SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer v Magistrates Court of Queensland & Ors; Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland & Ors* [2020] QCA 47
PARTIES:	**In Appeal No 1381 of 2019:** **CLIVE FREDERICK PALMER** (appellant) **v** **MAGISTRATES COURT OF QUEENSLAND** (first respondent) **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (second respondent) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (third respondent) **In Appeal No 1441 of 2019:** **PALMER LEISURE COOLUM PTY LTD** ACN 146 828 122 (appellant) **v** **MAGISTRATES COURT OF QUEENSLAND** (first respondent) **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (second respondent) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (third respondent)
FILE NO/S:	Appeal No 1381 of 2019 Appeal No 1441 of 2019 SC No 13339 of 2018 SC No 10132 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 8 (Ryan J)
DELIVERED ON:	17 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2019
JUDGES:	Fraser and Morrison JJA and Boddice J

ORDERS:

In Appeal No 1381 of 2019:

1. **Documents contained in the "Supplementary Joint Record Book" filed on 14 May 2019 be admitted as evidence in the appeal.**

2. **Appeal dismissed with costs.**

In Appeal No 1441 of 2019:

1. **Documents contained in the "Supplementary Joint Record Book" filed on 14 May 2019 be admitted as evidence in the appeal.**

2. **Appeal dismissed with costs.**

CATCHWORDS:

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF PROCESS – where each of the appellants was charged on complaint with an offence against s 631(1) of the *Corporations Act* 2001 (Cth) – where the criminal charges remain at the pre-committal stage in the Magistrates Court of Queensland – where the appellants commenced proceedings in the Supreme Court claiming declarations that the complaints charging the offences are abuses of process or that the continuation of the proceedings would tend to bring the administration of justice into disrepute, declarations designed to establish that the elements of the offences charged are premised upon an incorrect construction of provisions of the *Corporations Act* 2001 (Cth), and an order that the committal proceedings be permanently stayed – where the appellants allege that there was an unreasonable delay in the commencement of the criminal proceedings that was unfairly oppressive and prejudicial to the appellants – where the appellants allege that the committal proceedings are vexatious and oppressive because the circumstances giving rise to them have already been litigated – where the appellants allege that the criminal proceedings were or have the appearance of having been commenced for an improper purpose – where the respondents applied for summary termination of the appellants' claims – where the primary judge ordered that the appellants' claims be set aside and their statements of claim be struck out – whether the Supreme Court of Queensland has inherent power in its supervisory jurisdiction to permanently stay committal proceedings as an abuse of process – whether there was anything exceptional in the appellants' cases warranting the Supreme Court's intervention by way of the declarations sought or orders putting an end to the criminal proceedings – whether the appellants' claims in the Supreme Court lacked any reasonable basis, were vexatious, and were correctly struck out as an abuse of process

Constitution of Queensland 2001 (Qld), s 58
Corporations Act 2001 (Cth), s 631(1)
Uniform Civil Procedure Rules 1999 (Qld), r 16(e), r 16(g)

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, applied
Barac v Director of Public Prosecutions [2009] 1 Qd R 104; [2007] QCA 112, considered
Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27, cited
Boyne v Baillieu (1908) 6 CLR 382; [1908] HCA 39, cited
Clayton v Ralphs and Manor (1987) 45 SASR 347, cited
Dowling v Colonial Mutual Life Assurance Society Ltd (1915) 20 CLR 509; [1915] HCA 56, cited
Frugtniet v Victoria (1997) 71 ALJR 1598; (1997) 96 A Crim R 189; [1997] HCA 44, cited
GAD v DPP (Qld) & Anor [2008] QCA 27, cited
Gorman v Fitzpatrick (1987) 32 A Crim R 330, cited
Higgins v Comans (2005) 153 A Crim R 565; [2005] QCA 234, cited
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, applied
Lamb v Moss (1983) 76 FLR 296; [1983] FCA 264, cited
Lee v Abedian [2017] 1 Qd R 549; [2016] QSC 92, cited
Moti v The Queen (2011) 245 CLR 456; [2011] HCA 50, cited
Pan Laboratories Pty Ltd v Commonwealth (1999) 73 ALJR 464, considered
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66, cited
Sino Iron Pty Ltd & Anor v Palmer & Anor [2014] QSC 259, considered
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, applied
Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited

COUNSEL: No appearance for the appellant in Appeal No 1381 of 2019
C Ward SC, with M K Karam and E L Robinson, for the appellant in Appeal No 1441 of 2019
No appearance for the first respondent
T Begbie, with S Forder, for the second and third respondents

SOLICITORS: No appearance for the appellant in Appeal No 1381 of 2019
Alexander Law for the appellant in Appeal No 1441 of 2019
No appearance for the first respondent
Australian Government Solicitor for the second and third respondents

[1] **FRASER JA:** In September 2018 the appellants Mr Clive Palmer and Palmer Leisure Coolum Pty Ltd (PLC) commenced proceedings in the Supreme Court against the first respondent ("Magistrates Court"), the second respondent ("CDPP") and the third respondent ("ASIC"). Mr Palmer subsequently ceased to be a party to that joint claim. He filed a new claim in substantially identical terms save that Mr Palmer,

unlike PLC, claimed damages. In addition to Mr Palmer's claim for damages, the appellants claimed:

(a) Declarations that complaints charging offences against the appellants are abuses of process, or declarations that the continuation of those proceedings would tend to bring the administration of justice into disrepute.

(b) Declarations designed to establish that elements of the offence charged against the appellants are premised upon an incorrect construction of provisions of the *Corporations Act* 2001 (Cth).

(c) An order that the committal proceedings upon those charges in the Magistrates Court be permanently stayed.

[2] Each of Mr Palmer and PLC appeals against orders made by Ryan J (the primary judge) upon CDPP and ASIC's application striking out each appellant's statement of claim and setting aside each appellant's claim. The first respondent appropriately did not take an active part before the primary judge or in the appeals.[1] For ease of reference, I will describe CDPP and ASIC collectively as "the respondents".

Background

[3] Mr Palmer is a director of PLC. The primary judge succinctly outlined relevant background to the Supreme Court proceedings:

> "In April 2012, PLC lodged a bidder's statement with ASIC, offering to purchase shares, and corresponding occupancy rights to villas at the Palmer Coolum Resort, from shareholders in a company called The President's Club by way of a takeover bid. It is an offence under section 631(1) [of the *Corporations Act* 2001] to publicly propose a takeover bid and not to make offers for the shares/securities within 2 months. PLC did not make offers within that time, and that conduct, and Mr Palmer's alleged involvement in it, is the subject of the complaints.
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> From 26 June 2012 until early 2016, there were several proceedings concerning PLC's conduct more broadly (that is, not only in relation to the time limit for making an offer) in the Takeovers Panel and Federal Court.
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> Very briefly, The President's Club sought a declaration of unacceptable circumstances from the Takeovers Panel, submitting *inter alia* that PLC had lodged a bidder's statement which did not comply with a certain requirement of the *Corporations Act* and was deficient in other ways. It also submitted that PLC appeared to be in breach of section 631(1) as the time for making a complying bid had passed. After much litigation, including reviews and appeals, the declaration was made.
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> In April 2013, Mr Palmer became the leader of the Palmer United Party. In September 2013, he became a member of the House of Representatives.
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> In January 2016, ASIC advised PLC that it was investigating PLC's acquisition of an interest in shares issued by The President's Club.

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1 See *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35 – 36.

> In April 2016, ASIC indicated that it did not consider it in the public interest to further investigate or pursue any action against The President's Club for operating an unregistered time-sharing scheme."[2]

[4] In February 2018 each of Mr Palmer and PLC was charged on complaint with an offence. The complaint against PLC alleges that it breached s 631(1) of the *Corporations Act* by failing to make offers for the shares/securities in The President's Club within two months after PLC lodged its bidder's statement with ASIC in April 2012 offering to purchase shares and corresponding occupancy rights to villas at the Palmer Coolum Resort from shareholders in that company by way of a takeover bid. The complaint against Mr Palmer alleges that he abetted, counselled or procured PLC to commit this offence.

[5] The criminal charges remain at the pre-committal stage in the Magistrates Court as a result of various proceedings taken by Mr Palmer and PLC:

(a) In April 2018 Mr Palmer and PLC made a "no-case-to-answer" application which, as a result of two adjournments, was heard in August 2018. A magistrate then adjourned the application to be heard in the usual way at the end of the Crown case at the committal hearing, unsurprisingly accepting a submission for the prosecution that in circumstances in which all that had occurred was the delivery of a brief of evidence to the defendants the application was premature.

(b) On 29 August 2018 Mr Palmer and PLC filed applications in the Magistrates Court that the complaints be dismissed as an abuse of process.

(c) The appellants subsequently abandoned those applications, apparently when they came to understand that the Magistrates Court lacked power to accede to them.

(d) In September 2018, two days before the date set as the date upon which the committal would be mentioned, Mr Palmer and PLC commenced their proceedings in the Supreme Court and, two days later, the committal proceedings in the Magistrates Court were adjourned until November 2018 at the request of Mr Palmer.

(e) In November 2018 the Magistrates Court proceedings were adjourned until late January 2019 after the Magistrates Court was informed of the Supreme Court proceedings at the behest of Mr Palmer.

The respondents' application

[6] The respondents applied for the summary termination of the appellants' claims. The respondents' application sought an order setting aside the appellants' claims pursuant to r 16(e) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") or an order that the claims be stayed pursuant to r 16(g) of the UCPR, on the bases that the proceeding lacks a reasonable cause of action, is scandalous, is frivolous or vexatious, and is otherwise an abuse of the process of the Supreme Court. Alternatively, orders were sought striking out the appellants' statement of claim on the same bases. At the hearing before the primary judge the parties addressed numerous arguments in relation to the respondents' application. At this point it is necessary only to summarise some of the main contentions.

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2 Reasons [10] – [15].

[7] The respondents contended that the appellants' claims in the Supreme Court should be struck out or stayed as an abuse of process on various bases: they impermissibly fragmented the criminal proceedings (a fragmentation "of the most serious kind at the outset of the committal proceedings") and the appellants had not identified any circumstance capable of being regarded as exceptional such as to justify that fragmentation;[3] they resulted in an inappropriate multiplication of proceedings; and there was no substance in the appellants' claim for a stay of the committal proceedings. The respondents argued that the alleged delay in the prosecutions upon which the appellants relied in their claims did not create any prejudice and could not warrant the drastic remedy of a permanent stay of proceedings.

[8] The appellants contended that they were entitled to invoke the Supreme Court's supervisory jurisdiction. PLC argued that only the claims for declarations about the elements of the offences raised any issue about fragmentation of criminal proceedings at all. Mr Palmer argued that there was no fragmentation. Both appellants argued that there was no inappropriate multiplicity of proceedings. Instead the question was whether the appellants' claims for the intervention of the Supreme Court should be brought to an end without a hearing. They argued that there was merit in their claims or at least the respondents had not demonstrated that the claims were so lacking in substance as to justify summary dismissal of them.

The primary judge's conclusions

[9] The primary judge discussed the arguments about multiplicity of proceedings but did not find it necessary to decide whether the claims should be struck out as an abuse of process on that account.[4] The primary judge held that the authorities established that the administration of the criminal law should be left to the criminal courts except in rare and exceptional circumstances in which the intervention of the Supreme Court is justified. Fragmentation of or intervention in criminal proceedings should occur only in exceptional circumstances, "in rare cases where the need for interference is absolutely plain and manifestly required".[5] The primary judge observed that the appellants' claims for declarations about elements of the offences sought to fragment the criminal proceedings and the appellants did not appear to seriously suggest otherwise.[6] The primary judge observed that the appellants' other claims – for declarations or orders that would bring the prosecutions to an end as an abuse of process – might more accurately be described as involving an intervention in, rather than a fragmentation of, criminal proceedings. However, the primary judge considered that those claims also involved fragmentation because if the appellants were committed for trial the criminal trial court would have jurisdiction to deal with an application to stay an indictment as an abuse of process.[7] The primary judge found that there was nothing exceptional justifying the fragmentation of the criminal proceedings that would result from the intervention of the Supreme Court.[8]

[10] The primary judge referred to Mr Palmer's submissions relying upon delay and improper purpose as exceptional circumstances warranting the intervention of the Supreme Court. The primary judge observed that those arguments invited consideration

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3 Reasons [62].
4 Reasons [226] – [254].
5 Reasons [134] – [136].
6 Reasons [131].
7 Reasons [133].
8 Reasons [192].

of the merits of the appellants' claims, but disclaimed a suggestion that the fact of an arguable claim alone would warrant the fragmentation of the criminal proceedings sought by the appellants. The primary judge cited *Alqudsi v Commonwealth*[9] and *Pan Laboratories Pty Ltd v Commonwealth.*[10] Against the possibility that the primary judge was wrong in that analysis, the primary judge went on to consider the merits of the appellants' claims to determine whether they disclosed a reasonable cause of action.[11] In the following thirty paragraphs of the reasons the primary judge discussed the grounds upon which the appellants contended that the committal proceedings should be stayed, concluded that no reasonable cause of action was disclosed for the appellants' claims, and held there was nothing exceptional such as to warrant the interference in the criminal proceedings sought by the appellants.[12]

The appeals

[11] The appellants challenge the primary judge's orders. Senior counsel for PLC put at the forefront of his argument the contention that the trial judge had misconceived her function by setting aside PLC's claims upon the ground that there was "nothing exceptional warranting this court's intervention to make declarations or orders putting an end to the criminal proceedings".[13] PLC argues that the task of the primary judge was instead to decide whether or not PLC's claim in the supervisory jurisdiction of the Supreme Court was so untenable that it could not be allowed to go to trial. Mr Palmer was given leave to present his argument in writing. He adopted the outline of argument lodged on behalf of PLC and made additional submissions.

[12] As the primary judge considered, the courts' reluctance to interfere in criminal proceedings is not limited to cases where it will fragment the proceedings in the sense that only one or some of the issues in the criminal proceedings will be decided in the civil court. Thus, for example, in refusing to order a stay of a criminal proceeding against an accused pending the determination of proceedings in the High Court's original jurisdiction involving a challenge to the constitutional validity of legislation bearing on the trial process, Kirby J observed in *Frugtniet v Victoria*:[14]

> "This Court has more than once, including recently, emphasised how rare it is to make orders which would have the effect of interfering in the conduct of a criminal trial. No case has been brought to my notice where the court has made a stay order equivalent to the one sought on this summons. Although I do not doubt that, in a proper case, the court would have the jurisdiction to make such an order to protect the utility of its process, it would be truly exceptional for it to do so. The court expressed its attitude of restraint most recently in its decision in *Elliott*. There are many earlier such cases. They evidence the strong disposition of appellate courts in Australia – and especially of this Court – 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. Analogous principles apply, as it seems to me, to the provision of a stay to prevent the commencement of a trial so as to permit a constitutional point to be argued. That point will not be lost to the plaintiff. If need be, at a later stage, it can be raised again."

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9 (2015) 90 ALJR 192.
10 (1999) 73 ALJR 464.
11 Reasons [194], [195].
12 Reasons [195] – [225].
13 Reasons [192].
14 (1997) 96 A Crim R 189 at 195. I have omitted internal citations.

[13] In *Obeid v The Queen*[15] Gageler J quoted that passage after referring to the "longstanding and general reluctance on the part of this Court in point of policy to make orders which would have the effect of fragmenting a criminal process which has already been set in train." The same principle was applied in a very different context in *Pan Laboratories Pty Ltd v Commonwealth*,[16] in which an accused commenced a claim in the original jurisdiction of the High Court claiming declarations to the effect that offences with which it was charged were created by statutory provisions that were beyond the legislative power of the Commonwealth and an injunction against the DPP to restrain him from proceeding upon the indictment against the accused in the District Court of New South Wales. The Commonwealth and the DPP sought orders that the proceedings be stayed on the ground that they were vexatious or disclosed no reasonable cause of action or, alternatively, an order that the entire proceedings in the High Court be remitted to the District Court of New South Wales to be heard concurrently with the pending criminal trial. Kirby J ordered the matter to be remitted to that court after observing that the constitutional arguments should proceed to a hearing on the merits "in a manner respectful of the court of criminal trial and of its control over the trial process" so that the "function of the court of trial will be upheld" and the "rule against fragmentation of criminal process will be reinforced".[17] Kirby J noted that what was contemplated was that the criminal trial would proceed to verdict, one possible result of which would be that the questions raised by the accused might go away in the event of an acquittal. In *Alqudsi v Commonwealth*,[18] French CJ cited *Pan Laboratories* when applying the principle against fragmentation of pending criminal proceedings in exercising the discretion whether to remit to the trial court (the Supreme Court of New South Wales) a proceeding in the High Court challenging the validity of an Act under which the plaintiff had been charged with offences.

[14] PLC argues that those and other authorities discussed by the primary judge are inapplicable because they did not concern a claim in the supervisory jurisdiction of the Supreme Court by a defendant that a committal proceeding in the Magistrates Court (which lacks power to stay committal proceedings) should be stayed because it was an abuse of process or would bring the administration of justice into disrepute. PLC argues that the primary judge wrongly elevated concerns about fragmentation of criminal proceedings over the approach mandated by the High Court when a Supreme Court exercising its supervisory jurisdiction is asked to restrain criminal proceedings as an abuse of process. It argues that the High Court cases about abuse of process should be regarded as being paramount in this context: *Jago v District Court (NSW)*,[19] *Williams v Spautz*,[20] *Walton v Gardiner*,[21] *Rogers v The Queen*,[22] *Ridgeway v The Queen*,[23] *Batistatos v Roads and Traffic Authority (NSW)*,[24] and *Moti v The Queen*.[25]

[15] The respondents submit that none of those cases establish that the traditional restraint exercised by civil courts in interfering in criminal proceedings has a reduced

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15 (2016) 90 ALJR 447 at [15].
16 (1999) 73 ALJR 464.
17 73 ALJR 464 at [14].
18 90 ALJR 192 at [22] – [23].
19 (1989) 168 CLR 23.
20 (1992) 174 CLR 509 at 518.
21 (1993) 177 CLR 378 at 392.
22 (1994) 181 CLR 251 at 286.
23 (1995) 184 CLR 19 at 74 – 85.
24 (2006) 226 CLR 256 at 265.
25 (2011) 245 CLR 456 at [10].

significance in a case in which the jurisdiction of the Supreme Court is sought to be invoked by a defendant's claim that criminal proceedings are an abuse of process. They submit that *Jago*, *Rogers*, *Ridgeway* and *Moti* in particular do not support the appellants' argument because they concern stays of criminal proceedings made within the criminal jurisdiction rather than the exercise of a Supreme Court's power in its supervisory jurisdiction to stay a criminal proceeding in an inferior court.

[16] The Court was asked to decide these appeals upon two premises, namely, that the magistrate conducting the committal proceedings lacks power to order a permanent stay of those proceedings as an abuse of process and that the Supreme Court has power to grant such a stay. The first premise was confirmed by the decision in *Higgins v Comans*.[26] The respondents did not dispute the validity of the second premise, which is discussed further in [42] – [43] of these reasons. I will proceed upon the assumption that it too is correct.

Power to make the orders under appeal

[17] The grounds upon which the Court may exercise the powers in rules 16(e) and (g) of the UCPR are not confined by the rule. The immediately preceding rule empowers the Court, upon a reference by the registrar of originating process that appears to the registrar to be an abuse of the process of the Court or frivolous or vexatious, to direct the registrar either to issue or to refuse to issue the process without the leave of the Court. Rules 16(e) and (g) confer cognate powers. There is also no doubt that the Supreme Court possesses inherent power to permanently stay proceedings in the Court as an abuse of process. The appellants take no point about the fact that the primary judge set aside the claims rather than staying the proceedings upon those claims. It is therefore unnecessary to decide whether the appropriate order was a permanent stay of the proceedings under rule 16(g) rather than an order setting aside the claims under rule 16(e).

PLC's application for an adjournment

[18] PLC argues that the primary judge erred by rejecting its application for an adjournment of the respondents' application to permit PLC and the Court to have the benefit of answers to interrogatories before determining the application, and that the primary judge further erred by not giving reasons for that decision. The proposed interrogatories were described by PLC as being directed to obtaining information to explain what PLC submitted were the extraordinary timing and circumstances of the decision to prosecute. PLC submits that the primary judge was diverted by her view that the question of "fragmentation" could be decided independently of the merits of the appellants' claims, the respondents' application was in the nature of a summary judgment application in which matters that had not been pleaded and whether evidence might be obtained by interlocutory processes could be considered, and the primary judge should have either adjourned the respondents' application so that the application for leave to deliver interrogatories could be determined or dismiss the respondents' application upon the ground that the proposed interrogatories might strengthen the appellants' case.

[19] The transcript reveals that the primary judge was not diverted from the proper approach to the adjournment application by a view that it inevitably would not be necessary to consider the merits of the appellants' claims. To the contrary, the

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26 (2005) 153 A Crim R 565 (McPherson and Keane JJA and White J).

primary judge expressly adverted to the prospect that it might be necessary to consider the merits of the statement of claim properly to determine the respondents' strike out application.[27] The primary judge heard lengthy arguments by all parties about the applications by PLC and Mr Palmer for adjournments and delivered ex tempore reasons refusing the applications. In the course of those reasons the primary judge referred to PLC's submission that the respondents' application should be deferred until after the determination of an application by PLC for leave to administer interrogatories. The primary judge did not accept that submission, referring to the requirements of r 5 of the UCPR that the procedural rules were to be applied with the object of avoiding undue delay, expense and technicality and that a party impliedly undertakes to the Court and to the other parties to proceed in an expeditious way. The submissions for PLC do not identify any insufficiency or error in the reasons such as to justify appellate interference in the primary judge's discretionary decision to refuse an adjournment.

[20] In any case, the proposition that the respondents' application should be adjourned to permit PLC to apply for leave to administer interrogatories lacks merit in circumstances in which the grounds of the respondents' application were all directed to the conclusion that PLC's claim was an abuse of the Court's process. The whole point of an application of that character is to ensure that a defendant is not vexed by interlocutory processes or a trial in a claim that lacks any reasonable foundation.

[21] I note that Mr Palmer argued that the primary judge failed to give reasons for rejecting his application for an adjournment. Mr Palmer's notice of appeal contains no ground of appeal directed to that topic. It is apparent upon the face of the transcript and the reasons for judgment[28] that the primary judge did give reasons for rejecting Mr Palmer's application.

Procedural points

[22] Mr Palmer and PLC raise some procedural points. They contend[29] that the primary judge erred by determining the respondents' applications under r 16 in the absence of defences filed by the respondents. Rule 135(1) provides that except with the Court's leave a defendant may take a step in a proceeding only if the defendant has first filed a notice of intention to defend (that notice being defined to include a conditional notice of intention to defend). Rule 139(1) requires a notice of intention to defend to be in the approved form and to have the defence attached to it, but by r 144(3) the second requirement does not apply to a conditional notice of intention to defend. The respondents had filed conditional notices of intention to defend. The appellants argue that the respondents had no entitlement to do so. Rule 144(2) obliges a defendant who proposes to challenge the jurisdiction of the Court or to assert an irregularity to file a conditional notice of intention to defend. Rule 144(4) obliges a defendant who has filed such a notice to apply for an order under r 16 within 14 days.

[23] Rules 16(e) and (g) empower the Court to set aside an originating process and to stay a proceeding. Neither provision makes it a condition of the Court's power under the rule that a defendant who applies for such an order must first file a notice of intention to defend. If an application under either rule is to be regarded as a step in a proceeding under r 135, the requirement for filing a notice of intention to defend is qualified by

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27 Transcript 4 December 2018 at 1 – 11.

28 Reasons [38], [42] – [47].

29 Mr Palmer's notice of appeal ground (l) and PLC's notice of appeal ground (c).

the Court's discretionary power to grant leave for the defendant to take the step in the proceeding. Furthermore, the UCPR does not circumscribe the inherent jurisdiction of the Supreme Court.

[24] PLC referred the primary judge to *Sino Iron Pty Ltd & Anor v Palmer & Anor*,[30] in which Jackson J discussed the power in the UCPR to grant summary judgment and the provisions in r 16 and r 17, and observed that the Court should be slow to dismiss or stay a claim as an abuse of process in a way that might undermine the procedure for summary judgment. Jackson J referred to the requirements of r 293 that the defendant file a notice of intention to defend attaching a defence before applying for summary judgment, that the standard to be applied required the Court to be satisfied that the plaintiff had no real prospects of succeeding, and that a successful summary judgment application would produce a final judgment for the defendant. Jackson J concluded that "it will only be an unusual case where it will be appropriate for the Court to dismiss a proceeding as an abuse of process as being without reasonable grounds in a manner that operates outside the rules and at a stage in the proceeding before the point is reached under the rules for the cognate question to be decided upon summary judgment."

[25] The primary judge referred to those remarks but concluded that in this matter it was "appropriate and efficient to proceed to determine the applications, even though the applicants, as second and third defendants, have not filed a defence".[31] That was a discretionary decision. The appellants' arguments do not articulate any error in it that would justify appellate interference.

Error in the primary judge's initial analysis

[26] The order made by the primary judge under r 16(e) of UCPR setting aside the appellants' claims denied the appellants access to the usual interlocutory processes and a trial. The primary judge did not make that order upon the ground that the appellants' claims could or should have been litigated in the Magistrates Court: compare *UBS AG v Tyne*.[32] The primary judge did mention that the arguments underlying the claims for declarations about the elements of the offences could be raised in a no case submission before the magistrate or, if prosecutions ensued, in the District Court at the end of the Crown case,[33] but no party submitted that any of the relief claimed by the appellants in their Supreme Court proceeding could be sought by them in the Magistrates Court. Absent the invocation by the primary judge of any other ground, the order summarily terminating that part of the appellants' proceedings could be justified only upon the basis that the appellants' claims were, as the respondents contended in their application, an abuse of process. The claims were abuses of processes if they lacked reasonable grounds so as to be vexatious.[34]

[27] The respondents' application therefore attracted the principle articulated by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*[35] that "a court whose jurisdiction is regularly invoked in respect of a local defendant ... should not decide the issues raised in those proceedings in a summary way except in the clearest of cases"; there must be such "a high degree of certainty about the ultimate outcome of the proceeding

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30 [2014] QSC 259 at [11] – [13].
31 Reasons [60].
32 (2018) 92 ALJR 968.
33 Reasons [183].
34 See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at [10], [12], [14], [21] – [25].
35 (2000) 201 CLR 552 at 575 – 576 [57].

if it were allowed to go to trial in the ordinary way" as to justify summary termination of the proceedings: see *Batistatos v Roads and Traffic Authority (NSW)*.[36]

[28] The authorities cited by the primary judge generally involved the application of the traditional restraint against fragmenting criminal proceedings in the exercise of a discretion, for example, a discretion whether to grant prerogative relief, make orders under statutes providing for judicial review of administrative proceedings, stay proceedings pending the completion of criminal proceedings in the same court, grant special leave to appeal to the High Court, remove a proceeding to the High Court, or remit a proceeding to a trial court. None of those authorities involved a case in which a defendant applied for summary termination of a claim brought by a plaintiff regularly invoking the Supreme Court's power to grant declaratory relief or the power in its supervisory jurisdiction to stay criminal proceedings brought against a plaintiff in an inferior court or tribunal.

[29] The traditional restraint against fragmenting criminal proceedings certainly applies to those parts of the appellants' claims which ask the Supreme Court to adjudicate upon and make declarations about the elements of the offences. But the question raised by the respondents' application was not whether the Court should accede to those claims. The question was whether those claims were so clearly bound to fail that they should be summarily terminated as an abuse of process. In relation to the claims for a permanent stay of the committal proceedings, the primary judge correctly proceeded upon the footing that such relief should be granted only in an exceptional case, but again the question raised by the respondents' application was not whether a permanent stay should be granted but whether the applicants' claims for a permanent stay should be summarily dismissed as an abuse of process.

[30] As will appear, I would affirm the primary judge's conclusions that there is nothing exceptional in the appellants' cases warranting the Supreme Court's intervention by way of declarations about the elements of the offences[37] or its intervention to make declarations or orders putting an end to the criminal proceedings.[38] The respondents' application, however, required consideration of the further question whether the claims for those forms of relief were so obviously untenable as to justify their summary termination as an abuse of process. In relation to the claims for orders to put an end to the criminal proceedings upon the ground of abuse of process, upon the premises that the Magistrates Court lacked power to stay the committal proceedings and the Supreme Court is empowered to grant a stay of the committal proceedings as an abuse of process, a finding that the appellants had an arguable claim that the committal proceedings were an abuse of process would preclude the exercise of the power summarily to terminate the claims.[39]

[31] It must be accepted, as the appellants submit, that the primary judge therefore erred in deciding that the appellants' claims in the Supreme Court were amenable to summary dismissal merely upon the ground that they amounted to a fragmentation of or interference in criminal proceedings without any consideration of the question whether any of those claims might nevertheless succeed after a trial.

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36 (2006) 226 CLR 256 at [25], [46], [53], [71] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

37 Reasons [181].

38 Reasons [192].

39 The exceptional nature of orders interfering in committal proceedings might well justify refusal of an interlocutory injunction to restrain the committal proceedings, but the appellants did not apply for an interlocutory injunction.

[32] As I have indicated, however, the primary judge decided that summary termination of the appellants' claims was also justified upon the alternative bases that no reasonable ground was disclosed for the appellants' claims for a stay and there was nothing exceptional such as to warrant the inference in the criminal proceedings sought by the appellants. In that respect the appellants argue that, whilst the primary judge referred to the correct test, the primary judge did not apply that test when considering this alternative basis for the orders. The primary judge referred to the observation made by Bond J in *Lee v Abedian*[40] with reference to *General Steel Industries Inc v Commissioner for Railways (NSW)* [41] that "the power to strike out is to be used sparingly and only in clear cases" and his additional observation, made with reference to Dixon J's reasons in *Dey v Victorian Railways Commissioners*,[42] that the power cannot be exercised when there is a real question to be determined upon which the rights of the parties depend.[43] However, the primary judge did not use language of that kind, or the similar language used in *Agar v Hyde*, when considering the merits of the claims. Although the primary judge's conclusions are expressed in such terms as to suggest satisfaction with those requirements for summary termination, she did not in that context advert to the fact that summary orders denied the appellants access to the usual interlocutory steps and a trial. The primary judge did not frame her conclusion in terms such as that there was no tenable ground for the appellants to invoke the supervisory jurisdiction of the Supreme Court or to seek the declaratory and other relief claimed in their proceedings.

[33] It is therefore necessary to consider the case afresh, applying the approach explained in *Agar v Hyde* and also taking into account the impact of the procedural rules as described in *Sino Iron Pty Ltd & Anor v Palmer & Anor*. Upon that footing the following reasons explain my conclusion that the appellants' claims are so clearly untenable as to justify the primary judge's orders summarily terminating the appellants' proceedings in the Supreme Court as an abuse of process.

[34] Acknowledging that there are some differences between the content of Mr Palmer's statement of claim and the joint statement of claim to which he originally was a party, it is convenient to analyse both his and PLC's claims with reference to the original joint statement of claim. Apart from the abandonment by PLC of paragraphs alleging improper purposes by the respondents, none of the differences between Mr Palmer's statement of claim and the original joint statement of claim are significant. There were some proposed amendments to the pleadings, but none are significant in the present context.

The appellants' claims

[35] Sections A and B of the statement of claim allege uncontroversial background. **Section C** of the statement of claim includes a series of allegations, occupying six pages of the pleading, in support of pleaded conclusions that are the subject of the claimed declarations about the elements of the offences. The pleaded conclusions are that: PLC's offer was not an offer for securities or a takeover bid; if PLC proceeded with the offer in accordance with the bid it would have acquired The President's Club's timesharing scheme operating in contravention of the *Corporations Act*; it

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40 [2017] 1 Qd R 549 at [38].
41 (1964) 112 CLR 125 at 129 – 130.
42 (1949) 78 CLR 62 at 91.
43 Reasons [68].

would thereby have exposed any director of PLC to liability under that Act; for those reasons PLC was not required to make offers for the shares in The President's Club under s 631(1); and therefore it was not an offence for it to fail to proceed with making the offer. The criminal proceedings against the appellants are thereby alleged to be doomed to fail. The same argument is elaborated upon in the no case to answer application made by PLC and Mr Palmer in the Magistrates Court, which occupies 21 pages.

[36] The primary judge observed that this was not a case in which it was alleged that the prosecution had been wrongly brought, conducted contrary to law, failed to disclose an offence, or lacked legal substance.[44] The primary judge made the following remarks in the course of concluding that there was nothing exceptional in the appellants' cases warranting intervention by way of declarations about the elements of the offences.[45] The appellants' arguments might be raised in a no case submission before the magistrate or subsequently in the District Court at the end of the Crown case. Interference by the Supreme Court would fragment and detract from the efficient conduct of the criminal proceedings. The appellants did not identify anything exceptional in the arguments about the prospects of success of the prosecutions and nothing else warranted the Court's interference with the proper exercise of the magistrate's functions in the committal proceedings.

[37] In this appeal PLC originally submitted that it was beyond argument that the criminal proceedings could not succeed, their continuation amounted to an abuse of process for that reason alone, and this contention was of such substance that it could not properly have been the subject of the summary striking out of the appellants' proceedings. At the hearing of the appeal, however, senior counsel for PLC accepted that, if the contention that the prosecution was legally untenable was considered in a context that a stay could not be justified on any other grounds, that contention would be caught by the principle of restraint against the fragmentation of criminal proceedings. The effect of PLC's arguments then became that the absence of merit in the prosecution supplied additional support for the other grounds for concluding that the proceedings in the Magistrates Court are an abuse of process.

[38] Mr Palmer did not modify his argument. Contrary to Mr Palmer's submissions upon this point, his pleaded case was not that the charges had been wrongly brought, failed to disclose an offence, or had no legal substance.[46] That case did not raise only a question of law. It is evident upon the face of the statement of claim that the "doomed to fail" issue is not analogous to a discrete point of law that does not require reference to contestable evaluations of the evidence.

[39] The resolution of this issue does not depend merely upon an abstract comparison between the speed, efficiency and utility of an adjudication in the appellants' civil proceedings in the Supreme Court and an adjudication within the criminal process. The appellants seek a decision in the Supreme Court upon only some of the issues arising in the committal proceedings. It is clear beyond reasonable argument that this section of the statement of claim, like the appellants' claim for declarations, seeks to involve the Supreme Court in an exercise of jurisdiction that would fragment the criminal process. More than 35 years ago the Full Court of the Federal Court in *Lamb*

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44 Reasons [182].

45 Reasons [183].

46 Mr Palmer's notice of appeal, ground (e).

v Moss[47] referred to "a considerable body of authoritative judicial opinion that exceptional circumstances will generally be required before a superior court will consider interfering in committal proceedings, particularly at an interlocutory stage" and, citing a statement by Gibbs ACJ in *Sankey v Whitlam*,[48] held that except in special circumstances a failure to permit criminal proceedings to follow their ordinary course will constitute an error of principle. This principle has been repeatedly endorsed, including in many decisions cited by the primary judge.

[40] The appellants' pleadings and arguments do not articulate anything that might justify a trial judge in finding that this is an exceptional case. There is no reason to think that the appellants' case in this respect might improve during further interlocutory processes or at a trial of their claims. Unless another ground for a stay has some arguable basis, the appellants could not hope to persuade a trial judge to fragment the criminal proceedings by adjudicating upon the elements of the charged offences as the appellants seek. That is sufficient to dispose of this aspect of the appeal but it should be noted that a further consideration supports the same conclusion: the appellants seek an adjudication upon those issues in the Supreme Court notwithstanding that their application in the committal proceedings in the Magistrates Court that they have no case to answer, which comprehends the same arguments, remains on foot.[49]

Sections D-F of the statement of claim: claims for a permanent stay of the committal proceedings

[41] Before considering each of the remaining sections of the statement of claim I will refer to some general propositions concerning claims for a permanent stay of criminal proceedings.

[42] A superior court has inherent power to stay proceedings within the court on the ground of abuse of process in "all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".[50] The present case is instead concerned with the powers of the Supreme Court in the exercise of its supervisory jurisdiction over inferior courts and tribunals. That jurisdiction is expressed in s 58 of the *Constitution of Queensland* 2001 (Qld).[51] In *Walton v Gardiner*[52] the majority of the High Court applied the principles relating to

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47 (1983) 76 FLR 296 at 308 (Bowen CJ, Sheppard and Fitzgerald JJ). See also, for example, *Clyne v Director of Public Prosecutions* (1984) 154 CLR 640 at 643; *Yates v Wilson* (1989) 168 CLR 338 at 339; *Coco v Shaw* [1994] 1 Qd R 469 at 485, line 29 – 486, line 5 (McPherson SPJ), 497, line 37 – 498, line 50 (Ryan J), 499, lines 45 – 50 (Dowsett J).

48 (1978) 142 CLR 1 at 26.

49 That application was adjourned to be heard at the end of the Crown case at the committal hearing, as was acknowledged in PLC's outline of argument in reply para 20: "**With the exception of the 'doomed to fail' contention,** none of the matters advanced or relief sought in the present proceeding are matters which were or could have been raised in the hearing of the 'no case to answer' submission in the Magistrates Court". In para 21, PLC stated that the magistrate found that the Magistrates Court lacked power to dispose of the contention that the prosecution was doomed to fail "**at that stage**".

50 *Walton v Gardiner* (1993) 177 CLR 378 at 392 – 393. Inferior courts, including the Magistrates Court, have the same or a similar power to prevent an abuse of their processes (*Williamson v Trainor* [1992] 2 Qd R 572; and see *Director of Public Prosecutions v Shirvanian* (1998) 44 NSWLR 129 at 134 – 135 (Mason P)), but it has been held that this does not apply in committal proceedings.

51 The Supreme Court's supervisory power over inferior courts and tribunals is discussed by McPherson JA in *Higgins v Comans* (2005) 153 A Crim R 565 at [5].

52 (1993) 177 CLR 378 at 392 – 396 (Mason CJ, Deane and Dawson JJ). See also *Rogers v The Queen* (1994) 181 CLR 251 at 255 – 256, 287 and *PNJ v The Queen* (2009) 83 ALJR 384 at [3].

the inherent power of a superior court to stay proceedings within that court on the ground of abuse of process to the powers exercisable in the supervisory jurisdiction of the Supreme Court of New South Wales in the course of concluding that complaints brought in a New South Wales tribunal had properly been stayed.

[43] It is an open question whether the Supreme Court of Queensland's supervisory jurisdiction over the Magistrates Court comprehends the same powers, including the power to grant a permanent stay of committal proceedings on the ground of abuse of process.[53] Without deciding the question I will proceed upon the assumption that the Court has that power.

[44] The circumstances in which the Supreme Court may permanently stay a proceeding on the ground of abuse of process are not susceptible of comprehensive formulation,[54] but they comprehend the use of court procedures for an illegitimate purpose, the use of court procedures in a way that is unjustifiably oppressive to a party, and the use of court procedures in a way which would bring the administration of justice into disrepute.[55] Importantly for present purposes however, many decisions in the High Court emphasise the weight of the onus upon a plaintiff seeking a permanent stay of criminal proceedings to displace the public interest that persons charged with criminal offences should be brought to trial.

[45] In a passage in *Jago v District Court (NSW)*[56] quoted by the primary judge,[57] Mason CJ referred to the balancing process involving the community's right to expect that persons charged with criminal offences are brought to trial and the expectation that trials will be fair and take place within a reasonable time after a person has been charged. Mason CJ observed that "a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare".[58] In *Walton v Gardiner*,[59] Mason CJ, Deane and Dawson JJ referred to Mason CJ's observations in *Jago*, and similar observations by Deane, Toohey, and Gaudron JJ, and identified as being amongst the factors to be weighed in an application for the permanent stay of criminal proceedings as an abuse of process not only "the requirements of fairness to the accused" but also "the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice".

[46] Similarly, in *Barac v Director of Public Prosecutions*[60] Keane JA (McMurdo P and Jerrard JA agreeing) said (in a passage also quoted by the primary judge)[61] that the

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53 *GAD v DPP (Qld) & Anor* [2008] QCA 27 at [22]; *Barac v Director of Public Prosecutions* [2009] 1 Qd R 104 at [16]. A power of that character has been held to exist in the Supreme Courts of New South Wales and South Australia: see *Cooke v Purcell; Cooke v Whitbread and Others; Attorney-General v Purcell and Others* (1988) 14 NSWLR 51 at 54 (Kirby P), 63 – 67 (Mahoney JA), 77 – 80 (Clarke JA); *Gorman v Fitzpatrick* (1987) 32 A Crim R 330; *X v Commissioner of Police* [2012] NSWSC 930 at [30] and *Clayton v Ralphs and Manor* (1987) 45 SASR 347 at 357 – 362, 404. A contrary view has been expressed in Victoria (*Mokbel v Director of Public Prosecutions (Vic) & Ors* (2008) 202 A Crim R 319 at [25] and [36]).

54 *Moti v The Queen* (2011) 245 CLR 456 at [10].

55 *Moti* at [10].

56 (1986) 168 CLR 23 at 33.

57 Reasons [83].

58 *Jago* at 34.

59 (1993) 177 CLR 378 at 395 – 396.

60 [2009] 1 Qd R 104 at [24].

61 Reasons [93].

"strong public interest in the conviction and punishment of serious offences may be displaced by 'the paramount public interest' that the administration of criminal justice proceed fairly in a case where a prosecution is pursued for an improper purpose or with no prospects of success"; there was "no occasion for a court to impede or interfere in the exercise of the prosecutorial function unless and until '[c]ourt processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression'".[62] Again, in *Moti v The Queen*[63] the High Court discussed the "well-established rule that in both civil and criminal proceedings 'Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process'" and observed:

> "In *Dupas* [(2010) 241 CLR 237 at 243 [14]], this Court reiterated that the power 'exist[s] to enable the courts to protect themselves and thereby safeguard the administration of justice'. But the Court emphasised [241 CLR 237 at 251 [37]] (footnotes omitted)] that, in considering whether to grant a stay, there is a 'need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial ... as a permanent stay is tantamount to a continuing immunity from prosecution'."[64]

[47] The circumstance that the appellants' claims invoke the supervisory jurisdiction in relation to a committal hearing supplies an additional reason for a cautious approach: see *Gorman v Fitzpatrick*.[65]

[48] The stringency of the requirements for the grant of a permanent stay of committal proceedings must be taken into account in considering whether the respondents established that the appellants' claims for such orders as an abuse of process are so clearly untenable as to justify summary termination of those claims as an abuse of process.

[49] **Section D** of the statement of claim concerns delay in the commencement of the criminal proceedings. The first part of the section is directed to the contention that there had been unreasonable delay that was unfairly oppressive to the appellants. The second part of that section is directed to the contention that PLC and Mr Palmer are or will be unfairly prejudiced by that delay. Section D thus invokes two established categories of abuse of process: the power to stay proceedings both where any subsequent trial must necessarily be unfair and where, although a trial may still fairly be held, the delay produces a situation in which the continuation of the proceedings itself will be unfairly and unjustifiably oppressive such as to constitute an abuse.[66]

[50] The proceedings in the Takeovers Panel and the Federal Court occurred between June 2012 and February 2016. The primary judge inferred that the relevant authorities turned their attention to potential criminal proceedings only after the conclusion of the Takeover Panel proceeding, which was consistent with the timing of ASIC's and then CDPP's consideration of the matter, thereby explaining the delay between the relevant conduct and the laying of criminal charges.[67] The appellants challenge that

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62 *Barac* at [34].

63 (2011) 245 CLR 456 at [10], quoting from the reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265 [9].

64 245 CLR 456 at [11].

65 (1987) 32 A Crim R 330 at 340 – 341, 346 – 347.

66 *Jago* at 58 (Deane J); *Walton v Gardiner* (1993) 177 CLR 378 at 394.

67 Reasons [215].

inference. The inference drawn by the primary judge is a reasonable one. Certainly the statement of claim does not allege facts that might justify the exclusion of that inference in favour of an inference that the respondents deliberately delayed for some improper purpose. The following reasons proceed, however, upon the assumption that after a trial it might be found that there is no satisfactory explanation for the delay.

[51] The statement of claim alleges that ASIC knew or ought to have known of the circumstances giving rise to the alleged offences at least by July 2012 and the appellants did not become aware of the criminal proceedings until the complaints were served on them in early March 2018, after they were issued on 22 February 2018. The statement of claim alleges that because of the delay the appellants will be at a significant disadvantage in discharging the onus of establishing any defence to the alleged offences, that onus being upon them under s 670F of the *Corporations Act*. The particulars of that allegation assert only that the memory of witnesses will be impaired and may not be accepted, the appellants are likely to encounter difficulties in accessing records, and one Mr Edwards, who was a director of The President's Club from 16 June 2003, died on 6 November 2013. There is no allegation that Mr Edwards might have given relevant evidence, there is no identification of any potentially relevant evidence, witness, or records, and no specific prejudice is alleged.

[52] As the primary judge observed, citing *Jago*,[68] the Australian common law does not recognise a right to a trial within a reasonable time which operates with reference to "presumptive prejudice", rather than "actual prejudice or unfairness". The primary judge referred to the appellants' arguments about this point and accurately described their assertions as "vague and uncertain".[69] In the same passage, the primary judge referred to the apparent inconsistency between the appellants' case upon this point and their own allegation that the circumstances of the alleged offences were investigated in litigation in which PLC was a party from about 26 June 2012.[70] (In this appeal, Mr Palmer[71] and PLC[72] continue to allege that the underlying circumstances alleged to give rise to the offences were investigated in that litigation.)

[53] The primary judge observed that the kind of prejudice or unfairness which enlivens the discretion to stay a criminal proceeding is that which detracts from a fair trial; there must be delay producing an adverse effect which is incapable of being cured in the criminal proceedings, such as by directions of the trial judge.[73] The primary judge considered that those allegations in the appellants' pleadings do not satisfy that test. I agree. The allegations are manifestly incapable of contributing to a conclusion that the committal proceedings would or might amount to an abuse of process upon the basis of prejudice or unfairness detracting from a fair trial.

[54] The appellants argue that the primary judge omitted to take into account the second category of abuse of process described in [49] of these reasons. But this omission does not assist the appellants. In *Jago*, Deane J reiterated in the context of this

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68 168 CLR 23 at 33.

69 Reasons [210].

70 Joint statement of claim, para 22.

71 Outline of submissions in reply, para 14(g).

72 Outline of argument in reply, para 12(b).

73 Reasons [207], citing *Barac v Director of Public Prosecutions* [2009] 1 Qd R 104 (see at [22] – [24] (Keane JA, McMurdo P and Jerrard JA agreeing)).

category that it remains necessary for a plaintiff seeking a permanent stay to demonstrate an exceptional case.[74] The statement of claim refers to Mr Palmer's alleged announcement on 22 February 2018 of his intention to run as a candidate for a seat at the subsequent Federal election, the alleged fact that unreasonable delay in bringing the proceedings subjected him to the risk of ineligibility to run or be elected as a candidate, and alleged reputational damage likely to impact his prospects of running and being elected. The primary judge discussed these allegations and concluded that there was no link between the reputational consequences to which Mr Palmer was exposed and the fairness of his trial in the relevant sense and also that there was nothing extraordinary about Mr Palmer's concerns.

[55] I agree. The facts alleged by the appellants do not put the prosecutions outside the general run of cases in which reputational and other kinds of damage result from prosecutions. As the primary judge observed, whilst Mr Palmer has a public profile and political aspirations which differ from most defendants, his concerns for his reputation arising out of the criminal proceedings are not extraordinary. This aspect of the appellants' case is also untenable. It could not possibly support a conclusion that the commencement or continuation of the committal might result in oppression of a kind or degree capable of justifying a permanent stay of the committal proceedings.

[56] The appellants had ample opportunity to frame their cases upon this ground. There is no basis for thinking that the respondents might be in a better position than the appellants to identify adverse consequences for the appellants of the delay of a kind that might be oppressive, unfair or incapable of being cured in a criminal trial. The appellants' argument that their cases might be improved by interlocutory processes or at a trial of their claim is unpersuasive.

[57] **Section E** of the statement of claim concludes that the committal proceedings are vexatious and oppressive because the circumstances giving rise to them have already been litigated. The statement of claim alleges matters said to justify contentions that: Mr Palmer had been subjected to about four years of proceedings concerning the same circumstances, in which ASIC was a party and played an active role; he had already been subject to punishment (the pleading identifies in this respect only "a curtailment of the rights attached to PLC's ownership interest in [Coeur de Lion Investments Pty Ltd's] shareholding in [The President's Club]"); he had been subjected to embarrassment, expense and ordeal in responding to and defending allegations the subject of the alleged offences; he had been subjected to the same matters in his capacity as a director of PLC in relation to the conduct of the Takeover Proceedings; and he would be prejudiced in the criminal proceedings by the Takeover Panel Proceedings which did not afford such procedural or substantive protections as are afforded to defendants in criminal proceedings.[75]

[58] The primary judge considered that the critical point here was that there had not been any incurable prejudice identified by the appellants as arising as a consequence of the delay.[76] Again, I agree. A trial judge would not lack power to ameliorate any particular prejudice of the kind alleged (the absence of procedural or substantive protections in the Takeover Proceedings such as are afforded to defendants in criminal proceedings) if any such matter justified, for example, the discretionary exclusion of evidence or appropriate directions to the jury. But upon this issue the

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74 *Jago* at 60.

75 Statement of claim, para 48.

76 Reasons [215].

statement of claim is expressed in such vague and general terms as to be almost devoid of meaningful content. It does not allege any particular fact that even arguably might constitute prejudice that is both significant and incurable within a criminal trial. This alleged concern is incapable of supporting an arguable case for a permanent stay.

[59] The primary judge referred to the appellants' argument that the circumstances of the alleged offences already had been litigated, observing that the Takeovers Panel Proceedings were not criminal proceedings, their focus was upon private interests and the need for an efficient, competitive and informed market,[77] and the criminal proceedings served different purposes, including general deterrence. The primary judge also observed that the issue about s 631 ultimately was not determined by the Takeovers Panel and the fact that related issues were considered by that Panel was a factor to be considered by the prosecuting authorities in the exercise of their discretion, rather than by the Court.[78]

[60] The appellants argue that the proper arbiter of the public interest in the relevant statutory context was the Takeovers Panel, which concluded[79] that the passing of time had put the alleged contraventions "beyond the purposes that can now be served by the Panel".[80] That argument does not grapple with the primary judge's explanation of the differences between the functions of the administrative proceedings and the criminal proceedings. The appellants also argue that the alleged offences amounted merely to a technical breach, it was intended to adduce evidence at a trial about the circumstances of PLC's decision not to proceed with the transaction (including advice that to do so would involve the purchase of interests in an unregistered managed investment scheme), and no harm was caused because no shares were traded. The first and third points, which are related, involve contestable opinions which may be the subject of evidence and submissions within the criminal proceedings. The second point, which is connected with the claim pleaded in section C of the statement of claim, also supplies no support for the appellants' case that the prosecution is vexatious, oppressive, or improperly motivated.

[61] **Section F** of the statement of claim concerns allegations that the criminal proceedings were or have the appearance of having been commenced for an improper purpose. This section of the statement of claim invokes the category of abuse of process in which a court's procedures are invoked for an illegitimate purpose. The relevant purpose is the result which the proceeding is capable of producing and which it is intended to produce.[81] An improper purpose is one which uses a proceeding to obtain a result which the proceeding is not designed to produce.[82] The proper purposes of legal proceedings include the imposition of the available legal penalties.[83] The proper use of a proceeding for the purpose of obtaining a result which the proceeding is designed to produce cannot be characterised as an abuse of process merely because the person instituting the proceeding does so for an ulterior and improper motive.[84]

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77 The primary judge referred to *Corporations Act*, s 602.

78 Reasons [224].

79 [2016] ATP 1 at [205].

80 PLC outline of argument, para 67.

81 *Williams v Spautz* (1992) 174 CLR 509 at 532 – 533.

82 *Spautz* at 526 – 527.

83 *Spautz* at 532 – 533.

84 *Jago* at 47 – 48; *Ridgeway* at 46, 50, 75; *Spautz* (1992) 174 CLR 509 at 529 (Mason CJ, Dawson, Toohey and McHugh JJ) and 533 – 535 (Brennan J). See also *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509 at 521 – 523 (Isaacs J) and 525 – 526 (Powers J); *Boyne v Baillieu* (1908) 6 CLR 382 at 403 – 404 (O'Connor J).

[62] Within this section are a series of allegations directed to establishing that as a result of policy or political differences the Commonwealth Government pursued a campaign against Mr Palmer and the respondents commenced the criminal proceedings against PLC and Mr Palmer "implementing, or acting at the direction of, the Government's Campaign ... or alternatively there is a reasonable perception that they are doing so ...".[85] The statement of claim collects allegations of facts and opinions which are submitted to support Mr Palmer's case that the respondents engaged in the grossly improper conduct of commencing and continuing the prosecutions to implement a Commonwealth Government agenda against Mr Palmer.

[63] PLC did not press the 12 critically important paragraphs in this section of the statement of claim[86] and it disclaimed any present intention to allege that the criminal proceedings were commenced for an improper purpose. PLC nevertheless relied upon other allegations in this and other sections of the statement of claim as support for contentions that there was such conduct concerning and unreasonable delay in commencing the prosecution as gave rise to an abuse of process, or arguably so, and that the pleaded circumstances considered as a whole justified "grave disquiet" that the prosecutions were brought for an improper purpose. Mr Palmer did not abandon any pleaded allegation and he submitted that the criminal proceedings were brought for an improper purpose.

[64] I will describe this part of the pleading in a little more detail. The statement of claim alleges that on a great many occasions since June 2006 ASIC exercised statutory powers in relation to the activities of Mr Palmer or associated companies (conducting examinations and seeking production of documents), and that conduct commenced after or around the same time as various statements were made – by the Prime Minister, referring to his amazement and worry about the power of the Australian Government to destroy individuals and businesses, by the Prime Minister and some members of Parliament critical of Mr Palmer's role in relation to the appointment of liquidators to QNI and the loss of workers' entitlements, and by other members of parliament to the effect that the Commonwealth Government would "get" or "destroy" and (subsequently, in or about August 2017) had "got"[87] Mr Palmer.

[65] There is no reference in the alleged statements to CDPP. There are no references to the subject matter of the present proceedings. Such references as there are to ASIC are by individual members of parliament about expectations that ASIC would exercise its powers in relation to entitlements of employees and creditors of QNI.[88]

[66] The other substantial component of this part of section F concerns litigation in the Supreme Court and the Federal Court by the special purpose liquidator of QNI and others, in which Mr Palmer was a party, relating to the liquidation of QNI. This part of the pleading lacks any apparent relevance to any claim made by the appellants.

[67] The primary judge identified one of the fatal flaws in this part of the appellants' case: the appellants "do not in any ... reasonable or credible way connect the conduct alleged against ASIC and the CDPP to the alleged hostility of members of the Commonwealth Government towards Mr Palmer."[89] No reasonable basis for any different conclusion is suggested by the appellants' extensive pleadings and arguments.

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85 Statement of claim, subheading (b) in section F.

86 See Reasons [36] and footnote 7.

87 Statement of claim, para 73D.

88 Statement of claim, paras 65, 73A.

89 Reasons [222].

[68] The statement of claim alleges that on 22 February 2018 two events occurred: Mr Palmer issued a press release announcing his intention to run candidates in every seat at the next Federal election and (as is uncontroversial) the complaints against PLC and Mr Palmer were signed. (The second alleged event was also pleaded, in more detail, in section D.) The primary judge found[90] that the first alleged event did not occur. Instead, on 23 February 2018 Mr Palmer made statements to the effect that the Palmer United Party had not called for any nominations, Mr Palmer had retired from politics generally, and he thought that was still the case.[91] (Mr Palmer submitted to the primary judge that he had privately mentioned to some people that the party would run candidates.)

[69] The statement of claim alleges a policy or practice of ASIC about commencing criminal proceedings, makes a series of allegations, and expresses the conclusion (since abandoned by PLC, but not by Mr Palmer) that ASIC had caused the criminal proceedings to be commenced for purposes other than purposes consistent with its policy or practice.

[70] Section F concludes that the combination of the timing of ASIC's conduct, alleged departures by ASIC from its policy or practice in relation to the commencement of criminal proceedings, and alleged departures from CDPP's prosecution policy in relation to the commencement of criminal prosecutions, support Mr Palmer's contention that the respondents commenced the prosecutions by way of implementing the Commonwealth Government's agenda against Mr Palmer.

[71] The allegations about the timing of ASIC's conduct supply no support for any such conclusion. The appellants' arguments assume that the exercise by ASIC of its powers since about June 2016 was motivated by an improper purpose. There is no allegation of fact capable of supporting that assumption.

[72] The pleaded conclusion that the criminal proceedings are inconsistent with ASIC's policies depends in part upon a comparison between the decision to prosecute the appellants and alleged decisions by ASIC in February and April 2016 not to pursue any action against The President's Club and its directors in relation to the alleged unlawful operation of an unregistered time-sharing scheme. The statement of claim alleges that the offences alleged against the appellants related to the same time-sharing scheme that ASIC determined was not in the public interest to investigate further. That factor and the suggested greater seriousness and adverse consequences of operation of an unregistered managed investment scheme compared with the offences alleged against the appellants (with few other matters) are said to justify the conclusion that it was not in the public interest to commence the proceedings against the appellants.

[73] These allegations do not shed light upon the matters which motivated the relevant officer or officers of ASIC to decide that it was in the public interest to commence the prosecutions, much less the immediate purposes of those prosecutions. They are incapable of supporting the appellants' case that, as required by the alleged policy or usual practice of ASIC and contrary to the documentary evidence, ASIC did not consider the public interest in pursuing proceedings against the appellants or the other matters it was required by its policy or usual practice to consider.[92]

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90 No ground of appeal challenges this finding.

91 Reasons [204].

92 See statement of claim, para 87.

[74] The pleaded conclusions that the prosecutions are inconsistent with CDPP's prosecution policy depend in part upon allegations that CDPP commenced and subsequently did not discontinue the prosecutions after receiving an advice from counsel which raised an issue about proving the offences, formed a view in or about September 2017 that the prosecution would be "very difficult", and exchanged correspondence between 1 September 2016 and the commencement of the prosecutions.

[75] The trial judge analysed documents obtained from CDPP which, the appellants submitted, revealed that the commencement of the prosecution was delayed until Mr Palmer had announced his intention to run. After observing that there was no such announcement at the alleged time, the primary judge discussed the content of two "history reports" and two "prosecution policy declarations" (in each case, one relating to Mr Palmer and one relating to PLC), and concluded that the documents suggested nothing other than an orthodox approach to consideration of prosecution in terms of the sufficiency of evidence, prospects of success and public interest. The primary judge also concluded that the fact that the charges were considered separately, with CDPP taking longer to consider policy issues relating to Mr Palmer's prosecution, raised no concern.[93]

[76] The appellants challenge that conclusion. The appellants applied for leave to adduce new evidence which they submit supports their cases upon this aspect of the claims. I would admit the new evidence in the appeals, primarily because it appears that the new evidence was not available to the appellants at the time of the hearing before the primary judge. I will consider afresh the evidence adduced at the hearing before the primary judge together with the new evidence sought to be adduced in the appeals.

[77] An ASIC ministerial submission under the name of the Commissioner of ASIC: summarises the charges brought against PLC and Mr Palmer, who had been summoned to appear on 16 April 2018 before the Brisbane Magistrates Court; states that those charges are unrelated to ASIC's investigation into the affairs of Mineralogy Pty Ltd and QNI; supplies additional information by way of background including that Mr Palmer was one of two directors of PLC, now being the sole director, and that ASIC does not allege that anyone else was an accessory to the alleged contravention by PLC; and notes that ASIC had been investigating the matter since October 2015 with a referral made to CDPP recommending charges in September 2016.

[78] That is consistent with the "history report" relating to PLC of 12 September 2017. That report: describes ASIC as the referring agency; refers to a matter having been received on 16 September 2016; describes the "complexity" of the matter as "very difficult prosecution"; notes that in September 2016 a matter was transferred to CDPP Melbourne for a brief assessment, advice from counsel "raised an issue re-proving the offence", and an expert opinion anticipated on 4 August 2017 had not been received on 10 August 2017; describes the assessment phase ("brief ass") as starting on 16 September 2016 and ending on 7 September 2017; and comments that there was sufficient evidence to pursue PLC and Mr Palmer. The date specified for the end of the assessment of 7 September 2017 is also the date of a "prosecution policy declaration" for PLC, in which an officer of CDPP declared that he had addressed the terms of the test for prosecution in the Commonwealth prosecution policy and determined that there was a prima facie case, there was a reasonable prospect of a conviction, and in light of the provable facts and the whole of the surrounding circumstances the public interest required a prosecution to be pursued.

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93 Reasons [205].

[79] The history report in relation to Mr Palmer, also dated 12 September 2017, describes the brief as having been received on that date. The report includes the same comments about the complexity of the prosecution, the transfer to the Melbourne office, advice from counsel, and the anticipated expert opinion. This report leaves the end date blank, which is consistent with the assessment having not been completed. A prosecution policy declaration relating to Mr Palmer dated 19 February 2018 includes a declaration and statements about the prosecution in terms that are identical to the declaration concerning PLC. A difference is that the policy declaration for Mr Palmer, unlike the declaration for PLC, refers to "notes to prosecutor" and "evidence matrix".

[80] Given that a prosecution of Mr Palmer as an accessory would require proof, both of the matters required to be proved in a prosecution of PLC and of such conduct by Mr Palmer with knowledge of PLC's conduct as would render him liable as an accessory, the time that elapsed between the date of the prosecution policy declaration for PLC and the date of the similar declaration for Mr Palmer could not possibly justify drawing inferences of the serious kind which the appellants contended should or might be drawn after a trial.

[81] No tenable claim that either of the respondents was actuated by an improper motive to proceed against PLC could be derived from the circumstance that the prosecution of PLC was not commenced until CDPP had determined to commence the prosecution of Mr Palmer. No fact or combination of facts alleged in the statement of claim suggests a case that might be of sufficient strength to justify the charges made by Mr Palmer against the respondents to the exclusion of the reasonable inference that, if it were found to be appropriate to charge the accessory, that charge should be brought together with the closely related charge against the principal. The facts that, months before the prosecutions commenced, an issue was raised by counsel about proving the facts and the "complexity" of the prosecution was described as "very difficult" supply no seriously arguable basis for thinking that, inconsistently with the prosecution policy declarations, the respondents were aware of some fatal gap in the evidence or other impediment to proof of a prima facie case or findings of guilt in the prosecutions when they were commenced.

[82] As to the new documentary evidence sought to be adduced in the appeal, the appellants argue that there is such a focus upon Mr Palmer, rather than PLC, as to give rise at least to a concern about the purpose of the prosecution against PLC. In the first of those documents, an email dated 11 July 2016 from the senior executive to the Commissioner of ASIC, the subject matter is described as "Palmer Leisure Coolum Pty Ltd and The President's Club Limited: summary of examination of Clive Palmer". This is innocuous.

[83] The other documents sought to be adduced in the appeal comprise internal emails on 19 February and 6 March 2018, apparently about briefing the Minister. The content of the email of 19 April 2018 was redacted with reference to s 42 of the *Freedom of Information Act* 1982 (Cth) which exempts from disclosure documents subject to legal professional privilege, but the subject heading refers to PLC rather than Mr Palmer. Most of the emails dated 6 March 2018 refer to Mr Palmer, rather than PLC, although one email attaches a redacted briefing for PLC.

[84] Those documents post-date the decisions to charge the appellant and the bringing of the charges. They are not concerned with and do not express or imply anything about CDPP's decision to bring the charges or ASIC's decision to refer the matters to

CDPP. Examination of the evidence as a whole in the context of the appellants' pleadings and arguments reveals the absence of any reasonable basis for concern by the appellants that ASIC or CDPP might have engaged in any of the misconduct Mr Palmer asserts. I would affirm the primary judge's conclusion that the documents in evidence suggest nothing other than an orthodox approach to the contemplated prosecutions.

[85] The appellants argue that by the time of a trial they might gain access to redacted parts of the documents so far provided or additional documents that might support their claims. That is mere speculation. The fact that the appellants will have no opportunity to seek leave to administer interrogatories – an order which is rarely made in any case – could not justify permitting the appellants' speculative claims to proceed.

[86] Section F also alleges that Mr Palmer was the only one of two directors at PLC to be charged as a party to PLC's alleged contravention. No allegation in the statement of claim concerns their respective roles, if any, in relation to that alleged contravention. Nothing arguably relevant to the appellants' case could be inferred from the mere fact that Mr Palmer was the only director charged.

[87] Both appellants argued that the primary judge erred in finding that there was nothing exceptional in the appellants' claims such as to give rise to a prospect of intervention by the Supreme Court by putting an end to the criminal proceedings. For the reasons I have given there was no such error.

[88] Mr Palmer argued that upon this and other issues the primary judge failed to give adequate reasons for her decision. In particular, Mr Palmer contended that the primary judge had dismissed his 65-paragraph argument in one short paragraph. As should already be apparent from my recitation of central aspects of the primary judge's reasons, the complaint that her reasons are inadequate is without substance. Nor is there merit in the particular complaint about Mr Palmer's lengthy submissions concerning exceptional circumstances. In addition to other reasons by the primary judge already mentioned, the one paragraph of the primary judge's reasons to which Mr Palmer refers summarised the 11 circumstances which he contended were exceptional and succinctly explained her conclusion that there was nothing exceptional such as to warrant the making of declarations about the elements of the offences or bringing the criminal proceedings to an end.[94] That was an appropriate explanation for the rejection of Mr Palmer's arguments.

[89] I would affirm the primary judge's conclusion that the allegations made by the appellants do not provide any reasonable basis for concluding that the Court ought to have a sense of disquiet about ASIC's and CDPP's decisions to prosecute, much less that the proceedings against the appellants were brought as a result of political influence or for any improper purpose.[95] That conclusion finds additional support in the principle that allegations of grave misconduct are not established by "inexact proofs, indefinite testimony, or indirect inferences",[96] but I would reach the same conclusion also without reference to that principle.

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94 Reasons [186], the conclusion being at [187].

95 Reasons [222].

96 Reasons [101], quoting from Dixon J's judgment in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 – 362; the primary judge cited other decisions to similar effect at Reasons [103] – [106] (*Fernando v Commonwealth and Anor* (2014) 231 FCR 251 at [153], *Pharm-a-care Laboratories Pty Ltd v Commonwealth (No 3)* (2010) 267 ALR 494 at [68] and *Rajski v Bainton* (1990) 22 NSWLR 125 at 135.

Claims for a stay of the criminal proceedings

[90] I conclude that there was no reasonably arguable substance in any of the argued bases for the appellants' claims that the committal proceedings should be permanently stayed. The respondents established to the requisite standard for summary termination without a trial or the usual interlocutory processes that those claims are untenable. Although the primary judge did not express those conclusions in similar language, her conclusions are consistent with my own conclusion, considering the matter afresh, that the appellants' proceedings in the Supreme Court lacked any reasonable basis, were vexatious, and were correctly struck out as an abuse of process.

Claims for declarations about the offences

[91] The primary judge concluded that the appellants' claims for declarations about elements of the offences with which they were charged should be set aside because there was nothing exceptional in their cases warranting the intervention of the Supreme Court by way of declarations.[97] I agree. For the reasons given in relation to section C of the appellants' statement of claim, the claims for declarations about the elements of the offences were untenable. Those claims were correctly struck out.

Other claims

[92] It follows from the reasons already given that all of the appellants' claims, including Mr Palmer's claim for damages, were correctly struck out. The appellants failed to establish any ground for overturning the primary judge's orders.

Ground 2(n) of Mr Palmer's appeal

[93] Those reasons explain why I would reject the appellants' grounds of appeal, other than ground (n) in Mr Palmer's notice of appeal. That ground asserts that the primary judge "failed to properly exercise the jurisdiction vested in the court in a manner consistent with the requirements of Chapter III of the Commonwealth of Australia Constitution Act". Mr Palmer's argument upon that ground merely asserted that the alleged inconsistency with the Constitution was constituted by the primary judge dismissing the proceedings without the respondents having filed defences and before any joinder of issues upon Mr Palmer's allegations. The Constitution contains nothing capable of providing arguable support for this ground of appeal.

Proposed order

[94] I would make the following orders:

(a) Documents contained in the "Supplementary Joint Record Book" filed on 14 May 2019 be admitted as evidence in both appeals.

(b) The appeals are dismissed with costs.

[95] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

[96] **BODDICE J:** I agree with Fraser JA.

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97 Reasons [181] – [183].