FEDERAL COURT OF AUSTRALIA

Ashby v Commonwealth of Australia (No 4)

[2012] FCA 1411

Citation:	Ashby v Commonwealth of Australia (No 4) [2012] FCA 1411
Parties:	**JAMES HUNTER ASHBY v COMMONWEALTH OF AUSTRALIA and PETER SLIPPER**
File number:	NSD 580 of 2012
Judge:	**RARES J**
Date of judgment:	12 December 2012
Catchwords:	**PRACTICE AND PROCEDURE** – dismissal or stay – application for proceedings to be dismissed or stayed as an abuse of process pursuant to r 26.01(1) of the *Federal Court Rules 2011* (Cth) – categories of abuse of process not closed – where allegations allegedly made in pleading for predominant purpose of a political attack to advance maker's own interests – where some allegations made that were irrelevant, scandalous or calculated to injure – where applicant's lawyer responsible for impugned allegations – where applicant and lawyer intended or aware that media would obtain a copy of pleading and publish allegations made in it **COSTS** – where Court's power to order a party to pay costs limited by s 570(1) of the *Fair Work Act 2009* (Cth) – to cases where Court satisfied that applicant instituted proceedings vexatiously or without reasonable cause, or that applicant's unreasonable act or omission caused respondent to incur costs **Held:** proceedings an abuse of process – applicant to pay costs
Legislation:	*Constitution of the Commonwealth of Australia* s 40 *Evidence Act 1995* (Cth) s 126H *Fair Work Act 2009* (Cth) ss 340, 342, 351, 372, 545, 550, 570(1), 570(2)(a), 570(2)(b) *Federal Court of Australia Act 1976* (Cth) s 37M(2)(e) *Federal Court Rules 2011* (Cth) rr 2.32, 2.32(2,) 6.02, 8.05(1)(a), 26.01, 26.01(1)(b) *Judiciary Act 1903* (Cth) ss 78B, 78B(1)

	Legal Profession Act 1987 (NSW) s 57B *Legal Profession Act 2004* (NSW) *Professional Conduct and Practice Rules 1995* (NSW) *Safety Rehabilitation and Compensation Act 1988*(Cth) s 45(4)
Cases cited:	*Ahern v The Queen* (1988) 165 CLR 87 applied *Ashby v Commonwealth of Australia (No 2)* (2012) 203 FCR 440 referred to *Ashby v Commonwealth of Australia* [2012] FCA 640 referred to *Barker v Commonwealth Bank of Australia* [2012] FCA 942 applied *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 referred to *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 referred to *Clyne v NSW Bar Association* (1960) 104 CLR 186 applied *Fraser-Kirk v David Jones Ltd* (2010) 190 FCR 325 referred to *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 applied *Jones v Skelton* [1963] 63 SR (NSW) 644 applied *Kraus v Menzie* [2012] FCAFC 144 applied *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 referred to *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340 applied *Lewis v Daily Telegraph Ltd* [1964] AC 234 applied *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293 applied *Lloyd v David Syme & Co Ltd* [1986] AC 350 applied *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 applied *Omilaju v Waltham Forest London Borough Council* [2005] 1 All ER 75 referred to *Plomp v The Queen* (1963) 110 CLR 234 referred to *The Queen v Hillier* (2007) 228 CLR 618 applied *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 referred to *Williams v Spautz* (1992) 174 CLR 509 applied
Dates of hearing:	23 July 2012, 17 August 2012, 2, 4 and 5 October 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	202

Counsel for the Applicant:	Mr M B J Lee SC with Ms J McDonald (23 July 2012, 2, 4 and 5 October 2012) and Ms R Francois (23 July 2012, 17 August 2021 and 4 October 2012)
Solicitor for the Applicant:	Harmers Workplace Lawyers
Counsel for the First Respondent:	Mr J W K Burnside QC (23 July 2012, 2 and 4 October 2012) with Ms M Richards (23 July 2012, 17 August 2012) and Mr M Albert (2 and 4 October 2012)
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr I Neil SC with Mr D Chin (23 July 2012, 17 August 2012) Mr Slipper appeared in person on 4 and 5 October 2012
Solicitor for the Second Respondent:	Maurice Blackburn (up to 18 September 2012)

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 580 of 2012**

BETWEEN:	**JAMES HUNTER ASHBY** **Applicant**
AND:	**COMMONWEALTH OF AUSTRALIA** **First Respondent**
	PETER SLIPPER **Second Respondent**

JUDGE:	**RARES J**
DATE OF ORDER:	**12 DECEMBER 2012**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The proceedings be dismissed.

2. The applicant pay the second respondent's costs.

3. The costs ordered on 17 August 2012 to be paid by the second respondent to the applicant be set off against costs the subject of order 2.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 580 of 2012**

BETWEEN:	**JAMES HUNTER ASHBY** **Applicant**
AND:	**COMMONWEALTH OF AUSTRALIA** **First Respondent**
	PETER SLIPPER **Second Respondent**
JUDGE:	**RARES J**
DATE:	**12 DECEMBER 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 James Ashby commenced working as advisor to the Hon Peter Slipper in his capacity as Speaker of the House of Representatives, on 22 December 2011. Mr Slipper had become Speaker on 24 November 2011 with the support of the Labor Party Government in circumstances of some controversy. On the same day, Mr Slipper had ceased to be a member of the Queensland Liberal National Party (**LNP**) which was part of the Parliamentary Opposition. He then sat as an independent. Neither the Government nor the Opposition had a majority of seats in the House and the Government depended on the support of a number of independents.

2 On 20 April 2012, Mr Ashby's solicitors, **Harmers** Workplace Lawyers, electronically filed in the Court an originating application under the *Fair Work Act 2009* (Cth). The originating application alleged, among other serious matters, that during Mr Ashby's employment Mr Slipper had sexually harassed Mr Ashby and involved him in "questionable conduct in relation to travel". The originating application named the Commonwealth as the first respondent and Mr Slipper as the second respondent. Members of the staff of Senators, Members of the House of Representatives and Parliamentary office-holders, such as the Speaker, are employed by the Commonwealth under the *Members of Parliament (Staff) Act 1984* (Cth) (**the MOPS Act**).

3 Mr Slipper applied to have these proceedings dismissed as an abuse of the process of the Court. Mr Slipper contended that Mr Ashby's predominant purpose in bringing the proceedings against him, in combination with Karen **Doane** (another member of Mr Slipper's staff), the Hon Malcolm **Brough** (who was seeking to contest Mr Slipper's seat for the LNP at the next federal election), Steve **Lewis** (a journalist, employed by one of News Limited's subsidiaries as the national political correspondent for the *Daily Telegraph*), Anthony **McClellan** (a media consultant engaged by Mr Ashby) and Mr Ashby's lawyers, Michael **Harmer** and his firm, Harmers was, in effect, to inflict damage on Mr Slipper's reputation and political career in order to assist the LNP and Mr Brough and, so, to advance Mr Ashby's and Ms Doane's prospects of advancement or preferment by the LNP. The present application has been bitterly fought.

4 The legal principles at the heart of Mr Slipper's central allegation that the proceeding is an abuse of process are not in doubt. The Courts have an unlimited power over their own processes to prevent those processes being used for the purpose of injustice. That is why the categories of abuse of process are not closed: *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 at 93-94 [27]-[28] per French CJ, Gummow, Hayne and Crennan JJ. Proceedings that are seriously or unfairly burdensome, prejudicial or damaging, or productive of serious and unjustified trouble and harassment are examples of abuses of process. So too are proceedings where the Court's process is employed for an ulterior or improper purpose, or in an improper way, or in a way that would bring the administration of justice into disrepute among right thinking people: 239 CLR at 93-94 [27]-[28]. In *Williams v Spautz* (1992) 174 CLR 509 at 529 Mason CJ, Dawson, Toohey and McHugh JJ held (applying what the English Court of Appeal had held in *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB 391 at 469) that a party who alleged that a proceeding had been brought, or was being prosecuted, as an abuse of process had to show that the pre-dominant purpose of the other party in using the legal process "has been one other than that for which it was designed". They held that the onus of satisfying the Court that there was an abuse of process lay on the party alleging it and that this onus was "a heavy one". Their Honours cautioned that the power to grant a permanent stay in such cases could only be exercised in the most exceptional circumstances.

5 Mr Slipper also argued that the proceeding should be characterised as an abuse of the process of the Court because it was commenced and prosecuted in a manner that was

seriously and unfairly burdensome, prejudicial and damaging to him, or productive of serious and unjustified harassment. He argued that the proceedings were commenced and prosecuted in a manner that brought the administration of justice into disrepute, based on those vexatious and oppressive features together with the allegedly improper purpose of Mr Ashby and his confederates. He also contended that the process of the Court had been used as an instrument of a calculated and orchestrated political and public relations campaign with the object of harming him, aiding his political opponents and advancing the interests of Mr Ashby and Ms Doane.

PROCEDURAL BACKGROUND

6 The originating application filed on 20 April 2012 was in an irregular and unusual form. It sought damages for breach of contract and should have claimed the relief that Mr Ashby sought while being accompanied by a statement of claim as required by r 8.05(1)(a) of the *Federal Court Rules 2011* (Cth): *Ashby v Commonwealth of Australia* [2012] FCA 640 at [2]-[3]. On its final page the originating application contained a statement that the allegations it made were supported "by sworn/affirmed evidence", that included a forensic report in respect of text messages that it set out verbatim. The originating application made a number of serious allegations concerning Mr Slipper's conduct including that:

- Mr Slipper had sexually harassed Mr Ashby in the course of his employment (**the sexual harassment allegations**);
- in 2003 Mr Slipper had a relationship of a sexual nature with a younger male member of his staff and an encounter between them had been recorded on a video, a viewer of which had concluded that the relationship was consensual (**the 2003 allegations**); and
- Mr Ashby had been forced on three occasions to watch Mr Slipper sign multiple Cabcharge vouchers during his employment and hand them to the driver of a vehicle in which they both travelled and that Mr Ashby intended to report these matters to the Australian Federal Police (**the Cabcharge allegations**).

I will describe those allegations in more detail later in these reasons. Importantly, by filing the originating application in the Court, Mr Ashby, Mr Harmer and Harmers made the allegations it contained under absolute privilege.

7 On the same day as the originating application was filed, Vanda Carson, a journalist from the *Daily Telegraph*, a newspaper published by News Limited or one of its subsidiaries, sought and obtained access to the "statement of claim" under r 2.32 of the *Federal Court Rules*. Later on 20 April 2012, Mr Lewis, sent a text message to Mr Slipper saying he would like to contact him for his comment on the allegations in "court documents". Mr Lewis and Mr Ashby knew that Mr Slipper was then overseas. The next day many of the allegations about Mr Slipper's conduct that were made in the originating application received significant publicity in the media.

8 On Tuesday 15 May 2012, three days before the proceedings were first listed for directions, Mr Ashby filed a statement of claim that had been settled by senior counsel. That pleading substantially repeated, in a pithier form, the sexual harassment allegations made in the originating application. However, the statement of claim did not repeat the 2003 allegations and the Cabcharge allegations. Mr Ashby had only served Mr Slipper formally with the original originating application early that week.

9 On 18 May 2012, Mr Ashby applied in Court to amend his originating application to a more conventional form. On that occasion, senior counsel for the Commonwealth and the solicitor for Mr Slipper, both foreshadowed that they wished to give consideration to making an application to have the proceedings dismissed on the ground that they were an abuse of the process of the Court. I made directions that any such application be filed by 8 June 2012. In the event, both Mr Slipper and the Commonwealth filed such applications. Both based their applications under r 26.01. In addition, Mr Slipper sought an order that Mr Ashby not continue the proceedings on the ground that they were vexatious within the meaning of r 6.02.

10 On 15 June 2012, I directed each of the Commonwealth and Mr Slipper to plead points of claim in support of their interlocutory applications in order to identify the issues they wished to raise. I also ordered Mr Ashby to file and serve points of defence in reply. However, Mr Slipper's original and amended points of claim, when filed, suggested that Mr Ashby may have acted unlawfully in providing Mr Lewis and Mr Brough with photocopies of Mr Slipper's diary entries for particular periods in 2009 and 2010. (I will refer to the amended points of claim filed on 26 June 2012 as "Mr Slipper's points of claim".) As a result, on 6 July 2012, I relieved Mr Ashby of having to file any defence or evidence

until the moving parties, on the interlocutory applications to dismiss the proceedings, had closed their cases. This was to avoid Mr Ashby being put in the position of potentially having to incriminate himself until he knew the case and evidence he had to meet and could make an informed decision as to the course he wished to take. On 13 July 2012, I decided another interlocutory application filed by Mr Lewis. He had sought to be excused from producing a document in answer to a subpoena which he claimed was the subject of journalist's privilege under s 126H of the *Evidence Act 1995* (Cth): *Ashby v Commonwealth of Australia (No 2)* (2012) 203 FCR 440.

11 The interlocutory applications under r 26.01 were fixed for hearing on 23 July 2012. On that day, I ordered that evidence in each interlocutory application be evidence in the other and that they be heard together. After the Commonwealth and Mr Slipper had closed their cases, Mr Ashby announced that he elected to go into evidence and filed points of defence with two affidavits. The affidavits were made by David Russell QC, a former senior office holder of the LNP and one of its predecessor parties, the National Party and the Liberal Party, and Mr Harmer, who had caused the originating application to be filed in its original form. Mr Ashby also filed in Court a notice under s 78B of the *Judiciary Act 1903* (Cth). That notice asserted that to the extent any obligation of confidence or contract might have prevented him from supplying copies of Mr Slipper's diary to Mr Lewis and Mr Brough, Mr Ashby's conduct in doing so was protected under the implied constitutional freedom of communication on government and political matters: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Accordingly, the hearing of the interlocutory applications had to be adjourned, as required by s 78B(1), and they were fixed for further hearing on 2 October 2012.

12 On 17 August 2012, Mr Slipper applied to withdraw the allegations of unlawfulness made in his points of claim against Mr Ashby that had given rise to, among others, the constitutional issue. As a result, the evidence in the interlocutory applications was somewhat simplified, although it would not be accurate to describe it as simple. Indeed, the evidence is complex and voluminous. On 18 September 2012, Mr Slipper's solicitors filed a notice of ceasing to act and he then began to represent himself. At about 4.15 pm on the public holiday, 1 October 2012, Mr Slipper sent an email to my associate asserting that he had only formally learnt, on 28 September 2012, of the settlement of the proceedings arrived at between Mr Ashby and the Commonwealth and he was not in a position to appear the next

day. However, on numerous occasions, commencing when Mr Slipper first began to represent himself, Harmers had written to him informing him that his interlocutory application was listed for hearing on 2 October 2012 and that any application by him to adjourn that hearing would be opposed.

13 When the proceedings were called on 2 October 2012, Mr Slipper did not appear. Mr Ashby and the Commonwealth announced that they had entered into a settlement that each regarded as binding. However, they disagreed about the meaning of a term requiring the provision of "appropriate releases". Because the proceedings between Mr Ashby and the Commonwealth had not completely resolved and both part-heard interlocutory applications were subject to the order made on 23 July 2012 that they be heard together with evidence in one being evidence in the other, I ordered the whole of the proceedings, including the dispute as to the terms of release the subject of the settlement and all outstanding interlocutory applications to be referred to the Registrar for mediation the next day. All parties attended the mediation but after a lengthy period in discussion, the mediation was unsuccessful.

14 The parties returned to Court on 4 October 2012. Mr Slipper appeared and represented himself. I resolved the issue of what were "appropriate releases" and, by consent, the Commonwealth discontinued its interlocutory application and Mr Ashby discontinued his proceedings as against the Commonwealth. Part of the settlement involved the Commonwealth paying Mr Ashby $50,000 in settlement of all his claims against it, excluding any claim he might have against Comcare under the *Safety Rehabilitation and Compensation Act 1988* (Cth) and the proceedings he had against Mr Slipper.

15 Throughout the proceedings the media have displayed a great deal of interest in what has transpired in Court. This has included reporting on the details of publicly available documents, such as the originating and interlocutory applications that have been filed in the Court, and the evidence adduced in open Court, some of which, is of a highly personal and, in some instances, quite vulgar or inappropriate nature. At times each of Mr Ashby and Mr Slipper sent text messages, now in evidence, that used vile, and sometimes sexually inappropriate language and descriptions.

THE ORIGINATING APPLICATION

16 Mr Ashby's originating application made two claims for relief:

(1) a claim under the *Fair Work Act 2009* (Cth) that Mr Ashby had suffered adverse action by both the Commonwealth and Mr Slipper in the form of sexual harassment by Mr Slipper because of Mr Ashby's sexual preferences. Mr Ashby sought orders that Mr Slipper undergo counselling and training in the area of anti-discrimination, civil penalties be imposed on each of the Commonwealth and Mr Slipper and he be awarded compensation (after receipt of medical evidence);

(2) a claim for damages for breach by the Commonwealth of Mr Ashby's contract of employment "by involving [him] in questionable conduct in relation to travel", namely the Cabcharge allegations.

17 The sexual harassment claim comprised, *first*, the 2003 allegations and, *secondly*, a series of incidents involving Mr Slipper during the period between 4 January 2012 and 20 March 2012. The latter series was repeated in substantially similar terms in the statement of claim. I will summarise below the three sets of allegations that were made in the originating application.

The 2003 allegations

18 The 2003 allegations pleaded that:

- in mid 2003, the Commonwealth became aware that Mr Slipper had formed a relationship of a sexual nature with a younger male member of his staff, because Megan Hobson, a former member of Mr Slipper's staff had informed a senior adviser to the then Prime Minister that she had viewed a video in which Mr Slipper was observed to:
  - (a) enter the bedroom of the male staff member via the window;
  - (b) lie on a bed in shorts and a t-shirt with the staff member and hug him in an intimate fashion;
  - (c) "urinate out of the window of the room" of his staff member.
- after she had viewed the video Ms Hobson had concluded that the relationship was consensual ;
- the Prime Minister's adviser told Ms Hobson to "forget all about it";

- the Commonwealth thereafter failed "to take reasonable and effective steps to prevent [Mr Slipper] from utilising his office to foster sexual relationships with young male staff members";
- in around budget week in May 2003, the young male staff member had complained to Ms Hobson to the effect that he had been abused by Mr Slipper after an event in January 2003 when Mr Slipper made advances on him which were rejected.

The sexual harassment allegations

19 In substance, the sexual harassment allegations were that:

(1) In Mr Ashby's first week of work, commencing on 2 January 2012:

- At Mr Slipper's insistence he stayed in the latter's flat in Canberra. Mr Slipper had told Mr Ashby that another longer term male staff member normally stayed in the flat but was away and that others had also stayed in the flat.
- Mr Slipper had come into his office during that week and said that the male staff member referred to above had made an observation of a sexual kind concerning the relationship between Mr Slipper and Mr Ashby that Mr Ashby had brushed off at the time.
- On 4 January 2012, in his offices in Parliament House, Mr Slipper complained of having a sore neck and that, despite the availability of medical and other services in Parliament House, he asked Mr Ashby, at his flat, later that day to massage his neck. Mr Ashby claimed that he agreed to do so, not knowing what the appropriate response for a new staff member should be. When Mr Slipper lay on his bed clothed only in shorts, Mr Ashby commenced to massage his neck. Mr Slipper made groaning noises of a sexual nature that shocked Mr Ashby and made him very uncomfortable so that he stopped massaging, told Mr Slipper that he had finished and proceeded to leave the room. Mr Slipper had observed that the massage "felt so good".
- Mr Slipper suggested that Mr Ashby should shower and go the toilet with the door open and that Mr Ashby responded that it was not appropriate to do so.

The next day Mr Ashby heard Mr Slipper showering and saw that the bathroom door was open.

- As they were returning to Queensland via Sydney where they stopped over, Mr Slipper allegedly made a rude remark that the casual shirt Mr Ashby was then wearing made him appear to be fat. This was said to be an act of victimisation, since Mr Ashby was sensitive about his weight.

(2) On 14 January 2012, as he was driving Mr Slipper to a meeting, Mr Slipper made an enquiry about whether Mr Ashby had had a particular form of homosexual intercourse. Mr Ashby claimed to have been shocked and to have replied that this was not the kind of question Mr Slipper should ask.

(3) Some weeks later, while he was driving Mr Slipper in a car, Mr Slipper repeated the question in (2) above and asked Mr Ashby a question relating to the types of homosexual partners he had and that he (Mr Ashby) again responded that these were not the type of question that he should be asked.

(4) A long series of text messages were exchanged between Mr Ashby and Mr Slipper on 1 and 2 February 2012, from late in the afternoon of 1 February 2012 to the following effect:

- Mr Ashby advised Mr Slipper not to give a particular interview to a journalist.
- After Mr Ashby had discovered that Mr Slipper had gone ahead with the interview, Mr Ashby sent a text message telling Mr Slipper that what he had done was not funny and that he could not believe that Mr Slipper had called the journalist. He added: "We'll have to clean this mess up now!!! F[…] f[…] f[…]".
- Mr Slipper responded: "Relax my friend! x". The originating application stated that "x" in a text message is a reference to a kiss.
- Mr Ashby immediately replied: "It's so very hard when u care about the bloke they keep f[…]ing over. I hope like hell they don't f[…] u over this report."
- Mr Slipper subsequently responded: "Xxx". Mr Ashby asserted that that message made him concerned and that he viewed it as bizarre.

- Later that night Mr Slipper sent a text message: "Would be good if you were here but perhaps we are not close enough?".
- Mr Ashby did not respond and, about 20 minutes later, Mr Slipper resent the message, as was his habit when he received no response to text messages.
- Mr Ashby responded: "Ha ha, where's [a long term male staff member] tonight?".
- The two then exchanged text messages that dealt in a mutually provocative way, with speculation as to the possible activities of the other male staff member and the strength of Mr Slipper's personal relationships with both that person and Mr Ashby. The exchanges included both of Mr Ashby and Mr Slipper making sexually provocative statements to one another. Mr Slipper again inquired during this exchange whether Mr Ashby would be interested in being closer and praised his ability at massages. Mr Ashby said that he was happy the way things were adding "I care for u Pete but the massage is as far as it goes. Life's a lot simpler when it's business and a few drinks after work."
- By about 11 pm the exchange ended with Mr Slipper saying that he was sorry things were not working out but appreciated Mr Ashby's frankness. Mr Slipper said that in future circumstances Mr Ashby was to arrange all communications through the other male staff member as he, Mr Slipper, could not guarantee his availability and that he was sorry Mr Ashby was missing Sydney Harbour cruises. (The latter was reference to the harbour cruise that Mr Slipper was scheduled to attend with a visiting overseas parliamentary delegation.) Mr Ashby considered that the withdrawal of the invitation to go on a cruise and the suggestion that he communicate through the other staff member with Mr Slipper to be a sudden change that were reprisals for his declining, what he interpreted to be, Mr Slipper's sexual invitations.
- Mr Ashby inquired whether he was missing the cruise and Mr Slipper responded with a number of ambiguous replies.
- Early on the morning of 2 February 2012, Mr Slipper sent a text message to Mr Ashby saying that he had only been joking on the previous night and

inquiring how that day's media was. He added: "Sometimes I feel depressed and as tho the weight of the world is on my shoulders".

- About a hour later Mr Slipper added that he suspected he was fairly stressed about the next week. (This would be the first sitting of the House of Representatives since Mr Slipper had been made Speaker and he would have to preside over the House.)
- Mr Ashby responded that he understood but that Mr Slipper should "be mindful we all carry that same level of commitment and stress for various reasons".

(5) On 26 February, Mr Ashby and Mr Slipper had a lengthy exchange of text messages including:

- Around 7.30pm, Mr Slipper texted Mr Ashby, who was in Canberra while Mr Slipper was elsewhere, "Lucky Canberra. [A third person] thought you were a nice twink!".
- Mr Slipper repeated the message shortly afterwards and Mr Ashby responded: "Why would he have seen a pic[ture] of me? That's a little weird that comment from him. Weird he was having that convo with u".
- Mr Slipper responded that Mr Ashby had met the third person. After Mr Ashby recollected that he had, Mr Ashby asked what the conversation had been about. Mr Slipper responded that it had been about whether Mr Ashby's loyalty "… was to the thugs in LNP or to me! I told him I was hopeful your loyalty was to me".
- The originating application then stated that there was a lengthy exchange of text messages in which Mr Slipper appeared to be questioning Mr Ashby's loyalty and attempting to control his actions. In the course of that exchange Mr Slipper sent Mr Ashby a message that he did like Mr Ashby but the latter had to understand "I get upset when you play with my enemies and keep me in the dark. It is not what I expect of someone I considered I am close to. If you find this intolerable please discuss." (I have given some more detail of the exchanges on this occasion later in these reasons.)

(5) Mr Ashby had kept all the text messages on his mobile phone and that they had been forensically examined to ensure that they were genuinely sent.

(6) On 1 March 2012, Mr Ashby had prepared a YouTube video of Mr Slipper that explained the significance of the Mace in the Parliament and as, Mr Ashby was showing it to Mr Slipper on Mr Ashby's laptop, Mr Slipper stood behind him and put his arm on Mr Ashby's arm, stroking it and saying that he did "such a beautiful job with these videos". Mr Ashby immediately dropped his arm to ensure the touching ceased.

(7) On 20 March 2012, Mr Slipper walked into Mr Ashby's office and said loudly: "Can I kiss you both". Ms Doane was in the next office and, when Mr Ashby responded very loudly: "No", she looked up. By this time Mr Ashby had formed the view that Mr Slipper had recruited him to his personal staff for the purpose of pursuing a sexual relationship with him.

The Cabcharge allegations

20 The originating application pleaded that:

(1) the terms on which the Commonwealth employed him included terms that the Commonwealth would:

(a) not conduct itself without reasonable and proper cause in a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties (**the trust and confidence term**);

(b) act towards Mr Ashby fairly and in good faith;

(c) act with due regard for the agreed purpose of Mr Ashby's contract of employment, consistently with his justified expectations, and with due care to avoid or minimise adverse consequences to him;

(d) provide a safe system of work for all its employees, including Mr Ashby, and take all reasonable steps to protect their safety (**the safe work term**).

(2) the Commonwealth and Mr Slipper breached their obligations under each of those terms "by involving [Mr Ashby] in questionable conduct in relation to travel". This breach was particularised by reference to the following three incidents:

(a) on 27 January 2012, Mr Ashby was required to travel in Sydney with Mr Slipper as part of his duties. They travelled in a vehicle that was not a Commonwealth car, a taxi cab and did not otherwise display that it was available for hire or reward. Mr Slipper allegedly told Mr Ashby that he was being picked up by a friend and during the journey asked the driver how many Cabcharge dockets he required. The driver replied "three" and at the end of the journey Mr Slipper allegedly signed three Cabcharge vouchers without otherwise filling in any details before handing them to the driver;

(b) on 5 February 2012, Mr Ashby again travelled with Mr Slipper in Sydney and was driven by the same driver in the same vehicle. The pleading asserted that Mr Ashby "was forced to witness [Mr Slipper] sign multiple Cabcharge vouchers without any details being completed, and witnessed [Mr Slipper] hand them to the driver";

(c) on 11 February 2012 Mr Ashby alleged that he was again required to travel in Sydney with Mr Slipper and was "forced to witness" Mr Slipper sign multiple Cabcharge vouchers in the same way and hand them to the driver.

(3) Next the originating application stated:

> "[Mr Ashby] intends to make arrangements to make a statement to the Australian Federal Police concerning these expense issues concurrently with the filing of this application".

The originating application concluded with a general allegation that, due to the conduct of the Commonwealth and Mr Slipper, Mr Ashby had suffered "considerable stress, humiliation and illness and is currently seeking medical assistance".

THE BASIS OF MR SLIPPER'S AND THE COMMONWEALTH'S CLAIMS OF ABUSE OF PROCESS

21 Mr Slipper's points of claim pleaded that the proceedings were an abuse of the Court's process on the following basis:

"10. This proceeding is an abuse of the Court's process because:

(a) **the predominant purpose of Ashby's conduct in bringing this proceeding against Slipper**, **in combination with Doane, Brough, Lewis, McClellan, Harmer and/or Harmers**, was

(i) to vilify Slipper;

(ii) to expose Slipper to opprobrium and scandal;

(iii) to bring Slipper into disrepute; and/or

(iv) to destroy or seriously damage Slipper's reputation and standing, and his political position and career;

in order to advance the political interests of the LNP and/or Brough, and by those means to enhance or promote Ashby's and Doane's prospects of advancement or preferment within, or at the hands of, the LNP;

(b) this proceeding was commenced and prosecuted in a manner that is seriously and unfairly burdensome, prejudicial and damaging to Slipper, or is productive of serious and unjustified trouble and harassment, in that:

(i) no steps of any kind had been taken by Ashby to raise or resolve any dispute with Slipper prior to the dissemination of the allegations made in the proceeding by means of the publication of the Originating Application;

(ii) the allegations that were set out in the Originating Application were disseminated to the media for publication before any notice of those allegations was given to Slipper and at a time when, to the knowledge of Ashby, Slipper's capacity to respond to the media reports of those allegations was substantially inhibited because he was overseas;

(iii) Ashby abandoned some of those allegations after they had been widely reported in the media

(iv) the proceeding is vexatious and fails to disclose a reasonable cause of action against Slipper; and

(v) in the alternative to (iv), the claims made against Slipper in the proceeding are manifestly weak, and the damage that Ashby's claims to have suffered is illusory or trivial, both absolutely and relative to the damage inflicted on Slipper as a consequence of the commencement of the proceeding and the manner in which it has been prosecuted; and

(c) for the reasons given in (a) and (b), this proceeding was commenced and prosecuted in a manner that:

(i) brings the administration of justice into disrepute; and

> (ii) used the processes of the Court as an instrument in a calculated and orchestrated political and public relations campaign which had as its objects the purposes referred to in (a);
>
> in connection with which Slipper relies upon the facts and matters referred to hereafter in these points of claim." (emphasis added)

22 Mr Slipper then pleaded points of claim in some detail setting out the factual basis on which he contended that these allegations would be established. While Mr Ashby accepted that a number of those facts were correct, he disputed others and the ultimate conclusion asserted by Mr Slipper. Mr Slipper's pleaded case was elaborated as follows:

(1) from mid 2011 Mr Ashby began providing voluntary assistance to Mr Slipper in managing the media;

(2) from mid-October 2011 until 20 April 2012, Mr Ashby fostered beliefs in Mr Slipper that:

- they were friends;
- Mr Ashby supported him politically, had his interests at heart and opposed Mr Brough (who was proposing to contest LNP pre-selection to become its candidate at the next federal election for Mr Slipper's seat in the House of Representations);
- Mr Ashby frankly discussed his homosexuality with him and engaged in light hearted banter that occasionally contained sexual comments;

(3) despite the allegation in Mr Ashby's statement of claim that on 1 February 2012 Mr Slipper had directed him to make future contact through another member of Mr Slipper's staff, Tim **Knapp**, Mr Ashby continued freely to communicate directly with Mr Slipper at all times until 20 April 2012. (The allegation in the statement of claim was substantially similar to an allegation made in the originating application);

(4) from at least 2 February 2012, Mr Ashby's conduct towards Mr Slipper was duplicitous and deceitful because Mr Ashby:

- had conceived, or begun to conceive, plans to bring proceedings and make allegations of the kind in the originating application that would inflict damage on Mr Slipper and empower Mr Slipper's political opponents, including Mr Brough and the LNP;
- met secretly with Mark **McArdle** (who was a lawyer and then a senior shadow Minister in the Queensland LNP State opposition) and discussed those plans;
- asserted his loyalty to Mr Slipper in text messages on 26 February 2012;
- decided to commence proceedings on or about 26 March 2012;
- from about 29 March 2012, communicated and sent extracts of Mr Slipper's 2009 appointments diary to Mr Brough knowing that that material would be used in an attempt to damage Mr Slipper and assist Mr Brough politically against Mr Slipper;
- from 29 March 2012, affirmed with Ms Doane that they were working together in "this journey" and they communicated with one another as well as with Mr Brough and a "Jackie", about their intention to seek employment positions with LNP politicians including in the newly elected Queensland LNP State Government;
- communicated from 2 April 2012 with Mr Lewis about allegations of misuse by Mr Slipper of his travel entitlements, including sending to Mr Lewis extracts of Mr Slipper's 2009 and 2010 appointments diaries;
- was absent from work on sick leave on and after (Tuesday) 10 April 2012, while he secretly travelled to, and stayed in Sydney, in accommodation paid for by News Limited and arranged by Mr Lewis, in order to meet with Mr Lewis, Mr Harmer and his firm and to bring these proceedings;
- Mr Ashby, through Harmers, arranged on about 12 April 2012 that Mr McClellan manage Mr Ashby's contact with the media, including Mr Lewis;

(5) the proceedings were commenced in the context that:

- from 16 April 2012, Mr Lewis commenced publishing newspaper articles alleging that Mr Slipper had incurred excessive travel expenses;
- the originating application was filed on 20 April 2012 and Mr Ashby was aware that Mr Slipper was then in New York, making it difficult for Mr Slipper to respond to the allegations;
- Mr Slipper later received an email in New York from Harmers sent from Sydney at about 4 pm that day which was his first notice of the allegations made in the originating application;
- Mr Slipper left New York at 6.45 pm on 20 April 2012 (Sydney time) and arrived in Los Angeles later that day to be met by members of the Australian media, including television crews, questioning him over the allegations that had been made in the proceedings. When he arrived in Brisbane he was also met by a large media contingent;
- at 7.18 pm on 20 April 2012 (Sydney time), Mr Lewis sent Mr Slipper an email asking for his response to those allegations;
- a representative of the *Daily Telegraph* applied to the Court for access to the originating application on 20 April 2012;
- Mr Ashby, Mr McClellan and or Harmers had informed the media that the originating application had been, or would be, filed in Court before it was emailed to Mr Slipper so as to cause the allegations to receive maximum publicity, while Mr Slipper was not in a position to respond or seek legal advice, thus exposing him to the maximum adverse public reaction and damage to his reputation and so advantaging the LNP and Mr Brough;
- personal service of the originating application was not effected on Mr Slipper until 15 May 2012;
- the originating application was irregular in form and was not supported by a statement of claim or affidavit;

- the originating application contained the 2003 allegations and Cabcharge allegations, the latter suggesting criminal conduct by Mr Slipper, both of which were abandoned in the statement of claim filed on 15 May 2012;
- the 2003 allegations were not supported by sworn or affirmed evidence, contrary to the assertion made on the last page of the originating application that all its allegations were so supported;
- the genuine steps statement filed by Mr Ashby on 20 April 2012 asserted that the matter was urgent, involved aspects of victimisation and stated that "Alerting the Respondents to the matter would only increase the opportunity for victimisation", when most of the conduct complained of had occurred by 1 February 2012, and Mr Ashby had continued working for a further six weeks without complaining of being subjected to victimisation in Mr Slipper's office.
- Mr Ashby did not seek to use other remedies, including the Commonwealth's policy and procedure for complaints by staff employed under the MOPS Act or complaining to the Australian Human Rights Commission.

23 The Commonwealth's points of claim had alleged that the proceeding against it was an abuse of the process of the Court because Mr Ashby had brought it for the predominant purpose of damaging Mr Slipper and aiding his political opponents. It also alleged that Mr Ashby had a subsidiary purpose of pursuing collateral benefits for himself and Ms Doane, who was also employed by the Commonwealth as a media advisor of Mr Slipper. The Commonwealth asserted that each of those purposes was collateral to the legal remedies that Mr Ashby sought from the Commonwealth in the proceedings. It contended that the manner in which Mr Ashby had begun, and was conducting, the proceedings was unjustifiably oppressive to both the Commonwealth and Mr Slipper. It also alleged the manner in which Mr Ashby had invoked the Court's procedures brought the administration of justice into disrepute.

24 In essence, Mr Slipper's allegation of Mr Ashby's predominant purpose required Mr Slipper to establish that Mr Ashby had combined with one or more of Ms Doane,

Mr Brough, Mr Lewis, Mr McClellan, Mr Harmer and or his firm to publicly damage him in order to advance the political interests of the LNP, and or Mr Brough and, by those means to enhance or promote Mr Ashby's and Ms Doane's prospects of advancement or preferment within, or at the hands of, the LNP. That purpose went well beyond the improper purpose asserted by the Commonwealth, namely that Mr Ashby had brought the proceeding for the predominant purpose of damaging Mr Slipper publicly and aiding his political opponents. *First*, Mr Slipper's pleading alleged that a number of persons had combined with Mr Ashby for the purpose of bringing the proceedings and, *secondly*, those persons had sought to give effect to the purpose in order to advance the interests of the of the LNP and or Mr Brough so as, *thirdly*, to enhance or promote Mr Ashby's and Ms Doane's career prospects.

25 Mr Slipper did not wish to cross- examine either Mr Russell QC or Mr Harmer when their affidavits were read and he was then representing himself. He relied on the written submissions previously filed by both his counsel and the Commonwealth. However, the Commonwealth's formulation of the alleged abuse of process was different to Mr Slipper's.

The period before Mr Ashby began work with Mr Slipper

26 A great deal of material was in evidence. This included two extracts from Mr Ashby's affidavit of 13 April 2012. In the first extract, Mr Ashby said that, before he began work with Mr Slipper, he had been told by Judy McArdle, Mr McArdle's wife, of a rumour that Mr Slipper had had a relationship with a male staff member and that there was a video of it. Mrs McArdle told him that a female member of Mr Slipper's staff had seen the video and it showed Mr Slipper and the male staff member "on a bed and there was something involved" but that she "didn't elaborate". In the second extract from his affidavit, Mr Ashby said that he was no longer a member of the LNP, having resigned on 14 December 2011. He asserted that in making a complaint about Mr Slipper he was not motivated by any political or financial considerations and that his motivation was to ensure that Mr Slipper's "conduct towards me stops, and more importantly, that such conduct is not repeated in relation to any other staff, current or future". He also asserted that he had not been paid or promised any benefit in connection with his complaints about Mr Slipper's conduct including those of sexual harassment and his conduct in relation to the use of the Cabcharge vouchers.

27 On 10 October 2011, Mr Slipper and Mr Ashby exchanged text messages in which each referred to Mr Brough in terms of vulgar and sexualised abuse. The exchange related to

a YouTube video concerning Mr Brough that Mr Ashby had just launched on Mr Slipper's behalf. At one point Mr Ashby introduced a suggestion that Mr Slipper could become Speaker in the following exchanges:

> Mr Ashby: So tell me, do u want to run again or du u want to step up to speaker of the house and not bother with pre selection. I wanna know how much fight u have in u and whether I put my tactical brain into action to see us give Mal a carving up.
> Too personal?
>
> Mr Slipper: What's too personal? Throwing stones?
>
> Mr Ashby: Throwing stones? No the question about running for pre selection?
>
> Mr Slipper: Range of options open. But destroying Brough should happen anyway. Where did you get the idea I could become Speaker?
>
> Mr Ashby: A tactical thought that would allow u to remain in parliament without having to have a seat. Means that u don't have to battle shit fight with Mal. SCD [*Sunshine Coast Daily*] would still have a front page story for a week, but it would be a finger in the air to them, brough and anyone else who might want to c u go. Just a thought…

28 Mr Slipper corrected Mr Ashby by saying that the Speaker had to have a seat in the House of Representatives. At the time, Mr Slipper was Deputy Speaker. In a series of text messages on 28 October 2011, Mr Ashby and Mr Slipper exchanged some banter concerning a person with whom Mr Ashby was having a relationship. In response to a text message that Mr Slipper was "weird" he asked whether he had offended Mr Ashby. The latter said he had not been offended and did not offend that easily. Mr Slipper replied that he had warned Mr Ashby of his "warped sense of humour" to which Mr Ashby replied:

> "Yes, I raise an eyebrow from time to time wondering what some messages mean. **I'll be the first to say if something offends I'm not one to hold back**."
> (emphasis added)

29 At that time Mr Ashby indicated to Mr Slipper that he was working in the interests of Mr Slipper's then party, the LNP. Earlier, Mr Ashby had formed a friendship with Mr McArdle who was a shadow minister in the then Queensland LNP State Opposition.

30 When Mr Slipper was elected as Speaker on 24 November 2011, Mr Ashby sent him a text: "I'm in ore [sic] of the tactical response to the pressure that LNP and it's [sic] party members put u under. I will say I had this theory in my head when I text u on the 10.10.11".

31 On 1 December 2011, Mr Slipper offered Mr Ashby a job on his staff in the Speaker's office that had a base salary of about $138,000 (including an allowance in lieu of overtime) together with other entitlements. Mr Ashby accepted this position on the Speaker's staff and commenced working on 22 December 2011.

The events of early February 2012

32 On one view, Mr Slipper's messages of 1 February 2012, suggesting a closer relationship, could be read as a proposal that he and Mr Ashby have a sexual relationship. Mr Ashby rebuffed the suggestion to be met by Mr Slipper's withdrawal of his invitation to the harbour cruise and the instruction that Mr Ashby, directly in the future, should not contact Mr Slipper directly but communicate through another male adviser, Mr Knapp. Mr Slipper corrected that situation early the next day. His conduct might have been attributable to the stress Mr Slipper said, in his text message, that he felt. Not every attempt to develop a relationship into a sexual one, that is unsuccessful, necessarily has the character of sexual harassment: see *Kraus v Menzie* [2012] FCAFC 144 at [68] per Rares, McKerracher and Murphy JJ. Nonetheless, Mr Slipper's conduct in some of those text messages is capable of being characterised as sexual harassment. Thus, it was open to Mr Ashby to make such an allegation in both the originating application and statement of claim, whatever Mr Slipper may have intended to convey. What is significant from the text message exchanges on 1 February 2012 is that Mr Ashby was able to draw a firm line against having the proposed "closer" relationship and that appeared to have a relatively lasting effect.

33 Following the exchanges of text messages on 1 and 2 February 2012 between Mr Slipper and Mr Ashby, Mr Ashby texted Mr McArdle saying that what he wanted to discuss was 100% confidential, with which Mr McArdle agreed. In his affidavit of 31 August 2012, Mr Harmer recorded comments by Mr Ashby on selected text messages in the approximately 270 pages of them in evidence. I will refer to these as **Mr Ashby's commentary**. According to Mr Ashby's commentary he spoke to Mr McArdle on 2 February 2012, complaining of feeling distressed and uncomfortable about the text messages he had received from Mr Slipper (summarised in [19(4)] above) and that, in response, Mr McArdle told Mr Ashby that it was probably best to ignore the messages and go on having a normal professional relationship. Mr McArdle said that he would think the matter over and would give Mr Ashby any further advice if he changed his mind.

34 Later, on the night of 2 February 2012, Mr Slipper invited Mr Ashby on a second Sydney Harbour cruise, which Mr Ashby accepted enthusiastically. On 3 February 2012, Mr Ashby had dinner with a friend of his, whose first name was "**Martin"**. After thanking Martin for dinner in a text message sent at about 12.30 am on 4 February 2012, Mr Ashby extended his thanks for him being "so supportive in a moment when a fella needs real mates to make life changing decisions. National decisions actually". Soon after that text Mr Ashby sent a text to another friend Paul **Nagle**, at 12.44 am saying: "I'm serious when I ask this, would u put a bullet in my head to save the nation?". Later on 4 February 2012, another friend of Mr Ashby's, Tania **Hubbard** sent him a text saying that she had sat up all night about their chat and continued:

> "Are you decision making from ego? **Are you feeling a rush from the power of this moment** – are you clear this is not the case? **I could not tell completely last night.** Am concerned that you will not be protected. I understand you trust Mark – is his and your intention clear – measure up all the costs and consequences – remember this is not a heart decision – this requires logic, reasons, analysis. No meetings for you with any other Min was what we discussed last night – **pass the text forward in hard copy only to Mark** – let him move it forward. **Backup phone**, delete messages, put in safe and let it be. A smoking gun usually means someone has already been shot! Don't let it be you – please."

Mr Ashby responded:

> "… **I really enjoyed our chat last night** and I must admit there is **an understanding of what power can do to people, but this doesn't empower me once the information is passed on. I don't want to use it for my personal power. It will empower someone else definitely. Will I be rewarded or condemned?** Who knows. You are right though. The smoking gun is after the shot has been fired. We haven't yet seen the gun go off. **I need protection**, you're right. I always welcome your wisdom, so please feel free to text me anytime with thoughts. I will talk to Mark again tomorrow and See what his ideas are." (emphasis added)

35 The text messages on the evening of 1 February 2012 were, of course, because of the features that I have just mentioned, capable of being used to damage Mr Slipper if they were put into the public or political arena. On one view Mr Ashby could have seen Mr Slipper's approaches on that occasion as harassing. Hence, the way in which Mr Ashby reacted is significant. He saw Mr McArdle and discussed some plan with him, as appears from a text Mr Ashby sent later on 26 March 2012 (see [55] below). His text messages with Martin, Mr Nagle and Ms Hubbard are redolent of Mr Ashby having a purely political intention to use his text exchanges with Mr Slipper to damage him and assist his political opponents, rather than of Mr Ashby being in any way emotionally traumatised or even upset.

36 Mr Ashby's commentary asserted that he had confided in Ms Hubbard his feelings of distress and harassment he had felt concerning Mr Slipper's actions. His commentary also asserted that he had informed Ms Hubbard that he had spoken to Mr McArdle who had told him not to take steps to raise issues concerning Mr Slipper's behaviour and to see whether he could ignore the problem. Mr Ashby's commentary added that, by this time, Mr Ashby felt resentful towards Mr Slipper.

37 I do not accept Mr Ashby's commentary that he had feelings of distress and harassment concerning Mr Slipper's actions. Ms Hubbard's message quoted in [34] above suggests that at 4 February 2012 Mr Ashby was contemplating that Mr McArdle would use the text messages. The passages I have emphasised from the exchanges of text messages show that Mr Ashby's discussion with Mr McArdle concerning his text message exchanges with Mr Slipper, particularly those of 1 and 2 February 2012, was to do with empowering Mr McArdle or someone else with the ability to use those messages against Mr Slipper. Mr Ashby's references to "empowering others", and "national decisions", were concerned solely with the political consequences of what Mr Ashby was contemplating. Those consequences could affect the balance of power in the House of Representatives, depending on whether Mr Slipper could remain as Speaker if Mr Ashby used his "power" and what effect that use would have. That was because the Government did not have a majority in the House and was reliant on cross bench support, assisted by Mr Slipper having ceased to be a member of the Opposition and not being able to vote while Speaker, by reason of s 40 of the *Constitution*, unless the votes in the House were tied.

38 What is singular about all of the text message exchanges that Mr Ashby had with his friends and others in the period prior to the commencement of these proceedings is the lack of any complaint by him of feeling sexually harassed. And his friends' texts had no words of comfort for Mr Ashby as a victim of some traumatic experience of that kind. The exchanges between Martin, Mr Nagle, Ms Hubbard and Mr Ashby on 3 and 4 February 2012 do not read like those concerning a man claiming to feel sexually harassed or emotionally distressed by such conduct. Rather they read as if the participants were discussing the political ramifications of Mr Ashby revealing material that was sexually and politically embarrassing and that would compromise Mr Slipper and his position as Speaker if it appeared in the public domain. At least initially, Mr Ashby was contemplating that Mr McArdle, an LNP politician, would use the text messages against Mr Slipper's political interests – hence his

text that this did not "empower me once the information is passed on ... Will I be rewarded or condemned?". Read in its context with all his texts, I am satisfied that if Mr Ashby were the victim of sexual harassment he would not have speculated with his friend in this way about whether he would be rewarded by revealing it.

Mr Ashby's defiance of Mr Slipper

39 The exchange of messages on 26 February 2012 complained of (see [19(5)] above) centred on Mr Slipper remonstrating with Mr Ashby because of his failure to consult Mr Slipper about helping LNP candidates in the State election campaign. Mr Slipper led up to the discussion by texting that a third person had "thought you were a nice twink!" I infer that was a reference of a homosexual nature. Mr Ashby had made a video for one of the LNP candidates whom he considered to be a friend. Mr Ashby forcefully asserted in his texts to Mr Slipper that he would not turn his back on friends who had not turned their back on him and that Mr Slipper needed "to respect my decisions outside of work, the same as I respect your decisions". Mr Slipper replied "Happy dreams. In this job you are no longer a free agent and I get held to political account for whatever you do". Mr Slipper explained that he required to be told about whom Mr Ashby proposed to work for outside of his job. Mr Ashby responded:

> "You don't get held to political account for my private life Peter. **I will not have my private life managed.** I would not bring you into disrepute thru my actions. If I felt my actions would have an impact on u or the speakers role I would resign. I am proud of the fact I took on this role against all advice from the LNP. **I am as independent as you in my right to make decisions.**" (emphasis added)

40 Mr Slipper responded that that was unreasonable and that if Mr Ashby intended to assist his political enemies, which was his right, he owed it to Mr Slipper to inform him so that Mr Slipper could sort out their respective positions. Mr Ashby replied that this issue should be discussed in person because text messaging did not give a reasonable opportunity to both of them to state their cases. Mr Ashby's texts asserted that he was working strongly for Mr Slipper's re-election. He asserted that he was only giving assistance towards State candidates and had "no respect for Mal Brough and never will".

41 The debate continued on 26 February 2012 in further text messages with Mr Ashby showing no inhibition in making his own views clear and standing his ground. For example, he remonstrated with Mr Slipper stating: "It's unreasonable of u to have this conversation on

text. I'm actually angry u would do this. It makes for a jolted conversation and doesn't come across reasonable". Mr Slipper responded that he liked Mr Ashby but that Mr Ashby had to understand that he would:

> "… get upset when you play with my enemies and keep me in the dark. It is not what I expect of someone **I considered I am close to**. If you find this intolerable please discuss." (emphasis added)

42 The exchanges continued for some time further. Those texts demonstrated that Mr Ashby had no difficulty whatsoever in firmly putting forward his point of view and, in refusing to accept instructions from Mr Slipper on matters to do with Mr Ashby's conduct, even though that conduct may have impacted, or been seen to impact, on Mr Slipper's public position. It was self-evident, if Mr Ashby were known to be assisting persons who were politically hostile to Mr Slipper, that this could be seen to reflect badly, in political terms, on Mr Slipper and that others, as well as Mr Slipper, could see that conduct as disloyal to Mr Slipper. It was reasonable for Mr Slipper to insist on knowing what Mr Ashby was doing and to approve it before Mr Ashby made a public demonstration that, while he was a staff member of Mr Slipper, he was publicly known to be working for LNP candidates or causes.

43 The point of these exchanges which came most powerfully across was that Mr Ashby felt not the slightest inhibition in putting Mr Slipper in, what Mr Ashby considered, his place. It is difficult to believe that while Mr Ashby felt no inhibition in firmly and forcefully insisting that he was entitled to engage in political activities when Mr Slipper sought to restrain him from doing so, Mr Ashby would have felt inhibited in complaining to Mr Slipper about other conduct that he, Mr Ashby, did not appreciate. The contemporaneous documents in evidence do not reveal that Mr Ashby felt or expressed to Mr Slipper or any of his friends any such inhibitions or any distress occasioned by the conduct he complained of in his originating application. Similarly, the texts of 1 February 2012 showed that Mr Ashby felt able to decline the suggestion of a "closer" relationship.

44 The dispute over Mr Ashby's political activities concerned a matter about which Mr Slipper would have been entitled to terminate his services had he considered Mr Ashby to have been relevantly disloyal or acted in an unsatisfactory way. Mr Ashby's resolute defiance of Mr Slipper in respect of his conduct of the political aspects of his private life makes it highly unlikely that Mr Ashby would have felt any inhibition in putting Mr Slipper in his place in respect of any activity that he, Mr Ashby, felt was inappropriate in a sexual

respect. It is also highly unlikely that Mr Ashby felt threatened that he would lose his job if he complained to or rebuffed Mr Slipper in respect of any conduct of a sexual nature that Mr Ashby found unwelcome. After all, Mr Ashby had put his job squarely on the line when he debated his asserted right to engage publicly in political activities in support of LNP candidates at the State election while remaining a member of Mr Slipper's staff. Additionally, Mr Ashby continued to work for particular State LNP candidates up to the 24 March 2012 election, albeit with Mr Slipper's acceptance. Right after that election, he secretly began actively working against Mr Slipper while remaining employed, despite his assertion in his text quoted at [39] above that he would resign in such circumstances.

45 During the course of the proceedings, Harmers served an affidavit made on 20 July 2012 by Dr Jonathan Phillips, a clinical associate professor and consultant psychiatrist. Dr Phillips annexed to his affidavit a medical report he had made in respect of Mr Ashby for the purposes of the proceedings. In his report, Dr Phillips referred to "the very large power differential between Mr Ashby and Mr Slipper". He asserted that Mr Slipper was in a powerful position and that Mr Ashby "would readily be placed in a compromised situation, from which there was no ready path of escape". In submissions Mr Ashby placed some emphasis on Dr Phillips' identification of this power differential.

46 I do not accept that Mr Ashby felt in any way inhibited in his dealings by a "power differential" between him and Mr Slipper. The text exchanges of 26 February 2012 demonstrate that no such imbalance was perceived by Mr Ashby. Those exchanges occurred well after most of the allegations of sexual harassment had taken place. The originating application asserted that in these exchanges Mr Slipper appeared to question Mr Ashby's loyalty and was attempting to control his actions. A reasonable person in Mr Slipper's position would be entitled to express such concerns having regard to Mr Ashby's conduct. While Mr Slipper may have introduced that discussion using what I infer was a sexualised reference by a third person about Mr Ashby, both of them used sexualised and, on occasions, far more vulgar terminology in their communications. Sexual references in the texts must be considered having regard to the terms of a relationship in which both men used such means of communicating with one another in what they (or at least Mr Slipper) thought, at the time, were private communications that would never be publicly put forward in open court, as they have been.

47 As Dr Phillips observed, on several occasions Mr Ashby joined in text conversations with Mr Slipper that were "somewhat provocative and sexualised". He observed, and I find, that Mr Ashby on occasion "added to the frission of the interchange". Thus, in context, the mere fact that Mr Slipper commenced his text discussion on 26 February 2012 of Mr Ashby's work for LNP candidates with a sexualised reference, is not necessarily demonstrative of sexual harassment or victimisation. In all the circumstances I am not persuaded that it was on this occasion. Had Mr Ashby been upset by Mr Slipper's reference to another person saying he was a "twink" there is no doubt he would have remonstrated then and there with Mr Slipper as he forcefully did for some time in the later text exchanges on 26 February 2012 on Mr Ashby's political activities.

Mr Ashby asks to go overseas with Mr Slipper

48 During late March and April 2012, Mr Slipper was to lead a Parliamentary delegation on a visit to a number of countries, including Hungary. Mr Slipper was expected to be overseas from 24 March 2012 to 22 April 2012. In early to mid March 2012 Mr Ashby proposed that he accompany Mr Slipper on a visit to Hungary, at Mr Ashby's own expense. On 16 March 2012, Mr Slipper emailed Mr Ashby saying that it was not possible for Mr Ashby to accompany him on the trip writing: "Sadly, the excellent … suggestion you made seems too hard in an entitlement (even tho you paying) and PR and departmental/delegation sense. Gather it would be perceived as odd/risky." Mr Ashby replied "That's no worries. It was only a wild idea, but sometimes wild ideas become reality".

49 It is not credible that when Mr Ashby asked Mr Slipper if he could accompany him to Hungary at his own expense that Mr Ashby had any real concern about sexual harassment or "questionable conduct in relation to travel" on Mr Slipper's part. Such a trip had every potential to expose Mr Ashby to one or both categories of the alleged misconduct he subsequently complained of. If Mr Ashby were seriously concerned about either of these matters at that time, it defies belief that he would have volunteered to pay his own way to accompany Mr Slipper rather than stay in Australia away from the supposed source of his harassment and concerns. This episode demonstrates the likelihood that Mr Ashby's case involves an adventitious use by him of incautious text messages by Mr Slipper for the predominate purpose alleged by Mr Slipper.

The 20 March incident

50 Based on Mr Ashby's history to him, Dr Phillips gave a different account to that in the originating application of the incident on 20 March 2012 when Mr Slipper said: "Can I kiss you both". Dr Phillips recorded that Mr Ashby said that he believed that he had been adversely affected in the longer term by Mr Slipper saying: "He wished to kiss the applicant and his female co-worker" and that Mr Slipper looked at Mr Ashby when he made the comment.

51 On 20 March 2012, Mr Slipper was excited by a successful tactic devised by both Mr Ashby and Ms Doane that had deflected Mr Lewis from running an adverse story about Mr Slipper. Mr Lewis said in a interview with Chris Smith on Radio 2GB during the week after 20 April 2012: "I have been reporting on Mr Slipper and his abuse of the public purse for about two years". Mr Ashby and Ms Doane would have been well aware of the attitude of Mr Lewis in his reporting on Mr Slipper by 20 March 2012. Mr Slipper forwarded onto Mr Ashby a text on 20 March 2012 from Mr Lewis that read: "Thanks for the great publicity … we r not running the story tomorrow. Cheers Steve", to which Mr Ashby responded: "That's priceless!!!". The next day Ms Doane emailed Mr Slipper and Mr Ashby saying that Mr Lewis had left her a message saying that he would no longer be sending her emails and:

> "… is clearly unhappy. I feel no obligation to speak to him but I want to be assured I'm not a victim of his attacks, so unsure what can be done?"
>
> Would appreciate your thoughts on the way forward as he is a muck-raker and I do not need him to go after me in any way as you can imagine."

Mr Ashby responded: "Love it! You've backed him into a corner and he has nowhere further to go". Ms Doane added that Mr Lewis appeared to be disappointed.

52 Mr Ashby had alleged in the originating application that he was alone when Mr Slipper made the remark about kissing "you both". Dr Phillips' recording of the incident is inherently more likely to be correct. While perhaps an odd way of expressing his appreciation, Mr Slipper's conduct occurred in the presence or hearing of Ms Doane and reflected his pleasure at what she and Mr Ashby had each achieved in thwarting whatever they all feared that Mr Lewis may have had in mind. If it were capable of being seen as sexual harassment, it was at most a trivial incident. And, had he felt any genuine discomfort, Mr Ashby would have remonstrated with Mr Slipper then and there. Once again, there is no

mention of this incident, let alone any distress Mr Ashby felt from it, in the text messages with his friends.

53 It is difficult to treat that occasion as a factor that crystallised Mr Ashby's decision to bring these proceedings. Mr Ashby argued that he formed the view, upon reflection from about 1 February 2012 on, that he should take proceedings claiming that Mr Slipper sexually harassed him. Mr Ashby argued that he had taken his time in arriving at this position, having sought advice from friends such as Mr McArdle, Ms Hubbard, Mr Nagle and Martin, and that ultimately he found his work position to be intolerable. That characterisation is unpersuasive given that between 2 February and 20 March 2012, only three incidents occurred of which Mr Ashby complained; namely Mr Slipper's use of the word "twink" and the discussion that took place in the text messages on 26 February, the alleged stroking of Mr Ashby's arm on 1 March and the "kiss" remark on 20 March.

54 The text messages revealed that particularly on Friday, 23 March 2012, the relationship between Mr Slipper, Mr Ashby and Ms Doane became strained, Mr Ashby had been out of contact and was not responding to Mr Slipper to his mobile phone. No doubt Mr Slipper was preparing to go overseas the next day and felt frustrated about Mr Ashby's lack of response. Mr Ashby sent Ms Doane a text message at 7.50 pm that night stating: "I just want to get Peter off my back. He's being so weird tonight! Weird beyond weird!! Ms Doane responded: "You have no idea!!! 6.22 and all sorted". Mr Ashby responded: "He's asked me for a complete report. He's obsessive and ridiculous. You're sick and I've been in back to back meetings". Later that night she texted Mr Ashby: "He has crossed the line with me".

Mr Slipper goes overseas

55 Mr Slipper left for overseas on 24 March 2012, the same day as the Queensland State election. By late that night it was clear that the LNP had been elected to be the State Government with a large majority. On 26 March 2012 Mr Ashby sent a text message congratulating Mr McArdle on his role in the campaign and stated:

> "**I've decided to press ahead with what I spoke to u about some weeks ago.** It's going to the biggest challenge of my life, **but this man needs stopping. He's hurt too many people.** I appreciate your comments about not doing it, but I have the strength to go thru with it and regardless of the outcome I know I'll have done the right thing. I have no doubt we'll chat soon." (emphasis added)

56 On 28 March 2012, Mr Ashby exchanged some texts with Ms Doane that must have been preceded by two prior events, one being a conversation in which he had asked her to look at Mr Slipper's electorate diaries for 2009 and provide him with copies of some portions (4/244-245). The other prior event must have been Mr Ashby making contact with Mr Brough to indicate his preparedness to undermine Mr Slipper. That became apparent when Mr Ashby began exchanging texts the next day with Mr Brough about the diary entries.

57 On 29 March 2012, Mr Ashby exchanged texts with Ms Doane telling her that he did not want her to be stressed, that he had "so much support" and that she did as well. He added: "We've been chosen to take this journey for some bizarre reason". The texts referred to the need for each of them to remain strong and to an expectation of hearing from a woman called "Jackie" or a man called "Murray". One of the texts Ms Doane sent to Mr Ashby said: "I need to secure my deal or will need to work a plan B".

58 Later on 29 March 2012, Mr Brough exchanged texts with Mr Ashby. Mr Brough asked whether Mr Ashby could email a document because, what Mr Ashby had sent is "hard to read". Mr Ashby said that he would email it and Mr Brough later responded: "Will need to get daily printouts tomorrow with greater detail". I infer that this exchange related to Mr Brough having been sent, and later emailed, copies of printouts from Mr Slipper's electorate diary from 2009 made by Mr Ashby or Ms Doane. Earlier that day, Mr Lewis had emailed Mr Brough questions concerning Mr Slipper which he said would be:

> "a start. I would be fascinated to see what his diary said for these dates, they involve some large outlays, and the destinations were … er …. unusual!!"

Mr Lewis's email asked how many times Mr Slipper had travelled to New Zealand since July 2010 and asked for diary extracts for three date ranges in 2009 and 2010. Later on 29 March 2012, Mr Lewis emailed Mr Brough seeking further information on a date range in late 2009.

59 From around 29 March 2012, Mr Ashby also began communicating directly with Mr Lewis. Mr Ashby had been told by one of his friends who had worked on it that Mr Lewis was interested in investigating Mr Slipper's 2010 election campaign. On 29 March 2012, Mr Ashby forwarded to Ms Doane his friend's email with Mr Lewis' contact details. Ms Doane responded in an email to Mr Ashby on 30 March 2012:

> "Awesome – what a tangled web this all is!?!?!!
> My batteries are recharged as is my resolve to do the right thing for all of us. Bring on the future w[ith] **focussed careers with people we can be proud to affiliate our names**."

60 On about 29 March 2012, Mr Brough telephoned Mr Russell QC and said that he had been contacted by a person who worked in Mr Slipper's office and had raised a number of issues with Mr Brough, including sexual harassment and the person's view that there had been a misuse of entitlements. Mr Brough told Mr Russell QC that the staffer did not think that Mr Slipper had behaved appropriately towards him and wanted to get some legal advice about what he should do. Mr Russell said that he would think carefully about the matter because he was principally a tax lawyer and did not know much about sexual harassment legal issues. He also said that because of his political position, he would feel uncomfortable about acting for the staffer professionally but was prepared to give him some general advice.

61 Mr Russell QC explained in his evidence that he was not a particularly close colleague of Mr Brough and that they had taken opposite sides in the debate on forming the LNP, although, more recently, they had become closer acquaintances. During the conversation Mr Russell QC said that he could charge a nominal amount for seeing the staffer (still unnamed) of, say, $1.00. He said he also would speak to a junior counsel in his Sydney chambers who had acted in another highly publicised sexual harassment claim involving David Jones' former chief executive.

62 Mr Brough met with Ms Doane on Friday, 30 March 2012. On that occasion, among other matters, he agreed to assist her in seeking employment with the new Queensland LNP government. This emerged from an email she sent to Mr Brough on 2 April 2012 attaching an updated resume for the new Government's consideration and nominating her portfolio preferences in working for the new Ministers, concluding "I appreciate your consideration of my interest in serving the LNP in government".

63 On 30 March, Mr Ashby texted one of his friends, Glen, saying that he was hopeful "this all comes out within 2 weeks. I'm over the suspense in not having a lawyer to back me right now. My new lawyer will be back in a week."

64 Mr Ashby also sent a text on 30 March 2012 to Ms Doane about the success "Jackie" had had in arranging a lawyer for $1, being Mr Russell QC. (I infer that he was the lawyer

referred to in the text to Glen, since the meeting with Mr Russell QC occurred on 6 April 2012.) Also on 30 March, Ms Doane texted Mr Ashby saying that she was very happy with the chat that she had had with "Jackie". Ms Doane also texted that Mr Ashby should smile and "feel loved, you are very courageous my friend. Proud of what u r doing".

65 Later on 30 March Ms Doane texted Mr Ashby encouraging him to contact Murray, saying:

> "**You need to keep everyone on side and have options.** Not sure if State will be your future, or that you'll want it to be, **so the more options the better**. I really want the Sports portfolio that is my passion and I know it on many levels so I would be perfect …" (emphasis added)

and asked for Mr Ashby to send her Jackie's email address. Later that night, Ms Doane texted Mr Ashby saying that she had just been informed that:

> "State staffing isn't the decision of the Minister … do you think Jackie has influence? I would think yes?!?"

Mr Ashby said that he had no idea of that rule but:

> "I bet the likes of Jacki and Bruce McIver [the State President of the LNP] have some influence. Jacki is definitely a key player in the party these days. To arrange a lawyer for $1 of that calibre is a big thing in my mind." (4/1471)

66 Ms Doane responded that she agreed that arranging a lawyer of Mr Russell QC's calibre was a big thing and observed:

> "It is also due to the barrister's ties to the LNP **and the way this will tip the govt to Mal's [Brough] and the LNP's advantage**. Definitely a good move for us to meet with him so he gets to know **us rather than w the black mark from being w Peter**!!" (emphasis added)

Mr Ashby responded:

> "**I totally agree. We are fixing the black mark** … You don't have to thank me Karen. I think we're equally supportive for one another. We compliment one another nicely. **I'm very pleased u have been on board** even though we've both been thru so much shit." (emphasis added)

Ms Doane asked Mr Ashby to provide details of Mr Brough's email address so that she could send through her updated curriculum vitae and she offered to help Mr Ashby complete his. Mr Ashby's commentary to Mr Harmer asserted that he did not begin these proceedings "to

earn favour with any political party or remove any 'black marks'". I do not accept that assertion. It is in the teeth of contemporaneous documentary evidence including his total agreement with Ms Doane in the texts just quoted above.

67 On 2 April 2012, Mr Ashby texted Ms Doane that he had a most lengthy telephone conversation with Mr Lewis who would fly up on Wednesday, 4 April. The next day Ms Doane sent a text to Mr Ashby saying "I friggin loath Peter Slipper!!!". She sent another text message later that day saying that she wanted to "balance" Mr Ashby's harassment charge with one of her own concerning Mr Slipper's behaviour towards her which she considered unprofessional and indicated that she would think about contacting a lawyer for herself. Mr Ashby responded in a text saying he would contact Mr Brough again that day, failing which he would make contact with someone himself. Thus, Mr Ashby was using Mr Brough as the channel through which he was seeking, at that time, to obtain legal advice as well as a means of passing on information to Mr Lewis that could be used to damage Mr Slipper.

68 Next, on 2 April 2012, Ms Doane wrote to Mr Ashby that Mr Brough had forwarded her curriculum vitae and told her that she should receive a call within the next day or two and that if she was unsuccessful she should contact him again. As noted in [62] above, Ms Doane had emailed Mr Brough saying: "I appreciate your consideration of my interest in serving the LNP in government". She offered to assist Mr Ashby in putting his curriculum vitae together and he said that he would appreciate her doing it. They arranged to meet for dinner on 4 April.

69 Mr Harmer said that his firm was first contacted by Mr Ashby on 3 April 2012 and that Mr Ashby first met with Harmers on 10 April 2012.

Mr Ashby meets Mr Lewis

70 On 4 April 2012, Mr Lewis met with Mr Ashby at noon in a café on the Sunshine Coast in Queensland having previously arranged the rendezvous. Following their meeting, Mr Ashby sent Mr Lewis some details about a person in nearby Maroochydore and they also exchanged the following text messages.

> Mr Ashby: "Spoke to Richard about car. Richard said he has travelled in the car but was instructed to book the car on two occasions when the pope was in

> australia. The car was apparently used twice for different pope ceremonies. Good luck."
>
> Mr Ashby: "That should have been hasn't travelled in the car."
>
> Mr Lewis: "Ta Abt to hop on plane Will call later **We will get him!!**"
>
> Mr Ashby: "Great Thanks for coming up".
>
> Mr Lewis: "**I am here to help!!!**" (emphasis added)

71 Mr Harmer gave evidence that Mr Lewis had informed him that his remark (emphasised in the above exchanges) "We will get him!!" referred to locating the hire car driver so that he could corroborate some material. I do not accept that assertion. That is not how the text messages read. In my opinion the reference is clearly to Mr Ashby and Mr Lewis "getting" Mr Slipper, not to Mr Lewis finding a driver. Mr Ashby had been interviewed by Mr Lewis from noon. The texts were sent from about 3.40 pm. I infer that Mr Ashby had revealed or expanded on material concerning his sexual harassment claims and Mr Slipper's use of his travel entitlements, including the Cabcharge allegations. These stories would be sensational news if they were published and would have a very significant adverse effect on Mr Slipper and his reputation. Mr Lewis had been a journalist whom Mr Slipper, Mr Ashby and Ms Doane considered was hostile to Mr Slipper's interests and had been pursuing Mr Slipper in the press over, among other things, his use of travel entitlements. I am not satisfied that Mr Lewis was texting Mr Ashby, while he was boarding a plane, about "getting" a driver. It is difficult to see why Mr Lewis would use the words "get him" rather than "find him" if he was talking of locating a driver. Moreover, Mr Lewis' next comment: "I am here to help!!!", in response to Mr Ashby's thanks for his visit, again suggests collaboration with Mr Ashby and Ms Doane in damaging Mr Slipper. I find that on 4 April 2012, Mr Lewis referred to Mr Slipper when he wrote: "We will get him!!".

The meeting with Mr Russell QC

72 Mr Russell QC gave the following account of the meeting on the morning of Good Friday, 6 April 2012, at Mr Russell QC's home on the Sunshine Coast. Mr Ashby arrived with Mr Brough and Ms Doane. Mr Ashby handed Mr Russell QC a bundle of papers saying that they were notes he had made and copies of text messages sent by Mr Slipper to him. Mr Ashby said that he had investigated law firms that he might engage if Mr Russell considered there was sufficient substance in his concerns to merit taking the matter further.

Mr Ashby mentioned Harmers as one of those firms. Mr Russell QC said that Mr Ashby would need to have a lawyer who practised in the field of sexual discrimination to look at his claims further to see if they were worth pursuing.

73 During the course of the meeting Mr Ashby mentioned that he had concerns in relation to Mr Slipper's use of Cabcharge vouchers. He said that he had seen Mr Slipper give three unsigned Cabcharge dockets to a cab driver on one occasion. I think it is likely that Mr Ashby conveyed that the dockets were signed but incomplete. Mr Russell QC had had some experience in the use of Cabcharge for purposes of the Commonwealth from his various roles and duties in the Royal Australian Air Force and had an understanding of proper controls for their use in that respect. He observed to Mr Ashby that that conduct of Mr Slipper seemed highly inappropriate and would not be done in the military but he did not know what applied to members of parliament. Mr Brough said that the position was similar for members of parliament also and what Mr Ashby had described seemed "highly irregular". Significantly, Mr Brough added that it was "possible it might relate to three different journeys and, if so, it would be within entitlement".

74 At some point Mr Ashby also mentioned that the Australian Federal Police were investigating possible irregularities and travel claims by another member of Mr Slipper's staff, but Mr Russell QC did not remember the details. Mr Russell QC advised Mr Ashby that, if he had any concerns about Cabcharge use, he had the right, if not duty, to go to the police and that no one would criticise him for doing so. However, Mr Russell QC said that this was a matter for Mr Ashby and he should check with Harmers, or whatever firm he went to, about how to deal with the issue.

75 Ms Doane raised issues during the meeting about the practicality of her and Mr Ashby's situation. She observed that they had difficult financial circumstances and needed to stay in employment. She asked how they could do that. Mr Russell QC said that if they reached the view that they should take any action, they would probably have to resign and be prepared to get out of the office urgently. He said that it seemed to him that Mr Ashby might have a case for sexual harassment and that he also might need to reveal Mr Slipper's travel claims, that seemed to Mr Russell to be "very odd". However, Mr Russell QC cautioned that they should not rely on his advice because his role was simply to make sure that they were not wasting their time before they sought specific advice from

lawyers who practised in the field and to whom they could give full disclosure of all the material facts. Ms Doane asked:

> "If we are out of work, what will we do? Is it possible we could get employment in some other LNP parliamentarian's office?"

76 Mr Russell QC replied that one group that could not help them was the LNP. He said that federal and state members of the party would not be able to give them any assurances of employment or any benefit at all, either direct or indirect. He cautioned that, if they decided to take the contemplated action, they needed to take expert advice and think about matters very carefully because "they will throw everything at you – what you need to understand [is] that to bring this claim will take a great deal of courage. It will not be easy." Ms Doane responded, looking at Mr Ashby, "James, you know if you do nothing he's just going to do it again to someone else. It is an ongoing pattern of behaviour and he has to be stopped before he hurts others – just as he has hurt us." Mr Ashby indicated his agreement (3/960-964).

77 Mr Harmer said that Mr Ashby had informed him that prior to speaking to Mr Russell QC, Mr Ashby had believed that he may have had some prospect of obtaining employment in the new LNP State Government, but after that conference, he thought he would not be able to be employed or assisted financially by anyone associated with the LNP.

Mr Ashby collaborates with Mr Lewis and goes to Sydney

78 After the meeting with Mr Russell QC, Mr Ashby texted Mr Lewis on 6 April 2012 to ask for his email so that he could send Mr Lewis his own personal email address. He told Mr Lewis that he now had a daily printout of Mr Slipper's diary. He also sent a text to his friend Glen saying that he had had "Very good meeting this morning. It's all systems go! Lots going to take place during this next week".

79 On 7 April 2012, Ms Doane asked Mr Ashby for Mr Lewis's number so that she could make contact with him and make sure that she had everything Mr Lewis needed before returning her "media phone". Mr Ashby also texted Ms Doane that Mr Lewis might have found some new material to do with Mr Slipper's travel from interviewing someone in New Zealand.

80 On 9 April 2012, Mr Lewis asked Mr Ashby for copies of some further dates from Mr Slipper's diary. Mr Ashby texted Ms Doane asking her to photograph the relevant diary extracts with her iPhone so that he could email them to Mr Lewis if she did not want to send them directly.

81 On 10 April 2012 Ms Doane emailed Mr Brough her resume for consideration by Clive Palmer, a well-known Queensland entrepreneur with connections to the LNP. She said she was seeking a position through Mr Palmer at the Coolum Golf and Spa Resort. She thanked Mr Brough for his "support and wisdom". Later that day Ms Doane also emailed Mr Brough, forwarding to him an email she had received from Mr Slipper offering his best wishes for her recovery. In that email Mr Slipper had said that the amount of time she was taking off work was becoming a challenge for the office. She told Mr Brough in her email that Mr Slipper "is clearly unhappy with my absence and I believe looking at a way to let me go". Earlier, on 6 April 2012, Ms Doane had texted Mr Ashby that she was feeling "guilty about taking stress leave".

82 On 10 April 2012, Mr Ashby texted his friend Glen saying that he probably would not see him for a while. He wrote: "I'm officially in lockdown and I'm being flown out tonight. This is extremely quick!". He said that he was nervous but "for the right reasons". Mr Ashby also sent a text to his friend, Mr Nagle, a little later saying:

> "Lots going on. Just a quick note to say **it's all about to erupt. Stories likely to start coming out in Thursday's paper. Sexual harassment case likely to come out next week.** Legal team meeting me in Sydney at 8pm pro bono."
> (emphasis added)

Those text messages revealed that Mr Ashby was "officially in lockdown" and that he was participating in arrangements for media stories adverse to Mr Slipper to "come out" over the two weeks. On the same day Mr Ashby claimed two weeks sick leave. None of his text messages from late March 2012 up to this point referred to Mr Ashby being in any way unwell, let alone so sick he needed nearly three weeks from 5 April 2012 to recover (see [85] below). Mr Russell QC's affidavit made no reference to Mr Ashby or Ms Doane having any appearance of illness at the meeting of 6 April 2012. Instead, at 7.40 am on 10 April 2012 Mr Ashby sent a text message to another member of Mr Slipper's staff saying, revealingly:

> "I'm not well today I'm sorry. **I'll get a doctor's certificate** and send thru today with a bit of luck." (emphasis added)

83 In the meantime, Mr Slipper had sent a text to Mr Ashby and enquired how he was feeling after being informed by his office that Mr Ashby had reported in sick. Mr Slipper also complained about Ms Doane's taking of considerable sick leave as posing a challenge. Mr Ashby forwarded Mr Slipper's texts onto Mr Lewis and added: "We need to act fast mate".

84 Late on 10 April Mr Ashby emailed Mr Slipper saying that he had only just woken up and discovered Mr Slipper's and Ms Doane's emails and texts concerning her being unwell. Mr Ashby asserted that she had been dealing with discomfort from a cough or chest problem in the previous couple of weeks and he was "only guessing it's the same problem playing havoc with her". Mr Ashby asserted to Mr Slipper that he had visited the doctor and "they've insisted I have 2 weeks off. I am really concerned with my health at the moment and they're even more so." He said he would provide a copy of his medical certificate via one of the other staff members.

85 Siobhan Keating, Mr Slipper's former solicitor, gave evidence that Mr Slipper informed her that as far as he was aware Mr Ashby had never provided a medical certificate for that two week period commencing on 10 April 2012 and that Mr Ashby had not since attended work. Mr Harmer annexed to his affidavit of 26 September 2010 a copy medical certificate dated 5 April 2012 that Mr Ashby obtained from Landsborough Medical Centre. The certificate stated that Mr Ashby had "… a medical condition and will be unfit for work from 10/04/2012 to 22/04/2012 inclusive". Mr Harmer said that he was aware, at the time of commencement of the proceedings, that Mr Ashby had sought medical assistance "which I understood was related to the conduct which was the subject of his complaint" . Mr Harmer did not say when the medical certificate was first seen by him or came into existence. It is odd that Mr Ashby's 7.40 am text of 10 April 2012 spoke prospectively of him getting a doctor's certificate if he already had obtained one five days before. Moreover, Mr Ashby had been keen to establish an excuse for his absence from work while he went to Sydney. Had he received a medical certificate on 5 April 2012, it is unlikely he would not have sent the certificate dated 5 April 2012 to Mr Slipper's office at any time in the next five days.

86 As is clear from his text message sent earlier that day to his friends Glen and Mr Nagle, Mr Ashby had other plans than being sick for the forthcoming two weeks. After

Mr Ashby's plane landed in Sydney, he arranged to see Mr Lewis at his hotel. That night Ms Doane emailed Mr Brough telling him that Mr Ashby understood that he needed to follow legal advice to have all of his facts sighted and his "deposition" taken the next day "**before it goes to press**" (emphasis added). She added: "I think Steve Lewis would agree another day of waiting to ensure everything is as it should be is worth it".

87 On the morning of 11 April 2012, Mr Lewis texted Mr Ashby that he could continue staying at his hotel and that News Limited would sort out payment details while Mr Ashby saw Harmers. It is safe to infer that by no later than the time of their meeting on 4 April 2012 Mr Ashby had told Mr Lewis about his sexual harassment claims. That is why Mr Lewis arranged for Mr Ashby's hotel bill to be paid by News Limited while he saw Harmers for the purposes of preparing what ultimately became the originating application commencing these proceedings.

88 Mr Ashby's and Ms Doane's intention was to obtain Mr Lewis' assistance in publishing media stories critical of Mr Slipper, not just to do with travel but also linked to Mr Ashby's allegations of sexual harassment that he intended to make in court proceedings. Mr Ashby's text to Mr Nagle (set out at [82] above) and Ms Doane's email to Mr Brough (set out at [86] above) indicated that Mr Ashby had a time line in mind for the progressive release of damaging stories in the media about Mr Slipper's travel and alleged sexual harassment.

89 On 11 April 2012, while Harmers were taking his instructions for an affidavit, Mr Ashby sent and received a number of text messages. Mr Lewis was trying to get in touch with him. However, Mr Harmer had recommended to Mr Ashby that he engage Mr McClellan's services to manage his contact with the media, including Mr Lewis. Mr Ashby explained to another friend in text messages on 11 April 2012 that he might not be able to attend a political (and I infer LNP function) function the next day that this friend was organising near to Mr Ashby's Queensland home. He texted that he was sick and was passing blood in his urine as a result of what was thought to be a bladder infection.

90 Ms Doane sent Mr Ashby a text later on 11 April telling him to "enjoy your drinks". That was a reference to a drink Mr Ashby arranged to have with Mr Lewis. In the meantime, he sent a text to his friend Glen in which he said that Harmers had told him that they would like him to have 24 hours security with him so as to avoid being assassinated. He told his

friend that he had had a drink with Mr Lewis and that he would be back in Queensland somewhere by the weekend, adding "Can't say exactly where cause the sexual harassment story will likely break by the weekend or Monday". That revealed the real reason that Mr Ashby was claiming that he could not attend work. It is difficult to think that a man passing blood in his urine or with a bladder infection would be enjoying a drink. Ms Doane was more likely to know the true state of Mr Ashby's health. Her text suggests that his state of health was radically different to the message he was conveying to persons not connected to his trip to Sydney. I infer that Mr Ashby was physically fit and had no bladder or urine irregularities.

91 On 12 April 2012, Ms Doane sent a text to Mr Ashby saying that Mr Slipper had emailed both her email addresses asking about Mr Ashby's sickness. Mr Ashby responded that he would talk to the lawyers about that and that he did not want to reply but would find out what he should do. Mr Lewis made quite a number attempts to contact Mr Ashby on that day by text messages. Mr Slipper sent Mr Ashby a text asking how he was feeling and what was wrong with him. Mr Ashby responded that he had just realised his last message to Mr Slipper had failed and that he was "pissing blood. Lots of it. Not well". Mr Slipper responded saying that he was sorry to hear this and expressed concern, hoping that Mr Ashby was getting some tests done and asking to be kept informed.

92 On 12 April 2012, Mr McClellan sent Mr Ashby a proposal to provide "strategic advice services" to him concerning his employment and other issues . Mr McClellan had advised Mr Ashby not to talk to the media except through him. As a result Mr Lewis felt a degree of frustration and sought to contact Mr Ashby through both Ms Doane and Mr Brough.

93 Early in the evening of 12 April 2012, Mr Ashby sent a text to Ms Doane saying that he was being advised to make sure that all contact with Mr Lewis and any other journalist went through Mr McClellan. He said not to tell Mr Lewis anything more, including about that text until they had spoken. He gave her Mr McClellan's number and asked if the latter could call her the next day. Ms Doane sent a text later to Mr Ashby telling him that Mr Brough had called her. She added "Mal also said Clive [Palmer] was overseas so nothing can be put forward – Hmmmm". Mr Ashby then texted Mr Lewis saying that they had to communicate through Mr McClellan .

94 In text messages that have no dates, but I infer Ms Doane sent on 11 or 12 April 2012, she told Mr Brough that she had heard nothing from Mr Ashby since midday the previous day and was not answering her phone herself. She asked Mr Brough to tell Mr Lewis that "I'm sorry it's just very scary at the moment so I'm shut down for now. I will let you know when/if I hear anything. Thx for your concern." Some time later on that or the next day, she received a text from Mr Brough that Mr McClellan had just agreed to meet Mr Lewis that morning and that "Everything will be fine". Ms Doane replied: "Great news!! Definitely relieved for all. Just want this out".

95 The evidence of text messages on Mr Ashby's phone ceased on 13 April when the phone was given to Mr McKemmish to examine. Thus there is limited direct evidence of how the alleged conspirators behaved after that time.

96 On 15 April 2012, Mr McClellan emailed Mr Ashby confirming their discussion that Mr McClellan would only be billing on a deferred basis, based on the hours he had worked. He said that he would only be "seeking my fees from the other side with the successful outcome of your case". He sent Ms Doane a similar email and draft agreement on 15 April 2012. Mr McClellan's fees were $550 per hour plus GST (i.e. $605 per hour).

97 In the meantime, on 13 April 2012, Mr Ashby emailed Ms Doane saying that he had been reading document after document. He wrote that Mr McClellan had said that Mr Lewis "had given him fair warning that tomorrow [Saturday 14 April] they're releasing the FOI stories. Not great timing cause Peter will be nagging you to fix it. grrrrrrrr!"

98 In fact, the story broke in News Limited papers on 16 April 2012 under Mr Lewis's byline. The article in the *Daily Telegraph* on that day asserted that Mr Slipper had "splurged $75,000 on lavish limousine and taxi travel". The article then detailed what Mr Lewis said were irregularities and excesses in Mr Slipper's use of his parliamentary entitlements. It concluded by saying "The Speaker – who is currently overseas on a parliamentary delegation – did not respond to detailed inquiries".

99 Early on Monday 16 April, Ms Doane emailed Mr Slipper and other members of his staff saying that she had had a good run of work from 5:00am but then had a terrible

headache at 8:35am that was not allowing her to drive. She said she would need to continue to work from home, as she had during the past week, adding:

> "Given the Steve Lewis stories today, I'm keeping a close watch on any developments and also crafting a Twitter response now.
>
> The media phone is on (and quiet) so call if you need anything. My guess is that this will blow over like the SCD [*Sunshine Coast Daily*] stories."

100 Later that afternoon, she emailed Mr Slipper saying that she appreciated it was difficult because she was not in the office while she was sick and that she was not returning because of doctor's instructions. She told him that she would "continue to do my best until I am able to return to the office". Once again on 17 April 2012 Ms Doane emailed Mr Slipper's office saying that she had medical advice not to return to work for, at least, the next two days.

101 On 20 April 2012 (Sydney time), while in New York, Mr Slipper received an email from Harmers sent at 3.54 pm that attached a copy of the originating application filed in this Court earlier that day. At 7.18 pm that day (Sydney time) Mr Lewis sent Mr Slipper an email saying:

> "We are running a story involving allegations of sexual harassment – the allegations coming from one of your staff members.
>
> **There are also allegations of fraud against the Commonwealth, according to Court documents.**
>
> Phone me asap." (emphasis added)

102 Later on 20 April 2012, Mr Slipper left New York and flew to Los Angeles in transit to Brisbane, via Sydney. He was met at Los Angeles airport by representatives of the Australian media, including television crews and questioned about these proceedings. When he arrived at Brisbane airport Mr Slipper was met by a large group of journalists. Mr Slipper was not aware of how his itinerary became public. I infer that Mr Ashby or Ms Doane caused it to be provided to the media and that each of them planned that, as a result, the media would be waiting for Mr Slipper when he arrived.

103 Also on 20 April 2012, Mr Harmer wrote to the Minister for Finance on behalf of both Mr Ashby and Ms Doane asserting that both of his clients had been absent from work on sick leave "because their health has been affected by conduct associated with their

employment". The letter referred to the filing of the proceedings earlier that day. It said that Ms Doane was a potential witness in Mr Ashby's matter and had her own grounds to make a complaint about Mr Slipper's conduct towards her. Harmers warned the Minister that their clients should not be adversely affected in any way because of their conduct in bringing proceedings or making a complaint about their treatment as employees, having regard to the provisions of the *Fair Work Act 2009* (Cth). The letter asked that both clients be put on special paid leave.

104 On 21 April 2012, a member of News Limited publications broke the story. *The Australian's* headline was "Slipper accused of sexual harassment, funds misuse". The article referred to the 2003 sexual harassment and Cabcharge allegations made in the originating application together with Mr Slipper's sole response that: "The allegations are denied". After saying that the police would "be asked to investigate conduct by Mr Slipper in relation to the use of public funds". The article continued:

> "It is claimed in the Court documents that he signed Cabcharge vouchers that were later filled out by a limousine driver."

105 *The Courier-Mail's* story in its online edition early on 21 April 2012 appeared under Mr Lewis' byline. The first paragraph read:

> "Speaker Peter Slipper is facing explosive allegations he sexually harassed a young male adviser and misused taxpayer-funded Cabcharge dockets in a major new crisis for the Gillard Government."

Like the article in *The Australian*, this article referred to all the allegations in the originating application and the same denial by Mr Slipper. Stories in other media publications were to similar effect and soon began adding comments by other politicians, including discussions whether Mr Slipper should stand down as Speaker.

106 On 22 April 2012, Mr Slipper issued a statement in which he emphatically denied Mr Ashby's criminal and civil allegations against him. He said that he would stand aside as Speaker until the criminal allegations against him were resolved.

Mr Harmer's evidence

107 Mr Harmer gave affidavit evidence that in settling and filing the originating application he had attempted faithfully to discharge his professional obligations as he

understood them (3/1022 [13]). He referred to being conscious of the requirements of the *Professional Conduct and Practice Rules 1995* made by the Council of the Law Society of New South Wales pursuant to s 57B of the *Legal Profession Act 1987* (NSW) and cl 24 in Sch 9 of the *Legal Profession Act 2004* (NSW) esp rule A.23, A.35–A.37.

108 Mr Harmer discussed his experience of running high profile workplace cases, particularly those involving sex discrimination and sexual harassment on behalf of the applicants. He said that he had found that cases involving high profile respondents attracted publicity without the applicants having engaged media consultants or contacted the press. He said that, based on his experience, he had formed the view that there was an inherent and justifiable interest in such cases by the media whose role, he said, was to report on the courts and to monitor court lists by reason of the subject matter and identity of respondents. He said that his firm was not equipped to deal with that level of media inquiry and interest and, for that reason, he had come to the conclusion some years before that there a need to engage the services of an expert media consultant when the respondent to this type of claim is a high profile organisation or person.

109 Mr Harmer had given instructions for the preparation and contents of the genuine steps statement filed in these proceedings and, at the time of its completion, he believed it to be true. He denied that it was false and untenable. The Genuine Steps Statement baldly stated:

> "1. The matter is urgent and
> 2. The matter involves aspects of victimisation. Alerting the Respondents to the matter would only increase the opportunity for victimisation."

110 Mr Harmer responded to allegations in the Commonwealth's and Mr Slipper's points of claim that alleged that the 2003 allegations were not supported by sworn or affirmed evidence. Mr Harmer contended that he had relied on emails of 19 April 2012 passing between Ms Hobson and one of his employed solicitors, Brad Buffoni. Those dealt with drafts of an affidavit by Ms Hobson which updated amendments to an earlier draft affidavit that Harmers had prepared for her on 19 April 2012. In her final email of 19 April 2012, Ms Hobson said that she would try to have the affidavit witnessed the next day. However, at 12.41 pm on 20 April 2012, she emailed Mr Buffoni saying that, while she had received the updated version of the affidavit he had sent the previous night, she had not had the opportunity to get it signed by a Justice of the Peace. She stated that would not be able to do

so before the following Monday, 23 April 2012. She said that she would send it to Mr Buffoni once she had done so and would update the dates on the document to 23 April 2012.

111 Mr Harmer swore that at the unspecified time on 20 April 2012 that he authorised the filing of the application electronically while interstate, he was aware of the last email from Mr Buffoni to Ms Hobson of the previous day but was unaware of her response. He said that he understood from his previous communications with Mr Buffoni that Ms Hobson was happy with the contents of the draft affidavit and was in the process of swearing it on 19 April 2012. But, Mr Harmer said that he did not specifically check whether she had subsequently made her affidavit. That was because he thought that, if she had not, that matter would have been brought to his attention. Mr Harmer also referred to being aware that previously Ms Hobson had made a statutory declaration to similar effect of her draft affidavit. His evidence was that Mr Buffoni had received an unsigned copy of that declaration from her. Mr Harmer also said that he was also aware that the declaration had been provided to a media organisation. He said that, accordingly, he believed that the factual material already available to him provided a proper basis for the allegations in the originating application.

112 There was no evidence that Ms Hobson ever swore or affirmed any version of an affidavit that supported the 2003 allegations in the originating application. There was no evidence of a signed copy of the statutory declaration previously made by Ms Hobson. Mr Ashby was ordered on 18 May 2012 to provide to the Commonwealth or Mr Slipper the sworn or affirmed evidence referred to in the originating application. No affidavit or signed copy of a statutory declaration supporting the 2003 allegations was tendered at the hearing.

113 Mr Harmer said that he was responsible for including the statement in the originating application that the allegations it contained were supported by sworn or affirmed evidence. He asserted that his sole purpose in doing so was to convey that the allegations made in the originating application were based on material then in his possession in accordance with what he then understood to be his personal professional obligations.

114 In a subsequent affidavit Mr Harmer responded to the Commonwealth's and Mr Slipper's written submissions that asserted that the 2003 allegations had been included only for the purpose of harming Mr Slipper and did not relate to any legitimate cause of

action that Mr Ashby had. Mr Harmer said that he had decided what allegations would be included in the originating application and that he had believed that 2003 allegations were relevant to the claim of breach of contract.

115 Mr Harmer denied the allegations in Mr Slipper's points of claim that, in making the allegations in the originating application and subsequently the statement of claim, he had intended either alone or in combination with anyone else to expose Mr Slipper to the maximum degree of vilification, opprobrium, sensation and scandal and to cause maximum damage to his reputation to the political advantage of the LNP and Mr Brough.

116 Mr Harmer said that Mr Ashby had informed him that Mr Ashby had forwarded Mr Slipper's diary extracts to Mr Brough and Mr Lewis so that the material would be placed in the public domain. That was because Mr Ashby had asserted to Mr Harmer that he believed that:

> "… the conduct [sic] was morally and legally wrong" and he felt aggrieved that he had been placed in a situation of becoming, as he understood it, exposed to (and potentially implicated in), what he regarded as the wrongful conduct of a public official."

117 Mr Harmer did not elaborate on what "the conduct" in the diary extracts was. Mr Harmer said that he asked Mr Ashby about the documentary evidence of his and Ms Doane's intentions to seek employment with the newly elected LNP State Government and removing the "black mark" on them by reason of their employment in Mr Slipper's office. Mr Harmer said that Mr Ashby told him that he had decided that "because of the Relevant Conduct" [which I infer is a reference to the sexual harassment allegations made by Mr Ashby] "he must leave his employment well prior to the first of the relevant text messages referred to (being 30 March 2012)".

Mr Ashby's Statement of Claim

118 On 15 May 2012, on the advice of senior counsel, Mr Ashby filed a statement of claim that his senior counsel also settled. This pleading made no reference to the 2003 allegations, the Cabcharge allegations or the allegations that anything Mr Slipper had done amounted to, or threatened, victimisation of Mr Ashby. It repeated the allegations in the originating application that I have summarised in [19(1), (2), (3), (7)]. The statement of claim also pleaded the effect of seven texts sent by Mr Slipper to Mr Ashby in the exchanges

of 1 February 2012, in lieu of the lengthy recitation of texts summarised in [19(4)] above, in respect of the allegation that Mr Slipper was then proposing an emotional and sexually intimate relationship with Mr Ashby. And, in lieu of the lengthy recitation of texts referred to in [19(5)] above, the statement of claim referred to Mr Ashby being in Canberra and receiving texts referred to in the first dot point in [19(5)]. The statement of claim also pithily summarised the "Can I kiss you both" allegation referred to in [19(8)].

119 The statement of claim then pleaded that the Commonwealth was vicariously liable for Mr Slipper's conduct, that that conduct had discriminated against Mr Ashby, caused him to feel distressed and amounted to adverse action within the meaning of s 342 of the *Fair Work Act* by reason of his sex and homosexuality. The pleading alleged that by directing Mr Ashby on 1 February 2012 to communicate through the other male staff member and withdrawing the invitation for the harbour cruise, Mr Slipper had altered Mr Ashby's position to his prejudice because he had exercised a work place right, thus contravening s 351. It alleged that that conduct was a contravention of s 340 by the Commonwealth of Mr Ashby's workplace right to be able to work in a physically and psychologically safe workplace free from harassment and discrimination. The statement of claim alleged that Mr Slipper was liable by force of s 550, because he had aided and abetted or been involved in each of the contraventions alleged against the Commonwealth. Finally, the pleading alleged that the Commonwealth had breached its contract of employment with Mr Ashby because he had to work in a sexually hostile environment.

Mr Ashby's submissions

120 Mr Ashby argued that Mr Slipper had failed to prove the wide ranging conspiracy he had alleged. He contended that Mr Slipper had not discharged the heavy onus of proof carried by a party who alleges that his opponent has begun or prosecuted proceedings as an abuse of process: see *Williams* 179 CLR at 529 and [4] above. Mr Ashby argued that the core allegation in par 10(a) of Mr Slipper's points of claim was that, in bringing the proceedings, Mr Ashby had the predominant purpose, in combination with others, to harm Mr Slipper. Mr Ashby contended that Mr Slipper's written submissions (that had been prepared by his counsel when he was represented) had argued that that purpose could be inferred having regard to each of the matters below. Mr Ashby argued that none of those

matters had been established, having regard to the heavy onus borne by Mr Slipper. The matters relied on in Mr Slipper's written submissions were that:

- Mr Ashby and Ms Doane had expressly agreed that the proceeding was for the collateral purpose;
- Mr Ashby had made no attempt to achieve, before their commencement, any result for which the proceedings were designed;
- the manner in which the proceedings were commenced and prosecuted was designed to inflict damage on Mr Slipper beyond what the law offered;
- the available and potential remedies for Mr Ashby were wholly disproportionate to the costs and complexity of bringing the proceedings, having regard to s 37M(2)(e) of the *Federal Court of Australia Act 1976* (Cth);
- in light of Mr Ashby's conduct in carefully cultivating a close personal and flirtatious relationship with Mr Slipper, the proceedings were wholly without merit and manifestly weak .

121 Mr Ashby also contended that Mr Slipper had failed to prove the following further allegations, namely that Mr Ashby :

- had acted in a manner that was deliberately duplicitous and deceitful;
- had engaged in secret dealings with the LNP as part of a plan to commence the proceedings;
- sought to erase a "black mark" against him and secure preferment from the LNP;
- had lied about the reasons for his absences from work;
- included allegations in the originating application that were unsupported and unreasonably made.

122 Mr Ashby also relied on his written submissions in respect of the Commonwealth's interlocutory application as answering Mr Slipper's adoption of the Commonwealth's oral and written submissions.

Principles

123 The principles applicable to abuse of process are those identified at [4] above. The power of the Court to prevent an abuse of process is, as in this case, ordinarily exercised summarily, and without a full hearing on the merits. If the power is exercised, the person who brought the proceedings will not be afforded a full trial at which the matters he, she or it regarded as giving rise to a controversy will be resolved. That consideration ensures that the Courts are cautious about exercising their power and will only do so in a clear case cf: the reference in *Williams* 174 CLR at 529 to the heavy onus on the party alleging abuse.

124 Mr Slipper contended that Mr Ashby, in bringing these proceedings in combination with one or more of Ms Doane, Mr Brough, Mr Lewis, Mr McClellan, Mr Harmer and or Harmers, had an ulterior or improper purpose. The substance of this allegation of abuse of process is that:

- the predominant purpose of Mr Ashby and the persons who combined with him in bringing the proceedings was to injure Mr Slipper in order to advance the political interests of the LNP and or Mr Brough; and
- by bringing the proceedings and injuring Mr Slipper, Mr Ashby and Ms Doane were seeking to enhance their own future prospects of advancement or preferment within, or at the hands of, the LNP.

125 Usually, the agreement that is alleged to be a combination or conspiracy is proved as an inference from other facts; i.e. by circumstantial evidence. That is because the making of the agreement can seldom be proved by direct evidence. In cases concerning the crime of conspiracy and the civil tort of conspiracy, the Courts have drawn a clear distinction between, *first*, proof of the existence of the conspiracy or combination and, *secondly*, the participation of each of the alleged conspirators in it: *Ahern v The Queen* (1988) 165 CLR 87 at 93 per Mason CJ, Wilson, Deane, Dawson and Toohey JJ. The issues involved in the present claim, that Mr Ashby's proceedings are an abuse of process, are not the same as those in cases of criminal or civil conspiracy. No party made any submission that the principles of law applicable to proof of a conspiracy should be used to determine Mr Slipper's interlocutory application. However, the common law principles used to determine the existence of a combination and the participation of each person claimed to be a co-conspirator provide

helpful guidance in evaluating whether Mr Slipper's allegations of a combination and who were parties to it have been established.

126 Their Honours held in *Ahern* 165 CLR at 93-94 that evidence of the acts or declarations of one alleged conspirator that do not occur in the presence of the other or others can provide a basis from which to infer the fact of a combination. That inference can be drawn because one person's act or statement itself points to a common design that, when taken with other evidence, justifies a conclusion that there must have been a conspiracy or combination. However, the maker's act or statement is not treated as evidence against the others of the truth of the inference of combination. Rather, when the individual acts or statements made by each of the alleged conspirators are considered with those made by each of the others, the Court can infer that the independent making of each act or statement by two or more persons points to them being party to a combination as alleged. The Court then said in *Ahern* 165 CLR at 94:

> It was such a situation that Isaacs J had in mind in *R and Attorney-General (Cth) v Associated Northern Collieries* ("the *Coal-Vend Case*") (1911) 14 CLR 387 at 400 when he pointed out that both the fact of combination and the participation of the participants may be proved by the same evidence. He said at 400:
>
> > "... though primarily each set of acts is attributable to the person whose acts they are, and to him alone, **there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement**, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge." (emphasis added)

127 The evidence of separate acts or statements of the alleged conspirators will not always prove both the fact of their combination and their participation. If the evidence does not prove that any combination existed, the claim of conspiracy fails at the threshold. In *Ahern* 165 CLR at 94 the Court explained that the evidence may prove, *prima facie*, that a combination existed between certain, but not all, of the alleged conspirators. In that situation they said:

> "… then the question arises whether there are circumstances in which evidence of the acts and declarations of other participants, outside the presence of the individual, may be led against him, not as separate facts from which, when combined with other facts, an inference of combination may be drawn, but as evidence of his own participation. Evidence of the acts or declarations of others led for this purpose will be led to prove the truth of the assertion or implied assertion contained in those acts or declarations.

> It would be excluded as hearsay or its equivalent were it not admissible upon some other basis."

128 The Court held that evidence of the acts or declarations of others, that did not occur in his or her presence, would only be admissible to prove that a person was a participant in a conspiracy if, *first*, a combination of the type alleged has been established by other evidence, *secondly*, a participant's acts or declarations were made or said in furtherance of the combination's common purpose and, *thirdly*, apart from those acts or declarations, there is "reasonable evidence" (but not necessarily a *prima facie* case) that the person was also a participant: *Ahern* 165 CLR at 100.

129 The reason why such evidence is admissible is that when two or more persons are bound together in pursuit of an unlawful object, anything said or written by one in furtherance of that object is admissible against the others: i.e. all are treated as "partners in crime" or as agents of each other in pursuing the unlawful object, as the Court explained in *Ahern* 165 CLR at 94-95. In a criminal trial, the question of whether there is admissible evidence of a combination and of the accused's participation in it is a matter for the trial judge, who may postpone ruling on those issues until the whole of the evidence has been led: *Ahern* 165 CLR at 104.

130 Importantly, evidence in a circumstantial case cannot be considered piecemeal. That is because in such a case there will be evidence that, if taken alone or out of the context supplied by the whole of the evidence, would lead to an inference of innocence (or against the adverse inference asserted): *The Queen v Hillier* (2007) 228 CLR 618 at 638 [48] per Gummow, Hayne and Crennan JJ. Sometimes it will be "the united force of all of the circumstances put together" that will be crucial, as appears from the passages their Honours cited from *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 535 per Gibbs CJ and Mason J and *Plomp v The Queen* (1963) 110 CLR 234 at 242 per Dixon J.

CONSIDERATION

Ms Doane's and Mr Brough's roles

131 Mr Ashby and Ms Doane had decided to work together on a "journey" from no later than their exchanges of texts on 28 March 2012: [56]. Mr Ashby had told Mr McArdle two days before that he had decided to press ahead with what the two had discussed on

2 February 2012: [55]. Mr Ashby's text messages with his friends Martin, Mr Nagle and Ms Hubbard in early February 2012 revealed that what he was proposing as his course of action at that stage would "empower someone else definitely". He asked Ms Hubbard whether by acting to empower that person he would be rewarded or condemned. He told Martin that what he was contemplating involved "national decisions": [34]. The messages suggest that Mr Ashby was proposing using the record of his text messages with Mr Slipper for a political attack that would be the impetus for national decisions.

132 Mr Ashby and Ms Doane had decided by 29 March 2012 that Mr Ashby would make allegations of sexual harassment in legal proceedings against Mr Slipper and would assist Mr Brough and Mr Lewis to damage Mr Slipper in the public eye and political arena with any information they could find including using the requested diary entries together with any proceedings. Mr Ashby referred to seeing or using lawyers in his texts from about this time. Accordingly, I have inferred that he, Ms Doane and Mr Brough intended that Mr Ashby would bring proceedings against Mr Slipper alleging at least sexual harassment. Over the six previous months Mr Ashby had described Mr Brough to Mr Slipper in the most foul terms. He had also been considerably unflattering about Mr Lewis when discussing him with Mr Slipper. Yet, by 29 March 2012, Mr Ashby had confided in Mr Slipper's political foe, Mr Brough, about being sexually harassed by Mr Slipper and sought Mr Brough's help in obtaining a lawyer. Moreover, within a day or so Mr Ashby and Ms Doane were providing Mr Brough and Mr Lewis with copies of Mr Slipper's diaries.

133 Once they had decided on their course of action, Mr Ashby and Ms Doane did not go straight to see a lawyer to air any concerns about any legal wrongs that either may have suffered. Instead, Mr Ashby or Ms Doane contacted Mr Brough and they began working with him and Mr Lewis. That was an act of disloyalty that they both knew was antithetic to their continuing to work for Mr Slipper. But they did continue. They asked Mr Brough to help them find a lawyer. They used their positions on his staff surreptitiously to copy and provide extracts from Mr Slipper's diaries for periods in 2009 and 2010 at the requests of both Mr Brough and Mr Lewis. There is no evidence that Mr Ashby ever provided any of Mr Slipper's diary entries concerning the 2012 Cabcharge allegations to anyone. Mr Ashby met Mr Lewis on 4 April 2012 and Mr Ashby so enthused Mr Lewis that the latter wrote "We will get him!!" just before flying to Sydney.

134 Objectively, the conduct of Mr Ashby in relation to Ms Doane, Mr Brough and Mr Lewis prior to the meeting with Mr Russell QC is consistent with Mr Ashby working towards a politically damaging attack on Mr Slipper. That conclusion is reinforced by the absence of any indication in the text messages recorded on Mr Ashby's phone that indicate that he had expressed any concern, let alone distress, about any sexually harassing behaviour by Mr Slipper.

135 Mr Ashby asserted to Mr Harmer that his justification for his disloyalty as an employee in providing copies of Mr Slipper's 2009 and 2010 diaries was that he wished to place the material in the public domain. That was, his assertion went, because he "believed that **the conduct** was morally and legally wrong and he felt aggrieved that he had been placed in the situation of becoming, as he understood it, exposed to (and potentially implicated in) what he regarded as the wrongful conduct of a public official": [116] above. The words I have emphasised were ambiguous. If they referred to Mr Slipper's conduct on the days covered by the 2009 and 2010 diary entries he surreptitiously sent to Mr Brough and Mr Lewis, there is no evidence to support Mr Ashby's description or that he had any knowledge of particular conduct of Mr Slipper that was morally or legally wrong prior to him or Ms Doane sending the diary extracts to Mr Brough and Mr Lewis.

136 Notably, Mr Lewis had emailed Mr Brough on 29 March 2012 saying that he (Mr Lewis) "would be fascinated to see what his diary said for these dates, they involve some large outlays, and the destinations were … er …. unusual!!": [58]. The fascination expressed by Mr Lewis did not warrant Mr Ashby acting at that time on the basis that the diary entries he and Ms Doane surreptitiously copied and sent showed any legal or moral wrongdoing by Mr Slipper. Rather, Mr Ashby's and Ms Doane's conduct at that point indicated that he and she were anxious to supply information to Mr Brough and Mr Lewis so that they could use it to assemble an attack on Mr Slipper, if they could find sufficient material to do so, using the diary entries and other evidence. Mr Lewis was raising questions – not answers. The diary entries by themselves, or even with Mr Lewis' questions, did not reveal any legal or moral wrongdoing by Mr Slipper in relation to the occasions covered by the diary entries, even if they revealed a line of inquiry.

137 If the reference to "the conduct", in Mr Ashby's self-serving assertion to Mr Harmer, related to the subject matter of the Cabcharge allegations, Mr Ashby never asked Mr Slipper

about the arrangements he had with the Sydney driver. Mr Ashby was ready, willing and able to assert himself and to protect his own position when he perceived Mr Slipper to compromise that, as the texts of 1 and 26 February 2012 demonstrated. I do not accept that Mr Ashby ever believed that Mr Slipper had acted in a legally or morally wrong way so as to compromise Mr Ashby in relation to his use of Cabcharge vouchers.

138 I am also satisfied that Mr Ashby and Ms Doane by about 29 March 2012 were in a combination with Mr Brough to cause Mr Slipper as much political and public damage as they could inflict on him. They believed and hoped that Mr Lewis would publish unfavourable stories about Mr Slipper concerning whatever they could help Mr Lewis find in relation to Mr Slipper's use of his travel entitlements in the areas of Mr Lewis' curiosity. That is why each of Mr Ashby, Ms Doane and Mr Brough were anxious to provide Mr Lewis with the diary entries he sought. It is not clear whether Mr Brough had passed on to Mr Lewis Mr Ashby's foreshadowed complaint of sexual harassment in late March 2012. They also believed that Mr Lewis, and the media generally, would report on any legal proceeding against Mr Slipper in which Mr Ashby alleged sexual harassment. At this time, Mr Ashby and Ms Doane saw Mr Brough as their means of obtaining favour from the LNP in seeking new employment. It was obvious that once what Mr Ashby was then planning became public, he and Ms Doane could no longer work as members of Mr Slipper's personal staff. The relationship of trust and confidence (if it still subsisted) between Mr Slipper and the two staff members would have been destroyed by their acts of calculated disloyalty.

139 The timing of Mr Ashby's and Ms Doane's actions immediately after 24 March 2012 is also significant. They believed that new job opportunities would open up to them after the LNP won government in Queensland on the weekend of 24-25 March 2012. If Mr Ashby could discredit Mr Slipper politically by helping Mr Brough and using Mr Lewis, he perceived that would gain favour for him and Ms Doane in the eyes of the LNP. Mr Russell QC may have disabused Mr Ashby of that perception on 6 April 2012. However, both Mr Ashby and Ms Doane acted on that basis before 6 April 2012 and she, at least, continued to do so later.

140 I also infer that Mr Ashby and Ms Doane perceived that once the dust had settled after Mr Ashby's proceedings against Mr Slipper, they would have, what they perceived to be, the "black mark" of having worked for Mr Slipper removed and that this would open the way for

the LNP or persons with whom Mr Brough and his allies appeared to have had influence, such as Mr Palmer, to give them favourable consideration for employment once again. Thus, on 30 March 2012, Ms Doane had emailed Mr Ashby about a future with "focussed careers with people we can be proud to affiliate our names": [59], [66]. After the meeting with Mr Russell QC, Ms Doane continued to press Mr Brough for help in pursuing her opportunities. Thus, on 10 April 2012 she emailed him with her resume for consideration by Mr Palmer.

141 Mr Brough was unlikely to have been offering to assist Ms Doane and Mr Ashby in seeing Mr Russell QC for advice or looking for new careers out of pure altruism. Realistically, his preparedness to act for them was created and fed by their willingness to act against Mr Slipper's interests and assisting Mr Brough's and the LNP's interests in destabilising Mr Slipper's position as Speaker and damaging him in the eyes of his electorate. Mr Ashby wrote that he totally agreed with Ms Doane's observation in texts on 30 March 2012 that what they were doing, seeking to bring the sexual harassment case would "tip the govt to Mal's and the LNP's advantage". They also thought that meeting with Mr Russell QC would also be "[d]efinitely a good move for us" by aiding them in removing "the black mark from being" with Mr Slipper: [66]. By this time Ms Doane's animus against Mr Slipper was pronounced, as her text expressing loathing of 3 April 2012 showed: [67].

Mr Lewis' role

142 I infer that Mr Lewis was motivated by the opportunity to obtain newsworthy stories. As Mr Lewis said in his radio interview with Chris Smith "I have been reporting on Mr Slipper and his abuse of the public purse for about 2 years". Certainly, the nature of the allegations that Mr Brough, Ms Doane and Mr Ashby had provided Mr Lewis in about late March and early April 2012 would have suggested to a political journalist that there would now be more than one news story about Mr Slipper to pursue. Mr Lewis is likely to have been selected as the journalist to whom the story should be given, because of his earlier reporting on Mr Slipper. Both Mr Ashby and Ms Doane, as recently as 20 March 2012, had expressed hostile views to Mr Slipper about how Mr Lewis had reported on, and was perceived to view, Mr Slipper: [51]. Thus, they would have believed that Mr Lewis would give their stories attacking the person for whom they were working a sympathetic, if not enthusiastic, airing.

143 There is nothing unusual in a symbiotic relationship between members of the media, such as Mr Lewis, and persons involved in politics. Mr Lewis' conduct could be seen as a normal response of a journalist who is put onto the trail of a potentially good scoop. After meeting Mr Ashby on the Sunshine Coast, Mr Lewis exchanged the texts with Mr Ashby on 4 April 2012 set out at [70] above in which Mr Lewis referred to Mr Slipper when he wrote "We will get him!!". Both men knew that each of Mr Ashby and Ms Doane was continuing to act as if he were loyal member of Mr Slipper's staff while seeking surreptitiously to launch attacks on him. Before publishing Mr Lewis took the precaution of seeking to get his facts right. Hence he sought information and copies of Mr Slipper's diary entries from Mr Ashby and Ms Doane, investigated the matters on the dates that were of interest to him and also corroboration of what Mr Ashby had said to him. Mr Lewis understood that Mr Ashby would only commence proceedings alleging sexual harassment and other matters if Harmers thought there was enough in his complaints to justify that.

144 Mr Lewis knew that commencement of proceedings was likely to be imminent once Mr Ashby was in Sydney in "lock down" with Harmers. After all, he arranged for Mr Ashby to fly to and stay in Sydney at News Limited's expense while he conferred with Harmers. Mr Lewis and his fellow journalists at the *Daily Telegraph*, such as Ms Carson, knew that they could access the Federal Law Search facility to see whether a new case had been filed in this Court or the Federal Magistrates Court. Mr Lewis knew that, *first*, Mr Ashby would be named as the applicant in such proceedings, and *secondly*, once an originating application was filed any person would then have the right to inspect it: see r 2.32(2) of the *Federal Court Rules 2011*. Thus, all he or a colleague at News Limited had to do was monitor new Court filings to gain access to Mr Ashby's originating application. He would then be in a position to report on a story the general nature of which he was aware of from his earlier discussions with Mr Ashby.

145 Mr Lewis appears to have pursued, enthusiastically, the stories potentially available to him based on Mr Ashby's and Ms Doane's information. However, I am not satisfied that Mr Lewis shared with them the purpose of advancing the political interests of Mr Brough or the LNP or of aiding Mr Ashby or Ms Doane in their future prospects of advancement or preferment. It is more likely that Mr Lewis was focused on obtaining good copy for stories to sell newspapers. He may not have been so naïve that he was blind to the motivations of Mr Ashby, Ms Doane or Mr Brough. Mr Lewis was no doubt wanting to encourage them, as

sources, to continue to provide material which he could use to publish. But, that did not involve him in seeking to achieve the same end as his sources, despite some overlap. Publication of significant or sensational news can have significant impact on the public perception of persons or bodies referred to in the stories that favours one side rather than another in the political debates of the day. However, that consequence does not necessarily suggest that the journalist or publisher is seeking to aid or support the side of politics that benefits from the publication. Rather, it is more likely that, by publishing the story, the journalist or publisher is simply fulfilling his, her or its role of reporting news. Once presented with sources such as Mr Ashby and Ms Doane, together with the prospect of a story such as in the originating application, it is difficult to think that any journalist would have acted differently to Mr Lewis in pursuing and publishing that story.

146 Mr Ashby and Mr Lewis had planned that articles about Mr Slipper's use of travel entitlements would be published shortly before these proceedings were filed. They both knew that Mr Lewis would be able to publish further articles on the subject matter as soon as it was filed in Court in the originating application. Ms Doane and Mr Brough had also discussed the timing and sequence of publication of stories by Mr Lewis. So much is clear from Mr Ashby's texts to Mr Nagle of 10 April 2012, Glen of 11 April 2012 and Ms Doane's email to Mr Brough of 10 April 2012: see [82], [90], [86]. The planning reveals that Mr Ashby calculated how he would attack, and use the press to attack, Mr Slipper.

147 Mr Ashby had planned with Mr Lewis, and probably separately with Ms Doane and Mr Brough, the sequence of publications so as to raise the more serious allegations in the originating process, after the stories of 16 April 2012 appeared. The timing of those 16 April stories was linked to when the originating application would be filed. Once Mr Ashby began seeing Harmers and went into "lock down", Mr Brough and Mr Lewis became anxious to know when the proceedings would be ready to be filed. Hence their strenuous attempts to contact Mr Ashby once he began to act on Mr McClellan's advice to filter media contact through him. Mr Ashby had emphasised in his text to Mr Lewis on 10 April 2012 that "We need to act fast mate". And Mr Brough told Ms Doane on learning that, eventually, Mr McClellan would meet Mr Lewis "Everything will be fine": [94].

148 Mr Harmer did not explain why he decided to file the originating application on 20 April 2012, just at the time Mr Slipper was about to leave New York for home. Nor did he

explain what the urgency was that he asserted in the genuine steps statement. There was no need for urgency that was apparent on the evidence except if the plan had been to raise the allegations in the originating application when Mr Slipper would have great difficulty, while travelling, in responding and putting his position. Mr Ashby had begun collaborating with Ms Doane and Mr Brough shortly after Mr Slipper left for overseas on 24 March 2012. Mr Ashby is highly likely to have told Mr Harmer that Mr Slipper was overseas and when he was to return.

Mr McClellan's role

149 Mr Slipper's written submissions did not press any assertion that Mr McCellan was part of the combination originally alleged in the points of claim. By the time Mr McClellan was engaged, Mr Ashby and Mr Lewis had been discussing when Mr Lewis' first article concerning Mr Slipper and his use of travel entitlements would appear so as to co-ordinate that publication with when the proceedings would be filed and attract the consequential publicity of Mr Ashby's allegations against Mr Slipper. There is no evidence to suggest that Mr McClellan had any role, far less any actuating purpose in bringing the proceedings against Mr Slipper or in taking any other action complained of. The pleaded allegation that Mr McClellan was part of a combination to do so cannot be sustained.

THE CONTENT OF THE ORIGINATING APPLICATION AND MR HARMER'S ROLE

150 Mr Harmer asserted that he did not participate in commencing the proceedings on the basis that such a course would involve publicity and damage to Mr Slipper's reputation. He denied that he intended, alone or in combination with any other person, to expose Mr Slipper to the maximum degree of vilification, opprobrium, sensation and scandal and cause maximum damage to his reputation, to the political advantage of the LNP and Mr Brough. I do not accept that evidence. Mr Harmer knew that the proceedings would attract significant publicity. That is why he recommended Mr McClellan be engaged by both Mr Ashby and Ms Doane. They each engaged Mr McClellan on a contingency fee basis.

151 I accept Mr Harmer's evidence that he was not a member of any political party and, to the extent he held any, his political views were generally not consistent with those distinctive of the LNP or its allies. However, Mr Harmer intended to make the 2003 and Cabcharge

allegations, that included the assertion that Mr Ashby intended to report them to the police, as part of the originating application. He must have appreciated not only their individual capacities to damage Mr Slipper but also that they would do so when they became public. He must also have appreciated that Mr Slipper's entitlement to hold his position as Speaker in the Parliament would be called into question and his political opponents, including the LNP and Mr Brough, would be advanced. That was because those allegations were damaging to Mr Slipper. Moreover, the inclusion of the assertion that Mr Ashby intended reporting the Cabcharge allegations to the police was capable of conveying that Mr Slipper had committed criminal offences in early 2012 after he had become Speaker.

152 Of course, the sexual harassment allegations made by Mr Ashby were also damaging to Mr Slipper. Mr Harmer could not have been criticised for simply including those alone in the originating application or for the effect on Mr Slipper that their subsequent publication in the media would have. Mr Harmer and his firm were Mr Ashby's agents in instituting and prosecuting the proceedings on his behalf. Mr Harmer, with Mr Ashby, was responsible for the decision to include the 2003 allegations and the assertion that Mr Ashby intended to report the Cabcharge allegations to the police in, and then to file, the originating application in that form. That raises the question of whether those two sets of allegations, later omitted from the statement of claim, had any legitimate forensic purpose when they were included in the originating application.

153 In my opinion, for the reasons below, the 2003 allegations and the assertion about reporting the Cabcharge allegations to the police had no legitimate forensic purpose. They were not included in the originating application to advance any *bona fide* cause of action that Mr Ashby may have had against either the Commonwealth or Mr Slipper. The effect of their inclusion and, I find, the purpose that Mr Ashby and Mr Harmer had in including them in the originating application was to further damage Mr Slipper in the public eye and politically and to attract to him significant adverse publicity in the media. That was an aim of Mr Ashby's from the time he had seen Mr McArdle on 2 February 2012, as he discussed with Ms Hubbard on 4 February 2012 when they referred to empowering others.

The 2003 allegations

154 Mrs McArdle had told Mr Ashby about the video referred to in the 2003 allegations before Mr Ashby began working for Mr Slipper. According to Mr Ashby, Mr McArdle had

cautioned Mr Ashby in early February 2012 against doing what he embarked on from about 26 March 2012. The latter date was when Mr Ashby texted Mr McArdle to inform him of his decision to press ahead with what he had spoken of earlier [55].

155 Mr Ashby argued that the 2003 allegations were relevant to his claim that the Commonwealth had breached contractual terms that it was obliged to provide a safe system of work for him and to take all reasonable steps to protect the safety of its employees including him. He also argued that those allegations were relevant to his claim for the imposition of a pecuniary penalty and an order that Mr Slipper be counselled. Mr Ashby further argued that the 2003 allegations supported his pleading that the Commonwealth failed to take reasonable and effective steps to prevent Mr Slipper utilising his office to foster sexual relationships with young male staff members.

156 Mr Ashby argued that Mr Harmer was entitled to plead the 2003 allegations because they were relevant to establishing that the Commonwealth was put on notice of matters that might have affected the provision by it of a safe system of work for all its employees, including Mr Ashby. He contended that the Commonwealth breached the implied contractual safe work term that required it to take all reasonable steps to protect the safety of its employees, including Mr Ashby. The submission asserted that:

> "Had the Commonwealth further investigated the 2003 Incident via Ms Hobson, it would have been suggested that it would have become aware of **just how serious the conduct was alleged to be** (see paragraphs 6 and 9 of the [originating] application)." (emphasis added)

157 Mr Ashby also argued that the Commonwealth's failure to investigate was relevant to his allegation of a breach of the trust and confidence term. That was because, so he asserted, if proven, his awareness of the apparent failure of the Commonwealth to prevent the 2003 conduct recurring undermined his relationship of trust and confidence with both the Commonwealth and Mr Slipper.

158 Mr Ashby, through Mr Harmer, relied on authorities to suggest that each of the 2003 and Cabcharge allegations, if proved, would establish a breach of the pleaded contractual trust and confidence term and the safe work term: see [20] above. The trust and confidence term was pleaded in the originating application in accordance with the authorities distilled by Besanko J in *Barker v Commonwealth Bank of Australia* [2012] FCA 942 at [330] following

statements by a Full Court of the Industrial Relations Court of Australia in *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 at 151, per Wilcox CJ, von Doussa and Marshall JJ and by Allsop J in *Thomson v Orica Australia Pty Ltd* (2002) 116 IR 186 at 223-224 [140]-[143] esp at 224 [141]. Besanko J said:

> "The term only operates where a party **does not have reasonable and proper cause** for his or her conduct and the conduct is likely to *destroy* or *seriously damage* the relationship of confidence and trust between employer and employee."
> (bold emphasis added, original italicised emphasis)

159 Mr Ashby argued that breach of such a term could be inferred from a series of events over time, each event operating as a separate straw that ultimately would result in a straw to break the camel's back. He relied on what had been said by Dyson LJ, with whom May and Wall LJJ agreed in *Omilaju v Waltham Forest London Borough Council* [2005] 1 All ER 75 concerning the final straw analogy. He also argued that there were subjective and objective aspects to the seriousness of the conduct that were relevant to its impact on the level of trust and confidence in the relationship.

160 I reject those arguments. Mr Harmer had no proper evidence or other basis on which to make the 2003 allegations for the reasons I have given. Moreover, the originating application did not plead, and Mr Harmer had no basis to allege, that if the 2003 allegations had been investigated "via Ms Hobson" or in any other way, it would have established that Mr Slipper had utilised "his office to foster sexual relationships with young male staff members" in 2003, as alleged in par 8 of the originating application (see [18] second last dot point). The originating application itself pleaded that after viewing the video Ms Hobson formed the view that the relationship was consensual. The mere fact that a sexual relationship, as allegedly depicted on, or evidenced by the video, may have existed between Mr Slipper and the male staff member did not suggest that Mr Slipper had utilised his office to foster that relationship, as opposed to it being a voluntary or consensual relationship.

161 Critically, there was no evidence that the staff member, who was still, or again, working for Mr Slipper in 2011 and 2012, had ever complained to the Commonwealth about Mr Slipper's conduct or that, in fact, he had any complaint to make. The male staff member's complaint to Ms Hobson recorded in the originating application, when seen in the context of the same complainant's conduct recorded in the video, rang hollow in the absence of evidence from him to justify the 2003 allegations. Mr Harmer knew that he had no such

evidence available from that male staff member let alone any "sworn/affirmed evidence" from him of the kind referred to in the originating application. Thus, there was no basis on which Mr Ashby or Mr Harmer could assert that investigation in 2003 would have revealed anything at all concerning steps that the Commonwealth might have taken.

162 The 2003 allegations had nothing to do with Mr Ashby's complaint that Mr Slipper sexually harassed him. The descriptions of the video were gratuitous and scandalous. The other 2003 allegations concerning the staff member were of hearsay material that had no sworn or affirmed evidence to support them on which Mr Harmer could have relied to support his pleading of them. Even if it were reasonable for him to have believed, at the time he caused the originating application to be filed, that Ms Hobson had sworn or affirmed her draft affidavit or had made an earlier statutory declaration, neither could have been admissible evidence on the issue of whether or not the other staff member had been the victim of sexual harassment by Mr Slipper. Only the staff member or a witness of the alleged harassing activity could have given evidence about the fact of whether any such incident occurred. The statutory declaration was a hearsay account by a person (Ms Hobson) who was not present when any conduct by Mr Slipper was alleged to have occurred. The statutory declaration provided no basis for pleading the 2003 allegations, far less for asserting that they were supported by sworn or affirmed evidence.

163 Given that the originating allegation referred to sexual harassment that had happened in 2003 between the alleged complainant and Mr Slipper in private (about which Mr Harmer did not have any "sworn/affirmed evidence"), and a video of consensual conduct, there was no, let alone a reasonable, basis to justify the inclusion of the 2003 allegations in the originating application.

164 The form of the pleading of the 2003 allegations was obviously intended to bring Mr Slipper into disrepute for no good reason. For example, there was no legitimate forensic purpose in pleading either that Mr Slipper was seen in the video to gain access to the bedroom by the window or to urinate out the window. Those matters had nothing to do with alleged sexual harassment. Both those allegations were calculated to embarrass, demean and humiliate Mr Slipper in a very public way. They were irrelevant to any claim Mr Ashby might have had and were scandalous. Moreover, the pleading of Ms Hobson's conclusion that the contents of the video appeared to depict consensual behaviour between two adults

demonstrated its obvious irrelevance to any claim that Mr Slipper, on that occasion, engaged in sexual harassment. No reasonable person acting within the dictates of a professional lawyer's obligations, such as Mr Harmer, could have justified referring to the video in the originating application at all.

165 For these reasons, I am of opinion that Mr Ashby's and Mr Harmer's pleading of 2003 allegations was scandalous, oppressive and vexatious and an abuse of Mr Harmer's professional obligations to the Court as a lawyer.

The Cabcharge allegations

166 Mr Ashby contended that the assertion, in the originating application, of his intention to inform the police, reflected his subjective view that he considered the Cabcharge allegations to be so serious, subjectively and objectively, as to warrant such an investigation. For that reason he also contended that the alleged conduct breached the trust and confidence term. Mr Ashby argued that Dr Phillips' report supported the objective reasonableness of his assertion that the Cabcharge conduct amounted to a breach of the safe work term that required the Commonwealth to provide a safe system of work for Mr Ashby and to take all reasonable steps to protect his safety. Dr Phillips said:

> "Mr Ashby identified a series of incidents which he believes affected him adversely in the longer term. Specifically:
> …
> • He was alarmed and worried when [Mr Slipper] on a small number of occasions, handed signed Cabcharge dockets to the driver of an Audi A8 car which the Speaker used on a reasonably frequent basis.
> He thought, at the time, and continues to believe, that the actions of the Speaker **may have been unlawful** …"

Mr Ashby also relied on Dr Phillips' opinion that the main cause for his psychological decompensation in late 2011/early 2012 was what Dr Phillips described as "the increasing psychological trauma which he experienced in his professional relationship with Mr Slipper".

167 I reject those arguments. In my opinion, Mr Ashby included the Cabcharge allegations in the originating application for the predominant purpose of injuring Mr Slipper and assisting a political attack on him to benefit Mr Brough and the LNP. This is emphasised by his decision to include the assertion that he *intended* to report the matter to the Australian Federal Police. Mr Russell QC had told him, in Mr Brough's presence, two weeks before the

originating application was filed that he was free to do so if he was concerned about Mr Slipper's conduct. Mr Ashby did not do so. Instead, he waited to announce his "intention" to do so in the originating application knowing that this would be reported in the media. His statement that he "intended" to make the report was itself made two months after the alleged conduct last occurred and over one month after Mr Ashby had requested that he be allowed to travel at his own expense with Mr Slipper on an overseas trip.

168 Mr Russell QC had also told Mr Ashby that he should check with Harmers about how to deal with the issue. If Mr Ashby or Mr Harmer considered that the Cabcharge allegations warranted reporting to the police, the delay of a week from 13 April 2012 when Mr Ashby swore his affidavit to the filing of the originating application is difficult to comprehend. There was no need to delay reporting conduct to the police that was alleged or suspected of being criminal for over a week so that Mr Ashby could announce his "intention" to make such a report when his application was filed. Mr Ashby's planned attack on Mr Slipper involved prior publicity concerning other allegations of Mr Slipper's misuse of his travel entitlements.

169 There is no evidence to suggest that Mr Ashby ever asked Mr Slipper for or received any explanation of what he pleaded as being "questionable conduct". Mr Ashby's delay, and most particularly his request to accompany Mr Slipper overseas, point to his predominant purpose as being to seek publicity for the allegations so as to damage Mr Slipper and assist the latter's political opponents. They were allegations that were calculated to raise the spectre that Mr Slipper had engaged in criminal conduct, without actually asserting that he had done so.

170 Additionally, Mr Russell QC said that Mr Ashby had told him that he had observed Mr Slipper give three unsigned Cabcharge dockets to a cab driver on one occasion. Mr Russell QC had responded that that seemed highly inappropriate and would not be done in the military, of which he had experience. At the same time, Mr Brough said that the position was similar for members of parliament and the conduct seemed highly irregular, adding "I guess it's possible it might relate to three different journeys and if so, it would be within entitlement". In his originating application, Mr Ashby had asserted that Mr Slipper engaged in similar conduct on two further occasions. However, Mr Ashby alleged that on those two other occasions, Mr Slipper handed over "multiple" signed Cabcharge vouchers.

Mr Ashby was intending to use his contemplated proceedings to damage Mr Slipper. It is not necessary to decide whether Mr Ashby forgot, or overlooked mentioning in the meeting with Mr Russell QC, or Mr Russell QC did not take in that Mr Ashby had told him, about two other instances of conduct that had given Mr Ashby concern at the time each occurred where Mr Slipper handed over multiple blank, but signed, Cabcharge vouchers without asking the driver how many vouchers he wanted.

171 Mr Ashby's conduct in early to mid March 2012 when he sought to travel overseas at his own expense with Mr Slipper, well after he asserted the last of the Cabcharge incidents had occurred, demonstrated that he had no genuine belief in his later assertion, in the originating application that Mr Slipper had involved him in "questionable conduct in relation to travel" or that Mr Slipper or the Commonwealth had acted in breach of any contract in that respect.

172 In *Omilaju* [2005] 1 All ER at 80-83 [14]-[22], Dyson LJ explained that a term of trust and confidence in an employment contract may be breached by a relatively minor act that occurs against a background of a series of other acts or incidents, some of them quite trivial. He held that those acts or incidents cumulatively may amount to a repudiatory breach of the implied term of trust and confidence. However, he said that an entirely innocuous act on the employer's part cannot be the final straw even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is, as his Lordship said, objective: [2005] 1 All ER at 83 [22].

173 The makers of the Cabcharge allegations were anxious to wound but afraid to strike. The originating application stopped short of alleging directly that the "questionable conduct" amounted to a breach of the law, whether civil or criminal. Rather, it described the conduct in a way that made it appear that Mr Slipper misused his entitlements by handing over blank signed vouchers without any proper basis. But, as Mr Brough had tellingly said in the discussion with Mr Russell QC and Mr Ashby on 6 April 2012, if the number of vouchers handed over, in fact, related to the number of journeys that Mr Slipper had previously made, it would have been within Mr Slipper's entitlement to act as he did.

174 The originating application raised, but did not answer, the obvious question of why Mr Slipper would hand over more vouchers than represented journeys he had made. That conduct may well have justified pleading the allegation that Mr Slipper engaged in questionable conduct in relation to travel. However, when the pleader coupled Mr Slipper's conduct with the allegation that Mr Ashby intended to go to the police with the details, the originating application then conveyed to an ordinary reasonable reader that Mr Ashby and Mr Harmer believed Mr Slipper's actions involved more than "questionable conduct". Mr Ashby and Mr Harmer added to the characterisation of Mr Slipper's conduct, the damaging and prejudicial assertion that Mr Ashby intended to go to the police about it. That assertion was calculated to create the impression, conveyed by the originating application, that the Cabcharge allegations involved Mr Slipper in breaching the criminal law. Mr Harmer had not merely pleaded that Mr Slipper had "involved" Mr Ashby in "questionable conduct in relation to travel" but added that his client intended to go to the police, in the context that those allegations were "supported by sworn/affirmed evidence".

175 The recitation of the three Cabcharge incidents in the originating application, without any other context or explanation, coupled with the assertion of Mr Ashby's intention to inform the police, was capable of conveying, and I find did convey, to an ordinary, reasonable reader of the pleading that Mr Ashby was alleging that Mr Slipper was guilty of misuse of the Cabcharge dockets. Mr Ashby and Mr Harmer knew, and intended, that the media, including Mr Lewis, would obtain access to the originating application as soon as possible after it was filed and publish its allegations extensively. They both knew that the publication of those allegations would be highly damaging to Mr Slipper. Mr Lewis commenced his article published in *The Courier Mail* on 21 April 2012:

> "Speaker Peter Slipper is facing explosive allegations he sexually harassed a young male adviser and misused taxpayer-funded Cabcharge dockets in a major new crisis for the Gillard Government."

176 A person may publish matter concerning another person (such as Mr Slipper) that an ordinary reasonable person, drawing on his or her knowledge and experience of human affairs, would understand in a defamatory sense. A publisher who does so is responsible, for the purposes of the tort of defamation, for conveying that imputation or understanding. However, the publisher will not be responsible for conveying an imputation or understanding if the matter complained of is only capable of conveying the defamatory meaning because it

excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the other person (such as Mr Slipper): *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 301 per Mason J with whom Gibbs CJ, Wilson and Brennan JJ each agreed. In his seminal speech in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 284, Lord Devlin explained:

> "**When an imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts** …" (emphasis added)

And, his Lordship continued (at 285) in a passage partly cited with approval (commencing with my first emphasis below) by Brennan J in *Harrison* 149 CLR at 304:

> "It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, **it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done.** One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; **but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded**.". (emphasis added)

177 Mason J cited a passage from the judgment of Holroyd Pearce LJ in *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340 at 374 that made a similar point: *Harrison* 149 CLR at 302. His Lordship said:

> "When persons publish words that are imprecise, ambiguous, loose, fanciful or unusual, there is room for a wide variation of reasonable opinion on what the words mean or connote. The publisher can hardly complain in such a case if he is reasonably understood as having said something that he did not mean."

178 Here, the bare facts pleaded in the originating application about Mr Slipper handing over three and multiple incomplete signed Cabcharge vouchers on three different occasions, coupled with both the description of this as "questionable conduct" and the statement that Mr Ashby intended to report these matters to the police, invited an ordinary reasonable reader of the originating application to conclude that Mr Ashby (and the pleader) was alleging that Mr Slipper was guilty of misuse of Commonwealth funds, as indeed Mr Lewis reported. The reasoning of the Privy Council in *Jones v Skelton* [1963] 63 SR (NSW) 644 at 651 and *Lloyd v David Syme & Co Ltd* [1986] AC 350 at 363H-364A explains why an ordinary reasonable

reader of the Cabcharge allegations in the originating application would conclude that what they were really asserting was that Mr Slipper was guilty of misuse of taxpayer funded Cabcharge vouchers. Their Lordships said:

> "The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place - an explanation which the writer... did not care or did not dare to express in direct terms."

179 If Mr Slipper had done nothing legally wrong in handing over signed, but incomplete, Cabcharge vouchers, for example for the reason Mr Brough gave during the meeting with Mr Russell QC on 6 April 2012, then Mr Ashby had no basis to complain of a breach of contract based on the Cabcharge allegations. And, as I have found Mr Ashby's conduct in asking, at his own expense, to accompany Mr Slipper on his official visit to Hungary some time after the last of this allegedly "questionable conduct" had occurred, is completely inconsistent with any honest belief of Mr Ashby's that Mr Slipper had committed any legal wrong by engaging in the conduct the subject of the Cabcharge allegations.

180 The assertion that Mr Ashby intended to report the conduct to the police was irrelevant to any cause of action he may have had, but was included for the purpose of creating an allegation tantamount to criminality against Mr Slipper. However, Mr Ashby and Mr Harmer did not plead any criminality directly, for they stopped at the characterisation of "questionable conduct". That was done with both of Mr Ashby and Mr Harmer knowing and intending that the media could and would report the allegations in the originating application and so damage Mr Slipper's reputation and credibility. It came on the heels of Mr Ashby's intention to file the originating application after Mr Lewis had set the scene by earlier publishing stories (on 16 April 2012) damaging to Mr Slipper concerning other incidents related to his use of travel entitlements.

181 Accordingly, the inclusion of the allegation that Mr Ashby intended to report the Cabcharge conduct to the police was an abuse of the process of the Court. As I have noted, had the pleading not added the reference to Mr Ashby's intention it may not have been an abuse of process.

The propriety of Mr Harmer making the 2003 and Cabcharge allegations

182 During the hearing, I raised concern about the propriety of Mr Ashby and Mr Harmer pleading in the originating application each of the 2003 allegations and the assertion that Mr Ashby intended reporting Cabcharge allegations to the police. I referred the parties to the well known principles that apply to the use by a member of the legal profession of the absolute privilege given to statements made in open court or in court documents identified in *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 200-201. There, Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ said:

> "Cases will constantly arise in which it **is not merely the right but the duty of counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion**. From the point of view of the common law, it is right that the person attacked should have no remedy in the courts. **But, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence.** It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements **unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side**." (emphasis added)

183 Those statements are apposite to the contents of an originating application and a pleading in a jurisdiction such as in this Court where the Rules give a public right of access to such documents: see my reasons in *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293 at 299 [29]; see too *Fraser-Kirk v David Jones Ltd* (2010) 190 FCR 325 at 340 [50]-[51] per Flick J. A lawyer cannot properly make an allegation on originating application or pleading in this Court that departs from the standard of propriety set by the High Court in *Clyne* 104 CLR at 200-201. A lawyer cannot open a case in court by making statements that may have ruinous consequences to the person attacked that the lawyer cannot substantiate or justify by evidence. Similarly, a lawyer cannot plead such statements and assert that they are supported by sworn or affirmed evidence, when he or she does not have a reasonable basis for making such an assertion.

184 The Cabcharge allegations as a whole (including the assertion that Mr Ashby intended to report Mr Slipper's conduct to the police) conveyed the imputation that Mr Slipper was

guilty of misusing Commonwealth funds. The assertion of intention to report to the police was irrelevant as well as serious. It was calculated to add to the damage Mr Slipper in his office as Speaker and as a Member of the Parliament that the other Cabcharge allegations conveyed. Mr Harmer did not have a proper basis for including the assertion that Mr Ashby intended to report the other allegations to the police: see too *Clyne* 104 CLR at 201; Rule A.36 of the *Professional Conduct and Practice Rules*.

185 Mr Harmer was aware how damaging the making of each of the 2003 and Cabcharge allegations as a whole would be to Mr Slipper and his reputation. As he appreciated, this would be a "high profile workplace case" that would attract publicity about Mr Slipper who was a "high profile respondent". The imputation of not just misuse, but criminal misuse, of the Cabcharge dockets was obviously likely to damage Mr Slipper. So too were the 2003 allegations. The deployment by Mr Harmer in the originating application of the scandalous and irrelevant 2003 allegations and the assertion that Mr Ashby intended to report the Cabcharge allegations to the police, had no legitimate forensic purpose. No lawyer acting responsibly could have included either of those matters (leaving aside what would have been the position in respect of the Cabcharge allegations had the reference to the intention to report them to the police been omitted) in the originating application to make what would become a public attack on Mr Slipper when it was filed: *Clyne* 104 CLR at 200-201. Their inclusion made the originating application an abuse of the process of the Court.

The abandonment of the 2003 and Cabcharge allegations

186 Mr Slipper also contended that Mr Ashby's abandonment of the 2003 and all Cabcharge allegations on 15 May 2012 when the statement of claim was filed, demonstrated that by then those allegations had served their intended purpose of harming Mr Slipper. Mr Slipper relied on the absence of any evidence on Mr Ashby's part as to why the allegations had been made, only to be later withdrawn.

187 Mr Harmer gave evidence seeking to explain why he had pleaded those allegations and why he considered that doing so was consistent with his obligations to the Court as a lawyer. Mr Ashby contended, based on Mr Harmer's evidence, that his solicitor had a subjective and objective basis on which to found the Cabcharge allegations. He argued that:

> "Mr Harmer believed that conduct which could be regarded (objectively and subjectively) as unfairly and improperly implicating an employee in seriously

> wrongful conduct, could amount, on the state of the authorities, to the pleaded breach of the implied term of trust and confidence;"

188 Mr Ashby asserted that breach of the trust and confidence term can arise from a series of events over time, each event being a "straw" placed on the camel's back. He argued that his assertion in the originating application that he intended reporting the Cabcharge conduct to the police had to be considered in this context. He also argued that the Cabcharge allegations should be viewed as relevant to the breach of the safe system of work term of Mr Ashby's contract: see [20(1)(d)] above.

189 I reject those submissions. As Dyson LJ explained in *Omilaju* [2005] 1 All ER at 83 [22], the test of whether an employee's trust and confidence has been undermined is objective. Mr Ashby's history given to Dr Phillips was simply that Mr Ashby believed that Mr Slipper's actions "may have been unlawful". Mr Ashby did not have any genuine disquiet when he raised the Cabcharge allegations in the originating application, for the reasons I have given.

190 Even if I am wrong and Mr Ashby did have some disquiet, that could not have justified him or Mr Harmer pleading Mr Ashby's asserted intention to go to the police with his concerns. By pleading that damaging assertion, Mr Harmer breached his professional obligation not to misuse his privilege to make allegations under absolute privilege in Court documents. Mr Harmer knew that Mr Ashby had the right, if not the duty, to go to the police with any concerns he genuinely had about Mr Slipper's use of Cabcharge vouchers. But, the pleading of Mr Ashby's intention to do so had no legitimate forensic purpose. His inclusion of irrelevant assertion of Mr Ashby's intention to go to the police in the originating application was an abuse of the process of the Court for the same reasons as was the submission of the barrister, Peter Clyne in open court that a solicitor, Mr Mann, had been guilty of professional misconduct. The High Court said of that in *Clyne* 104 CLR at 201:

> "If the solicitor [against whom Mr Clyne made the allegations] was guilty of misconduct, the proper course was to report him to the Law Institute. **It is difficult to avoid the conclusion that the course adopted was chosen because of the opportunities which it offered for a public attack on Mr. Mann.**" (emphasis added)

191 Here, it is difficult to avoid the conclusion, that I draw, namely that the inclusion in the originating application of the assertion that Mr Ashby intended to report the Cabcharge

allegations to the police, offered him and Mr Harmer the opportunity to make a more serious public attack on Mr Slipper than would have been the case merely by making the balance of the Cabcharge allegations. That attack, in the form it was made, was a misuse of Mr Harmer's privilege as a lawyer. The use of the Court's process to make that attack in that form was an abuse of process.

The Genuine Steps Statement

192 There was no basis for Mr Harmer to assert in the genuine steps statement that the matter was so urgent that genuine steps to resolve it could not have been undertaken before the proceedings were filed. The inclusion of the 2003 and Cabcharge allegations in the originating application certainly inflamed the matter, but that was Mr Ashby's and Mr Harmer's doing. The originating application did not make any allegation that Mr Ashby had been "victimised" in the period of more than two months after 1 February 2012. Moreover, the subsequently filed statement of claim pleaded no acts of victimisation. As at 20 April 2012, Mr Ashby was nowhere near ready to litigate the matter at a final hearing. The originating application pleaded that his damages claim for breach of contract would "be calculated following the receipt of expert medical evidence". He only first attended on Dr Phillips on 19 June 2012, two months after the asserted urgency in the genuine steps statement. Mr Ashby had been actively intending to bring the proceedings since at least 26 March 2012, but only in his good time and after Mr Lewis had gone to press first (on 16 April 2012) with other allegations against Mr Slipper.

193 As the Commonwealth identified, a range of alternative remedies were available to Mr Ashby. These included his rights to:

- complain under the Bullying, Harassment and Workplace Violence Policy and Procedure for MOPS Act employees;
- complain to the Ministerial and Parliamentary Services Division of the Commonwealth Department of Finance;
- apply to Fair Work Australia under s 372 of the *Fair Work Act 2009* (Cth) to deal with the dispute by conducting a conference;

- refer the matter to the Department of Finance and Deregulation under cl 74.4(c) of the *Commonwealth Members of Parliament Staff Enterprise Agreement 2010-2012*;
- complain to the Australian Human Rights Commission and seek conciliation there.

194 None of these courses would have resulted in a public vindication of Mr Ashby in respect of his complaint of sexual harassment against Mr Slipper. In addition, only the Court could impose a pecuniary penalty or make an order under s 545 of the *Fair Work Act* that Mr Slipper undergo counselling and attend training in the area of anti-discrimination, as Mr Ashby sought in his originating application (OA 52). If any of the alternative courses of action had been pursued, there is no evidence to suggest that it would not have provided an effective resolution of any grievance Mr Ashby had against Mr Slipper. And, if there were any substance in his allegations, any such procedure could have offered the possibility that steps would be taken to prevent any repetition.

195 The existence of other alternatives to Court proceedings cannot deny the right of any person to seek the resolution of any *bona fide* dispute by a Court including under the *Fair Work Act*. However, these proceedings do not fall into such a category. The maximum damages that the Court can award an employee for any non-economic loss under s 45(4) of the *Safety Rehabilitation and Compensation Act 1988* (Cth) is $110,000. Any injury suffered by Mr Ashby would have been sustained by him as an employee of the Commonwealth in the course of his employment. As I have found, the contemporaneous texts messages and other documents do not reveal any trace of psychological or emotional suffering or complaint by Mr Ashby arising from any sexual harassment. Mr Ashby's request in early to mid March 2012 to accompany Mr Slipper overseas, at Mr Ashby's own expense, reinforces the obvious lack of any, or any perceivable substantive damage that he may have suffered from any inappropriate conduct by Mr Slipper. In any event, the $50,000 paid by the Commonwealth ensured that Mr Ashby recovered more than he would have been awarded in damages and pecuniary penalties against both the Commonwealth and Mr Slipper if he had established his claims relating to the relatively trivial incidents of sexual harassment he pleaded.

CONCLUSION

196 Having read all of the text messages on Mr Ashby's mobile phone, as Mr Ashby's senior counsel invited me to do, as well as the other evidence, I have reached the firm conclusion that Mr Ashby's predominant purpose for bringing these proceedings was to pursue a political attack against Mr Slipper and not to vindicate any legal claim he may have for which the right to bring proceedings exists. Mr Ashby began planning that attack at least by the beginning of February 2012. As Mr Ashby and Ms Doane agreed in their texts of 30 March 2012 what they were doing "will tip the govt to Mal's [Brough] and the LNP's advantage": [66]. It may be a coincidence that Mr Ashby suggested to Mr Slipper the idea of becoming Speaker just as Mr Brough began to move towards challenging Mr Slipper for LNP pre-selection for his seat and Mr Ashby ended up in an alliance in late March 2012 with Mr Brough to bring down Mr Slipper after he became Speaker. It is not necessary to make any finding about this or about whether Mr Slipper did sexually harass Mr Ashby in any of the ways alleged. It is also not necessary to consider whether these proceedings are "vexatious proceedings" within the meaning of r 6.02 or if that expression has a different meaning in r 26.01(1)(b) under which the Court can give summary judgment if "the proceeding is frivolous or vexatious".

197 For the reasons above, I am satisfied that these proceedings are an abuse of the process of the Court. The originating application was used by Mr Ashby for the predominant purpose of causing significant public, reputational and political damage to Mr Slipper. It contained the scandalous and irrelevant 2003 allegations and assertion that Mr Ashby intended to report to the police Cabcharge allegations. To allow these proceedings to remain in the Court would bring the administration of justice into disrepute among right-thinking people and would be manifestly unfair to Mr Slipper: *Jeffery & Katauskas* 239 CLR at 93 [28]. Even though Mr Ashby has now abandoned the 2003 and all the Cabcharge allegations, the features that I have criticised did the harm to Mr Slipper that Mr Ashby and Mr Harmer intended when those allegations were included in the originating application. A party cannot be allowed to misuse the Court's process by including scandalous, irrelevant or damaging allegations knowing that they would receive very significant media coverage and then seek to regularise his, her or its pleading by subsequently abandoning those claims.

198 Sexual harassment of anyone, including an employee such as Mr Ashby, is a violation of the person's human dignity and rights. The Court must always be available for the hearing

and determination of *bona fide* proceedings to vindicate and protect those rights. But for the reasons I have given, Mr Ashby's pre-dominant purpose in bringing the proceedings was not a proper one.

199 Even though I have not found that the combination was as wide as Mr Slipper alleged in his points of claim, the evidence established that there was a combination involving Mr Ashby, Ms Doane and Mr Brough of that kind. Mr Ashby acted in combination with Ms Doane and Mr Brough when commencing the proceedings in order to advance the interests of the LNP and Mr Brough. Mr Ashby and Ms Doane set out to use the proceedings as part of their means to enhance or promote their prospects of advancement or preferment by the LNP, including by using Mr Brough to assist them in doing so. And the evidence also established that the proceedings were an abuse of the process of the Court for the reasons I have given. Accordingly, I am satisfied that the exceptional situation that enlivens the Court's power to dismiss (or stay) proceedings as an abuse has been proved to the heavy standard required: *Williams* 174 CLR at 529. The duty and power of the Court to protect its own processes require that I give effect to the findings I have made by dismissing the proceedings under r 26.01.

COSTS

200 Ordinarily, s 570(1) of the *Fair Work Act* limits the powers of a Court exercising jurisdiction under that Act to order a party to pay costs. However, the Court can make such an order where it is satisfied that the party instituted the proceedings vexatiously or without reasonable cause (s 570(2)(a)) or that the party's unreasonable act or omission caused the other party to incur the costs (s 570(2)(b)). Initially, these proceedings were not brought solely under that Act because of the existence of the common law claims in contract against the Commonwealth. Those claims gave Mr Ashby a vehicle to make the 2003 and Cabcharge allegations against Mr Slipper, even though he was not liable in contract to Mr Ashby.

201 Mr Ashby began these proceedings as against Mr Slipper on Mr Harmer's advice, in the "no costs" jurisdiction under the *Fair Work Act*. Mr Ashby and Mr Harmer determined to raise the stakes by including the 2003 allegations, the intention to report the Cabcharge allegations to the police and the assertion of there being sworn or affirmed "evidence" to support all the allegations in the originating application. Mr Ashby's claims of sexual harassment involved relatively minor incidents. Those claims were only ever likely to attract

only a very modest award of damages or other compensation (such as a pecuniary penalty) if Mr Ashby were successful. It is likely that by engaging Mr McClellan at $550 per hour plus GST, on top of Mr Ashby's irrecoverable solicitor and client costs, would have resulted in Mr Ashby receiving virtually no damages or other compensation in his own pocket even if he were "successful". He now has the $50,000 paid by the Commonwealth.

202 The power to make an order for costs is in the discretion of the Court once the factors in s 570(2)(a) or (b) have been satisfied. The power must be exercised judicially. Mr Ashby instituted the proceedings without reasonable cause because they were and are an abuse of the process of the Court. Additionally, his unreasonable acts of instituting and prosecuting the proceedings caused Mr Slipper to incur costs for the same reason. Mr Ashby should be ordered to pay Mr Slipper's costs of the proceedings. Mr Slipper is entitled to an order for his costs of the proceedings subject to those being set off against the order for costs I made against him on 17 August 2012. If any special order for costs is sought in consequence of the orders I will make today either party may apply within 7 days.

I certify that the preceding two hundred and two (202) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 12 December 2012