# SUPREME COURT OF QUEENSLAND

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| CITATION: | *PRS v Crime and Corruption Commission* [2019] QCA 255 |
| PARTIES: | **PRS**<br>(appellant)<br>**v**<br>**CRIME AND CORRUPTION COMMISSION**<br>(respondent) |
| FILE NO/S: | Appeal No 4172 of 2019<br>SC No 9644 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane – [2019] QSC 83 (Davis J) |
| DELIVERED ON: | 19 November 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 July 2019 |
| JUDGES: | Morrison and McMurdo JJA and Bradley J |
| ORDERS: | **1. Appeal dismissed.**<br>**2. The appellant pay the respondent's costs of and incidental to the appeal.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – where the appellant in the first instance applied for injunctive relief against the respondent – where the application arose out of an investigation into alleged corrupt conduct by a person (ABC) who held an appointment in a unit of public administration – where an investigation by the respondent concerned dealings between the appellant and ABC – where the application in the first instance was dismissed – where the appellant seeks to appeal the decision to dismiss the application – where fourteen grounds of appeal were initially articulated in the amended notice to appeal, but were subsequently grouped into six grounds – where it is contended that the court erred in failing to order the respondent to provide disclosure of documents – where it is contended that the court erred in failing to allow the appellant leave to amend the orders sought – where it is submitted that the court erred in finding that the investigation had concluded at the relevant time and that the court therefore had no power to grant injunctive relief pursuant to s 332 of the *Crime and Corruption Act* 2001 (Qld) – where it is argued that the court |

erred in finding that a police officer seconded by the respondent had the power to charge the appellant in relation to a corruption offence – where it is submitted that the court erred in finding that it should not embark upon a consideration of the appellant's complaint as to unfairness – whether the learned primary judge erred in the first instance pursuant any of to the appealed grounds

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – EXERCISE OF POWERS AND DUTIES – GENERALLY – where the learned primary judge concluded that the investigation of the respondent had concluded and the court therefore had no power to grant injunctive relief pursuant to s 332 of the *Crime and Corruption Act* 2001 (Qld) – where the appellant argues that for the purposes of s 332 the relevant time for deciding whether an investigation is on foot or not is the time at which a person "claims" one of the two bases under s 332(1) *Crime and Corruption Act* 2001 (Qld) – where it is contended that the interpretation of the s 332 of the *Crime and Corruption Act* 2001 (Qld) permitted the circumvention of the of that section by the respondent – where it is contended that a police officer that was seconded by the respondent was not able to exercise the powers of an arresting or charging officer into the conduct of a person called to give evidence before the respondent as an officer not seconded by the respondent might – where it is contended that the seconded officer could not be in a position to determine that any charge should be laid against the appellant as the officer could not form a "reasonable suspicion" divorced from consideration of privileged material – where it is submitted that the preservation of police powers under s 255(5) of the *Crime and Corruption Act* 2001 (Qld) should be read subject to a limitation – whether the learned primary judge erred in his interpretation that the court had no power to grant injunctive relief – whether the learned primary judge erred in concluding that the investigation was complete – whether the learned primary judge erred in finding that the officer seconded by the respondent had the power to charge the appellant in relation to a corruption offence

*Crime and Corruption Act* 2001 (Qld), s 197(7), s 255(5), s 332

*Le Grand v Criminal Justice Commission* [2001] QCA 383, cited
*NS v Scott* [2018] 2 Qd R 397; [2017] QCA 237, cited

COUNSEL: K Weston-Scheuber for the appellant
L K Crowley QC, with S E Harburg, for the respondent

SOLICITORS: A Ace Solicitors for the appellant
Crime & Corruption Commission for the respondent

[1] **MORRISON JA:** PRS applied for injunctive relief against the Crime and Corruption Commission (**the CCC**). The application arose out of an investigation into alleged corrupt conduct by a person (**ABC**) who held an appointment in a unit of public administration. The investigation concerned, amongst other things, dealings between PRS and ABC.

[2] In the course of the investigation the CCC utilised various statutory powers, including powers of compulsory examination of PRS.

[3] The learned primary judge directed that points of claim be filed so that the nature of the claim and relief could be properly identified. The amended application, brought under s 332 of the *Crime and Corruption Act* 2001 (Qld) (***CCC Act***), sought various forms of relief including:

(a) an injunction restraining the CCC from proceeding further in the prosecution of any charges against PRS until the application had been determined by the court;

(b) that the Commissioner of the CCC be restrained from chairing a hearing in relation to PRS;

(c) that the CCC direct all police officers seconded to the CCC not to issue a notice to appear or a complaint and summons to PRS;

(d) that a similar direction be issued preventing seconded police officers from referring the matter to any other police officer for the purpose of commencing charges against PRS;

(e) that the CCC be restrained from exercising any power, whether directly or indirectly, to perform any action which is outside their powers as identified in the *CCC Act*;

(f) that the CCC close the investigation into the corruption hearing of ABC;

(g) alternatively, that the CCC open the corruption hearing of ABC to the public, with some exceptions;

(h) that the CCC take all steps required to ensure that the investigation is conducted in a manner that is fair to all the parties;

(i) that all witnesses called at the corruption hearing of ABC be recalled and that the legal representatives of PRS be entitled to cross-examine those witnesses;

(j) that the legal representatives of PRS be provided with copies of all evidence gathered in the corruption hearing of ABC; and

(k) that the legal representatives of PRS be entitled to call witnesses at the hearing into PRS.

[4] The points of claim filed in support of that claim alleged that the CCC did not have jurisdiction to charge anyone with corruption offences. Particulars of that allegation were that the CCC had issued a directive to a police officer to charge PRS with the offence of criminal corruption, that police officer did not form a reasonable suspicion that PRS had committed that crime, and no facts existed which would create a reasonable suspicion that that was the case.

[5] The points of claim then pleaded that the investigation by the CCC was not handled in a manner which was fair and just to PRS, but revealed apprehended bias, actual bias and unfairness otherwise within the meaning of s 332 of the *CCC Act*. Within that last allegation it was said that: PRS had been denied natural justice, the full scope of evidence and particulars against PRS had never been put to PRS, nor was PRS provided with an opportunity to respond or provide evidence.

[6] That application was dismissed by the learned primary judge. PRS now seeks to challenge that decision.

**Approach of the learned primary judge**

[7] At the outset the learned primary judge noted a number of findings including:[1]

(a) the CCC had conducted an investigation into ABC, which involved the use of coercive powers, including compulsory examination of witnesses;

(b) PRS had been summoned and examined in the exercise of those coercive powers;

(c) the investigation of ABC "is at an advanced stage, if not completed";

(d) ABC had been charged with criminal offences;

(e) a police officer had sworn that he had formed a reasonable suspicion that PRS had committed the offence of official corruption, and intended to charge PRS by issuing a Notice to Appear;

(f) the only reason he had not done so was because of PRS's application to the Supreme Court; and

(g) no further investigations were planned into the activities of PRS and the investigation of PRS had been completed.

[8] The learned primary judge examined a number of provisions of the *CCC Act*, and then set out s 332, the provision governing the application:

> "**332 Judicial review of commission's activities in relation to corrupt conduct**
>
> (1) A person who claims:
>
> (a) that a commission investigation into corrupt conduct is being conducted unfairly; or
>
> (b) …
>
> may apply to a Supreme Court judge for an order in the nature of a mandatory or restricted injunction addressed to the commission.
>
> …
>
> (8) An application under this section is to be heard in closed court.
>
> (9) In this section—

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1 *PRS v Crime and Corruption Commission* [2019] QSC 83 at [7]-[8].

> ***commission investigation into corrupt conduct*** includes an investigation of a matter mentioned in section 33(2).
>
> ***injunction proceeding*** means an application under subsection (1) and a proceeding on the application."

[9] The learned primary judge noted that the relief sought fell into one of two categories. The first was for orders which regulated or stopped the investigation into ABC and PRS. The second was orders which prevent the prosecution of PRS being commenced.[2]

[10] The learned primary judge identified the first issue as being whether s 332 gave jurisdiction to make the orders sought. His Honour concluded that s 332 seeks to regulate the use of investigative powers "which are being or are to be exercised", and the section did not contemplate a review of the past exercise of powers where no further exercise of powers was contemplated.[3] Referring to the decision of this Court in *Le Grand v Criminal Justice Commission*[4] his Honour found that what PRS really sought was "a review of the completed investigation, its reopening, and the making of orders directing that the reopened investigation be conducted in a particular way". His Honour concluded that s 332 did not authorise such orders.

[11] The learned primary judge then examined whether the Court had jurisdiction to regulate the exercise of the CCC's statutory powers independently of s 332 of the *CCC Act*.[5] His Honour concluded that discretionary considerations pointed inevitably towards the refusal of relief. In that respect his Honour made several findings:

(a) as a matter of fact, the further exercise of coercive investigative powers against PRS was not contemplated, the investigation being complete;[6]

(b) any impact of the conduct of the CCC investigation upon criminal proceedings brought against PRS was a matter for assessment by the court in which those criminal proceedings were brought;[7] and

(c) review of the complaints was unnecessary and inappropriate because of the finding that there was no current investigation and no basis to grant injunctive relief.[8]

[12] The learned primary judge then turned to the question whether a police officer seconded to the CCC, who charged a person arising out of an investigation, was or could be directed to do so by the CCC. His Honour concluded that the true position was that such a police officer retained power to do so under the *Police Powers and Responsibilities Act* 2000 (Qld) and acted independently in doing so:[9]

> "However, a police officer seconded to the CCC but retaining his or her powers, vested by the *PPRA*, retains the responsibility of exercising those powers lawfully; just as if he or she were not seconded to the

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2 Reasons below at [19].
3 Reasons below at [25]-[27].
4 [2001] QCA 383.
5 Referring to *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, and *Annetts v McCann* (1990) 170 CLR 596.
6 Reasons below at [33].
7 Reasons below at [34].
8 Reasons below at [34].
9 Reasons below at [52].

> CCC. It is the police officer who must form the 'reasonable suspicion' before issuing a notice to appear. The CCC cannot direct any police officer to act unlawfully. In particular, the CCC could not direct a seconded police officer to issue a notice to appear without him forming the requisite suspicion. If the police officer, though, forms the requisite suspicion, the police officer exercises the powers given to him or her under the *PPRA* to issue a notice to appear and it is therefore the police officer, not the CCC, who will charge the applicant."

[13] Finally his Honour found that there were overwhelming discretionary reasons why the Court would not order the CCC to give a direction to police officers to prevent them exercising their powers.[10]

**Grounds of appeal**

[14] Fourteen grounds of appeal were articulated in the amended notice of appeal, but the outline on behalf of PRS grouped them into six grounds:

(a) Ground 1 – failing to order that the CCC provide disclosure of documents;

(b) Ground 2: failing to grant leave to amend the orders sought;

(c) Grounds 3-5: finding that the investigation had concluded at the relevant time, and that the court therefore had no power to grant injunctive relief pursuant to s 332 of the *CCC Act*;

(d) Grounds 6-11: finding that a seconded police officer at the CCC had the power to charge PRS in relation to a corruption offence;

(e) Ground 13: finding that the orders sought should not be made in the general jurisdiction of the court; and

(f) Ground 14: finding that the court should not embark upon a consideration of PRS's complaints as to unfairness.

[15] It should be noted that grounds 13 and 14 were sought to be added only in the appellant's outline of submissions. The respondent to the appeal opposed leave being granted in respect of ground 13, but met the contention in respect of ground 14.

**Grounds 3 – 5: investigation concluded or not**

[16] It is convenient to commence with grounds 3-5, which concern the learned primary judge's finding that the CCC investigation had concluded at the relevant time, and that the court therefore had no power to grant injunctive relief pursuant to s 332 of the *CCC Act*.

[17] The appellant's contention was that for the purposes of s 332 the relevant time for deciding whether an investigation is on foot or not is the time at which a person "claims" one of the two bases under s 332(1). That time, it was said, was when the application was filed on 6 September 2018. On 8 February 2019 the appellant was notified of the refusal of his application to cross-examine one witness. That

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10 Reasons below at [53]-[57].

indicated that the investigation was on foot at that time. The learned primary judge was, it was said, in error to make a finding based upon the state of the investigation as at the date that the application was heard and determined. Further, it was contended that there was error in treating the "investigation" as one into PRS, rather than "investigation Windage".

[18] The contention was that the learned primary judge's interpretation of s 332 permitted the CCC to circumvent its operation by closing an investigation if a complaint was made under that provision. Further, it was contended that the court's broad powers would extend to reopening an investigation where it had closed between the making of the complaint and the time of hearing, if the investigation was ongoing at the time the complaint was made.

[19] For the respondent, it was submitted whether an investigation is being conducted as at a particular date was a question of fact.[11] The uncontested evidence of the relevant police officer was that the investigation was complete. That officer was not cross-examined at first instance. His evidence was that he formed the requisite suspicion to charge PRS on 22 June 2018, and there was no evidence of any acts in furtherance of the investigation after June 2018. Further, the fact that the CCC communicated a refusal of a request to cross-examine a witness after that date was not evidence that the investigation was on foot. The evidence of the police officer was the only evidence before the court.

**Discussion: grounds 3 – 5**

[20] The proper construction of s 332 depends upon the text of that provision, in the general context of the *CCC Act*. It is therefore appropriate to refer to a number of provisions to understand that context.

[21] The CCC Act's purposes and how they are to be achieved are set out in ss 4 and 5:

> "**4. Act's purposes**
>
> (1) The main purposes of this Act are—
>
> (a) to combat and reduce the incidence of major crime; and
>
> (b) to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector.
>
> (2) The Act also has as the purpose to facilitate the commission's involvement in a confiscation related investigation.
>
> **5. How Act's purposes are to be achieved**
>
> (1) The Act's purposes are to be achieved primarily by establishing a permanent commission to be called the Crime and Corruption Commission.
>
> (2) The commission is to have investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate major crime and criminal organisations and their participants.
>
> (3) Also, the commission is to—

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11 Referring to *Le Grand v CJC* [2001] QCA 383, at [23].

(a) investigate cases of corrupt conduct, particularly more serious cases of corrupt conduct; and

(b) help units of public administration to deal effectively and appropriately with corruption by increasing their capacity to do so.

(4) Further, the commission has particular powers for confiscation related investigations for supporting its role under the Confiscation Act."

[22] The CCC's functions and powers relate to the investigation of major crime and major corruption. The investigation concerning ABC and PRS was a corruption investigation, exercising the CCC's corruption function. The Commission's corruption functions are conferred by s 33:

"**33 Commission's corruption functions**

(1) The commission has the following functions for corruption (the ***corruption functions***)—

(a) to raise standards of integrity and conduct in units of public administration;

(b) to ensure a complaint about, or information or matter involving, corruption is dealt with in an appropriate way, having regard to the principles set out in section 34.

(2) The commission's ***corruption functions*** also include—

(a) investigating and otherwise dealing with—

(i) conduct liable to allow, encourage or cause corrupt conduct; and

(ii) conduct connected with corrupt conduct; and

(b) investigating whether corrupt conduct or conduct mentioned in paragraph (a)(i) or (ii) may have happened, may be happening or may happen."

[23] Section 34 then sets out the principles for performing corruption functions, including cooperation between the CCC and units of public administration, both to prevent and deal with corruption, and public interest principles such as an overriding responsibility to promote public confidence, including in the way corruption is dealt with, and exercising its power to deal with particular cases of corruption when it is appropriate having regard to various factors including the nature and seriousness of the corruption and any likely increase in public confidence in having the corruption dealt with by the CCC directly.

[24] The way in which the CCC performs its corruption functions is the subject of s 35:

"**35 How commission performs its corruption functions**

(1) Without limiting how the commission may perform its corruption functions, it performs its corruption functions by doing 1 or more of the following—

(a) expeditiously assessing complaints about, or information or matters (also ***complaints***) involving, corruption made or notified to it;

(b) referring complaints about corruption within a unit of public administration to a relevant public official to be dealt with by the public official;

…

(e) dealing with complaints about corrupt conduct, by itself or in cooperation with a unit of public administration;

…

(g) assuming responsibility for, and completing, an investigation, by itself or in cooperation with a unit of public administration, if the commission considers that action to be appropriate having regard to the principles set out in section 34;

(h) when conducting or monitoring investigations, gathering evidence for or ensuring evidence is gathered for—

(i) the prosecution of persons for offences; or

(ii) disciplinary proceedings against persons;

…

(j) …

(2) In performing its corruption functions in a way mentioned in subsection (1), the commission should, whenever possible, liaise with a relevant public official."

[25] The powers exercisable by the CCC are found in chapter 3 of the *CCC Act*. Those powers include the ability to search pursuant to warrant, search in emergency situations without warrant, search persons and property, monitor and supervise financial institutions in respect of the activities of people suspected of criminal activity, issue surveillance warrants and controlled operations.

[26] Chapter 4 authorises the CCC to conduct hearings "in relation to any matter relevant to the performance of its functions": s 176(1). There are various provisions regulating how the power to conduct hearings is to be exercised, drawing a distinction between hearings in respect of criminal investigations and those in respect of corruption investigations. There are provisions within Chapter 4 which render those powers subject to judicial control: for example, s 195.

[27] It is in that context that one finds the provisions of s 332: see paragraph [8] above.

[28] As is apparent, s 332 provides a form of judicial review of the CCC's activities in relation to corrupt conduct. The powers conferred for that purpose are found in s 334:

"**334 Application under s 332**

(1) If the judge who hears an application under section 332 is satisfied as to the matter claimed by the applicant, the judge may, by order—

(a) require the senior executive officer (corruption) to conduct the investigation in question in accordance with guidelines specified in the order; or

(b) direct the senior executive officer (corruption) to stop or not proceed with an investigation on the complaint or information to which the application relates."

[29] Where the CCC investigates corruption and determines that action should follow, provision is made in the *CCC Act*, Division 5 of Part 3 of Chapter 2, which is headed "Action following investigation". The relevant provisions are as follows:

"**49 Reports about complaints dealt with by the commission**

(1) This section applies if the commission investigates (either by itself or in cooperation with a public official), or assumes responsibility for the investigation of, a complaint about, or information or matter involving, corruption and decides that prosecution proceedings or disciplinary action should be considered.

(2) The commission may report on the investigation to any of the following as appropriate—

(a) a prosecuting authority, for the purposes of any prosecution proceedings the authority considers warranted;

…

(3) If the commission decides the prosecution proceedings for an offence under the Criminal Code, section 57 should be considered, the commission must report on the investigation to the Attorney-General.

(4) A report made under subsection (2) or (3) must contain, or be accompanied by, all relevant information known to the commission that—

(a) supports a charge that may be brought against any person as a result of the report; or

(b) supports a defence that may be available to any person liable to be charged as a result of the report;

…

(5) In this section—

***prosecuting authority*** does not include the director of public prosecutions.

**50 Commission may prosecute corrupt conduct**

(1) This section applies if the commission reports to the chief executive officer of a unit of public administration under section 49 that—

(a) a complaint, matter of information involves, or may involve, corrupt conduct by a prescribed person in the unit; and

(b) there is evidence supporting the start of a disciplinary proceeding for corrupt conduct against the prescribed person.

(2) The commission may apply, as provided under the QCAT Act, to QCAT for an order under section 219I against the prescribed person.

(3) In this section—

***prescribed person*** means—

(a) a person—

(i) was a member of the police service; or

(ii) being a member of the police service, whose employment as a member of the police service ends after the corrupt conduct happens, regardless of whether the employment ends before or after the start of a disciplinary proceeding for the corrupt conduct; or

…

**51 Other action for corruption**

(1) Nothing in this part limits the action that may lawfully be taken by the commission or a unit of public administration to discipline or otherwise deal with a person for corruption.

*Example –*

The commissioner of police may bring a disciplinary charge against a police officer under the *Police Service Administration Act 1990*.

(2) Subsection (1) is subject to sections 47 and 48."

[30] The CCC's powers are wide, as can be seen from s 174, which deals with the general powers of the CCC, but also refers to a person whose services are seconded to the CCC:

"**174 Commission's powers generally**

(1) Without limiting the commission's specific powers under this or another Act, the commission has power to do all things necessary or convenient to be done for or in connection with, or reasonably incidental to, the performance if its functions.

*Note –*

See, for example, the *Police Powers and Responsibilities Act 2000*, chapter 11 (Controlled operations).

(2) A person who is a member of a relevant office whose services are seconded to the commission under section 255 retains, and may exercise, all powers had by the person as a member of the office.

(3) In this section—

***relevant office*** means a unit of public administration or an office within a unit of public administration."

[31] The reference in s 174(2) to a person who is seconded to the CCC under s 255 focusses attention upon that section. It relevantly provides:

"**255 Secondment of officers**

(1) The chief executive officer may arrange with the chief executive of a department, or with another unit of public administration, for the services of officers or employees of the department or other unit to be made available (***seconded***) to the commission.

(2) The arrangement is not effective unless it has been approved by—

(a) …

(b) for the secondment of a member of the police service—the Minister and the Minister administering the *Police Service Administration Act 1990*; or

(c) …

(3) An officer or employee seconded to the commission under this section is subject to the direction and control of the chief executive officer.

(4) However, if police officers are seconded to the commission, their efficient deployment is to be the joint responsibility of the chief executive officer and the most senior police officer seconded to the commission.

(5) Without limiting section 174(2), a police officer seconded to the commission under this section continues to be a police officer for all purposes and to have all the functions and powers of a police officer without being limited to the performance of the commission's functions.

*Example for subsection (5) –*

A police officer seconded to the commission may exercise the powers of a police officer under the *Police Powers and Responsibilities Act* 2000 for an investigation of alleged corruption involving a relevant offence as defined in section 323 of that Act."

[32] Relevant to an analysis of these grounds of the appeal is the evidence of Detective Sergeant Edwards, which appears in an affidavit sworn by him on 21 February 2019.[12] He deposed that he was a police officer of nearly 17 years standing when

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12 Appeal Book (**AB**) 501.

he "commenced at the Crime and Corruption Commission on 26 September 2017 on a temporary basis". On 9 July 2018 he "was seconded to the Crime and Corruption until 8 July 2021". Upon his commencement with the CCC he was "assigned to Operation Windage". He then made direct reference to PRS and matters concerning him:

> "5. On 22 June 2018, I formed the reasonable suspicion PRS, [ABC] and [CDS] had committed an offence in relation to the 'Yamanto development'.
>
> 6. On 10 August 2018, I issued [ABC] and [CDS] a Notice to Appear in relation to the Yamanto Development.
>
> 7. At the time of forming the reasonable suspicion, the investigation had concluded but for the attainment of statements from a number of witnesses including CCC investigators, covert surveillance officers.
>
> 8. The last civilian statement was taken on 20 June 2018. All of the statements obtained after this date had been from law enforcement officers.
>
> 9. At this point of time, there is no outstanding statements that I need to obtain in relation to the Yamanto Development or other investigative steps that I need to undertake."

[33] There was no request made before the learned primary judge to cross-examine DS Edwards.

[34] The reference to "Operation Windage" is explained elsewhere. Ms McIntyre's affidavit[13] deposes that on 17 October 2016, the CCC "commenced a corruption investigation code named Operation Windage". DS Edwards' reference to Yamanto is also explained in Ms McIntyre's affidavit. The Notice of Attendance to relevant witnesses related to the development of a site at a particular address in Yamanto.[14]

[35] It is also apparent that the codename of the corruption investigation varied. DS Edwards and others referred to it as "Operation Windage", but the authorisation documents to hold hearings referred to it as "Investigation Windage"[15] and other official acts did the same.[16] Further, the notice of appeal filed by PRS refers to "the investigation known as Operation Windage".[17] Finally, paragraph 4 of the statement of facts alleges that Operation Windage "was an investigation into the corruption of" certain persons.[18]

[36] What follows from that evidence, none of it challenged, is that: (i) DS Edwards' assignment was to a corruption investigation code named "Operation Windage"; (ii) that investigation included the Yamanto Development which concerned, amongst others, PRS; and (iii) on 22 June 2018, he formed the reasonable suspicion that PRS had committed an offence in relation to that development. As a consequence, a Notice to Appear was issued to others the subject of the investigation. That occurred prior to the originating application being filed.[19]

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13 AB 186.
14 AB 187, para 7.
15 For example, AB 193.
16 For example, AB 195, AB 229.
17 AB 2, para 3.
18 AB 108.
19 This only occurred on 6 September 2018: AB 443.

[37] There is other evidence to which reference can be made. The material reveals the following:

(a) PRS was issued with his own notice to appear before the CCC, on 1 August 2017;[20] the hearing was scheduled for 23 August 2017;

(b) on 21 August 2017, at 1.15 pm, the solicitor for PRS foreshadowed to the CCC that his instructions were to apply to the Supreme Court for an urgent order restraining the CCC from proceeding with the hearing;[21]

(c) on 21 August 2017, at 4.43 pm, the solicitors for PRS advised that they held instructions to seek declaratory relief in the Supreme Court in relation to the appearance by PRS;[22]

(d) on 10 August 2018, DS Edwards advised the solicitor for PRS that the CCC had "finalised investigations surrounding your client's involvement in a development at Yamato", and that he intended to charge PRS with one count of official corruption;[23]

(e) on 22 August 2018, the solicitor for PRS foreshadowed that an interim order would be sought, that no action be taken until the application to the Supreme Court was determined;[24]

(f) on 29 August 2018, the CCC advised the solicitor for PRS that "the CCC will not take steps to charge your client prior to the first mention of this matter in court", provided it was commenced expeditiously;[25]

(g) on 6 September 2018, the originating application was filed;[26]

(h) on 28 November 2018 the solicitor for PRS was provided with copies of redacted transcripts of the closed investigation hearings of a witness (XYZ), conducted on 11 and 12 October 2017;[27]

(i) the letter of 28 November 2018 explained that in preparation of the proceedings commenced by the originating application it had been noted by the CCC that an order had been made to the effect that the solicitor for PRS "would receive notification and the opportunity to make submissions to be present if other witnesses attended a Commission hearing in relation to the investigation into suspected corrupt conduct involving … your client …";[28] the letter went on to explain that due to an oversight they had not been advised about the witness XYZ; the letter then asked for a response "if you would like to make any submissions about having the opportunity to examine [XYZ]";[29]

(j) on 18 December 2018, the solicitor for PRS requested an undertaking that PRS would not be charged until after the CCC considered his client's request to cross-examine XYZ;[30]

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20 AB 151.
21 AB 166.
22 AB 165.
23 AB 173, 383.
24 AB 385-386.
25 AB 391.
26 AB 436.
27 AB 439.
28 AB 441.
29 AB 441 – 442.
30 Affidavit of Mr Gorry, paragraph 18, AB 398.

(k) on 18 December 2018, an email went from the CCC to the solicitor for PRS, confirming the phone conversation between them; it recorded an agreement that if the solicitor provided a written application that day to examine witness XYZ, an undertaking would be given on behalf of the CCC "that your client will not be charged until this application has been considered and you have been advised of the outcome of the decision to examine [XYZ]";[31]

(l) on 18 December 2018, the formal request to cross-examine was made;[32]

(m) the response came on 8 February 2019:[33]

> "I have considered your application to cross-examine [XYZ]. I have decided not to grant the application. Pursuant to Section 31 and Schedule 2 – item 3(1) of the *Judicial Review Act 1991*, I am not required to provide you with a statement of reasons for my decision."

[38] It is plain from that sequence, none of it challenged, that on 10 August 2018, well before the filing of the originating application, PRS was advised that the investigation was complete and that he was to be charged with an offence.

[39] Contrary to the submissions for PRS, none of that, in my view, warrants the conclusion that the investigation was still on foot at the time the response came as to cross-examining XYZ. It was after the originating application had been filed that it became apparent that by oversight notice had not been given about XYZ, who attended hearings in October 2017.[34]

[40] Even without the direct evidence of DS Edward's communication on 10 August 2018, that the investigation was complete, there was a basis to infer that it was complete by the time the application was filed on 6 September 2018.

[41] As the learned primary judge observed, s 382 of the *Police Powers and Responsibilities Act* provides a way for a police officer to start proceedings against a person for an offence. The police officer may issue a Notice to Appear if the police officer reasonably suspects that the person has committed or is committing an offence: s 382(2)(a). The Notice to Appear must contain a statement of "the substance of the offence alleged to have been committed", but with general particulars such as the type of offence and when and where it is alleged to have been committed: s 386(1).

[42] That being so, it was open to infer that by 22 June 2018, the investigation was complete, because by that date Sergeant Edwards was in a position to issue a Notice to Appear, which alleges the offence derived from the investigation. The "reasonable suspicion" is that an offence had been committed, and the Notice to Appear alleges that an offence has been committed. By 22 June 2018 that state of mind had been reached in relation to PRS.

[43] The application on behalf of PRS was not filed until 6 September 2018. That application proceeded on the basis that the investigation had, by that time, been completed. That appears to be the only available inference from the form of the application

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31 AB 450.
32 AB 453.
33 AB 466.
34 The year is recorded as 2018 in the CCC's letter dated 28 November 2018 (AB 441) but that is clearly a typographical error.

itself,[35] in that it sought orders that the CCC be restrained "from proceeding further in the prosecution of any charges" against PRS, until such time as the evidence in relation to ABC was disclosed and witnesses called in relation to ABC were recalled.

[44] In my view, the evidence provided a solid foundation for the findings by the learned primary judge that the CCC investigation in relation to PRS had been completed, and that the only reason PRS had not been charged was the proceedings in the court.[36] It seems evident from his Honour's reasons that his Honour's findings were as to the state of the investigation as at the date of the hearing. However, in my view, the evidence went further. The investigation had been completed before the Supreme Court proceedings issued. I therefore reject the submissions to the contrary on behalf of PRS, and that there was relevant error by the learned primary judge as to the state of the investigation at the time of the application being filed.

[45] I pause to note that part of those submissions included a challenge as to whether DS Edwards was in fact seconded to the CCC. This can be dealt with briefly. DS Edwards deposed that he commenced on 26 September 2017 on a temporary basis, and on 19 July 2018 was seconded until a finite date, namely 8 July 2021. In my view, that evidence is sufficient to show that he was seconded to the CCC at all relevant times. That is, in fact, what PRS contended in the statement of facts, pleading in paragraph 13(e) that at all material times he was "a police officer who was seconded to the Commission".[37]

[46] In my view, and as was accepted by Counsel for PRS before this Court, s 332 and the exercise of the powers in s 334 are dependent on an ongoing investigation.[38] At the time the application was filed, and at the time the application was heard, there was no investigation ongoing such as would make s 332 or s 334 applicable.

[47] These grounds of appeal fail.

**Ground 1: failure to order disclosure**

[48] This ground of appeal may be dealt with in short terms. At the hearing before the learned primary judge the solicitor for PRS agreed that the necessity for disclosure was dependant on whether it could be demonstrated that there was a legal basis for the substantive relief sought.[39] Absent a basis to obtain relief under s 332 and s 334 of the *CCC Act*, there is no basis for disclosure. The failure of grounds 3 – 5 mean that this ground fails also.

[49] The learned primary judge articulated the reasons why he refused the application for disclosure.[40] They were:

(a) the principal application was hopelessly misconceived;

(b) s 332 of the *CCC Act* upon which the application was based appeared not to authorise the making of the orders sought;

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35 AB 436.
36 Reasons below at [8], [27], [33] and [34].
37 AB 109.
38 *Le Grand v Criminal Justice Commission* [2001] QCA 383 at [22] – [23].
39 AB 637 lines 16-40.
40 Reasons below at [66].

(c) it appeared highly unlikely that the orders would be made in the exercise of the Court's general jurisdiction; and

(d) it was not then possible to identify any real issues which would warrant an order for disclosure.

[50] The appellant's contentions do not identify any substantive basis upon which one would conclude that the discretion miscarried. The appellant contends that notwithstanding the inability to obtain relief under s 332, the number of points raised in the points of claim were not admitted and were expressed as being "Subject to disclosure ruling".[41] An example was given in the submissions, namely that the appellant would be entitled to interrogate on the issue of whether DS Edwards was validly seconded to the CCC. It was submitted that the disclosure application should have been dealt with in advance of the substantive application for relief under s 322, as the disclosure was relevant to the success of that application.

[51] The appellant's contentions cannot be accepted. The basis upon which the relief was sought was that s 322 was applicable. If that proceeding continued, then it is possible that the *Uniform Civil Procedure Rules* could be utilised to give appropriate disclosure. However, there was no basis to invoke the powers under s 322 and s 334. To grant disclosure in those circumstances would be an abuse of the discretion underlying the application of *UCPR* rule 223.

[52] Further, reference to the originating application and the application for disclosure[42] reveals that at the time the application for disclosure was dismissed: (i) the relief sought was to restrain **the CCC** from instituting charges against PRS; (ii) the disclosure was in support of that relief; and (iii) what was sought was an extensive list of documents relating to hearings concerning people other than PRS.

[53] As will appear below, the charge foreshadowed was one brought by DS Edwards pursuant to s 382 of the *Police Powers and Responsibility Act*. It was not a charge brought by the CCC, nor could the CCC direct DS Edwards as to how to perform his duties under the *Police Powers and Responsibility Act*. Further, s 332 relates to the conduct of an investigation, not the subsequent bringing of a charge after the investigation is complete. These factors are why the learned primary judge found that the proceedings, including the application for disclosure, were hopelessly misconceived.[43]

[54] Further, only one category of disclosure directly related to PRS[44] and others were hopelessly wide in their scope. For example, paragraph 2(a) sought the criminal intelligence hearing of CDS, paragraph 2(f) sought "any formal police statements provided by any persons relating to offences arising out of Operation Windage", and paragraph 2(g) sought "any Police notes and/or recordings taken between police officers and witnesses during Operation Windage". There was no apparent attempt to confine the scope of the application appropriately and as it stood it amounted to an abuse.

[55] In my view, the learned primary judge's discretion on this application did not miscarry. This ground fails.

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41 Appellant's outline, paragraph 4.
42 AB 36, 95.
43 Reasons below at [66].
44 Paragraph 2(d) of the application.

**Ground 2: refusal of leave to amend**

[56] This ground cannot succeed in light of the failure of grounds 3 – 5. There was no basis to invoke the powers of the court under s 332 and s 334, and therefore refusal of leave to amend the orders sought cannot be the subject of complaint. This ground fails.

**Grounds 6 – 11: power of a seconded police officer to charge**

[57] These grounds concern the fact that DS Edwards, a police officer seconded to the CCC, brought a charge against ABC and CDS, in the form of a Notice to Appear under s 382 of the *Police Powers & Responsibilities Act*. When the grounds of appeal were formulated it was the prospect of a charge issuing against PRS that was at the heart of these grounds. At that point DS Edwards had announced that he had formed the reasonable view that an offence had been committed by PRS, but the charge had been delayed while the proceedings were determined.

[58] Between the time when the notice of appeal was filed and the hearing before this Court occurred, events changed. On 7 April 2019 PRS was charged with official corruption under s 87(1)(b) of the *Criminal Code* 1899 (Qld). That was done by way of a Notice to Appear under s 382 of the *Police Powers & Responsibilities Act*.

[59] Counsel for PRS tendered some documents relating to that charge. They reveal that the police station or establishment involved was the "Crime and Misconduct Police Group" and the particular police officer involved is described as "QPS reference: Sergeant A EDWARDS, 4007990, CRIME AND MISCONDUCT POLICE GROUP".

[60] PRS's contentions accepted the conclusion by the learned primary judge that under s 255(5) of the *CCC Act*, a police officer seconded to the CCC retained the powers held by him or her as a police officer.[45] However, it was contended that such a police officer "is not able to exercise the powers of an arresting or charging officer into the conduct of a person called to give evidence before the Commission as an officer not seconded to the Commission might". This, it was said, followed because the coercive powers bestowed on the CCC include the power to require a person to give evidence that incriminates that person, over objection. In this respect, reference was made to s 192 of the *CCC Act*. As a secondee to the CCC, DS Edwards had access to the evidence given by PRS, which included evidence given under compulsion and over objection. The contention was that DS Edwards was "not entitled to access or have regard to that information for the purpose of investigating any allegation of criminal conduct by [PRS], nor for the purpose of considering whether charges should be laid against him".[46]

[61] The ultimate submission was that DS Edwards had access to the evidence given by PRS but only "for the purpose of performing a function under the Act and other specified Acts",[47] and that he was not entitled to access or have regard to that information for the purpose of investigating any allegation of criminal conduct by PRS, nor for the purpose of considering whether charges should be laid.[48]

[62] The appellant also contended that DS Edwards could not be in a position to determinate that any charge should be laid against PRS, as he could not form

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45 Reasons below at [49] – [50].
46 Appellant's outline, paragraph 24.
47 Referring to Schedule 2 of the order made by Mr Alsbury on 20 September 2018; AB 229-231.
48 Appellant's outline, paragraph 24.

a "reasonable suspicion" divorced from consideration of privileged material. The preservation of police powers under s 255(5) of the *CCC Act* should be read subject to such a limitation. If a seconded officer were entitled to charge notwithstanding that fact, it was submitted that it would be impossible to carry out judicial review of the decision to charge in a way that a person charged is entitled to do.[49] In determining whether a "reasonable suspicion" had been formed, the police officer's knowledge of the inadmissible material could not be excluded.[50]

[63] For the respondent it was submitted that the appellant's outline assumed that DS Edwards was either present or subsequently provided with access to the evidence given by PRS or other witnesses in coercive hearings. There was no evidence that that was so, as was found by the learned primary judge.[51] In any event, nothing in the *CCC Act* suggested that if it were established that a seconded police officer became privy to information which gave rise to the requisite reasonable suspicion of an offence, that the officer could not exercise their powers under the *Police Powers and Responsibilities Act* to issue a notice to appear.[52]

[64] It was contended that there was no injustice in such a construction of the *CCC Act*, because if evidence given in a coercive hearing had been improperly obtained or used, PRS could seek various remedies in resulting criminal proceedings including, in an extreme case, a stay of those proceedings. Those grievances are appropriately ventilated before the court where the criminal proceedings are brought.[53]

[65] Further, the respondent contended that seconded police officers retained their duties, functions and powers which they held as police officers under the common law and other statutes, such as the *Police Powers and Responsibilities Act*. The *CCC Act* does not expressly exclude the exercise of those duties, functions and powers, and they cannot be said to have been excluded by necessary implication from the terms of s 174(2) and s 255(4). Accordingly, a seconded police officer was entitled, and bound, to exercise the power to issue and serve a Notice to Appear where they reasonably suspected that a person had committed an offence. It was DS Edwards, and not the CCC, who formed the reasonable suspicion that an offence had been committed and it was he, and not the CCC, who decided to charge PRS.[54]

**Discussion: Grounds 6 - 11**

[66] For a number of reasons I am unable to accept the contentions for PRS on these grounds.

[67] First, the contentions proceed upon the basis that DS Edwards has been privy to, or had regard to, evidence obtained from PRS and others under the coercive powers given to the CCC. Further, the underlying assumption is that DS Edwards has taken such material into account in forming his reasonable suspicion that an offence has been committed by PRS. There is simply no evidence to support that assumption. Further, during the hearing before the learned primary judge, the solicitor appearing for PRS accepted that to be so. Specifically, when a submission was made to the learned primary judge that "a reasonable suspicion cannot possibly … be gained

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49 Referring to *Coleman v Power* (2004) 220 CLR 1 at [118] – [124].
50 Appellant's outline, paragraphs 25 and 26.
51 Referring to the transcript of the hearing below: AB lines 43- 46, AB 656 lines 1–16, and AB 657 lines 8–17.
52 Referring to the Reasons below at [64].
53 Respondent's outline, paragraph 28.
54 Respondent's outline, paragraph 32.

because of the access to the coercive material",[55] the learned primary judge questioned that. The response was that DS Edwards had not been cross-examined about that.[56] The proposition that DS Edwards was simply acting as directed by the CCC was also challenged by the learned primary judge,[57] drawing the response from PRS's solicitor that "there is no evidence as to why they formed the opinion that they shouldn't refer this matter to DPP".[58]

[68] Those passages, when taken in the context that there was no challenge to DS Edwards before the learned primary judge, leads to the conclusion that the evidentiary basis upon which the submission proceeds is simply absent. There is no basis to conclude that in forming his "reasonable suspicion", DS Edwards did so by reference to evidence obtained under coercive powers, or that he even had access to that evidence. If that were a proposition upon which this Court was to be asked to act, more would be required.

[69] Secondly, it is, in my view, not clear that even if DS Edwards did have regard to such material that the consequence would be that he could not refer the charge in exercise of his duties as a police officer under s 382 of the *Police Powers and Responsibilities Act*.

[70] If the CCC investigates corruption and decides that prosecution proceedings "should be considered", it may report on the investigation to "a prosecuting authority": s 49(2)(a) of the *CCC Act*. Such a report must contain or be accompanied by "all relevant information known to the commission that … supports a charge that may be brought …": s 49(4)(a). There is no suggestion here that such a report was made. The CCC also has power to prosecute by application to QCAT: s 50. That is inapplicable here.

[71] The CCC "may give intelligence information or other information to any entity the commission considers appropriate …": s 60(2). The *CCC Act* also provides that the conferral of functions on the CCC "does not limit police powers … to perform similar functions": s 61(1). As will appear, a police officer seconded to the CCC remains subject to the duties and responsibilities, and with the powers, of an officer under the *Police Powers and Responsibilities Act*: s 174(2) and s 255 of the *CCC Act*.

[72] The CCC Act contained provisions that restrained direct use of coercively obtained evidence but permitted derivative use. Thus s 197(2) provides that such evidence given under compulsion "is not admissible in evidence against the individual in any civil, criminal or administrative proceeding". That prohibits only direct use and says nothing about derivative use. Thus, the *CCC Act*, as it stood before the amendments made by the *Crime and Corruption and Other Legislation Amendment Act* 2018,[59] did not prohibit a police officer's consideration of such evidence in the process of forming a reasonable suspicion and thus making a decision about whether to lay a charge.

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55 AB 655, lines 45-46.
56 AB 656, lines 4-16.
57 AB 657, lines 29-35.
58 AB 658, lines 4-5.
59 Act No 29 of 2018, in force from 9 November 2018.

[73] The *Crime and Corruption and Other Legislation Amendment Act* 2018 introduced s 197(7):

> "(7) Subsection (2) does not prevent any information, document or other thing obtained as a direct or indirect consequence of the individual giving or producing the answer, document, thing or statement from being admissible in evidence against the individual in a civil, criminal or administrative proceeding."

[74] Thus, the Legislature moved to make clear that any information, document or other thing obtained by derivative use of coercively obtained evidence was not inadmissible. That was confirmed in the Explanatory Notes to the Bill, which explained:[60]

> "The proposed amendment to section 197 of the CC Act **makes clear that the Commission may make "derivative use" of an answer, document, thing or statement disclosed by a person during a coercive hearing to gain other evidence for use in subsequent proceedings**. Currently, the Act is silent as to derivative use. The direct use immunity provided in section 197(2), which protects against the direct use of a person's answer, document, thing or statement in a later proceeding, will remain.
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> The amendment to section 197 of the CC Act **confirms that derivative use may be made of compulsory acquired information** in line with existing practices employed by the Commission. If the Commission were unable to derive evidence from answers provided by individuals under compulsion, this would significantly undermine the effectiveness of the coercive powers under the CC Act and the Commission's objective of combating and reducing the incidence of major crime and corruption in Queensland."

[75] Such derivative use does not prevent a police officer using the coercively obtained evidence to investigate further. In *NS v Scott*[61] consideration was given to a refusal to answer in a closed hearing by the CCC, because an investigating police officer was present. The Chief Justice noted, without demur, the acknowledgment of the parties that s 197 did not protect against derivative use.[62] An order was made at the hearing that the answers were not to be given to "any officer of any prosecuting agency involved in his prosecution".[63] Use of the evidence by investigating police officers was considered:[64]

> "[34] Nor does the Act leave any room for reading a limitation into s 331(4)(b) to the effect that answers cannot be required where they may result in the obtaining of derivative evidence. Section 190(2) does not distinguish between the prospect of self-incrimination through the direct use of answers given and the prospect of self-incrimination through the derivative use of

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60 At page 9; emphasis added.
61 *NS v Scott* [2017] QCA 237 at [34], [37]-[39].
62 *NS v Scott* at [6].
63 *NS v Scott* at [9].
64 *NS v Scott* at [34] per Holmes CJ, Philippides JA and Flanagan J concurring; emphasis added; internal citations omitted.

> answers given. Section 331(4)(b), in giving power to ask questions about the subject matter of the appellant's charges, clarifies the Commission's power, given in s 331(1), to continue and complete an investigation notwithstanding a pending trial. Those powers are conferred in the context of an Act which gives the Commission investigative power in relation to major crime and provides the investigative hearing as a tool for that purpose. **Use of the evidence obtained to enable police officers to investigate further and obtain more evidence is consistent with the Commission's statutory function of investigating crime, which includes the gathering of evidence for prosecution**. The capacity to second police officers or secure the assistance of a police task force to assist the Commission in the exercise of its functions further supports the view that information may be provided to police officers for investigative purposes. **The legislature has expressed its intention "with irresistible clearness" that a witness can be compelled to answer even if the result may be the obtaining of further evidence in relation to a charge against him**."

[76] There was also consideration of the position where the use to be made was to add to the prosecution brief in relation to the existing charge against the witness:[65]

> "[37] It remains necessary to consider whether the primary judge should have found that the circumstances of this case, in which an investigating officer in relation to the charge against the appellant was present at the hearing, the answer to the question asked could result in the finding of further evidence, and there was no prohibition on the prosecution's using any such evidence at the trial, combined to amount to reasonable excuse. By virtue of the presiding officer's orders, the police officer who was present at the hearing could not communicate the appellant's answers to the prosecuting agency, which is no doubt what the primary judge was alluding to in his reference to *Lee v The Queen*. However, he was not prevented from seeking further evidence, on the basis of those answers, to add to the prosecution brief.
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> [38] The evidence did not make clear the status of the officer as at the time of the hearing, although given his "instructing" role, it seems likely that he had become part of the Commission's investigation team. However that may be, the mere fact of his presence and possible involvement in seeking further evidence is of no practical consequence if further investigation could in any event be undertaken by other police officers who had no involvement in the earlier investigation of the appellant and could similarly furnish evidence obtained to the prosecution. The real question is whether the prospect of additional evidence thus obtained being used at trial, which was not

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65 *NS v Scott* at [37]-[39].

prohibited by the presiding officer's orders, amounted to a reasonable excuse for refusing to answer.

> [39] As was acknowledged in the joint judgment of French CJ and Crennan J in *X7* and in Bathurst CJ's judgment in *R v Seller*, the use of derivative evidence does not necessarily prejudice a fair trial. It will depend on the nature of the evidence, and whether it is available from other sources. Those are not matters likely to be apparent at a Commission hearing. If there were a question of unfairness in the adducing at trial of evidence thus obtained, it would be open to the appellant to apply for its exclusion on the ground of unfairness, under s 130 of the *Evidence Act* 1977 (Qld). Given the availability of that recourse, the prospective obtaining of derivative evidence and its provision to the prosecution did not amount to a reasonable excuse under s 190(1)."

[77] In my view, the fact the *NS v Scott* involved an existing charge does not affect matters. Derivative use to add to a prosecution brief could well lead to additional charges. The protection against unfairness lay in the embargo on giving the coercively obtained evidence to the actual prosecuting agency, and in the charged person's ability to apply to exclude its use under s 130 of the *Evidence Act* 1977 (Qld). Each applies here, and reflects the consideration given by the learned primary judge.

[78] Thirdly, a police seconded to the CCC retains that officer's powers as a police officer under the *Police Powers and Responsibilities Act*. Section 174(2) provides that a person who is a member of a relevant office (and a police officer is one) whose services are seconded to the CCC under s 255 "retains, and may exercise, all powers had by the person as a member of the office". Thus the secondment under s 255 does not mean that a police officer loses the functions and powers that the police officer normally has. So much is clear from s 255(5) which provides that a police officer seconded to the CCC "continues to be a police officer for all purposes and to have the functions and powers of a police officer without being limited to the performance of the Commission's functions".

[79] That means, in my view, that a seconded police officer still retains the power granted by s 365 of the *Police Powers and Responsibilities Act*, to arrest without warrant. That is available if the police officer "reasonably suspects" that a person has committed an offence, and the arrest is reasonably necessary for one or more of twelve different reasons set out in s 365(1). As an alternative to arrest, the *Justices Act* 1886 (Qld) contains an avenue whereby a summons can issue requiring a person to attend before the Magistrates Court and answer a charge: s 53 of the *Justices Act*.

[80] The final alternative is the one used by DS Edwards, to issue a Notice to Appear under s 382 of the *Police Powers and Responsibilities Act*. Once again it requires that the officer "reasonably suspects" that the person has committed or is committing an offence: s 382(2)(a).

[81] I respectfully agree with the learned primary judge that the CCC cannot direct a police officer to act unlawfully, or to direct a seconded police officer to issue a

Notice to Appear without forming the requisite suspicion.[66] However, if such a police officer exercises the powers given under the *Police Powers and Responsibilities Act* to issue a Notice to Appear, it is that officer who charges the offender, and not the CCC.

[82] Fourthly, Counsel for PRS tendered documents relating to the charge brought against PRS. Part of that consists of the court brief. There is nothing in that document apparently sourced from coercive hearings involving PRS. To a large extent the material comes from telecommunication interceptions, physical surveillance and CCTV footage. The only reference to information from a coercive hearing relates to answers given by ABC. In my view, that, together with the matters referred to above, leaves this Court in the position where it cannot infer that the view formed by DS Edwards has been improperly tainted.

[83] Similarly, those circumstances distinguish the current case from authorities such as *DPP (Cth) v Galloway*[67], *QAAB v ACC*[68] and *NS v Scott*.[69] The material does not permit the conclusion that DS Edwards had access to or gave consideration to coercively obtained material, and even if that proved to be the case, steps could be taken to quarantine that information in the subsequent prosecution.

[84] Fifthly, the relief sought by PRS is effectively to prevent the charge from proceeding, or to dismiss it. A practical problem posed by that form of relief is that whilst the CCC is a party to these proceedings, DS Edwards is not. It is DS Edwards who exercised his powers under the *Police Powers and Responsibilities Act* to bring the charge, not the CCC. Even if, as Counsel for PRS proposed during the course of argument, that the relief be framed as a declaration that the charge was unlawfully issued, that is relief in which DS Edwards would have an interest.

[85] Finally, the relief sought under these grounds faces overwhelming obstacles from the point of view of the exercise of any discretion to grant relief. No proper application for judicial review of the decision to charge has been made, and DS Edwards has not been served. Now that a charge has been brought, a court will be called upon to finally determine guilt or otherwise, and that court has the power to make preliminary findings in relation to the evidence which might be admitted. The proceeding before this Court is a wholly inadequate and inappropriate way in which to deal with such issues.[70] Any relief in the form of a stay of proceedings, which is akin to the relief sought here, is usually founded upon the necessity to prevent an abuse of the court's processes. There is no discernible basis for the exercise of such a power here. There are remedies available in the proceedings which will follow the charge made against PRS, and if any unfairness is resulted from the exercise of coercive investigative powers such as to warrant a stay, one can be granted.[71]

[86] These grounds fail.

**Ground 13: failure to make the orders in the general jurisdiction of the Court**

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66 Reasons below at [52].
67 [2017] VSCA 120.
68 (2014) 227 FCR 293; [2014] FCA 747.
69 [2018] 2 Qd R 397.
70 *Likiardopoulos v The Queen* (2012) 247 CLR 265 at [2]; *Jago v District Court of New South Wales* (1989) 168 CLR 23, 28; and *Barton v The Queen* (1980) 147 CLR 75, 94.
71 *Strickland v Commonwealth Director of Public Prosecutions* (2018) 361 ALR 23.

[87] It is common ground that this aspect of the Reasons below was not raised in PRS's original application. The respondent objects to the ground being raised.

[88] The learned trial judge's consideration of this aspect was generated by the fact that PRS, by his then legal representative, contended that notwithstanding the uncontested evidence that the investigation had been concluded, it was, in fact, ongoing.[72] The learned primary judge concluded that, whilst the Court may have jurisdiction to regulate the exercise of the CCC's statutory powers independently of s 332,[73] discretionary considerations pointed inevitably towards the refusal of such relief. Part of the reason for that was, as the learned primary judge found, "further exercise of coercive investigative powers against the applicant is not contemplated", and the investigation was complete.[74] Once PRS has been charged, the power to exclude evidence improperly obtained, and the power to regulate the prosecution, fell on the Court exercising criminal jurisdiction in that regard.

[89] The learned primary judge declined to exercise any power that might have been engaged because the impact of the conduct of any investigation under the *CCC Act* was a matter for assessment by the Court in whose jurisdiction the criminal proceedings were brought. It was for that Court to fashion any relief which might be thought necessary. The learned primary judge considered that any views he might express might influence that Court, and that was inappropriate.[75]

[90] When PRS's outline on the appeal was filed, the charge had not been preferred against PRS. It has now.

[91] DS Edwards had previously sworn that he had formed the reasonable suspicion that PRS had committed had committed an offence, and that was not challenged by cross-examination.

[92] Now that a charge has been preferred against PRS it is, in my respectful view, a matter for the Court dealing with that criminal prosecution to deal with questions of the admissibility or exclusion of particular evidence. In the circumstances which prevail, that is not a question this Court should entertain, particularly as the legal representatives for PRS declined the opportunity to cross-examine DS Edwards as to the foundation of his belief, or to explore whether he had access to, or otherwise had regard to, material obtained by coercive means.

[93] Given that this particular ground arises because of the learned primary judge's approach to exploring matters, rather than any application by PRS, the basis upon which this Court might be moved to deal with it is not enlivened. The respondent's objection to it being raised now should be upheld.

[94] This ground fails.

**Ground 14: failure to embark on a consideration of the appellant's complaints**

[95] Counsel for PRS contended that the learned primary judge declined to consider the complaints as to the unfairness of the investigation carried out by the CCC. It was

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72 Reasons below at [28].

73 As to which see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, and *Annetts v McCann* (1990) 170 CLR 596.

74 Reasons below at [33].

75 Reasons below at [34].

said that there were a number of bases upon which the inquiry was conducted in an unfair way, particularly in its failure to allow PRS, by his legal representatives, to cross-examine the witnesses called in the course of that investigation. The contention was that the duty of procedural fairness arose because the power involved was one which may destroy, defeat or prejudice a person's rights, interests, or legitimate expectations. In this regard, reliance was placed on *Ainsworth v Criminal Justice Commission*.[76] The contention was that because PRS's conduct had been the subject of examination in relation to potential criminal conduct, and other witnesses had given evidence relevant to that conduct, the requirements of fairness dictated that the PRS should have an opportunity to cross-examine those witnesses.

[96] The respondent contended that the requirements and dictates of procedural fairness varied from case to case, informed by the legislative purpose and context, and the nature of the power or function being exercised.[77] The decision in *Ainsworth* was distinguishable because the party there had been given no notice or opportunity to respond to findings made against them. Here, it was said, closed coercive hearings were held as part of an investigation and PRS attended with his legal representation, and answered questions under compulsion and had evidence put to him. Nothing further was required, it was submitted. Reliance was placed upon *National Companies and Securities Commission v News Corporation Ltd*.[78]

[97] The learned primary judge made findings that the investigation in respect of PRS was complete and that there was no current investigation on foot.[79] His Honour considered whether there was jurisdiction to review decisions made in the course of a criminal investigation, and noted that any such relief was discretionary.[80] His Honour's conclusions were:[81]

> "[33] Here, discretionary considerations point inevitably towards the refusal of relief. The further exercise of coercive investigative powers against the applicant is not contemplated. The investigation is complete. Any court exercising criminal jurisdiction, once the applicant is charged, has power to exclude evidence improperly obtained (see: *Bunning v Cross* and *Police v Dunstall*) and to regulate any prosecution, even to the point of ordering a permanent stay if that is necessary in the interest of justice (*Jago v District Court of New South Wales*). For an example of a case where the conduct of coercive examinations led to a permanent stay of subsequent criminal proceedings, see: *Strickland v DPP (Cth)*.
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> [34] Any impact of the conduct of the investigation under the *CCC Act* upon criminal proceedings brought against the applicant, is a matter for the assessment of the court in which those criminal proceedings are brought. It is for that court to fashion any relief which might be thought to be necessary. No

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76 (1992) 66 ALJR 571.

77 Referring to *Kioa v West* (1985) 159 CLR 550 at [585], and *Duncan v Independent Commissioner Against Corruption* [2016] NSWCA 143 at [688]-[693].

78 (1984) 156 CLR 296.

79 Reasons below at [27], [28] and [34].

80 Reasons below at [32].

81 Reasons below at [33]-[34]; internal citations omitted.

> purpose is served by me on an application such as the present, reviewing the various complaints made by the application and then expressing views. Indeed, any views that I might express now might influence any decision made in the criminal court. That is inappropriate. For these reasons it is undesirable that I review the material and express views. Review of the complaints is unnecessary and inappropriate as I have concluded that there is no current investigation and no basis, whether under s 332 of the *CCC Act* or otherwise, to grant injunctive relief concerning the exercise of the CCC's investigative powers."

[98] There are a number of reasons why I consider that the learned trial judge's approach was correct, and that the contentions for PRS should be rejected.

[99] First, I do not consider that the requirements of procedural fairness in this particular case extend to the lengths for which PRS contends. The CCC's investigation is not to be viewed in the same way of the conduct of a trial or other form of hearing. The *CCC Act* invests the CCC with the responsibility of investigating, amongst other things, official corruption. For that purpose it is given a suite of coercive powers, including the ability to conduct hearings in closed session, and compel answers to be given over objections as to self- incrimination. That process is, no doubt, attended by the requirements of procedural fairness but that does not extend, in my respectful view, to the necessity to allow PRS to cross-examine other witnesses who gave evidence in their own separate closed sessions. It is the fact that PRS attended and answered questions under compulsion, and had evidence put to him. There is no credible suggestion that the essence of the complaint against him was not put to him, and that he was not given a chance to answer it in his own evidence.

[100] Secondly, there are policy considerations which support having such coercive hearings carried out in the way which the CCC did. In *Hamdan v Callanan*; *Younan v Callanan*[82] this Court considered a situation where notices had been given to various persons requiring them to attend hearings at the Crime and Misconduct Commission in circumstances where they were regarded as suspects in the commission of a crime but no charges had been laid. They challenged the decision to issue those attendance notices, by seeking a statutory order of review. Albeit in the context of a debate concerning disclosure of material that might attract immunity from production, the Court made observations about the nature of the process involved in such an investigation:[83]

> "[17] Her Honour concluded that it would be contrary to the public interest to compel disclosure of documents relating to the ongoing investigation of a major crime, such as this alleged murder, because of the risk of seriously hindering that investigation and prejudicing criminal proceedings at [42] of her decision in reliance on decisions such as *National Companies and Securities Commission v News Corporation Ltd* and *Spargos Mining NL v Standard Chartered Aust Ltd (No 1)*. The passage in the joint judgment of Mason, Wilson and Dawson JJ in *National Companies and Securities*

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82 [2013] QCA 104.

83 *Hamdan v Callanan* at [17]-[19]; internal citations omitted.

*Commission v News Corporation Ltd*, to which her Honour referred, is particularly compelling:

> "It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course, there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment."

[18] Her Honour also noted the "valid distinction between disclosure at the investigation stage and disclosure in the course of a prosecution" at [41], discussed the issues related to the desirability of not stifling cooperation between different law enforcement agencies in Queensland and interstate and of not disclosing the identity of informers at [43]-[46] and concluded as part of the balancing exercise that she engaged in:

> "[47] The countervailing public interest consideration on which counsel for the applicants relied is the applicants' right to be treated fairly as suspects and as citizens.
>
> [48] By s 57 of the *Crime and Misconduct Act*, the CMC is required always to act independently, impartially and fairly having regard to the purposes of the legislation (which include combating and reducing the incidence of major crime) and the importance of protecting the public interest. That obligation necessarily applied to the decisions to issue Attendance Notices. For the purposes of these applications, I accept that protection of the public interest within the meaning of s 57 includes protection of the public interest in respect for the rights of individuals in the position of the applicants, as well as protection of the public interest in the broader sense.
>
> [49] As Applegarth J said in *Accused A v Callanan*, the liberties of persons required to attend a crime investigation hearing are affected by the compulsion to attend and answer questions; their privilege against self-incrimination is abrogated; and the compulsory examination may confer a number of forensic advantages upon the prosecution in the trial of an accused. But it was clearly the

> Legislative's (sic) intention that this should be so, and in my view this does not amount to 'unfairness' in the relevant sense.
>
> [50] Counsel for the applicants pointed to the delays in examining Younan, and in the decisions to issue the second notice to him and the notice to Hamdan. Even if the explanations proffered did not fully account for all of the delays, it is pertinent that the legislation places no time limitation upon the exercise of the CMC's powers.
>
> [51] Any unfairness to the applicants is, in my view, outweighed by the public interest in non-disclosure of the documents."
>
> [19] Her Honour's approach to the balancing exercise required was, in my view, entirely appropriate."

[101] Thirdly, delay is a factor affecting the exercise of the discretion in this case. Here PRS took no steps to challenge the conduct of the CCC until the originating application was filed. By then DS Edwards had advised that the investigation was complete and he intended to charge PRS. In response PRS requested that the charge be withheld while court proceedings were taken. By the date of the hearing before the learned primary judge, the CCC had filed material saying that the investigation had been completed and that DS Edwards had formed a reasonable suspicion that PRS, amongst others, had committed an offence. After the decision of the learned primary judge, no stay or temporary injunction was sought pending the appeal to this Court. The consequence was that between the delivery of the decision below and the hearing in this Court the charge was actually brought against PRS. PRS having stood by, this Court should not, as a matter of discretion, exercise power to interfere now.

[102] Fourthly, the CCC investigation has been completed for some time. There is no suggestion that the investigation is lying dormant. For this Court to exercise any power now, compelling the CCC to reopen the investigation and to recall witnesses whose evidence is completed, is an unwarranted and inappropriate interference in the operations of the CCC.

[103] Fifthly, PRS has not been denied any opportunity to test the evidence against him, or to challenge its admissibility. Those rights are fully preserved in the criminal proceedings themselves.

[104] Sixthly, the contentions as to a denial of procedural fairness are not so persuasive that they should move this Court to act. Gibbs CJ had the following to say in *National Companies and Securities Commission v News Corporation Ltd*:[84]

> "… I do not agree that the publication of adverse findings, conclusions or evidence after a hearing such as the present is normally, and without more, one of the functions of the Commission, that does not in my opinion make a critical difference to the result.

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84 (1984) 156 CLR 296.

> Let it be assumed that as a result of the hearing the reputation of the respondents may in some way be affected. The question would then be what natural justice requires when a hearing, publicly announced but held in private, is held only for the purpose of investigation, the hearing being one in the course of which no issue can be determined, and a result of which no right, interest or legitimate expectation can be affected, although the reputation of the respondent may be damaged. That question has to be answered in the light of a statutory framework which expressly recognizes the need for expedition and gives the Commission power to decide who may attend and who may intervene at the hearing. If the Commission were to accord to all the persons whose reputation might possibly be affected by the hearing a right to cross-examine the witnesses and call evidence as though they were in a court of law, the hearing might become so protracted as to render it practically futile. In these circumstances, with all respect, I find it quite impossible to say that the rules of natural justice require the Commission to proceed as though it were conducting a trial. It seems to me in no way unfair, that at a hearing of the kind which I have described, the respondents should not be entitled to cross-examine such witnesses as the Commission may call, or to call evidence of their own. If proceedings are subsequently brought in the Supreme Court against the respondents, they will of course be able to test by cross-examination the evidence adduced, and to call evidence themselves."

[105] Those comments seem to me to be apt in the current circumstances. The CCC had a legislative purpose and duty to pursue an investigation in relation to corruption. It did so, using the various powers granted to it under the *CCC Act*. Part of the investigation consisted of closed session hearings, and the use of coercive powers to compel responses. It has completed that investigation. I do not consider it an appropriate exercise of discretion that this Court order that the CCC start the investigation up again just so PRS can test evidence, when he can do so in the criminal proceedings.

[106] This ground fails.

**Conclusion**

[107] As all grounds have failed, the appeal should be dismissed with costs. I propose the following orders:

1. Appeal dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal.

[108] **McMURDO JA:** Morrison JA has discussed thoroughly the extensive arguments of the appellant, and I need not repeat them.

[109] Grounds 6 to 11 have been somewhat overtaken by the event of the appellant being charged with the offence of corruption, after the primary judgment and before the hearing of this appeal. Nevertheless the appellant persists in his case that Detective Sergeant Edwards, as a police officer who had been seconded to the Commission, should not have been involved in a decision to bring that charge. This was because, it is argued, Detective Sergeant Edwards was not entitled to use information which

he had obtained in his work on secondment to the Commission for the purpose of considering whether to charge the appellant.

[110] No specific statutory limitation to that effect, on the exercise of the powers of a police officer, is identified in the appellant's argument. Further, the argument is difficult to reconcile with the terms of s 192 of the *Crime and Corruption Act* 2001. I refer there to the terms of s 192 prior to the addition of sub-section (7), which counsel for the Commission conceded did not operate in this case, because the investigation and the other use of the Commission's powers was completed prior to the commencement of that amendment.

[111] The arguments in support of those grounds overlook the distinction between the Commission and a police officer. This charge has been made by Detective Sergeant Edwards, and not by the Commission. The Commission has no power to direct the police officer to discontinue that charge. The appellant's arguments, if they otherwise have any merit, are for another day in a case to which the prosecutor is a party.

[112] I agree with the reasons of Morrison JA on the other grounds of appeal, and with the orders which his Honour proposes.

[113] **BRADLEY J:** I agree with the reasons of Morrison JA in respect of grounds 1 to 5 and 12 to 14. I agree with his Honour's conclusions as to the factual evidence in respect of grounds 6 to 11. I agree with the reasons of McMurdo JA in respect of grounds 6 to 11.

[114] In the circumstances, I also agree with the orders proposed by Morrison JA for the disposition of the appeal.