintiffs' claims for declarations about the elements of the offences.

[135] The critical question is whether to permit the plaintiffs to seek this court's interference in the criminal proceedings currently in the Magistrates Court, applying the principles espoused in the authorities discussed below. As will be seen, the court is strongly disposed against intervention in criminal proceedings and relief which would fragment or disrupt criminal proceedings is rarely granted.

**Authorities on "fragmentation" relied upon by the applicants**

[136] The authorities make it very plain that fragmentation of, or intervention in, criminal proceedings should only occur in exceptional or truly exceptional circumstances. This court should be reluctant to disturb the process of criminal proceedings: other than in rare cases where the need for interference is absolutely plain and manifestly required.

***Obeid v The Queen***[95]

[137] Obeid pleaded not guilty in the Supreme Court of New South Wales to the offence of wilful misconduct in public office.

[138] On 22 September 2015, Beech-Jones J overruled a demurrer to the indictment and refused to quash the indictment or permanently stay the proceedings. On 8 December 2015, the Court of Criminal Appeal granted leave to appeal from the decision of Beech-Jones J but dismissed the appeal. On 15 December 2015, the applicant filed an application for special leave to appeal to the High Court. It was unlikely that it would be determined before the date for commencement of the applicant's trial (that is, 10 February 2016).

[139] On 14 December 2015, the applicant applied to Beech-Jones J, by way of notice of motion, for a stay of his trial. Beech-Jones J dismissed the notice. On 19 January 2016, the applicant unsuccessfully applied to the High Court for the stay.

[140] In refusing to stay the proceedings, Gageler J said (footnotes omitted, my emphasis):

---

[95] (2016) 329 ALR 372 at [15] – [23].

[15] There is a longstanding and general reluctance on the part of this Court in point of policy to make orders which would have the effect of fragmenting a criminal process which has already been set in train …

[16] The reasons given by Kirby J in *Frugtniet v Victoria* for refusing to stay a criminal proceeding against an accused pending the determination of a proceeding in this Court's original jurisdiction are particularly instructive in the present context. The proceeding in the original jurisdiction of this Court in that case concerned a challenge to the constitutional validity of legislation which bore on the trial process in a manner which was argued to infringe Ch III of the Constitution. His Honour said:

> "This Court has more than once … emphasised how rare it is to make orders which would have the effect of interfering in the conduct of a criminal trial. No case has been brought to my notice where the Court has made a stay order equivalent to the one sought on this summons. Although I do not doubt that, in a proper case, the Court would have the jurisdiction to make such an order to protect the utility of its process, it would be truly exceptional for it to do so. The Court expressed its attitude of restraint most recently in its decision in *R v Elliott*. There are many earlier such cases. They evidence the **strong disposition** of appellate courts in Australia – and especially of this Court – **not to interfere in the conduct of criminal trials except in the clearest of cases where the need for such interference is absolutely plain and manifestly required. Analogous principles apply … to the provision of a stay to prevent the commencement of a trial so as to permit a constitutional point to be argued. The point will not be lost to the plaintiff.** If need be, at a later stage, it can be raised again.

[17] How then is it argued in the present case that this Court's appellate jurisdiction would become inutile or a source of adverse consequences in the absence of the stay which the applicant seeks and **what is it about the present case which is said to make its circumstances exceptional or extraordinary?**

[18] **The applicant points, in somewhat general terms, to reputational, financial and emotional consequences to which he will be exposed if the trial is to go ahead.** He does not, however, seek to link those consequences to his ability to conduct proceedings in this Court, or to the utility of any order which this Court might ultimately make in the subsequent appeal were special leave to be granted. Nor does he demonstrate that those consequences are themselves of such a nature or degree as to distinguish his circumstances significantly from those of any other criminal defendant who faces trial having been unsuccessful in an attempt to quash the indictment or permanently stay the prosecution.

> [19] The applicant then focuses on the nature of the contentions which he seeks to raise on the application for special leave to appeal …
>
> …
>
> [22] Given that the applicant would retain the ability to agitate both contentions in a further application for special leave to appeal if he were convicted at trial and unsuccessful in any subsequent appeal against conviction in the Court of Criminal Appeal, neither contention was, in my opinion, sufficient to justify fragmentation of the trial process which was set in motion. The order which the applicant sought would have had that effect.

[141] I was referred to many other authorities reflecting the long-standing reluctance to fragment ongoing criminal proceedings referred to in *Obeid*. Those authorities were consistent in their expressions of that principle, but I found it helpful to consider the factual context of several of them.

***Sankey v Whitlam***[96]

[142] *Sankey* concerned informations laid by a private citizen against the former Prime Minister, Mr Whitlam, and former government ministers, charging them with an offence of conspiracy under section 86 of the *Crimes Act* 1914 (Cth), and conspiracy at common law. When the matter came on before a magistrate, he ruled, *inter alia*, that the first information disclosed an offence known to the law. Mr Whitlam and one of the former ministers applied to the Supreme Court for orders that the magistrate should not proceed further with the hearing, but should discharge the defendants. Their applications were dismissed. When the hearing before the magistrate resumed, the Commonwealth objected to the production of certain documents sought by subpoenas issued by the plaintiff and Mr Whitlam. Ultimately, the magistrate upheld the claim to privilege for most of the documents.

[143] The plaintiff then began proceedings in the Supreme Court against the defendants, the magistrate and the Commonwealth for declarations that the documents should be produced, and for an order in the nature of mandamus. Mr Whitlam cross-claimed for declarations that the first information did not disclose an offence and that the documents ordered to be produced by the magistrate should not be disclosed or admitted into evidence. Upon the application of the Attorney General for the Commonwealth, the matter was removed to the High Court.

[144] Gibbs ACJ said that the court's power to make a declaration was very wide. It was not excluded because the matter in respect of which the declaration was sought may fall for decision in criminal proceedings. His Honour referred to cases in which it was claimed that the plaintiff was exposed to proceedings which had been wrongly brought, or that proceedings were being conducted in a manner which was contrary to law, and observed that in those cases there was clear power to grant a declaration.[97]

---

[96] (1978) 142 CLR 1.
[97] Ibid 25.

[145] Similar considerations applied to Mr Whitlam's cross-claim. If the information did not disclose an offence, then the charges under the section could not be sustained. His Honour said (footnotes omitted, my emphasis):

> **In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief.** The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. **But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it was designed to avoid ... Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on an accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect to fragment the proceedings and to detract from the efficiency of the criminal proceedings.**

[146] His Honour found the circumstances of the case before the court "most exceptional" and the proceedings had been long delayed. There were cogent reasons for "putting the matter to rest" but his Honour added:[98]

> In this respect the attitude of an ultimate appellant court before which questions of this kind have been argued may necessarily be somewhat different from that which would be taken by a court lower in the judicial hierarchy.

***Clyne v Director of Public Prosecutions and another***[99]

[147] Clyne was committed for trial on a charge of contravening regulation 40 of the *Banking (Foreign Exchange) Regulations* (Cth).

[148] He commenced an action in the High Court arguing that regulation 42, the penalties regulation, was *ultra vires* and that therefore a breach of regulation 40 would not expose him to punishment or penalty. The defendants demurred to the statement of claim and the demurrer was directed to be heard by the Full Court. In the course of their judgments, Gibbs CJ (and Dawson J) made statements about the undesirability of interrupting criminal proceeding. Gibbs CJ said:[100]

> This Court has in a number of cases said that it is wrong that the ordinary course of proceedings in the criminal courts should be interrupted by applications for declarations as to questions which will or may arise in the criminal proceedings … In the present case it would have been open to the defendants to apply to stay the proceedings as vexatious or as an abuse of the process of the Court [I note, as the applicants have done in this case.]

---

98 Ibid.
99 (1984) 154 CLR 640. 660.
100 Ibid 643.

> However no such application was made and the defendants chose to demur. Now that the demurrer has been set down for hearing before us it is convenient to determine it.

***Vereker v O'Donovan***[101]

[149] This matter concerned a tax minimisation scheme. The defendants were the promoters of the scheme and the barrister who gave advice about it. In *Vereker & Ors v Rodda & Anor,*[102] Jackson J heard an application for an order of review, under section 5 of the *Administrative Decisions (Judicial Review) Act* 1977, in respect of a decision of a magistrate that there was evidence sufficient to commit the defendants for trial. His Honour considered the matter sufficiently exceptional to make an order for review. He found that the magistrate had applied an incorrect test to determine whether the evidence was sufficient to commit the defendant for trial. His Honour set aside the decision of the magistrate and remitted the matter to him for further hearing and determination "in accordance with the reasons for judgment herein".

[150] There was an appeal, and cross-appeal, from Jackson J's decision: *O'Donovan v Vereker and Others.*[103] The court found that Jackson J had erred. The appeal was allowed in part, by varying the second order made by Jackson J by deleting therefrom the words "in accordance with the reasons for judgment herein" and substituting the words "according to law". The cross-appeal was dismissed.

[151] In considering, and refusing, an application for special leave to appeal from that decision, the High Court, per Mason CJ said:

> It would require a most exceptional case for this Court to grant special leave to appeal from a decision of the Federal Court reviewing a decision of a magistrate to continue committal proceedings. **The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us.** Despite the arguments advanced by Mr Hughes of Queen's Counsel [that there were issues of law in conflict between the views expressed in the Full Court and *Collie v Edwards*], we do not consider that the features of the present case are such that the advantages of intervention by this Court outweigh the **desirability of the matter proceeding in the ordinary way.**
>
> We would add that **we are by no means convinced that the Federal Court has the jurisdiction which it claimed to exercise in the present case and we would emphasize what the learned judges of the Federal Court have already pointed out, that if that court has the jurisdiction, it is a jurisdiction to be exercised very sparingly and in the most exceptional cases only.**

***Yates v Wilson***[104]

---

[101] (1988) 6 Leg rep SL 3.
[102] (1987) 26 A Crim R 25.
[103] (1987 – 1988) ALR 97.
[104] (1989) 168 CLR 338.

[152] Yates was committed for trial on 65 charges for offences relating to the evasion of sales tax under section 29A(2) of the *Crimes Act* 1914 (Cth). He applied to the Federal Court, claiming relief (under the *Administrative Decisions (Judicial Review)* Act 1977) and section 39B of the *Judiciary* Act 1903 (Cth) on the ground that the charges did not disclose an offence against section 29A(2).

[153] His application was dismissed. His appeal from that decision was dismissed. He applied for special leave to appeal to the High Court on the ground that the Full Court's decision, (that the words "benefit to be … given by the Commonwealth" in section 29A(2) included the non-levying of tax) was wrong, and that this was an important question of law.

[154] The brief judgment of the High Court was delivered by Mason CJ (my emphasis):[105]

> It would **require an exceptional case** to warrant the grant of special leave in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. **The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us.** It is a factor which should inhibit the Federal Court from exercising jurisdiction under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) as well as inhibit this Court from granting special leave to appeal.

***Re Rozenes; ex parte Burd***[106]

[155] Rozenes QC was the Commonwealth Director of Public Prosecutions and the respondent to an application for (*inter alia)* an order nisi for a writ of prohibition, alternatively mandamus.

[156] The applicants had been committed for trial on charges for offences against customs and drugs legislation. After their arraignment, but before a jury was empanelled, the applicants made certain applications to the trial judge, who refused the relief sought. The trial was to proceed. One of their arguments related to jury selection. The other related to the joinder in an indictment of State and Federal offences.

[157] After outlining the applicants' arguments, Dawson J indicated that notwithstanding that the grounds advanced may be arguable, he ought to exercise his discretion against giving the relief sought. His Honour said (footnotes omitted, my emphasis):[107]

> This Court has repeatedly indicated that **the fragmentation of a criminal trial by proceedings to contest the rulings of a trial judge, either by way of either leave to appeal or prerogative relief, is highly undesirable and will only be allowed in exceptional circumstances.** As Brennan J said in *Beljajev v Director of Public Prosecutions*, "The jurisdiction of this Court is not fitted to the supervision of interlocutory processes of a criminal trial".

---

[105] Ibid 339.
[106] (1994) 120 ALR 193.
[107] Ibid 195.

> I am unable to discern the exceptional circumstances in this case which would warrant granting these applications …
>
> …
>
> It is undeniable that, if the applicants were ultimately to succeed upon appeal on the grounds which they now raise, they would nevertheless have suffered the expense and strain of a criminal trial. That, however, is a circumstance which is always present when it is sought to contest the ruling of a trial judge and is not of itself, in my view, an exceptional circumstance.

***Frugtniet v Victoria***[108]

[158] Frugtniet sought a stay of her conspiracy trial about a week before it was due to start to allow the High Court to hear and determine her statement of claim, which sought two declarations: (i) that certain provisions of the *Crimes Act* 1958 (Vic) were contrary to the implied Constitutional guarantee of a right to a fair trial, and therefore invalid, and (ii) that the Court was unable to ensure that the plaintiff would receive a fair trial without legal representation, therefore it should stay the proceedings until legal representation was available.

[159] Kirby J outlined the "remarkable saga" of this criminal litigation,[109] during which the Chief Judge of the County Court of Victoria observed that the applicant (and her two co-accused) explored every opportunity and pursued every point at trial and in various proceedings in the court in New South Wales, calculated to delay the expeditious disposition of the trial. The applicant denied that characterisation of the conduct. She claimed that she had made nothing more than proper attempts to uphold and defend her legal rights.

[160] In dismissing the applicant's summons, having determined that the nature of the claim and the circumstances facing the plaintiff did not justify her application for an immediate, but temporary stay, Kirby J said (footnotes omitted):[110]

> This Court has more than once, including recently, emphasised how rare it is to make orders which would have the effect of interfering in the conduct of a criminal trial. No case has been brought to my notice where the court has made a stay order equivalent to the one sought on this summons. Although I do not doubt that, in a proper case, the court would have jurisdiction to make such an order to protect the utility of its process, it would be truly exceptional for it to do so. The court expressed its attitude of restraint most recently in its decision in *Elliott*. There are many earlier cases. They evidence the strong disposition of appellate courts in Australia – and especially of this Court – not to interfere in the conduct of criminal trials except in the clearest of cases where the need for such interference is absolutely plain and manifestly required. Analogous principles apply, as it seems to me, to the provision of a stay to prevent the commencement of a

---

[108] (1997) 96 A Crim R 189.
[109] Ibid 191*ff*.
[110] Ibid 194.

trial so as to permit a constitutional point to be argued. That point will not be lost to the plaintiff. If need be, at a later stage, it can be raised again.

***Pan Laboratories Pty Ltd v Commonwealth***[111]

[161] Pan Laboratories was charged with offences under the *Therapeutic Goods Act* 1989 (Cth) which arose out of the local supply and export of evening primrose oil capsules. A re-trial was ordered after a successful appeal. The re-trial was to commence on a new indictment on a certain date which was vacated because Pan raised constitutional matters in the High Court. It sought declarations to the effect that the provisions of the *Therapeutic Goods Act* under which it had been charged were invalid. It also sought an injunction against the DPP, restraining him from proceeding on the new indictment.

[162] The Commonwealth and the DPP sought orders that the entire proceedings by Pan be stayed on the ground that they were vexatious or an abuse of process or disclosed no reasonable cause of action, or that certain paragraphs of its statement of claim (claiming constitutional relief) be struck out because the grounds raised were unarguable. In the alternative, the Commonwealth and the DPP sought an order that the entire proceedings be remitted to the District Court of New South Wales to be heard concurrently with the pending trial.

[163] Pan's application was dismissed and the matter was referred to the District Court of New South Wales, Kirby J observed (my emphasis):[112]

> [11] Four considerations inform my approach to the summons of the Commonwealth and the DPP:
>
> 1 This Court has said on many occasions, including recently, that **great restraint** must be exercised by the High Court and other courts of appeal and review before issuing orders or taking steps which may disturb or fragment the course of a criminal trial ...
>
> …

[164] Later, his Honour said:[113]

> [14] The matter which Pan wishes to argue is important for it. There is no sufficient reason, in my view, why Pan should be denied the opportunity of developing its argument in a way that is not possible today. It has non constitutional arguments of a legal character which must be dealt with and against which peremptory relief would be inappropriate. Pan is represented by experienced counsel who wishes to develop the constitutional arguments. The courts hearing Pan's arguments can protect themselves and prevent undue waste of time. **In my view, the constitutional arguments should proceed to hearing on their merits. However, they should do so in a manner respectful of the court of criminal trial and of its control over the trial process. In that way, the arguments that Pan wishes to advance will be reserved. The function of the court of trial will be**

---

[111] (1999) 73 ALJR 464 [11].
[112] (1999) 73 ALJR 464 at 466 – 467 [11].
[113] Ibid 467 [14].

> **upheld. The rule against fragmentation of criminal process will be reinforced …**

[165] The proceedings were remitted to the District Court of New South Wales.

***Alqudsi v Commonwealth; Alqudsi v The Queen***[114]

[166] Alqudsi was charged with offences under the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) (the **CFIRA**). Three months before his trial was due to start, Alqudsi commenced proceedings in the High Court for a declaration that the provision of the CFIRA under which he was charged was invalid. In separate proceedings, he sought the removal of his prosecution to the High Court (under section 40 of the *Judiciary Act* 1903 (Cth)). The Commonwealth filed a summons in the declaratory proceeding, seeking that it be remitted to the Supreme Court of New South Wales.

[167] In remitting the first proceeding and dismissing the second, French CJ found that insufficient cause had been shown to overcome the principle against fragmentation of pending criminal proceedings by the interlocutory interventions of this Court. His Honour said (footnotes omitted, my emphasis):[115]

> In considering the nature of the constitutional challenge which the plaintiff foreshadows … I will accept for present purposes that he has an arguable case. **The existence of an arguable case, however, is not sufficient cause for removal of proceedings into this Court.** The Commonwealth makes the obvious point that to grant the removal application would be to disturb or interrupt the course of criminal proceedings in the Supreme Court. It would undoubtedly delay the commencement of those proceedings by some months.
>
> There is ample authority for the proposition that this Court should be reluctant to disturb the progress of pending criminal proceedings …

[168] The same approach has been taken by intermediate appellate courts, as reflected in the following decisions (a sample of those to which I was referred).

***Lamb v Moss***[116]

[169] *Lamb v Moss* concerned an application to the Federal Court to review the decision or conduct of a magistrate. The complaints sought to be made by Dr Moss included that the prosecution evidence could not sustain the finding by the magistrate of a prima facie case.

---

[114] (2015) 327 ALR 1.
[115] Ibid [21] – [23].
[116] (1983) 76 FLR 298.

[170] With respect to the manner of exercise of whatever discretion existed to grant or refuse declaratory relief the Court said (my emphasis):[117]

> … there is a considerable body of authoritative judicial opinion that exceptional circumstances will generally be required before a superior court will consider interfering in committal proceedings, particularly at an interlocutory stage. **Failure to permit criminal proceedings to follow their ordinary course will, in the absence of special circumstances, constitute an error of principle, as Gibbs CJ pointed out in *Sankey v Whitlam* …**

***Coco v Shaw***[118]

[171] In *Coco v Shaw*, the plaintiff was charged with 11 Federal offences. Committal proceedings commenced on 26 February 1990, and the hearing was then adjourned until 12 March 1990. During the committal hearing, Shaw, a member of the Australian Federal Police, gave evidence that a listening device was installed at the premises of Cosco Holdings at Carole Park; that tape recordings were made of conversations at the premises; and that it was intended that those conversations be tendered in evidence against the plaintiff.

[172] On 14 March 1990, the plaintiff issued a writ, and a notice of motion was filed, seeking final relief in the form of certain declarations. The primary judge (a Justice of the Supreme Court) made declarations including that the use of listening devices at the premises of Cosco Holdings at Carole Park was not a use authorised under section 43(2) of the *Invasion of Privacy Act* 1971 (Qld) and that evidence of any conversation recorded by the use of any such listening device was inadmissible evidence in any proceeding.

[173] On appeal from the decision of the primary judge, the Court of Appeal found his Honour erred in exercising his discretion to make declarations. McPherson SPJ said that the interposition of the Supreme Court in proceedings being conducted within the jurisdictional limits of another tribunal appointed by Parliament must necessarily be relatively infrequent. [119]

[174] Ryan J said:[120]

> His Honour [the primary judge] … held that there were special circumstances existing and good reasons why the court in this particular case should embark upon a consideration of the merits of the plaintiff's application for relief. Matters to which he referred in coming to his conclusion included the following: (a) that a declaration if now made in favour of the plaintiff would conclusively determine at least one serious charge and may assist in the disposal of some others; (b) that the reluctance of the court to interfere with committal proceedings by way of declaration

---

[117] Ibid 307.
[118] (1991) 104 FLR 1. 14 – 15, 27 – 28, 29.
[119] Ibid [14] – [15].
[120] Ibid 27 – 28.

> may be outweighed by the desirability of a prompt and authoritative decision upon a question of law, particularly where there was no dispute as to the facts; (c) the plaintiff was not claiming a mere declaration that the evidence proposed to be tendered before the stipendiary magistrate was inadmissible; he was also claiming a proprietary or similar right in confidential information in the tapes and transcript and an injunction.
>
> None of these considerations, in my opinion, warranted the course taken which involved interruption of the committal proceedings, and the numerous authorities referred to and analysed in his Honour's judgment seem to indicate that the discretion should in this case have been exercised adversely to the applicant. In *Seymour v Attorney-General (Cth)* (1984) 4 FCR 498, it was said by Beaumont J (with whom Fox J expressed agreement) at 503 – 504:
>
> "It is true that the court may well decide to intervene where the very jurisdiction of the magistrate to proceed to committal can be questioned. A clear illustration is where the information discloses no offence known to the law: see *Sankey v Whitlam*. That raises a bare question of law which may be appropriately dealt with by another court on judicial review. But questions relating to the admissibility of evidence raise special problems which are best left to the tribunal receiving the evidence."

[175] Dowsett J agreed that it was not appropriate for the primary judge to have intervened in the pending criminal proceedings.[121]

**Whether the plaintiff's proceedings should be set aside, stayed or struck out**

[176] The plaintiffs seek the intervention of this court to bring to an end "now" the criminal charges they face. They contend that the proceedings – which have barely commenced – are an abuse of process.

[177] The applicants contend that the only abuse of process is that attempted by the plaintiffs in their applications to the Supreme Court for intervention – and that the plaintiffs' proceedings ought to be set aside, stayed or struck out.

[178] The criminal matters have not been allowed to travel far in the Magistrates Court. The plaintiffs sought to have a "no case to answer" application determined even before the committal hearing had commenced.

[179] The plaintiffs' claims are for two kinds of "relief", namely (i) declarations relevant to proof of the offences; and (ii) declarations or orders which would have the effect of bringing the criminal proceedings to an end.

[180] As the many cases discussed in this judgment make plain, this court should not grant relief which would interfere with, or fragment, the course of criminal proceedings unless the need for such interference or fragmentation is absolutely plain and

---

[121] Ibid 29.

manifestly required or the circumstances are exceptional and extraordinary. The administration of the criminal law should be left to the criminal courts. The undesirability of fragmenting criminal proceedings is a powerful consideration. The discretion to intervene should be exercised very sparingly and in the most exceptional cases only. The failure to permit criminal proceedings to follow their ordinary course will, in the absence of special circumstances, constitute an error of principle.

***The claim for declarations about the interests in the time-sharing scheme and the bid for interests in that scheme***

[181] I find that there is nothing exceptional in the plaintiffs' cases warranting this court's intervention by way of declarations about elements of the offences with which they are charged.

[182] The plaintiffs do not allege that the proceedings have been wrongly brought; conducted in a manner which is contrary to law; fail to disclose an offence; or have no legal substance (*Cf Sankey v Whitlam*). Rather, they seek declarations about elements of the offence charged, which support their argument that the prosecution is "doomed to fail".

[183] Arguments that the criminal charges are doomed to fail may be raised in a no case submission before the magistrate, or in the District Court, at the end of the Crown case. The plaintiffs may even secure the Crown's agreement to resolve a legal issue on the strength of agreed facts before any trial commences. This court's interference would plainly fragment the criminal proceedings and detract from their efficient conduct. Criminal proceedings should be allowed to follow their ordinary course, unless exceptional circumstances arise such as to warrant this court's intervention by declaratory order. There is nothing exceptional about the arguments the plaintiffs wish to raise about the prospects of success of the prosecution. Nor does anything about their circumstances warrant this court's interference with the proper exercise by the magistrate of his or her function in committal proceedings. There is no reason to tolerate the further delay and discontinuity that the plaintiffs' claims bring. Those claims should be set aside.

[184] In reaching that conclusion I have had regard in particular to *Coco v Shaw.* The primary judge in that case found special circumstances, warranting his interference in committal proceedings, in the fact that the declarations might result in a prompt and authoritative decision on a question of law. Ryan J said that that consideration did not warrant the interruption of the criminal proceedings which had occurred.

[185] I have noted that, were the plaintiffs to ultimately succeed in their no case application, then they would have suffered "the expense and strain of a criminal trial" (or committal hearing), but that circumstance is not, of itself, exceptional (*Re Rozenes; ex part Burd*).

[186] With respect to the 11 circumstances which Mr Palmer asserts are exceptional, I note, adopting his numbering, that –

- as to (1) – the criminal courts are well equipped to cope with a "first prosecution" and do so not infrequently;

- (2), (3), (4),(6), (7), (8), (9), (10) and (11) are contentions in support of Mr Palmer's assertion that the prosecution has been brought for an improper purpose – they do not raise relevant exceptional circumstances: I acknowledge that if there was clear evidence of high quality of improper purpose (as per *Briginshaw, Fernando, Pharm-a-care, Rajski*), then the position may be different – but this is not such a case;
- as to (5) – the authorities on fragmentation make it plain that this is not an exceptional circumstance. This argument was expressly dealt with, and rejected, in *Coco v Shaw*.

[187] Mr Palmer has nominated nothing exceptional in the relevance sense such as to warrant this court's interference in the committal proceedings for the purposes of making declarations about the elements of the offences *or* to bring an end to proceedings.

[188] I have also had regard to the warning that resort to applications to the civil courts for declarations or other relief in criminal matters is open to abuse, and in some cases applications may be brought by a defendant for the purposes of delay. That was the suggestion of the applicants in this case. Without question, the plaintiffs' claims in this court have delayed the committal proceedings and the applicants suggest that Mr Palmer's "eleventh-hour" discontinuance of the joint claim and commencement of a new, virtually identical claim, was another component of the plaintiffs' alleged use of the court's process to achieve delay.

[189] The timing of Mr Palmer's discontinuance of the joint claim raises some concern. If, as it seems to be, it has been brought about because the legally represented corporate plaintiff appreciates the limits to which officers of the court may go in making scandalous allegations, then it is of surprise that those limits were only recently appreciated.

[190] I note also the keenness of the corporate plaintiff for an adjournment of the present application.

[191] However, I do not consider it necessary in this matter to do anything other than apply the tests set out in the authorities relevant to the applications sought. In so doing, it is not necessary for me to make judgments about the plaintiffs' motives.

***The claim for orders which would put an end to the criminal proceedings***

[192] I find that there is nothing exceptional warranting this court's intervention to make declarations or orders putting an end to the criminal proceedings. The claims for that relief should be set aside.

[193] In determining this aspect of the application, I have taken into account the fact that the Magistrates Court cannot order a stay of committal proceedings: *Higgins v Mr Comans, Acting Magistrate & DPP (Qld)*.[122] The plaintiffs would have to wait until an

[122] [2005] QCA 234.

indictment was presented in the trial court before bringing such an application – on the assumption that the plaintiffs were committed for trial. But – save for the rare exceptions to which the authorities refer – that is the case for all defendants. As I have stated, the authorities establish that this court should not interfere in the conduct of criminal proceedings other than in the clearest of cases, where the need for interference is absolutely plain and manifestly required. The undesirability of fragmenting the criminal process is a powerful consideration.

[194] As I understand his submissions, Mr Palmer also relies upon delay and improper purpose as exceptional circumstances warranting this court's intervention. This invites consideration of the merits of the plaintiffs' claims – although I am not suggesting that the fact of an arguable claim alone would warrant fragmentation: see *Alqudsi*, *Pan Laboratories*.

[195] Also, if I am wrong about the applicability of the principles about the fragmentation of criminal proceedings to the plaintiffs' claim for relief which would bring the proceedings to an end, then a consideration of the merits of their claims is necessary to determine whether they disclose a reasonable cause of action.

[196] The plaintiffs assert that there has been unreasonable or unjustifiable delay, which is oppressive and has produced unfair prejudice and for that reason, the criminal proceedings should be stayed.

[197] Among other matters, they rely upon documents obtained from the CDPP which they submit, in effect, reveal that the prosecution delayed until Mr Palmer announced his intention to run for Government to charge him and PLC. There was in fact no such announcement at that time as mentioned above. However I will consider the inferences to be drawn from the CDPP documents.

[198] The documents tendered by PLC included two CDPP documents which appear to be (pro forma) reports of the status of CDPP matters.[123] One of the documents (headed "Matter QC16100658 – Palmer Leisure Coolum Pty Ltd History report) conveyed the following: The CDPP had identified the prosecution of PLC and Mr Palmer as a very difficult prosecution. The CDPP had received advice from counsel (perhaps Robert Strong) which "raised an issue proving the offence". ASIC was to consider the issue with Raymond Finkelstein.[124] The CDPP expected an "opinion" by 4 August 2017. No opinion had been received by 10 August 2017. As at 28 August 2017, the CDPP was still waiting on an "opinion from ASIC re counsel's advice".

[199] It is not possible to know *from the document* whether that ASIC opinion or the advice was received, but the document states as the "Outcome": "Prosecution commenced" and includes as a comment, made it seems on 7 September 2017: "Sufficient evidence to pursue Palmer Leisure Pty Ltd and Clive Palmer".

---

[123] Exhibits 4 and 5.
[124] Queen's Counsel.

[200] The second document is not as complete as the first. It contains contact details for Mr Palmer and explains the timetable for ASIC's opinion but very little other information.

[201] PLC also tendered two "Prosecution Policy Declarations" (**PPD**).[125] On the face of one of the PPDs, on 7 September 2017, David Bahlen declared that he had addressed "the terms of the test for prosecution" (as per the Prosecution Policy of the Commonwealth) and determined that there was, in respect of PLC, a prima facie case; reasonable prospects of a conviction being secured; and "in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued". The documents said to have been taken into account in considering issues relating to reasonable prospects of success and public interest factors included "counsel's advice".

[202] On the face of the other PPD, on 19 February 2018, Jessica Williams make a declaration in the same terms in respect of Mr Palmer. She too considered "counsel's advice" about the prospects of success of the prosecution and public interest issues.

[203] Thus, one interpretation of the documents tendered is that in addition to considering whether there was *sufficient evidence* to prosecute Mr Palmer and PLC, and concluding, on 7 September 2017 that there was, there was *further and separate consideration* of the *potential charges in the context of CDPP's prosecution policy* (by different CDPP officers) on 7 September 2017 in the case of PLC and on 19 February 2018 in the case of Mr Palmer.

[204] As noted above, the prosecutions were commenced on 22 February 2018. PLC's written submissions asserted that this was the same date as Mr Palmer publicly announced his intention to run in the next Federal election, although, as the applicants pointed out, on an examination of the material, that was not so. There was a news report about his plans to bring back the Palmer United Party on 23 February 2018, but he did not then announce his intention to run. He said that he had not thought much about whether he would contest his former Sunshine Coast seat of Fairfax: "I haven't thought about that. The party hasn't called for any nominations. It's not so much about me. It's about the politics and what we can do for the country. I've retired from politics generally and I still think that's the case".

[205] Regardless, in my view, the CDPP documents which were tendered do not suggest anything other than an orthodox approach to the consideration of the prosecution of the plaintiffs in terms of the sufficiency of evidence and then in terms of the prospects of success and the public interest. The fact that the charges were considered separately raises no concern, nor does the fact that the CDPP took longer to consider policy issues in relation to Mr Palmer's prosecution than it did to consider policy issues in relation to PLC's.

[206] I have considered more broadly the allegations that the delay has caused unfairness or oppression of such a nature as to warrant the interference of this court.

---

[125] Exhibits 2 and 3.

[207] The prejudice or unfairness which enlivens the discretion to stay criminal proceedings is the prejudice which detracts from a fair trial: a real and incurable adverse effect (*cf Barac; R v Derby Crown Court, referred to in Clayton v Ralphs* ) – not unfairness in a more general sense.

[208] A stay of proceedings (for any reason) is only ordered in extreme cases and it will only be in rare cases that such an order will be based on delay alone. The Australian common law does not recognise the existence of a special right to a speedy trial, or to trial within a reasonable time, which relies upon the concept of presumptive prejudice (*Jago*). To justify a stay of proceedings, there must be a fundamental defect which goes to the root of the trial of such a nature that a trial judge cannot relieve against its unfair consequences.

[209] The plaintiffs refer to the fact that the onus of proof of a defence is upon them (see section 670F of the *Corporations Act* 2001) and suggest that the passage of time means that memories might be affected or documents might not be able to be located which will assist in their defence. Also, Mr Palmer asserts that unfair oppression may be found in the consequences of delay on his political aspirations and the reputational damage the proceedings have caused.

[210] As to any difficulties in formulating a defence to the charges, the plaintiffs' assertions about problems with memory or difficulty locating documents are vague and uncertain. Also, if as the plaintiffs contend, the section 631(1) matter has already been litigated in the Takeovers Panel, or there is overlap between the issues the subject of the criminal proceedings and the matter litigated in the Takeovers Panel, then it is reasonable to expect that reports of those proceedings or material collated for their purposes might assist the plaintiffs in their defences in the present matter.

[211] Mr Palmer's complains about the reputational consequences of the proceedings particularly in the context of his current political aspirations, there having been a delay between the relevant conduct and his being charged, with the criminal proceedings occurring at a time at which he is returning to politics.

[212] While Mr Palmer may have a public profile that many other criminal defendants do not have, and while his aspirations may be very different from those of most criminal defendants, there is nothing extraordinary about his concerns for his reputation. Most criminal defendants fear the consequences of criminal prosecution upon their reputations. And for many, their aspirations – occupational, sporting, personal, celebrity, financial or otherwise – are at risk. But the significant point is that Mr Palmer asserts no link between the reputational consequences to which he is exposed and the fairness of his trial in the relevant sense (*cf Obeid*).

[213] I note the assertions in the statements of claim about statements made by ASIC which might have suggested to the plaintiffs that they would not be criminally prosecuted. However, the fact that a person may have organised their life on the assumption that they would not be facing criminal proceedings, based on a communication or assurance from, or an agreement with, the prosecuting authorities, is not the sort of prejudice comtemplated by the authorities in this context (*Barac v DPP*).

[214] The Magna Carta point raised by Mr Palmer is of no assistance to him in this case because the delay he complains of is not the delay between his being charged and his being brought to trial (*Clayton v Ralphs and Manos, relying upon Herron v Mcgregor*). Regardless the delay between the conduct said to give rise to the criminal offences and charge, while reasonably long, is not extraordinarily long (*cf Jago*); nor have the plaintiffs identified any relevant prejudice which has arisen as a consequence of the delay, and certainly no relevant prejudice which cannot otherwise (that is, otherwise than by way of a stay of proceedings) be addressed by a trial judge. For example, if indeed the passage of time means that the plaintiffs are unfairly disadvantaged in their defence by loss of memory or loss of relevant documents, then a trial judge may deal with that unfairness by an appropriate direction to the jury which identifies the forensic disadvantage experienced by the plaintiffs.

[215] The plaintiffs assert that the delay is unexplained. I note that the proceedings in the Takeovers Panel and the Federal Court took years – from June 2012, when The Presidents Club sought a declaration of unacceptable circumstances, until the final decision of the panel (after appeals and reviews) on 2 February 2016, with its reasons published on 24 February 2016.[126] It is, in my view, not unreasonable to infer that the relevant authorities turned their attention to potential criminal proceedings once the Takeover Panel's proceedings concluded – consistent with the timing of ASIC's and then the CDPP's consideration of the matter and explaining the delay between the relevant conduct and the laying of criminal charges. But regardless, the critical point is that there has been no relevant, incurable prejudice identified by either of the plaintiffs which has occurred as a consequence of the delay.

[216] As to the complaint that the prosecution has been brought for an improper purpose, both plaintiffs assert in effect, against the background of the delay, that the proceedings have been brought contrary to the prosecuting policies of the relevant authorities.

[217] Brennan J in *Jago* observed how ill-equipped the courts were to evaluate the decisions of the prosecuting agencies in determining who to prosecute and where to commit resources. However, in *Williams v Spautz*, it was held that a stay may be ordered to stop a prosecution which has been instituted and maintained for an improper purpose. And in *Barac*, Keane JA said that there was no occasion for a court to impede or interfere in the exercise of the prosecutorial function unless court processes have been employed for an ulterior purpose, or to cause vexation or oppression.

[218] It seems that the corporate plaintiff does not wish to allege more than that the circumstances in which the proceedings have been brought – that is, the delay and (allegedly) in breach of the policy of ASIC and the CDPP – cause grave disquiet and are explicable only in the context of improper purpose.

[219] Mr Palmer goes further and alleges, in effect, that ASIC and the CDPP have (somehow) been influenced by members of the Commonwealth Government and persuaded to prosecute him and PLC for an improper purpose.

---

[126] [2016] ATP 1.

[220] The allegations are serious in the extreme. Allegations of that nature cannot be established in the absence of solid evidence – and certainly not on the strength of "inexact proofs, indefinite testimony or indirect inferences".

[221] I will not repeat the detail of the statements of claim or the links drawn in them between statements made by members of the LNP and the allegation that the criminal proceedings have been brought for an improper purpose. It is enough to say that they do not survive scrutiny.

[222] The statements of claim do not in any way reasonable or credible way connect the conduct alleged against ASIC and the CDPP to the alleged hostility of members of the Commonwealth Government towards Mr Palmer. Nothing in the statements of claim provides any reasonable basis for an inference that the court ought to have a sense of disquiet about the exercise of the discretion of ASIC and the CDPP to prosecute, let alone that the proceedings were in fact brought for improper purposes as a consequence of political influence.

[223] In my view, the proceedings do not disclose a reasonable cause of action.

[224] As to the argument that the criminal matters have already been litigated: Takeovers Panel proceedings are not criminal proceedings. Their focus is on private interests and the need for an efficient, competitive and informed market.[127] Criminal proceedings serve different purposes – including general deterrence. Also, the section 631 issue was not ultimately determined by the Takeovers Panel. However, the fact that related issues have been considered by the Takeovers Panel is a factor to be considered by the prosecuting authorities in the exercise of their discretion – not this court.

[225] I find nothing exceptional about the plaintiffs' circumstances such as to warrant the interference in the criminal proceedings which they claim.

**The inappropriate multiplicity of proceedings**

***The applicants' arguments***

[226] The applicants also argued that the claim and statement of claim ought to be struck out because the multiplicity of the plaintiffs' proceedings caused vexation, wasted resources and delay. It was submitted that the plaintiffs' Supreme Court proceedings "sought to invoke the processes of the Court in an exercise which would undermine confidence in the proper and efficient administration of justice".

[227] The multiple proceedings to which the applicant referred included (1) the no case to answer argument in the Magistrates Court, brought on 6 April 2018, pre-committal, the hearing of which had been deferred until the end of the Crown case at the committal hearing proper; (2) an originating application, filed in the Supreme Court (court file number 3721/18) seeking orders that the prosecution be stayed as an abuse of process, and injunctions restraining ASIC and the CDPP from proceeding further against the

[127] Section 602 *Corporations Act*.

plaintiffs – an application which was discontinued on 12 April 2018; and (3) an application in the Magistrates Court, which was based on a submission that the prosecution was an abuse of process – an application which has been withdrawn since the filing of these proceedings.

[228] To that list, the applicants added Mr Palmer's discontinuance of the joint claim and the filing of his new claim.

[229] The applicants submitted that the multiplicity of proceedings was unjustifiable and unnecessary: warranting the striking out of the claims and statements of claims. The administration of justice might be brought into disrepute were the court to permit duplicative proceedings. Vexation and abuse of process may arise even if the duplicative proceedings could otherwise be said to be fair, or not precluded by estoppel, or discontinued.

[230] The applicants relied upon *UBS AG v Tyne*;[128] *Moore v Inglis*;[129] *Henry v Henry*;[130] *Di Carlo v Dubois*;[131] *Flynn v Suncorp Metway Limited*[132] and *Tomlinson v Ramsey Food Processing Pty Ltd*.[133] In my view, *Moore* and *Flynn* are also fragmentation cases.

***The plaintiffs' response***

[231] The plaintiffs contended that the applicants' argument was "misconceived".

[232] The no case to answer argument was different from the abuse of process argument, which the Magistrate Court could not determine. With the exception of the "doomed to fail" argument, none of the plaintiffs' claims could be advanced in the Magistrates Court. And the first Supreme Court proceeding was withdrawn because the plaintiffs appreciated that it ought to have been commenced by way of a claim, not an application and that is what occurred.[134]

**Whether the applicants' argument about the multiplicity of proceedings is misconceived**

[233] The applicants' arguments about the multiplicity of proceedings are not misconceived.

[234] As the authorities referred to below demonstrate, pursuit of the same relief by two causes of action in separate proceedings between the same parties is presumptively oppressive. The "doomed to fail" argument which the plaintiffs wish to make in this court may be made in the Magistrates Court at the close of the Crown case at committal and at trial. And an application for a stay of proceedings may be made in the trial court – on the assumption that the plaintiffs are committed for trial.

---

[128] [2018] HCA 45.
[129] (1979) 9 ALR 509.
[130] (1995) 185 CLR 571.
[131] [2007] QCA 316.
[132] [2009] QSC 175.
[133] (2015) 256 CLR 507.
[134] PLC's written submissions, paragraphs [67] – [73].

[235] I note the plaintiffs' explanation for there being two proceedings brought in the Supreme Court; the withdrawal of their abuse of process argument in the Magistrates Court; and the explanation for Mr Palmer's discontinuance of the joint claim and his filing a new one.

[236] In my view, the vice in the plaintiffs' claims is more obviously in the way in which they fragment the criminal proceedings than in their multiplicity. I have dealt with the application primarily on that basis. It is not necessary for me to also determine the applicants' arguments about the multiplicity of proceedings, however, the authorities to which I was referred, which deal with the prejudice of multiple proceedings, also deal with delay and abuse of process and reinforce my conclusions and *USB AG v Tyne* was relied upon by the applicants for other reasons which I have dealt with. For that reason, I will refer to them.

**The applicants' authorities**

***UBS AG v Tyne***

[237] *UBS AG v Tyne* was a 4:3 decision of the High Court, allowing an appeal from a decision of the Full Court of the Federal Court, and finding, in effect, that the primary judge was correct in concluding that proceedings by Tyne were an abuse of process.

[238] The case involved a dispute which was litigated in the Federal Court of Australia, the High Court of Singapore and the New South Wales Supreme Court. In the Federal Court, it was alleged by Tyne and his wife that UBS gave negligent advice to him and to the trustee of his family trust and to his investment company (Telesto), which caused loss to the trust and to Tyne's wife, as guarantor.

[239] Tyne, the trustee of the trust and Telesto brought proceedings in the Supreme Court of New South Wales, which made claims similar to those made in the Federal Court. Tyne and the trust discontinued their claims in the Supreme Court. Those proceedings, with then only Telesto as plaintiff, were permanently stayed on the ground that Telesto was seeking to re-litigate causes of action which had been substantially determined by the High Court of Singapore.

[240] UBS applied to have the Federal Court proceedings stayed on grounds which included that they were an abuse of process of the Federal Court. At first instance, the proceedings were stayed as an abuse of process. An appeal by Tyne against the primary judge's decision was successful, (Dowsett J dissenting), and the proceedings were allowed to continue.

[241] On appeal to the High Court, they were found (4:3) to be an abuse of process and orders were made which had the effect of restoring the decision of the primary judge.

[242] The difference of opinion in the High Court was based on different views of Tyne's conduct. There was no difference of opinion about the principles involved.

[243] The majority in *UBS AG v Tyne* held that the timely, cost-effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute. It found that Tyne's conduct, in removing the trust's claim from the Supreme Court proceedings, with a view to bringing it in another court after the determination of those proceedings, was the antithesis of the discharge of the duty imposed upon parties to civil litigation to conduct proceedings consistent with the overriding, overarching purpose to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

[244] Kiefel CJ, Bell and Keane JJ concluded:[135]

> For the Federal Court to lend its procedures to the staged conduct of what is factually the one dispute prosecuted by related parties under common control with the attendant duplication of court resources, delay, expense and vexation … is likely to give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys. The primary judge was right to permanently stay the proceedings as an abuse of the processes of the Federal Court.

[245] The minority found that it was not an abuse of process for the trustee to institute the Federal Court proceedings after the previous trustee had discontinued its participation in the Supreme Court proceedings. Their Honours findings included that that there had in fact been no material delay, additional costs, repetition of process, undue vexation of UBS or inconvenience as a consequence of Tyne's conduct. Nor had UBS changed its position in reliance upon the discontinuance.

[246] Gordon J, in the minority, said (footnotes omitted):[136]

> This appeal raises important issues about the way in which litigation is conducted in the 21st century. Over the last 20 years, there has been a "culture shift" in the conduct of litigation. The legal system has faced, and continues to face, great challenges in providing appropriate mechanisms for the resolution of civil disputes. Cost and delay are long-standing challenges. The courts and the wider legal professional have an obligation to face and meet these and other challenges. Failure to respond creates (or at least exacerbates) hardship for litigants and potentially results in long-term risks to the development, if not the maintenance, of the rule of law.
>
> The power to grant a stay of proceedings exists to enable a court to "protect itself from abuse of process thereby safeguarding the administration of justice". The doctrine of abuse of process is not limited to defined and closed categories of conduct. It is *capable* of being applied to "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". If a proceeding would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party, the proceeding should be stayed or dismissed. Or, put another way, where "the processes and procedures of the court, which exist to administer

---

[135] Ibid [59].
[136] Ibid [125 ] – [126].

justice with fairness and impartiality, may be converted into instruments of injustice or unfairness", a proceeding should be stayed or dismissed. .

***Moore and Others v Inglis***

[247] Mrs Inglis commenced proceedings first the Supreme Court of the Australian Capital Territory and then in the High Court. There were some differences between the actions, but the subject matter was the same. Mrs Inglis sought declarations in the High Court that the defendants had engaged in conspiracies which might be taken into account in the Supreme Court proceedings for damages for conspiracy.

[248] The defendants applied to the High Court for an order striking out the whole of the statement of claim.

[249] The principal issue was whether the commencement by the plaintiff of proceedings in the High Court should be held to be vexatious or oppressive. Mason J referred to statements of principle to the effect that it was *prima facie* vexatious to bring two actions where one would lie, or to sue concurrently in two courts, and determined that although there were differences between the two proceedings, the High Court proceedings should be stayed.

***Di Carlo v Dubois***

[250] *Di Carlo v Dubois* concerned an unsuccessful application by the appellant for damages for personal injury, allegedly inflicted by the negligence of the respondent Dr Dubois and others. The action was commenced in 1996, and ultimately concluded, against the appellant, in July 2003. He appealed unsuccessfully against the decision of the primary judge in May 2004 and was refused leave to appeal to the High Court in March 2005. He made two applications to the Court of Appeal (in 2007) seeking to review his claims. His applications were refused. Keane JA said (footnotes omitted):[137]

> It is of great importance in the administration of civil justice that litigation is not allowed by the courts to become an instrument of harassment and oppression. There is, objectively speaking, an undeniable element of vexation in the applicant's insistence on attempting to maintain his appeal in relation to the original action and, at the same time, pursuing an action to have the judgment in the original actions set aside. It has long been established that the pursuit of the same relief by two causes of action in separate proceedings between the same parties is presumptively oppressive …

***Flynn v Suncorp Metway***

[251] Flynn commenced proceedings in the Magistrates Court against Suncorp Metway. The proceedings concerned the alleged breach of fiduciary duty by a trustee. Suncorp Metway disputed the existence of the trust. Flynn filed an originating application in the Supreme Court, for a declaration that, in effect, the trust existed. In staying further proceedings under the originating application, the Chief Justice observed that the case was not dissimilar to *Moore v Inglis*. Flynn was pursuing a claim for a declaration in the Supreme Court with a view to facilitating the determination of the issues already

[137] [2007] QCA 316, [27].

live in the Magistrates Court. The Supreme Court proceedings were stayed as an abuse of process. I note that costs were awarded on an indemnity basis, especially because Flynn had been warned about the inappropriateness of the conduct he proposed.[138]

**Comments about the multiplicity of proceedings arguments**

[252] As I have explained, I do not need to decide whether the multiplicity of proceedings in this case is so oppressive or productive of such delay as to warrant their being set aside, stayed or struck out.

[253] However, I note the statements of Gordon J in *UBS AG v Tyne* and the need for the courts to respond to the challenges of costs and delay and the importance of ensuring that the court's procedures are not deployed in such a way as to bring the administration of justice into disrepute.

[254] I note also the similarities between this case and *Flynn v Suncorp Metway* and *Moore and Others v Inglis* in the plaintiffs' attempts to have this court make decisions about matters relevant to their foreshadowed no case application in the Magistrates Court. In *Flynn* and *Moore,* the concurrent proceedings were stayed.

**Orders**

[255] I order that the plaintiffs' claims (on file numbers 10132/18 and 13339/18) be set aside.

[256] The claims having been set aside, I order that the accompanying statements of claim (in the case of PLC, as amended) be struck out.

[257] The applicants seek costs on an indemnity basis. Written submissions from the plaintiffs and the first defendant about the appropriate costs order are to be provided by 4 pm on 31 January 2019.

---

[138] [2009] QSC 175 [26].