SUPREME COURT OF QUEENSLAND

CITATION: *Smith v Kelsey & Ors; Dalley & Ors v Kelsey & Ors* [2020] QCA 55

PARTIES: **In Appeal No 7689 of 2019:**

TIMOTHY LUKE SMITH
(appellant)
v
SHARON RAE MARIE KELSEY
(first respondent)
LOGAN CITY COUNCIL
(second respondent)
CHERIE MARIE DALLEY
(third respondent)
RUSSELL BRUCE LUTTON
(fourth respondent)
STEPHEN FREDERICK SWENSON
(fifth respondent)
LAURENCE WILLIAM SMITH
(sixth respondent)
PHILIP WAYNE PIDGEON
(seventh respondent)
TREVINA DALE SCHWARZ
(eighth respondent)
JENNIFER RACHEL JULIE BREENE
(ninth respondent)

In Appeal No 7699 of 2019:

CHERIE MARIE DALLEY
(first appellant)
RUSSELL BRUCE LUTTON
(second appellant)
STEPHEN FREDERICK SWENSON
(third appellant)
LAURENCE WILLIAM SMITH
(fourth appellant)
PHILIP WAYNE PIDGEON
(fifth appellant)
TREVINA DALE SCHWARZ
(sixth appellant)
JENNIFER RACHEL JULIE BREENE
(seventh appellant)
v
SHARON RAE MARIE KELSEY
(first respondent)
LOGAN CITY COUNCIL
(second respondent)
TIMOTHY LUKE SMITH

(third respondent)

FILE NO/S:	Appeal No 7689 of 2019 Appeal No 7699 of 2019 ICQ No C/2019/14 ICQ No C/2019/15
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Industrial Court at Brisbane – [2019] ICQ 8 (Martin J)
DELIVERED ON:	27 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2019
JUDGES:	Morrison and Philippides JJA and Brown J
ORDERS:	**In Appeal No 7689 of 2019:** **1. Appeal dismissed.** **2. The appellant pay the first respondent's costs of the appeal.** **In Appeal No 7699 of 2019:** **1. Appeal dismissed.** **2. The appellants pay the first respondent's costs of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN REFUSED – where the CEO of Logan City Council made a public interest disclosure (PID) to the Logan City Council, the Minister for Local Government, and the Crime and Corruption Commission (CCC) alleging possible misconduct by the then Mayor of Logan City – where the Councillors were given legal advice that they could not take the PID into account when considering the CEO's employment – where the Councillors received legal advice that it would be unlawful to terminate the CEO's employment due to the PID – where the CEO's employment was terminated after a vote by the Councillors – where Councillors Dalley, Lutton, Swenson, Smith, Pidgeon, Schwarz and Breene all voted in favour of termination of the CEO – where the CEO commenced IRC proceedings with the Mayor and the above named Councillors named as respondents – where the Mayor and the above named Councillors were all charged with fraud on the basis that they caused detriment to the CEO – where the Mayor and the

above named Councillors applied to the Industrial Relations Commission for a stay of the IRC proceedings on the basis that the IRC proceeding would require the Commission to determine the same factual matters that would need to be determined by the jury in the criminal trial – where it was contended that the likely publicity associated with that determination would prejudice the fair trial of the criminal charges – where the Commission refused to grant the stay – where the IRC decision was appealed to the Industrial Court – where the appeal was dismissed by the Industrial Court – where the appellants seek to challenge the decision of the Industrial Court – where the Industrial Court held that it had not been shown that the primary decision was affected by error of the type in *House v The King* – where it was held that there was a substantial difference between the IRC and criminal proceedings – whether the appellants were required to demonstrate an error of the type described in *House v The King* – whether the Industrial Court erred in not granting the stay – whether it was right to conclude that there is a substantial difference between the IRC proceedings and the criminal proceedings – whether the Industrial Court erred in the determination matter below

Industrial Relations Act 2016 (Qld), s 285
Public Interest Disclosure Act 2010 (Qld), s 40, s 48

Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd (2007) 164 FCR 487; [2007] FCA 1868, cited
Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission (2016) 242 FCR 153; [2016] FCAFC 97, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Macleod v The Queen (2003) 214 CLR 230; [2003] HCA 24, cited
McMahon v Gould (1982) 7 ACLR 202, considered
Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7, cited
R v Dillon; Ex parte Attorney-General (Qld) [2016] 1 Qd R 56; [2015] QCA 155, cited
R v Ferguson; Ex parte Attorney-General (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, followed
R v Glennon (1992) 173 CLR 592; [1992] HCA 16, cited
Websyte Corporation Pty Ltd v Alexander (No 2) [2012] FCA 562, cited

COUNSEL: **In Appeal No 7689 of 2019:**

M Trim for the appellant
C J Murdoch QC, with H M Stephanos, for the first respondent
A K Herbert for the second respondent
W L Friend, with C A Massy, for the third to ninth respondents

In Appeal No 7699 of 2019:

W L Friend, with C A Massy, for the appellants
C J Murdoch QC, with H M Stephanos, for the first respondent
A K Herbert for the second respondent
M Trim for the third respondent

SOLICITORS: **In Appeal No 7689 of 2019:**

Gadens Lawyers for the appellant
Minter Ellison for the first respondent
King & Company Lawyers for the second respondent
McInnes Wilson for the third to ninth respondents

In Appeal No 7699 of 2019:

McInnes Wilson for the appellants
Minter Ellison for the first respondent
King & Company Lawyers for the second respondents
Gadens Lawyers for the third respondent

[1] **MORRISON JA:** Ms Kelsey was appointed as CEO of Logan City Council on 2 June 2017. Her contract of employment contained a six-month probation period during which her employment could be ended on two weeks' notice. The contract had a nominal expiry date of 25 June 2021.

[2] On 12 October 2017 Ms Kelsey made a Public Interest Disclosure (**PID**) to the Logan Council, Minister for Local Government, and the Crime and Corruption Commission (**CCC**), alleging possible misconduct by Mr Smith.[1]

[3] After the PID was made, the Councillors received legal advice that they could not take the PID into account when considering Ms Kelsey's employment.

[4] On 1 December 2017 Ms Kelsey commenced proceedings against the Council and Mr Smith in the Industrial Relations Commission, alleging contraventions of s 285 of the *Industrial Relations Act* 2016 (Qld)[2] and s 48 of the *Public Interest Disclosure Act* 2010 (Qld).[3]

[5] It was common ground that the PID and the institution of proceedings each constituted the exercise of a workplace right within the meaning of s 285 of the *IR Act*.

[6] On 5 February 2018 the CCC wrote to each of the Councillors of the Logan City Council, informing them of the penalties involved in taking action against a person because that person had made a PID, and advising that they would be investigating any action taken in respect of Ms Kelsey's employment.

[7] Immediately prior to 7 February 2018 the Councillors received legal advice that it would be unlawful for them to terminate Ms Kelsey's employment for the reason that she had made the PID or because she had instituted the IRC proceedings.

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1 The Mayor of Logan City Council and the appellant in Appeal No 7689/19.
2 To which I shall refer as the *IR Act*.
3 To which I shall refer as the *PID Act*.

[8] On 7 February 2018 Ms Kelsey's employment was terminated following a vote of the Council. The vote was 7:5 in favour of termination.[4] Councillors Dalley, Lutton, Swenson, Smith, Pidgeon, Schwarz and Breene[5] all voted in favour of termination. Ms Kelsey was given two weeks' notice.

[9] Ms Kelsey's IRC proceedings were amended to join the Councillors as respondents. The relief sought included orders for reinstatement as CEO, injunctive relief preventing the Councillors from voting on her employment until 2021, declarations that the Councillors had taken adverse action against her by voting to terminate her employment, and damages.

[10] On 10 July and 18 November 2018 the CCC informed the Councillors and Mr Smith that it was investigating the Mayor's conduct.

[11] The substantive hearing of Ms Kelsey's proceedings commenced on 17 December 2018 with evidence being heard over 15 days concluding on 15 February 2019. Mr Smith did not give evidence but each of the Councillors did, both by affidavit and orally, and were cross-examined. The parties filed written submissions and were due to give oral responses to the written submissions on 2 and 3 May 2019.

[12] On 26 April 2019 each of the appellants was arrested by officers of the CCC and charged with fraud under s 408C of the *Criminal Code* 1899 on the basis that they dishonestly caused a detriment to Ms Kelsey by terminating her employment. The form of the charges is:[6]

> "On or about the 9th day of October 2017 at Logan or elsewhere in the State of Queensland, [name] dishonestly caused a detriment namely the dismissal from her employment to Sharon Rae Maree Kelsey and the detriment was of a value of at least $100,000.00."

[13] The appellants applied to the Industrial Relations Commission for a stay of the IRC proceedings on the basis that the IRC proceedings would require the Commission to determine the same factual matters that would need to be determined by the jury in the criminal trial, and that the likely publicity associated with that determination would prejudice the fair trial of the criminal charges.

[14] The Commission refused to grant the stay.[7]

[15] That decision was then appealed to the Industrial Court. The appeal was dismissed.[8] Martin J, President of the Industrial Court, held that it had not been shown that the primary decision was affected by error of the type in *House v The King*.[9] His Honour went further, holding that even if such error had been demonstrated, he would have refused the stay on discretionary grounds.[10]

[16] The appellants now seek to challenge the decision of the Industrial Court. They seek that this Court order a stay of the IRC proceedings until determination of the criminal proceedings.

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4 By an order of the Industrial Relations Commission, Mr Smith was barred from participating in the meeting.
5 The appellants in Appeal No 7699/19. I shall refer to those respondents as "the Councillors".
6 Appeal Book (**AB**) 231.
7 *Kelsey v Logan City Council & Ors (No 7)* [2019] QIRC 085.
8 *Dalley & Ors v Kelsey & Ors* [2019] ICQ 8.
9 (1936) 55 CLR 499 at 504-505.
10 [2019] ICQ 8 at [68]-[70].

[17] Oral submissions in the IRC proceedings have been adjourned until determination of the stay application and appeal.

Additional factual background

[18] Ms Kelsey's PID notified the CCC of certain conduct of the Mayor (Mr Smith), which she suspected of being corrupt conduct.

[19] The CCC's investigation into the Mayor was in relation to the termination of Ms Kelsey's employment, including allegations that the Mayor directed or otherwise influenced the seven Councillors to vote in favour of termination, as retaliation for Ms Kelsey's notification of suspected corrupt conduct.

[20] One of the issues in the IRC proceedings concerns the question of direction or influence by the Mayor in relation to the Councillors who voted for termination. As the CCC put it, an issue is "whether there is an alignment resulting in a voting 'bloc' of seven (7) councillors who vote with the Mayor without exercising independent thought".[11] The CCC also noted that a number of the Councillors who were parties to the IRC proceedings had sworn affidavits denying that they were aligned or affiliated with the Mayor, or that they exercised their votes in accordance with how the Mayor and other Councillors voted.

[21] In the IRC proceedings the Councillors who had voted for termination had put forward their reasons for doing so in written submissions documenting each Councillor's concerns.[12] Further, the Councillors had all provided affidavits in which they said what motivated them to vote for termination. The Councillors submitted that they did not exercise their voting rights based upon Ms Kelsey's exercise of a workplace right. As was noted in the appeal from the decision to reinstate Ms Kelsey,[13] the reasons were set out in detail in the affidavits and if they were to constitute the only evidence at the final hearing, "then it is likely that the Council would discharge its onus under the *IR Act*". Of course, it was noted that those affidavits do not constitute the only evidence.

[22] The Councillors' contentions in the IRC proceedings were that all had valid reasons for making their decision based on Ms Kelsey's performance, and that decision was made notwithstanding advice from the CCC and legal advice that it would be unlawful for the decision to be made if it was based on the exercise of a workplace right.[14]

[23] Nonetheless, it has been plain since the CCC warned that it might investigate the circumstances of Ms Kelsey's termination, that the IRC proceedings would be conducted knowing the CCC were investigating and that CCC prosecution was a possibility. No doubt it is for that reason that no submissions were made before this Court that there were particular forensic decisions made about steps in the IRC proceedings, including what evidence to put on, that would prejudice the Councillors' position in the criminal proceedings.

Nature of the appeal

[24] Before the Industrial Court all appellants accepted that the decision by the IRC was the result of the exercise of a discretion, and therefore, before the Industrial Court,

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11 AB 360.
12 *Kelsey v Logan City Council & Ors* [2018] QIRC 053 at [50]-[51], AB 890-893.
13 *Dalley & Ors v Kelsey & Ors* [2018] ICQ 006 at [50], AB 946.
14 *Kelsey v Logan City Council & Ors* [2018] QIRC 053 at [59], AB 894.

the appellants were required to demonstrate error of the type described in *House v The King*.[15]

[25] An appeal to this Court pursuant to s 554 of the *IR Act* lies only on the grounds of error of law or excess or want of jurisdiction.

The decision below

[26] Martin J distilled the many grounds of appeal from the decision of the IRC into the following propositions of error:[16]

(a) failed to apply the principle propounded in *ASIC v HLP Financial Planning (Aust) Pty Ltd*;[17]

(b) failed to take into account the prejudice which would or might be caused by the IRC determining the same factual questions that a jury would have to consider in a criminal trial;

(c) conflated two different issues: the effect of pre-trial publicity and the determination of "precisely the same factual matter that will need to be determined by the jury";

(d) failed to take into account public interest in maintaining the integrity of the criminal justice system;

(e) did not find that the prejudice to the appellants outweighed that which would be suffered by Ms Kelsey;

(f) failed to accept that it would be unfair for the appellants to be forced to make a decision as to whether they would make submissions in the proceeding without knowing how the prosecution in the criminal trial will put its case;[18]

(g) failed to take into account:

(i) that there might be an appeal from the IRC proceedings;

(ii) the evidence which Ms Kelsey would give at a criminal trial;

(iii) the potential prejudice to the appellants in combination with the gravity of the potential sentences; and

(h) finding that compensation was not an adequate remedy for Ms Kelsey.

[27] Martin J held that there was no relevant error on the part of the Vice-President of the IRC, in summary because:

(a) there was no principle laid down in *ASIC v HLP*, and it was distinguishable in any event;[19]

(b) there was a substantial difference between the IRC proceedings and the criminal proceedings; in the IRC proceedings the appellants had to prove that the action they took was not for the reasons in s 285 of the *IR Act*, whereas the

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15 (1936) 55 CLR 499 at 504-505.
16 Reasons below at [17].
17 (2007) 164 FCR 487.
18 This ground was not pressed on the appeal to this Court.
19 Reasons below at [23]-[28].

criminal proceedings required the prosecution to prove beyond reasonable doubt that the appellants acted dishonestly in taking their actions; even though there was an overlap of evidence, the questions were not the same; the question of prejudice flowing from the outcome in the IRC proceedings was adverted to;[20]

(c) specific identification of the public interest in having the criminal justice system operate without undue interference was not a mandatory consideration leading to *House v The King* error; reliance for that proposition depended upon comments by Kirby J in *Yuill v Spedley Securities Ltd and Others*[21] about the guidelines referred to in *McMahon v Gould*[22] but those comments were not adopted by the majority in *Yuill*;[23]

(d) the grounds relating to miscarriage of the discretion, including the competing claims to prejudice, failed because the questions in the two sets of proceedings were different, the criminal proceedings would not come to trial for 18 months to two years which would unfairly delay the outcome in the IRC, and the impact on the jury of any publicity could be ameliorated by appropriate directions;[24] and

(e) remaining grounds added no more substance to the appeal.

[28] Martin J expressed his conclusion thus:[25]

> "[68] The appellants have not demonstrated an error of the kind referred to in *House v The King*. Had they done so I would have considered whether this Court should deal with the matter. In all the circumstances, it would have been appropriate to do so. I would not have granted a stay. Many of the authorities were concerned with civil proceedings which had only commenced. Unlike so many of those cases which deal with the principles to be applied on such an application, these proceedings are on the cusp of conclusion. The actual prejudice which Ms Kelsey would suffer (and which was described by the Vice President) outweighs the potential prejudice which might be inflicted on the appellants.
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> [69] The appellants accepted, as they had to, that there has been substantial publicity given to this matter and that is something which will probably have to be dealt with in any criminal proceeding. The concern of the appellants concentrated on two issues. First, that the Commission would decide precisely the same questions as a jury would be asked to decide. For the reasons given above that cannot be accepted. Secondly, the appellants were concerned about any publicity which might be given to the decision of the Commission. While that can be dealt with by way of appropriate direction to a jury, any possible harm can be alleviated by only publishing the reasons

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20 Reasons below at [30]-[36].
21 (1992) 8 ACSR 272 at 274.
22 (1982) 7 ACLR 202.
23 Reasons below at [38]-[41].
24 Reasons below at [50]-[64].
25 Reasons below at [68]-[70].

> to the parties. That would avoid the prospect of findings made about the credibility of any witness entering the public domain.
>
> [70] At the heart of any application for a stay is a balancing exercise where the rights of all the parties must be considered. This is a case in which the prejudice which would be caused by any stay of proceedings to Ms Kelsey weighs more heavily than the potential prejudice which might be suffered by the appellants."

Issues on the appeal

[29] Notwithstanding the fact that Mr Smith was separately represented from the Councillors, there are a number of common issues which require determination:

(a) was it right to conclude that there is a substantial difference between the IRC proceedings and the criminal proceedings;[26]

(b) was the existence of a possibility that substantially the same factual questions needed to be determined by both the QIRC and a jury a sufficient basis for the relief;[27]

(c) is there a principle articulated in *ASIC v HLP Financial Planning (Aust) Pty Ltd*[28] to be applied where there are concurrent civil and criminal proceedings, and is it applicable here;[29]

(d) did the balance of convenience favour the grant of the stay;[30] and

(e) what orders should follow.

[30] I should pause to note that, though the Council was a party to the appeal, it did not take an active role, except to support the stay of the IRC proceedings in the event it was determined that the criminal proceedings would be compromised by continuation of the IRC proceedings. That stance was because, even though it was potentially affected by the outcome, the Councillors and Mr Smith had been suspended from their positions, and the Council had been dissolved on 2 May 2019, with an Administrator being appointed.

Legislative provisions

[31] There are several provisions which have a potential impact upon the resolution of issues in the appeal.

[32] Section 285 of the *IR Act* provides:

> "(1) A person must not take adverse action against another person—
>
> (a) because the other person—

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26 Ground 2 in 7689/19; grounds 2a and 2b in 7699/19.

27 Ground 3 in 7689/19; grounds 2a and 2b in 7699/19.

28 (2007) 164 FCR 487 at [58]; see also *CFMEU v ACCC* [2016] FCAFC 97 at [45] and *ASIC v Craigside Company Ltd* [2013] FCA 201.

29 Ground 4 in 7689/19; ground 2a in 7699/19.

30 Grounds 5-8 in 7689/19; ground 2c in 7699/19.

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes to or proposes not to, or has at any time proposed to or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note—

This subsection is a civil penalty provision.

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes to or has at any time proposed to exercise, a workplace right for the second person's benefit or for the benefit of a class of persons to which the second person belongs.

Note—

This subsection is a civil penalty provision."

[33] The *IR Act* provides for a form of reversed onus of proof in s 306, which relevantly provides:

"(1) Subsection (2) applies if—

(a) in an application in relation to a contravention of a provision of this part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would be a contravention of the provision.

(2) It is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(3) Subsection (2) does not apply in relation to orders for an interim injunction."

[34] Section 314 of the *IR Act* provides for the orders that may be made if contravention is shown:

"(1) Without limiting the commission's jurisdiction to make orders, the commission may make 1 or more of the following orders on deciding an application mentioned in section 313 —

(a) an order for reinstatement of the person;

(b) an order for the payment of compensation to the person;

(c) an order for payment of an amount to the person for remuneration lost;

(d) an order to maintain the continuity of the person's employment;

(e) an order to maintain the period of the person's continuous service with the employer;

(f) an order granting an interim or other injunction or make any other order it considers appropriate to prevent, stop, or remedy the effects of, a contravention of this part.

(2) A person to whom an order under subsection (1) applies must not contravene a term of the order.

Note—

This subsection is a civil penalty provision."

[35] Section 48 of the *PID Act* provides:

"(1) An application for an injunction about a reprisal may be made to the industrial commission if the reprisal—

(a) has caused or may cause detriment to an employee; and

(b) involves or may involve a breach of the *Industrial Relations Act 2016* or an industrial instrument under that Act.

(2) The application may be made by—

(a) the employee; or

(b) an industrial organisation—

(i) whose rules entitle it to represent the industrial interests of the employee; and

(ii) acting in the employee's interests with the employee's consent; or

(c) the Crime and Corruption Commission acting in the employee's interests with the employee's consent if—

(i) the employee is a public officer; and

(ii) the reprisal involves or may involve an act or omission that the Crime and Corruption Commission may investigate.

(3) The *Industrial Relations Act 2016*, section 473 applies to the application, but this part prevails if it is inconsistent with that section.

(4) If the industrial commission has jurisdiction to grant an injunction on an application under subsection (1), the jurisdiction is exclusive of the jurisdiction of any other court or tribunal other than the Industrial Court.

(5) Without limiting this section, the application is an industrial cause within the meaning of the *Industrial Relations Act 2016*."

[36] So far as is relevant, s 408C of the *Criminal Code* provides:

"(1) A person who dishonestly—

…

(e) causes a detriment, pecuniary or otherwise, to any person; or

…

commits the crime of fraud.

Penalty—

Maximum penalty—5 years imprisonment.

…

(2A) The offender is liable to imprisonment for 20 years, if, for an offence against *subsection (1)*—

(a) the property, or the yield to the offender from the dishonesty, or the detriment caused, is of a value of at least $100,000; or

(b) the offender carries on the business of committing the offence."

Substantial difference between the IRC proceedings and the criminal proceedings?

[37] The criminal proceedings concern a charge of fraud under s 408C of the *Criminal Code*. The relevant elements of that offence are that the accused: (i) dishonestly; (ii) causes; (iii) a detriment; (iv) to a person. For the purposes of considering the issues on the appeal it may be accepted that the relevant detriment and the person who suffered it are not in issue, as it was the termination of Ms Kelsey's employment as CEO. Equally causation is not in issue, as the Councillors voted to terminate the employment.[31]

[38] Therefore, to succeed, the prosecution will have to prove, beyond reasonable doubt, that in causing Ms Kelsey's termination the accused Councillors acted dishonestly.

[39] The criminal proceedings concern charges of fraud under s 408C of the *Criminal Code*. Dishonesty is a necessary element of that offence. The relevant dishonesty attaches to the acts by which the accused person "causes a detriment". The jury in such a case will have to determine whether the prosecution has proved, beyond reasonable doubt, that the Councillors acted dishonestly when they caused detriment to Mr Kelsey by voting to terminate her employment.

[40] Dishonesty is a state of mind consisting of knowledge, belief or intent. As was said in *MacLeod v The Queen*[32] the trial judge must, when instructing the jury:

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31 Of course it may be that these matters will actually be in issue in the criminal proceedings.

32 (2003) 214 CLR 230 at [55] and [100].

(a) identify the knowledge, belief or intent which is said to render the relevant conduct dishonest;

(b) instruct the jury to determine whether the accused had that knowledge, belief or intent and, if so, whether, on that account, the act was dishonest; and

(c) direct the jury that, in determining whether the conduct of the accused was dishonest, the standard is that of ordinary, decent people.

[41] It is well settled that dishonesty for the purposes of s 408C is not judged by reference to the subjective beliefs of the accused. In *R v Dillon*; *Ex parte Attorney-General (Qld)*[33] this court said:

> "… Queensland courts must now construe the term 'dishonesty' in s 408C as requiring the prosecution to prove only that what the accused person did was dishonest by the standards of ordinary honest people. To secure a conviction, the prosecution need not prove that the accused person must have realised that what he or she was doing was dishonest by those standards."

[42] The contravention of s 285 of the *IR Act* is different. The IRC proceedings are necessarily focused on the issues arising under s 285 of the *IR Act* because it is contended that the Councillors' actions were in breach of s 285(1)(a). It is also that breach which, if it causes detriment, grounds an application for an injunction under s 48 of the *PID Act*.

[43] However, s 285 is a civil penalty provision, and contravention is not an offence: s 571(1). In the IRC proceedings the case against the Councillors is that they were involved in a contravention of s 285, within the meaning of s 571. Section 571(3) provides what "involved in" means:

> "a person is ***involved in*** a contravention of a civil penalty provision only if the person—
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats, promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention."

[44] The case against Mr Smith and the Councillors includes but is not limited to the contention that they were knowingly involved in the Council's contravention under s 571(3)(c).[34] A person involved in a contravention of s 285, "is taken to have contravened the provision": s 571(2). But that person does not thereby commit an offence.

[45] Under s 285(1)(a) a person must not: (i) take adverse action; (ii) against another person; (iii) because the other person has a workplace right, or has exercised

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33 [2015] QCA 155 at [48].

34 Paragraph 4(b) of the application, AB 63; paragraphs 30C, 30.5, 30.10, 30.15, 30.20, 30.25, 30.30 and 30.35 of the statement of facts, AB 95-99.

a workplace right. For the purposes of considering the issues on the appeal it may be accepted that the person who has taken adverse action, and against whom are not in issue. The accused Councillors voted to terminate Ms Kelsey's employment. It is accepted that action was taken to terminate her employment and that constituted a detriment and was therefore adverse action.

[46] The central issue in the IRC proceedings is whether the Councillors took adverse action against Ms Kelsey because she had exercised a workplace right.[35] Therefore if the IRC determines that the reason for the adverse action was that Ms Kelsey had exercised a workplace right, that establishes the breach of s 285, which enlivens the power to grant relief.

[47] This is a case where the IRC proceedings involve the allegation that a person took action for a particular reason or with a particular intent, and doing so would be a contravention of s 285. Therefore, the complaint engages s 306(2). As a consequence there is a presumption "that the action was … taken for that reason or with that intent, unless the person proves otherwise".

[48] Section 306(2) has the effect that there is a presumption that the action was taken for that reason, unless the person proves otherwise. But that merely reverses the onus of proof.

[49] Proof of the contrary does not necessarily require that another reason be positively proved, merely that it be proved that the presumed reason was not the case. However, even if the proof of the contrary reason was rejected, that does not equate with a finding of dishonesty. Both s 285 of the *IR Act* and s 48 of the *PID Act* make certain conduct unlawful in the sense that it is the contravention of civil penalty provision. But that does not mean it is dishonest. Rather, it is simply contrary to the statutory provisions. Proof of the elements for s 285 and s 48 does not require a finding of dishonesty.

[50] The same result applies insofar as the proceedings concern relief under s 48 of the *PID Act*. That Act relevantly makes provision in respect of reprisals in s 40:

> "**40 Reprisal and grounds for reprisal**
>
> (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
>
> (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
>
> (b) ....
>
> (2) …
>
> (3) A contravention of *subsection (1)* is a reprisal or the taking of a reprisal.
>
> (4) A ground mentioned in *subsection (1)* as the ground for a reprisal is the unlawful ground for the reprisal.
>
> (5) For the contravention mentioned in *subsection (3)* to happen, it is sufficient if the unlawful ground is a substantial ground for

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35 There are two: the institution of the proceedings and the PID.

> the act or omission that is the reprisal, even if there is another ground for the act or omission."

[51] Injunctive relief about a reprisal is available if the reprisal may involve a breach of the *IR Act* and: (i) the reprisal; (ii) has caused; (iii) detriment; (iv) to an employee. As can be seen, the elements are essentially the same as those under the *IR Act*. However Mr Smith submits that under the *PID Act* the onus falls on Ms Kelsey to establish the contravention of that provision and there would have to be a finding that the reasons were unlawful.[36] That is not the case.

[52] Once again, it may be accepted that the act, the detriment and the employee to whom it was caused are not in issue. It was the termination of Ms Kelsey's employment as CEO. At issue will be whether it was because she made a PID.

[53] Further, even if the IRC made a finding that the Councillors' denials, that the reason for taking adverse action was because Ms Kelsey had exercised a workplace right, should not be accepted on the basis of either credibility or reliability, that does not necessitate a finding that the Councillors were dishonest in their evidence. Not only is such a finding not necessary, but it is undoubtedly the case that the IRC will be conscious of any potential impact on the criminal trial, even from the point of view of publicity of the findings it makes. There is no reason to think that the IRC will not properly observe the need for restraint so that relevant findings only go as far as they need to.

[54] In my view, there is a substantial difference between the issues to be determined in the civil proceedings in the IRC, and the criminal proceedings. In the IRC proceedings, the entitlement to relief is grounded simply by a finding that s 285 of the *IR Act* has been contravened. Neither s 285 nor any individual part of it requires consideration of, let alone a finding about, whether the person was dishonest when they took the adverse action. The adverse action must merely be because the other person has exercised a workplace right.

[55] By contrast, the offence under s 408C cannot be established without proving dishonesty. Proving that one person caused another a detriment for whatever reason does not establish the offence of fraud. The detriment must be caused dishonestly.

[56] The appellants went so far as to contend that a finding that conduct was unlawful was to be equated with a determination that it was dishonest, and also that a jury would understand such a finding that way.[37] Reliance was placed on two passages in *Peters v The Queen*:[38]

> "[15] There is a degree of incongruity in the notion that dishonesty is to be determined by reference to the current standards of ordinary, honest persons and the requirement that it be determined by asking whether the act in question was dishonest by those standards and, if so, whether the accused must have known that that was so. That incongruity comes about because ordinary, honest persons determine whether a person's act is dishonest by reference to that person's

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36 T1-30, lines 15-35.

37 Appeal transcript T1-9, lines 5-31; T1-26, 27.

38 (1998) 192 CLR 493 at [15], [30]; internal citations omitted; emphasis added.

> knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done. They do not ask whether he or she must be taken to have realised that the act was dishonest by the standards of ordinary, honest persons. **Thus, for example, the ordinary person considers it dishonest to assert as true something that is known to be false.** And the ordinary person does so simply because the person making the statement knows it to be false, not because he or she must be taken to have realised that it was dishonest by the current standards of ordinary, honest persons."

> "[30] … Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to "some lawful right, interest, opportunity or advantage", knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests."

[57] As to the first passage and the highlighted sentence, it was submitted that the Councillors had asserted in their responses in the IRC proceedings, that they had valid reasons nothing to do with Ms Kelsey's exercise of a workplace right.[39] The submission was that if the IRC rejected that evidence, that would equate to a finding of dishonesty, expressed in the highlighted sentence.

[58] That submission should be rejected. Such a finding in the IRC might occur for a number of reasons, such as: (i) a rejection of the evidence, which could be for a variety of reasons, for example because it is unreliable; or (ii) because the IRC was not satisfied that the reversed onus of proof had been met. It is not a finding of dishonesty.

[59] As to the second passage, the submission was that the Council could lawfully terminate Ms Kelsey's employment without cause, and without giving a reason. Thus, it was submitted, "if it is found that they did it unlawfully, we say that is affecting her right, or damaging her or acting to her detriment, in a way which is dishonest" by reference to the passage from *Peters v The Queen*.[40]

[60] That submission should be rejected. Those comments were made in the course of Toohey and Gaudron JJ rejecting the proposition that mere intention to inflict economic loss or imperil economic interests would suffice for conspiracy to defraud. Their Honours said that proposition wrongly assumed that "fraud does not involve an element of dishonesty over and above the use of dishonest means". The passage merely gave an example of that. A finding in the IRC proceedings that the Councillors' reasons contravened s 285 does not even reach the plateau of dishonest means, let alone add the additional element of dishonesty over and above that.

[61] It was submitted that the IRC would need to determine the reasons why Ms Kelsey's employment was terminated, and "whether the reasons given for that by [the Councillors] were honest".[41] The submission went on that "the only conceivable

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39 Response, para 42(e), AB 110.
40 Appeal transcript T1-10, lines 28-34.
41 Appellant's Amended Outline, 7689/19, para 24.

basis (at present) for the charges is that the action to terminate the employment was not for the reasons given in evidence but for different reasons (ie the reasons prohibited by the two pieces of legislation in issue in the QIRC proceeding)".

[62] In my view, that submission confuses two separate questions. One is the basis for rejection of evidence. The other is concerned with the findings that are required to be made based on the cause of action in IRC proceedings. The only issue to be proved in the IRC proceedings, in order for Ms Kelsey to succeed, is that the termination was for the reason that she exercised a workplace right. If it was not, the case fails regardless of what the reason truly was. No part of that case requires any finding that reasons ascribed by the Councillors were honestly held or honestly described in evidence. Further, rejection of the evidence by any particular witness, that the real reason was X or Y, does not necessitate a finding of dishonesty.

[63] The Councillors contended that the IRC decision and the Industrial Court did not properly consider the extent of the prejudice that would flow to the appellants by an independent judicial officer determining the same factual matters as would be left to the jury in the criminal proceeding. In each case it was contended that the same factual matter was whether the appellants terminated Ms Kelsey's employment for an unlawful reason.[42] The contention continued, that in circumstances where the Councillors were told immediately before the vote that they could not lawfully terminate Ms Kelsey's employment for the reason that she had exercised a workplace entitlement, a finding that they did terminate her employment for that reason is a finding that their behaviour was dishonest by the standards of ordinary decent people.[43]

[64] It was therefore put that the declaration sought by Ms Kelsey, that the appellants had terminated her employment for an unlawful reason, amounted to a finding that the appellants had caused a detriment dishonestly.

[65] I am unable to accept the contention. The advice given to the Councillors was, apparently, that they had no lawful entitlement to terminate Ms Kelsey's employment as CEO, if the reason for doing so was that she had exercised a workplace right. When one has regard to the terms of s 285 of the *IR Act*, such a step is prohibited.

[66] All that means is that the Councillors could not lawfully do that which was done. That they were advised that it was unlawful to take that step before they did so does not make them dishonest. It simply means that they deliberately contravened s 285 of the *IR Act*. There could be a number of reasons why someone in that position would take a step contrary to the advice given. One is that they did not accept the advice as being accurate or applicable. Another might be that there was contrary advice, which was preferred. Yet another might be that they were given advice but they did not understand its import.

[67] In my respectful view, the contention proceeds on a misapprehension as to what "dishonesty" means, and the standard by which it is to be judged. Dishonesty for the purposes of s 408C of the *Criminal Code* is not objectively determined. It looks to the subjective intent of the accused person, and asks whether the conduct was

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42 Appellants' Amended Outline, 7699/19, para 30.

43 Appellants' Amended Outline, 7699/19, para 32.

dishonest. But in judging that dishonesty, it must be dishonesty by the standards of ordinary persons. In other words, it is not an idiosyncratically determined concept, governed by the peculiar subjective view of the accused person. But it must be dishonest, nonetheless.

[68] Further, the contention admits no possible application of the defence of honest and reasonable mistake under s 24 of the *Criminal Code*. The Councillors have put forward reasons why they acted as they did, ascribing them to the CEO's performance. If they honestly and reasonably, but mistakenly, believed that those reasons thereby did not offend s 285 of the *IR Act*, such a defence might be open.

[69] That the Councillors received advice as to what they were entitled to do, and acted contrary to it, merely means that they deliberately flouted the law. That does not mean they acted dishonestly. The declaration which would follow would simply be that the termination of employment was contrary to s 285 of the *IR Act*. No further finding is necessary to resolve the issues in the IRC proceedings.

[70] The submissions also focussed on what was said to be a concession given in response to the President during a hearing in the Industrial Court. In the course of discussion about the nature of the two sets of proceedings Counsel for Ms Kelsey observed that the criminal trial was "embryonic and possibly years away" and then submitted that "unlike the HLP decision – despite the submission to the contrary – does not involve allegations of breach of the same legal obligations at all".[44] Counsel then said:[45]

> "It does not involve allegations of breach of the same legal obligations. We accepted below, and we accept here, that it involves – it is likely to involve a … jury considering some similar issues, and in particular, whether or not the councillors acted honestly in terminating Ms Kelsey's employment. But they are … they are not the same; it is not the same provision, not the same statute."

[71] The submissions assert that this comment effectively conceded the issue of whether there was a substantial difference between the proceedings.[46] In my respectful view, it does no such thing. Counsel's submissions to the President maintained the disparity in the legal obligations, and the disparity in the statutory provisions. All that was said was that the jury were likely to consider "some similar issues". That goes nowhere to conceding an identity of issues, either legal or factual.

[72] Mr Smith also contends that Martin J did not deal with an alternative argument raised in submissions,[47] and had framed the argument incorrectly in his reasons.[48] The alternative contention was that a stay was warranted if there was a possibility that substantially the same factual questions needed to be determined by both the IRC and a jury.[49] While Martin J did frame the argument in terms of "precisely the same factual issues", that appears to have been the result of the way the parties orally framed the arguments before him. In any event, Martin J referred to

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44 AB 1115, lines 1-3.
45 AB 1115, lines 7-11.
46 Appellant's Amended Outline, 7689/19, para 19.
47 Ground B.
48 Appellant's Amended Outline, 7689/19, para 29.
49 Appellant's Amended Outline, 7689/19, para 30.

"substantial" differences[50] between the IRC proceedings and criminal proceedings, supporting the fact that he did consider the question from the broader perspective and did consider whether the issues or facts to be determined were substantially the same. As is made clear in the above analysis Martin J was, in my respectful view, correct in that regard. While there will be an overlap of factual matters between the two proceedings, there are substantial differences. The differences in the proceedings was clearly an issue of which the parties were cognisant.

[73] In my respectful view, it has not been demonstrated that Martin J erred in his analysis and resolution of these issues.

[74] These grounds fail.

Principle in *ASIC v HLP Financial Planning (Aust) Pty Ltd*?

[75] The appellants contended that there was a principle of law propounded in *ASIC v HLP Financial Planning (Aust) Pty Ltd*,[51] that there was a strict rule whereby civil courts should not interfere with criminal proceedings in another court.

[76] In that case ASIC contended that corporate defendants (the HLP Group) operated an unregistered managed investment scheme in breach of s 601ED(5) of the *Corporations Act* 2001 (Cth). ASIC also contended that one of the controllers of the HLP Group operated the scheme himself, and sought declarations against him personally. The issue before Finkelstein J was whether, if the facts were made out, orders should be made.

[77] There was no real contest as to the making of declarations against the HLP Group that the scheme was an unregistered managed investment scheme. The real debate was whether a declaration should be made against the controller, that he had operated the scheme in contravention of s 601ED(5), and whether perpetual restraining orders ought to be made. Finkelstein J was told by ASIC that it was considering whether to charge the controller with criminal offences arising out of his operation of an illegal managed investment scheme. The evidence that ASIC intended to rely upon to establish that the controller had operated an unregistered managed investment scheme was based substantially on statements made during the controller's compulsory examinations under s 19.

[78] Against that background Finkelstein J examined the rules applicable where civil courts intersect with courts conducting criminal proceedings. Specifically, his Honour looked at the law applicable to the question whether civil courts have jurisdiction to grant relief in aid of or to supplement the criminal law.[52]

[79] Having examined a considerable number of English and Australian authorities, Finkelstein J concluded:[53]

> "I would sum up the position as I see it as follows. The English and Australian authorities that warn of the dangers of a civil court becoming involved in criminal conduct continue to apply in an

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50 Reasons below at [30].
51 (2007) 164 FCR 487.
52 *ASIC v HLP Financial Planning* at [19]-[24].
53 *ASIC v HLP Financial Planning* at [58].

> appropriate company case. The general rule in a company case is that a civil court will usually be the appropriate court to deal with a contravention of the *Corporations Act*. But the court should be wary of granting relief, including the grant of a declaration or an injunction, if the case is likely to end up before a criminal court. Ordinarily, a civil court should not intervene in those circumstances unless its failure to do so will result in irreparable injury. That strict rule need not be applied if the case involves undisputed facts and the issue raised gives rise to a question of pure law. Then a declaration can be a very useful remedy. As Barwick CJ said in *Commonwealth v Stirling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305 that is the kind of case 'which contributes enormously to the utility of the jurisdiction'."

[80] It is plain that Finkelstein J was considering a case where the contraventions of the *Corporations Act* by the controller, which exposed him to declaratory relief, were the very same contraventions which could result in a criminal prosecution. So much was made clear by his Honour:[54]

> "The current regime of corporate regulation is, as the Cooney Committee's report observed (at 190), characterised by a 'pyramid of enforcement'. The basic premise is that to deter breaches of the legislation, there should be various levels of enforcement that correspond to the seriousness of the contravention. There are three levels to this pyramid: civil remedies at the base, civil penalties in the middle and criminal sanctions at the top. But it is the court exercising its civil jurisdiction that is the primary means of enforcement. Only the most serious contraventions now end up before a criminal court. Nonetheless when a criminal proceeding is commenced the criminal court should be given (and in many cases expressly given) priority over civil litigation.
>
> The present case is one where the contraventions of the Corporations Act of which Mr Berlowitz has been accused may result in him being prosecuted for criminal offences. What should happen when a civil court is asked to make a declaration of contravention and to grant an injunction restraining future contraventions when a criminal trial is pending or threatened?"

[81] Once that is understood the comments relied upon do not bear the construction for which the appellants contend. Finkelstein J was considering a case where the civil court declaratory relief would effectively be as to the criminal conduct alleged in the criminal proceedings. The wariness of granting relief to which his Honour referred was tempered by his Honour's view that "ordinarily, a civil court should not intervene in those circumstances". The use of the qualifying word "ordinarily" and the phrase "in those circumstances" plainly restrict the comments to the case then being considered, and tell against any principle being laid down, let alone one to be applied strictly to all cases.

[82] Much less could it be said that he was purporting to lay down a rule of principle, or a strict rule, applicable to cases of a stay of proceedings. That was not in issue in

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54 *ASIC v HLP Financial Planning* at [50]-[51].

ASIC v HLP. In my view his Honour did not purport to lay down a strict rule of general application, but rather his Honour inelegantly expressed a rule derived from more general principles concerning the problems of hearing and determining civil proceedings when the subject matter of the proceeding may also be a consideration in criminal prosecutions.

[83] I respectfully agree with the observations of Jagot J in *ASIC v Craigside Company Ltd*[55] that Finkelstein J was not dealing with questions applicable to a stay of proceedings, but rather the question of making final declarations which may well impact upon a criminal proceeding based on the same subject matter. Noting that Finkelstein J did not refer to the decision in *McMahon v Gould*,[56] a decision which set out the guidelines applicable to the question of a stay of civil proceedings in the face of criminal proceedings, her Honour said:[57]

> "Be that as it may there is no doubt that the analysis of Finkelstein J in *HLP Financial Planning* involves consideration of the underlying principles of the potential problem of hearing and determining civil proceedings when the subject matter of the civil proceedings is or may be the subject of criminal prosecutions. So much is apparent from the way in which his Honour ultimately resolved the issue by the grant of a stay at [60] as follows:
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> > 'For the foregoing reasons I decline to entertain, on a final basis, the application for declaratory and injunctive relief against Mr Berlowitz. I am, however, prepared to stand the matter over until the final decision is taken as regards a criminal prosecution. If Mr Berlowitz is to be charged I would dismiss this proceeding against him and leave it to the criminal court to decide his fate. On the other hand, if the decision is made not to lay charges, this case can be brought back on.'"

[84] In my view, more relevant to the present case is the guidance given in respect of cases on stay applications where the two forms of proceedings intersect. In *McMahon v Gould*[58] the court's power to grant a stay of a civil proceeding when a party faced the prospect of criminal proceedings for the same or related conduct, was considered by Wootten J. A number of guidelines were identified as relevant:[59]

(a) *prima facie* a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court;

(b) it is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds;

(c) the burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with;

(d) neither an accused nor the Crown are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;

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55 [2013] FCA 201 at [13].
56 (1982) 7 ACLR 202.
57 *ASIC v Craigside Company Ltd* at [13].
58 (1982) 7 ACLR 202.
59 *McMahon v Gould* at 206; internal citations omitted.

(e) the court's task is one of "the balancing of justice between the parties", taking account of all relevant factors;

(f) each case must be judged on its merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors;

(g) one factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding;

(h) however, the so-called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings; the plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding;

(i) the court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings;

(j) in this regard factors which may be relevant include:

  (i) the possibility of publicity that might reach and influence jurors in the civil proceeding;

  (ii) the proximity of the criminal proceeding;

  (iii) the possibility of miscarriage of justice, eg disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses;

  (iv) the burden on the defendant of preparing for both sets of proceedings concurrently;

  (v) whether the defendant has already disclosed his defence to the allegations;

  (vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him;

(k) the effect on the plaintiff must also be considered and weighed against the effect on the defendant; it may be relevant to consider the nature of the defendant's obligation to the plaintiff; and

(l) in an appropriate case the proceedings may be allowed to proceed to a certain stage, eg setting down for a trial, and then stayed.

[85] Another case concerned with the question of whether civil proceedings should be stayed until the completion of a criminal prosecution concerning the same subject matter as the civil proceedings, was *Websyte Corporation Pty Ltd v Alexander (No 2)*, in which Dodds-Streeton J said:[60]

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60 [2012] FCA 562.

> "It is well established that this court has an extensive jurisdiction to stay proceedings in the interests of justice and that 'the matter is one of judicial discretion'"[61]
>
> "On the present state of the law, there is no automatic entitlement to a stay of the proceedings simply because there are or may be parallel criminal proceedings involving the same or related subject matter."[62]
>
> "While many courts have recognised tension between Wootten J's approach in *McMahon v Gould* to the right of silence in a parallel civil proceeding and the High Court's approach to the privilege against civil incrimination in *Reid v Howard*, it has been recognised that any authoritative re-evaluation of *McMahon v Gould* should be made only by an appellate court, or perhaps the High Court itself."[63]
>
> "While *McMahon v Gould*, unless authoritatively re-evaluated, remains applicable, Wootten J did not purport to establish a rigid code, but expressly recognised that the relevant considerations will vary according to the individual case and that his guidelines were not exhaustive. It is also important to observe that Wootten J did not suggest that potential impact on the privilege against self-incrimination was irrelevant in this context."[64]
>
> "The 'real risk of injustice' relevant in this context can relate either to an actual or potential criminal proceeding."[65]

[86] I respectfully consider the conclusions of Martin J on this aspect were without error.

[87] This ground fails.

The impact of publicity upon the jury

[88] The appellants pressed the contention that there was a high risk of prejudice in the criminal proceedings from the real prospect of the jury being contaminated by having disclosed to it the declarations or other relief granted in the IRC, or by the evidence given in the IRC proceedings.

[89] For the reasons given above, the overlap between the proceedings is not such that the IRC findings should be seen as foreclosing the jury's determinations.

[90] Particular reliance was placed on the doubts expressed by Finkelstein J in *ASIC v HLP*, and comments of the Full Court of the Federal Court in *CFMEU v Australian Competition and Consumer Commission*.[66]

[91] In my view, too much is made of this point. The Vice President hearing the IRC proceedings is, of course, well aware that the criminal proceedings have been commenced, and of the concern about the impact of its findings on the jury. It must

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61 *Websyte* at [53].
62 *Websyte* at [113].
63 *Websyte* at [114].
64 *Websyte* at [115].
65 *Websyte* at [117].
66 [2016] FCAFC 97; (2016) 242 FCR 153.

be accepted that the Vice President will be careful to make findings only to the extent required.

[92] Further, to the extent that there is publicity attracted to those findings, or the ultimate conclusion, there is no reason to doubt that proper directions can be given to the jury to exclude those matters from their considerations. Those directions would include an explanation of the different issues, and in particular the absence of any requirement for a consideration of dishonesty in the IRC proceedings. This court should proceed on the basis that the jury will follow the directions they are given.[67] In *Ferguson* this court considered the question of adverse publicity on a jury and said:[68]

> "As to the first of the issues of present concern, there is an abundance of authoritative statements that even where a trial is accompanied by adverse publicity, even adverse publicity concerning the accused's previous criminal convictions, the court should be slow to conclude that the result of risk of unfairness to the accused is intractable because the jury is unlikely to be amenable to the directions of the trial judge to ignore the adverse publicity and render their verdict based on the evidence."

[93] Further, in *R v Glennon*[69] Mason CJ and Toohey J said:

> "Likewise, the suggestion that there was a substantial risk that at least one juror would have acquired knowledge, before the verdict was given, of the respondent's prior conviction was again a matter of mere conjecture or speculation. The mere possibility that such knowledge may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown. The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. As Toohey J observed in *Hinch* ((1987) 164 CLR at 74), in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them. In *Murphy v The Queen*, we stated ((1989) 167 CLR 94 at 99; see also *Reg v Von Einem* (1990) 55 SASR 199 at 211):
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> > 'But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *Reg v Hubbert* ((1975) 29 CCC (2d) 279 at 291): 'In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving

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67 *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483; [2008] QCA 227.

68 *Ferguson* at [26].

69 (1992) 173 CLR 592 at 603; citations footnoted in original.

> considerable notoriety, it would be possible to select twelve jurors who had not heard anything about the case. Prior information about a case, even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.'
>
> To conclude otherwise is to underrate the integrity of the system of trial by a jury and the effect on the jury of the instructions given by the trial judge."

[94] Having analysed those passages and others, this court in *Ferguson* said:[70]

> "These passages emphasise the need for circumspection on the part of a court in acting on a prediction of the inability of the jury to render a verdict fairly in accordance with the directions of the trial judge. It is necessary to bear in mind that, pursuant to s 50 of the *Jury Act*, the members of a jury swear 'to give a true verdict, according to the evidence, on the issues to be tried …'. The passages which we have set out above also emphasise that the system of trial by a jury proceeds on the assumption that jurors can be trusted to be true to their oath.
>
> The jury trial has not been regarded and should not be regarded, as an exotic and delicate contrivance, the integrity of which cannot survive jurors' knowledge of matters adverse to an accused gained other than through admissible evidence."

[95] In *CFMEU v ACCC* the court was considering a case where the CFMEU and two individuals were the subject of proceedings in relation to alleged contraventions of s 45D(1) and s 45E(2) of the *Competition and Consumer Act* 2010 (Cth), and s 50 of the *Australian Consumer Law* (Cth). Those contraventions were said to arise from the attempts of the CFMEU to prevent a concrete supplier from supplying concrete to a construction company. The relevant contraventions arose out of what occurred at a particular meeting in April 2013, and the contravention of s 45D(1) was alleged to have occurred in February 2013.

[96] The two individuals were also charged with counts of blackmail, contrary to s 87 of the *Crimes Act* 1958 (Vic). That related to their conduct at the April 2013 meeting. As a consequence, a consent order was made staying that part of the proceedings that related to the April 2013 meeting. A stay of the balance of the proceedings against the CFMEU for breach of s 45D was not stayed. Of note is the fact that the court did not consider that the High Court's decision in *Commissioner of Australian Federal Police v Zhao*[71] was applicable. *Zhao* recognised the potential prejudice for an accused if the evidence given by the accused in civil proceedings would reveal or telegraph information to the prosecutor about the accused defence in criminal proceedings. The High Court's decision noted a fundamental principle of common law, that the prosecution has to prove the guilt of an accused person in criminal proceedings, and cannot compel a person charged with a crime to assist in the discharge of its onus of proof. That principle was inapplicable in *CFMEU v ACCC* as there was no evidence to suggest that the individuals would be compelled to give evidence in the s 45D proceeding at a time

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70 *Ferguson* at [39]-[40].
71 (2015) 255 CLR 46.

prior to the hearing of the blackmail proceedings. I pause to note that the risk identified in *Zhao* does not apply in this case, because all of the evidence that might be given in the IRC proceedings has been given already. There is no further risk which will arise.

[97] The court in *CFMEU v ACCC* turned to the question of potential common contamination of the jury in the blackmail proceedings "by the findings and declarations that may be made in the s 45D proceeding".[72] The court shared the reservations expressed by Finkelstein J in *ASIC v HLP*,[73] but declined to intervene on that basis because it was premature. It was possible that publication of the reasons and declarations would post date the hearing of the blackmail proceedings, or they may be delayed specifically by the court below.[74]

[98] In my view, that issue does not arise here. As was conceded by Mr Friend QC, appearing on behalf of the appellants other than Mr Smith, the findings in the IRC proceedings would not be admissible in the criminal proceedings, nor would any of the evidence given in those proceedings. The only risk, then, arises from publicity. As to that, the established line of authority in Queensland is reflected in *R v Ferguson*, and cases which have followed it. This court should proceed on the basis that the jury will conduct itself in accordance with directions given to it.

[99] This ground fails.

Balance of convenience

[100] The IRC proceedings are at the point of finalisation. All the Councillors have given their evidence and submitted to cross-examination. Of course, Mr Smith has not, but he does not suggest that any step taken in the IRC proceedings is now rendered unfair because of the criminal proceedings. The trial is over and written submissions have already been lodged with the IRC, and exchanged between the parties. All that remains is for oral submissions to be made, and then for the Commission to make its determination.

[101] It should be noted, as I have mentioned above, that those proceedings have been conducted (at least for the bulk of the time) in the knowledge that the CCC might take prosecutorial steps once its investigation was finalised. Whilst the notice given in July and November 2018 related to the Mayor's conduct, the CCC had already advised the Councillors on 5 February 2018 that it would investigate any action taken in respect of Ms Kelsey's employment.

[102] By contrast, the criminal proceedings have only just begun. The evidence before the President suggested that it could be a period of two years before the trial is heard. That could be even longer given the prospect of appeals and retrials. Martin J estimated a period of up to three to four years.[75] That conclusion was not the subject of criticism on the appeal. That means that if a stay is granted, the IRC proceedings cannot be finalised for a very considerable period of time. Further,

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72 *CFMEU v ACCC* at [44] and following.
73 *CFMEU v ACCC* at [46].
74 *CFMEU v ACCC* at [48]-[49].
75 Reasons below at [53].

they would not be concluded until after the expiry date of Ms Kelsey's contract as CEO.[76]

[103] And such a delay puts the judicial officer hearing the IRC proceedings in an invidious position, with such a long gap between hearing the witnesses and making determinations on what evidence to accept, especially where that is based on findings of credit.[77] It is, in my view, no real answer to say that the IRC could finalise its proceedings but not publish the findings, or not publish them beyond the parties. Courts and tribunals are expected to conduct their hearings in open court, and the circumstances here do not warrant secrecy.

[104] That is an invidious position for Ms Kelsey, who has pursued her rights with expedition. It is all the more invidious because a previously given undertaking to meet her income under the contract has now been withdrawn.[78] These considerations were adverted to by Martin J.[79] For all that time Ms Kelsey would have to stand by, not having her name cleared and bearing the strain (financial and personal) of this litigation.

[105] As for publicity concerns, the material shows that there has already been a substantial public airing of the various twists and turns in the media. No doubt that would continue even in the face of the criminal proceedings. No party suggests that means that the criminal trial cannot be fair. For the reasons above, any further publicity concerning the outcome does not weigh heavily in favour of a stay. The different issues in the two proceedings, the likelihood of the IRC being careful to find only that which need be found, and the directions that can be given, which this Court should assume the jury will follow, combine to make this consideration of less weight than the appellants would have it.

[106] The appellants criticised the IRC decision for not considering the public interest in the efficacy of the criminal justice system. That submission was one linked to those concerning the cross-over between the two sets of proceedings. It does not carry much weight given the conclusions reached above on the other considerations. In any event, its foundation lies in the desire to protect a person's right to silence. Senior Counsel conceded that was not really applicable here, where the Councillors have already given evidence exposing their reasons for voting as they did.

[107] A consideration of the various factors mentioned in *McMahon v Gould* show that the balance of convenience would favour the refusal of a stay.

[108] In the alternative to a stay, the appellants sought that this Court order that the final submissions in the IRC proceedings should be heard in camera, a non-publication order should be issued in respect of the proceedings and that no decision is to be rendered until after the resolution of the criminal charges. However, as was accepted by the parties, there is no reason why the Commission cannot make those orders, if appropriate. It is neither necessary nor appropriate for this Court to dictate to the Commission the appropriate procedural steps, which it is best placed to determine.

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76 That contract ran until 25 June 2021.

77 *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17.

78 That offer, which was of doubtful utility (see Reasons below at [61]), was still on foot before the Industrial Court, but withdrawn by the time the present appeal was heard.

79 Reasons below at [61]-[63].

Orders

[109] I therefore propose the following orders:

1. In Appeal No 7689 of 2019;

   (i) Appeal dismissed.

   (ii) The appellant pay the first respondent's costs of the appeal.

2. In Appeal No 7699 of 2019;

   (i) Appeal dismissed.

   (ii) The appellants pay the first respondent's costs of the appeal.

[110] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and the orders proposed by his Honour.

[111] **BROWN J:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.