SUPREME COURT OF QUEENSLAND

CITATION: *Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors; Palmer v Magistrates Court of Queensland & Ors* [2024] QCA 8

PARTIES:

In Appeal No 14938 of 2022

CLIVE FREDERICK PALMER
(appellant)
v
MAGISTRATES COURT OF QUEENSLAND
(first respondent)
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
(second respondent)
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(third respondent)
PALMER LEISURE COOLUM PTY LTD
ACN 146 828 122
(fourth respondent)

In Appeal No 15295 of 2022

PALMER LEISURE COOLUM PTY LTD
ACN 146 828 122
(appellant)
v
MAGISTRATES COURT OF QUEENSLAND
(first respondent)
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
(second respondent)
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(third respondent)

In Appeal No 15300 of 2022

CLIVE FREDERICK PALMER
(appellant)
v
MAGISTRATES COURT OF QUEENSLAND
(first respondent)
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
(second respondent)
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(third respondent)

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(intervenor)

FILE NO/S:	Appeal No 14938 of 2022 Appeal No 15295 of 2022 Appeal No 15300 of 2022 SC No 6224 of 2021 SC No 6224 of 2021 SC No 6350 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 227 (Callaghan J)
DELIVERED ON:	6 February 2024
DELIVERED AT:	Brisbane
HEARING DATE:	18 and 19 September 2023
JUDGES:	Dalton and Boddice JJA and Burns J
ORDER:	**In Appeal No 14938 of 2022:** **Appeal dismissed with costs.** **In Appeal No 15295 of 2022:** **Appeal dismissed with costs.** **In Appeal No 15300 of 2022:** **Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the appellant has been charged under the *Corporations Act 2001* (Cth) and the *Criminal Code 1899* (Qld) and the prosecutions are pending in the Magistrates Court of Queensland – where neither prosecution has progressed in any substantive way due to the appellant and his interests continuing to make applications designed to bring the prosecutions to an end – where the appellant filed proceedings in the Supreme Court asserting that the prosecutions should be discontinued because they controverted earlier decisions of Superior Courts and were otherwise an abuse of process – where the respondents argued that the Supreme Court proceedings amounted to abuses of process – whether the primary judge erred in permanently staying the Supreme Court proceedings on the basis that they were abuses of process *Corporations Act 2001* (Cth), s 184(2), s 631 *Criminal Code 1899* (Qld), s 408C(1) *Batistatos v Roads and Traffic Authority (NSW)* (2006)

226 CLR 256; [2006] HCA 27, distinguished
Coeur De Lion Investments Pty Limited v The President's Club Limited (No 2) [2020] FCA 1705, considered
Emanuel Exports Pty Ltd v Department of Primary Industries and Regional Development [2023] WASCA 36, cited
GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) 97 ALJR 857; [2023] HCA 32, cited
Grassby v The Queen (1989) 168 CLR 1; (1989) 41 A Crim R 183; [1989] HCA 45, cited
Higgins v Comans (2005) 153 A Crim R 565; [2005] QCA 234, considered
Hutson v Australian Securities and Investments Commission [2023] QCA 167, cited
Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors (2020) 3 QR 546; [2020] QCA 47, considered
Sankey v Whitlam (1978) 142 CLR 1; [1978] HCA 43, considered
Sino Iron Pty Ltd v Palmer & Anor (No 3) [2015] 2 Qd R 574; [2015] QSC 94, considered
UBS AG v Tyne (2018) 265 CLR 77; [2018] HCA 45, considered

COUNSEL:

In Appeal No 14938 of 2022
The appellant appeared on his own behalf
J R Hunter KC, with M T Hickey and S Marsh, for the second and third respondents
P J Dunning KC, with K S Byrne and J Underwood, for the fourth respondent

In Appeal Nos 15295 of 2022 and 15300 of 2022
P J Dunning KC, with K S Byrne and J Underwood, for the appellant
J R Hunter KC, with M T Hickey and S Marsh, for the second and third respondents

K J E Blore appearing for Attorney-General (Qld) (intervenor) excused from the appeals on 19 September 2023

SOLICITORS:

In Appeal No 14938 of 2022
The appellant appeared on his own behalf
Australian Government Solicitor for the second and third respondents
Alexander Law for the fourth respondent

In Appeal Nos 15295 of 2022 and 15300 of 2022
Alexander Law for the appellant
Australian Government Solicitor for the second and third respondents

G R Cooper, Crown Solicitor appearing for Attorney-General (Qld) (intervenor) excused from the appeals on 19 September 2023

[1] **DALTON JA:** These three appeals were heard together. They are from decisions made in the trial division on 16 November 2022. On that date the primary judge made orders in two proceedings – BS6224/21 (the Coolum Resort proceeding) and BS6350/21 (the Cosmo proceeding). Lawyers act for Mr Palmer in appealing the orders made in the Cosmo proceeding – Appeal No 15300/22. Both Mr Palmer and Palmer Leisure Coolum Pty Ltd (Leisure) were parties to the Coolum Resort proceeding, and they make separate appeals to this Court in relation to the orders made in it. That is, in Appeal No 14938/22 Mr Palmer acts for himself in appealing the decision in BS6224/21, and in Appeal No 15295/22 lawyers acting for Leisure appeal from the same judgment. In all three appeals the Commonwealth Director of Public Prosecutions (CDPP) and Australian Securities and Investments Commission (ASIC) filed notices of contention. The Queensland Attorney-General intervened in the Cosmo appeal. However, as the hearing progressed, the issue the Attorney was concerned about evaporated, and the Attorney was given leave to withdraw.

[2] I would order that the three appeals be dismissed with costs. Before descending into detail, I give an overview of my reasoning.

[3] The primary judge permanently stayed the Cosmo proceeding and the Coolum Resort proceeding on the basis that they were abuses of process. Such a decision can only be made in an exceptional case – *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*.[1] That is because:

> "… the grant of a permanent stay to prevent an abuse of process involves an ultimate decision that permitting a matter to go to trial and the rendering of a verdict following trial would be irreconcilable with the administration of justice through the operation of the adversarial system. That ultimate decision must be one of last resort on the basis that no other option is available."

[4] A decision to stay is not to be regarded as discretionary; it is to be regarded as a decision which is susceptible of only one correct answer. This Court must look to see if the decision below was right or wrong in characterising the Cosmo proceeding and the Coolum Resort proceeding as abuses of process warranting permanent stays.[2]

[5] There are aspects of the primary judge's reasons which I think are erroneous. Nonetheless, my view is that the primary judge's decision to characterise both the Cosmo and Coolum Resort proceedings as abuses of process which should be permanently stayed was correct. In broad outline, that was because the proceedings sought the exercise of the supervisory jurisdiction of this Court to interfere in the course of pending criminal proceedings (a "most exceptional"[3] jurisdiction) in circumstances where it was not, and could not, be demonstrated that there was any compelling reason to do so. It was not demonstrated that either the Cosmo prosecution or the Coolum Resort prosecution was doomed to fail. There was no reason demonstrated why such points of legal argument or defence as the appellants wished to raise could not be determined in the criminal courts in the ordinary way. In those circumstances, the delay and disruption to the prosecutions which the Cosmo proceeding and the Coolum Resort proceeding were causing, and would continue to cause, meant that they were an abuse of the process of this Court

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1 [2023] HCA 32, [3].
2 *GLJ*, above, [1], [15]-[16].
3 *Sankey v Whitlam* (1978) 142 CLR 1, 25, per Gibbs ACJ.

because they interfered with the proper administration of criminal justice according to law.

Prosecutions

[6] Two prosecutions involving Mr Palmer are pending in the Magistrates Court. On 22 February 2018 ASIC filed complaints against Mr Palmer and Leisure (the Coolum Resort prosecution). Separately, on 6 February 2020 ASIC filed a complaint against Mr Palmer (the Cosmo prosecution).

[7] The complaint in the Coolum Resort prosecution is that on or about 12 June 2012:

(a) Leisure breached s 631(1) of the *Corporations Act 2001* (Cth) in that, after publicly proposing to make a takeover bid for securities in a company, Leisure did not in fact make an offer for securities in that company within the two month time limit fixed by that section, and

(b) by virtue of s 11.2 of the *Criminal Code* (Cth)[4] Mr Palmer aided, abetted, counselled or procured that offence by Leisure.

[8] The complaint in the Cosmo prosecution is:

> "(a) Between the fifth day of August 2013 and the fifth day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 408C(1)(d) of the *Criminal Code Act 1899* (Queensland), dishonestly gained a benefit or advantage, pecuniary or otherwise, namely a chose in action, for any person, namely Cosmo Developments Pty Ltd and/ or the Palmer United Party and others. And the property is of a value of at least $30,000 namely $10,000,000.
>
> (b) Between the fifth day of August 2013 and the fifth day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 184(2)(a) of the *Corporations Act 2001* (Commonwealth), dishonestly used his position as a director of a corporation, namely Mineralogy Pty Ltd, with the intention of directly or indirectly gaining an advantage for someone else, namely Cosmo Developments Pty Ltd and/ or the Palmer United Party and others.
>
> (c) Between the thirty-first day of August 2013 and the third day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 408C(1)(d) of the *Criminal Code Act 1899* (Queensland) dishonestly gained an advantage, pecuniary or otherwise, namely a chose in action, for any other person, namely Media Circus Network Pty Ltd and/or the Palmer United Party. And the property is of a value of at least $30,000 namely $2,167,065.60.

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4 Schedule to the *Criminal Code Act 1995* (Cth).

(d) Between the thirty-first day of August 2013 and the third day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 184(2)(a) of the *Corporations Act 2001* (Commonwealth), dishonestly used his position as a director of a corporation, namely Mineralogy Pty Ltd, with the intention of directly or indirectly gaining an advantage for someone else namely Media Circus Network Pty Ltd and/or the Palmer United Party."

[9] Section 408C(1) of the *Criminal Code*[5] provides:

"(1) A person who dishonestly—

(a) applies to his or her own use or to the use of any person—

(i) property belonging to another; or

(ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or

(b) obtains property from any person; or

(c) induces any person to deliver property to any person; or

(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or

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

(f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or

(g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or

(h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

commits the crime of fraud.

Maximum penalty—5 years imprisonment."

[10] Section 184(2) of the *Corporations Act 2001* (Cth) provides:

"(2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:

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5 *Criminal Code Act 1899* (Qld).

(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or

(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation."

[11] On 7 February 2021 the CDPP supplied a statement of facts in relation to the Cosmo prosecution as follows:

"Overview

1. The alleged offending relates to two transactions effected by the defendant in August and September 2013, [concerning] the withdrawal of funds totalling $12.167 million from an account held by Mineralogy Pty Ltd (**Mineralogy**) and the subsequent [deposit] of funds to the same value into the bank accounts of various entities controlled by, or related to, the defendant. In short, it is alleged that the funds held in the Mineralogy account were [being] held on account of other entities for a specific purpose and, knowing this to be so, the defendant dishonestly used those funds for his own benefit, including to fund his political party, Palmer United Party (**PUP**) (as it was then known).

Background

2. On 26 October 2001, Mineralogy entered into facilities deed agreements with Sino Iron Pty Ltd … (**Sino Iron**) and Korean Steel Pty Ltd … (**Korean Steel**) (together, the **'Facilities Deeds'**) relating to mining facilities [a port] to be constructed [in] Western Australia, over which Mineralogy held the relevant exploration and mining licenses (**Mineralogy's Tenure**).

…

4. In 2006 and 2008 respectively, CITIC Limited acquired Sino Iron and Korean Steel …

…

6. Pursuant to Clause 5 of the Facilities Deeds, Mineralogy established an administrative fund … (**Admin Fund Account**).

7. Pursuant to Clause 5 of the Facilities Deeds, Mineralogy must use the Admin Fund Account only to:

a. Pay administration costs and the day to day expenses of operating, maintaining and repairing Approved Facilities; and

b. Reimbursing Company and Third Parties for operational, maintenance and repair work they have

carried out to Approved Facilities which is approved by Mineralogy.

c. Any other matter needed to establish, maintain and operate Approved Facilities for Company, Mineralogy and / or Third Parties.

…

[CITIC contributed funds to the Admin Fund Account in accordance with its obligations under the Facilities Deeds].

…

11. As at 5 August 2013, the balance of the Admin Fund Account was $12,117,638.98.

Particulars of offending

12. Charges 1 and 3 relate to the transfer by the defendant, of a total of $12,167,065.60 from a bank account held by Mineralogy Pty Ltd (**Mineralogy**) to bank accounts held by Media Circus and Cosmo Developments Pty Ltd (**Cosmo**) and ultimately used for the benefit of the Palmer United Party (**PUP**) to fund its 2013 Federal Election campaign. The funds were held by Mineralogy pursuant to existing agreements with other companies. The transfer and ultimate use of the funds was not in accordance with those agreements.

13. On 6 August 2013, Palmer drew a cheque on the Admin Fund Account in the amount of $10 million and made it payable to Cosmo (**Charge 1**).

14. It is further alleged that the defendant dishonestly used his position as Director to gain an advantage for Cosmo Developments Pty Ltd and/or the Palmer United party and others, by using the funds referred to above in the way alleged (**Charge 2**).

15. On 1 September 2013, Palmer drew a cheque on the Admin Fund Account in the amount of $2,167,065.60 and made payable to Media Circus (**Charge 3**).

16. In respect of the drawing of the cheque the subject of Charge 2, it is further alleged that the defendant dishonestly used his position as Director to gain an advantage for Media Circus Network Pty Ltd and/or the Palmer United Party (**Charge 4**).

Use of funds

…

22. At the relevant times:

a. Mineralogy did not have occupation or possession of the Port;

b. There were no additional port management services or other services required to be performed by or for Mineralogy at the Port;

c. Most of the funds were used by PUP for its 2013 Federal Election campaign, including for media and advertising booked through Media Circus; and

d. Funds transferred to bank accounts held by other companies were controlled by Palmer and were used for working capital purposes.

23. On 3 September 2013, on behalf of Sino Iron and Korean Steal, [sic] CPMM wrote to Mineralogy requesting arbitration under the *Commercial Arbitration Act 2013* (Qld), seeking an account and reconciliation of the Admin Fund Account.

24. Commencing in February 2014, directions were given in the arbitration that Mineralogy disclose records required to be kept in accordance with Clause 9 of the Facilities Deeds. Subsequently, records were provided by Mineralogy to the CITIC Parties which disclosed the PUP payments as being for 'Port Management Services'.

25. On 9 May 2014, $12,700,000 was credited back to the Admin Fund Account from Qld Nickel.

26. After this deposit, Mineralogy made a number of unsuccessful attempts to repay the CITIC Parties funds it had contributed to the Admin Fund Account. CITIC refused to accept the funds.

27. On 12 November 2014, the Arbitration Tribunal ordered Mineralogy to repay the sum of $22,531,537 to [CITIC]. This was repaid from the Admin Fund Account on 22 November 2014.

…"

[12] Both the criminal proceedings remain listed for mention in the Magistrates Court. Neither has progressed in any substantive way due to the fact that Mr Palmer and his interests continue to make applications designed to bring the prosecutions to an end.[6] The judgment under appeal in this matter is the latest of those applications.

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[6] The primary judge recorded the detail of this in part of Annexure A to the judgment below:
"3. Since the Corporations Act Prosecution was commenced, it has been mentioned at least 18 times in the Magistrates Court of Queensland. PLC and Mr Palmer have filed no case to answer submissions on two occasions, and made an application to the Magistrates Court that the prosecution be dismissed as an abuse of process. The Corporations Act Prosecution remains at the pre-committal stage.
4. The Corporations Act Prosecution has also been the subject of challenges in this Court. In April 2018, PLC and Mr Palmer filed an originating application against the CDPP and ASIC seeking, inter alia, that the Corporations Act Prosecution be permanently stayed as an abuse of process. This proceeding was later discontinued.
5. In September 2018, PLC and Mr Palmer brought the second Supreme Court proceeding against the Magistrates Court of Queensland, the CDPP and the Australian Securities and Investments Commission ('ASIC'), seeking, inter alia, a declaration that the Corporations Act Prosecution was an abuse of process and it be permanently stayed. In December 2018, Mr Palmer discontinued this

The Proceedings from which Appeal is Brought

[13] In 2021 Mr Palmer and Leisure filed the Coolum Resort proceeding. They named the "Magistrates Court of Queensland" [sic], CDPP and ASIC as defendants. At or about the same time Mr Palmer filed the Cosmo proceeding. It names the same three defendants. In accordance with the principles in *Hardiman*,[7] no-one on behalf of the Magistrates Courts has played an active part in the proceedings. In fact, by the end of the hearing, the appellants had conceded that the Magistrates Court of Queensland was not a proper defendant below, or respondent in this Court.

[14] The claim filed in the Coolum Resort proceeding was drafted by lawyers and seeks declarations:

> "1. As against all defendants
>
> (a) A declaration that the Commonwealth Criminal Proceeding is an abuse of process.
>
> (b) Further or alternatively, a declaration that the Commonwealth Criminal Proceeding would tend to bring the administration of justice into disrepute.
>
> (c) Further or alternatively, a declaration that the continuation of the Commonwealth Criminal Proceeding would tend to bring the administration of justice into disrepute.
>
> (d) An order that the Commonwealth Criminal Proceeding be permanently stayed.
>
> …"

[15] The claim in the Cosmo proceeding appears not to be drafted by lawyers, but is similar:

> "1. As against all defendants:
>
> (a) A declaration that the Complaint is an abuse of process.
>
> (b) A declaration that the Proceeding is an abuse of process.
>
> (c) An order that the Proceeding be permanently stayed.

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proceeding, but PLC did not do so. In December 2018, Mr Palmer also brought the third Supreme Court proceeding against the Magistrates Court of Queensland, the CDPP and ASIC. This also sought to permanently stay the Corporations Act Prosecution as an abuse of process. The CDPP and ASIC filed applications to strike-out the second and third Supreme Court proceedings. In January 2019, Ryan J heard these strike-out applications and delivered a judgment ordering that the claims in the second and third Supreme Court proceedings be set aside, and the accompanying statements of claim be struck out.

6. PLC and Mr Palmer appealed the decision of Ryan J. In March 2020, the Court of Appeal dismissed the appeal with costs. In April 2020, PLC and Mr Palmer applied for special leave to appeal the decision of the Court of Appeal to the High Court of Australia. In August 2020, Gageler and Keane JJ made an order dismissing PLC and Mr Palmer's applications for special leave."

7 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

(d) Further or alternatively, the Complaint made on 6 February 2020 against the plaintiff alleging offences under s408C(1)(d) of the Criminal Code and s184(2)(a) of the Corporations Act 2001 (Cth) is bad in law.

(e) Further or alternatively, a declaration that the Complaint would tend to bring the administration of justice into disrepute.

…

(j) An order that any or all of the following acts or decisions were unlawful:

(ix) the making of a complaint by the ASIC against the plaintiff;

…

(xii) the purported exercise of the jurisdiction of the Magistrates Court of Queensland to summon the applicant to answer the Complaint;

…"

[16] In both proceedings the Commonwealth defendants made applications for a permanent stay of the Supreme Court proceedings on the basis that they were an abuse of process which disrupted and dislocated the criminal proceedings on the prosecutions. Mr Palmer and Leisure resisted those applications. They asked for summary judgment on parts of their claims, which they said raised only points of law, the determination of which meant that each of the prosecutions was doomed to fail. The point of law which was the subject of the summary judgment applications was the same in each of the proceedings. In the hearings below and on appeal it was called the incontrovertibility point. It was an assertion that both prosecutions relied upon proof of a fact which had been determined in favour of Mr Palmer or Leisure in other litigation. It was said that to attempt to controvert these findings in the prosecutions was an abuse of process.

[17] To be clear, in each of the Cosmo and Coolum Resort proceedings Mr Palmer and Leisure raised numerous other matters which they said made the prosecutions an abuse of process. These other matters depended on consented factual assertions and were not the subject of the summary judgment applications.

The Approach of the Primary Judge

[18] It appears all four applications came before the primary judge who recorded the way he proceeded to resolve matters as follows:

"[5] … The plaintiffs identified and agitated issues on which summary judgment was sought; those have been decided against the plaintiffs.[8] Otherwise, and on the basis that the

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[8] Given that it was appropriate to order a stay of both SC No 6224/21 and SC No 6350/21, it might have been unnecessary to deal with the plaintiffs' applications for summary judgment in those cases. However, since the plaintiffs brought those applications, and since they involved no questions of fact, I am prepared to give judgment in them. It was convenient to advise the parties of the reasons why I intend to dismiss

> plaintiffs' applications for summary judgment are to be dismissed, the balance of litigation can and will be resolved by the exercise of my discretion to order a permanent stay of proceedings in both SC No 6224/21 and SC No 6350/21." (footnote from the original).

[19] At the invitation of the Court, on the hearing of this appeal, the respondents were granted leave to amend their notices of contention so as to challenge this approach. The amended notices of contention read:

> "…
>
> 2. The threshold question for the primary judge was whether it was in the interests of justice that the issues of law and fact agitated by the appellants in seeking the relief sought from the Supreme Court should be determined in the exercise of its supervisory jurisdiction of criminal proceedings rather than allowing the criminal proceedings to follow the usual course. It was open to his Honour to resolve that question adversely to the appellants.
>
> …"

[20] In my view, this contention is correct. The applications for a stay of the proceedings should have been determined first. The primary judge ought to have taken the approach he mentions and dismisses in the footnote to the part of his judgment which I have quoted, and dealt with the applications by the CDPP and ASIC to permanently stay the proceedings in the Supreme Court. Only if he came to a decision not to stay the proceedings, should he have considered the summary judgment applications. The very point of an application to dismiss a proceeding as an abuse of process is to prevent the defendant to such a proceeding having to spend time and resources dealing with it.[9] Secondly, where the CDPP and ASIC brought an application for a permanent stay on the grounds that the Cosmo proceeding and the Coolum Resort proceeding interfered with, and fragmented, the ordinary criminal process, embarking upon a determination of the summary judgment applications itself fragmented and interfered with the ordinary course of the criminal proceedings. This point is made very clearly in *Emanuel Exports Pty Ltd v Department of Primary Industries and Regional Development*.[10] The approach in *Emanuel* was followed by this Court in *Hutson v Australian Securities and Investments Commission*.[11]

[21] More complexity is introduced into an analysis of the decision below when the primary judge's approach to the summary judgment applications is considered. Such a hearing should have involved the application of the test at r 292 of the

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those applications for summary judgment in SC No 6224/21 and SC No 6350/21. That advice was given to them on 9 March 2022 and its terms are reflected (although not perfectly reproduced) in [6]–[57] of this judgment.

9 *Palmer v Magistrates Court* (2020) 3 QR 546, [20], where this point is made in proceedings between these parties dealing with a very similar point. I will call this case *Palmer (No 1)* in these reasons.

10 [2023] WASCA 36, [38]-[43].

11 [2023] QCA 167, [50]-[51] and [61]-[63].

Uniform Civil Procedure Rules, and either a conclusion that the points raised by the appellants deserved to run to a civil trial in the Supreme Court (ie., a conclusion that the summary judgment application was dismissed), or if the points were only points of law, a determination of them.

[22] The primary judge did consider that only points of law were involved, paragraph [8] of the judgment below. On each summary judgment application he determined the point raised, but against the appellants – [35] and [55] below, and the orders at [90] below. In all three appeals the appellants challenged those determinations, not on the basis that the judge ought not to have determined the points, but that his determinations were incorrect.[12] The respondents, by paragraph 3 of the Commonwealth parties' notice of contention, seek to support the determination in relation to the Coolum Resort proceeding for reasons other than those given by the primary judge (again, see the footnote to the primary judge's reasons reproduced as footnote 8 above).

[23] Before leaving the topic of the primary judge's approach to this matter, it was most undesirable that the primary judge issued what he called "advice", which was in the form of a "draft judgment".

Three Appeal Grounds Advanced by Represented Appellants

[24] Unfortunately, all three notices of appeal are very poorly drafted. They are prolix and do not concisely and precisely identify errors of fact or law in the judgment below. However, the represented appellants filed a short outline of oral submissions which put the appeals on the basis of three errors. Oral argument on behalf of the represented appellants was advanced in accordance with that outline. Mr Palmer continued to rely upon his prolix notice of appeal. In dealing with this appeal I shall first deal with the three points relied upon by the represented appellants, before considering whether anything further of substance is raised by Mr Palmer.

[25] The first two errors identified in the short outline of oral submissions were the incontrovertibility point made twice – once in relation to the Cosmo proceeding, and once in relation to the Coolum Resort proceeding. In each case the error was said to be that the primary judge should have determined the point in favour of Mr Palmer and Leisure and stayed the prosecutions as an abuse of process. The third error advanced on behalf of the represented appellants was that the primary judge erred in finding that "the appellants' claims should be stayed because there was 'another jurisdiction [ie., the Magistrates Court] in which [the claims] can and should be dealt with'".[13]

Approach to this Appeal

[26] The approach of this Court on appeal should be to look first to those grounds of appeal which concern the decisions of the primary judge to permanently stay the Coolum Resort and Cosmo proceedings. As I am of the view that those decisions were correct, I will not embark on a consideration of the primary judge's determination of the summary judgment applications.

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12 Para 2(a) of each Notice of Appeal.

13 Paragraph 4(c), represented appellants' short outline of argument.

[27] However, the merits or strength of the incontrovertibility points are relevant to a consideration of whether it was correct to stay the Cosmo and Coolum Resort proceedings. If a consideration of the incontrovertibility points revealed them to be meritorious, the correct approach on the stay applications would be to refuse a permanent stay of the Cosmo and Coolum Resort proceedings and, instead, make the type of order which the High Court made in *Sankey v Whitlam,* an order which would bring the Cosmo and Coolum Resort prosecutions to an end. Accordingly, I consider the incontrovertibility points raised below, but in the context of whether the primary judge was correct to permanently stay the Cosmo and Coolum Resort proceedings.

[28] I do not consider either incontrovertibility point meritorious. A question arises as to whether or not to finally determine those points. In terms of general approach, I do not think that it is necessary for a court to finally determine these type of points on an application for a permanent stay.[14] In this case, I consider that it is appropriate to finally determine the points. The appellants asked for the points to be finally determined both below and on appeal; the primary judge did finally determine them; no-one contended he was wrong to do so, and both the appellants and respondents on this appeal asked this Court to finally determine the points. Decisively though, the delay which has already resulted from the attempts to derail the prosecutions (see footnote 6 above) is a cogent reason to finally determine the points.[15]

Magistrates' Inherent Power to Prevent Abuse of Process

[29] Superior and inferior courts, including the Magistrates Courts, have an inherent power to prevent their own processes being abused.[16] However, this Court held in *Higgins v Comans*[17] that a magistrate had no power to stay a committal proceeding. Sections 104 to 111 of the *Justices Act 1886* (Qld) did not give such a power expressly, and were not to be construed as implying a power to do so.[18] This decision was in conformity with the High Court decision in *Grassby v The Queen*.[19]

[30] In *Higgins v Comans*, Keane JA referred to *Jago v District Court (NSW)*[20] saying:

> "[32] … Mason CJ explained the rationale which underpins the power of a court to stay criminal proceedings as an abuse of process in the following terms:
>
> > 'The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness.'
>
> [33] This explanation reflects the general approach that an abuse of process arises when 'the processes and procedures of the court,

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14 See *Emanuel* and *Hutson*, above.
15 *Sankey v Whitlam*, above, p 26 per Gibbs ACJ and p 83 per Mason J.
16 *Palmer (No 1)* above, [44] and the authorities cited there.
17 [2005] QCA 234; (2005) 153 A Crim R 565.
18 While there were quite substantial amendments to this part of the *Justices Act* in 2010 to modernise the procedure for committals, I cannot see that those amendments change anything relevant to the interpretation question decided in *Higgins v Comans*.
19 (1989) 168 CLR 1; 41 A Crim R 183.
20 (1989) 168 CLR 23, 28.

> which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness'.[21] The relevant concern is whether judicial power to make a final determination of guilt or innocence at a trial is being abused so as itself to create an injustice.
>
> [34] The powers exercised by a Magistrates Court in conducting an examination of witnesses are distinctly not judicial. …" (my underlining).

[31] The reasoning is that while the Magistrates Courts are inferior courts, and while a magistrate must act judicially in conducting a committal,[22] a committal is an administrative process, largely conducted for the benefit of the defendant.[23] A magistrate does not determine guilt or innocence, but merely whether or not there is a *prima facie* case upon which the accused may be tried, so that it cannot be said that there is unfairness to an accused in undertaking the committal process.[24] Thus, a magistrate conducting a committal does not "administer justice" in the relevant sense.

The Supervisory Jurisdiction of the Supreme Court

[32] The judgment of McPherson JA in *Higgins v Comans* gives the history of the supervisory jurisdiction of the Supreme Court. He traces it to s 58(2)(a) of the *Constitution of Queensland 2001* which declares the Supreme Court to be "of general jurisdiction in and for the State"; "the superior court of record in Queensland", and as having "subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise". McPherson JA said:

> "The 'high and transcendent' powers, as Blackstone called them (3 Bl Com 42), of King's Bench automatically attach to the highest court of general jurisdiction in the land …" – [5].

The result is, as McPherson JA put it, that this Court has "supervisory powers over inferior courts and tribunals" within Queensland – [5].

[33] As Fraser JA remarked in *Palmer (No 1)*, the question whether this Court's supervisory powers over the Magistrates Courts extend to staying a committal remains an open question. He was prepared to assume the question in favour of the Palmer interests in that case. I would too.[25] Even without that assumption, not all the relief sought in the Coolum Resort and Cosmo proceedings depends on this Court granting a stay of the committal. I would assume that if this Court made a declaration that the bringing of one or both of the prosecutions amounted to an abuse of process, or as to a particular, crucial, question of law (as was done in

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21 *Walton v Gardiner* (1993) 177 CLR 378, 393.

22 *Sankey v Whitlam* (above), 83 per Mason J.

23 See McPherson JA in *Higgins*, [4]. A magistrate does have power to stay a prosecution in a summary trial which he or she is hearing as an abuse of process.

24 See Keane JA in *Higgins*, [36].

25 There is *dicta* of Mason J in *Sankey v Whitlam* (below) which supports this: "It would be quite unacceptable to say that a committing magistrate is not under a duty to act judicially or that he is entirely free from supervision by a superior court, even when acting without jurisdiction or in excess of his jurisdiction" – p 84.

Sankey v Whitlam, below), the CDPP and ASIC would desist, with the practical effect that the committals would come to an end.

[34] *Sankey v Whitlam* established beyond doubt that the supervisory jurisdiction of a superior court included power to make a declaration in relation to the subject matter of pending committal proceedings – pp 22-23 per Gibbs ACJ. In that case the High Court declared, "that the information laid on 20th November 1975 against Edward Gough Whitlam, alleging an offence under s 86 of the *Crimes Act 1914*, (Cth) as amended, is bad in law". Gibbs ACJ thought that declaration of right could be made, "since the accused has a 'right' not to be exposed to proceedings that have no legal substance" – p 24.

[35] In *Sankey v Whitlam* the High Court made it very clear that making such a declaration was exceptional. Some of the reasoning as to that point is pertinent here. Gibbs ACJ considered that seeking a declaration in relation to pending criminal proceedings:

> "… is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid. … criminal proceedings may be needlessly protracted if they are interrupted by an application for a declaration … For these reasons I would respectfully endorse the observations of Jacobs P (as he then was) in *Shapowloff v Dunn* , that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order." – pp 25-26 (my underlining).

[36] Mason J made similar comments:

> "In *Forster v Jododex Aust Pty Ltd*, Gibbs J, with whose judgment on this point McTiernan and Stephen JJ and I agreed, referred to Lord Radcliffe's observation in *Ibeneweka v Egbuna* that 'the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making'." – p 81.

[37] Mason J referred to the "dearth of authority supporting the grant of declaratory relief in relation to committal proceedings" – p 81. He said:

> "The absence of authority is doubtless to be explained by a variety of circumstances—the recognition that the function of a magistrate in hearing committal proceedings is to decide whether there is a prima facie case against a defendant which warrants his being put upon trial; that a committal for trial is a preliminary examination which involves no final determination of the defendant's guilt of the offence charged; the absence of any appeal from the magistrate's decision; and the existence of the Attorney-General's discretion to commit for trial. All these factors tend to indicate that a plaintiff for declaratory relief in relation to committal proceedings needs to show some special reason why the court should grant the relief sought in

> lieu of allowing the committal proceedings to pursue their ordinary course. The chequered history of the committal proceedings in this very case is a salutary example of what may occur when proceedings are commenced in a superior court seeking answers to some, but of necessity not all, of the issues arising in committal proceedings. The proceedings before the magistrate are interrupted whilst the superior and appellate courts give attention to particular questions upon which guidance is sought. It may result in unacceptable discontinuity and delay." – pp 81-82 (my underlining).

Exercise of the Supervisory Jurisdiction in this Case

[38] The Cosmo and Coolum Resort proceedings asked this Court to exercise its supervisory jurisdiction either to stay the committals, or to make declarations which would otherwise bring the prosecutions to an end. They are the type of proceedings which *Sankey v Whitlam* cautioned are themselves open to abuses and which might lead to interruption and unacceptable discontinuity and delay of criminal proceedings. Relief will only be granted in the most exceptional circumstances. This point is made at paragraph 7 of the respondents' amended notice of contention. While some cases dealing with the type of issues raised in this case do speak in terms of the undesirability of fragmentation of criminal proceedings, the principles stated in *Sankey v Whitlam* are wider than this. They recognise that criminal proceedings ought not be interrupted, delayed and disrupted; they should follow their ordinary course, unless there is some extraordinary reason to the contrary.

[39] Here, the appellants rely upon the incontrovertibility points to show an extraordinary reason why the Cosmo and Coolum Resort prosecutions should not follow their ordinary course in the criminal courts. In *Sankey v Whitlam*, Sankey launched a private prosecution against the former Prime Minister of Australia and members of his cabinet. The prosecution was brought alleging a conspiracy under s 86 of the *Crimes Act 1914* (Cth) "to effect a purpose that was unlawful under a law of the Commonwealth" namely the Financial Agreement of 1927. The High Court held that the Financial Agreement of 1927 was an executive act, not "a law of the Commonwealth". The prosecution was thus bad in law, and was declared to be so. The appellants here say that their incontrovertibility points involve nothing but law, are clear and compelling and should be determined because they will entirely defeat each prosecution.

Incontrovertibility: *Rogers v The Queen*

[40] The appellants relied on *Rogers v The Queen*[26] and other cases,[27] to assert that once a particular factual matter has been determined by a court, that matter is to be treated by other courts as incontrovertibly correct. Subsequent litigation of the same issue is vexatious and oppressive to the party concerned, and involves "the scandal of conflicting decisions".[28] For these reasons the subsequent litigation is an abuse of process.

[41] It is not necessary to dispose of this appeal to investigate the metes and bounds of the principle in *Rogers*. In particular it is not necessary to try to resolve the

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26 (1994) 181 CLR 251.

27 For example, *R v O'Halloran* [2000] NSWCCA 528 and *The Queen v Carroll* (2002) 213 CLR 635.

28 See *Rogers* (above), pp 255-256 and 272-273.

application of the principle where the parties to the litigation which is said to controvert, or collaterally attack, a judicial determination are different from the parties involved in the first piece of litigation. The reason is that, even assuming that there is an incontrovertibility principle as simple and unqualified as is asserted by the appellants, the appellants do not demonstrate that any fact essential to the Cosmo prosecution or the Coolum Resort prosecution has already been determined in their favour. I turn to explain the reasons for my view.

The Cosmo Prosecution

[42] The statement of facts relied upon by the Commonwealth in respect of this prosecution is set out above. In 2014 Sino Iron Pty Ltd and Korean Steel Pty Ltd sued Mr Palmer and Cosmo Developments Pty Ltd in the Supreme Court of Queensland. Their claim was that Mineralogy Pty Ltd paid money to Cosmo Developments and Media Circus Network Pty Ltd in breach of trust. It was claimed that Mr Palmer procured or assisted the breaches of trust, or that he knowingly participated in them. It was alleged that Mr Palmer was dishonest and fraudulent in so doing.

[43] The proceeding came on for trial before Jackson J at the end of 2014. In 2015 he delivered a judgment dismissing the claim – *Sino Iron Pty Ltd v Palmer (No 3)*.[29] I will call this the *Sino Iron* decision. Jackson J described the contractual framework between Sino Iron, Korean Steel and Mineralogy as follows:

> "[19] Each of the plaintiffs and Mineralogy are parties to a deed relating to the approval, development, administration and maintenance of facilities to be constructed on an area at or near Cape Preston in Western Australia. The deed between the first plaintiff and Mineralogy is called the 'Sino Iron Facilities Deed'. … I will describe them as 'the Facilities Deeds'. Each of the first plaintiff and second plaintiff is defined therein as 'Company'.
>
> [20] Each of the Facilities Deeds provides:
>
> (a) By recital D, the parties have agreed to enter into a contract in respect of the procedures for the approval, development, operation, administration and maintenance of Facilities in the Preston Area, on the terms and conditions of the Deeds.
>
> (b) By cl 5:
>
> 'Mineralogy may establish an Administrative Fund at any time after the Commencement Date, Mineralogy must use the Administrative Fund only to:
>
> (a) pay Administration Costs and the day to day expenses of operating, maintaining and repairing Approved Facilities; and
>
> (b) reimbursing (sic) Company and Third Parties for operational, maintenance and repair work they

[29] [2015] 2 Qd R 574.

have carried out to Approved Facilities which is approved by Mineralogy;

(c) any other matter needed to establish, maintain and operate Approved Facilities for Company, Mineralogy and/or Third Parties.'

…"

[44] Under the Facilities Deeds, Mineralogy prepared an annual budget for administration costs and imposed a levy on Sino Iron and Korean Steel in accordance with that budget. They paid contributions to the Administrative Fund. In February 2010 Mineralogy caused a bank account to be opened into which Administrative Fund contributions were to be paid. In 2010, 2011, 2012 and 2013 Mineralogy sent invoices to Sino Iron and Korean Steel for budgeted administration costs and together, by 23 November 2012, those two companies had paid $13,471,392 into the Administrative Fund.

[45] Jackson J describes the two impugned withdrawals from the Administrative Fund:

"[1] On 8 August 2013 the first defendant, Mr Palmer, drew a cheque on the account of Mineralogy Pty Ltd ('Mineralogy') at the National Australia Bank No. 16-939-3487 styled 'Port Palmer Operations' ('the bank account'), payable to the second defendant, Cosmo Developments Pty Ltd, in the sum of $10,000,000.

[2] On 2 September 2013, the first defendant drew another cheque on the bank account payable to Media Circus Network Pty Ltd ('Media Circus') in the sum of $2,167,165.60."

[46] Jackson J described features of the dispute before him as follows:

"[10] A curious feature of the case is that shortly before the hearing began, Mineralogy paid to the plaintiffs, and they accepted payment of, a sum including an amount of $12,167,000 on account of the challenged payments. ...

[11] Notwithstanding the payment, the plaintiffs persist in their claim against the defendants on the footing that they might still elect to claim interest ... As well, they submit that they are entitled still to an inquiry in relation to any profits that may have been made ...

[12] … the issues for determination may be divided in two. First, were the funds in the bank account held by Mineralogy on trust for the plaintiffs? Second, if they were held on trust, are the defendants liable to the relief claimed against them?

[13] Another unusual feature of the way in which the matter proceeded was that the defendants made a number of concessions when the hearing of the liability issues began. ...

[14] Paragraphs 71 and 72 of the statement of claim allege that Mineralogy did not have any need to incur expenses in relation

> to the Port, or for Port management services at the Port, as referred to in the Facilities Deeds. Paragraph 23 of the defence alleges that on 1 June 2013 Mineralogy agreed with Qld Nickel Ltd ('QNI') that QNI would provide services and discharge the responsibilities of Mineralogy pursuant to the Facilities Deeds for a fee of $12,000,000 and that $12,000,000 of the challenged payments was made in payment of that fee. The defendants abandoned para 23 of the defence.
>
> [15] Only if I find that the challenged payments were made from funds held on trust, the defendants made three other concessions. First, they concede that the challenged payments were made by Mineralogy in breach of trust. Second, if I also find that the first defendant had knowledge of the trust, they concede that the first defendant procured the breaches of trust constituted by making the challenged payments. Third, if those findings are made, they concede that the plaintiffs do not need to prove that the breaches of trust were fraudulent or dishonest or that the first defendant in procuring the breaches of trust acted fraudulently or dishonestly in order to obtain the relief they seek, ...
>
> [16] The defendants submit that the consequence of those concessions is that any question of fraud or dishonesty, either by Mineralogy as trustee, or by the first defendant, has no further relevance. …
>
> [17] For their part, the plaintiffs refused to accept these concessions. They persisted with the tender of evidence intended to prove that Mineralogy's breach of trust was dishonest and fraudulent and they seek findings of dishonesty against the first and second defendants."

[47] After a detailed examination of the provisions of the Facilities Deeds, and the law of trusts, Jackson J came to the conclusion that, "… the Administrative Fund contributions made to the bank account were not held on trust by Mineralogy, because the contractual obligations of Mineralogy did not extend to an obligation not to deposit into and thereby mix other moneys in the bank account." – [109]. As recognised in the preceding discussion in that judgment, that finding means that Sino Iron and Korean Steel did not have equitable ownership of the monies in the Administrative Fund Account.[30]

[48] Jackson J went on to consider whether the defendants had "the requisite knowledge or notice to be liable for any breach of trust by Mineralogy". He explained that he did so for two reasons, "First, if the defendants' submissions on this question are accepted, it would be an independent ground for dismissing the plaintiffs' claims. Second, if I am wrong on the trust question it is appropriate in the case of any appeal that I make at least the minimum findings that would be necessary to otherwise resolve the proceeding" – [111].

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30 [65] of Jackson J's judgment.

[49] Jackson J recorded that Mr Palmer was at all material times the sole director of Cosmo Developments; the sole signatory of the Administrative Fund bank account, and the person who signed the cheques to make the challenged payments. Accordingly, it was Mr Palmer's knowledge that he needed to consider – [112]. As to that, Jackson J found that Mr Palmer "knew that the payments were made in breach of Mineralogy's promises to pay only the authorised costs and reimbursements under cl 5 of the Facilities Deeds". Further, he found Mr Palmer knew the approximate balance of the Administrative Fund bank account before the challenged payments were made; that the balance was "derived from contributions made by or on behalf of the plaintiffs", and that the $12,167,000 payments to Cosmo and Media Circus were not authorised payments under the Facilities Deed – [115].

[50] Jackson J then dealt with the contention that Mr Palmer could not be liable because he did not know that Mineralogy held the Administrative Fund on trust. As the research collected in the judgment shows, that question is unsettled at law. Jackson J favoured the line of cases which had extrapolated on what Gibbs J said in *Consul Development Pty Ltd v DPC Estates Pty Ltd*:[31]

> "On the other hand, it does not seem to me to be necessary to prove that a stranger who participated in a breach of trust or fiduciary duty with knowledge of all the circumstances did so actually knowing that what he was doing was improper. It would not be just that a person who had full knowledge of all the facts could escape liability because his own moral obtuseness prevented him from recognizing an impropriety that would have been apparent to an ordinary man." – [133].

[51] Jackson J expressed his conclusions on Mr Palmer's liability as follows:

> "[141] I find that the first defendant's knowledge was sufficient to make him liable for knowingly procuring or inducing the alleged breach of trust by Mineralogy.
>
> …
>
> [143] In my view, it was not necessary … that the first defendant knew that the plaintiffs had a beneficial interest in the funds held in the bank account when the challenged payments were made. It is enough that he knew, in general, of the provisions of the Facilities Deeds for contributions to be made to the Administrative Fund, how they were to be dealt with under the provisions of the Facilities Deeds and that the challenged payments were made in breach of the contractual obligation to pay only the authorised costs and reimbursements under the Facilities Deeds.
>
> [144] I reach that view having regard to the cases mentioned above. To require that a defendant must actually appreciate that the relevant facts constitute a trust in law would favour the legally ignorant over the legally aware, when the facts and knowledge

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31 (1975) 132 CLR 373.

> otherwise are identical. In my view, the preferable principle is that liability is engaged by the relevant factual knowledge.
>
> [145] In view of those findings, it is unnecessary for me to go further. It is not necessary to make a specific finding of dishonest or fraudulent design by Mineralogy, through the first defendant, or of dishonest assistance with knowledge by the first defendant. There are reasons why, in my view, I should not do so. First, such findings could cause significant reputational damage to the first defendant, but they are not necessary in order to resolve the liability of the first or second defendants as a matter of fact and law. Second, the way in which this case has been conducted does admit of the possibility that the plaintiffs seek not only to obtain the relief claimed in the proceeding but also to embarrass the first defendant at the same time."

[52] On this appeal, the appellants' contention was that the *Sino Iron* decision determined that Mr Palmer had caused Mineralogy to pay away monies in the Administrative Fund in breach of contract, but not in breach of trust; that meant he had not paid away money which in equity belonged to Sino Iron and Korean Steel, and that the law "does not recognise breach of contract *simpliciter* as dishonest"[32]. All of that may be accepted, but it is perfectly plain that:

(a) The Cosmo prosecution is not dependant on the monies in the Administrative Fund being held on trust. To the contrary, the statement of facts says that the funds were "held on account of other entities for a specific purpose" – that is not a description inconsistent with the *Sino Iron* decision; monies can be held on account of another at common law.[33]

(b) The Cosmo prosecution does not depend on "a breach of contract *simpliciter*"; it depends upon an allegation that Mr Palmer was dishonest. In the complaint the offence is put as a breach of s 408C(1)(d) of the *Criminal Code*, dishonestly gaining a benefit for Cosmo Developments, Media Circus or the Palmer United Party. Whether that offence is made out depends upon whether or not Mr Palmer's actions were dishonest according to the ordinary standards of decent persons. It does not depend upon a finding that monies in the Administrative Fund were held on trust, or even that he breached a contract.

    Alternatively, it might be thought that the first paragraph of the Commonwealth Statement of Facts might raise a case within s 408C(1)(a)(ii).[34] There may be other parts of s 408C to be considered. At the end of the committal, when the facts are known, the magistrate has power to commit for <u>any</u> indictable offence, not just the offence charged.[35]

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32 T 1-11 of the hearing before this Court.

33 The Cosmo prosecution was begun, and the statement of facts was delivered, after the *Sino Iron* decision was delivered.

34 In general I would make the observations that the Commonwealth's Statement of Facts needs review by an experienced prosecutor.

35 *Justices Act* ss 104(2) and 108(1), and see Gibbs ACJ in *Sankey v Whitlam*, above, p 24.

(c) The *Sino Iron* decision is not that the payment was honest – Jackson J expressly refused to determine the dishonesty point. There are circumstantial matters, even on the material this Court has, which point to dishonesty. There is the fact that monies in the Administrative Fund were contributed by Sino Iron and Korean Steel on the promise that it would be used for Port management services. There is the fact that Mineralogy recorded the impugned payments as being for Port management services, when they were not. There is the fact of the refund to the Administrative Fund account, and the matters referred to by Jackson J at [14] of the *Sino Iron* decision. There are the matters at [49] above.

[53] The Cosmo prosecution also includes two charges which are based on s 184(2) of the *Corporations Act*. That offence is made out if Mr Palmer, as a director of Mineralogy, used his position dishonestly with the intention of advantaging himself or someone else (say Cosmo Developments; Media Circus, and the Palmer United Party by paying them money), or causing detriment to Mineralogy by paying away money it was obliged to use to develop a port. Section 184(2)(b) provides that the offence will be made out even if there is no intention, but only recklessness. Proof of this offence does not depend upon the existence of a trust over the Administrative Fund, it does not depend upon a breach of contract.

[54] To conclude, to run the Cosmo prosecution it will not be necessary to controvert any finding made in Mr Palmer's favour in the *Sino Iron* decision. The primary judge reached the correct decision on this point. The appeal from it must fail.

The Coolum Resort Prosecution

[55] This prosecution alleges a contravention of s 631(1) of the *Corporations Act.* The prosecution alleges that Mr Palmer and Leisure publicly proposed to make a takeover bid for the securities in a company called The President's Club Limited and did not within two months thereafter make offers for those securities under a takeover bid.

[56] The appellants' incontrovertibility case is that in *Coeur De Lion Investments Pty Limited v The President's Club Limited (No 2)*[36] Justice Greenwood of the Federal Court decided that very issue in favour of Leisure and Mr Palmer. I will call this the *Coeur De Lion* decision.

[57] In the *Coeur De Lion* decision Greenwood J sets out the history of litigation about a resort at Coolum developed by Coeur De Lion. It comprised a hotel, a golf course and a number of villas. The President's Club Limited was incorporated as a vehicle to allow people to invest in the villas by way of timesharing. Timeshare investors could purchase parcels of 13 shares in The President's Club. The shares were stapled to a one-quarter interest in a villa. The owner could occupy the villa for 13 weeks, a quarter of the year.

[58] Until January 2005 The President's Club was exempt from the regime established by the *Corporations Act* for managed investment schemes. At the end of January 2005 it became subject to that regime, but ASIC granted an exemption on the basis that the Palmer interests (then about 43 per cent) would not vote more than 10 per cent of the votes on any resolution of The President's Club (except in some

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36 [2020] FCA 1705.

exceptional circumstances). The Palmer interests gave ASIC a deed poll to that effect.

[59] By 2011 the Palmer interests controlled nearly all, if not all, of Coeur De Lion. The relationship between the Palmer interests and The President's Club became entirely dysfunctional. In 2018 Coeur De Lion sought an order to wind up The President's Club. It alleged that The President's Club had become moribund, "Moreover, the central elements of the time-share scheme were said to constitute an unlawful 'managed investment scheme' for the purposes of the Act" – [36] of the *Coeur De Lion* decision. The President's Club resisted the order for winding-up essentially on the ground that Coeur De Lion was "the author of the problems confronting" it. It denied it was conducting an unlawful managed investment scheme. It made a cross-claim for damages.

[60] The matter came on for hearing. Greenwood J records that The President's Club was forced to abandon its cross-claim as it became evident that it was the members of the company who had suffered loss, rather than the company itself – [38] of the *Coeur De Lion* decision. Greenwood J records that:

> "In the result, aspects of all of the factual contentions about the conduct, the resort and many of the matters [the subject of the cross-claim], were heard in the winding-up proceeding and judgment reserved. In abandoning the cross-claim, the legal representatives for [The President's Club] advised that they held instructions to act on behalf of a member [of that company] to bring a representative proceeding on behalf of a 'closed class'. … The proposition was put that the representative proceeding ought be heard, in effect, as a surrogate or substitute cross-claim in place of the abandoned cross-claim. Judgment was reserved on the principal proceeding with directions [and orders] made about the conduct of the class claim." – [38].

[61] In the *Coeur De Lion* decision Greenwood J gives a broad outline of the behaviour alleged in the representative proceeding. There were more than 12 complaints which were apparently characterised as unconscionable behaviour or oppression on the part of Mr Palmer and the companies which he controlled. It was alleged that Mr Palmer and his companies had "illegally taken over" the resort in acquiring shares in Coeur De Lion and its holding company. Further, that unlawful notice had been given to ASIC of intention to revoke the deed poll. That Coeur De Lion had terminated a resort management agreement with the Hyatt group, and informed The President's Club that it no longer intended to comply with a resort administration agreement. It was said that the Palmer interests took steps to degrade the standard of the golf course; disconnected power and utility services to the villas; closed the resort; failed to market the resort; failed to maintain the resort in a five star and first-class condition, and made unlawful demands on The President's Club members in respect of levies. In amongst all these allegations, Greenwood J records one that Leisure engaged in "bidder contraventions" in connection with a bid for all shares in The President's Club. It may be accepted for the purposes of this appeal that this was a reference to the public proposal to make a takeover bid for the securities in The President's Club, the subject of the Coolum Resort prosecution. Greenwood J's reasons in the *Coeur De Lion* decision say he understood that the allegation was disputed by Mr Palmer.

[62] Justice Greenwood records the fate of the representative proceeding:

> "40. The representative proceeding (being the de facto or substitute cross-claim by those with standing to make such a claim) was to be heard commencing on 23 November 2020. However, an application was made by the applicant to vacate those dates having regard to a number of matters one of which was the difficulty confronting the applicant of being able to progress the litigation in the context of available funds …
>
> 41. In the result, due to case management hearings concerning the various proceedings, it became apparent that certain steps might be able to be taken which might result in a set of arrangements being reached which would have the effect of resolving all of these contentious matters. At the heart of the potential resolution was the proposition that as the members and holders of the stapled interests had quantified the diminution in the value of the per quarter share interest in the Club Entity at (no less than) $65,013 and the Palmer interests were willing to entertain a settlement on the basis that the non-Palmer interests be paid $65,013 for that interest as claimed, the proceedings might be capable of resolution if related matters upon which such a proposal might be conditioned could be worked out.
>
> 42. Without examining the detail of the intervening steps and the discussions with the parties by the Court in, in effect, case management mode, it is sufficient to note that what emerged is a set of proposals framed in QUD 79 of 2020 by which an unconditional offer would be made to every member of the Club Entity (other than those associated with the Palmer interests) to purchase the members' interest in their shares in the Club Entity and the corresponding stapled villa interest (that is, each per quarter stapled interest) for $65,013 which would be open for acceptance for 30 days from the date of the orders.
>
> 43. The total value of the interests is $20,804,160 (in respect of 320 stapled interests).
>
> 44. The proposal is that that sum be paid into Court.
>
> 45. The notion is that the orders will reflect and recognise that the acquisition of the stapled interests and payment of the monies according to the program is in accordance with the Act.
>
> 46. The second notion is that one of the Palmer entities would, under the program, become the beneficial owner of the stapled interests and the Share Register would reflect that circumstance but subject to a right in a member to apply to the Court.
>
> 47. The proposed orders then set out a sequence for the particular implementation of the offer, acceptance and securing, by the relevant Palmer entity, of transfer documents from the

> member, and the drawdown from the Court, ultimately in favour of each member, of $65,013 for the transfer of their interest. In some cases, the interest may be subject to a security in which event the mortgagee would receive the relevant monies." (my underlining).

[63] The judgment continues in similar vein, describing various other aspects of the orders. Greenwood J notes that under s 33V(1) of the *Federal Court of Australia Act 1976* (Cth), a representative proceeding may not be settled without the approval of the Court, which will only be given when the Court is satisfied that the settlement is a fair and reasonable compromise – [53]. Greenwood J explains why he thought the settlement was fair, reasonable and just.

[64] The *Coeur De Lion* decision is one which sanctions a settlement of a representative proceeding. It is not a decision which resolves factual disputes or makes factual determinations. Apart from mentioning in one sentence that the representative proceeding involved an allegation that Leisure had engaged in "bidder contraventions" in connection with the shares of The President's Club, Greenwood J does not say anything about the facts, matters or circumstances which the Commonwealth would need to prove in the Coolum Resort prosecution. Greenwood J mentions bidder contraventions in the context of describing an allegation. He makes no findings of fact about the bidder contraventions. To the contrary, the *Coeur De Lion* decision explains that resolution of the issues raised in the representative proceeding is not necessary because the parties settled that litigation.

[65] The appellants contended that the decision which would be controverted in the Coolum Resort prosecution was not in the reasons for judgment, but was to be found at paragraph 6(a) of Greenwood J's order. The order is lengthy. Its purpose was described in the judgment – relevantly here, see the underlined parts at [42], [45] and [47]. It was essentially a Court-supervised procedure to settle the winding up proceeding and the representative proceeding by having Leisure buy the shares and villa interests owned by the members of The President's Club. The relevant parts of the order are:

> "**THE COURT NOTES THAT:**
>
> 1. Orders 3, 4, 8-13 are made by consent; and
>
> 2. Orders 1, 2 and 5-7 are, as made, not opposed.
>
> **THE COURT ORDERS THAT:**
>
> 1. [Leisure] must within 7 days of the date of this order make an offer to every Member of [The President's Club] … (**Member**) to purchase all of their right title and interest in their shares in [The President's Club] (**Shares**) and the corresponding stapled villa interest (**Villa Interest**). (Collectively are the **Stapled Interests**).
>
> 2. [Leisure's] offer shall constitute an offer to purchase the Stapled Interests which Stapled Interests shall not constitute an interest in an unregistered managed investment scheme

regulated under Chapter 5C of the Act. Such offer must be and is in accordance with the following terms:

(a) is an unconditional offer to purchase;

(b) $65,000 for each Villa Interest and $1 (one dollar) for each stapled Share of the defendant to which the offer to purchase relates, making a total of $65,013 for each Stapled Interest;

(c) has an expiry date for acceptance of the offer being on or before 30 days from the date of these orders;

(d) not be an offer to acquire shares or interests in a registered managed investment scheme within the meaning of section 92(3)(a) of the Act.

3. [Solicitors for the President's Club] must within 2 days of the date of these orders give a copy of each member's address to [solicitors for Palmer interests] to send a copy of this order to every Member forthwith.

…

5. [Leisure] shall make the offer (referred to in order 2 above) and complete the purchase of the Stapled Interests by paying into Court the sum of $20,804,160 (being $65,013 x 320 Member Stapled Interests) not earlier than 15 days nor later than 21 days after the making of these orders.

6. Upon [Leisure] paying into Court the sum of $20,804,160 referred to in order 5:

(a) All offers or requirements to make a bid by [Leisure] for shares in [The President's Club] are deemed to have been validly made and completed in accordance with the Act;

(b) [Leisure] shall be the beneficial owner of all of the Stapled Interests …;

(c) the share register of [The President's Club] must record … [Leisure] as the legal and beneficial owner of the Shares …;

(d) all directors and the secretary of [The President's Club] shall cease to be officeholders of [The President's Club];

(e) [Leisure] shall cause consenting persons to be appointed as officeholders of [The President's Club];

(f) the … defendants must deliver to [Leisure] the company register and all corporate books, records, and other property of [The President's Club].

7. By [Leisure] paying into Court the sum of $20,804,160 referred to in Order 5, and by complying with these orders, [The President's Club] is not engaged in the operation of an

unregistered managed investment scheme pursuant to section 601ED(6) of the Act.

8. [Solicitors for the Palmer interests] must within 21 days of the date of these orders:

   (a) give to every Member such instruments of transfer … as may be required to enable transfer from such Member to [Leisure] (**Transfer Documents**) of all their right title and interest in their shares in [The President's Club] (**Shares**) and the corresponding villa interest (**Villa Interest**) …;

   (b) request that the Member sign and return the Transfer Documents to [solicitors for the Palmer interests].

…

11. Upon [solicitors for Palmer interests] being in possession of properly executed Transfer Documents in respect of any Stapled Interest … [solicitors for Palmer interests] must apply to and obtain payment out of court of the sum of $65,013 ....

…

13. Upon receipt of confirmation referred to at order 11, [Leisure] must pay the amount of stamp duty and registration fees properly payable in respect of Transfer Documents for a Villa Interest from a Member to [Leisure]. [Solicitors for The President's Club], upon the receipt of registration fees from [solicitors for Palmer interests] must take all necessary and reasonable steps to cause the transfer of all of the Villa Interests to be registered …

14. These proceedings be otherwise dismissed.

15. There shall be no order as to costs.

16. These orders are subject to the supervision of the Court so as to ensure that all those members who have transferred their share in [The President's Club] and the corresponding stapled villa interest pursuant to the offer and these orders, receives the agreed purchase price of $65,013.

…"

[66] In my view, paragraph 6(a) of the above order does not refer to anything but the offer which was part of the settlement regime established by the order. When it refers to offers or requirements to make a bid, it is referring to the offer which was to be made by the payment of $20 million into court pursuant to the previous paragraph of the order. As explained at [42] of his reasons (underlined above), the parties and Greenwood J had crafted paragraph 6(a) of the order so that the settlement (which was no doubt a unique way to buy and sell security interests) was not defeated because it did not comply with some provision of the *Corporations Act*. Greenwood J, the parties, and paragraph 6(a) were concerned with the settlement being effected by the orders, not with whether or not, in 2012, after

making a public proposal to make a takeover bid for securities, Mr Palmer had, or had not, made an offer for securities under a takeover bid.

[67] Counsel for the appellants relied upon the fact that the word "shares" was used in 6(a), rather than the defined term "Shares", or "Stapled Interests", as showing that 6(a) was not concerned with the offer spoken of in paragraph 1 of the order. I do not find this at all convincing. The language used in 6(a) is similar to that used in paragraph 2(d), which is also concerned with compliance with the *Corporations Act.* In that context, it makes sense that a more general word is used, rather than the defined term.

[68] Language aside, the context is overwhelmingly against the appellants. This order was made two years after the Coolum Resort prosecution was commenced. Greenwood J was aware of the Coolum Resort prosecution.[37] It is just not sensible to suppose that of all the contentious allegations in the litigation before him, Greenwood J would have singled out for determination the bidding contravention allegation from 2012; determined it alone, without mentioning that he was doing so (or why), let alone giving reasons for his determination, and then recorded that determination in a set of orders which are otherwise focused in a very detailed way on a transfer of shares to take place in 2020 so as to effect a settlement of the disputes between the parties, including the bidder contravention allegation.

[69] The appellants relied on a later order of Greenwood J made on 4 August 2021 in the same matter. That order records that Leisure was given leave to bring an application pursuant to the liberty to apply provisions of the order of 23 November 2020. Some supplementary orders as to villa interests subject to mortgages were made, and then the order reads:

> "6. The court declares the Orders made by Greenwood J on 23 November 2020 in these proceedings were made in respect of a bid, villa interest, shares and stapled interests as orders *in rem*."

[70] Mr Sameh Iskander, a solicitor acting for the Palmer interests in that proceeding, swore an affidavit on 16 July 2021 which explains the origin of Order 6 of 4 August 2021. Mr Iskander swore:

> "25. In accordance with Order 13, Alexander Law was required to take all necessary and reasonable steps to convey the transfer of all of the villa Interests and to be registered with the Department of Natural Resources and to keep PLC informed in respect thereof including providing regular reports regarding the transfers and a registration confirmation statement to the PLC following registration of the transfer of each Villa Interest.
>
> 26. As I was left with the task of administering the Orders, I have informed the holders of the stapled interest who were not parties to the proceedings which the orders affected that the orders were in my view orders *in rem* and where the Orders were made in respect of past events, I advised such parties that

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37 Mr Palmer's further amended outline of submissions on this appeal, paragraph 85.

> the court had the power to make such orders pursuant to the courts inherent power, consequently for good order I seek the Court makes the declaration as set out in the Consent Orders exhibited hereto and marked **SMI-03.**" (reproduced as per the original).

[71] Taking Mr Iskander's affidavit at face value, it reinforces my conviction that paragraph 6(a) of the 23 November order was concerned with the effect of the offer which, by the order, would be constituted by the payment into Court.

[72] More generally, the affidavit does not disclose a sensible concern on the part of Mr Iskander, or why he sought a most peculiar declaration as to the 23 November 2020 order being *in rem*. If members of The President's Club were concerned about not having been a party to the litigation in which the 23 November 2020 order was made, I would have thought the answer to those concerns would be found within the provisions of the *Federal Court of Australia Act* and rules dealing with representative proceedings. But these things cannot matter to the point under consideration. Describing an order as being *in rem* when it was not, could not make it so. Whether or not the 23 November 2020 order was *in rem* does not change its meaning.

[73] The *Coeur De Lion* decision did not determine any matter relevant to the Coolum Resort prosecution.

Criminal Courts to Decide Remaining Points

[74] I turn to the third ground of appeal advanced on behalf of the represented appellants. This dealt with the primary judge's decision that, apart from the incontrovertibility points, the points raised by the appellants in the Cosmo and Coolum Resort proceedings could and should be dealt with in the criminal courts in the ordinary way.

[75] In the Cosmo and Coolum Resort proceedings, Mr Palmer and Leisure raised a number of complaints which were said to make the prosecutions an abuse of process. These complaints were of two types. The first were matters of defence alleged to be available to them, or legal flaws in the prosecution cases. The second category of complaints can be described as allegations impugning the motives, decisions and actions of the CDPP and ASIC in investigating the matters the subject of the prosecutions; in deciding to bring the prosecutions, and in steps taken thereafter. All these matters were factually undeveloped and factually contentious. They could not be determined in a summary way like the points in *Sankey v Whitlam*, or the incontrovertibility points. If they were to be determined in the Cosmo and Coolum Resort proceedings, those proceedings would require to pass through the normal interlocutory steps for civil proceedings and then a trial would be necessary. The result of the trial would, of course, be subject to appeal. The delay to the prosecutions would be extreme.

[76] The primary judge found that there was nothing about these matters which would justify an exercise of the supervisory jurisdiction of this Court to remove them from the ordinary criminal courts and determine them in the Cosmo and Coolum Resort proceedings: [61] and [67] below. As part of his reasoning, the primary judge took cognisance of the fact that the appellants had available to them the procedures of the

Magistrates Court, including the process of disclosure which would precede the committal, and the opportunity to seek a ruling in the Magistrates Court that there was no case to answer. The primary judge noted that if an indictment were presented, it would be open for the appellants to apply for it to be stayed in the court in which it was presented. I would add that the s 590AA procedure would also be available in the trial court.

[77] Having regard to the exceptional nature of the supervisory jurisdiction; the factually contentious nature of the matters raised; the availability of the abovementioned remedies in the Magistrates Court and in the trial court; the desirability that criminal proceedings not be delayed, interrupted or fragmented; and the already lengthy delay in both the Cosmo and Coolum Resort prosecutions, the primary judge concluded that the Cosmo and Coolum Resort proceedings ought to be permanently stayed.

[78] The represented appellants say this decision was erroneous on two related bases. First, because the Magistrates Courts lack power to stay a committal proceeding on the ground that it constitutes an abuse of process. Secondly, because the primary judge refrained from expressing a view about the merits of the substantive matters which Mr Palmer and Leisure wished to pursue in the Supreme Court in the Cosmo and Coolum Resort proceedings. This was said to be contrary to what was said in *Palmer (No 1)*.

[79] As discussed above, a magistrate has no power to stay a committal. The primary judge did not say anything to the contrary. He referred to the other mechanisms available to the appellants to make the points and challenges they wish throughout the committal process, and after any indictment is presented, in the trial court.

[80] The decision in *Palmer (No 1)* was on an appeal from a decision of Ryan J to strike out the statements of claim, and to set aside a separate set of proceedings commenced by Mr Palmer and Leisure to challenge the Cosmo and Coolum Resort prosecutions. The application to strike out was made pursuant to r 16(e) of the *Uniform Civil Procedure Rules 1999*. The application before Ryan J also sought a stay pursuant to r 16(g) of the rules on the basis that the proceedings were an abuse of process of the court. Ryan J struck out (but could have stayed) the proceedings on the grounds that they disrupted the ordinary course of criminal proceedings and did not demonstrate any clear or compelling reason for the court to intervene in its supervisory jurisdiction to determine all or part of the criminal proceedings. It was accepted on the hearing of *Palmer (No 1)* that nothing turned on Ryan J's having made an order to strike out the proceedings, rather than stay them.

[81] In *Palmer (No 1)* this Court dismissed the appeal, but the reasoning of the only substantive judgment (Fraser JA) was put on a slightly different basis to that of Ryan J. Fraser JA considered that, Mr Palmer and Leisure having invoked the Supreme Court's power to grant declaratory relief in a regular way, the case could not be struck out (or stayed) as an abuse of process unless the claims raised in the proceedings:

> "… were so clearly bound to fail that they should be summarily terminated as an abuse of process. In relation to the claims for a permanent stay of the committal proceedings, the primary judge correctly proceeded upon the footing that such relief should be

> granted only in an exceptional case, but again the question raised by the respondents' application was not whether a permanent stay should be granted but whether the applicants' claims for a permanent stay should be summarily dismissed as an abuse of process." – [29].

[82] Fraser JA agreed with the primary judge's conclusion that there was nothing exceptional in the appellants' cases which warranted the Supreme Court's exercise of its supervisory jurisdiction, but went on to say:

> "The respondents' application, however, required consideration of the further question whether the claims for those forms of relief were so obviously untenable as to justify their summary termination as an abuse of process. … a finding that the appellants had an arguable claim that the committal proceedings were an abuse of process would preclude the exercise of the power summarily to terminate the claims." – [30].

[83] Fraser JA then re-examined the issues for determination in that case and concluded that "the appellants' claims are so clearly untenable as to justify the primary judge's orders summarily terminating the appellants' proceedings in the Supreme Court as an abuse of process" – [31]. One factor which he found significant in determining his reframed question was that, because the supervisory jurisdiction to intervene in committal proceedings was such an exceptional one, it was relatively easy for the respondents to show an untenable case, because the question was whether or not the appellants could articulate "anything that might justify a trial judge in finding that this is an exceptional case" calling for the exercise of the supervisory jurisdiction – [40].

[84] In introducing his views on the procedural point Fraser JA said:

> "The order made by the primary judge under r 16(e) of UCPR setting aside the appellants' claims denied the appellants access to the usual interlocutory processes and a trial. The primary judge did not make that order upon the ground that the appellants' claims could or should have been litigated in the Magistrates Court: compare *UBS AG v Tyne*. The primary judge did mention that the arguments underlying the claims for declarations about the elements of the offences could be raised in a no case submission before the magistrate or, if prosecutions ensued, in the District Court at the end of the Crown case, but no party submitted that any of the relief claimed by the appellants in their Supreme Court proceeding could be sought by them in the Magistrates Court. Absent the invocation by the primary judge of any other ground, the order summarily terminating that part of the appellants' proceedings could be justified only upon the basis that the appellants' claims were, as the respondents contended in their application, an abuse of process. The claims were abuses of processes if they lacked reasonable grounds so as to be vexatious." – [26] (my underlining).

[85] The primary judge in this case does not say that he uses the underlined part of that passage in Fraser JA's judgment as a departure point, but I think it distinctly possible. In this case the primary judge said:

> "… As to the balance of the arguments, I have concluded that the conventional processes are fit for purpose and that since no requirement for interference has been demonstrated, I am going to stay both proceedings. There is therefore no need for me additionally to certify, in either case, that there is no prospect of success for the plaintiffs' other arguments. The test which would be applicable to a strike-out application would demand engagement on that point. In circumstances where I have found that those arguments should proceed in another forum, there is in fact good reason to refrain from certifying anything about them, or even expressing a view. Indeed, to do as requested (in the alternative) by the Commonwealth defendants might be thought to amount to some sort of supervisory order akin to that which I have decided is inappropriate to confer upon the plaintiffs. The stay of the proceedings is granted on the basis that there is another jurisdiction in which these matters can and should be dealt with." – [88] of the reasons below.

[86] In relation to the first category of complaints sought to be advanced in the Cosmo and Coolum Resort proceedings (flaws in the prosecution cases and defences) the points sought to be agitated in the Cosmo and Coolum Resort proceedings can be heard and determined on committal, and again if necessary, at any trial. Not only can they be, they should be: the criminal courts are the proper place for the matters of fact and law involved to be determined. The lack of power in a magistrate to stay a committal is irrelevant to a consideration of whether an attempt to have this Court determine these points is an abuse of process. I do not think Fraser JA's reasoning applies to these complaints because of the part of [26] in *Palmer (No 1)* which I have underlined above. That is sufficient to dispose of this third ground of appeal in so far as it concerns complaints about defences and flaws in the prosecutions. Nonetheless the reasoning below applies to this category of complaints as well.

[87] As to the second category of complaints sought to be advanced in the Cosmo and Coolum Resort prosecutions (impugned motives), the Magistrates Court on committal cannot evaluate or determine these matters. The trial court can, if an indictment is presented. Nonetheless, in my view, the primary judge did not err in the way suggested by the appellants.

[88] The abuse of process alleged in *Batistatos v Roads and Traffic Authority (NSW)*[38] was not similar to the abuse of process sought to be established in this case (or in *Palmer (No 1)*). There were two bases for applying to have the proceedings in *Batistatos* stayed as an abuse of process. One related to the merits of the claim advanced – the claim was said to be untenable; the other was delay – [56]-[58]. It is clear from the majority judgment that it was only the first of these bases which required a consideration of the principles in *General Steel*. *Batistatos* is not authority for the proposition that whatever abuse of process is alleged, a proceeding cannot be struck out or stayed unless the substantive claims sought to be made in it are untenable. That this is so is neatly illustrated by a passage in the judgment of Kiefel CJ, Bell and Keane JJ in *UBS AG v Tyne*:[39]

> "The abuse of process in *Batistatos* lay in the very great delay in the commencement of the proceedings on behalf of the incompetent

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38 (2006) 226 CLR 256, 265-266 [10], 266 [12], 266-267 [14], 269-270 [21]-[25].

39 (2018) 265 CLR 77.

> plaintiff; a delay which made the fair trial of his claim impossible. That is not this case. The appeal is to be determined upon acceptance that the Trust's claims are arguable, that UBS has not been called upon to defend them, and that the delay has not made their fair trial impossible. The claimed abuse lies in invoking the processes of the Federal Court to litigate claims that could and should have been litigated in the SCNSW proceedings." – [41] (my underlining).

[89] The categories of abuse of process are not closed.[40] Whatever the abuse of process alleged in any particular application to permanently stay a proceeding, the underlying principles recognised in *GLJ* will apply: a stay will not be granted except in exceptional circumstances, because to stay the proceeding deprives the plaintiff of a determination of their claim in accordance with law. Nonetheless, because abuse of process is a protean concept, language used to deal with the facts and circumstances of one case will not necessarily apply, in terms, to determine the result of another. It is for this reason that the reasoning of Fraser JA in *Palmer (No 1)* is not to be read as meaning that a proceeding can only ever be struck out as an abuse of process if the merits of the claim are untenable within the meaning of *General Steel*.[41]

[90] The claims of abuse of process in *Palmer (No 1)*, and in this case, were not based on an assertion that the Supreme Court proceedings so lacked reasonable grounds that they were vexatious – cf the final sentence of [26] in *Palmer (No 1)* quoted above. They were based on the assertion that the Supreme Court proceedings interfered with and delayed the ordinary processes of the criminal courts. It was that question which the primary judge had to determine, both in this case and *Palmer (No 1)* – cf the final sentence in [29] of *Palmer (No 1)* quoted above. To determine that question in this case, it was relevant and necessary to consider the substantive points which Mr Palmer and Leisure wished to advance in the Cosmo and Coolum Resort proceedings. An assessment of the merits of those points was important to determining whether the Supreme Court proceedings were an abuse of process. But where the abuse of process asserted was that determination of those points in this Court would disrupt the ordinary criminal process, the merits of the points sought to be advanced did not have to be so poor that they could be described as untenable or unarguable before the Cosmo and Coolum Resort proceedings could be stayed.[42] The passage from *UBS AG v Tyne* quoted above is on point.

[91] The primary judge did assess the merits of the points which are the subject of this third ground of appeal. He indicated that he was not impressed with the merits of them – [76], and that they were little more than unsubstantiated assertions – [77]. He recognised that Mr Palmer and Leisure asserted that after undertaking interlocutory processes their claims would be more developed, and he recognised the delay that would cause – [78]. These were all pertinent matters in making the evaluative decision as to whether or not the Cosmo and Coolum Resort proceedings were abuses of process. The primary judge recognised the exceptional nature of the exercise of the supervisory jurisdiction, and that criminal proceedings ought run

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40 *Ridgeway v The Queen* (1995) 184 CLR 19 at 75, cited in *GLJ* (above), [26] per Kiefel CJ, Gageler and Jagot JJ. *Ridgeway* is also cited for this proposition in *Batistatos*, [14]. See also the lengthy discussion at [2]-[9] of *Batistatos*.

41 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130.

42 See Emanuel and Hutson.

their normal course in the criminal courts unless something extraordinary was demonstrated.

[92] I cannot see that the decision of the primary judge involved error either because the Magistrates Courts lacked jurisdiction to stay the complaints which impugned the motives of the prosecutors, or because the primary judge refrained from finding that those complaints were untenable. All the matters discussed in [91] above, were relevant to the decision as to whether or not to stay the Cosmo and Coolum Resort proceedings. So was the nature of the committal where no finding of guilt or innocence would be made; the delay which had already occurred in the criminal proceedings, and the fact that the matters relied upon could have been raised, but were not, in *Palmer (No 1)*. Having regard to all these matters, it seems to me that the primary judge reached the correct decision in staying the Cosmo and Coolum Resort proceedings as abuses of process.

Mr Palmer's Independent Points

[93] As noted at the outset, Mr Palmer did not limit those points which he advanced in his notice of appeal and written outline of argument. Although, on examination, most of them have in fact already been discussed in the preceding part of my judgment.

[94] In his separate outline of argument Mr Palmer elaborated upon his views of the law as to s 631 of the *Corporations Act* which he considered showed that he and Leisure had not contravened the section, or if they had, that they had a good defence.[43] He will have every opportunity to run those points before the magistrate, and at any trial. As well, Mr Palmer relied upon the opinions of other people as to whether or not an offence pursuant to s 631 of the *Corporations Act* had been committed. These other people ranged from statements made by his own lawyers in 2012, to persons holding public positions who had made statements as the application of s 631 in contexts unrelated to the factual matters relevant to the Coolum Resort prosecution.[44] No doubt Mr Palmer and his lawyers can make submissions of law in the criminal courts. Certainly none of these matters shows anything which would warrant the exercise of this Court's supervisory jurisdiction.

[95] Mr Palmer vigorously agitated the fact that there were two prosecutions as something which made his case extraordinary.[45] I cannot see that it does in the sense which is relevant to the exercise of the supervisory jurisdiction.

[96] Mr Palmer relied upon language and approaches used by the primary judge which he criticised.[46] Likewise, parts of Mr Palmer's argument fastened onto comments or observations by the primary judge.[47] None of these matters were crucial to any decision the primary judge made.

[97] In conclusion, most of Mr Palmer's grounds of appeal raised matters which were agitated by the represented appellants, albeit sometimes in a different framework.

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43 Grounds 2(f), 2(v), 2(w) and 2(x).
44 Ground 2(n).
45 Ground 2(y).
46 Grounds 2(aa), 2(bb), 2(dd) and 2(ee).
47 Ground 2(pp).

None of the points Mr Palmer made separately demonstrates error on the part of the primary judge.

[98] **BODDICE JA:** I agree with Dalton JA.

[99] **BURNS J:** I agree with the reasons of Dalton JA and the order proposed by her Honour.