SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors; Palmer v Magistrates Court of Queensland & Ors* [2022] QSC 227
PARTIES:	**In SC No 6224 of 2021:** **PALMER LEISURE COOLUM PTY LTD** ACN 146 828 122 (first plaintiff) **CLIVE FREDERICK PALMER** (second plaintiff) **v** **MAGISTRATES COURT OF QUEENSLAND** (first defendant) **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (second defendant) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** **(third defendant)** **In SC No 6350 of 2021:** **CLIVE FREDERICK PALMER** (plaintiff) **v** **MAGISTRATES COURT OF QUEENSLAND** (first defendant) **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (second defendant) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (third defendant) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervenor)
FILE NO/S:	SC No 6224 of 2021 SC No 6350 of 2021
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING	Supreme Court of Queensland at Brisbane

COURT:

DELIVERED ON: 16 November 2022

DELIVERED AT: Brisbane

HEARING DATES: 7- 9 February 2022, 31 May 2022, 1 June 2022

JUDGES: Callaghan J

ORDERS:

1. **The applications for summary judgment in proceedings SC No 6224/21 and SC No 6350/21 be dismissed.**
2. **Proceedings SC No 6224/21 and SC No 6350/21 be permanently stayed.**
3. **The plaintiffs pay the second and third defendants' costs in proceedings SC No 6224/21 and SC No 6350/21 on an indemnity basis.**
4. **The plaintiffs pay the Attorney-General's costs of and incidental to proceedings SC No 6224/21 and SC No 6350/21.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – GENERALLY – where the plaintiffs have been charged under the *Corporations Act 2001* (Cth) and the *Criminal Code 1899* (Qld) – where the plaintiffs argued that the criminal proceedings should be discontinued because they controverted earlier decisions of the Federal Court of Australia and Supreme Court of Queensland – whether those decisions were "incontrovertible" – where the plaintiffs argued the ultimate issues were decided in those earlier decisions – where the plaintiffs argued the defendants enjoy no prospects of defending the plaintiffs' actions – where the plaintiffs argued the criminal proceedings would undermine public confidence in the administration of justice – whether a permanent stay of the criminal proceedings should be granted – whether the identity of the parties involved in those decisions needs to be the same as those involved in the application for stay

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – PREVENT ABUSE OF PROCESS – GENERALLY – where the plaintiffs have been charged under the *Corporations Act 2001* (Cth) and the *Criminal Code 1899* (Qld) – where the plaintiffs argued that the criminal proceedings should be discontinued because they amount to an abuse of process – where the plaintiffs argued that the criminal proceedings were

"doomed to fail" due to the availability of a defence – where the plaintiffs argued that the criminal proceedings were "doomed to fail" by resolution of a point of law involving no dispute of fact – where the second and third defendants argue that these proceedings amount to an abuse of process and are calculated to fragment the courts' processes – whether there is an "obviously compelling" "need" or "requirement" to interfere with the ordinary course of the courts' processes – whether the proceedings involve "fragmentation" or "dislocation" of proceedings in another court and are therefore an abuse of process – whether the issues identified by the plaintiffs could be dealt with in the Magistrates Court through the ordinary course of the courts' processes – whether the permanent stay of these proceedings should be granted

Corporations Act 2001 (Cth) ss 9, 184(2)(a), 232, 233(1), 631(1)
Criminal Code 1899 (Qld) ss 408C(1)(a)(ii), 408C(1)(d)
Justices Act 1886 (Qld) ss 78, 83A

Coeur De Lion Investments Pty Limited v The President's Club Limited (No 2) [2020] FCA 1705, considered
Fingleton v The Queen (2005) 227 CLR 166, cited
Frugniet v Victoria (1997) 148 ALR 320, followed
Grassby v The Queen (1989) 168 CLR 1, cited
Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49; [1970] HCA 63, cited
Jago v District Court (NSW)(1989) 168 CLR 23; [1989] HCA 46, cited
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, cited
Obeid v R (2016) 329 ALR 372; [2016] HCA 9, 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, cited
Peters v The Queen [1998] HCA 7; (1998) 192 CLR 493, cited
R v Dumble & Ors (unreported, District Court of Queensland, Clare SC DCJ, 25 June 2021), cited
R v Dumble & Ors [2021] QCA 161, cited
R v Hanson; R v Ettridge [2003] QCA 488, cited
R v O'Halloran (2000) 182 ALR 431; [2000] NSWCCA 528, followed
Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42, followed
Sino Iron Pty Ltd v Palmer & Anor (No 3) [2015] 2 Qd R 574; [2015] QSC 94, considered
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited

COUNSEL:	On 7-9 February 2022:	
	P Dunning KC, K Byrne & J Underwood for the first plaintiff in 6224/21 and the plaintiff in 6350/21	
	G Del Villar KC, M McKechnie & S Marsh for the second and third defendants in both matters	
	B Cramer for the first defendant in both matters	
	KJE Blore for the intervenor in 6350/21	
	Second plaintiff in 6224/21 self-represented	
	On 31 May & 1 June 2022:	
	K Byrne for the first plaintiff in 6224/21 and the plaintiff in 6350/21	
	J Hunter KC & S Marsh for the second and third defendants in both matters	
	B Cramer for the first defendant in both matters	
	S Spottiswood for the intervenor in 6350/21	
	Second plaintiff in 6224/21 self-represented	
SOLICITORS:	Alexander Law for the first plaintiff in 6224/21	
	Robinson Nielson Legal for the plaintiff in 6350/21	
	Australian Government Solicitor for the second and third defendants in both matters	
	Crown Law for the first defendant in both matters	
	Crown Law for the intervenor in 6350/21	

INTRODUCTION

[1] I shall refer to the parties as follows:

(a) In SC No 6224/21, Palmer Leisure Coolum Pty Ltd (**'the first plaintiff'**) and Mr Palmer (also **'the second plaintiff'**) (collectively, **'the plaintiffs'**);

(b) In SC No 6350/21, Mr Palmer ('**the plaintiff**' or **'Mr Palmer'**);

(c) The Magistrates Court of Queensland ('**the first defendant**');

(d) Commonwealth Director of Public Prosecutions ('**CDPP**') and Australian Securities and Investments Commission ('**ASIC**') (collectively, '**the Commonwealth defendants'**); and

(e) In SC No 6350/21, the Attorney-General of Queensland ('**the intervenor**').

SC No 6224/21

[2] On 22 February 2018, ASIC filed complaints against the plaintiffs in the Magistrates Court of Queensland. The complaints alleged that both Palmer Leisure Coolum Pty Ltd and Mr Palmer had breached s 631(1) of the *Corporations Act 2001* (Cth) ('**Corporations Act**').[1]

[3] These charges remain listed in the Magistrates Court for mention only. By application commenced on 1 June 2021 (namely, SC No 6224/21), the plaintiffs seek, from this Court, an order that would result in the permanent stay of proceedings in those prosecutions. Conversely, the Commonwealth defendants seek, amongst other things, a permanent stay of the proceedings in SC No 6224/21.

SC No 6350/21

[4] Further criminal charges have been laid against Mr Palmer himself. These involve alleged breaches of s 184(2)(a) of the Corporations Act and s 408C(1)(d) of the *Criminal Code 1899* (Qld) ('**Criminal Code**').[2] On 6 February 2020 ASIC filed, in the Magistrates Court, complaints about these breaches.[3] In SC No 6350/21, commenced on 3 June 2021, Mr Palmer seeks[4] a permanent stay of the prosecution of these complaints brought against him. Again, conversely and amongst other things, the Commonwealth defendants seek a permanent stay of proceedings in SC No 6350/21.

Applications for Summary Judgment / Resolution of these Proceedings

[5] Further applications have slapped onto the Registry counter like cards in an enthusiastic game of Uno.[5] In the result, it is necessary only to rule on two of them. The plaintiffs identified and agitated issues on which summary judgment was sought; those have been decided against the plaintiffs.[6] Otherwise, and on the basis that the 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. Taken at their highest, and even if argued on the basis of a second further amended statement of claim, it would be inappropriate in either case to exercise the Supreme Court's "supervisory jurisdiction".

"INCONTROVERTIBILITY" – THE BASIS FOR THE SUMMARY JUDGMENT APPLICATION

Observations applicable to both proceedings

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1 Affidavit of Sameh Iskander, in BS 6224/21, filed 5 November 2021, at exhibits pages 1 and 3.

2 Affidavit of Timothy Foley, in BS 6350/21, filed 13 October 2021, at exhibit pages 7-8.

3 Ibid at exhibit page 2.

4 As against both Commonwealth defendants.

5 Details of the applications now in the tangled pile can be found in the attached chronology and summary of litigation (**Annexure A**). There have also been three prior attempts – of which, two were discontinued – to seek the same relief that is now sought. See Affidavit of Timothy Foley, in BS 6224/21, filed 13 October 2021, at pages 3-5 for further detail.

6 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 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.

[6] The separate applications for summary judgment in both proceedings were both predicated upon the concept of "incontrovertibility". For the plaintiffs to succeed in these applications, it had to be established that the Commonwealth defendants enjoyed no prospects of defending the plaintiffs' actions. The plaintiffs could do that, it was said, because in both cases the prosecutions initiated by the Commonwealth defendants amounted to an abuse of process[7] of a kind that mandated a stay of the criminal proceedings now pending in the Magistrates Court.

[7] That Court's processes were being abused, so the argument ran, because to succeed in each case the prosecution necessarily had to establish a proposition that has already been resolved (authoritatively, and against it) in other proceedings.[8] Those propositions were said now to be "incontrovertible".[9]

[8] For the purposes of these applications for summary judgment I accept that an abuse of process may be identified (and a stay of proceedings in the Magistrates Court ordered) if it is found that an "ultimate issue" is already the subject of judicial determination. This is purely a question of law, and its resolution can be achieved on material about which there is no contest.

[9] The Court's power to order such a stay of proceedings could be exercised because, save in highly specific circumstances (such as a retrial after an appeal) it is oppressive to vex an individual twice with litigation of the same issue. To allow the courts' processes to be used in this way would also undermine public confidence in the administration of justice.[10]

[10] I propose to treat these applications on the basis that even though it is usual, it is not necessarily the case that the relevantly "incontrovertible" resolution should be reached during litigation between the same parties. I am prepared to accept, for current purposes, that complete coincidence in the identity of the parties involved in both parcels of litigation may not be essential for the relevant principles to be invoked.[11]

[11] I have reservations about this. However, the prospect that the "ultimate issue" in question might have been determined in litigation between parties other than those involved in the stay application seems to have been left open in *R v O'Halloran*.[12] The issue was raised squarely in that case. Heydon JA (as his Honour then was) could have decided the case by insisting on coincidence in identity, but his Honour refrained from doing so. In the result, his Honour allowed only that "the position in relation to parties … create(d) certain difficulties" for the party who was maintaining that an issue had been incontrovertibly decided.[13] Given that the issue was presented so

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7 Plaintiffs' Summary Judgment Submissions, in BS 6350/21 and BS 6224/21, filed 14/01/2022, at pages 7-9.

8 Ibid at pages 7-8.

9 It is different from principles such as *res judicata*, or any kind of estoppel. Even if the effect is the same, its character is not quite the same as a ruling that there is "no case to answer", but rather requires a (legal) determination that to the extent that there may have been a case to answer, it has already been met. The unusual nature of the issues involved is one reason why it was appropriate for me to rule on them by determining the applications for summary judgment.

10 See *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251 at 280 (Deane & Gaudron JJ).

11 Ibid at 287-288.

12 [2000] NSWCCA 528; (2000) 182 ALR 431.

13 Ibid at 457 [98] (Heydon JA). Some of those "difficulties" are no doubt self-evident, in that it is the parties to an action who will shape the issues, and if the parties involved in one case are different from

conspicuously in that case, his Honour's approach suggests that the contention made by the plaintiffs in this case might be accepted.

[12] There remains, however, something intuitively unattractive about the idea that parties to litigation might have their prospects of success eclipsed by a decision made in another case to which they were not a party. It seems problematic in circumstances where the affected party has not been heard and enjoyed no right of appeal. Indeed, it may be that I am reading too much into the failure by Heydon JA to decide *R v O'Halloran* on the basis that a difference in the identity of parties should put an end to any stay application made on the basis of "incontrovertibility".

[13] In any event, given the contents of the reasons that follow, my preparedness to proceed on the basis identified in [10] above is of no functional significance. I have taken time to explain my treatment of this particular issue because it may be one about which the Commonwealth defendants might raise a contention if, as foreshadowed to me and as the history of the litigation suggests is likely, these decisions are appealed.

"Incontrovertibility", in the case of Proceeding SC No 6224/21

[14] The charge against the first plaintiff reads:[14]

> "[T]hat on or about the twelfth day of June 2012 at Brisbane and elsewhere in the State of Queensland, contrary to s 631(1) of the Corporations Act 2001 (Cth) PALMER LEISURE COOLUM PTY LTD (ACN 146 828 122) formerly known as QUEENSLAND NORTH AUSTRALIA PTY LTD, after publicly proposing to make a takeover bid for securities in a company, namely THE PRESIDENT'S CLUB LTD (ACN 010 593 263), did not make an offer for securities in that company within two months."

[15] The charge against the second plaintiff reads:[15]

> "[T]hat on or about the twelfth day of June 2012 at Brisbane and elsewhere in the State of Queensland, contrary to s 631(1) of the *Corporations Act 2001* (Cth) PALMER LEISURE COOLUM PTY LTD (ACN 146 828 122) formerly known as QUEENSLAND NORTH AUSTRALIA PTY LTD, after publicly proposing to make a takeover bid for securities in a company, namely THE PRESIDENT'S CLUB LTD (ACN 010 593 263), did not make an offer for securities in that company within two months and CLIVE FREDERICK PALMER did aid, abet, counsel or procure PALMER LEISURE COOLUM PTY LTD to commit that offence by virtue of s 11.2 of the *Criminal Code* (Cth)."

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those involved in another, there is a corresponding increase in the likelihood that, in substance, the "ultimate issues" in the respective cases will also be different.

14 Affidavit of Sameh Iskander in BS 6224/21, filed 5 November 2021, at exhibits page 1.

15 Ibid at exhibits page 3.

[16] The basis for the charge is explained in a "Summary of Facts".[16] Mr Palmer is a director of the first plaintiff, which proposed an offer to the shareholders in a company called 'The President's Club'. It would have been an offer to purchase shares and corresponding occupancy rights in villas at Palmer Coolum Resort. In effect, it was a takeover bid. Having made such a proposal, the Corporations Act stipulated a two-month time limit within which the actual offer should be made.[17] Purported attempts to do that were found by ASIC to be defective.[18]

[17] The essence of the alleged offences, therefore, is an omission. It was accepted, for the purposes of these applications, that there was a relevant requirement for such an offer to be made, and that no such offer was in fact made.[19]

[18] However, this omission reflected only a small part of a larger conflict between the plaintiffs in SC No 6224/21 and the other parties who were affected by the takeover. In fact, they were involved in what was described as a "wide range of litigation".[20]

[19] All of that litigation was resolved as a result of orders made by Greenwood J in the Federal Court on 23 November 2020.[21] In broad terms, those orders gave effect to the takeover bid and settled all controversies between the parties involved. A number of them were made "by consent".[22]

[20] Some did, however, require the exercise of a judicial discretion.[23] Amongst these were orders made pursuant to ss 232 and 233(1) of the Corporations Act.[24]

[21] One of those (Order 6(a)) was an order that:[25]

> "All offers or requirements to make a bid by [PLC] for shares in [The Club] are deemed to have been validly made and completed in accordance with the [Corporations Act]."

[22] If the effect of this order was a true judicial determination of any issue, the plaintiffs in SC No 6224/21 might succeed in their applications. The criminal complaint about a breach of s 631(1) of the Corporations Act avers that the relevant offers were not made. The order "deems" that they were.[26] If that order is in fact an incontrovertible judicial determination of any question as to whether offers were made, then it would be an abuse of process for a prosecutorial agency to assert otherwise.

[23] The Commonwealth defendants resist that conclusion. They assert that the order should not be taken to apply to the circumstances as they existed at the time of the offence.[27] They submit that:[28]

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16 Extracted in Annexure B.
17 *Corporations Act 2001* (Cth) s 631(1)(c).
18 This invalidated the bid.
19 Transcript at page 1-19.
20 *Coeur De Lion Investments Pty Limited v The President's Club Limited (No 2)* [2020] FCA 1705 at [7] ('***Coeur De Lion***').
21 Ibid.
22 Ibid at iii.
23 *Coeur De Lion* at 18-19 [58].
24 The provisions are extracted in Annexure A.
25 Ibid at page iv, order 6(a).
26 As defined in the Oxford Australian Law Dictionary (3rd ed).
27 Commonwealth Defendants' Outline of Submissions on the Purported Summary Judgment Applications, in BS 6224/21 and BS 6350/21, filed 21 January 2022, at page 5 footnote 11, referring to

> "An order under s 233 [of the Corporations Act] can only be made if the Court finds the circumstances in s 232 to be made out. Consequently, it is difficult to see how s 233 orders could be made in respect of different subject matter to the s 232 circumstances or which are otherwise not responsive to or necessitated by them."

[24] The point was elucidated in the submission that:[29]

> "In particular, as was stated in paragraph [58] of Coeur De Lion, the FCA Orders were made because Greenwood J was "*satisfied that the conduct of the company's affairs [was] contrary to the interests of the members as a whole*" and that "*[t]he company cannot continue in its current state*". These comments make clear that the FCA Orders were made responsive to and as a remedy for the current state of the company's affairs and [were] not targeted at historical conduct unrelated to the subject matter of that dispute." (emphasis in original)

[25] This submission may have substance, but the plaintiffs in SC No 6224/21 validly point to the fact it is not supported explicitly by anything contained in the order itself. They propose that the order should not be construed according to an inference about the intention behind it, but merely according to its terms, which are plain.

[26] It is, however, by reference to its terms that the issue can be decided. Attention focuses on the word "deemed". That word has one meaning when requiring a certain legal situation to be viewed in a particular way, such as the deeming of an 18-year-old to be an adult.[30] But it can also be understood that, depending upon the context, the word may be used in order to create a useful legal fiction.[31]

[27] That was the way in which Greenwood J used it, and the purpose for which the fiction was created is identifiable. It was a component in a "package deal" that settled a "wide range of litigation".[32] Greenwood J exercised his discretion to create that fiction as one small part of a much larger process.

[28] There is no need to extend its significance beyond the role it played in that process. It is therefore not open to regard the order made by his Honour as a judicial determination possessing "incontrovertibility" of a kind that would support an argument that a court's processes are being abused.

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the Applicants' Amended Outline of Submissions on the Strike-Out Application, in BS 6224/21 and BS 6350/21, filed 21 January 2022, at page 13 [41].

28 Applicants' Amended Outline of Submissions on the Strike-Out Application, in BS 6224/21 and BS 6350/21, filed 21 January 2022, at page 13 [41].

29 Ibid at page 13 footnote 60.

30 As discussed in *Hunter Douglas Australia Pty Ltd v Perma Blinds* [1970] HCA 63; (1970) 122 CLR 49 at 65 (Windeyer J).

31 Ibid.

32 *Coeur De Lion* at [7].

[29] That conclusion is fortified when it is recalled that there are particular reasons why proceedings will be stayed as an abuse of process.[33] Those reasons are not applicable in this case.

[30] It could not in reality be said that the plaintiffs in SC No 6224/21 will be "vexed" with the need to litigate, for a second time, issues referable to the offers. Whilst Greenwood J's orders were made as a consequence of litigation, there is nothing before me to suggest that they were truly "litigated".[34] Rather, the orders made by his Honour were presented to him after a series of hearings involving "discussions with the parties by the Court in, in effect, case management mode".[35] They were either made by consent or, as in the case of Order 6(a), on the basis that they were not opposed. The plaintiffs in *Coeur De Lion* were not, for example, required to adduce evidence to establish that offers were made – and at least in these proceedings it should be accepted they could not have done that.

[31] Further, a "right-thinking" person, charged with the responsibility of deciding whether the Commonwealth defendants' conduct might bring processes into "disrepute", would understand that, in all of the circumstances, the terms of his Honour's order did not confer immunity from prosecution. The reasonable observer would consider that any such immunity would be conferred only pursuant to a specific power and after detailed consideration. That is, the sort of consideration demanded of Commonwealth defendants who are required in the discharge of their statutory duties to take account of the public interest.

[32] It is true that the prosecutions were mentioned in submissions in the proceedings before Greenwood J,[36] and his Honour exhibited an awareness of them.[37] However, without more, this does not come close to providing a basis upon which it could be considered that his Honour's discretion was being exercised for any wider purpose. Still less does it mandate any conclusion about the way in which his Honour's orders should be interpreted.

[33] The plaintiffs urged that significance should attach to the fact that the orders made by Greenwood J were *in rem*.[38] However, the relevance of that proposition is problematic. Order 6(a) does not attach to a "thing" of a kind that is conventionally discussed in this context.[39]

[34] In sum, a "right thinking person" would find no conflict between:[40]

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33 *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378 at 395-396 (Mason CJ, Deane & Dawson JJ), citing *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 30-34 (Mason CJ), 59-61 (Deane J), 72 (Toohey J), 76-78 (Gaudron J).

34 *R v O'Halloran* [2000] NSWCCA 528; (2000) 182 ALR 431 at 457 [103].

35 *Coeur De Lion* at [41]-[42].

36 Ibid at [24].

37 Transcript at pages 1-78 to 1-79. Reference is made by the first plaintiff's counsel to Greenwood J being cognisant of the prosecutions in separate proceedings to *Coeur De Lion*. See Commonwealth defendants' counsel's reply submissions in the Transcript at page 2-60.

38 Regarding Greenwood J's orders, see Plaintiffs' Summary Judgment Submissions, in BS 6224/21 and BS 6350/21, filed 14 January 2021, at page 22 [84]; Orders of Greenwood J, dated 4 August 2021, order 6; Second Plaintiff's Outline of Submissions, in BS 6224/21, filed 14 January 2022, at pages 11-15. Regarding Jackson J's decision, see Transcript at page 2-21.

39 Transcript at pages 2-19 to 2-20.

40 See *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251, 280 (Deane and Gaudron JJ).

(a) a decision of a court (putatively, a conviction for an offence) made on the basis of evidence which established that the plaintiffs in SC No 6224/21 did not make "offers" as required by the Corporations Act; and

(b) another court's order:

(i) made without opposition, and therefore without engaging in the issues in a way that could be said to mean that they had been resolved by litigation (as opposed to in the course of it);

(ii) pursuant to a statutory provision that does not refer to the prospect of criminal liability being affected by its use;

(iii) made in circumstances where, beyond its existence, little was made known about the other litigation; and

(iv) which created, for a specific purpose (unrelated directly to the concerns and responsibilities of the Commonwealth defendants), a legal fiction that is for current purposes accepted to be fiction.[41]

[35] There is "tension" between such a decision and the order, but it is not of a kind that amounts to a "scandal". There is no abuse of process involved in a prosecution that necessarily refuses to confer upon a convenient fiction the status of an "alternative fact". The application for summary judgment in SC No 6224/21 must be dismissed.

"Incontrovertibility", in the case of Proceeding SC No 6350/21

[36] The charges against Mr Palmer read:[42]

1) "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.

2) 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.

3) Between the thirty-first day of August 2013 and the third day of September 2013 at Brisbane and elsewhere in the State of

41 Transcript at pages 2-64 and 3-45.

42 Affidavit of Timothy Foley, in BS 6350/21, filed 13 October 2021, exhibit pages 7-8.

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.

4) 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."

[37] In essence,[43] it is alleged that a company ('**Mineralogy'**) run by Mr Palmer entered into contracts ('**facilities deed arrangement**') with Sino Iron Pty Ltd & Korean Steel Pty Ltd in October 2001. These two companies were later acquired by CITIC Limited ('**CITIC'**). Pursuant to the facilities deed arrangement, Mineralogy received money from CITIC for specified purposes.[44] It is alleged that this money was used by the plaintiff dishonestly, and for his own benefit, "including to fund his political party".[45]

[38] The transactions involved were considered by Jackson J in *Sino Iron Pty Ltd v Palmer & Anor (No 3)* [2015] QSC 94; [2015] 2 Qd R 574 (**'*Sino Iron*'**).

[39] His Honour summarised part of the situation that confronted him in this way:[46]

"[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.

[3] Both cheques were presented and paid by the bank to the payees (the "challenged payments").

[4] The plaintiffs, Sino Iron Pty Ltd and Korean Steel Pty Ltd, allege that the challenged payments were made by Mineralogy in breach of trust. They claim that the first defendant procured or

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43 The full basis for the charges is explained in a "summary of facts" extracted in Annexure C.

44 *Sino Iron Pty Ltd v Palmer & Anor (No 3)* [2015] QSC 94; [2015] 2 Qd R 574 at 582 [24] ('***Sino Iron***').

45 Annexure C at page 1.

46 Ibid at 576-577 [1]-[6].

assisted in Mineralogy's breaches of trust, or knowingly participated in them. They allege that the second defendant knowingly received the $10,000,000 payment.

[5] Against the first defendant, the plaintiffs claim declaratory relief that he dishonestly procured or was involved in or assisted Mineralogy's breaches of trust or knowingly assisted Mineralogy in its dishonest and fraudulent breaches of trust and that he is liable to account to the plaintiffs, as constructive trustee, in relation to the payments.

[6] Against the second defendant, the plaintiffs claim a declaration that it is liable to account as a constructive trustee to Mineralogy, for the $10,000,000 payment, and that the second defendant received that payment in breach of trust and with knowledge of (Mineralogy's) breach of trust."

[40] His Honour resolved that controversy as follows:[47]

> "In my view, it follows 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."

[41] That finding, so the plaintiff submits, is an "incontrovertible" one that the Commonwealth defendants must impeach if they are to succeed in any prosecution of the offences charged.[48]

[42] This is because, so this argument runs, the success of any prosecution is predicated on a finding that there was in fact a trust.[49]

[43] The plaintiff therefore submits that since Jackson J found that there was no trust, any conviction would reflect a conflict of the kind which ought not be tolerated, and in consequence the prosecution must be stayed as an abuse of process.[50]

[44] The proposition contained in [42] must be isolated and examined. As seen above,[51] the word "trust" does not appear in any of the charges laid against the plaintiff, so the averred necessity to prove the existence of a trust does not arise in that way.

[45] Rather, the plaintiff points to the fact that both charges do contain the word "dishonestly", now understood to describe behaviour that is dishonest "according to the standards of ordinary people" (for the purposes of the charges under the Corporations Act[52]) or as behaviour that is dishonest "by the standards of ordinary decent people" (for the purposes of s 408C of the Criminal Code[53]).

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47 Ibid at page 596 [109]. Emphasis added.

48 Plaintiffs' Summary Judgment Submissions, in BS 6224/21 and BS 6350/21, filed 14 January 2021, at page 9 [30]-[32].

49 Ibid at page 8 [27].

50 Ibid at page 9 [32].

51 At [39].

52 *Corporations Act 2001* (Cth) s 9.

53 *Peters v The Queen* [1998] HCA 7; (1998) 192 CLR 493 at 504 [18] (Toohey & Gaudron JJ).

[46] The plaintiff maintains that whilst the word "trust" might not appear, there is no way that the element of dishonesty can be established without first proving that the money given by CITIC to Mineralogy was held pursuant to a trust. The language used in the "Summary of Facts"[54] imports – unmistakably, so it is said – the notion of a trust and relies upon the existence (and breach) of one in order to draw the requisite conclusion about dishonesty.[55]

[47] It is true that the prosecution's "Summary of Facts" uses language comparable to that which would be used to describe a breach of trust, committed dishonestly.

[48] However, it also makes reference to the transfer and use of funds not being "in accordance with [the] agreements",[56] and avers that the plaintiff was "dishonestly us[ing] his position to gain an advantage…".[57]

[49] On that basis, the Commonwealth defendants counter that a finding of dishonesty does not, in the circumstances, depend upon an anterior finding about the existence and breach of a trust. It was submitted that:[58]

> "Mr Palmer knew that there were legal obligations[59] on the use that could be made of the money, but he … used it anyway, notwithstanding that and in doing so he either conferred advantage on these other companies or he, simply, acted dishonestly under the Corporations Act. So, it's not the same as the issues that his Honour Justice Jackson had to determine…"

[50] Not every breach of a "legal obligation" is dishonest, and the Commonwealth defendants submit that their case does not depend on a finding that they are. Rather, their assertion is that, in the particular circumstances of this case, a jury might find dishonesty on the basis that the plaintiff knew that he should not have done what he did – but did it anyway.

[51] It is unnecessary at this point for me to do more than allow that this may be possible. That is because these applications must be determined by reference only to the question of whether something said by Jackson J amounted to a determination of an issue that would have to be established by the prosecution in pursuit of the charges as drafted.

[52] It is not open, by reference to anything written by his Honour in [109] of *Sino Iron* to conclude that it has.

[53] It might have been different if the charge faced by the plaintiff had been brought pursuant to s 408C(1)(a)(ii) of the Criminal Code, which contemplates the

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54 Extracted in Annexure C. Said to be subject to amendment, but taken for current purposes to be a complete statement of the prosecution case.

55 Plaintiffs' Summary Judgment Submissions, in BS 6224/21 and BS 6350/21, filed 14 January 2021, at pages 9-10 [34]-[35].

56 Annexure C at [12].

57 Ibid at [14], [16].

58 Transcript at page 2-44.

59 These "legal obligations" are said to have been imposed by the contractual requirement that the money only be used for identified purposes pursuant to the Facilities Deeds. The purposes are outlined in Annexure C. See also Annexure A for contextualisation.

misappropriation of property held pursuant to a trust.[60] However, it does not follow that, in the absence of a trust, it is impossible to prove dishonesty in another way. No principle operates to prevent the prosecution from attempting to establish dishonesty as foreshadowed, even if it is prohibited from establishing, contrary to Jackson J's finding, that any trust existed.

[54] The fate of the plaintiff's summary judgment applications does not depend upon my assessment of the problems that might lie ahead of the prosecution in establishing the offence as charged. Rather, it depends upon whether the prosecution actually is barred by reason of a finding that is "incontrovertible", in circumstances where the need to "controvert" it is an indispensable prerequisite to a successful prosecution. Jackson J's decision does not have that effect.

[55] It can again be accepted that his Honour's finding was one made *in rem* and was of a kind that might,[61] if it pertained to a functionally relevant circumstance, preclude anyone from facing the possibility of a conviction that depended upon any finding to the contrary. However, his Honour made no relevant determinations about dishonesty, nor as to whether dishonesty could – or could not – be established in these (or any) circumstances by reference to breaches of contractual obligations.[62] The issues in each case may be analogous, but they are not identical, and unless his Honour decided an "ultimate issue" that was identical to the one which is engaged in the criminal prosecution, the application for summary judgment cannot succeed.

[56] The method by which it is asserted that dishonesty can be proven – that is, by reference to acts that constituted an intentional breach of a "legal obligation" – does invite attention. It conjures a number of questions which were considered under this heading, and it was sought to make them relevant under headings considered below.[63]

[57] The Commonwealth defendants may have much to say in answer to such questions and the contest may well be interesting. It can, however, be held in a different forum. There is neither need nor requirement for it to take place here. The application for summary judgment in SC No 6350/21 must fail.

THE COMMONWEALTH DEFENDANTS' APPLICATIONS FOR A STAY OF BOTH PROCEEDINGS

[58] As discussed,[64] the plaintiffs have brought actions that seek to finalise criminal proceedings that are pending before another court. The Commonwealth defendants urge me to take an "exceptional" course and either set aside or stay the proceedings brought by the plaintiffs, or to strike out the process by which they are brought. That can be done if it is determined that the proceedings were an "abuse of process".

[59] As indicated, I propose to uphold this part of the Commonwealth defendants' submission. The proceedings in both SC No 6224/21 and SC No 6350/21 should be permanently stayed as an abuse of process. These orders follow from my finding that, as submitted by the Commonwealth defendants, the plaintiffs' actions are calculated

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60 Although, even then, the discrete need to establish the element of dishonesty would remain.
61 See [10] – [12] above.
62 *Sino Iron* at 603 [145].
63 At [75(g)].
64 At [3] above.

to fragment and/or dislocate the processes of the courts.[65] Even if they would not, strictly speaking, "fragment" proceedings, I am of the view that in the particular circumstances of these cases the dislocation of the relevant processes would amount to a misuse of proceedings before this Court.

[60] The "processes" in question are those by which a criminal charge is laid by the state against an individual person or corporation. They may appear cumbersome, and their machinations are certain to cause frustration for any individual who feels that they have been accused wrongly. Such individual no doubt believes that their own case is "exceptional" and might be adamant that the "process" is an "abuse".

[61] However, the same procedures apply to every individual and there must be something exceptional about a case to warrant its removal from the mainstream, and its elevation to a forum in which it can receive special consideration. The plaintiffs' cases do not have the characteristics that would warrant conferral of that status.

[62] I accept that, as the plaintiffs put it, the law may be "more nuanced" than as averred by the Commonwealth defendants. The relief sought cannot be denied merely on the basis that the plaintiffs have not demonstrated "truly exceptional" circumstances. If nothing else, when put that way, the Commonwealth defendants' submission begs the question as to what is meant by "exceptional".

[63] Further, I can accept that the plaintiffs' claims have been couched in terms that go beyond requesting the Court to make an "evidentiary ruling", which is indeed the situation in which the "the 'fragmentation problem' is one that looms largest".[66]

[64] Nevertheless, the plaintiffs cannot overcome the difficulties raised for them when the debate goes beyond the meaning of protean terms, such as "exceptional" and "abuse", and engages with the language used in authorities where such concepts have been considered. This includes the language used in *Frugniet v Victoria*, where Kirby J referred to the "strong disposition of appellate courts in Australia… not to interfere in the conduct of criminal trials except in the clearest of cases where the need for such interference is absolutely plain and manifestly required".[67]

[65] It can be accepted that I am being asked to exercise "supervisory" rather than "appellate" jurisdiction, but the rationale that underpins such statements is equally applicable. It will be an "abuse" – that is, a "wrong or improper use" [68] – of this Court's proceedings to perform the function of another court in the absence of a clear need to do so.

[66] That need does not arise simply because the accused party feels that criminal proceedings are misconceived. It is understood that the very fact of being charged with a criminal offence is something that can create extraordinary and, for some, intolerable stress. The requirement to enter into a bail undertaking may involve some curtailment of liberty. The process of defending a charge involves sometimes

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65 I include the concept of "dislocation" as a concession to the argument that success for the plaintiffs would not "fragment" proceedings; it would conclude them.

66 First Plaintiff's Submissions in 6224/21 and Plaintiff's Submissions in 6350/21, filed 6 May 2022, at page 15 [58].

67 *Frugniet v Victoria* (1997) 148 ALR 320, at 326-327 (Kirby J) (emphasis added).

68 That term appearing in both the definition of "misuse" and "abuse": *Macquarie Dictionary* (8th ed, 2020) 'misuse' and 'abuse'.

considerable expense and the very fact of being charged may cause reputational damage which will not begin to abate until the charge is resolved (if it is resolved in the defendant's favour). Even then, it may never be restored.

[67] All of this elevates the desirability of expeditious resolution. None of it means that legal processes are being abused. No "obviously compelling"[69] need or requirement for the intervention of this Court can be identified. It is not, for example, the case that expedition can be demanded because the cases involve a current deprivation of liberty. Indeed, in both prosecutions, Mr Palmer is "at large" without bail.[70]

[68] The plaintiffs have available to them the procedures of the Magistrates and courts.[71] These procedures include requirements for disclosure,[72] which precede a committal proceeding where the plaintiffs will have an opportunity to seek a ruling that there is no case to answer.[73] At all times, the progress of the charge is susceptible to scrutiny by a judicial officer. Especially is this so after the CDPP has laid bare its case and the basis for a conviction is made clear. If the plaintiffs' complaints about abuse of process have any basis, they will become coherent during this process.

[69] The decision to commit is an administrative one,[74] and is subject to judicial review. The subsequent presentation of an indictment involves the exercise of a discretion by the CDPP, to whom a submission can always be made. If an indictment is presented, it will be open for the plaintiffs to apply for it to be stayed as an abuse of process of the court in which it is presented. All such measures can be taken before a trial takes place.[75]

[70] Before then, the use of these proceedings to agitate the plaintiffs' particular concerns is wrong and improper. It is right and proper that they should be ventilated in the lower courts. The Supreme Court does have a supervisory jurisdiction,[76] but supervision is not to be engaged on the assumption that other courts are unwilling or incapable of guarding their own processes.

[71] It has not (and, given the state of proceedings, could not have) yet been suggested to those courts that their processes have been abused.[77] Self-evidently, those courts have not adjudicated upon such an argument. When the situation is understood in this way, the plaintiffs cannot, even on an amended pleading, make a case which establishes a "need" or a "requirement" for the relevant processes to trial to be interrupted.

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69 *Obeid v R* [2016] HCA 9; (2016) 329 ALR 372 at 378 [23] (Gageler J).

70 Affidavit of Timothy Foley, in BS 6350/21, filed 13 October 2021, at exhibit page 183; Affidavit of Timothy Foley, in BS 6224/21, filed 13 October 2021, at exhibit pages 29, 91.

71 See Annexure A for a history of the Magistrates Court proceedings.

72 *Justices Act 1886* (Qld) s 83A.

73 Ibid ss 146, 148.

74 *Judicial Review Act 1991* (Qld) s 31, sch 2; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 9, sch 1. See also *Grassby v The Queen* (1989) 168 CLR 1 at 11-12 (Dawson J).

75 *Criminal Code 1899* (Qld) s 590AA.

76 *Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47; (2020) 3 QR 546 at 556 [17] (Fraser JA, Morrison JA & Boddice J agreeing).

77 It is understood that a Magistrates Court cannot stay a committal proceeding – see *Grassby v The Queen* (1989) 168 CLR 1 at 18-19 (Dawson J) – but it nonetheless retains control over its processes.

[72] The plaintiffs' more detailed submissions are considered below, but there is nothing in them, nor in anything raised, that displaces this conclusion. All of the plaintiffs' grievances can and should be dealt with in the lower courts.

"Bad faith" in Proceedings SC No 6224/21 and SC No 6350/21

[73] The plaintiffs have, in one way or another, complained about a variety of matters that conveniently can be considered under this heading. These complaints are directed at the motives, decisions and actions of the Commonwealth defendants.[78] It is averred that they have breached prosecutorial duties and acted in ignorance of the human rights enjoyed by Mr Palmer.[79]

[74] However, and even if amendments to the statements of claim in both proceedings were allowed, the stays of proceedings would still be ordered. I have considered all of the points made by the plaintiffs. In SC No 6224/21, the arguments include the propositions that:[80]

(a) the CDPP have breached their duties, including disclosure duties, and that ASIC have failed to carry out a proper investigation and provide proper information to the CDPP;[81]

(b) the prosecution proceeds without a victim, financial detriment, and in the absence of fairness and consistency, resulting in the plaintiffs being "singled out for special treatment";[82] and

(c) an inference of impropriety should be drawn from the alleged close working relationship between ASIC investigators and CDPP prosecutors.[83]

[75] In SC 6350/21, the arguments include the propositions that:

(a) the prosecution is attended by an absence of good faith, a breach of the overriding duty to the court to assist it to arrive at the truth, a breach of the duty to act in good faith, and a breach of the duty not to use one's position improperly;[84]

(b) a relationship of undue influence can be inferred from the frequency and duration of contact between the CITIC parties and ASIC;[85]

(c) the complaint involves wrongful conduct by ASIC;[86]

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78 See MFI #N tendered 1/06/2022 in BS 6224/21 & BS 6350/21.

79 These complaints were supported by the proposition that the prosecutions were attempting to "controvert" matters that had already been decided; I have already decided that this is not so.

80 The second plaintiff makes similar allegations of bad faith in his "second further amended statement of claim": Proposed Second Further Amended Statement of Claim, as found in Exhibit CFP-01 to Affidavit of Clive Palmer, filed 5 May 2022, at [32]-[58] ('**2FASOC of 2nd plaintiff in 6224/21**').

81 Proposed Second Further Amended Statement of Claim, as found in Exhibit SMI-01 to Affidavit of Sameh Morris Iskander, filed 6 May 2022, at [28A]-[28ZC] ('**2FASOC of 1st plaintiff in 6224/21**').

82 Ibid at [29]. See also [43]-[51].

83 Ibid at [31].

84 Proposed Second Further Amended Statement of Claim, as found in Exhibit TLR-09 to Affidavit of Tracey Robinson, filed 6 May 2022, at [119F], [119G], [119M], [119N], [119O(a)], [132(b)], [132(c)] ('**2FASOC in 6350/21**').

85 Ibid at [115(j)]-[115(o)].

86 Ibid at [117(b)].

(d) the CDPP has breached duties of disclosure.[87] It is pleaded that the CDPP aided and abetted the CITIC parties to pursue their wrongful stratagem;[88]

(e) the brief of evidence is incomplete, inaccurate, and includes prejudicial and selective evidence;[89]

(f) ASIC failed to carry out proper investigations in accordance with the law, and failed to do so for an improper purpose;[90] and

(g) there are questions that might fairly be asked about the very nature of the criminal charge at the centre of SC No 6350/21, including questions about:

(i) the appropriateness of pursuing a criminal prosecution in the circumstances described in Annexure C;

(ii) the feasibility of doing so when no one has suffered a financial detriment, and the "advantage" said to have been obtained was one that was enjoyed by one entity, which must have been accrued at the expense of another such entity, in circumstances where each of those entities is under the control of the one identity;

(iii) the implications for commercial activity if prosecutions were pursued in all such cases; and

(iv) whether, if such matters are not conventionally the subject of prosecution, the plaintiff is being singled out for special treatment.

[76] In sum, in both cases, the conduct of the Commonwealth defendants has been impugned. In effect, bad faith has been alleged on bases that, if established, would make legal history. I have not dismissed these complaints, as it seemed I was urged to, on the basis that they were simply scandalous. Courts would fail their constitutional responsibility if they assumed infallibility on the part of the executive.[91] Even in Australia, responsible agencies have been known to betray a fundamental misunderstanding of criminal cases they were pursuing, and maintain (even on appeal) arguments in favour of convictions that were always unattainable and eventually exposed as unsustainable.[92]

[77] However, by definition, the assertions about the Commonwealth defendants are at this stage unsubstantiated. There is not – and in advance of disclosure it is unlikely that there could be – evidence that establishes any of these things. The loose collection of circumstances identified, and questions asked by the plaintiffs might fuel speculation, but afford no inference.

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87 Ibid at [119A]-[119O].

88 Ibid at [119O].

89 Ibid at [119K]-[119M].

90 Ibid at [120]-[129], [130]-[135F], [136]. This includes the allegation that, even after it appeared to ASIC that the plaintiff may have committed an offence against the Corporations Act, and ought to have been prosecuted for that offence, a compulsory examination under s 19 of the *Australian Securities and Investment Commission Act 2001* (Cth) took place: at [135C]. It was alleged that by reason of this unlawful examination, information was unlawfully obtained and the plaintiff's right to silence denied: at [135F].

91 Cf *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68 at 148 [57] – 156 [84] (Kirby J).

92 See, for example, *R v Hanson; R v Ettridge* [2003] QCA 488 and *Fingleton v The Queen* (2005) 227 CLR 166. As recently as last year, in *R v Dumble & Ors* (unreported, District Court of Queensland, Clare SC DCJ, 25 June 2021), prosecutorial authorities insisted on the correctness of a misconceived prosecution until rebuffed by the Court of Appeal: see *R v Dumble & Ors* [2021] QCA 161, [19]-[20].

[78] It is understood that the plaintiffs would seek to have the Commonwealth defendants file a defence, engage the disclosure regime applicable in this Court and, as their case advanced, furnish the evidence upon which their claims could be made out. However, it cannot be found that this Court's procedures would confer upon the plaintiffs any advantage that they would not enjoy under the disclosure regime that is applicable in the Magistrates Court. The ability for the plaintiffs to require the production of material pursuant to a summons[93] is as available in that Court as it is here. A stay of proceedings can be ordered by the District Court as well as it can be ordered here.

[79] In reaching this conclusion, I have taken into account the possibility that a conclusion as to "bad faith" might be fortified, and the claim to relief strengthened, by the further arguments considered below,[94] and that the plaintiffs' arguments must be considered in conjunction with each other and as a whole. For example, Mr Palmer makes the point that if he is the subject of proceedings on a charge that cannot succeed,[95] that will erode confidence in the judicial system.[96] However, the judicial system works on several levels, and the issues discussed below can and should all be dealt with at the level where that system envisages that will happen.

Is the prosecution in SC No 6350/21 "doomed to fail" due to the availability of a defence?

[80] The concern has been raised, in SC No 6350/21, that the criminal prosecution is unsustainable when regard is had to the asserted existence of a "set off" and a reconciliation. A number of facts are pleaded, including some that assert the plaintiff's "genuine and bona fide belief".[97]

[81] Invoking the concept of a "set off" may be problematic when no actual deficit is alleged, but in any case, it was submitted that the conclusion to be drawn from these circumstances is that the offences charged cannot be proven.[98]

[82] However, the plaintiff's case should not be allowed to proceed in this Court on any basis that depends for its success upon conclusions of fact. This prohibition should extend to any facts concerning the payment of money and, ultimately, the use of those facts to inform the further conclusion that the plaintiff's conduct in connection with the payments was not dishonest. These are conclusions destined for resolution by a designated arbiter of fact. It is neither "required" nor "necessary" for the supervisory jurisdiction of this Court to be engaged in order for it to assume that role.

SC No 6350/21 – issues regarding the 'facilities deed'

[83] However, it is also advanced that "the plaintiff's conduct in connection with the First Payment and the Second Payment was not dishonest",[99] and that:[100]

> "the making of the First Payment and Second Payment:

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93 *Justices Act 1886* (Qld) s 78.
94 At [80] – [85].
95 At [80] – [82] below.
96 Transcript at page 6-38.
97 2FASOC in 6350/21, at [90A(e)].
98 Ibid at [92].
99 Ibid at [92(b)].
100 Ibid at [94(c)].

(i) did not thereby even constitute a breach the Facilities Deeds;

(ii) do not establish a dishonest benefit under s 408C(1)(d) of the Criminal Code or dishonestly using a position s 184(2)(a) of the [Corporations Act] as alleged in the Complaint."

[84] It may be that there are disputes about the facts asserted, but for the purpose of this application, I am prepared to proceed on the basis that this argument might be an argument regarding a "discrete question of law" requiring no conclusion about a state of mind.

[85] It is, however, a question that arises within the prosecution's case and which can and should be resolved in the forum where that case is brought.[101] Properly characterised, it amounts to a claim that there is no case to answer (which is a question of law), and there is neither need nor requirement for that to be determined in this Court. In the absence of something that could in context qualify as such a need or requirement, it would be a misuse of this Court's processes to embark upon such a determination. It is not, as I have noted,[102] as if there is someone in custody who will remain there until there is a judicial determination of the issue. The plaintiff retains the opportunity to make this argument part of a no case submission in the Magistrates Court and, if the decision is nevertheless made to commit, invoke the jurisdiction of this Court by way of judicial review,[103] or agitate the question in a stay application before the District Court. There is no need for these opportunities to be relocated.

Further complaints by Mr Palmer

[86] Mr Palmer did make the point that he should not be precluded from at least seeking the order in this Court, because of itself that does not fragment the administration of criminal justice. It is the making of an order which would cause fragmentation. The point is too subtle. Whilst the orders sought would conclude (and not fragment) proceedings, so too might the same sort of order made in the Magistrates Court or District Court. It remains a misuse of the proceedings of this Court to attempt to obtain a ruling that there is "no case to answer" when such a ruling might be obtained in the Magistrates Court and reviewed by this Court, with the result of that review itself being subject to appellate processes.

[87] Mr Palmer has stated that if the Commonwealth defendants are granted an order of the kind that I propose to make, then his case will be "snuffed out".[104] That is not so. One reason why these proceedings should be stayed is that the plaintiffs' cases can in fact be made elsewhere. There is ample scope for Mr Palmer's grievances to be agitated, but there is no need nor requirement for that to occur in proceedings in this Court. Proceedings SC No 6224/21 and SC No 6350/21 should therefore be stayed, permanently.

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101 In this way, it can be distinguished from the "incontrovertibility" issue, which, if made good, would not have been so much a submission that there was no case to answer as that the case should not – on the basis of all that was publicly known – have been brought in the first place.

102 At [65] – [66] above.

103 The Court will then have the benefit of evidence, submissions and a set of reasons as a basis for the argument.

104 Transcript at pages 6-25 & 6-27.

The proceedings be stayed; the pleadings are not set aside or struck out.

[88] Having reached the conclusions identified in [6] – [57] above, I would have been prepared if necessary to strike out those parts of the pleadings which assert "incontrovertibility". 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.[105] 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.

ORDERS

[89] Since the foundational proceedings have been stayed, all associated applications fall away.

[90] On 20 October 2022, I provided the parties with these reasons and invited further submissions as to the precise terms of the orders which should give effect to them, and as to the issue of costs. After receiving and considering submissions, I shall make the following orders, which are in essence those to which the parties agreed:

1. The applications for summary judgment in proceedings SC No 6224/21 and SC No 6350/21 be dismissed.

2. Proceedings SC No 6224/21 and SC No 6350/21 be permanently stayed.

3. The plaintiffs pay the second and third defendants' costs in proceedings SC No 6224/21 and SC No 6350/21 on an indemnity basis.

4. The plaintiffs pay the Attorney-General's costs of and incidental to proceedings SC No 6224/21 and SC No 6350/21.

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105 In a way, the Commonwealth defendants have had such a benefit, but the plaintiffs brought that on by forcing the "incontrovertibility" argument to a head in their applications for summary judgment.

ANNEXURE A – Chronology and summary of litigation

SC No 6224/21 – the Corporations Act Prosecution

1. On 22 February 2018, the Commonwealth Director of Public Prosecutions ('**CDPP**') commenced a prosecution against Palmer Leisure Coolum Pty Ltd ('**PLC**') under s 631(1) of the *Corporations Act 2001* (Cth) ('**Corporations Act Prosecution**').

2. The CDPP also commenced prosecution against Mr Palmer, a director of PLC, alleging that he aided and abetted PLC in respect of PLC's breach of s 631(1) of the *Corporations Act 2001* (Cth) ('**Corporations Act**').

3. Since the Corporations Act Prosecution was commenced, it has been mentioned at least 18 times in the Magistrates Court of Queensland.[106] 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.[107] The Corporations Act Prosecution remains at the pre-committal stage.[108]

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.[109] This proceeding was later discontinued.[110]

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.[111] In December 2018, Mr Palmer discontinued this proceeding, but PLC did not do so.[112] In December 2018, Mr Palmer also brought the third Supreme Court proceeding against the Magistrates Court of Queensland, the CDPP and ASIC.[113] 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.[114] 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.[115]

6. PLC and Mr Palmer appealed the decision of Ryan J. In March 2020, the Court of Appeal dismissed the appeal with costs.[116] In April 2020, PLC and Mr Palmer applied for special leave to appeal the decision of the Court of Appeal to the High

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106 Affidavit of Timothy Foley, in BS 6224/21, filed 13 October 2021, at page 2-3. As at 13 October 2021.
107 Ibid at 2.
108 Ibid.
109 Ibid at 3.
110 Ibid.
111 Ibid at 3-4.
112 Ibid.
113 Ibid.
114 Ibid.
115 *Palmer Leisure Coolum Pty Ltd & Anor v Magistrates Court of Queensland & Ors* [2019] QSC 8.
116 *Palmer v Magistrates Court of Queensland; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Anors* [2020] QCA 47, Fraser and Morrison JJA, Boddice J presiding.

Court of Australia.[117] In August 2020, Gageler and Keane JJ made an order dismissing PLC and Mr Palmer's applications for special leave.[118]

7. The present proceedings therefore represent the fourth Supreme Court proceedings where PLC and Mr Palmer have sought, inter alia, a permanent stay of proceedings on the Corporations Act Prosecution. The proceedings are brought against the Magistrates Court of Queensland ('**Magistrates Court**') and the CDPP and ASIC ('**Commonwealth Defendants**'). The plaintiffs seek to rely upon a second further amended statement of claim, which is contained as an exhibit to an affidavit.[119] Argument was heard as to whether leave to file these second further amended statements of claim should be granted.

8. Numerous interlocutory applications have been made in respect of these proceedings:

    a. An application by the plaintiffs for summary judgment;

    b. An amended application of the Commonwealth defendants for strike-out;

    c. A further amended application of the Commonwealth defendants for strike-out;

    d. An application of both plaintiffs for leave to file and serve a second further amended statement of claim;

    e. An application of the second plaintiff seeking, inter alia, to correctly name the first defendant and join individual Magistrates to the proceedings; and

    f. An application of the intervenor to act as *amicus curiae* for the first defendant in the proceedings.

SC No 6350/21 – the Criminal Code Prosecution

9. On 6 February 2020, the CDPP commenced a prosecution against Mr Palmer under s 408C(1)(d) of the *Criminal Code 1899* (Qld) ('**Criminal Code**') and s 184(2)(a) of the Corporations Act. Two charges were brought under the Criminal Code, and two under the Corporations Act (collectively, the '**Criminal Code Prosecution**').

10. Since the Criminal Code Prosecution was commenced, it has been mentioned at least six times in the Magistrates Court of Queensland.[120] The Criminal Code Prosecution remains at the pre-committal stage.[121]

11. The Criminal Code Prosecution has also been the subject of another challenge in the Supreme Court of Queensland by Mr Palmer. In March 2021, Mr Palmer filed proceedings in the Supreme Court against the Magistrates Court, CDPP, ASIC and Ms Heather Gibson (an ASIC employee) alleging the Criminal Code Prosecution

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117 Affidavit of Timothy Foley, in BS 6224/21, filed 13 October 2021, at page 4.

118 Ibid at 5.

119 Proposed Second Further Amended Statement of Claim of PLC can be found in Exhibit SMI-01 to Affidavit of Sameh Morris Iskander, filed 6 May 2022; Exhibit CFP-01 to Affidavit of Clive Palmer, filed 5 May 2022. Proposed Second Further Amended Statement of Claim of Mr Palmer can be found in Exhibit SMI-01 to Affidavit of Sameh Morris Iskander, filed 6 May 2022.

120 Affidavit of Timothy Foley, in BS 6350/21, filed 13 October 2021, at exhibit pages 2-3. As at 13 October 2021.

121 Ibid.

was an abuse of process, and seeking relief under the *Human Rights Act 2019* (Qld).[122] In May 2021, Mr Palmer discontinued these proceedings.[123]

12. The present proceedings therefore represent the second Supreme Court proceedings where Mr Palmer has sought, inter alia, a permanent stay of proceedings on the Criminal Code Prosecution. The proceedings are brought against the Magistrates Court and the Commonwealth Defendants. Mr Palmer seeks to rely on his Further Amended Statement of Claim filed on 17 December 2021, which is contained as an exhibit to an affidavit.[124] Argument was heard as to whether leave to file these Amended Statements of Claim should be granted.

13. Numerous interlocutory applications have been made in respect of these proceedings, some of which act as companions to the applications by the same names filed in relation to the Corporations Act Prosecution:

    a. An application by the plaintiffs for summary judgment;

    b. An amended application of the Commonwealth defendants for strike-out;

    c. An amended application of the Attorney-General of Queensland for strike-out;

    d. A further amended application of the Commonwealth defendants for strike-out; and

    e. An application for leave to file and serve a second further amended statement of claim.

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122 Ibid at 3-4.
123 Ibid at 4.
124 Exhibit TLR-09 to Affidavit of Tracey Robinson, filed 6 May 2022.

ANNEXURE B – Summary of Facts in SC No 6224/21

SUMMARY OF FACTS

PALMER LEISURE COOLUM PTY LTD

&

CLIVE FREDERICK PALMER

1. The President's Club Limited **(TPC)** is an unlisted public company'.

2. TPC operates a timeshare scheme at the property previously known as Hyatt Regency Coolum and now known as Palmer Coolum Resort **(the resort).** TPC is the tenant under two leases, both dated 21 December 1988 and each for a term of 80 years, over all the lots in TPC Golf Community Titles Scheme and TPC Tennis Community Titles Scheme.[2]

3. The constitution of TPC contemplated that each holder of ordinary shares in the company would hold one or more parcels of 13 ordinary shares, and would own an associated one-quarter interest as tenant in common in a lot **(a villa interest)** in either of the community titles schemes. The effect of a set of interlocking agreements was that a purchaser of one timeshare interest must become both:[3]

    - a member of TPC, holding 13 shares; and
    - the registered proprietor of a corresponding one-quarter interest in either of the community titles schemes.

4. Purchasers of timeshare interests were also required to execute:

[1] (PLC.0003.0003.0001)

[2] As referred to in Bidder's Statement and Replacement Bidder's Statement (eg (PLC.0003.0004.0032) at 0035),

[3] As referred to in Bidder's Statement and Replacement Bidder's Statement (eg (PLC.0003.0004.0032) at 0035), (PLC.0003.0001.0435)

- a deed poll that bound them, if they sold their villa interest, to sell the corresponding shares in TPC to the same person; and

- an assignment of a letting pool agreement, under which their villa interest was made available with others as part of a pool.[4]

5. On 31 January 2005, ASIC exercised its powers under s 601QA(l)(a) of the Corporations Act 2001 **(the Act)** to conditionally exempt TPC from registration as a managed investment scheme under Chapter 5 of the Act. The exemption was providedon the basis that the developer of the resort, Coeur de Lion Investments Pty Ltd **(CDLI),** entered into a deed poll **(the CDLI Deed Poll)** under which CDLI covenanted that it would not exercise more than 10% of its voting rights on any resolution unless it had received ASIC's written consent or the vote was in relation to a resolution to wind up the scheme.[5]

6. Clause 4.2 of the CDLI Deed Poll allowed CDLI to revoke it upon providing to ASICand TPC at least 180 days prior written notice.[6]

7. At all material times Coeur de Lion Holdings Pty Ltd **(CDLH)** was the sole shareholder in CDLI which, in tum, owned approximately 41% of the shares in TPC as at 30 June 2011.[7] Prior to July 2011, the shares in CDLH were solely owned by Lend Lease Development Pty Limited (Lend Lease).

8. In July 2011, Queensland North Australia Pty Ltd **(QNA)** acquired 98% of the shares in CDLH from Lend Lease,[8] with the remaining 2% of shares acquired by Closeridge Pty Ltd **(Closeridge),** an entity controlled by Mr Clive Frederick Palmer **(Palmer).**[9]

[4] (PLC.0003.0001.1822)

[5] (PLC.0003.0001.0262) / (PLC.0003.0001.0313)

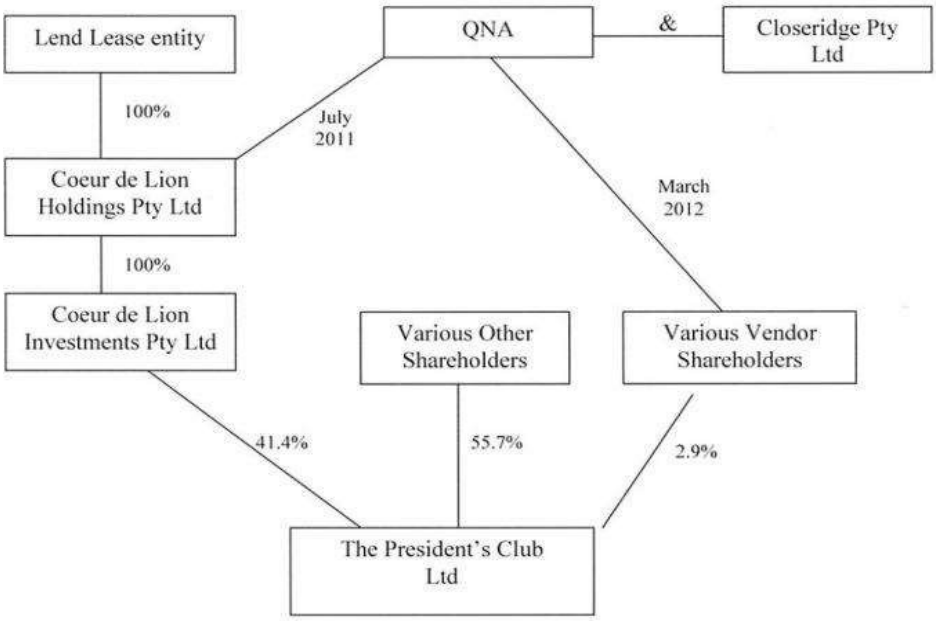
[6] (PLC.0003.0001.0262) / (PLC.0003.0001.0313)

[7] (PLC.0013.0002.0402) at 0402

[8] (PLC.0013.0002.0402)

[9] (PLC.0003.0003.0078)

Share Structure



9. The directors of QNA as at 1 July 2011 were Mr Basil Ahyick **(Ahyick),** Mr GeoffreySmith **(Smith)** and Palmer[10].

As at 1 July 2011, the directors of CDLH were Smith, Palmer and Ahyick. During theperiod 12 April 2012 to 12 June 2012, the directors of CDLH were Smith, Palmer andWilliam Matthew Schoch **(Schoch).**[11]

11. As at 1 July 2011, the directors of CDLI were Smith, Ahyick and Palmer.[12]

12. As at 1 July 2011, the directors of Palmer Coolum Resort Pty Ltd (PCR}-previously known as Coolum Resort Pty Ltd-were Palmer, Ahyick and Smith.[13]

13. On 29 February 2012, CDLI and PCR were placed into voluntary administration (withPalmer, Ahyick and Smith resigning as directors on that date). The administration

[10] (PLC.0003.0003.0070) (now Palmer Leisure Coolum Pty Ltd)
[11] (PLC.0003.0003.0045)

[12] (PLC.0003.0003.0020)

[13] (PLC.0003.0004.0002)

ceased on 3 April 2012. From 29 February 2012 until 12 June 2012, the director of both entities was Schoch. Palmer was subsequently reappointed as a director of the entities.[14]

14. On 15 September 2011, CDLI gave notice that it intended to revoke the CDLI Deed Poll.[15]• That revocation took effect on or about 15 March 2012 following expiry of therequired 180 day notice period. It followed that, on or about 15 March 2012, the ASICexemption from registration as a managed investment scheme ceased to apply.

15. On 10 April 2012, Mr Joseph Welch **(Welch),** a solicitor who was acting for QNA, was appointed as a director of QNA. At a meeting of QNA's directors that day it was resolved that Welch be authorised to take the steps necessary to make a takeover bid of TPC, including lodging the bidder's statement.[16]

16. As at 12 April 2012, the directors of QNA were Palmer, Smith and Welch.[17]

17. On 12 April 2012, QNA lodged a bidder's statement with ASIC that proposed a bid for all TPC shares and the corresponding villa interests. The purchase price offered foreach parcel of 13 shares and corresponding villa interests was $55,013 (being $1 per share for the 13 shares and $55,000 for the villa interest).[18]

18. On 20 April 2012, ASIC wrote to QNA raising a number of concerns with the bidder's statement, including inadequate disclosure.[19] TPC's lawyers, King & Wood Mallesons **(King & Wood),** had earlier written to QNA (on 17 April 2012) also identifying purported issues with the bidder's statement.[20]

19. Also on 20 April 2012, Welch ceased his directorship of QNA.[21]

[14] Refer to (PLC.0003.0003.0020) & (PLC.0003.0004.0002)

[15] (PLC.0003.0001.0354) (TPC)

[16] (PLC.0003.0003.0070) (now Palmer Leisure Coolum Pty Ltd) & (PLC.0010.0002.0752)

[17] (PLC.0003.0003.0070) (now Palmer Leisure Coolum Pty Ltd)

[18] (PLC.0003.0004.0032) at 0032

[19] (PLC.0003.0001.0322)

[20] (PLC.0003.0001.0536)

[21] (PLC.0003.0003.0070) (now Palmer Leisure Coolum Pty Ltd)

20. On 24 April 2012, QNA's solicitors, Hickey lawyers, wrote to TPC advising that QNA did not intend to proceed with its bid. ASIC was notified of this decision by letter of the same date.[22]

21. On 26 April 2012, ASIC advised QNA's solicitors that, having regard to s 631(1) of the Act, ASIC considered the bid to have been made public through the lodgement of the bidder's statement with ASIC. Accordingly, QNA could not withdraw its bid and was required to proceed with the offer within two months from the announcement.[23]

22. Ashurst were then engaged to act as lawyers for QNA.

23. On 11 May 2012, QNA sought an extension of time within which to lodge a supplementary and replacement bidder's statement.[24] On the same date ASIC granted the extension of time sought.[25] This extension of time resulted in offers to the members of the TPC being required to be provided between 4 and 8 June 2012. On 14May 2012, Schoch-on behalf of QNA-provided undertakings sought by ASIC that QNA would lodge a replacement bidder's statement under the appropriate ASIC class order and that QNA would explain the effect of the relief instrument in that replacement bidder's statement.[26]

24. A replacement and supplementary bidder's statement was provided to ASIC on 17 May 2012.[27] ASIC indicated in subsequent correspondence that the bid remained non-compliant and further changes were required to the replacement bidder's statement.[28]

25. On 21 May 2012, QNA formally lodged a replacement bidder's statement and servedа copy of it on TPC's lawyers. In the replacement bidder’s statement QNA proposed to make an offer to purchase all the shares in TPC and the corresponding villa

[22] (PLC.0003.0001.0560), (PLC.0003.0001.0559)

[23] (PLC.0003.0001.0569)

[24] (PLC.0003.0001.0561)

[25] (PLC.0003.0001.0353), (PLC.0003.0001.0566)

[26] (PLC.0010.0002.1784)

[27] (PLC.0010.0002.1736), (PLC.0010.0002.1740), (PLC.0010.0002.1741)

[28] (PLC.0003.0005.0038)

interests.[29] The lawyers for TPC subsequently sent a letter dated 29 May 2012 which referred to purported deficiencies in the replacement bidder's statement that needed to be addressed.[30]

26. On 1 June 2012, QNA's solicitors advised TPC's solicitors that the replacement bidder's statement would not be dispatched, that a further replacement bidder's statement would be provided on 4 June 2012 and that QNA would seek further relief from ASIC to extend the dispatch period until 12 June 2012.[31]

27. No further replacement bidder's statement was provided by QNA and no further relief was sought by it from ASIC (and nor was such relief granted).

28. No offer was made by QNA to TPC members within the two month period which commenced on 12 April 2012 (being the date of the public proposal of the takeover bid).

29. TPC lodged an application with the Takeovers Panel on 26 June 2012.[32]

30. QNA breached the requirements of s 631(1) of the Corporations Act by not making an offer for the securities under the takeover bid within two months after the public proposal of the takeover bid.

ANTICIPATED DEFENCES - EXPLANATION AND DOCUMENTARY EVIDENCE ASIC RELIES UPON TO REBUT THE DEFENCE

31. Section 670F provides that:

"A person does not commit an offence under subsection 631(1) or (2), and is not liable under section 670E for a contravention of those subsections if the person

[29] (PLC.0010.0002.1523), (PLC.0010.0002.1524), (PLC.0010.0002.1525), (PLC.0010.0002.1526)

[30] (PLC.0003.0001.0548)

[31] (PLC.0003.0001.0606)

[32] (PLC.0003.0001.0048)

proves that they could not reasonably have been expected to comply with those subsections because:

(a) at the time of the proposal or announcement, circumstances existed that the person did not know of and could not reasonably have been expected to know of; or

(b) *after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.*
"

32. Based on correspondence (attached), the arguments made before the takeovers panel, the evidence given by Palmer during his s19 examination before ASIC and from ASIC's review of the materials, there are a number of matters that may be raised by the company and its directors in order to satisfy the test in s.670F.

A. That the shares and villa interests are not stapled securities

33. An argument that might be presented by the defence is that Chapter 6 of the Act doesnot apply to interests in an unregistered managed investment scheme.

34. The definition of securities at s 92(3) of the Act includes "shares in a body" and interests in a registered managed investment scheme. Chapter 6 states that the chapter applies to an unlisted company with more than 50 members: s 602. By definition, TPC is not a registered managed investment scheme under the Act. ASIC's view is that the TPC shares are, in effect stapled, to the villa interests given the TPC constitution does not permit the transfer of shares or the villa interest without the transfer/sale of the other.

35. The argument that is likely to be raised by the defence is that the shares and villa interests are not stapled, and therefore the villa interests are not subject to the 'minimum bid principle' defined in s 621(3). That section requires an offer under a bid must equal or exceed the maximum consideration paid for the shares within the preceding four months. Within the preceding four months, QNA purchased a number of shares

in TPC and their associated villa interests, which resulted in QNA acquiring a further 3% of the total shares of TPC. In these purchases, QNA particularised the consideration for the offer as a sum for the villa interest (amounts varying between $55,000 and $65,000), and also specified the value of the associated 13 shares as $1 per share. QNA may argue that TPC shares were only worth $1 each and that the minimum bid principle only applied to this part of the transaction. Further, we are aware that QNA sought legal advice on this issue and may seek to rely on this advice.

36. Palmer stated in the course of his s 19 examination, that after the lodgement of the original bidder's statement, King & Wood informed QNA's solicitors that the minimum bid principle applied to both the shares and corresponding villa interest. King & Wood had also threatened to make an application to the Takeovers Panel if QNA did not comply. Palmer also stated that he was concerned that if QNA disregarded King & Wood's position on this issue and proceeded with the takeover bid, that he would be in contempt of the Takeovers Panel.

ASIC's view:

37. On 17 April 2012, King & Wood informed QNA of concerns relating to the minimum bid principle. Further, on 20 April 2012, ASIC wrote to QNA outlining similar concerns. Regardless, QNA continued to include both the shares and corresponding villa interests in the replacement bidder's statement. When QNA sought to withdraw the bidder's statement on 24 April 2012, the minimum bid principle was not raised asa reason for the attempted withdrawal.

38. The Takeover Panel proceedings were not commenced until 26 June 2012, being after the end of the two month period (which ended on 12 June 2012). An argument that a contempt of the Takeovers Panel might arise from QNA proceeding with the bid in the face of a mere threat by TPC to bring proceedings before the Takeovers Panel is without merit.

39. The TPC shares entitled long term leasing agreements between the owners of the villa interests and TPC. Therefore, the value of the TPC

share was effectively the value of the use of the villa interest. As such, $1 per share was simply an arbitrary figure and was not reflective of the true implicit value of the share.

40. Relevant Documents or Events:

Date	Description	Reason	Barcode
12 April 2012	Bidder's statement	Includes shares and villa interests	(PLC.0003.0004.0032)
17 April 2012	Complaint by KWM	First raised issue including threatening takeover panel action	(PLC.0003.0001.0536)
24 April 2012	Letter purporting to withdraw bid	No mention of minimum bid principle as the reason	(PLC.0003.0001.0559) (PLC.0003.0001.0560)
30 April 2012	Ashurst engaged	Continue with the bid	(PLC.0010.0002.1799)
11 May 2012	Instrument	Extension of period sought and granted by ASIC in which to provide offers to members of TPC	(PLC.0003.0001.0561) (PLC.0003.0001.0566)
21 May 2012	Replacement bidder's statement	Includes shares and villa interests	(PLC.0003.0004.0088)
29 May 2012	KWM letter	Raising issue and takeover panel again	(PLC.0003.0001.0548)
1 June 2012	ASIC email to Ashurst (ref to telephone call on 30 May)	Intending on removing villa interests	(PLC.0003.0005.0044)

B. That QNA were made aware on 4 June 2012 that TPC were insolvent and, therefore, it would have been unlawful to proceed with the takeover.

41. An argument may be made by the defence that TPC was trading whilst insolvent and that this became apparent in an email received by QNA on 4 June 2012. In his s 19 examination, Palmer stated that he was not aware of any solvency issues until that date.

ASIC's view:

42. In terms of timing, there was no compliant bidder's statement as at 4 June 2012.

43. As at 4 June 2012, the instrument required the offer-as opposed to the

replacement bidder's statement-to be provided to TPC members between 4 and 8 June 2012. If the further replacement bidder's statement had been lodged on 4 June 2012, offers under the takeover regime would have to be made after 14 days of 4 June 2012. QNA would have required relief from ASIC to ensure that offers either could be made between 4 and 8 June or alternatively that the two month period be extended. QNA did not seek further relief from ASIC and nor was such relief granted.

44. Since 15 March 2012, PCR, the resort administrator (a Palmer entity), refused to enable TPC members to let their units. As a result TPC could not derive any rental income from their units. This was due to CDLI revoking the CDLI deed in September 2011. There were two other forms of income available to TPC - the raising of levies on its members or the receipt of funds from Lend Lease under a developer's subsidy. Palmer indicated in the section 19 examination that he had been made aware that Lend Lease had disputed payments under this developer's subsidy arrangement due to a purported 'misuse of funds'.

45. ASIC's view is that s 670F(b) would not apply as this "change of circumstances" was indirectly caused by Palmer and QNA by the revocation of the deed and the refusal to allow the units to be let.

46. Further, ASIC's position, in accordance with ASIC Regulatory Guide 59,[33] is that the bidder has as much information as the market at the time of the bid and therefore it is reasonable for the bidder to proceed with its bid even if a material adverse change in the target's financial position has occurred.

47. In his section 19 examination, Palmer indicated that prior to the bidder's statement QNA had reviewed TPC's financial position (p47 of s.19 examination).

[33] (PLC.0003.0008.0001) ASIC Regulatory Guide 59, 'Announcing and withdrawing takeover bids (s653 &s746) issued at 21/08/1995 at 59.66, 59.67.

48. Relevant documents and events

Date	Description	Reason	Barcode
21 August 1998	ASIC Regulatory Guide 59		(PLC.0003.0008.0001)
17 January 2001	Resort Administration Agreement (RAA)	Agreement between Coolum Resort P/L and TPC & ors - Letting pool etc	(PLC.0003.0001.0945)
31 January 2005	Exemption Deed		(PLC.0003.0001.0313)
15 September 2011	Notice of Revocation of deed		(PLC.0003.0001.0354)
4 April 2012	Letter from TPC and KWM	'Termination' of RAA - Not permitting members to use villas	(PLC.0003.0001.1011)
11 April 2012	Letter from CDLI and CR to TPC members	Can't rent out properties under RAA, engagement of lawyers by directors of TPC 'unlawful', legal action for 'consultant's fees and lawyers.	(PLC.0003.0001.0567)
22 June 2012	Letter from KWM	Takeover panel action to be filed after no RBS filed, if not rectified by 25 June 2012	(PLC.0003.0001.0316)
26 June 2012	Takeover Panel Application		(PLC.0003.0001.0048)

C. That the Refurbishment amounts were no longer being paid by TPC members

49. A flying minute of TPC dated 10 April 2012[34] stated that:

> *"The Directors propose by flying minute the following motion:* ***in the light of the unilateral actions of the Resort Administrator to vary the available rights of Owners' use of the Resort Facilities,*** *without notice to PCL, the Directors propose to*

[34] (PLC.0017.0001.0003), (PLC.0017.0001.0004), (PLC.0017.0001.0005)

suspend the requirement for Owners to pay the refurbishment levy until further notice,which is expected to be given once the dispute is resolved to the satisfaction of the Board of Directors." (emphasis added)

50. Palmer stated in his section 19 examination that he was made aware of this flying minute in early June 2012, and that the existence of this resolution made a material difference to the bid. Palmer stated that the refurbishment levies related to a significant sum of monies.

51. Palmer asserted that this resolution would result in a sum in the millions not being collected from TPC members for ongoing refurbishment of the villa units. Palmer stated that this materially affected the financial position of TPC. Further, he stated thatin June 2012 he had sought legal advice on this issue and that in early June 2012 he was advised that this resolution constituted a sufficient change and that QNA was not required to make an offer to TPC members before 12 June 2012.

ASIC's View:

52. QNA revoked the CDLI deed poll which exempted TPC from being a registered managed investment scheme. This revocation became effective on 15 March 2012. From 15 March 2012, PCR refused to allow the TPC units to be leased as part of the letting pool under the Resort Administration Agreement on the basis that TPC was an unregistered managed investment scheme. In effect, this annulled the Resort Administration Agreement and deprived TPC members of leasing income and use of their own villas.

53. ASIC's view is that it is not unreasonable for TPC members to suspend payment of such a refurbishment levy in circumstances where they could not derive income. Further, Palmer ought to have been aware as at 15 March 2012 that there was no obligation on TPC members to pay the refurbishment levy, as a result of PCR's annulment of the RAA.

54. Section 670F(a) provides a defence where *"a person proves that they could not reasonably have been expected to comply with the subsection because (a) at the time of the proposal or announcement, circumstances existed that the person did not know of, and could not reasonably have*

been expected to know of ..".

55. The refurbishment levy was due on a monthly basis and was directly calculated on thebasis of monies received in letting income. As the TPC was not deriving any incomefrom 15 March 2012 onwards, it is arguable there was no obligation to pay refurbishment levies. Therefore Palmer's suggestion that this flying minute would deprive TPC of millions of dollars is without merit.

Date	Description	Reason	Barcode
17 January 2001	Resort Administration Agreement	Agreement between Coolum Resort P/Land TPC & ors - Letting pool etc	(PLC.0003.0001.0945)
4 April 2012	Letter from KWM re RAA	'Termination' of RAA - Not permitting membersto use villas	(PLC.0003.0001.1011)
10 April 2012	Minute of TPC	Regarding ceasing of refurbishmentpayments	(PLC.0017.0001.0003) (PLC.0017.0001.0004) (PLC.0017.0001.0005)
11 April 2012	Letter from CDLI and CR toTPC members	Can't rent out properties under RAA, engagement oflawyers by directors of TPC 'unlawful', legal action for 'consultant's fees and lawyers.	(PLC.0003.0001.0567)
7 June 2012	File note of telephone call from Flynn (Ashurst) to ASIC	Reason given for delay was developer's subsidyissues that have arisen. Ashurst proposing ASIC relief.	(PLC.0003.0004.0001)

12 June 2012	Letter from Ashurst to TPC	Refers to 'handling of funds collected as refurbishment fees' raised in letter of 11 April (from PCR). [No suggestion in letter that they are not receiving future payments]	(PLC.0010.0002.1486)
13 June 2012	Letter from Ashurst to KWM	Refers to letter of CDLI on 6 June 2012seeking access to financial records of TPC, and current amount of refurbishment levies,and how these have been accounted for.	(PLC.0010.0002.1484)
13 June 2012	Email from Ashurst to KWM	Requesting access to records of TPC asap.	(PLC.0010.0002.1481)
19 June 2012	Email from Ashurst to ASIC	"our client is concerned about the way refurbishment moneys (...) have been dealt with by the President's Club" [no reference to not co11ecting fees]	(PLC.0003.0005.0032)

D. Unregistered managed investment scheme

57. In his s 19 examination, Palmer stated he believed that TPC would take steps to seek registration as a managed investment scheme after they were notified in September 2011 that CDLI intended to revoke the CDLI deed poll. Palmer stated that he was first made aware during the period after lodging the bidder's statement that TPC had not taken any steps toward registration as a managed investment scheme. Palmer was of the view, that as an unregistered managed investment scheme, the takeover

of TPC was "illegal".

ASIC's view:

58. Palmer agreed that it was an assumption that, after CDLI gave notice that they were revoking the deed in September 2011, that TPC would have taken steps to rectify this issue and ensure that TPC was a compliant registered managed investment scheme. The fact that TPC were a non-compliant managed investment scheme was entirely due to CDLI revoking the CDLI deed poll. In his section 19 examination, Palmer stated that the revocation of the CDLI deed poll was his decision. Also, given that QNA intended on purchasing all units and ending the "timeshare" scheme, ASIC does not accept that there is any illegality in obtaining such an entity.

59. In the bidder's statement, Palmer signed a letter from QNA to the shareholders of TPC. In that letter he states "...*That deed has been revoked by CDLI. The President's Club timeshare is a non-compliant managed investment scheme. The Board of The President's Club Limited have acknowledged this by seeking to change the constitution of The President's Club Ltd at the EGM on 14 March 2012, to impose a voting restriction upon CDLI. Ultimately the motion to change the constitution was defeated".* ASIC's view is that this is evidence of Palmer's knowledge, at the time of the bidder's statement, that TPC was not a registered managed investment scheme.

Date	Description	Reason	Barcode
31 January 2006	Exemption Deed		(PLC.0003.0001.0313)
15 September 2011	Revocation of deed		(PLC.0003.0001.0354)
1 November 2011	Email from P Burke (QNI) to Ahyick, Smith and Palmer	Stating that P Kelly of TPC would like to discuss with CDLI representatives the deed revocation	(PLC.0014.0002.0582)

10 November 2011	Letter from P Kelly of TPC to Ahyick of CDLI (forwarded by email to Palmer - seeking his instructions)	Setting out likely steps relating to revocation of deed and wanting to engage with CDLI in 'meaningful dialogue'	(PLC.0014.0002.0909) (PLC.0014.0002.0911)
2 February 2012	Letter from P Kelly of TPC to Ahyick of CDLI (forwarded to Welch, Wright and Palmer)	Seeking to engage in "real dialogue" to resolve difficulties. Seeking contact be made to discuss. However as noresponse EGM proposed	(PLC.0014.0002.0629) (PLC.0014.0002.0630)
13 February 2012	Letter from P Kelly of TPC to W Schoch of PCR	Impact of revocation of deed. Advising that TPC must take legal action. Wants to have 'meaningful discussions" this weekto achieve a resolution	(PLC.0014.0002.0353)
12 April 2012	Letter from Palmer in Bidder's Statement	*That deed has been revoked by CDLI. The President's Club timeshare is a non-compliant managed investment scheme. The Board of The President's Club Limited have acknowledged this by seeking to change the constitution of The President's Club Ltd at the EGM on 14 March 2012, to impose a voting restriction upon CDLI. Ultimately the motion to change the constitution was defeated".*	(PLC.0003.0004.0032)

E. Developer subsidy - solvency

60. In 2007, Lend Lease and TPC entered into an agreement whereby the developer (CDLI) would subsidise losses incurred by TPC for a period of

five years, ending on 3 August 2012. At the time of the QNA purchase, Lend Lease (via their subsidiary SH Coolum Pty Ltd) **(SHC)** signed an agreement with QNA stating that they would continue to be liable for the payment of this subsidy where there was a negative monthly return to TPC villa owners.

61. The agreement provided that SHC would be responsible for the obligations of CDLI contained in clause 11 of the developer's subsidy agreement. In summary, SHC was not liable for losses if the resort did not operate in the normal course of business or if the letting pools ceased to operate in accordance with the RAA.

62. QNA may argue that it did not foresee, during the period of the bid, that SHC would refuse to subsidise losses incurred by TPC in the months of April and May.

ASIC's view:

63. The Palmer entities were aware of the factors that would result in disputed payments and therefore the need for TPC to repay subsidy payments previously made, prior to April 2012.

64. The disputed payments related to fees for legal services (to protect TPC rights against QNA/CDLI action) and the directors fees (of which CDLI had knowledge given that they had brought legal action against the directors in this regard in February 2012).

65. The voluntary administrations of PCR and CDLI were caused by those entities (which then caused a breach of the developer subsidy agreement).

66. From 15 March 2012, the Palmer entities were not honouring the Resort Administration Agreement, and as such TPC were deriving no income (which also caused a breach of the subsidy agreement, given that the resort was not operating in the normal course of business).

The core documents are:

Date	Description	Reason	Barcode

3 August 2007	Developer's subsidy agreement	Sets out the requirements for eligibility of subsidy and time period	(PLC.0010.0002.1260)
1 July 2011	Lend Lease agreement	With CDLI - LL retaining liability	(PLC.0010.0002.0741)
28 February 2012	Letter from CDLI to TPC	Sets out litigation for monies being paid to directors	(PLC.0003.0001.1256)
29 February 2012	Voluntary Administration	CDLI and PCR placed into VA (which is a breach of the dev subsidy agreement)	(PLC.0003.0003.0020 at .0021 and PLC.0003.0004.0002 at .0003)
4 April 2012	Letter from KWMre RAA	'Termination' of RAA - Not permitting members to use villas [therefore no income and greater operating loss which formed basis of subsidy from developer]	(PLC.0003.0001.1011)
11 April 2012	Letter from CDLIand CR to TPC members	Lawyers and consultant's fees - legal action by CDLI of TPC directors	(PLC.0003.0001.0567)
12 April 2012	Bidder's statement	Clause 2.l(i)- statement as to existence of dev subsidy and end date. Clause 8.5 - letter of 4 April re termination of RAA noted, as well as action taken by CDLI against the directors of TPC for payments of consultants and legal fees.	(PLC.0003.0004.0032)

21 May 2012	Replacement bidder's statement	Detailed reference to repayment sums sought by LL and amounts refused up to March 2012.	(PLC.0003.0004.0088)
24 May 2012	PCR letter to TPC	Regarding developer's subsidy and effect on any offer and liability of TPC members	(PLC.0003.0001.0605)
26 June 2012	Email from L Tanner of Lend Lease to Schoch	Email with attachments relating to 'audit' conducted on developer's subsidy	(PLC.0015.0001.0005) (PLC.0015.0001.0006)
6 July 2012	Email from R Wood of PCR to L Tanner of Lend Lease	Titled "SEK Adj Note - Rejected expenses" with attached letter dated 30/6/12 from CDLI & table of payments	(PLC.0015.0001.0009) (PLC.0015.0001.0010)
26 July 2012	Email from L Tanner to Schoch	Email setting out "developer subsidy-rejected items".	(PLC.0015.0001.0007)

ROLE OF PALMER

67. Palmer accepted in his s 19 examination that he solely made decisions for QNA and the Palmer entities and that he was responsible for the lodgement of the bidder's statement and for offers to be made within the two month period.

68. In terms of admissible evidence, the following documents highlight Palmer's involvement in the takeover process:

Date	Description	Reason	Barcode
28 February 2012	Letter from CDLI to TPC shareholders (from Palmer)	Reference to litigation and fees paid todirectors	(PLC.0003.0001.1256)
10 April 2012	Resolution to appoint welch		(PLC.0010.0002.0752)

12 April 2012	Bidder's statement	Letter signed by Palmer to shareholders	(PLC.0003.0004.0032)
21 May 2012	Replacement bidder's statement	Letter signed by Palmer to shareholders (identical to above)	(PLC.0003.0004.0088)
4 June 2012	Email produced by Palmer. From McIntosh to Palmer	Re solvency of TPC	(PLC.0017.0001.0001)

ROLE OF WELCH

69. Welch was appointed as a director of QNA on 10 April 2012. He ceased as a director on 20 April 2012. At the time of his appointment Welch was acting as a legal representative for QNA.

70. ASIC officers conducted a voluntary interview with Welch. He was generally unhelpful and did not provide reasons for his appointment nor did he elaborate on his discussions with other directors.

71. Palmer, in his s 19 examination, confirmed that Welch was appointed as a director to enable Welch to sign all documentation in relation to the takeover bid. Palmer stated that he was unable to sign documents in person during this period.

72. Upon becoming aware of issues of compliance with the original bidder's statement (shortly after 12 April 2012), Welch was removed as a director, and subsequently Ashurst were appointed as QNA's legal representatives.

73. Palmer stated in his s 19 examination that he solely made all decisions in relation to the proposed takeover of TPC. For these reasons, ASIC does not propose that Welch be charged with the offence in accordance with section 11.2 of the Criminal Code.

ROLE OF SMITH

74. Smith was appointed as a director of QNA on 15 March 2011. He ceased as a director on 1 March 2015

75. Smith was employed as the in-house legal counsel of Mineralogy Pty Ltd (a Palmer entity) between 1 January 2007 and 1 March 2015.

76. The documentary evidence suggests that Smith was originally appointed as a director of QNA in order to facilitate the purchase of CDLH from Lend Lease which occurred in July 2011.

77. In his s 19 examination, Smith stated that he had no involvement in relation to the TPC takeover bid. This is consistent with Palmer's explanation in his s 19 examination that all decisions were made solely by him. It is also consistent with documents in ASIC's possession which indicate that Smith had very little involvement with the takeover bid after 13 April 2012.

78. The relevant documents are:

Date	Description	Reason	Barcode
10 April 2012	Minutes of Meeting of Directors of QNA	G Smith noted as by telephone. Palmer appointed Welch and gave him authorisation to sign for transaction	(PLC.0010.0002.0752)
11 April 2012	Email from Welch	To Smith. Noted that he "is away"	(PLC.0014.0002.0859)
13 April 2012	Email from G Smith to others atMineralogy	G Smith forwarding Welch's account to Mineralogy. Noted "Sent from my iPhone"	(PLC.0014.0002.0879)
5 August 2016	Statutory Declaration of G Smith dated 5/8/16 (with corresponding questions from ASIC)	G Smith stating that he had no involvement	(PLC.0019.0001.0001) (PLC.0003.0006.0001)

79. Given this evidence and the explanations provided in the s 19

examinations of QNA directors, ASIC 's view is that there is insufficient evidence to charge Smith with the offence pursuant to section 11.2 of the Criminal Code.

ANNEXURE C – Summary of Facts in SC No 6350/21

SUMMARY OF FACTS[1]
Clive Frederick Palmer

Offences

The defendant is charged with:

- Two offences contrary to s408C(l)(d) Criminal Code (Qld), of dishonestly gain a benefit or advantage, pecuniary or otherwise for any person; and
- Two offences contrary to s184(2)(a) Corporations Act 2001 (Cth), of dishonest use of director's position.

The maximum penalty for an offence contrary to s408C(l)(d) in this case, is 12 years' imprisonment. The maximum penalty for an offence contrary to s184(2) in this case, is 5 years' imprisonment.

Overview

1. The alleged offending relates to two transactions effected by the defendant in August and September 2013, concerning the withdrawal of funds totaling $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 behind 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 ACN 058 429 708 **(Sino Iron)** and Korean Steel Pty Ltd ACN 058 429 600 **(Korean Steel)** (together, the **'Facilities Deeds')** relating to mining facilities to be constructed on an area located near Cape Preston, Western Australia, over which Mineralogy held the relevant exploration and mining licenses **(Mineralogy's Tenure**).

3. The defendant executed the Facilities Deeds on behalf of Mineralogy, Sino Iron and

Korean Steel.

4. In 2006 and 2008 respectively, CITIC Limited acquired Sino Iron and Korean Steel from Mineralogy and Palmer. CITIC Limited is a Hong Kong listed company. Following the acquisition by CITIC Limited, the CITIC Parties commenced construction of the Sino Iron Project **(Project)** on Mineralogy's Tenure. The Project is the largest magnetite mining and processing operation in Australia and includes a large port facility at the Port of Cape Preston **(Port)** built by the CITIC Parties (CITIC Port Facility).

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[1] This document has been prepared as a draft and is subject to review. The Commonwealth reserves the right to make amendments or revisions to this Summary of Facts.

5. The CITIC Parties comprises the following entities:

   a. CITIC Pacific Mining Management Pty Ltd ACN 119 578 371 **(CPMM);**
   b. Sino Iron Pty Ltd ACN 058 429 708 **(Sino Iron);** and
   c. Korean Steel Pty Ltd ACN 058 429 600 (**Korean Steel).**

6. Pursuant to Clause 5 of the Facilities Deeds, Mineralogy established an administrative fund; namely a bank account with National Australia Bank **(NAB);** BSB 084-004 Account Number 16-939- 3487, held by Mineralogy in the name of 'Port Palmer Operations' **(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[2]; 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 I or Third Parties.

8. Pursuant to Clause 7 of the Facilities Deeds, between March 2010 and November 2012, Mineralogy issued calendar year budgets for the years 2010 - 2014 to the CITIC Parties detailing the administration costs and the sinking fund. Invoices were issued by Mineralogy requiring the CITIC Parties to pay in advance, the amount of costs budgeted for the following calendar year.

9. For the calendar year budgets 2010, 2011, 2012 and 2013, the CITIC Parties contributed a total of $26,254,664.05 to the Admin Fund Account. The CITIC Parties refused to contribute funds for the 2014 calendar year budget on that basis that the budget was manifestly excessive and unreasonable.

10. Pursuant to Clause 9 of the Facilities Deeds, Mineralogy was required to keep separate records and account separately for administration costs. For the 2010 calendar year budget, the CITIC Parties inspected the records Mineralogy was required to maintain. For budgets issued for calendar years 2011- 2014, the CITIC Parties raised concerns about budgets items and increased costs and requested reconciliation of the Admin Fund Account; which wasn't provided by Mineralogy.

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

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[2] "Approved Facilities" is defined in the Facilities Deeds, and such facilities only relate to the Sino Iron Project.

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

17. Following the deposit of $10 million in Cosmo's NAB account on 8 August 2013, the following cheque payments were made:

    a. on 8 August 2013, $6 million was paid to the Palmer United Party;
    b. on 16 August 2013, $799,763.47 was paid to Media Circus;
    c. on 21 August 2013, 300,000 was paid to Mineralogy;
    d. on 22 August 2013, $1,247,844 was paid to Media Circus;
    e. on 4 September 2013, $50,000 was paid to Cold Mountain Stud;
    f. on 4 September 2013, $250,000 was paid to Mineralogy; and

g. on 4 September 2013, $250,000 was paid to Waratah Coal.

18. Media Circus was engaged by the Palmer United Party to run its marketing and advertising campaign for the 2013 Federal Election held on 7 September 2013.

19. The cheque payment of $2,167,065.60 made on 1 September 2013 was made payable directly to Media Circus to pay an invoice issued in the same amount by Media Circus on 31 August 2013.

20. The result of the cheque payment to Media Circus, was that the Admin Fund Account was overdrawn in the amount of $232,679.86. On 4 September 2013, Palmer drew two cheques on the Cosmo NAB Account made payable to the Admin Fund Account; one in the amount of

$200,000 to cover payroll and other expenses and one in the amount of $240,000 to cover the account being overdrawn.

21. At the relevant times, Mr Palmer was:

a. the sole signatory of the Admin Fund Account;
b. the sole signatory of the Cosmo NAB account and the PUP NAB Account;
c. the sole Director of Mineralogy and Cosmo; and,
d. a joint director of Cold Mountain Stud and Waratah Coal.

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 beperformed 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, CPMM wrote to Mineralogy requesting arbitration under the *Commercial Arbitration Act 2013 (Qld),* seeking an account andreconciliation 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 Sino Iron and Korean Steel. This was repaid from the Admin Fund Account on 22 November 2014.

28. Funds contributed to the Admin Fund Account could only be used to meet administration costs and operating and maintaining certain port-related facilities at the Port. The Palmer United Party payments were not payments made pursuant to Clause 5 of the Facilities Deeds.

29. A total of $12.167mil was transferred to Cosmo and to Media Circus, with a total of $10,214,673.07 transferred to bank accounts held by Palmer United Party and Media Circus for the benefit of Palmer United Party's 2013 Federal Election campaign. Funds from the original $10 million transfer to Cosmo were also transferred to other bank accounts controlled by Mr Palmer's companies; namely Mineralogy, Waratah Coal and Cold Mountain Stud. Such payments were not made pursuant to Clause 5 of the Facilities Deeds.