

# FEDERAL COURT OF AUSTRALIA

## General Manager of the Fair Work Commission v Thomson [2013] FCA 380

Citation: General Manager of the Fair Work Commission v Thomson [2013] FCA 380

Parties: **GENERAL MANAGER OF THE FAIR WORK COMMISSION v CRAIG THOMSON**

File number: VID 798 of 2012

Judge: **JESSUP J**

Date of judgment: 26 April 2013

Catchwords: **PRACTICE AND PROCEDURE** – application by respondent to stay proceeding under s 312 of *Fair Work (Registered Organisations) Act 2009* (Cth) – conduct forming basis of criminal charges substantially the same as some but not all of contraventions alleged in present proceeding – whether s 312 of *Fair Work (Registered Organisations) Act 2009* (Cth) operates to stay entirety of proceeding – construction of s 312 of *Fair Work (Registered Organisations) Act 2009* (Cth) – whether remainder of proceeding should be stayed on basis of principles expressed in *McMahon v Gould* (1982) 7 ACLR 202

Legislation: *Crimes Act 1958* (Vic), ss 74, 81, 82, 321M  
*Fair Work (Registered Organisations) Act 2009* (Cth), ss 285, 286, 289, 292, 293, 306, 307, 311, 312, 313, 315, 335C(2)(b)

Cases cited: *McMahon v Gould* (1982) 7 ACLR 202

Date of hearing: 18 April 2013

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 25

Counsel for the Applicant: Dr S Donaghue SC with Mr J Fetter

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondent: Mr J Pearce

Solicitor for the Respondent: McArdle Legal

Counsel for the Intervener –  
Health Services Union: Mr M Irving

Solicitor for the Intervener –  
Health Services Union: Slater and Gordon

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION**

**VID 798 of 2012**

**BETWEEN:                   GENERAL MANAGER OF THE FAIR WORK  
                                  COMMISSION  
                                  Applicant**

**AND:                        CRAIG THOMSON  
                                  Respondent**

**JUDGE:                    JESSUP J**

**DATE OF ORDER:       26 APRIL 2013**

**WHERE MADE:           MELBOURNE**

**THE COURT BEING SATISFIED THAT**, to the extent that this proceeding involves applications for pecuniary penalties in relation to the matters alleged in Parts F.2, F.3, F.4 and F.5 of the Statement of Claim, it was stayed on 31 January 2013 and 5 February 2013 by the operation of s 312(1) of the *Fair Work (Registered Organisations) Act 2009 (Cth)* –

**THE COURT ORDERS THAT:**

1. With respect to the allegations in Parts F.2, F.3, F.4 and F.5 of the Statement of Claim other than those the subject of the operation of s 312(1) of the *Fair Work (Registered Organisations) Act 2009 (Cth)*, the proceeding be stayed pending the conclusion of the proceedings commenced by the charges laid against the respondent on 31 January 2013 and 5 February 2013 reproduced as Annexure 1 to the affidavit of Christopher McArdle sworn on 26 February 2013 and as Ex LP1 to the affidavit of Luana Payne sworn on 28 February 2013 or further order.
2. Save as aforesaid, the respondent's Interlocutory Application filed on 20 March 2013 be dismissed.
3. On or before 20 June 2013, the applicant and the intervener provide for inspection the documents discovered under Order 2 of the orders made in this proceeding on 18 April 2013 in electronic format in accordance with the Federal Court Practice Note CM 6.
4. On or before 1 August 2013, the applicant file and serve:

- (a) a list of lay witnesses she proposes to call at trial;
  - (b) in respect of each such witness, either:
    - (i) an affidavit from that witness; or
    - (ii) an outline of the evidence the applicant proposes to adduce from that witness.
5. On or before 29 August 2013, the applicant file and serve:
- (a) a list of expert witnesses she proposes to call at trial;
  - (b) an expert report from each such witness.
6. The matter be listed for further directions on a date to be fixed by the Court on or after 5 September 2013.
7. There be liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA  
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**VID 798 of 2012**

**BETWEEN:           GENERAL MANAGER OF THE FAIR WORK  
                          COMMISSION  
                          Applicant**

**AND:                CRAIG THOMSON  
                          Respondent**

**JUDGE:             JESSUP J**

**DATE:              26 APRIL 2013**

**PLACE:             MELBOURNE**

**REASONS FOR JUDGMENT**

1           In this proceeding, which was commenced on 15 October 2012, the General Manager of the Fair Work Commission (“the Commission”) seeks orders against the respondent, Craig Thomson, for pecuniary penalties under s 306 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (“the RO Act”), and for compensation orders under s 307 of the RO Act, in relation to alleged contraventions of ss 285, 286 and 287 –

- (a) of Sch 1B to the *Workplace Relations Act 1996* (Cth) (“the WR Act”) with respect to conduct occurring between 12 May 2003 and 26 March 2006; and
- (b) of Sch 1 to the WR Act with respect to conduct occurring between 27 March 2006 and 30 June 2009;

and of certain rules of an organisation registered under those schedules, the Health Services Union (“the Union”).

2           Relevantly for present purposes, the Statement of Claim organises the allegations against the respondent under three main headings, with each of which are associated several subheadings, which are as follows:

- F.       CONTRAVENTIONS RELATING TO EXPENDITURE BY THE  
         RESPONDENT USING HSU NATIONAL OFFICE CREDIT CARDS**
- F.1.   Credit cards issued to the Respondent by HSU National Office
- F.2.   Purchase of escort services
  - Purchases before the commencement of the RAO Schedule on 12 May 2003
  - Purchases after the commencement of the RAO Schedule on 12 May 2003

- Escort transactions involving cash withdrawals using the CT CBA Mastercard
  - Purpose and authorisation of escort expenditure
  - Contravention of HSU Rule 36(b)
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Damage to HSU
- F.3. Use of credit cards to make \$102,337.45 in cash withdrawals
  - The cash withdrawals
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
- F.4. Expenditure while on annual leave with spouse – 16-19 September 2005
  - Contravention of HSU Rule 36(b)
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Damage to HSU
- F.5. Expenditure on spousal travel
  - Expenditure on Christa Thomson
  - Expenditure on Alison Soutar
  - Purpose and authorisation of spousal travel expenditure
  - Contravention of HSU Rule 36(b)
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
  - Damage to HSU
- G. CONTRAVENTIONS CONCERNING EXPENDITURE RELATING TO THE ELECTORATE OF DOBELL**
- G.1. Background
- G.2. Employment of Criselee Stevens
  - Employment
  - Credit card expenditure
  - Purpose and authorisation of employment and expenditure
  - Contraventions of HSU Rules
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
  - Damage to HSU
- G.3. Employment of Matthew Burke
  - Employment
  - Credit card expenditure
  - Other expenditure on Burke
  - Purpose and authorisation of employment and expenditure
  - Contravention of HSU Rules
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
  - Damage to HSU
- G.4. Direct expenditure on or associated with the Respondent's campaign for Dobell
  - Payments to ALP Dobell FEC
  - Campaign office
  - Campaign bus
  - Campaign postage expenses
  - ALP Advertising

- Radio advertising
- Printing expenses
- Purpose and authorisation of Dobell campaign expenditure
- Contravention of HSU Rule 36(b)
- Contravention of section 287(1)
- Contravention of section 286(1)
- Contravention of section 285(1)
- Damage to HSU
- G.5. Coastal Voice
  - Establishment of and involvement in Coastal Voice
  - Work done by Stevens for Coastal Voice
  - Work done by Burke for Coastal Voice
  - Expenditure of HSU funds on Coastal Voice
  - Purpose and authorisation of expenditure on Coastal Voice
  - Contravention of HSU Rule 36(b)
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
  - Damage to HSU
- G.6. Golden Years Collectables
  - Golden Years Collectables expenditure
  - Purpose and authorisation
  - Contravention of HSU Rules
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
  - Damage to HSU
- G.7. Dads in Education Father's Day Breakfast
  - Donations
  - Purpose and authorisation
  - Contravention of HSU Rules
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
- G.8. Central Coast Convoy for Kids
  - Donation
  - Purpose and authorisation
  - Contravention of HSU Rules
  - Contravention of section 287(1)
  - Contravention of section 286(1)
  - Contravention of section 285(1)
- G.9. Central Coast Rugby League
  - Contravention of HSU Rule 36(b)
  - Contravention of section 285(1)
- G.10. Failure to cause HSU to disclose donations
  - Obligation to disclose Central Coast Convoy and Golden Years Collectables donations
  - Non-disclosure of donations
  - Contravention of HSU Rule 32(f)
  - Contravention of section 285(1)
- G.11. Annual leave while campaigning for Dobell in October and November 2007
  - Contravention of HSU Rule 32(e)
  - Contravention of section 285(1)
- H. **OTHER CONTRAVENTIONS CONCERNING THE HSU NATIONAL OFFICE**

- H.1. Employment of other National Office staff
  - Nicole Rodger
  - Karinda Flavell
  - Struan Robertson
  - Mark McLeay
  - Belinda Ord
- H.2. Failure to prepare policies and procedures
  - Policies and procedures relating to credit cards
  - Contravention of section 285(1)
  - Policies and procedures concerning travel-related expenditure
  - Contravention of section 285(1)
- H.3. Payments relating to National Council meetings
  - Fares and expenses of Branch delegates to National Council meetings
  - 2006 National Council Meeting
  - 2007 National Council Meeting
- H.4. Payment to Julie Williamson Fundraising Appeal
  - Contravention of HSU Rule 36(b)
  - Contravention of section 285(1)

3           On 30 January 2013, 149 charges were laid against the respondent for breaches of various provisions of the *Crimes Act 1958* (Vic). Most of these charges were laid under either s 81 or s 82 of that Act, but ss 74 and 321M were also relied on. On 5 February 2013, a further five charges were laid against the respondent for breaches of ss 74, 81, (one count in each case) and 82 (three counts) of that Act.

4           The laying of these charges has given rise to two questions which presently require determination: first, whether the present proceeding is stayed to any, and if so what, extent by the operation of s 312 of the RO Act; and secondly, if something less than a complete stay is effected by s 312, whether the court should, in the exercise of its discretion, stay the remainder.

5           Sections 311, 312 and 313 of the RO Act provide as follows:

**311 Civil proceedings after criminal proceedings**

The Federal Court must not make a pecuniary penalty order against a person or organisation for a contravention if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

**312 Criminal proceedings during civil proceedings**

(1) Proceedings for a pecuniary penalty order against a person or organisation are stayed if:

- (a) criminal proceedings are started or have already been started against the person or organisation for an offence; and
- (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.



- (2) The proceedings for the order may be resumed if the person or organisation is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

**313 Criminal proceedings after civil proceedings**

Criminal proceedings may be started against a person or organisation for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether an order under this Part has been made against the person or organisation.

6 It is common ground that each of the contraventions covered by Part F in the applicant's Statement of Claim is constituted by conduct that is substantially the same as conduct which is the subject of the criminal offences with which the respondent has been charged. It is also common ground that no such offence is constituted by conduct that is substantially the same as the conduct alleged to constitute any contravention covered by Part G or Part H of the applicant's Statement of Claim. The question which arises, in these circumstances, is one of construction: if, in a single proceeding under s 306 of the RO Act, some alleged contraventions are constituted by conduct which is substantially the same as the conduct in respect of which the person concerned is alleged to have committed a criminal offence, while other contraventions do not satisfy that description, is the proceeding under s 306 stayed at all, and if so, is it stayed in its entirety, or only to the extent of the allegations which involve substantially the same conduct as that upon which the criminal charges are based?

7 Neither party submitted that s 312 required there to be a perfect correlation, or complete overlap, as between the criminal proceedings and the corresponding proceedings under s 306. In the circumstances of the present case, therefore, it is common ground that s 312 has some operation at least. On behalf of the applicant, it was submitted that s 312 operated to stay only so much of the present proceeding as related to conduct which was substantially the same as the conduct with respect to which the charges had been laid. In other respects, it was submitted, the present proceeding was not stayed, and could proceed in the normal way. On behalf of the respondent, it was submitted that, it being accepted that aspects of the conduct upon which the applicant relied were substantially the same as those with respect to which the charges had been laid, s 312 operated to stay the present proceeding in its entirety. It was said that s 312 could not be sliced up, in effect, as the applicant proposed, and that the "proceedings" to which s 312(1) referred was the proceeding brought

in court as a procedural artefact, regardless of whether that proceeding also included allegations that were unrelated to the conduct upon which the charges were based.

8           The construction for which the respondent contends does not, in my view, sit comfortably with the text of s 312 itself. Paragraphs (a) and (b) of subs (1) speak of "an offence" and of "the offence", in the singular. Paragraph (b) speaks of "the contravention", also in the singular. Although, no doubt, the singular includes the plural in this provision, the comparison which is implicitly required by the subsection must proceed offence by offence, and contravention by contravention. That is to say, each offence with which the person concerned has been charged must be lined up with a particular alleged contravention (of the RO Act) for the purpose of determining the matter of substantial correspondence to which para (b) refers. Then, if the person is convicted of *that* offence, the proceedings for the order, in relation to *that* contravention, are dismissed: subs (2).

9           There can be no assumption that a proceeding commenced in this court which alleges at least a single contravention of a civil penalty provision under the RO Act would contain no other allegation, and rely on no other cause of action. Indeed, it is a commonplace that civil proceedings include suites of allegations, often invoking causes of action arising under federal law and otherwise. If the respondent's submission is correct, the existence of a single allegation which invokes the court's jurisdiction under s 306 of the RO Act would put the proceeding as a whole at peril of being dismissed by the operation of s 312(2), if the person concerned were charged, and subsequently convicted, of an offence based on conduct which was substantially the same as the conduct alleged to constitute the civil contravention. That would, in my view, be a consequence of such striking inconvenience as to exclude it from the range of possibilities that might reasonably have been within the contemplation of the legislature when it enacted s 312.

10           I discuss below, in another context, the principles which have been recognised as guiding the discretion of a civil court to stay further proceedings until the completion of contemporaneous criminal proceedings which involve correspondence of critical facts or allegations. To the extent that the administration of justice might be damaged by both proceedings going forward at the same time, that would occur, at least in the normal case, within this area of correspondence. Consistently with that idea, the policy of s 312, as it seems to me, is concerned with particular offences and particular civil contraventions, where

the conduct providing the basis for each is substantially the same. It is difficult, if not impossible, in my view, to perceive in s 312 a purpose of preventing the applicant in the civil proceeding from pursuing the remedies to which he or she is presumptively entitled in respects other than those in which the conduct relied on has the correspondence to which the section refers.

11 In my view, it does no violence to the text or apparent intent of s 312 for it to be construed as operating upon the s 306 proceeding to the extent that the conduct alleged therein is substantially the same as conduct constituted by the offence or offences with which the person concerned has been charged. I would construe the opening passage of s 312 as follows: "Proceedings for a pecuniary penalty order against a person or organisation are stayed to the extent that: ..." That is, I consider, a practical and workable construction, and is the one which I propose to adopt.

12 The result of the operation of s 312 of the RO Act then, is that, to the extent that the present proceeding is one for a pecuniary penalty order under s 306 of the RO Act and the relevant contraventions are constituted by the allegations in Parts F.2, F.3, F.4 and F.5 of the Statement of Claim, the proceeding is stayed.

13 The next question is whether the court should, in the exercise of its discretion, stay all or some part of the remainder of the proceeding. The applicant accepts that, to the extent that the allegations in Parts F.2, F.3, F.4 and F.5 of her Statement of Claim would be relied upon in support of orders other than for pecuniary penalties (substantially, as I understand it, orders for compensation under s 307), the proceeding should likewise be stayed. In the result, the proceeding will be wholly stayed with respect to the allegations in those parts of the Statement of Claim.

14 The respondent contends that the remainder of the proceeding should also be stayed in accordance with the principles expressed in *McMahon v Gould* (1982) 7 ACLR 202, 206-207:

- (a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court (*Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 19);
- (b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds (*ibid*);
- (c) The burden is on the defendant in a civil action to show that it is just and

- convenient that the plaintiff's ordinary rights should be interfered with (*Jefferson Ltd v Betcha* [1979] 1 WLR 898 at 905);
- (d) Neither an accused (*ibid*) nor the Crown (*Rochfort ...* at 21) are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;
  - (e) The court's task is one of "the balancing of justice between the parties" (*Jefferson ...* at 904), taking account of all relevant factors (*ibid* at 905);
  - (f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors (*ibid* at 905);
  - (g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding (*ibid* at 904). ....
  - (h) However, the so-called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding (*ibid* at 904-5);
  - (i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (*ibid* at 905);
  - (j) In this regard factors which may be relevant include:
    - (i) the possibility of publicity that might reach and influence jurors in the civil proceedings (*ibid* at 905);
    - (ii) the proximity of the criminal hearing (*ibid* at 905);
    - (iii) the possibility of miscarriage of justice eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses (*ibid* at 905);
    - (iv) the burden on the defendant of preparing for both sets of proceedings concurrently (*Beecee Group v Barton* (1980) 5 ACLR 33);
    - (v) whether the defendant has already disclosed his defence to the allegations (*Caesar v Somner* [1980] 2 NSWLR 929 at 932; *Re Saltergate Insurance Co Ltd* (1980) 4 ACLR 733 at 736);
    - (vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him (*cf Re Saltergate ...* at 735-6);
  - (k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. ....
  - (l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed [(*Beecee Group ...*).

15           The circumstance that the allegations in this case which are based on conduct which is substantially the same as that which provides the foundation for the criminal charges will not, pending the completion of the criminal proceedings, be a part of the case made the task of the respondent in persuading the court to stay the proceeding as a whole a challenging one. Given the operation of s 312 of the RO Act, and the stay of the proceeding to the extent that it relates to the allegations in Part F of the Statement of Claim referred to above, there is no

longer the obvious basis for a discretionary stay to which the *McMahon v Gould* principles were addressed. However, counsel for the respondent relied upon the first five factors in item (j) in the list above as justifying a discretionary stay of the balance of the proceeding not already stayed by the operation of s 312(1). I shall turn to those factors in a moment.

16 Counsel for the respondent made the general submission that there was not a bright line separating the aspects of the case that had been stayed under s 312(1) from those which had not. Counsel referred first to allegations in the Statement of Claim, in Parts G and H as well as in Part F, which foreshadowed a reliance by the applicant on certain rules of the Union. It was said that, if these rules were relevant to Part F of the Statement of Claim, they were presumably relevant also to the offences with which the respondent has been charged, and that their involvement in the applicant's case under Parts G and H of her Statement of Claim created a degree of commonality as between the civil and the criminal proceedings which would give rise to embarrassment and prejudice of the kind which the *McMahon v Gould* principles were intended to avoid. The submission made on behalf of the respondent, however, went no further than that. I was not taken to the terms of the particular rule or rules that might be relevant both in the civil and in the criminal proceedings, and I have not, therefore, been able to get a sense of the nature or gravity of the embarrassment and prejudice referred to.

17 Counsel submitted that, in both proceedings, the court would be called upon to "construe" the rules of the Union in question. I accept that, if it should come to pass that the same rule is being construed by different courts at the same time, there may be the risk of inconsistent rulings. In that event, I would not exclude the possibility that this court (and I cannot speak for the court which would have control of the criminal proceeding) would make whatever adjustment to its process as might be necessary to avoid such inconsistency. I am not, however, persuaded that the prospect of the same rule having to be construed in different proceedings is a sufficient reason, either in itself or in combination with other factors referred to herein, to stay the whole of the present proceeding.

18 Counsel also foreshadowed that the present proceeding would quite likely require a resolution of one of the collective bodies within the Union made on 25/26 February 2003 to be "construed". It was suggested that that resolution would, or at least may, also come up for construction in the criminal proceeding. Again, I was not exposed to the terms of the

resolution, or to the constructional problems which seemingly lie ahead. As with the construction of the rules of the Union, however, I am not persuaded that the prospect that the meaning of the resolution passed by a body within the Union in February 2003, would come before different courts for consideration is something which should cause the present court, at this early stage, to stay the whole of the proceeding in which it has jurisdiction.

19           Returning now to *McMahon v Gould*, counsel for the respondent first submitted that the conduct of the present case would be associated with substantial publicity in the media which would have the very real potential to infect the thinking of members of the public, from whose ranks the jurors in the criminal trial would be drawn. It was submitted that I should be slow to assume that the media, or those to whom its messages are addressed, would be able to make a ready discrimination between the different categories of contravention which form the basis of the applicant's allegations in the present case.

20           I cannot see why I should not make that assumption. At the purely factual level, the conduct with which the balance of the present proceedings is concerned is quite different from that which forms the basis of the charges which have been laid against the respondent. It is true, perhaps, that there are some threads of legal principle which run through all of the presently relevant matters, but those threads would, in my view, be much more apparent to the legal practitioner than to members of the public. Furthermore, if, as I presume will be the case, the media will report the present proceeding in an accurate and responsible way, the risk that reasonable members of the public would fail to appreciate that there are two proceedings against the respondent, each with its own factual allegations, is a negligible one. Doubtless the circumstance that the respondent is also facing the criminal charges will be commented upon from time to time, but this puts the respondent in a position no different from any person who has the misfortune to be involved in separate legal proceedings within what is broadly the same time frame. Even if one of those proceedings is to be determined by way of a jury trial, the fact that the respondent has recently been (or is still being) sued in another proceeding is, in my view, no basis to stay the latter.

21           The next point advanced by counsel for the respondent related to the "proximity" of the present proceedings with the criminal proceedings arising out of the charges which have been laid. To the extent that the relevant detriment is constituted by the burden of having to give attention to two serious proceedings at the same time, I deal with the subject below. To

the extent that the detriment relates to the confusion which might be generated in the eyes of the public, and therefore in the eyes of potential jurors, as between the two proceedings, I have dealt with it above. Otherwise, the "proximity" point appears to come down to the circumstance that the respondent will not be able to be in two places at the same time. I accept that proposition, of course, but it is much too early to anticipate a logistical problem of that kind. The problem here is essentially one of listing, rather than one which requires the present proceeding to be stayed at this stage. The parties will have liberty to apply, and, if it appears that the present case will be ready for trial at about the same time that the criminal prosecution will be heard in the relevant court, I have no doubt but that appropriate arrangements would be made to ensure that the respondent suffers no prejudice as a result of a clash of dates, or nearly so.

22           It was next put by counsel for the respondent that, unless the present proceeding were now stayed, the respondent would be confronted with the burden of having to prepare for two important cases within the same time frame. That is a consideration, but, upon analysis, it is not, in my view, one of great weight. If the present proceeding stood alone, the allegations in Part F of the Statement of Claim would not have been stayed pursuant to s 312 of the RO Act. The respondent would then have been obliged to engage in preparation for the whole of the allegations made by the applicant. As it happens, the matters which correspond to the conduct alleged in Part F will be a concern for the respondent in the criminal proceeding, but not in this proceeding. Taking that circumstance into account, and having regard to the current stage which each proceeding has reached, I am not persuaded that the respondent is in any worse position than someone who is obliged to confront wide-ranging allegations, whether in one proceeding or two, and whether or not either of the proceedings is a criminal one.

23           Counsel for the respondent next submitted that, if this proceeding were not stayed, the respondent would be obliged to disclose defences (as they were described) upon which he has not yet firmly decided to rely, but which may be invoked at an appropriate stage, under ss 315, 285, 292 and/or 293 of the RO Act. These were, however, all defences that might be taken in this proceeding. The relevant principle in *McMahon v Gould* relates to defences which might be open in the criminal proceeding, but which would have to be disclosed in the anterior civil proceeding if the latter were to be responsibly conducted in the interests of the person concerned. The point was not put to the court in a way that made relevant defences of

the kind contemplated in *McMahon v Gould*. I would add that, in the view I take, whatever might be the position otherwise, the circumstance that the defences referred to by counsel will relate only to alleged contraventions of the RO Act which do not overlap with the criminal offences of which the respondent has been charged necessarily produces the result that there could be neither embarrassment nor prejudice, in relation to the criminal case, should it be the fact that the time arises for the respondent to take those defences in the present proceeding.

24 Counsel for the respondent raised a final general point which related to information which, it seems, the applicant disclosed to the Victoria Police pursuant to s 335C(2)(b) of the RO Act, which was introduced on 29 June 2012. Counsel's submission was that, having co-operated with the police in this way, the applicant is now in no position to resist the normal consequences of the criminal proceedings against the respondent involving common factual elements with those which arise in the present proceeding. There is, in my view, nothing in this point. It was not suggested that the applicant's provision of information to the police was unauthorised or otherwise irregular, which takes us back to the general question whether there is likely to be such a commonality of factual material as between the forthcoming prosecution and the present proceeding as to give rise to prejudice or embarrassment to an extent sufficient to invoke the court's discretionary power to stay the latter. For reasons already given, that will not be the situation.

25 For the above reasons, save with respect to the residue of the allegations in Parts F.2, F.3, F.4 and F.5 of the Statement of Claim not stayed by the operation of s 312 of the RO Act, there will be no order staying any part of this proceeding.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:



Dated: 26 April 2013