SUPREME COURT OF QUEENSLAND

CITATION:	*Flegg v Hallett* [2014] QSC 220
PARTIES:	**BRUCE STEPHEN FLEGG** (plaintiff) v **GRAEME NORMAN HALLETT** (defendant)
FILE NO:	SC No 11629 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	12 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2014
JUDGE:	Flanagan J
ORDER:	**1. Defendant's application filed 28 August 2014 be dismissed.** **2. Exhibits KVJ-4, KVJ-5, KVH-6 and KVJ-7 to the affidavit of Kristopher Volker Jahnke filed 28 August 2014 be sealed and are not to be opened except upon order of a Judge of the Supreme Court of Queensland.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – STAY OF CIVIL PROCEEDINGS PENDING CRIMINAL PROCEEDINGS – where the defendant applied to have a civil defamation proceeding stayed pending the outcome of a criminal proceeding – where the plaintiff was the Queensland Minister for Housing and Public Works – where the defendant was the plaintiff's Senior Media Adviser – where the plaintiff terminated the defendant's employment – where the defendant is alleged to have threatened the Director of the Government Media Unit that he would divulge information about the plaintiff unless he was provided another job – where the defendant subsequently held a press conference providing statements to the media which are the subject of the defamation proceeding – where the defendant pleads defences of privilege at common law and qualified privilege pursuant to s 30 of the *Defamation Act* 2005 – where none of the current pleadings plead any material fact relating to the alleged threatening of the Director of the Government Media Unit – where the defamation proceeding has been set down for trial commencing 15 October 2014 – where the criminal

proceeding relates to the alleged threatening of the Director of the Government Media Unit pursuant to s 54A of the *Criminal Code* 1899 – where a trial in the criminal proceeding may not take place until the second half of 2015 – whether any prejudice to the plaintiff in having the defamation proceeding stayed outweighs any prejudice to the defendant – whether any publicity of the defamation proceeding is likely to prejudice any subsequent criminal proceeding – whether the defendant's defence in the defamation proceeding would prejudice the defendant's ability to defend the criminal proceeding – whether there is a real danger of injustice in the criminal proceeding if the defamation proceeding is not stayed – whether the civil defamation proceedings ought to be stayed pending the finalisation of the criminal proceedings

Criminal Code 1899 (Qld), s 54A
Defamation Act 2005 (Qld), s 30

Australian Securities Commission v Kavanagh (1993) 12 ACSR 69, cited
Baker v Commissioner of Federal Police (2000) 104 FCR 359, considered
Elliot v Australian Prudential Regulation Authority [2004] FCA 586, considered
Gypsy Fire v Truth Newspapers Pty Ltd (1987) 9 NSWLR 382, considered
McMahon v Gould (1982) 7 ACLR 202, considered
Philippine Airlines v Goldair (Aust) Pty Ltd [1990] VR 385, cited
Re AWB Ltd (No 1) (2008) 21 VR 252, considered
Reid v Howard (1995) 184 CLR 1, cited
State of Queensland v Bush [2003] QSC 375, cited
State of Queensland v Henderson (Unreported, Supreme Court of Queensland, Fryberg J, 16 May 2003), cited
State of Queensland v Shaw [2003] QSC 436, cited
Stevens v Trewin & van den Broek [1968] Qd R 411, cited
White v Australian Securities and Investment Commission [2013] QCA 357, applied
Yuill v Spedley Securities Ltd (in liq) 1992) 8 ACSR 272, considered

COUNSEL: N H Ferrett with M May for the plaintiff
S J Keim SC for the defendant

SOLICITORS: Cooper Grace Ward for the plaintiff
Guest Lawyers for the defendant

[1] This is an application by Graeme Norman Hallett that a defamation action (Supreme Court No 11629 of 2012) be stayed until determination of criminal proceedings.

The application is brought within the inherent jurisdiction of the court to control its own processes.[1]

Background

[2] Mr Hallett ("**the defendant**") is the defendant in defamation proceedings brought by Dr Bruce Stephen Flegg ("**the plaintiff**").

[3] The plaintiff was and remains a member of the Legislative Assembly of the Parliament of Queensland for the electoral district of Moggill. From on or about 3 April 2012 to 14 November 2012 he was the Minister for Housing and Public Works in and for the State of Queensland. The defendant was employed as the Senior Media Advisor to the plaintiff from about 3 April 2012 until 12 November 2012. On 12 November 2012 the plaintiff caused the defendant to be dismissed from this position.

[4] On the same day the defendant is alleged to have had a conversation with Russell Lee Anderson ("**Mr Anderson**") the Director, Government Media Unit, Office of the Premier. It is this alleged conversation which is the substance of the criminal charge.

[5] Further on 12 November 2012, the defendant said the following words to one or more journalists or employees of media organisations in Brisbane:[2]

> "(a) I will be making certain disclosures that Dr Flegg is not a fit and proper person to be a minister; and
> (b) Flegg has dismissed me so I am going to put all of this in the public record."

[6] This is the first publication pleaded by the plaintiff in the defamation proceedings.

[7] On 13 November 2012 the defendant held a media conference outside the Parliamentary Annexe with approximately 10 to 15 invited reporters. In the course of the media conference, the defendant said, and thereby published the words attributed to him in Annexure A to the statement of claim. This is the second publication pleaded by the plaintiff.

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1 *Stevens v Trewin & van den Broek* [1968] Qd R 411, 417 (Hanger J).
2 Statement of claim filed 4 December 2012, [10].

[8] The third publication is a radio interview in which the defendant participated on the same day.

[9] On 14 November 2012 the plaintiff resigned from the Ministry. The decision to resign from the Ministry was directly connected to the publication of the alleged defamatory matters.[3]

The defamation proceedings

[10] The plaintiff commenced defamation proceedings by claim and statement of claim on 4 December 2012. The claim seeks general compensatory damages in the amount of $339,000 together with aggravated compensatory damages in the amount of $500,000 and special damages suffered by reason of the plaintiff having to resign from the Ministry.

[11] The statement of claim pleads the three publications which I have referred to above. It should be immediately noted that the plaintiff does not rely on anything allegedly said by the defendant to Mr Anderson as a publication. There are for example no pleaded imputations arising from anything said by the defendant to Mr Anderson.

[12] On 7 January 2013 the defendant filed a defence and counterclaim to the statement of claim. The defence essentially admitted the publication of the statements. The defence admitted that certain imputations arose from the words spoken but otherwise denied that other pleaded imputations arose.

[13] Paragraphs 17 to 19 of the defence pleaded a defence of privilege at common law (the *Lange*[4] defence), a defence of lawful excuse pursuant to s 36 and/or 38 of the *Public Interest Disclosure Act* 2010 (Qld) and a defence of qualified privilege pursuant to s 30 of the *Defamation Act* 2005 (Qld). The defence under the *Public Interest Disclosure Act* 2010 was subsequently abandoned. The defence under the *Public Interest Disclosure Act* 2010 did however make reference in paragraph 18(dd) of the defence that the defendant had a conversation with Mr Anderson on 12 December 2012 in the presence of Mr Martin Kennedy. A further reference to a conversation with Mr Anderson was made in paragraph 29(c) of the counterclaim.

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3 Affidavit of Bruce Stephen Flegg filed 2 September 2014, [18]-[20].

The counterclaim which sought general, aggravated, exemplary and special damages for alleged breaches of the *Public Interest Disclosure Act* 2010 by the plaintiff was also abandoned by the defendant.

[14] In the amended defence of the defendant filed 11 March 2014 the defences are limited to the *Lange* defence and qualified privilege pursuant to s 30 of the *Defamation Act* 2005. By paragraph 17(c) and 19(f) of the amended defence, the defendant alleges that the publication by the defendant was reasonable in the circumstances. The actual circumstances relied on for this allegation are not particularised.

[15] The plaintiff filed an amended reply on 25 March 2014. Paragraph 4(c) pleads that the publication by the defendant was not reasonable in the circumstances having regard to a number of matters:

- the defendant did not have reasonable grounds for believing that each of the imputations were true;
- each of the imputations was a serious allegation to make against the plaintiff;
- the defendant could have, but failed to, obtain and examine copies of further emails referred to an email that was in his possession;
- the defendant did not take proper steps to verify the accuracy of each of the imputations;
- the defendant did not seek, or publish, a response from the plaintiff in respect of the matters the defendant subsequently published.

[16] The allegation that the defendant's conduct in making the publication was not reasonable is repeated in paragraph 6 of the amended reply in respect to the defence of qualified privilege.

[17] The amended reply in paragraph 7 further pleads that the defendant, in making the publication, was actuated by malice. Importantly, the particulars of malice are

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[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

limited to the defendant being actuated by ill-will towards the plaintiff arising from the fact that the plaintiff caused the defendant's employment to be terminated. No part of the plea of malice relies on any alleged conversation as between the defendant and Mr Anderson on 12 November 2012.

[18] The defamation action has been subject to case flow orders by Atkinson J. Various notices of non-party disclosure have been served pursuant to those orders. In April 2014 the defamation proceedings were set down for trial for three days commencing 15 October 2014.

The criminal proceedings

[19] From the material it would appear that the criminal matter had its procedural origins in a complaint to the Crime and Misconduct Commission ("**CMC**") made by the plaintiff some time after the events of 12 November 2012. On 21 May 2013 the Acting Chairperson of the CMC furnished the Director of Public Prosecutions (DPP) with a brief of evidence for the purpose of any prosecution proceedings which the DPP considered warranted against the defendant.[5]

[20] On 21 October 2013 the CMC received a letter from the DPP in which it was advised that the DPP had decided that one count pursuant to s 54A of the *Criminal Code* 1899 (Qld) against the defendant was warranted.[6] Section 54A of the *Criminal Code* 1899 deals with demands with menaces upon agencies of government:

> "(1) Any person who demands that anything be done or omitted to be done or be procured by—
>
> (a) the Government of Queensland or a person in the employment of the Crown in right of Queensland, in performance of the duties of the person's employment or otherwise in the person's official capacity; or
>
> (b) the Governor, in his or her role of Governor; or
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> (c) a Minister of the Crown, in his or her office as Minister or as a member of the Executive Council of Queensland; or
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> (d) a government corporation, in discharge of its functions conferred by law, or a person in the employment of a government corporation, in performance of the duties of the person's employment or otherwise in the person's official capacity;

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5 Exhibit KVJ-1 to the affidavit of Kristopher Volker Jahnke filed 28 August 2014.

6 Exhibit KVJ-1 to the affidavit of Kristopher Volker Jahnke filed 28 August 2014.

> with threats of detriment of any kind to be caused to any person aforesaid or any other person or to the public or any member or members of the public or to property, by the offender or by any other person, if the demand is not complied with is guilty of a crime and is liable to imprisonment for 14 years."

[21] The elements of the criminal charge are as follows:

(a) a demand made;

(b) of an employee of the Crown in right of Queensland;

(c) with a threat of detriment to a person if the demand is not complied with.

[22] In respect to those elements Mr Ferrett of counsel who appeared with Mr May of counsel for the plaintiff submitted: [7]

> "Those elements are, on the Crown's case, all obviously satisfied by the evidence of Mr Anderson."[8]

The Crown's case may be made out without the necessity of demonstrating that the threats were carried out. All that s 54A of the *Criminal Code* 1899 requires in this respect is the making of a threat.

[23] On 30 June 2014 the defendant was served with a notice to appear. Relevantly the notice stated:[9]

> "YOU ARE ACCUSED OF THE FOLLOWING OFFENCE(S):
> s.54A CRIMINAL CODE – Demands with menaces upon agencies of government
> That on 12/11/2012 in Brisbane you demanded that Russell Lee ANDERSON secure employment with threats of detriment to be caused to Bruce FLEGG."

[24] The defendant appeared in the Brisbane Magistrates Court on 11 July 2014. His matter was adjourned for further mention at the committal callover before the Brisbane Magistrates Court to 18 August 2014. On that occasion the matter was adjourned to 8 September 2014 for further mention.[10]

[25] The brief of evidence was provided to the defendant's solicitors on or about 20 August 2014 and on or about 3 September 2014 the defendant's solicitors were

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7 Plaintiff's outline of argument dated 4 September 2014, [15].

8 See annexure KVJ-5 to the affidavit of Kristopher Volker Jahnke filed 28 August 2014, [9]-[11].

9 KVJ-2 to the affidavit of Kristopher Volker Jahnke filed 28 August 2014.

advised they were in possession of all material to be relied on by the Crown.[11] Exhibited to the affidavit of Mr Jahnke filed 28 August 2014 are copies of statements of evidence from Mr Anderson and the plaintiff which have been disclosed by the DPP. The defendant's application for a stay of the defamation proceedings also seeks an order that these statements be sealed and subject to a non-publication order. Mr Keim SC, who appeared for the defendant, requested that I have regard to these statements which include three statements of Mr Anderson and one statement of the plaintiff.

[26] It is likely that a committal hearing will be set down in either November or December 2014. If however, the defendant brings an application for leave to cross-examine certain witnesses at the committal, which is intended if the Crown does not consent to cross-examination, then it is more likely that the committal will be held between January and April 2015.

[27] If the defendant is committed for trial there is no evidence before me as to when such a trial would take place except an estimate by the defendant's solicitor of no later than the second half of 2015. It is clear however, that if any stay is granted in relation to the defamation proceedings the trial dates set for 15 to 17 October 2014 will need to be vacated. Any attempt by the plaintiff to vindicate his reputation by the defamation proceedings would be considerably delayed.

The relevant principles for a stay

[28] The starting point in considering a stay application is the decision of Wootten J in *McMahon v Gould*[12] where his Honour stated matters that may be relevant to the exercise of the Court's discretion in cases of this kind:

> " (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;

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10 Affidavit of Kristopher Volker Jahnke filed sworn 4 September 2014, [3]-[4].

11 Affidavit of Kristopher Volker Jahnke filed sworn 4 September 2014, [6].

12 *McMahon v Gould* (1982) 7 ACLR 202, 206-208.

(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;

(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 own 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. I return to this subject below;

(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 a 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 proceedings;

  (ii) the proximity of the criminal hearing;

  (iii) the possibility of miscarriage of justice eg by 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 … ;

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

[29] These guidelines were applied by Young CJ in *Philippine Airlines v Goldair (Aust) Pty Ltd*[13] and by the Court of Appeal in New South Wales in *Yuill v Spedley Securities Ltd (in liq)*.[14] In that case, Kirby P foreshadowed that one day it would be appropriate for the Court of Appeal to reconsider the guidelines stated by Wootten J in *McMahon v Gould*:[15]

> "There are, in my view, considerations additional to those which are referred to by Wootten J which it would be relevant to consider in proceeding to determine an application for a stay such as was before Rolfe J. For example, it is in my opinion relevant to take specifically into account the public's own interest in the normal primacy of the administration of criminal justice, being a part of the public law of the community relevant to its good order and peaceful government. This consideration might help explain why, ordinarily but not universally, such proceedings should be heard and determined first.
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> Also relevant is the fact that serious criminal proceedings are still determined, in most cases in this State, by juries. Most civil litigation is now decided by judges sitting alone. Judges, by their training, are conventionally considered to be better able to make the mental adjustments for excluding the prejudicial effect of pretrial publicity than lay jurors are. The sensational and highly personalised presentation of much news by the news media today has become a factor relevant to the fair trial of prominent 'personalities'. Guarding their right to a manifestly a fair criminal trial is as much in the interest of the community and its legal institutions as in the interests of the individuals concerned.
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> A further consideration in cases of this class is the 'deep-rooted' inclination of our law to avoid, directly or indirectly, depriving a person of the right to silence in criminal proceedings. Sometimes the prior litigation of the criminal trial may have that effect, either by its interlocutory procedures or by the need of the accused, in the forensic setting of the civil trial, to give evidence or ask questions, thereby disclosing a defence to the outstanding criminal charge.
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> More than lip service must be paid by courts to the preservation of these enduring features of the criminal process, whether in the interpretation of apparently inconsistent statutes or in the exercise of a discretion to stay civil proceedings until related proceedings are completed." (*citations omitted*)

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13 [1990] VR 385.

14 (1992) 8 ACSR 272.

15 *Yuill v Spedley Securities Ltd (in liq)* (1992) 8 ACSR 272, 274-275.

[30] Further doubt has been cast on *McMahon v Gould* by the decision of Gyles J in *Baker v Commissioner of Federal Police*.[16] The criticism of *McMahon v Gould* made in that case was that it gives insufficient weight to, and has not fully appreciated the extent of, the privilege against self incrimination. This is particularly so since the restatement of that principle by the High Court in *Reid v Howard*.[17] Gyles J observed:[18]

> "In my opinion, there is some merit in the submission that there should be reconsideration of the manner in which the *McMahon v Gould* line of authority is now applied so as to decide whether too little weight is given to the practical as well as legal prejudice to the accused and to the primacy of criminal proceedings in our justice system. The decision in *Reid v Howard* adds force to remarks to this effect by Kirby P (as he then was) in *Yuill v Spedley Securities Ltd (in liq)*. However, any such reconsideration would need to be undertaken either by a Full Court of this Court or the High Court." (*citations omitted*)

[31] Robson J in *Re AWB Ltd (No 1)*[19] also suggested that the principles identified in *McMahon v Gould* should be revisited:[20]

> "For the purposes of this case, I assume I am bound to follow the *McMahon v Gould* line of authorities. Nevertheless, I wish to add my voice to those at first instance suggesting that an appellate court may wish to reconsider *McMahon v Gould*. In particular, an appellate court may consider that the right of silence should not only be recognised, but protected by the courts by preventing a defendant from being effectively compelled to waive his right of silence and thereby help those who seek to prove an offence by requiring him to defend civil actions relating to the same or similar conduct the subject of existing or potential criminal proceedings before those civil proceedings are completed. Compelling the defendant to defend civil proceedings, particularly those which impose a penalty, may assist the Crown in its prosecution by putting the Crown onto a train of inquiry or enable it to adjust its case to meet the anticipated defence in advance. It might be thought that such a circumstance denies the defendant his or her basic common law right to have the Crown establish its case against him or her without any assistance from the defendant." (*footnotes omitted*)

[32] This passage of Robson J and the principles expounded in *McMahon v Gould* were recently considered by the Queensland Court of Appeal in *White v Australian*

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16 (2000) 104 FCR 359.
17 (1995) 184 CLR 1.
18 *Baker v Commissioner of Federal Police* (2000) 104 FCR 359, 366-367 [34]-[35].
19 (2008) 21 VR 252.
20 *Re AWB Ltd (No 1)* (2008) 21 VR 252, 277 [58].

Securities and Investments Commission,[21] Muir JA with whom Gotterson JA and Applegarth J agreed, observed at [23]:

> "Even if it were to be accepted that additional weight or emphasis should be afforded to maintaining the relevant privileges consistently with the principles articulated in *Reid*, it was not submitted that any such approach would result in an unconditional right to the stay of civil proceedings, the continuation of which might have the practical result of forcing a defendant in the civil proceedings to take steps which would waive the defendant's right of silence and thus disadvantage the defendant in criminal proceedings being prosecuted in a different jurisdiction. Moreover, as may be seen from the foregoing discussion, the primary judge did not merely apply the guidelines stated in *Gould* and his alleged error in not applying the *Gould* principles reformulated in accordance with *Re AWB Ltd (No 1)* was not identified."

[33] Muir JA emphasised that an applicant has no absolute right to a stay of a proceedings. Further, that in considering whether such a stay should be granted the rights of other parties including a consideration of the public interest must be taken into account.[22]

[34] 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. The court must balance justice between the parties taking into account all of the relevant factors including consideration of the defendant's right to silence in the criminal proceedings. In this respect Applegarth J in *White v Australian Securities and Investment* observed:[23]

> "There was no elevation of case management principles above the appellant's fundamental common law right. The primary judge was assisted by the guidelines stated in *McMahon v Gould* and appreciated that later authorities refined those guidelines by affirming that it is legitimate for a party in the appellant's position to deprive the prosecution of an early opportunity to check his story and obtain evidence to refute it. The primary judge did not engage in a case management exercise. His concern was with the interests of justice. The principles stated in *McMahon v Gould* and later authorities identified the court's task as balancing competing interests and deciding whether the interests of justice warranted a stay." (*footnotes omitted*)

[35] The balancing of competing interest in this respect must have as its starting point a proper analysis of the relevant issues in both the civil and criminal proceedings. The defendant must demonstrate that there is a real and not merely a notional

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21 [2013] QCA 357.

22 *White v Australian Securities and Investment Commission* [2013] QCA 357, [25].

danger of injustice in the criminal proceedings. Fryberg J in *State of Queensland v Henderson*[24] in refusing an application for a stay stated:

> "… before [the applicant] can be entitled to substantive relief, it is incumbent on him to demonstrate either or both that he has a matter that he wishes to raise in defence of the forfeiture proceedings which if raised would prejudice the criminal proceedings and/or that he has a matter which he would wish to raise in exclusion proceedings to like effect."

[36] His Honour concluded that the evidence before the court was insufficient to demonstrate a substantial likelihood of prejudice and that the argument in that respect had been "speculative".

[37] To similar effect is the decision of Justice Mackenzie (as his Honour then was) in *State of Queensland v Bush.*[25] In that case his Honour refused to stay confiscation proceedings noting:[26]

> "… the mere fact that a criminal proceeding has been started against a person is not a ground for staying the forfeiture proceedings. It is not useful to try to define … what might suffice to justify deferral of the proceedings. In my view at the minimum, it would require that it be demonstrated by reference to circumstances of the particular case, why the interests of justice will not be served by the forfeiture proceedings being heard in advance of the criminal proceedings."

[38] His Honour however in *State of Queensland v Shaw*[27] granted a stay where on the facts of the case the fundamental question in both the criminal and civil proceedings were the same. In defending the forfeiture proceedings the applicant wished to provide evidence which was not in the possession of investigators. Justice Mackenzie stated:[28]

> "Depriving a defendant of such an advantage by requiring him to undergo prior proceedings where the State may, in effect, test-run the same case it proposes to lead in the prosecution proceeding and if necessary improve it if it can prior to that time is in my view sufficiently of the character of a demonstrated reason why the interests of justice would not be served by the forfeiture proceedings being heard in advance of the criminal proceedings. In my view the circumstances in which a stay is justified are established by the particular facts of the case."

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23 *White v Australian Securities and Investment Commission* [2013] QCA 357, [39].
24 (Unreported, Supreme Court of Queensland, Fryberg J, 16 May 2003), 5.
25 [2003] QSC 375.
26 *State of Queensland v Bush* [2003] QSC 375, [4].
27 [2003] QSC 436.
28 *Queensland v Shaw* [2003] QSC 436, [25].

[39] In *Elliot v Australian Prudential Regulation Authority*[29] Gray J was chiefly concerned with the question whether the applicant's material contained sufficient information to enable the court to determine whether there could be some real prospect of substantial prejudice. His Honour referred to the evidence being an affidavit from the applicant's solicitor which merely referred to correspondence. At [21] his Honour stated:

> "There is a need, in my view, for the applicants to descend to specifics if they wish to establish that there will be injustice or prejudice to them from having to elect whether to respond to the letters of 31 October 2003. It is necessary for each applicant separately to say how he or she might be affected in making any response, so that the Court can see if there is a real risk of prejudice or injustice of a sufficiently substantial nature."

[40] A stay application in the particular context of defamation proceedings was considered by Hunt J in *Gypsy Fire v Truth Newspapers Pty Ltd*.[30] His Honour observed:[31]

> "If, therefore, a defendant in a civil defamation litigation has been charged with a criminal offence arising out of the same subject matter, or if there is a real prospect that he will be so charged, it is open to him to seek a stay of the civil litigation until the conclusion of the criminal prosecution if he is able to show that his obligation in that litigation to disclose his case in answer to the criminal charge might lead to a potential miscarriage of justice in the prosecution. Such an application must obviously be made before his case has been disclosed in the civil litigation.
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> Upon that basis, the defendant's application for a stay of proceedings in the present case must be refused. It has already filed a defence and given at least some particulars of the substantive defences raised. It has already given discovery. Although it has not yet answered the plaintiff's interrogatories, the nature of its defence to the criminal prosecution must already have been disclosed not only by the steps which it has taken so far but also, I should assume, in the cross-examination of the plaintiff (as the complainant), in the committal proceedings … there has been no suggestion made by the defendant in support of its application that it has anything further in relation to its case in answer to the criminal charge which it wishes to withhold. Indeed, I was informed (without objection) that the defendant has

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29 [2004] FCA 586.
30 (1987) 9 NSWLR 382.
31 *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382, 388-389.

> notified the Magistrate that it proposes to go into evidence in the committal proceedings."

The defendant's submission

[41] Mr Keim SC submitted that the allegation in the criminal proceedings is linked, both thematically and chronologically to the issues arising in the civil proceedings. The chronological link is hours in respect of the first publication and not more than a day in the case of the second and third publications. Mr Keim further submitted that whereas the termination of the applicant's employment is alleged to be at the heart of the allegation of malice, a demand for employment (in substitution for the terminated employment) is said to be the demand the subject of the criminal charge. The further thematic link is that the alleged publications are, in effect, the carrying out of the alleged "threats of detriment" which is an essential element of the criminal charge. Mr Keim referred to the fact that the words relied upon as constituting the second publication include a question and answer going to the matters which are the subject of the criminal allegations. That exchange is found at page 4 of Annexure A to the statement of claim:

> "Question There's no doubt that you're going to be accused of being a rat, here. Did you ever say you wouldn't go public with this if the Government offered you another job?
>
> Graeme Hallett No, I would refute that. As far as being a rat is concerned, as I said, I have over 20 years' experience, and most of you know me from the past. I worked for the Howard Government and have been a life-long Liberal. Most of you here wouldn't even remember, but my first involvement with politics was working on a polling booth in October 1969, standing out in the booth at Swansea, working for John Gordon. So, you know, that's how far I go back. Most of you have probably never even heard of him."

[42] Mr Keim therefore submitted that:[32]

> "The allegations of lack of reasonable inquiries; unreasonableness; and malice in the respondent's reply would almost certainly require the applicant to go into evidence in the civil proceedings to make out his defences and to defeat the allegation of malice.

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32 Defendant's outline of argument dated 4 September 2014, [28]-[30].

> That may also, almost certainly, require the applicant to discuss all of his conduct in the days leading up to and immediately subsequent to his dismissal from employment with the respondent. This would necessitate discussion on his part of the events said to constitute the criminal offence.
>
> In any event, the applicant is likely to be cross-examined by the respondent about the events alleged to constitute the criminal offence."

[43] It follows it is submitted, that the defendant would, effectively, lose his right to silence. Further the civil proceedings are likely to receive extensive publicity which may also disadvantage the applicant in his criminal defence.

Plaintiff's submissions

[44] Mr Ferrett submitted that the defendant's evidence does not demonstrate any risk of him not obtaining a just outcome in the criminal proceedings. He accepted that the factual substratum of the criminal and civil proceedings are linked in that the subject of the criminal charge is the defendant's alleged threat whilst the subject of the defamation proceedings is the alleged threat made good.

[45] In submitting that there is no evidentiary basis which establishes any real risk of prejudice to the defendant's criminal proceedings, Mr Ferrett identified the following matters:[33]

- There is no evidence from anyone familiar with the defendant's account of events to the effect that what the defendant might say in giving evidence in the civil proceeding might have a tendency to incriminate him.

- The defendant has already pleaded in the defamation proceedings. Therefore, to the extent that there is overlap between the civil and criminal proceedings, the defendant has already disclosed what his case is on those matters. That includes the defendant having given an account (in an earlier pleading) of an alleged conversation between the defendant, Mr Anderson and Mr Kennedy on 12 November 2012.

- Given the nature of the charge, the prospect that the defendant might decline to give evidence seems more theoretical than real. The basis of the charge is a conversation (or conversations) between two people, in the presence of no others.

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[33] Plaintiff's outline of argument dated 4 September 2014, [17]-[19].

[46] Mr Ferrett also referred to the demonstrated prejudice to the plaintiff if the defamation proceedings were to be stayed. In this respect he identified five considerations:[34]

> "*First*, a State election is due to be held in March 2015 and a stay has the real potential to prejudice the plaintiff's prospects of being pre-selected by the LNP in that election (and of being elected if pre-selected). If ordered, a stay has the potential not only dramatically to affect the plaintiff's career, but also to influence the composition of the Parliament of Queensland, and potentially the Queensland Government. It will be virtually impossible for the plaintiff to recover anything by way of damages to reflect any prejudice he suffers in that regard, given the obvious difficulty in proving causation in relation to a pre-selection or election process.
>
> *Secondly*, this proceeding is already at a very advanced stage. It was commenced in December 2012. A trial date was set in April 2014. The trial is now little over a month away.
>
> *Thirdly*, what is sought is effectively an indefinite stay of this proceeding, as there is no evidence of when the criminal proceedings might be concluded.
>
> *Fourthly*, the nature of the plaintiff's claim, and his reason for bringing it, is to vindicate his reputation. The vindication offered by any judgment is diluted with time. The plaintiff has given detailed evidence of the prejudicial impact that the statements the subject of the civil proceedings have had on his reputation, his career, and the career and wellbeing of his son Jonathon. Those matters give these proceedings a particular claim on being tried promptly.
>
> *Finally*, the defendant has conducted these proceedings in a way that has aggravated the distress of the original defamation. That includes filing documents requested under UCPR rule 222 in such a way as to make them accessible by the media from the Court file. The media appears to have accessed those documents because shortly after they were filed, those documents were the subject of a number of stories critical of the plaintiff. It also includes the defendant changing his case in a significant way almost 14 months after the proceedings commenced."

Consideration

[47] The defendant has not demonstrated how, in defending the defamation proceedings at trial, his criminal proceedings will be prejudiced or his right to silence affected.

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[34] Plaintiff's outline of argument dated 4 September 2014, [20]-[25].

[48] None of the words allegedly spoken by the defendant to Mr Anderson on 12 November 2012 are the subject of any pleaded publication of defamatory matter. To the extent the second publication contains a question and answer going to the matters which are the subject of the criminal allegations no imputation is pleaded as arising from this exchange. Further, this exchange is between the defendant and an unnamed reporter in the context of a media conference arranged by the defendant. The fact of this publication and the words spoken by the defendant (with one minor amendment) are the subject of admissions by the defendant in the amended defence.[35]

[49] Whilst it is correct to say that the alleged publications (which have been admitted by the defendant) may be categorised as "the carrying out of the alleged 'threats of detriment' that is an essential element of the criminal charge",[36] neither the statement of claim, amended defence or amended reply contain any pleaded material facts related to the defendant's alleged conversation with Mr Anderson.

[50] As noted above, the only references to a conversation with Mr Anderson were pleaded in a previous defence. Those references have been abandoned by the defendant in his amended defence.

[51] Further, the elements of s 54A of the *Criminal Code* 1899 only requires the making of a threat of detriment not the carrying out of any such threat. The Crown would however in all probability rely on the evidence of the carrying out of the threat as corroborative of the making of the threat.

[52] Any potential injustice to the defendant does not arise from the mere fact of publication simply because it was done after his alleged conversation with Mr Anderson. The issue is whether, in seeking to raise the *Lange* defence and that of qualified privilege under s 30 of the *Defamation Act* 2005 and in meeting the allegation of malice, the defendant will be required to reveal aspects of his defence to the criminal charge.

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35 Amended defence of the defendant filed 11 March 2014, [1], [6].

36 Defendant's outline of argument dated 4 September 2014, [25].

[53] The defamation action is of course a civil proceeding where the pleadings are closed and the matter has been set down for trial. The defences of privilege at common law and qualified privilege are raised in respect to only those imputations pleaded in the statement of claim. There are no imputations pleaded in respect of the defendant's alleged conversation with Mr Anderson. The defendant pleads in paragraph 17(a) in respect of common law privilege that each publication complained of related to government and political matters. In paragraph 19(b) he pleads, in respect of qualified privilege, that the information given by the publications is and was of public interest. To make out these defences one must of course have reference to the words of the publications themselves. To the extent that the defendant may wish the court to have regard to the surrounding circumstances, it will be a matter for him whether one of those circumstances include him seeking to bring matters of concern to the attention of Mr Anderson. Such a circumstance cannot however be viewed as central to the defences raised. Even without any reference to the alleged conversation it remains open to the defendant, from other circumstances surrounding the publication and the words of the publication themselves, to argue the defences at trial.

[54] In relation to each defence the defendant has pleaded that the publications by the defendant were reasonable in the circumstances. His defence does not identify his alleged conversation with Mr Anderson as one of those circumstances from which it may be inferred that his conduct was reasonable. Nor is the alleged conversation a circumstance relied on by the plaintiff as suggesting that the defendant's conduct in making the publications was unreasonable.

[55] Importantly, in respect of the plaintiff's plea that the defendant was actuated by malice, it is no part of the plaintiff's case that the defendant's motive in making the publications was because Mr Anderson did not secure another Government position for the defendant. The pleaded case is that the defendant was actuated by malice because the plaintiff had caused the defendant to be dismissed. The plaintiff, in terms of cross-examination of the defendant as to this issue, will be confined to his pleaded case.

[56] I am satisfied that the defendant will be able to defend the defamation proceedings without any danger of injustice in the criminal proceedings. Any such danger, as

identified by Mr Keim, is in my opinion, notional rather than real. In any event the defendant has already publicly commented on the alleged conversation and has fully pleaded his defences to the defamation claim.

[57] Mr Keim submitted that Mr Anderson and the plaintiff are likely to be witnesses in both the civil and criminal proceedings. Having analysed the pleadings it is not immediately clear to me why Mr Anderson would be called by the plaintiff in the defamation proceedings. If the defendant wished to call Mr Anderson that would be a matter for the defendant.

[58] Whilst the civil proceedings are likely to receive publicity there will be a considerable intervening period between the civil proceedings and the criminal proceedings. Hayne J considered a similar issue concerning publicity in *Australian Securities Commission v Kavanagh*:[37]

> "Proceedings against the respondents and others concerned with Pro-Image have already been the subject of report in the newspapers. It may be expected that the trial of the civil proceedings will also attract some publicity but I do not consider that it therefore follows that there is any real likelihood of any prejudice to the conduct of any subsequent criminal trial. Certainly no indication was given in the course of submissions of how any such prejudice would arise. I do not consider this to be a matter of great weight."

[59] I accept the submissions made by Mr Ferrett on behalf of the plaintiff as to prejudice. The civil proceedings have been set down for trial since April 2014. By those proceedings the plaintiff seeks to vindicate his reputation. It is unknown when the criminal matter will be listed for trial. If a stay was granted it would require the vacation of the trial dates and delay the resolution of the defamation proceedings considerably.

[60] I therefore dismiss the defendant's application. I order that exhibits KVJ-4, KVJ-5, KVJ-6 and KVJ-7 to the affidavit of Kristopher Volker Jahnke filed 28 August 2014 be sealed. I order that these exhibits are not to be opened except upon order of a Judge of this Court.

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37 (1993) 12 ACSR 69, 76.