FEDERAL COURT OF AUSTRALIA

Ashby v Slipper [2014] FCAFC 15

Citation:	Ashby v Slipper [2014] FCAFC 15
Appeal from:	Ashby v Commonwealth of Australia (No 4) [2012] FCA 1411
Parties:	**JAMES HUNTER ASHBY v PETER SLIPPER** **MICHAEL DANIEL HARMER v PETER SLIPPER and JAMES HUNTER ASHBY**
File number(s):	NSD 22 of 2013 NSD 31 of 2013
Judges:	**MANSFIELD, SIOPIS & GILMOUR JJ**
Date of judgment:	27 February 2014
Catchwords:	**PRACTICE AND PROCEDURE** – application for leave to appeal from decision to dismiss proceedings as an abuse of process – leave to appeal required – principles relating to appellate review – challenge to factual bases upon which proceedings classified as an abuse of process – whether or not improper collateral purpose for bringing proceeding – adverse inferences drawn by primary judge - whether solicitor has standing to appeal in relation to adverse findings made as to the conduct of a proceeding - whether the Court has duty to act in relation to a perceived abuse of process - inferences to be drawn from a failure of a witness to depose to matters in issue - application of the *Ferrcom* principle.
Legislation:	*Fair Work Act 2009* (Cth) ss 340, 351, 372, 539, 540, 545, 550 *Federal Court of Australia Act 1976* (Cth) s 24(1A), 37M(2)(e), Part VB *Federal Court Rules 2011* (Cth) rr 2.32, 6.02, 8.05(1)(a), 26.01, 34.05 *Evidence Act 1995* (Cth) s 140 *Civil Dispute Resolution Act 2011* (Cth) s 6 *Legal Profession Act 1987* (NSW) s 57B *Revised Professional Conduct and Practice Rules 1995* (NSW) rr A.35, A.36, A.37 *Members of Parliament (Staff) Act 1984* (Cth) *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1)

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Commonwealth v Construction Forestry Mining and Energy Union (2000) 98 FCR 31
Commonwealth v Fernando (2012) 200 FCR 1
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission (2007) 162 FCR 466
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Date of hearing:	2-3 May 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	458
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 22 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**JAMES HUNTER ASHBY** **Applicant**
AND:	**PETER SLIPPER** **Respondent**

JUDGES:	**MANSFIELD, SIOPIS & GILMOUR JJ**
DATE OF ORDER:	**27 FEBRUARY 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. Leave to appeal be granted.

2. The appeal be allowed.

3. The orders made on 12 December 2012 be set aside and in lieu thereof there be orders that:

    3.1 the respondent's interlocutory application dated 8 June 2012 be refused.

    3.2 the respondent pay the applicant's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 31 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MICHAEL DANIEL HARMER** **Applicant**
AND:	**PETER SLIPPER** **First Respondent**
	JAMES HUNTER ASHBY **Second Respondent**
JUDGES:	**MANSFIELD, SIOPIS AND GILMOUR JJ**
DATE OF ORDER:	**27 FEBRUARY 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application for leave to appeal be refused.

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

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 22 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **JAMES HUNTER ASHBY**
Applicant

AND: **PETER SLIPPER**
Respondent

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 31 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **MICHAEL DANIEL HARMER**
Applicant

AND: **PETER SLIPPER**
First Respondent

JAMES HUNTER ASHBY
Second Respondent

JUDGES: **MANSFIELD, SIOPIS AND GILMOUR JJ**
DATE: **27 FEBRUARY 2014**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

MANSFIELD AND GILMOUR JJ:

1 The applicant, James Ashby, seeks leave to appeal and to appeal from an interlocutory judgment of a judge of this Court delivered on 12 December 2012 by which Ashby's application against the second respondent, Peter Slipper, was dismissed as being an abuse of the process of the Court. We are satisfied that Ashby should be granted leave and that his appeal should be allowed.

2 There is a further application before the Court. Michael Harmer, of Harmers Workplace Lawyers (Harmers), Ashby's solicitor, was not a party to the proceeding but is the subject of adverse findings made by the primary judge. These findings also attached to Ashby. Harmer personally seeks leave to appeal and to appeal the judgment. We agree with Siopis J, having had the benefit of considering his reasons in draft, that Harmer ought not be granted leave to appeal. Nonetheless, we have concluded that the adverse findings in relation to his conduct, with their flow on affect upon Ashby, ought not to have been made.

Background

3 The following background is largely as described in the reasons of the primary judge.

4 Slipper was a member of the Commonwealth House of Representatives. Prior to 24 November 2011, Slipper had been a member of the Liberal National Party of Queensland (LNP). On 24 November 2011, Slipper was appointed Speaker of the House of Representatives in controversial circumstances. Those circumstances led Slipper to resign from the LNP. Ashby joined the staff of the Hon Peter Slipper, then the Speaker of the House of Representatives, in late December 2011. Ashby was a political advisor to Slipper.

5 On 20 April 2012, Ashby's solicitors, Harmers, electronically filed in the Court an originating application under the *Fair Work Act 2009* (Cth) (the FW Act) which included an allegation that during Ashby's employment Slipper had sexually harassed him and involved him in "questionable conduct in relation to travel". The originating application named the Commonwealth as the first respondent and Slipper as the second respondent. As required, that application was accompanied by a genuine steps statement.

6 The originating application sought damages for breach of contract. It should have claimed the relief that Ashby sought, and should have been 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 Slipper's conduct including that:

(1) Slipper had sexually harassed Ashby in the course of his employment by conduct between 4 January 2012 and 20 March 2012 (the sexual harassment allegations);

(2) in 2003 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

(3) Ashby had been forced on three occasions to watch Slipper sign multiple Cabcharge vouchers during his employment and hand them to the driver of a vehicle in which they both travelled and that Ashby intended to report these matters to the Australian Federal Police (the Cabcharge allegations).

As the primary judge observed, by filing the originating application in the Court, Ashby, and as lawyers acting for Ashby, Harmer and Harmers, made the allegations it contained under absolute privilege.

7 The Commonwealth settled Ashby's claim by payment of $50,000. It is not necessary to refer to that aspect of the proceeding further except so far as it is incidental to the present applications.

8 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, Steve Lewis, a journalist employed as the national political correspondent for the *Daily Telegraph*, sent a text message to Slipper saying he would like to contact him for his comment on the allegations in "court documents". Lewis and Ashby knew that Slipper was then overseas. The next day many of the allegations about Slipper's conduct that were made in the originating application received significant publicity in the media.

9 On Tuesday 15 May 2012, three days before the proceeding was first listed for directions, Ashby filed a statement of claim that had been settled by senior counsel. That pleading substantially repeated the sexual harassment allegations made in the originating

application. However, the statement of claim did not repeat the 2003 allegations and the Cabcharge allegations. Both the Commonwealth and Slipper filed interlocutory applications seeking orders that the proceeding be dismissed on the ground that it was an abuse of process under r 26.01 of the *Federal Court Rules*. Slipper, in addition, sought an order that Ashby not continue the proceeding on the ground that it was vexatious under r 6.02.

10 Slipper's original and amended points of claim (APOC) in relation to his interlocutory application claimed that Ashby may have acted unlawfully in providing Lewis and The Hon Malcolm Brough, who was seeking to contest Slipper's seat for the LNP at the next Federal election, with photocopies of Slipper's diary entries for particular periods in 2009 and 2010. That aspect of his assertions ultimately was not pursued.

11 An order was made on 23 July 2012 that evidence in each interlocutory application be evidence in the other and that they be heard together. As noted, the Commonwealth's application was not decided as the claim against it was resolved by agreement by the payment to Ashby of $50,000. Slipper's application was successful, and the proceeding against him was dismissed. The primary application now before the Court is Ashby's application for leave to appeal from that decision, and if leave is granted, for an order that his claim against Slipper be reinstated.

12 It is necessary to refer in some detail to the material before the primary judge.

The originating application

13 Ashby's originating application made two claims for relief:

(1) a claim under the FW Act that Ashby had suffered adverse action by both the Commonwealth and Slipper in the form of sexual harassment by Slipper because of Ashby's sexual preferences, arising from the sexual harassment allegations, and from the 2003 allegations. Ashby sought orders that Slipper undergo counselling and training in the area of anti-discrimination, civil penalties be imposed on each of the Commonwealth and Slipper and he be awarded compensation (after receipt of medical evidence);

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

Only the sexual harassment allegations were maintained in the statement of claim when it was filed. However, it is necessary to record each of the sets of allegations to understand the context of this application.

The 2003 allegations

The 2003 allegations pleaded that:

(1) in mid 2003, the Commonwealth became aware that Slipper had formed a relationship of a sexual nature with a younger male member of his staff, because Megan Hobson, a former member of Slipper's staff, had informed a senior adviser to the then Prime Minister that she had viewed a video in which 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.

(2) after she had viewed the video Hobson had concluded that the relationship was consensual;

(3) the Prime Minister's adviser told Hobson to "forget all about it";

(4) the Commonwealth thereafter failed "to take reasonable and effective steps to prevent [Slipper] from utilising his office to foster sexual relationships with young male staff members";

(5) in or around budget week in May 2003, the young male staff member had complained to Hobson to the effect that he had been abused by Slipper after an event in January 2003 when Slipper made advances on him which were rejected.

The sexual harassment allegations

In substance, the sexual harassment allegations were that:

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

(a) At Slipper's insistence he stayed in the latter's flat in Canberra. Slipper had told 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.

(b) 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 Slipper and Ashby that Ashby had brushed off at the time.

(c) On 4 January 2012, in his offices in Parliament House, Slipper complained of having a sore neck and that, despite the availability of medical and other services in Parliament House, he asked Ashby, at his flat, later that day to massage his neck. Ashby claimed that he agreed to do so, not knowing what the appropriate response for a new staff member should be. When Slipper lay on his bed clothed only in shorts, Ashby commenced to massage his neck. Slipper made groaning noises of a sexual nature that shocked Ashby and made him very uncomfortable so that he stopped massaging, told Slipper that he had finished and proceeded to leave the room. Slipper had observed that the massage "felt so good".

(d) Slipper suggested that Ashby should shower and go to the toilet with the door open and that Ashby responded that it was not appropriate to do so. The next day Ashby heard Slipper showering and saw that the bathroom door was open.

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

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

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

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

(a) Ashby advised Slipper not to give a particular interview to a journalist.

(b) After Ashby had discovered that Slipper had gone ahead with the interview, Ashby sent a text message telling Slipper that what he had done was not funny and that he could not believe that Slipper had called the journalist. He added: "We'll have to clean this mess up now!!! F[…] f[…] f[…]".

(c) Slipper responded: "Relax my friend! x". The originating application stated that "x" in a text message is a reference to a kiss.

(d) 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".

(e) Slipper subsequently responded: "Xxx". Ashby asserted that that message made him concerned and that he viewed it as bizarre.

(f) Later that night Slipper sent a text message: "Would be good if you were here but perhaps we are not close enough?".

(g) Ashby did not respond and, about 20 minutes later, Slipper resent the message, as was his habit when he received no response to text messages.

(h) Ashby responded: "Ha ha, where's [a long term male staff member] tonight?"

(i) 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 Slipper's personal

relationships with both that person and Ashby. The exchanges included both Ashby and Slipper making sexually provocative statements to one another. Slipper again inquired during this exchange whether Ashby would be interested in being closer and praised his ability at massages. 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".

(j) By about 11 pm the exchange ended with Slipper saying that he was sorry things were not working out but appreciated Ashby's frankness. Slipper said that in future circumstances Ashby was to arrange all communications through the other male staff member as he, Slipper, could not guarantee his availability and that he was sorry Ashby was missing Sydney Harbour cruises. (The latter was a reference to the harbour cruise that Slipper was scheduled to attend with a visiting overseas parliamentary delegation). 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 Slipper to be a sudden change that were reprisals for his declining, what he interpreted to be, Slipper's sexual invitations.

(k) Ashby inquired whether he was missing the cruise and Slipper responded with a number of ambiguous replies.

(l) Early on the morning of 2 February 2012, Slipper sent a text message to 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".

(m) About an hour later 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 Slipper had been made Speaker and he would have to preside over the House).

(n) Ashby responded that he understood but that Slipper should "be mindful we all carry that same level of commitment and stress for various reasons".

(5) On 26 February 2012, Ashby and Slipper had a lengthy exchange of text messages including:

(a) Around 7.30 pm, Slipper texted Ashby, who was in Canberra while Slipper was elsewhere, "Lucky Canberra. [A third person] thought you were a nice twink!"

(b) Slipper repeated the message shortly afterwards and 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".

(c) Slipper responded that Ashby had met the third person. After Ashby recollected that he had, Ashby asked what the conversation had been about. Slipper responded that it had been about whether Ashby's loyalty "… was to the thugs in LNP or to me! I told him I was hopeful your loyalty was to me".

(d) The originating application then stated that there was a lengthy exchange of text messages in which Slipper appeared to be questioning Ashby's loyalty and attempting to control his actions. In the course of that exchange Slipper sent Ashby a message that he did like 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".

(6) 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.

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

(8) On 20 March 2012, Slipper walked into Ashby's office and said loudly: "Can I kiss you both". Karen Doane, another member of Slipper's staff, was in the next office and, when Ashby responded very loudly: "No", she looked up. By

this time Ashby had formed the view that Slipper had recruited him to his personal staff for the purpose of pursuing a sexual relationship with him.

The Cabcharge allegations

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 Ashby fairly and in good faith;

(c) act with due regard for the agreed purpose of 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 Ashby, and take all reasonable steps to protect their safety (the safe work term).

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

(a) on 27 January 2012, Ashby was required to travel in Sydney with 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. Slipper allegedly told 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 Slipper allegedly signed three Cabcharge vouchers without otherwise filling in any details before handing them to the driver;

(b) on 5 February 2012, Ashby again travelled with Slipper in Sydney and was driven by the same driver in the same vehicle. The pleading

asserted that Ashby "was forced to witness [Slipper] sign multiple Cabcharge vouchers without any details being completed, and witnessed [Slipper] hand them to the driver";

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

(3) Next the originating application stated:

> [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 Slipper, Ashby had suffered "considerable stress, humiliation and illness and is currently seeking medical assistance".

The abuse of process grounds

14 Slipper's APOC 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 [sic] 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.

15 It should be observed firstly that the predominant collateral purpose pleaded in APOC 10(a) involved Ashby acting in combination with five other persons (treating Harmer and Harmers together) to cause damage to Slipper for a particular purpose. There is much to be said that the pleading, as expressed, includes as the alternatives only Harmer or Harmers and should be read as asserting that all of the five persons acted in combination for that purpose. The primary judge found that none of Lewis, Anthony McClellan, a media consultant engaged by Ashby, or Harmer acted in combination with Ashby with that purpose, so on that

view the allegation was simply not made out. The primary judge regarded the allegation as being that one or more of the five persons acted together with Ashby to achieve that purpose. We proceed on the assumption that that construction of the pleading is available.

16 Secondly, we observe that the allegations in APOC 10(b) provided an alternative basis for the contention that the proceeding was an abuse of the Court's process or was vexatious, so it is necessary to consider that alternative separately.

17 Thirdly, the hearing of Slipper's application (and for some time before it was resolved, the Commonwealth's application) proceeded over five days on three separate occasions. On the final occasion, Slipper, who had previously been represented, appeared in person. There was extensive affidavit evidence read.

18 The affidavit evidence read by Ashby included affidavits of David Russell QC, a former senior office holder of the LNP, affidavits of Harmer, and an affidavit of 20 July 2012 of Dr Jonathan Phillips, a consultant psychiatrist, annexing and adopting a medical report on Ashby. There was no cross-examination in the course of the hearing of any deponent.

19 Ashby's affidavit of 13 April 2012 included that, in making a complaint about Slipper, he was not motivated by any political or financial considerations and that his motivation was to stop Slipper's conduct towards him and "more importantly, that such conduct is not repeated in relation to any other staff, current or future".

20 The evidence included extensive text messages between Slipper and Ashby from October 2011, that is before the period Ashby commenced to work for Slipper, and up to March 2012. It is evident that the primary judge placed considerable weight on those text messages.

21 Harmer's affidavit, apart from explaining when and why he acted as he did in relation to the conduct of the proceeding, at least so far as he could without breaching Ashby's legal professional privilege, included an extensive commentary of Ashby on the text messages (the commentary). The primary judge measured those comments against the content of the text messages in making his findings and conclusions.

22 Slipper invited the primary judge to infer that the collateral purpose pleaded at APOC 10(a) was Ashby's predominant purpose in bringing the proceeding and that it outweighed any legitimate purpose he might have had.

23 This submission before the primary judge was said to be supported by the following:

(a) there was express agreement between Ashby and Doane that the proceeding was for the collateral purpose;

(b) prior to commencing the proceeding, Ashby made no attempt, genuine or otherwise, to achieve any result for which the proceeding is designed;

(c) the manner in which the proceeding was commenced and prosecuted was designed to inflict damage on Slipper beyond what the law offers and consistent with Harmers' approach to litigation which was avowedly designed to achieve outcomes beyond what the law offers;

(d) the available and potential remedies were wholly disproportionate to the costs and complexity of bringing the proceeding, having regard to s 37M(2)(e) of the *Federal Court of Australia Act 1975* (Cth) (FCA Act); and

(e) in light of Ashby's conduct in carefully cultivating a close personal and flirtatious relationship with Slipper the proceeding was wholly unmeritorious and manifestly weak.

Findings of the primary judge

24 The findings of fact of the primary judge are found in two separate sections of his reasons. There is an extensive section under the heading "The Basis of Mr Slipper's and the Commonwealth's Claims of Abuse of Process" where his Honour considered the evidentiary material and then, by a series of chronological steps, its significance. That analysis shows the process by which the ultimate conclusions were reached, set out later in the reasons.

25 After considering the text messages of February 2012, the primary judge accepted that Slipper's conduct in some of them was capable of being characterised as sexual harassment, so it was open to Ashby to make the sexual harassment allegations in the proceeding.

26 However, his Honour observed from the text messages of 1 and 2 February 2012 "that Ashby was able to draw a firm line against having the proposed 'closer' relationship" with Slipper. At that time, Ashby had consulted a lawyer and senior shadow minister in Queensland LNP State opposition Mark McArdle, and according to the commentary complained to him of feeling distressed and uncomfortable about the text messages. The text messages around that time also included messages between Ashby and certain friends, as to which his Honour said at [35] that they:

> … are redolent of Mr Ashby having a purely political intention to use the 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.

The commentary also asserted that Ashby had confided to one of those friends that he had feelings of distress and harassment.

27 His Honour also concluded that text messages in the latter part of February 2012 also revealed Ashby showing no inhibition in making his own views clear and standing his ground, in particular in Ashby's proposed support for the LNP in the then proceeding Queensland election. His Honour said at [43] and [44] that those contemporaneous documents do not reveal that Ashby felt or expressed any distress from the conduct of Slipper of which the application complains, and that it was highly unlikely that Ashby would have felt any inhibition in dealing with Slipper in respect of any inappropriate sexual conduct.

28 Consequently, the primary judge rejected or placed no weight on the evidence of Dr Phillips concerning "the very large power differential" between Ashby and Slipper, and its consequences on the way Ashby and Slipper related. Dr Phillips' views were expressed having regard to the terms of the text communications.

29 There was a further element of the text exchanges relied on by the primary judge which, he said at [49], demonstrated the likelihood that Ashby's claim involved the "adventitious use by him of incautious text messages" by Slipper. Ashby suggested to Slipper in early to mid March 2012 that he (Ashby) accompany Slipper on a visit to Hungary at Ashby's expense, when Slipper was to be there as part of a proposed Parliamentary delegation.

30 In this section of the reasons of the primary judge, there is then a section dealing with Ashby's dealings with Brough and Lewis in late March 2012 whilst Slipper was overseas. Brough referred Ashby to Russell QC to give informal advice to Ashby. Russell QC's advice was temperate and cautious. The recital of his evidence includes that he made it clear that the LNP would not help Ashby, or give him or Doane any assurances of later employment. It also records that, in Russell QC's presence, both Ashby and Doane referred to the need to stop Slipper's "ongoing pattern of behaviour" before he hurt others. In early April 2012, Ashby arranged to see Harmer.

31 There is a separate section of this part of the reasons recording Harmer's evidence in some detail.

32 Under the principal heading of "Consideration", further conclusions of the primary judge are set out with reasons for those conclusions.

33 The primary judge found that the Cabcharge allegations as a whole, including the assertion that Ashby intended to report Slipper's conduct to the police, conveyed the imputation that Slipper was guilty of misusing Commonwealth funds. His Honour also concluded that the assertion of intention to report to the police was irrelevant as well as serious and was calculated to add to the damage Slipper in his office as Speaker and as a Member of the Parliament would suffer as a result of what was conveyed by the other Cabcharge allegations. The primary judge held that Harmer did not have a proper basis for including the assertion that Ashby intended to report the other allegations to the police. In so finding his Honour had regard to *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 201 (*Clyne*) and r A.36 of the *Revised Professional Conduct and Practice Rules 1995* (NSW).

34 The primary judge at [185] made the following findings in relation to Harmer. These findings were, in themselves, found by his Honour to constitute an abuse of process of the Court quite apart from the abuse claims founded on the pleaded combination of Ashby and others.

> [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.

35 The primary judge held at [190] that by pleading that damaging assertion, Harmer breached his professional obligation not to misuse his privilege to make allegations under absolute privilege in Court documents and that the pleading of Ashby's intention to do so had no legitimate forensic purpose. The inclusion of this irrelevant assertion of Ashby's intention to go to the police in the originating application was, his Honour held, 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 (see *Clyne* at 201).

36 The primary judge concluded that its inclusion offered Ashby and Harmer the opportunity to make a more serious public attack on Slipper than would have been the case merely by making the balance of the Cabcharge allegations, that this was a misuse of Harmer's proper function as a lawyer and the use of the Court's process to make the attack in that form was an abuse of process.

37 The primary judge held that there was no basis for 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. His Honour observed that the inclusion of the 2003 and Cabcharge allegations in the originating application had inflamed the matter, and that this was Ashby's and Harmer's doing. His Honour found that the originating application did not make any allegation that Ashby had been "victimised" in the period of more than two months after 1 February 2012 and that the subsequently filed statement of claim pleaded no acts of victimisation. There were additional reasons including that the originating application pleaded that his damages claim for breach of contract would "be

calculated following the receipt of expert medical evidence". Ashby first attended on a consultant psychiatrist Dr Phillips on 19 June 2012, two months after the asserted urgency in the genuine steps statement. His Honour then concluded that 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".

38 The primary judge noted that a range of alternative remedies had been available to Ashby, including his rights to:

(a) complain under the Bullying, Harassment and Workplace Violence Policy and Procedure for *Members of Parliament (Staff) Act 1984* (Cth) (the MOPS Act) employees;

(b) complain to the Ministerial and Parliamentary Services Division of the Commonwealth Department of Finance;

(c) apply to Fair Work Australia under s 372 of the FW Act to deal with the dispute by conducting a conference;

(d) 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* (the Enterprise Agreement);

(e) complain to the Australian Human Rights Commission and seek conciliation there.

39 However, the primary judge acknowledged that none of these courses would have resulted in a public vindication of Ashby in respect of his complaint of sexual harassment against Slipper, and that only this Court could impose a pecuniary penalty or award compensation or make an order under s 545 of the FW Act that Slipper undergo counselling and attend training in the area of anti-discrimination, as Ashby sought in his originating application. His Honour reasoned that if any of the alternative courses of action had been pursued, there was no evidence to suggest that it would not have provided an effective resolution of any grievance Ashby had against Slipper.

40 The primary judge accepted that the existence of other alternatives to Court proceedings could not deny the right of any person to seek the resolution of any *bona fide* dispute by a Court including under the FW Act. However, he found that this proceeding did not fall into such a category. His Honour then made certain observations to the effect that Ashby had not suffered perceivable substantive damage. This was based on his Honour's critical finding that the contemporaneous text messages and other documents did not reveal any trace of psychological or emotional suffering or complaint by Ashby arising from any sexual harassment. Moreover, his Honour found that Ashby's request in early to mid March 2012 to accompany Slipper overseas, at Ashby's own expense, reinforced the obvious lack of any such substantive damage that he may have suffered from any inappropriate conduct by Slipper. The primary judge also held that in any event, the $50,000 paid by the Commonwealth in settlement of Ashby's claims against it ensured that Ashby recovered more than he would have been awarded in damages and pecuniary penalties against both the Commonwealth and Slipper if he had established his claims relating to what his Honour characterised as "the relatively trivial incidents of sexual harassment" pleaded by Ashby.

41 The primary judge concluded that Ashby's predominant purpose for bringing the proceedings was to pursue a political attack against Slipper and not to vindicate any legal claim he may have had for which the right to bring proceedings exists. His Honour held that Ashby began planning that attack at least by the beginning of February 2012.

42 His Honour held that it was not necessary to make any finding about whether Slipper did sexually harass Ashby in any of the ways alleged, although he found that the claims were arguable, or to consider whether the proceedings were "vexatious proceedings" within the meaning of r 6.02 or r 26.01(1)(b).

43 Accordingly, the proceedings were dismissed as an abuse of the process of the Court. This was so even though Ashby had, when his statement of claim was filed, abandoned the 2003 allegations and all the Cabcharge allegations which the primary judge held, in respect of the features criticised by his Honour, had done the harm to Slipper that Ashby and Harmer had intended when those allegations were included in the originating application.

Leave to appeal

44 The orders are interlocutory in nature. Accordingly, leave to appeal is required pursuant to s 24(1A) of the FCA Act. The decision whether to grant leave or not involves an exercise of judicial discretion.

45 The well-known test generally applied is whether the decision below is attended by sufficient doubt to warrant it being reconsidered by an appellate court and whether substantial injustice would result if leave to appeal were refused, supposing the decision to be wrong: *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399 (*Decor*).

46 In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [43], citing *Ex parte Bucknell* (1936) 56 CLR 221 at 225, French J, with whom the other members of the Court agreed, said that a "prima facie case exists for granting leave to appeal" if the judgment, although interlocutory, has the practical operation of finally determining the rights of the parties.

Ashby

47 The test in *Decor*, for reasons as will become apparent, is readily satisfied in the case of Ashby. The interlocutory order was final in its effect. Leave to appeal will be given to Ashby. It is therefore necessary to consider his appeal as found in the draft notice of appeal.

Harmer

48 As noted above, we have had the benefit of reading, in draft, the reasons of Siopis J on this issue. To the extent that his Honour has concluded that Harmer should be refused leave, we agree with him in general and his reasons for so finding.

49 The Federal Court has recently affirmed that an appeal under s 24 of the FCA Act involves, relevantly, an appeal against a judgment, decree or order itself whether final or interlocutory order, but not against the reasons given for the judgment. Reasons necessarily include findings of fact: *Harmer v Oracle Corporation Australia Pty Ltd* (2013) 299 ALR 236 at [21]-[22]. The Court observed at [35] that reputational damage arising from a judgment or orders could, in some circumstances, provide sufficient standing to seek leave to appeal. This is not such a case. The order of dismissal made by the primary judge did not

itself affect the reputation of Harmer. Harmer contends that it is the adverse findings concerning him in the reasons of the primary judge which have or are likely to have affected his reputation. The particular findings in this case do not give him standing to appeal.

50 We have come to a different view from his Honour's finding that Harmer was given sufficient notification that the Court may make findings that Harmer abused the privilege given to legal practitioners by making serious and inappropriate allegations in court documents. That is dealt with in more detail later in these reasons because those findings were employed to sustain a conclusion that Ashby and Harmer had combined to abuse the process of the Court. Such a combination on these grounds had never been pleaded.

Ashby's appeal

51 We have set out only certain of the proposed grounds of appeal. The identification of these is sufficient for the disposition of Ashby's appeal. We have employed the numbers contained in the draft notice of appeal. They are as follows:

> ***Grounds of appeal***
>
> 1. The primary judge erred in finding (at [196]) that the appellant's predominant purpose for bringing the proceedings below was to pursue a political attack against the respondent and not to vindicate any legal claim he may have for which the right to bring proceedings exists and accordingly that the proceedings were an abuse of the process.
>
> 2. The primary judge erred in finding (at [197]) that Mr Michael Harmer intended to cause harm to the respondent by including scandalous and irrelevant allegations in the originating application and accordingly that the proceedings were an abuse of process.
>
> 3. The primary judge erred in dismissing the proceedings pursuant to r 26.01 of the *Federal Court Rules 2011* in reliance upon the findings identified in paragraphs 1 and 2 above.
>
> ***The Evidence and Factual Findings***
>
> 4. The primary judge erred in law in taking an approach to the evidence and fact finding which:
>
>   a. did not give any proper regard to section 140(2) of the *Evidence Act 1995* (EA);
>   b. was wrong, unreasonable or perverse in rejecting unchallenged evidence in the particular circumstances the case, being evidence which was not inherently incredible or improbable;
>   c. contrary to the established approach on the hearing of summary

applications, failed to take the appellant's case at its highest and speculated that no evidence could or would be led at trial which would support or corroborate the appellant's evidence which he otherwise rejected; and

d. involved the drawing of inferences that were not open as they were the product of conjecture and speculation.

No or Insufficient Evidence for Findings

5. In the circumstances of a summary application and having regard to section 140(2) of the EA, there was no or no sufficient evidence upon which the primary judge could find, as he did [in respect to some 35 different findings of fact set out seriatim under this ground].

Unreasonable Rejection of Evidence

6. In the circumstances of a summary application and having regard to section 140(2) of the EA, the primary judgment erred in rejecting unchallenged evidence without a proper basis to do so, including [a series of discrete findings are included under this ground].

. . .

14. The primary judge erred in law in failing to consider (as the appellant submitted) that the material in Mr Harmer's possession which formed a reasonable basis for making the 2003 allegations could be affected by the *"cloak of legal-professional privilege"* (T12.12 ff - 5.10.12) in circumstances where the evidence disclosed that Mr Harmer had been specifically instructed to maintain claims for privilege until the trial (and according fell into error (at [160]) by speculating in finding on a summary application that Mr Harmer did not have any "*proper evidence or other basis on which to make the 2003 allegations*").

15. The primary judge erred in law, when determining whether there was a reasonable basis for the inclusion of the 2003 allegations in the originating application, in taking into consideration (at [161]) the lack of evidence that the staff member involved in the 2003 allegations had ever complained to the Commonwealth about the respondent's conduct or that in had any complaint to make, particularly given:

a. Mr Harmer gave unchallenged evidence that he [sic] factual material available to him which provided a proper basis for the 2003 allegations;

b. the summary nature of the application and the possibility (as submitted by the appellant) that Mr Harmer may have had such 'evidence', but was not at liberty to disclose such material due to the appellant asserting a claim of legal professional privilege prior to trial; and

c. the circumstances of the case and having regard to section 140(2) of the EA.

. . .

19. The primary judge erred in law in failing to accord the appellant procedural fairness by finding (at [199]) without giving notice to the appellant prior to the close of the appellant's case that he may do so, that the appellant had acted in combination with only two of the alleged conspirators, namely Ms

Doane and Mr Brough when commencing the proceedings in order to advance the interests of the LNP and Mr Brough, when this was not the case pleaded and advanced on the application as against the appellant in the respondent's amended points of claim.

20. The primary judge erred in law in failing to accord the appellant procedural fairness by finding (at [185]) without giving notice to the appellant prior to the close of the appellant's case that he may do so, that the inclusion in the originating application of the 2003 allegations and the assertion that the appellant intended to report the Cabcharge allegations to the police, was, *per* se, an abuse of process.

21. The primary judge erred in law in failing to accord the appellant procedural fairness by finding (at [197]) without giving notice to the appellant prior to the close of the appellant's case that he may do so, that Mr Michael Harmer intended to cause harm to the respondent by including scandalous and irrelevant allegations in the originating application and accordingly for this reason alone that the proceedings were an abuse of process.

. . .

23. Having found (at [145] and [149] that Mr Lewis and Mr McClellan were not part of the pleaded combination the primary judge should have found that the case as pleaded and advanced by the respondent had not been proved and dismissed the respondent's' interlocutory application.

. . .

26. The primary judge erred in law in finding that the proceedings were an abuse of process because, in part, the appellant had provided information to Mr Lewis about the respondent's travel claims, knowing that Mr Lewis would cause stories to be published in the press that were critical of the respondent.

27. The primary judge erred in law in taking into consideration when determining that the proceedings were an abuse of process whether Mr Harmer did or did not have 'sworn or affirmed evidence' that supported the 2003 allegations when he filed the originating application given Mr Harmer's unchallenged evidence as to why those words were used in the originating application.

28. The primary judge erred in law in holding (at [153], [160], [162], [185] and [190]) that the 2003 allegations and the assertion about reporting the Cabcharge allegations to the police had no legitimate forensic purpose and (at [153]), that the appellant and Mr Harmer included such allegations *"to further damage Mr Slipper in the public eye and politically and to attract to him significant adverse publicity in the media."*

29. The primary judge erred in law:
    a. in finding (at [164]) that *"no reasonable person acting within the dictates of a professional lawyers obligations, such as Mr Harmer, could have justified referring to the video* [referred to in the 2003 allegations] *in the originating application at all"*;
    b. in holding (at [165]) that the appellant's and Mr Harmer's *"pleading of the 2003 allegations was scandalous, oppressive and vexatious and an abuse of Mr Harmer's obligations to the Court as a lawyer"*; and
    c. in holding (at [185] and [191])) that the inclusion of the 2003

> allegations and the assertion that the appellant intended to report the Cabcharge allegations to the police was an abuse of the process of the Court.
>
> . . .
>
> 32. The primary judge erred in finding (by implication at [194]) that the proceedings were an abuse of process due to the appellant's failure to seek redress in another forum or by other means, by failing to take into account or giving insufficient weight to:
>
> a. the importance to the appellant of the vindication of a judgment; and
>
> b. the fact that the respondent denies the conduct complained of and that therefore the only way the factual dispute could be resolved authoritatively is by a finding of fact by a Chapter III Court.

52 Many of the grounds overlap and it will be convenient to deal with the grounds in a composite manner.

Nature of the appeal

53 Appellate review of the exercise of power by a judge to stay or dismiss a proceeding on grounds of abuse of process "looks to whether the primary judge acted on a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration": *R v Carroll* (2002) 213 CLR 635 at [73] per Gaudron and Gummow JJ, adopted by the majority in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [7]. It is not enough if the circumstances are such that minds may differ as to whether or not they constitute an abuse. There must be demonstrable error: *Batistatos* at [150]. Here Ashby seeks to contend that numerous factual findings, including key ones made by the primary judge, were erroneous.

54 Almost all of the factual challenges by Ashby are directed to inferences drawn by the primary judge. Slipper's case was, to a significant extent, built on circumstantial evidence. There was, in particular, no direct evidence of Ashby's alleged motivation, so that Slipper's case as to that central issue was circumstantial. These inferences were characterised by Ashby in submissions as, in part, speculation and, in part, as incapable of supporting a finding of abuse of process or as consistent with a benign explanation. In short, the complaint is that despite his recitation of relevant principles, the primary judge did not bring the appropriate caution to the fact finding process in deciding the existence or not of such an abuse as the authorities require in the particular circumstances.

55 Ashby submits that it was this approach to fact finding which led the primary judge to conclude at [196] that Ashby's predominant purpose was to pursue a political attack against Slipper and not to vindicate any legal claim he may have for which the right to bring proceedings exists, and accordingly, that the proceeding was an abuse of process; and at [197] that Harmer intended to cause harm to Slipper by including scandalous and irrelevant allegations in the originating application and accordingly that the proceeding was an abuse of process.

56 It is correct, as put by senior counsel for Slipper, that, at bottom, the primary judge was asked to make findings about Ashby's motivation in instituting the proceedings. Accordingly, the principal challenge by Ashby goes to the heart of the factual bases upon which the primary judge concluded that Ashby's predominant motivation in bringing these proceedings rendered them an abuse of process.

57 An appeal, pursuant to s 24(1)(a) of the FCA Act, is in the nature of a re-hearing. When reviewing findings of fact, the principled approach is as summarised in the majority judgment of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118. It was there noted that "mistakes ... can occur at trial in the comprehension, recollection and evaluation of evidence" at [24] and that a "real review" must be undertaken on appeal ([25]). In circumstances where the Court is required, as the first step, to consider the merits of the proposed appeal on the application for leave, that is the approach to be taken.

58 A "real review" obliges the appellate court to conduct a thorough examination of the record and the Court:

> … is not confined to reconsideration of the record in order to correct errors of law, although that will certainly be encompassed in such an appeal. It is required to consider suggested errors of fact-finding. … Having conducted a rehearing as so described, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance".
>
> *CSR Ltd v Della Maddalena* (2006) 224 ALR 1 at [16] per Kirby J.

59 The primary judge correctly acknowledged in the primary reasons at [4], [123], [199] that Slipper's onus of satisfying the Court that there was an abuse of process was "a heavy one" that could only be exercised in "the most exceptional circumstances": *Williams v Spautz* (1992) 174 CLR 509 at 529 per Mason CJ, Dawson, Toohey and McHugh JJ. His application

involved accusations of moral impropriety. Significantly, the relief sought was the summary dismissal of the proceeding, without a full trial on the merits. The application for dismissal was the subject of evidence which the primary judge described at [12] as "complex and voluminous". As Dixon J explained in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91:

> A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.

60 Ashby contends that these observations are apposite to this case once the factual errors are corrected.

Fact finding: relevant principles

61 Ashby submitted to his Honour that Slipper had failed to prove the wide ranging conspiracy he had alleged and that he 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. Indeed, the primary judge at [199] accepted that he did "not f[ind] that the combination was as wide as Slipper alleged in his points of claim". The primary judge at [196] concluded that Ashby's predominant purpose for bringing these proceedings was to pursue a political attack against Slipper and not to vindicate any legal claim he may have and for which the right to bring proceedings exists. He found at [197]) that the originating application was used by Ashby for the predominant purpose of causing significant public, reputational and political damage to Slipper. Then at [199] the primary judge concluded that there was a combination involving Ashby, Doane and Brough of the kind alleged: Ashby acted in combination with Brough to advance the interests of the LNP and Brough; Ashby and Doane set out to use these proceedings as part of their means to enhance or promote their prospects of advancement or preferment by the LNP including by using Brough to assist them in doing so. Accordingly, the case pleaded and which Ashby met was not established.

62 That burden which Slipper carried in his interlocutory application required him to show on the whole of the evidence to the reasonable satisfaction of the Court the elements of his contention: *Axon v Axon* (1937) 59 CLR 395 per Dixon J at 403. Inferences, that is, affirmative conclusions from circumstances otherwise proved in evidence are part of the process by which the court determines whether it has been persuaded to the requisite standard of the existence of a fact in issue. As Dixon CJ explained in *Jones v Dunkel* (1959) 101 CLR 298 at 305, "[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied".

Section 140(2)(a) of the Evidence Act

63 The standard of proof in a civil proceeding before this Court is prescribed by s 140 of the *Evidence Act 1995* (Cth) (the Evidence Act): *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [110] and [139]. Section 140 of the Evidence Act provides as follows:

> **140 Civil proceedings: standard of proof**
>
> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
> (a) the nature of the cause of action or defence; and
> (b) the nature of the subject-matter of the proceeding; and
> (c) the gravity of the matters alleged.

64 As the Full Court observed in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 (*CEPU v ACCC*) at [30]:

> [30] The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.

65 These observations are an echo of what was said by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 which was decided before the Evidence Act was enacted:

> The ordinary standard of proof required of a party who bears the onus in civil

> litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

66 Whilst these remarks were directed to fraudulent or criminal conduct they are apt also to the statutory requirements of s 140(2) in the present context where very serious allegations, said to constitute an abuse of the process of this Court, were made.

67 The nature of the cause of action was significant, seeking, as it did, in effect, final relief in the way of dismissal of the proceeding but without a full trial on the merits. The nature of the subject matter of the proceeding involved whether the processes of the Court were being abused because Ashby's predominant purpose, in combination with others in bringing the proceedings was an improper collateral purpose and not primarily to vindicate any legal right as expressed in [10](a) of the APOC.

68 As to the gravity of the allegations of abuse made by Slipper these were most serious: that the collateral purpose of Ashby, in combination with others, was to vilify Slipper, expose him to opprobrium and scandal, bring him into disrepute and to destroy or seriously damage his reputation and standing, his political position and career for the purpose of advancing 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. Those allegations of improper purpose would, necessarily, raise for Ashby, and those with whom he was asserted to have acted in combination, serious consequences to their personal and professional reputations. Each would undoubtedly be viewed as guilty of grave moral delinquency. Such was the case when RD Nicholson J in *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 found that a claim of unlawful conspiracy to cause injury on the part of government ministers executing their public duties was a serious matter requiring consideration pursuant to s 140(2) as an adverse finding against the parties accused would raise an event of "grave moral delinquency": at [206].

69 The gravity of the allegations embraces a consideration of the likely consequences if the allegations are made out. The graver the allegations and their potential consequences, the stronger is the evidence required to conclude that the allegations have been established which will give rise to those consequences. Thus, in *Commonwealth v Fernando* (2012) 200 FCR 1 where the allegation was that a Minister of the Commonwealth had deliberately exercised an important statutory power knowing that, in doing so, he was acting unlawfully, the allegation was held by the Full Court to be a grave allegation. The Court, against that background, said at [130]:

> [130] … The legal consequences are potentially serious as too is the effect on the Minister's reputation. In circumstances in which, on the facts found, conflicting inferences are open and one of those inferences is favourable to the respondent, the Court will not be satisfied that the applicant's case has been proved to the necessary standard.

70 As we have observed, Slipper's case was, in important aspects such as Ashby's motivation in bringing these proceedings, circumstantial**.** There is nothing surprising about this given the nature of the allegations made. Accordingly, the primary judge was invited to find certain "intermediary facts" and then to consider whether those facts, in combination and by inference, proved Slipper's claims on the civil onus. Justice Dixon (as his Honour then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 336 said at 362:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. *In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*
> (Emphasis added.)

71 The so-called *Briginshaw* standard, whilst it has been criticised by some, nonetheless is well enough understood. It is effectively enshrined in s 140 of the Evidence Act. However, an inference must not be drawn where it is but "a choice among rival conjectures but rather there must be "evidence supporting some positive inference … which arises as an affirmative conclusion from the circumstances proved in evidence": *Jones v Dunkel* at 304. As was stated in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5, reported in *Holloway v McFeeters* (1956) 94 CLR 470 at 480-481:

> … you need only circumstances raising a more probable inference in favour of what is alleged … where direct proof is not available it is enough if the circumstances

> appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture (see per Lord *Robson, Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687).

72 The Full Court in *CEPU v ACCC* at [38] stated in a paraphrase of this passage:

> Ultimately, because this is a civil, not criminal, proceeding the civil standard of proof applies. Thus, the ACCC had to establish that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degrees of probability, that [the impugned conduct had occurred].

73 As was put more recently by the Full Court in *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 at [31], drawing from what was said by Crennan J in *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [94]:

> [31] Inference does not mean conjecture, even in a civil case. In civil proceedings the inferential process "may fall short of certainty, [but] must be more than an inference of equal degree of probability with other inferences, so as to avoid guess or conjecture". ... A court is not authorised to choose between guesses, even on the ground that one guess seems more likely than another or others.

Rejection of unchallenged evidence

74 The principle known as the "rule" in *Browne v Dunn* (1893) 6 R 67 has two aspects. First, it is a rule of practice and procedure designed to achieve fairness. The rule requires that a party or cross-examiner who intends to invite the court to disbelieve an opposing witness put to the witness in cross-examination the grounds upon which the evidence is to be disbelieved. The rule is designed to "achieve fairness to witnesses and a fair trial between the parties".

75 The rationale of the rule was explained by Lord Herschell at 70-71 as follows:

> ...it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the

> conduct of a case, but is essential to fair play and fair dealing with witnesses.

76 Similarly, Lord Halsbury at 76-77 stated:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

77 The second aspect, critical to this appeal, relates to the weight or cogency of the evidence: that is, as a general proposition, evidence, which is not inherently incredible and which is unchallenged, ought to be accepted: *Precision Plastics Pty Limited v Demir* (1975) 132 CLR 362 at 370-371 (per Gibbs J, Stephen J agreeing, Murphy J generally agreeing). The evidence may of course be rejected if it is contradicted by facts otherwise established by the evidence or the particular circumstances point to its rejection.

78 As Samuels JA observed in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 587-588, it may be "wrong, unreasonable or perverse to reject unchallenged evidence" and if an appellate court concludes that it were so, in the particular circumstances of a given case, it may overturn the decision of the primary judge on the basis of an error of fact, rather than an error of law. However, as his Honour observed at 588, there is no rule of law in this country that a Court must accept unchallenged evidence.

Consideration of the factual challenges

The core challenge

79 Central to the disposition of the application before him was the finding by the primary judge in which he rejected Ashby's unchallenged claim in the commentary that he felt distressed and harassed by Slipper's alleged sexual conduct: at [37]-[38]. That Ashby did not complain to his friends of feeling sexually harassed in his text messages was prominent in the reasoning of the primary judge in reaching this conclusion at [35], [37], [38], [52] and [134], together with the fact that by contrast, Ashby had felt readily able to complain about political matters to Slipper (at [42]-[44]). This was tantamount to a finding that Ashby was lying about this matter which was an essential fact in his case. It was this finding, it seems, which was prominent in leading the primary judge to conclude that Ashby's predominant purpose in

initiating the proceeding was to pursue a political attack against Slipper and not to vindicate any legal claim: at [196].

80 His Honour rejected Ashby's claim that he had contemporaneously complained of being distressed to both McArdle (then a senior shadow minister in the Queensland LNP State opposition) and his friend Hubbard (at [37]). The primary judge considered that an overwhelmingly negative inference was available from Ashby's text messages sent on 4 February 2012, which discussed mainly the political implications of what Ashby was contemplating but which failed to state expressly that he felt distressed.

81 The primary judge considered Ashby's claims to have been distressed and the 4 February text messages as follows:

> [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.

82 The primary judge, correctly in our view, in light of the content of Slipper's text messages to Ashby, numerous of which contained overtly repugnant sexual language, concluded that they were capable of being characterised as conduct constituting sexual harassment. Slipper denies those allegations. For example, there was, in evidence, a media statement of 22 April 2012 by Slipper in which he denied the allegations. It was tendered through an affidavit sworn by a solicitor in the employ of Slipper's then solicitors. But there was no direct evidence by affidavit by Slipper tendered in evidence. Accordingly there is

neither a direct denial nor an explanation of, or in relation to, those allegations made by Ashby, at least not by Slipper on his oath.

83 We have concluded that Ashby's unchallenged claim that he felt harassed and distressed by the alleged conduct of Slipper was not inherently improbable or incredible. Nor do we consider that it was contradicted by other proved facts. Moreover, his evidence was expressly corroborated by what was attributed to Valerie Bradford in an article in *The Australian* newspaper of 5 May 2012. Bradford, a local LNP State branch chairwoman, is reported as saying that she had heard, progressively over the months that Ashby worked for Slipper, his allegations of sexual harassment by Slipper including being urged to shower with the door open. It was she, it appears from the report, who advised Ashby to contact Brough. She is reported to have said she did this and Brough too is reported, in the same article, to have told *The Australian* that Ashby had sought out help from him on Bradford's advice. Bradford is quoted as having said:

> I had been speaking to James [Ashby] for weeks about what was happening and he was becoming really distressed.
> I told him to see a doctor, which he did, and talk to a solicitor, but he didn't have one.

84 This report from *The Australian* was an annexure to an affidavit tendered by the Commonwealth in the proceeding brought against it by Ashby. It was also evidence in the application before the primary judge.

85 This evidence of what Bradford had said was not mentioned by the primary judge. It was the kind of evidence which one would expect to find in the reasoning process by the primary judge on this key issue. That it was not might suggest that his Honour failed to consider it. Further, Ashby's evidence on this issue was capable of further corroboration at a trial by, for example, Hubbard, others of his friends and McArdle.

86 The primary judge did consider, but rejected, the unchallenged expert evidence of Dr Phillips, a consultant psychiatrist. His lengthy CV demonstrates that he is an eminent leader in his field. Dr Phillips assessed Ashby at the request of his solicitor on 19 and 20 June 2012. His opinion was the product of those two consultations, together with consideration of three letters of instruction as well as a lever arch file of documents. It was based on assumptions which included that the history provided by Ashby was true and correct.

87 His report is lengthy and detailed setting out Ashby's personal and medical history, his dealings with Slipper and his allegations of harassment. Ashby completed a Beck Depression Inventory II for symptoms of depression. Dr Phillips also considered a lengthy affidavit sworn by Ashby. A detailed summary of this is set out in the report. It is apparent that the text messages complained of were considered by Dr Phillips. His report discusses them in detail.

88 Dr Phillips' opinion described the very large "power differential" between Ashby and Slipper which meant that Ashby "would readily be placed in a compromised situation from which there was no ready path of escape". This particular opinion evidence was rejected by the primary judge (at [46]), who did not accept that Ashby felt in any way inhibited in his dealings by a "power differential" between him and Slipper. His Honour took a different view of the text messages, without the benefits of insight from Ashby that Dr Phillips had.

89 In his report, Dr Phillips frankly observed that Ashby had at times added to the frisson of provocative and sexualised text exchanges with Slipper. Nonetheless, relevantly, his opinion was expressed thus:

> 48. …. it is important to consider the very large power differential between Mr Ashby and Mr Slipper. At the time of joining the staff of the Speaker, the applicant was extremely junior and had no experience in the mainstream political environment. He had considerable ambition however, and wanted to consolidate his position. The Speaker holds one of the most senior positions in this country and the parliament. There is immense power invested in the office of the Speaker. It would be fair to state that the Speaker was in a powerful position, and that the applicant would readily he placed in a compromising situation, from which there was no ready path of escape.
>
> 49. Notwithstanding the contribution that Mr Ashby made in text exchanges with Mr Slipper, the various actions of the Speaker and text written by the Speaker appear to have been laced with sexual innuendo and that the messages may have represented an unstated attempt to induce the applicant into some form of compromised relationship with the Speaker.
>
> 50. Perhaps each of Mr Slipper's actions taken on their own do not amount to much, but when the Speaker's behaviour and text messages are taken together, they appear not to have been of a proper professional type (to be expected in any interchange between the Speaker and a staff member), but highly personalised, provocative, sexualised and occasionally of a threatening type.
>
> 51. I believe that a distinction should be drawn between simple sexualized banter and the comments alleged to have been made by the Speaker which were focussed on his interaction with the applicant and which carry strong

suggestions about possible sexual contact.

52. If I am correct in my professional interpretation of Mr Slipper's actions, the personalised messages would have caused Mr Ashby increasing mental alarm, with likelihood that the applicant would react adversely from the emotional point of view, with subsequent development of adverse psychological symptoms.

53. There is no material available to me to suggest that Mr Ashby suffered trauma in his formative years, or exhibited any form of genetically determined mental health disorder, or suffered any substantive psychological symptoms at least until the time when he took the position in the office of the Speaker.

54. Almost certainly, the main cause for Mr Ashby's psychological decompensation in late 2011/early 2012 was the increasing psychological trauma which he experienced in his professional relationship with Mr Slipper. The timing and onset of his various symptoms during and following his daily contact with the Speaker point strongly to this also. However, other possible causes which might explain Mr Ashby's psychological decompensation might be sought. Outstanding is the possibility that the applicant has entered a legal process which has exposed him publically and which has become traumatic in his own right. The applicant made no suggestion that this has been the case and he justified the path which he has chosen to take.

55. Giving clinical weight to each of the above, I believe it can reasonably be stated that, in greater part, Mr Ashby's clinical decompensation has been caused by the actions/activities/comments of Mr Slipper, in a situation where there was a great power differential between the two persons. I accept, at least at a theoretical level, that in minor part, the stress of litigation is now adding to the applicant's mental health burden.

56. It is now time to consider Mr Ashby’s growing pattern of psychological symptoms, and a number of psycho-physiological symptoms additionally.

57. On the basis of Mr Ashby's history and his Affidavit, he developed psychological symptoms only from the period of close contact with Mr Slipper, and his symptoms continue at the present time. The applicant doubts that he was hired by the Speaker for proper reasons, he believes he has lost control over his life, he notes that he now lacks direction in his life, he has lost trust in others and believes his personal trust has been abused, he holds that others do not believe him, he has become fearful particularly when alone and he is anxious that he may be harmed in an organised manner by others, he is despondent most of the time with co-existing nihilistic thinking and he has given thought to killing himself in a violent manner. He sleeps poorly with initial insomnia, fragmented middle of the night sleep, and early waking. He has become avoidant in his ways and is concerned by his public exposure. He feels a general sense of demoralisation and a sense of disappointment in himself. He feels sorry for others, particularly the Speaker's wife, the Speaker's children and his own parents. He believes himself to be judged unfairly by others. He has been drinking more than in the past in an attempt to minimise adverse feelings. He also notes loss of cognitive focus with poor concentration/memory and poor follow through on

tasks.

58. Additionally, Mr Ashby has a number of symptoms in the physical domain, most of which may be psycho-physiological in origin. He has passed blood in his urine (but this is likely to have a physical origin) and he experiences nausea, abdominal pain and diarrhoea (which are probably of psycho-physiological origin).

59. It will be obvious on analysis of the above, that Mr Ashby now has increasingly chronic and pervasive mental health symptoms and psycho-physiological symptoms, which began after he joined the office of the Speaker, and which cross the spectrum of depression, the spectrum of anxiety, and psycho-physiological problems likely to be secondary to his level of anxiety. The totality of the applicant's symptoms will best be understood by reference to his history, and to his self report using BDI II and BAI.

60. Additionally, it becomes obvious that Mr Ashby has symptoms of intensity sufficient to interfere with the smooth conduct of his everyday life, to reduce his enjoyment in life, and to reduce the quality of his life overall.

61. On my analysis of the available clinical data, Mr Ashby has developed, in the context of significant stressors in his relationship with Mr Slipper, an adjustment disorder with mixed anxiety and depressed mood DSM IV TR 309.28 (chronic type). This is a recognisable and diagnosable psychiatric disorder.

62. Mr Ashby meets criterion A for adjustment disorder (development of emotional/behavioural symptoms in relation to an identifiable stressor occurring within 3 months of onset of the stressor); criterion B(2) (significant impairment in functioning across major domains of his life); criterion C (the disturbance is not better explained by another DSM 1V TR Axis I psychiatric disorder, or a DSM IV TR Axis 2 personality disorder); criterion D (exclusion of bereavement). Criterion E does not apply as the applicant meets the chronic specifier for the disorder.

63. A diagnosis of adjustment disorder can only be maintained if the stressor persists, or during the 6 month period following cessation of the stressor. Matters linked with Mr Ashby's trauma brought about in the course of his relationship with Mr Slipper are unresolved currently, and hence can be said to continue.

. . .

71. Finally, it is always wise in a medico-legal context to try and determine whether a person has given a self serving history, or has feigned symptoms (malingered). Whilst I have approached Mr Ashby's case with proper clinical scepticism, I cannot state that either of the above will apply.

90 His Honour at [46] found that the text exchanges of 26 February 2012 demonstrated that no such power imbalance was perceived by Ashby, noting that these exchanges occurred

well after most of the alleged sexual harassment had taken place. The primary judge described these text messages at [19(5)]:

> (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.)

91 Rejection of Dr Phillips' unchallenged opinion evidence as to the power differential between Ashby and Slipper thus proceeded from reasoning that because Ashby felt comfortable in rejecting Slipper's views concerning his political dealings, he would, in the same way, not have "felt inhibited in complaining to Slipper about other (sexual) conduct that he, Ashby, did not appreciate" (at [43]-[44]). We do not consider it follows that an inference of the latter flows, on the balance of probabilities, from proof of the former and indeed no submission was put to his Honour to this effect by Slipper. The primary judge was wrong to dismiss Dr Phillips' unchallenged opinion concerning the power differential. Moreover, as is apparent from the extract from his report set out above, Dr Phillips opined on a range of matters beyond the question of a power imbalance and which otherwise supported his opinions which were objective evidence of distress caused to Ashby. Dr Phillips described Ashby's clinical decompensation, caused by Slipper's actions and activities and comments, resulting in psychological trauma which has led, amongst other things, to a general sense of demoralisation. This was associated with Ashby drinking more than in the past to minimise

his adverse feelings. He had a loss of cognitive focus with poor concentration and memory and poor follow through on tasks. Thus Dr Phillips described Ashby as having increasingly chronic and pervasive mental health and psychological symptoms, which began after he commenced working for Slipper. These cross the spectrum of depression and anxiety leading to an adjustment disorder. This, he said, was a recognisable and diagnosable psychiatric disorder. He also stated that he was satisfied too that Ashby was not providing a self-serving history or malingering.

92 Accordingly, in our view, the adverse inference drawn by the primary judge that Ashby did not have feelings of distress and harassment concerning Slipper's action (at [37]) because he did not complain of these things in text messages to his friends was not open on the summary dismissal application. It does not survive the onus imposed on Slipper on such an application. It is no more than conjecture. There were other equally if not more compelling inferences consistent with the truth of Ashby's assertions. There was other apparently cogent evidence to support them. There was also other material which tended to support them which may well have been available as direct and admissible evidence at a trial. There is no reason to conclude that a victim of sexual harassment would necessarily express distress by means of text messages to friends. It is at least equally as likely that such a person would rather confide feelings of shame and distress verbally to close friends and doctors. Bradford, it appears, was such a person. Dr Phillips' report discloses that Ashby told him of his distress at Slipper's conduct. His report, objectively viewed, tends to corroborate the likelihood that he was in fact distressed. Furthermore, Ashby, in his profession, considered political implications and strategies. It is hardly surprising that he considered his own situation in that context and discussed the range of possible outcomes, both as to the general political environment which might prevail as well as how Ashby himself would be regarded as the person making these serious allegations against a prominent politician. Nor is it surprising that he consulted McArdle on those issues. As noted, there is material that says that Ashby did speak to McArdle about the stress he was under.

93 In addition, relevant to this core adverse finding is the conclusion of the primary judge that Ashby participated equally in sexually suggestive exchanges with Slipper. A detailed review of those materials does not support such a finding. The inappropriate

sexualised remarks were conveyed by Slipper. Ashby's responses were either to ignore them, rebuff them or to attempt to change the subject. Examples of such exchanges include:

(a) In October 2011, Slipper used the foulest language to describe Brough and then later followed this up with a gross description of vaginas. Ashby did not respond in like manner and immediately changed the topic to the question whether Slipper wanted to become Speaker of the House.

(b) Several of the text messages sent by Slipper to Ashby on 1 February 2012 were blatantly sexualised. Ashby did not reciprocate and advised Slipper that things should be kept to business. Whilst Ashby occasionally used bad language his messages were not sexualised towards Slipper. In his affidavit of 13 April 2012, speaking of these texts Ashby actually deposed to the fact that he was wanting to deflect Slipper's remarks. His text messages bear this out. He also deposed that he read Slipper's texts out to his flatmate whilst describing them to him as bizarre.

(c) Ashby sent a text to Slipper on 3 February 2012 mentioning he was at dinner with someone called [name removed]. Slipper responded with a text: "Fukbuddies". Ashby did not reply.

(d) Slipper asked Ashby a thoroughly offensive sexually-based question whilst they were both in a car about 2 km from Slipper's house. Ashby told him that it was not the kind of question you ask anybody. Slipper asked the same question some weeks later and added further sexualised content. Ashby told him he felt uncomfortable and that he shouldn't ask such questions.

94 Moreover, there is evidence in the text messages which is supportive of Ashby's expressed discomfort with Slipper's attempts to intrude into the details of Ashby's sex life in November 2011, before he became an employee and subject to the power differential the subject of Dr Phillips' evidence:

> Mr Slipper: Yes consummated? Suspect yes?
>
> Mr Ashby: Inappropriate
>
> Mr Slipper: I imagine it would be and trust you observe that lofty approach! Not!!!!!
> And by the way suspect congratulations are in order. Well done!!!

> Mr Ashby: So where are u laid up tonight?
>
> Mr Slipper: Ha an admission by deflection. You seem drained and to answer your question directly as I always do unlike some others, I'm laid up in Glebe!
>
> Mr Slipper: When did you succeed?
>
> Mr Ashby: I'm not revealing anything of my real personal PERSONAL life Pete there's things in my life I don't share and that's one of them.
>
> Mr Slipper: Ok sorry to assume too close a relationship. I had thought I could tell you anything and have but now am firmly put back in my box.
>
> Mr Ashby: My closest friends don't share that kind of info. Others might feel differently towards their personal details but I have to consider Andrews feelings as well as mine. I couldn't see him liking that info divulged either. I'd be disappointed in him if he told his friends personal detail. I wouldn't consider asking that of u about u and inge. I respect the two of u and the sex lives of one another is not what our friendship is founded on.

95 This text message is not mentioned directly or indirectly by the primary judge.

96 Accordingly, we have concluded that the primary judge was in error in concluding that Ashby, in effect, lied as to this key fact that he felt distressed by the conduct, including the content of text messages, by Slipper towards him.

Ashby's purpose

97 This error led to further error because it formed the basis, together with other findings based on inference which are challenged, for the rejection by his Honour of Ashby's unchallenged evidence, both in the commentary to his text messages and in his affidavit of 13 April 2012, as to his purpose in commencing the proceeding (at [66]).

98 It was submitted on behalf of Slipper that Ashby had the opportunity to give evidence as to his motivation in instituting these proceedings but did not do so. This was not the case. Ashby had deposed to his purpose in starting the proceedings in very detailed terms in his affidavit as follows and particularly at [259]:

> My motivation and independence
>
> 258 I am not a member of any political party or organisation, whether formal or informal. In particular, I am no longer a member of the Liberal National Party, having resigned on 14 December 2011.

259 I am not motivated, in making a complaint about the speaker of the House of Representatives, Mr Peter Slipper, by any political considerations, or by any financial considerations. My motivation is to ensure that Peter Slipper's conduct towards me stops and, more importantly, that such conduct is not repeated in relation to any other staff, current or future.

260 In relation to my complaint about the conduct of Peter Slipper (including my complaints about sexual harassment and my complaints about his conduct in relation to use of cab charge vouchers) and any action in any court or tribunal that may be commenced by me in relation to the conduct of Peter Slipper towards me:

(a) I have not been paid or promised any financial or other benefit or consideration (whether in money, goods, services or in any other form whatsoever) if I make any complaint or commence such action;

(b) To the best of my knowledge and belief, no other person has been paid or promised any financial or other benefit (whether in money, goods, services or in any other form whatsoever) if I or Karen Doane make a complaint or commence action;

(c) I am not being funded or materially supported by any person organisation or body to make a complaint or commence action;

(d) I am not making the complaint or commencing action at the instigation of, on [sic] at the behest of, any person, organisation or body. In particular, I am not making the complaint or commencing action at the instigation of:

(i) any newspaper, television station, radio station, journalist or media organisation or entity; or

(ii) any member of parliament, State or Federal; or

(iii) any political party or organisation or any officer or member of a political party or organisation.

There was no cross-examination of Ashby.

99 Moreover, Ashby's evidence of purpose was corroborated by the evidence of Russell QC as well as Harmer. The primary judge appears to have accepted their evidence at [76]-[77]:

[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.

100 The basis upon which the primary judge rejected Ashby's evidence was that he had sent text messages on 30 March 2012, prior to meeting Russell QC on about 6 April 2012, which referred to the removal of the "black mark" of having worked for Slipper (at [66]). The notion of removing the "black mark" in fact emanated from Doane. Ashby agreed that what they were contemplating would have that effect and added that he was pleased to have her on board as they both had "been through so much shit". This is perhaps a reference to the conduct of Slipper about which both of them had complaints. In any event, as appears from the reasons of the primary judge at [76]-[77], Ashby commenced proceedings only after Russell QC had made it plain that the LNP would not assist him and after he had been told to obtain independent advice from a solicitor with no connection to the LNP.

101 Accordingly, Ashby's unchallenged sworn evidence as to his motivations was not inherently improbable and was corroborated by evidence, which appears to have been accepted by the primary judge.

102 There is the related inference drawn by the primary judge that once the proceedings were over, Ashby and Doane perceived that they would be able to work for the LNP or obtain assistance from it to further their careers. The evidence of Russell QC's advice was to the contrary. That was therefore known before the proceeding was commenced. Nor is there evidence in any of Ashby's text messages or emails to support such an inference. Indeed, it is expressly contrary to the sworn evidence of Ashby at para [260] of his affidavit, referred to above, when he deposed that:

> (a) I have not been paid or promised any financial or other benefit or consideration (whether in money, goods, services or in any other form whatsoever) if I make any complaint or commence such action.

103 Moreover, we also accept the applicant's submission that there was no basis to implicitly reject the evidence recited at [55] of the reasons of the primary judge that Ashby wrote in a text message on 26 March 2012 "this man needs stopping. He's hurt too many people", corroborated by the evidence recited at [76] that Doane looked at Ashby and said to Russell QC: "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".

104 We also are of the opinion that the primary judge ought not have drawn the inference that Ashby and Doane had planned the sexual harassment proceeding before they had even seen a lawyer (at [132]) and then criticised them for not having seen a lawyer to immediately address their concerns (at [133]). This may be an inference but it is by no means the only or the most probable inference. We accept Ashby's submission that it is also equally consistent with Ashby not having any specific plans other than to do something about Slipper's conduct and to stop him doing it again, not knowing the best way to stop Slipper hurting him and others and seeking advice from those they knew in the political arena as to what to do and eventually being put in touch with a lawyer from whom they sought advice.

105 The primary judge also rejected Lewis's representation deposed to in the affidavit of Harmer as to the meaning of his text message "We will get him!!" (at [71]). Again, Harmer's evidence of what was said to him by Lewis was not challenged and it is unclear why his Honour found, in effect, that Lewis was also lying about the subject of his remark. No submission was made to the primary judge that his Honour ought make the finding he did. The basis upon which the primary judge rejected this evidence was the result of his inferring that Ashby had revealed or expanded on material concerning his sexual harassment claims and Slipper's use of his travel entitlements, including the Cabcharge allegations, to Lewis during a meeting sometime before the message was sent (at [71]).

106 We do not consider that on the evidence, it was open to the primary judge to draw the inference that Ashby and Lewis must have spoken on 4 April 2012 about Ashby's sexual harassment claims (at [71]), absent any record of this in the text messages, which was the basis for the primary judge to then reject Lewis' evidence about the meaning of his text messages on that day. This inference is no more than conjecture and ought not have been

drawn. The context of the text message set out at [71] of the reasons of the primary judge, if anything, suggests that the discussion may have been about travel entitlements but even that is by no means clear. It appears that Lewis had for some time been investigating Slipper in relation to his 2010 election campaign (at [59]) and further that Lewis' interests to that point, as disclosed in articles written by him, focused on questions of misuse of entitlements by Slipper, mostly related to travel claims.

107 We also consider, for the same reasons, that it was not open to the primary judge to draw the inference on the summary dismissal application and in circumstances therefore where not all the evidence touching an issue may have been adduced, based upon the earlier inference that Ashby and Lewis had spoken about his sexual harassment claims, that Lewis had arranged for News Limited to pay for Ashby's hotel bill when he was seeing Harmer in Sydney because Ashby had told him about the sexual harassment allegations (at [87]).

108 Finally, the primary judge rejected the unchallenged evidence of Dr Shaiza Mazhar of the Landborough Medical Centre that Ashby had a medical condition and was unfit for work from 10 April 2012 to 22 April 2012 (at [85] and [90]). Dr Mazhar's evidence was corroborated by Dr Phillips and Bradford. The basis upon which it was rejected was that Ashby did not send a copy of Dr Mazhar's medical certificate to Slipper and was sufficiently well to meet with those persons with whom Slipper alleged he acted in combination during this period. However, by this stage Ashby's working relationship with Slipper had broken down. Assuming the truth of Ashby's claims of distress and the validity of Dr Phillips' opinion evidence of an adjustment disorder, then Ashby was not fit to attend work with Slipper. It was likely to aggravate his condition. This does not mean that he was not well enough to take the steps described by the primary judge to seek redress for the wrong he perceived had been done to him. We do not consider that there was a basis in the evidence to reject the unchallenged evidence as to Ashby's medical condition rendering him unfit to work.

109 The primary judge's rejection of the medical certificate seems implicitly based upon a finding that it was not genuine and perhaps, although it is not quite clear, that it had been brought into existence after the event and backdated.

110 His Honour refers to Ashby's text on 10 April 2012 speaking in prospective terms of getting a doctor's certificate. Why, his Honour asked rhetorically, would he have written this if he already had the certificate. There is no evidence of just how the certificate was obtained. However, at least one possibility explaining this anomaly might be that it was incorrectly dated. There is a basis for such a possible conclusion. The certificate, although dated 5 April 2012, is in terms:

> Mr James Ashby has a medical condition and will be unfit for work from 10/04/2012 to 22/04/2012.

It is as odd that a doctor would certify, five days in advance, that Ashby was going to be unfit for work for 12 days, as it is that he was texting on 10 April 2012 that he would get a medical certificate. That this is so, absent other evidence, is all the more reason not to draw any adverse inference against Ashby in this respect and in our opinion the primary judge ought not to have done so.

Insufficient evidence for finding

111 It is unnecessary, given our views as to core factual findings made by the primary judge, to consider seriatim each of the thirty-five errors complained of in ground 5 of the draft notice of appeal. Ashby rather focused in submission on three examples. We will deal with these in turn.

112 First, ground 5(b) concerns the primary judge's finding that if Ashby had been the victim of sexual harassment, he would not have speculated with his friend about whether he would be rewarded or condemned by revealing it. This challenge focuses upon para [38] of the reasons of the primary judge:

> 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.

113 It is important to understand the context in which Ashby questioned whether he would be rewarded or condemned. The text from Ashby's friend Tania Hubbard and his reply both on 4 February 2012 are as follows:

> Tania Hubbard: Hey there dearest. Tania here. I sat up over night about our chat, again this morning. PLEASE DO NOT TEXT ME BACK. This is just from me to you for further thought. Because I care I am going to ask … 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, reason, 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. Tell me to sod off – I can handle the truth – won't text you again with this without your express wish for further discussion. Take great case. Tania.
>
> Ashby: Your message contradicts itself lol. U wrote don't text u back, yet at the end won't text u again without your wish &#xD83D;&#DE09; I really enjoyed our chat last night and I must admit there's 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.

114 Plainly enough Hubbard was concerned that Ashby might be "shot" if he went ahead with his plans to reveal his concerns to McArdle, a LNP State politician whom he knew. Ashby notes in his reply that what he is proposing was not to use the information for his own personal power, although he recognised that it could empower, implicitly, McArdle. That he questioned whether he would be rewarded or condemned is a question anyone in Ashby's position arguably may reasonably have asked. Not everyone likes a whistleblower.

115 It seems apparent that, as well as the distress of sexual harassment, Ashby and Doane were looking for ways to stop Slipper doing to others what they said had been suffered by them. The pursuit of legal advice in respect of possible litigation claiming relief for that harassment and raising these same concerns with politicians already known to Ashby are not mutually inconsistent. Ashby had no personal political power. He, it seems, assumed that

people like McArdle did. There is nothing wrong, on its face, with Ashby pursuing his aim of stopping Slipper through political channels. The one does not render the other meaningless, or a sham, or merely as part of an attempt to damage Slipper.

116 It is self-evident that allegations of sexual harassment made publicly against Slipper in legal proceedings would likely damage Slipper's personal and political reputation. This does not mean that the predominant purpose was to cause such harm. The pursuit of a parallel complaint within the political arena also had the potential to harm Slipper. That was not a reason, necessarily, not to go down that alternative path. Ashby's expressed concern as to the outcome of either or both of these approaches was to be expected. However, such analysis does not give rise on the balance of probabilities to the kinds of inferences drawn by the primary judge at the summary dismissal stage, where there is contrary evidence which has not been tested in cross-examination and where it is likely that not all the evidence that would be adduced at trial has been presented.

117 We have already referred to the evidence of what on 6 April 2012 Doane said to Ashby in the presence of Russell QC that Slipper was "just going to do it to someone else … It [was] an ongoing pattern of behaviour" and Slipper "ha[d] to be stopped before he hurts others – just as he has hurt us" as well as what Ashby texted on 26 March 2012 to McArdle that Slipper "needs stopping" because he had "hurt too many people".

118 Not insignificantly, as Ashby's text discloses, McArdle had advised him not to press forward with his claims but Ashby stated that he had the strength to do what he felt was the right thing because Slipper needed "stopping".

119 This adverse inference drawn by the primary judge should not, on the evidence, have been drawn.

120 Second, ground 5(k) of the draft notice of appeal is directed at the primary judge's finding that Ashby had contacted Brough prior to 28 March 2012 to "indicate his preparedness to undermine Slipper" (at [56]). There was no evidence to support such a finding. The only evidence before the primary judge, but not referred to in the reasons, was to the contrary: that of Ashby and the press interviews given by Bradford and Brough and Mrs Brough. Of course, hearsay evidence was admissible as Slipper's application was

interlocutory. Bradford stated that Ashby had told her he did not wish to speak to any member of Parliament. However, she persuaded him to contact Brough because she believed he was the only person who could assist Ashby. This does not support a finding by inference, that Ashby was seeking out people and in particular parliamentarians, who might wish to harm Slipper politically. An inference arises which is at least equally compelling that contact was then made with Brough and information provided to him, which is merely consistent with the account of both Bradford and Brough seeking to help a young and inexperienced staffer in distress. Brough stated that he was initially suspicious when Ashby contacted him on 23 March 2012 but provided advice and assistance to him to obtain legal advice from a "lawyer friend". This was Russell QC.

121 Slipper rejects this and contends that there was ample evidence for the primary judge to make this finding. He points particularly to [141] of the reasons of the primary judge which states:

> 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].

122 We have already discussed the text messages of 30 March 2012 (at [100] above) in a related context. However, it is sufficient to observe again that the characterisation of their past involvement with Slipper as a "black mark" emanated from Doane. It was she too who wrote about "the way this will tip the government to Mal's [Brough] and the LNP's advantage". Ashby responded by saying that he agreed that they were "fixing the black mark". He said nothing in response to Doane's other opinion concerning Brough and the LNP. Moreover, these texts sat in the wider context of an exchange of emails between them that evening in which, amongst other things, Ashby mentioned that he felt "super drained" and was with his family to "bring them up to speed with everything that is about to happen". Doane replied by saying "enjoy the love of your family … smile and feel loved you are very

courageous my friend. Proud of what you are doing". He replied by thanking her and saying that the "sooner this is over the better". Viewed in context and observing that the opinion concerning the government, Brough and the LNP came from Doane, we do not think that the adverse inferences drawn by the primary judge as against Brough, Doane and Ashby at [141] were open on the balance of probabilities. There is no evidence that Brough offered to assist either Ashby or Doane to find new careers. That Brough was prepared to consider allegations of misuse of travel entitlements in relation to Slipper and to look at evidence produced by Ashby which might support these allegations does not necessarily mean that his purpose was to harm Slipper politically. It is at least equally open to infer that Brough was assisting a young political staffer who believed he had unearthed corrupt conduct.

123 Third, ground 5(r) of the draft notice of appeal concerns the primary judge's finding that Ashby or Doane alerted the media to Slipper's travel arrangements on 20 April 2012 and "planned" that the media would be waiting for Slipper when he arrived at Los Angeles airport and at Brisbane airport (at [102]). This was not an allegation made before to the primary judge. It was not open to infer that the travel plans of a prominent and newsworthy politician travelling at the public expense on Qantas could not be obtained by the media other than from staff of that politician.

124 We are also of the opinion that there was no basis for the primary judge to conclude that Brough was part of any combination with anyone in respect to the commencement of these proceedings with the predominant purpose of damaging Slipper in the way alleged or at all. Ashby was persuaded to contact Brough by Bradford. Despite Brough's hesitation at seeing Ashby he did so and referred him to Russell QC. There is absolutely nothing untoward about those matters. That he was the recipient of copies of some of Slipper's diary entries does not convert what he did in referring Ashby to Russell QC into something sinister. Beyond this referral there is no evidence which links Brough in any way to the decision by Ashby to commence proceedings or as to what claims would be made in any such proceedings. Evidence that Brough had an "animus" towards Slipper does not alter this conclusion. Ashby's unchallenged sworn testimony was that he was not commencing his action at the instigation or behest of any member of parliament, State or Federal, or any political party. This evidence is neither inherently improbable nor do we consider that it is contradicted by other evidence. For reasons we have explained, Ashby, on the face of it,

pursued alternative approaches to deal with his complaints: one legal and the other political. He wanted vindication of his legal rights but also wanted to stop Slipper hurting other staff. There is no reason to think that seeking that second objective politically, including providing excerpts from Slipper's diary, was either wrong or necessarily meant that his predominant purpose in bringing the proceedings was to harm Slipper. Slipper withdrew an allegation he had made in the proceedings that what Ashby had done in relation to his diaries was unlawful.

125 For these reasons we are of the opinion that the evidence did not support the adverse inference of purpose alleged in the APOC of Slipper and attributed to Ashby, on the balance of probabilities. There were other inferences which were at least equally open. Ashby gave sworn evidence of his purpose which was unchallenged, as did Harmer to the extent that his purpose can be attributed to Ashby.

126 The primary judge additionally made adverse findings concerning the 2003 allegations, the Cabcharge allegations, the genuine steps statement and the allegations concerning the involvement of the media. We have dealt with these when considering the discrete finding of abuse of process involving only Harmer and Ashby: a case which was never put by Slipper in isolation. Nonetheless, the conclusions to which we have come concerning those allegations in that context have equal force in relation to the case that was pleaded by Slipper. We find, for reasons that follow, that those adverse findings ought not to have been made.

127 The conclusions to which we have come as to the key adverse inferences erroneously drawn by the primary judge are sufficient in themselves to dispose of the appeal in favour of Ashby. It is accordingly unnecessary to deal with the balance of the grounds of appeal. It follows that we reject the submission made on behalf of Slipper that, even if the disputed factual findings had not been made, the overall effect of the accumulated evidence would remain the same. Had the primary judge not concluded that Ashby, in effect, had lied as to being distressed and harassed by Slipper's conduct, it is not routinely probable that he would have come to the ultimate conclusion which he did concerning Ashby's predominant purpose in bringing these proceedings. As we have explained, this one fact drawn by inference was central to the disposition of the application before the primary judge.

Additional finding of abuse of process

128 The proceedings were commenced by the filing of the originating application and a genuine steps statement prepared by Harmer. A statement of claim, prepared by Harmer and settled by counsel, was filed approximately 4 weeks later.

129 Although the primary judge did not find that Harmer or Harmers were part of the combination pleaded by Slipper, nonetheless he made serious adverse findings in respect of Harmer which his Honour held constituted an additional abuse of the process of the court. Ashby was held to have been involved in this discrete abuse of process. Significantly, his Honour rejected Harmer's evidence as to his purpose and intention in commencing the proceedings. In so doing the primary judge considered four key issues. We will refer to these as the Harmer issues although they were taken into account by the primary judge in finding an abuse of process in respect to Ashby:

(a) whether the 2003 allegations were included in the originating application prepared by Harmer for a legitimate forensic purpose;

(b) whether the Cabcharge allegations were included in the originating application prepared by Harmer for a legitimate forensic purpose;

(c) whether there was any basis for 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"; and

(d) whether Harmers provided a copy of the originating application to members of the media including Lewis, before it was emailed to Slipper (APOC [43]).

130 Most of the findings were the subject of direct evidence from Harmer. He gave affidavit evidence as to the reason he included the 2003 allegations, Cabcharge allegations and the notation in the originating application about all allegations being supported by sworn/affirmed evidence. He gave evidence as to why he completed the genuine steps statement in the manner that he did and denied that the proceedings were commenced in the manner in which they were for the reasons alleged by Slipper. He also denied releasing any information concerning Ashby's application to the media.

131 In his APOC at [53], Slipper alleged that by making, providing to the media and subsequently abandoning the 2003 Cabcharge allegations and an allegation that he had fraudulently misused his travel entitlements, both Ashby and Harmer intended to expose him 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 Brough. However, this was not a discrete allegation of unprofessional conduct on the part of Harmer. Rather, in the context of the APOC as a whole, it formed part of the particularisation of the abuse of process alleged under APOC [10].

132 The combination pleaded by Slipper at APOC [10] included Ashby, Doane, Brough, Lewis, McClellan, Harmer and/or Harmers. As we mentioned, his Honour found that Harmer was not part of the pleaded combination.

133 Despite this, the primary judge concluded that Harmer's conduct in initiating the proceedings on behalf of Ashby was itself an abuse of the Court's process and characterised that conduct as a breach of Mr Harmer's professional obligation not to misuse his privilege to make allegations under absolute privilege in court documents: at [190].

134 As to this last matter**,** Siopis J correctly observed in his reasons that a court may have occasion to comment adversely upon the manner in which a legal practitioner has acted in the conduct of a proceeding before the court and that one such circumstance may arise in the context of a court being concerned to prevent its process from being abused: *Clyne* at 201; *Jago v The District Court of New South Wales* (1989) 168 CLR 23.

135 We agree again with Siopis J's observation that although the primary judge had determined that Harmer did not form part of the combination pleaded by Slipper, it was nonetheless still open to him to consider Harmer's conduct as an officer of the Court in relation to the institution of the proceedings. However, as we mentioned, we have come to a different view to his Honour upon the question whether Harmer was given adequate notice concerning the allegations giving rise to findings, in effect, of unprofessional conduct against him. As the findings made against Harmer directly affected Ashby and involved him, it is necessary to review those findings of fact which Ashby contends were made erroneously.

136 Harmer is a solicitor and the sole proprietor of the law firm Harmers. Harmers are the solicitors of record for the applicant in this proceeding and Harmer has had the conduct of this matter. He is a qualified and experienced legal practitioner. Six affidavits from Harmer were read in the proceedings: 17 May 2012; 28 May 2012; 23 July 2012; 31 August 2012; 26 September 2012 and 2 October 2012. Harmer deposed that he had no instructions to waive client privilege, and, in effect, the content of his affidavits were to that extent constrained. Harmer has also filed an affidavit dated 14 January 2013 in support of his application for leave to appeal. That he was instructed by Ashby to maintain a claim for client privilege in his earlier affidavits was again deposed to in this affidavit. As he explained at [28], his "ability to give evidence was therefore limited by this claim for client legal privilege".

137 The concerns relating to Harmer's professional conduct, as a discrete issue, isolated from the abuse case pleaded and run by Slipper, were first mentioned by the primary judge when he made reference to "*Clyne's* case at 104 CLR" at 200-201. However, this was ventilated on the penultimate day of the hearing, well after the evidence in the case of each party had closed. Submissions were filed by Ashby in relation to certain of those concerns on the last day of the hearing. Harmer was not a party to the proceedings nor, at any stage, was he represented by counsel. Accordingly, no submissions were made directly on his behalf.

138 We take a different view to Siopis J who considered that Slipper made allegations in his APOC which called into question the propriety of Harmer's professional conduct. Slipper's APOC made allegations against Ashby and a combination of others including Harmer or Harmers. That is plain enough. The allegations of making, providing to the media and subsequently abandoning the 2003 allegations and the Cabcharge allegations were levelled at [53] of the APOC against Ashby and Harmers. No mention of unprofessional conduct concerning Harmer is to be found.

139 At the commencement of the hearing of the interlocutory applications on 23 July 2012 by the Commonwealth and Slipper, senior counsel for Ashby characterised the case against his client as making serious allegations of a conspiracy including, amongst a number of other persons, Harmer. There was no mention of unprofessional conduct relating to Harmer. Of course, Harmer, who was not a party, was not represented. Had such allegations been levelled against him and the primary judge inclined to hear them discretely from the pleaded

case which made no mention of them, Harmer may well have sought to withdraw as the solicitor on the record and sought leave to be joined. Moreover, by 2 October 2012 the evidence of the parties had closed.

140 Slipper made no substantive oral submissions in the closing stages of the hearing. Rather, he relied upon the written submissions filed on his behalf dated 16 July 2012. These were before this Court on the application before us. A review of these submissions discloses no express criticism of Harmer or Harmers beyond the alleged abuse of process claims pleaded at APOC [10] in the combination of persons alleged there. Whilst this pleading incorporated the para [53] allegations by reference there were no specific allegations of professional misconduct against Harmer. These were raised by the primary judge on 4 October 2012.

141 These concerns in respect of Harmer, and which affected Ashby, were serious and the potential consequences grave. Indeed we regard them as at the extreme end of those which might be raised against a solicitor. In such circumstances, there was the need for caution in drawing adverse inferences against Harmer, particularly where such inferences and their significant consequences had not been specifically put to Harmer. The comments in *Bale v Mills* (2011) 81 NSWLR 498 are apposite. The New South Wales Court of Appeal said at [79]:

> The inference sought was one, but only one, possibility. The matters to which we have already referred… in discussing what was not put to Mr Schipp reveal that a recognition of error and conscious dishonesty are not the only possible explanations. The inference that Mr Schipp was aware of the error and intentionally deceived his client is a possibility. It is a possibility about which minds might differ as to whether it is sufficiently probable to be a proper inference, that is more probable than not... In our view that inference cannot be drawn as more probable than not, for the reasons set out below. Most importantly, however, could it be drawn with the requisite confidence in circumstances where that inference and its significance was never raised with Mr Schipp so that he was deprived of any opportunity to respond to it? The answer is plainly, no.

142 Where serious issues are raised in proceedings concerning a non-party solicitor in relation to the professional conduct and which go to that solicitor's integrity, the matters alleged require careful consideration. Where, as here, there has been no specific pleading or identification of those issues, and no cross-examination of the solicitor upon material issues

which the solicitor has explained by affidavit, the opportunity to elucidate or explain such matters is very important. As the Court of Appeal in *Bale v Mills* stated at [66]:

> Fairness in the administration of justice extends not only to ensuring a fair trial for the actual parties but also to ensuring that a witness who is not a party is treated fairly. It is especially important in circumstances such as the present, where a witness such as Mr Schipp had himself no right to object to his credit being impugned with respect to the Centrelink representation and where he was not given the opportunity to respond to what was clearly an extremely serious allegation not only going to his credit as a witness but also, as the primary judge was at pains to emphasise, to his honesty as a person and to his probity as a solicitor and an officer of the court. Further, the unfairness consequential upon the breach struck directly at the entitlement of the appellants to a fair hearing and procedural fairness in the making of findings by the District Court.

143 The denial of this opportunity, and lack of personal representation, rendered Harmer in an effectively defenceless position in relation to the concerns as to his professional integrity raised by the primary judge. In our view, his Honour ought to have refrained from making serious findings about Harmer's professional conduct and integrity.

144 Moreover, Harmer confronted a particular disadvantage. His entire evidence was given within the limits of a claim by his client of client legal privilege. He considered himself, rightly or wrongly, to be bound by those instructions. There was no basis before the primary judge for thinking Ashby had waived of such privilege. No adverse inferences can be drawn from the assertion by a person of a claim to legal professional privilege: e.g. *Ballerini v Shire of Berrigan* [2004] VSC 321 at [50]. Further, and more importantly, analogously with personal costs order cases, where "a legal practitioner's ability to rebut [a] complaint is hampered by the duty of confidentiality to the client he or she should be given the benefit of the doubt": *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at [92(f)]. In such circumstances "[t]he court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so": *Medcalf v Mardell* [2003] 1 AC 120 at [23]. The fact is that Harmer considered, and was not challenged about his belief, that in the compilation of his affidavits he was bound by that privilege and his affidavits reveal this fact. The contents of his affidavits were constrained for that reason. It cannot be said, in these circumstances, that Mr Harmer was given the "benefit of the doubt".

145 Indeed, senior counsel for Ashby informed the primary judge that if the Court's findings were to have been pleaded and specifically sought by Slipper, there was a wealth of material which could have been advanced in evidence in relation to the concerns raised in respect of Harmer. In that and other significant respects Harmer's position is quite different from that of the barrister in *Clyne*.

146 Given the gravity of the concerns of the primary judge, in our opinion, it was necessary for the primary judge to have put such concerns to Harmer in clear terms either before the close of evidence or after recalling Harmer so that he could give further evidence, perhaps unconstrained by his client's privilege and likely with the benefit of his own counsel. None of this occurred. Had this been done, as we mentioned, Harmer may well have sought an adjournment to obtain legal representation, put submissions on his own behalf or filed further evidence.

147 The proper approach was explained by the majority of the High Court in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [75]:

> In the absence of any challenge from the cross-examiner to the frankness and completeness of the plaintiff's evidence, it was incumbent on the trial judge, if his conclusion that the plaintiff had not been frank and complete was to play a role in his decision adverse to the plaintiff, to make the challenge himself. Perhaps the criticism in the judgment did not occur to the trial judge until after the plaintiff had left the box, or until after the hearing had concluded and before the judge's reserved judgment was given. It remained necessary either to recall the plaintiff or to have no regard to that aspect of the plaintiff's evidence.

148 An alternative was for the primary judge to have referred his concerns to the Professional Conduct Committee of the Law Society of New South Wales for consideration and, if thought necessary, for adjudication in disciplinary proceedings.

149 The adverse findings amounted, in effect, to findings that in relation to key factual issues Harmer was untruthful in his affidavit evidence. His affidavit evidence was rejected. The gravity of such findings cannot be overstated.

150 We do not consider that Harmer was treated fairly in the way that the concerns of the primary judge were raised and resolved. Although we have concluded that Harmer ought not be given leave to appeal, the adverse findings made against him formed the additional basis

for the primary judge's conclusion that Ashby had commenced the proceedings in a manner which constituted an abuse of the process of the Court. Such an alternative case had never been pleaded. It was, in our view, not appropriate for the primary judge in the circumstances to make those findings against Harmer, and then to employ these as the basis for his ultimate decision as to one alternative. The unfairness attaching to the process by which the primary judge made adverse findings against Harmer accordingly also attached to the conclusions arrived at by his Honour concerning Ashby.

Harmer issues: findings

151 Apart from these considerations of fairness, it is also our opinion that the evidence did not warrant the making of these adverse findings in relation to the Harmer issues. We will consider these in turn.

152 As a backdrop to the more specific evidence relating to the Harmer issues it is important to appreciate broadly the evidence given by Harmer in relation to the core allegations made against Ashby but which were said to involve himself. He specifically denied that he had the alleged predominant purposes in assisting Ashby in bringing and conducting the proceeding. He deposed that neither he nor any of his firm's employed solicitors, based on his information and belief, had informed the media that the originating application would be filed. He deposed to his professional experience that workplace cases, particularly sex discrimination and sexual harassment litigation, involving high profile respondents attracted publicity even where the applicants have neither engaged media consultants nor contacted the press. He deposed to his belief that there is an inherent and justifiable public interest in such cases by the media, who monitor the Court list by reason of the subject matter and the identity of the respondents. He deposed that his firm was not equipped to deal with that level of media enquiry and interest. He said that for this reason he had come to the conclusion years before that in such cases there was a need to engage the services of an expert media consultant. He denied the allegations set out at APOC [53]. He deposed that he instructed the preparation and contents of the genuine steps document and that at the time of its completion he believed it to be true. He believed that the application conformed to the pleading requirements of the *Federal Court Rules*. He did not believe that at the time the application was filed that it was irregular. He deposed to his belief based on

detailed reasons which he explained, as well as documentary evidence that, at the time of filing the application, the allegations in it were supported by sworn or affirmed evidence.

153 He deposed that he did not brief Russell QC and had never had any communication with him other than in relation to an issue of legal professional privilege. He deposed that he had not had any contact with any person that he was aware held office or was in any way associated with the LNP in Queensland, or the Liberal Party of Australia or the National Party of Australia in relation to any of Ashby's affairs. He also deposed that he was not a member or supporter of the Liberal Party of Australia or the LNP or any other conservative political party, and was not a member of any other political party. He deposed that to the extent that he held political views, these generally were inconsistent with the views he understood represented the objectives and policies of the Coalition parties at a State or Federal level, to the extent that they differed from other mainstream political parties. The primary judge, it seems, accepted Harmer's evidence as set out in this paragraph. At least he made no observation to suggest that they were not accepted.

154 Harmer also deposed in considerable detail to his knowledge of the relevant professional conduct and practice rules. We will refer to this in more detail later.

155 In light of his professional experience and his standing as a solicitor, the affidavit evidence given by Harmer as to his intentions in commencing the proceedings in the form and manner that he did was not inherently improbable or unreasonable. In such circumstances, his Honour ought to have been very cautious in not accepting such evidence, and proceeding to make serious adverse findings mainly by the drawing of inferences.

156 The conduct alleged against Harmer was such that the conventional perception adverted to by the High Court in *Neat Holdings* at 449-450, referred to earlier in these reasons, would suggest that members of our society, in this case an experienced solicitor cognisant of their professional obligations, would not ordinarily engage in an unethical and unprofessional abuse of the court's process. Accordingly, findings on the balance of probabilities mainly upon inference that Harmer had been guilty of such conduct were not to be made lightly, particularly on a summary dismissal application where direct evidence was not tested and where not all relevant evidence to the ultimate issues may have been advanced.

157 It was important too, as we have mentioned, to take into account the lack of any cross-examination of Harmer and any alternative explanation which he may have been able to proffer, had the matter been put to him: *Bale v Mills* at [85]. A court should be reluctant to draw inferences adverse to a person when the issue could have been put to a witness but was not. The adverse findings of the primary judge were on matters of Harmer's subjective intention as to which, as we have described it, he gave detailed and unchallenged evidence.

158 This is all the more so given that, as we have explained, Harmer did not know Slipper personally; did not know Ashby before being retained by him on a referral from Russell QC; was not a member of a political party; was no supporter of, indeed, if anything, his political views were antithetical to those of, the LNP; and did not personally know Brough. That he should involve himself and his firm in a deliberate attempt to visit highly public personal, professional and political harm on Slipper by the content of the originating application, thereby abusing this Court's process without more, is highly improbable.

159 As we have earlier observed, the fact of a solicitor, appreciating a range of potential consequences arising from the initiation of proceedings, does not necessarily give rise to an assumption that certain of those consequences formed part of the solicitor's motivation in commencing those proceedings. There were a number of likely consequences of the commencement of the proceedings, including that Ashby would have an opportunity to gain legal redress for the conduct about which he complained.

The 2003 allegations

160 The 2003 allegations were included in the originating application which was endorsed, above Harmer's signature, with the statement that the allegations "contained in the Application" - explicitly including, by those words, the 2003 allegations – were "supported by sworn/affirmed evidence". They were not included in the statement of claim settled by senior counsel.

161 The primary judge concluded at [153] and [185] that the 2003 allegations had no legitimate forensic purpose because:

(a) the 2003 allegations were not included in the originating application for any legitimate, bona fide or reasonable purpose;

(b) the 2003 allegations were scandalous and irrelevant to Ashby's sexual harassment complaint;

(c) Harmer had no proper evidence or other basis on which to make the 2003 allegations: at [160]-[163];

(d) the 2003 allegations were included by Harmer in the originating application to raise the stakes, bring Slipper into disrepute and further damage him in the public eye and politically; and

(e) no lawyer acting responsibly could have included the 2003 allegations in the originating application.

162 The making, providing to the media and subsequent abandoning (in the statement of claim) of the 2003 allegations was expressly identified by Slipper as an element in his case that the proceedings were an abuse of process. As noted several times above, in para [53] of the APOC, Slipper asserted that by their conduct in connection with the 2003 allegations Ashby and his solicitors intended to expose 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 Brough".

163 Slipper submits that the findings and reasoning of the primary judge at [160]-[162] are unassailable. This is to say, in effect, that taking all of the material available to Harmer at its highest, there was never any basis for including the 2003 allegations in the originating application, and therefore no legitimate forensic basis for doing so.

164 Harmer was not cross-examined and the primary judge did not put Harmer on notice in clear terms prior to the close of Ashby's case, that he might find in relation to Harmer personally that:

(a) his inclusion in the originating application of the 2003 allegations was, of itself, an abuse of process; and

(b) Harmer intended to cause harm to Slipper by including scandalous and irrelevant allegations in the originating application and accordingly, for this reason alone, the proceedings were an abuse of process.

165 Ashby submits that these findings incorporated an erroneous belief by the primary judge that the 2003 allegations were included in the originating application to demonstrate that if they had been investigated, "it would have established that Slipper had utilised 'his office to foster sexual relationships with young male staff members' in 2003" (at [160]-[162]). The primary relief sought by Ashby was pursuant to ss 340, 351, 539, 540, 545 and 550 of the *Fair Work Act 2009*. This involved causes of action based in alleged "adverse action as well as victimisation". Additional relief based in breach of contract was also sought. Paragraphs [5]-[9] of the originating application which contain the allegation that the Commonwealth failed to take reasonable and effective steps to prevent Slipper from utilising his office to foster sexual relationships with young male staff members are together relevant to, and expressly stated to be so, the knowledge of the Commonwealth. This in turn was relevant to the causes of action as we have described them.

166 Ashby had submitted to the primary judge that the 2003 allegations were in fact included in the originating application as they were relevant to, among other things:

(a) the Commonwealth's breach of the safe work term in that when put on notice of the 2003 conduct, the Commonwealth ought to have fully investigated the incident which pointed to a clear risk to employee safety, identified the nature and seriousness of the risk, explored the propensity for the risk to recur and considered and implemented measures to control the risk and prevent recurrence. An employer on notice of such alleged conduct has a duty to address any potential safety risk. Significantly, in this respect, the originating application encapsulated concerns regarding the inaction of the Commonwealth during the leadership of both the Howard Government and the present Government in relation to breaches of the safe work term;

(b) the Commonwealth's breach of the trust and confidence term in that if proven, the awareness of Ashby of the apparent failure of the Commonwealth to prevent that conduct recurring, undermined the relationship of trust and confidence between Ashby and each of Slipper and the Commonwealth; and

(c) the assessment of penalties against Slipper and the Commonwealth and the imposition of reform orders on Slipper.

167 Detailed submissions were put to the primary judge concerning these matters. It is important to set them out in full:

Breach of Safe Work Term

17. The breach of the Safe Work Term relates to the alleged failure by the Commonwealth to take all reasonable steps to ensure the safety of its employees. Paragraphs 5 to 9 of the Original Application appear under the heading "*Knowledge of the First Respondent - the Commonwealth*" and, as pleaded, relate to risk management steps the Commonwealth failed to take when put on notice of the 2003 Conduct. Paragraph 8 relevantly asserts that, having been put on notice of the 2003 Incident:

> *"The Commonwealth thereafter failed to take reasonable and effective steps to prevent the Second Respondent from utilising his office to foster sexual relationships with young male staff members."*

18. The case advanced, was, in essence, when put on notice of the 2003 Conduct the Commonwealth should have fully investigated the 2003 Incident which pointed to a clear risk to employee safety, identified the nature and seriousness of the risk, explored the propensity for the risk to recur; consider and implement measures to control the risk and prevent recurrence. 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 application).

19. It is a commonplace that pleadings relating to breaches of the Safe Work Term in cases regularly include particulars of deficiencies in the management of risks to safety (see, for example, *Clarke v BHP Billiton Direct Reduced Iron Pty Ltd* [2009] WASCA 134].

Trust and Confidence Term

20. The 2003 Conduct was also relevant to the breach of the Trust and Confidence Term; if proven, the awareness of Mr Ashby of the apparent failure to prevent that conduct recurring, in the circumstances, undermined the relationship of trust and confidence between Mr Ashby and both respondents.

Assessment of Penalties and Reform Orders

21. The matters set out above would have been contended to have been relevant to the assessment of penalties against both respondents and the imposition of reform orders on the Speaker; the existence of a contractual breach is itself relevant to the assessment of the objective seriousness of the alleged statutory contraventions for purposes of the assessment of penalty.

22. The matters to be taken into account on imposition of a penalty require an assessment of all circumstances which may be relevant. As noted in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR

> 560, '*(t)he task of the court is to fix penalties that are appropriate to the circumstances of the case and which pay due regard to the need to maintain public confidence in the statutory regime*.' The purpose of statutory penalties is to punish the wrongdoers, to deter it from behaving in the same way again and to deter other employers who might be tempted to follow suit. *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] 158 FCR 543 at [93]. This is to be done by reference to all matters which might be thought to be relevant. Given such a broad ranging inquiry minds may legitimately differ as to the metes and bounds of what is relevant.
>
> 23. As Tracey J observed in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426; (2008) 177 IR 61 at [39] - [40] (and has been repeated many times) "*potentially relevant and applicable considerations*" for determining appropriate penalties for a similar contraventions such as those pleaded include such broad ranging enquiries as to the nature and extent of the conduct which led to the breaches; the circumstances in which that relevant conduct took place; whether there had been similar previous conduct by the respondent; whether the breaches were properly distinct.

168 These submissions were not analysed by the primary judge although at [160] his Honour rejected them on the basis that Ashby did not plead, and that Harmer had no basis to allege, that if the 2003 allegations had been investigated "via Mrs Hobson" or in any other way, it would have established that Slipper had utilised "his office to foster sexual relationships with young male staff members". This was to misunderstand that part of Mr Ashby's case. These arguments were neither inherently improbable nor unreasonable.

169 In the circumstances of a summary application and having regard to s 140(2) of the Evidence Act, the evidence did not warrant the making of these findings.

170 Nonetheless, in making them the primary judge rejected Harmer's unchallenged evidence that he did not:

(a) participate in commencing proceedings on the basis that such a course would involve publicity and damage to Slipper's reputation; or

(b) intend, by making the 2003 allegations in the originating application either alone or in combination with anyone else, to expose 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 Brough.

171 Further, these findings were in direct contradiction of Harmer's unchallenged evidence that in settling and filing the originating application, he attempted to faithfully discharge his professional obligations as he understood them and that he has never included material in a court document "only with a purpose of harming" another person and would not engage in such conduct. They were also contrary to Harmer's unchallenged evidence that at the time the originating application was filed, he believed that the 2003 allegations were supported by sworn or affirmed evidence and had included them in the originating application as he had believed that they were relevant to the claim of breach of contract, and that he did not have a predominant purpose of assisting Ashby in bringing or conducting the proceedings, either alone or in combination with other persons, to vilify Slipper, expose Slipper to opprobrium and scandal, bring Slipper into disrepute and/or destroy or seriously damage Slipper's reputation and standing, and his political position and career.

172 We consider too that the primary judge failed to have regard for the fact that, as Ashby had submitted, the material in Harmer's possession which formed a reasonable basis for making the 2003 allegations could be affected by the "cloak of legal professional privilege", in circumstances where the evidence disclosed that Harmer had been instructed to maintain claims for client legal privilege.

173 Moreover, despite the absence of any evidence from relevant potential witnesses or submissions in relation to the issue, the primary judge assumed the accuracy of a conclusion said to have been held by one potential witness, to the effect that the relationship between Slipper and the male staff member the subject of the 2003 allegations was consensual. This was so notwithstanding his Honour's view that such witness' account was hearsay. In the result, the primary judge made significant adverse findings against Harmer and thereby Ashby based on this assumption.

174 Finally, when determining whether there was a reasonable basis for the inclusion of the 2003 allegations in the originating application, his Honour took into consideration the lack of evidence that the staff member involved in the 2003 allegations had ever complained to the Commonwealth about Slipper's conduct or that he had any complaint to make. We agree with the submission that such consideration was not warranted given the unchallenged evidence of Harmer that at the time the originating application was filed, he believed that the

2003 allegations were supported by sworn or affirmed evidence; the summary nature of the application; the possibility, as submitted by Ashby, that Harmer may have had such 'evidence', but was not at liberty to disclose it due to his client asserting a claim of client legal privilege prior to trial; and again the provisions of s 140(2) of the Evidence Act.

175 We are of the opinion that the primary judge erred in law, when finding that Harmer and thereby Ashby "had no proper evidence or other basis on which to make the 2003 allegations", in taking into consideration the ultimate admissibility of the evidence available to Ashby and his solicitor Harmer at the time of filing the originating application.

176 It is not a requirement that a party or their legal representative has in their possession at the preliminary stage admissible evidence in support of the allegations (whether sworn/affirmed, non-hearsay evidence or admissible documentary or other evidence), but only that the legal representative has available material to justify the making of the allegations: *Medcalf v Mardell* at [22], [45], [46], [75] and *Momibo Pty Ltd v Adam (t/as Marsdens Law Group)* (2004) 1 DCLR (NSW) 316 at [85], [86], [97] are illustrations of this approach. Harmer had deposed to his knowledge of the terms of the *Revised Professional Conduct and Practice Rules 1995* made by the Council of the Law Society of New South Wales pursuant to its power under s 57B of the *Legal Profession Act 1987* (NSW) (which rules were deemed to be made under the *Legal Profession Act 2004* (NSW) by virtue of sch 9 cl 24 of that Act). He was also aware of Part VB of the FCA Act. He deposed in particular to his knowledge of the rules relevant to the making of allegations under privilege e.g. rr A.35, A.36, A.37 and that in settling and filing the originating application he attempted to discharge faithfully his professional obligation as he understood them.

177 The case law confirms that a solicitor is reasonably justified in initiating proceedings even in a case where the supporting evidence is weak but arguable: *European Hire Cars Pty Ltd v Beilby Poulden Costello* [2009] NSWSC 526 at [60] or "barely arguable": *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683 at [24] although Ashby's case was not characterised by the primary judge as falling into this category.

178 When the originating application was filed, Harmer believed that the 2003 allegations were supported by sworn or affirmed evidence, including that of Hobson. His unchallenged evidence was that, at that time, he believed that Hobson had sworn the draft affidavit that she

had approved and which he had read, and that the matters deposed to in that draft affidavit were evidence that she would give should the matter proceed to a contested hearing and she be called. The unchallenged evidence of Harmer was that at the time that the originating application was filed he believed that a statutory declaration had also been made by Hobson which supported the 2003 allegations. It is the case that Hobson's statutory declaration was not in evidence. However, there is a reason for this. Ashby had sought to tender a copy of it which had been emailed by Hobson to Harmers. The Commonwealth had conceded that her statutory declaration provided a proper basis for Harmer to believe that he could include the 2003 allegations and on the basis of its concession had objected to the tender. He also deposed that the factual material already available to him provided a proper basis for the allegations.

179 The primary judge at [112], [162] and [163] found, correctly, that there was no sworn or affirmed affidavit evidence supporting the 2003 allegations. This finding is not challenged. However, his Honour made no finding as to the belief by Harmer that Hobson had sworn an affidavit, a draft of which he had seen and which had been prepared by a lawyer from his firm. There was no reason to reject this unchallenged evidence and his Honour did not do so. The position, of course, would be different where, after a trial, it was demonstrated that the allegations had no reasonable basis. In summary applications the evidence of the plaintiff should be taken at its highest.

180 Further, Harmer may well have had other information available to him in relation to the 2003 allegations that he was not in a position by reason of client legal privilege to disclose at the time of filing the originating application. This, for example, may potentially have included evidence of other similar incidents of sexual harassment by Slipper in the period after 2003 about which the Commonwealth apparently had knowledge and in relation to which Harmer was in the process of seeking evidence; and all of these matters require to be considered in light of the provisions of s 140(2) of the Evidence Act.

181 When all of these considerations are taken together, we are of the opinion that the adverse findings in relation to the 2003 allegations ought not to have been made.

The Cabcharge allegations

182 The originating application included allegations that on three occasions Slipper had provided a driver with "multiple cab charge vouchers".

183 These allegations were made in connection with a claim that characterised Slipper's conduct as "involving [Mr Ashby] in questionable conduct in relation to travel", which, it was said, constituted a breach of obligations implied in Ashby's contract with the Commonwealth.

184 Immediately after the allegations about Slipper's conduct the originating application was endorsed with the following assertion:

> [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.

185 The primary judge held that the inclusion in the originating application of the assertion that Ashby intended to "report" the Cabcharge allegations to the Australian Federal Police gave rise to an abuse of process.

186 The primary judge found, in particular, that:

(a) Ashby had inexplicably delayed reporting the Cabcharge allegations to the police: at [167]-[169];

(b) the assertion about reporting the Cabcharge allegations to the police (Cabcharge reporting assertion) was irrelevant and not included in the originating application on any proper basis or to advance any bona fide cause of action: at [153], [180] and [184];

(c) the Cabcharge reporting assertion was included for the purpose of creating an allegation tantamount to criminality against Slipper by alleging, in effect, that he was guilty of misusing Commonwealth funds, while not pleading any criminality directly: at [169], [174] and [180]. The primary judge drew an analogy between the way in which this imputation was insinuated ("anxious to wound but afraid to strike") and the defamatory suggestion discussed in *Jones v Skelton* [1963] 1 WLR 1362 at 1372;

(d) Ashby and Harmer knew and intended that the media could and would report the allegations including the Cabcharge reporting assertion in the originating application and so further damage Slipper in the public eye and politically and to attract to him significant adverse publicity in the media beyond the damage the other Cabcharge allegation would cause: at [168], [173], [180], [184] and [190];

(e) no lawyer acting responsibly could have included the Cabcharge reporting assertion in the originating application: at [185];

(f) by pleading this assertion, Harmer breached his professional obligation not to misuse his privilege to make allegations under absolute privilege in Court documents: at [190]-[191]; and

(g) Ashby and Harmer "determined to raise the stakes" by including the Cabcharge reporting assertion and the assertion of there being sworn or affirmed evidence to support all the allegations in the originating application: at [201].

(together called the Cabcharge findings).

187 The primary judge then held that neither Ashby nor Harmer had any basis for an imputation of criminality, substantially for the reasons set out in [170] of the primary judgment.

188 The Cabcharge findings necessitated the primary judge rejecting Harmer's unchallenged evidence that he did not participate in commencing proceedings on the basis that such a course would involve publicity and damage to Slipper's reputation or intend, by making the Cabcharge allegations in the originating application either alone or in combination with anyone else, to expose 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 Brough.

189 The primary judge implicitly also rejected Harmer's unchallenged evidence that:

(a) in settling and filing the originating application, he attempted to faithfully discharge his professional obligations as he understood them;

(b) he had never included material in a court document "only with a purpose of harming" another person and he would not engage in such conduct;

(c) at the time the originating application was filed, he believed that the Cabcharge allegations were supported by sworn or affirmed evidence;

(d) he included the Cabcharge allegations in the originating application because he believed on the current state of the case law that the requirement to acquiesce in, or witness, Slipper failing to comply with proper travel requirements could amount to a breach of the implied term of trust and confidence; and

(e) he did not have a predominant purpose of assisting Ashby in bringing or conducting the proceedings (either alone or in combination with other persons) to vilify Slipper, expose Slipper to opprobrium and scandal, bring Slipper into disrepute or destroy or seriously damage Slipper's reputation and standing, and his political position and career.

190 In making the Cabcharge findings, the primary judge, in the absence of any relevant evidence from Ashby or Harmer drew serious adverse inferences against each of them. The primary judge inferred from para [55(e)] of the originating application that Ashby had not already approached the police in relation to this issue and based significant adverse findings against Harmer upon that inference.

191 Paragraph [55(e)] of the originating application is in terms that Ashby "intends to … make a statement". The primary judge construed this as Ashby intending to *report* the Cabcharge allegations to the Australian Federal Police. These words admit of more than one construction, including that Ashby had already reported the Cabcharge allegations to the police and intended to provide a follow-up statement.

192 Absent any evidence regarding the reason for the assumed delay by Ashby in approaching the Australian Federal Police regarding the Cabcharge allegations, his Honour inferred that Harmer was in some manner responsible for such assumed delay.

193 When inferring Harmer's purpose of including the Cabcharge reporting assertion in the originating application, the primary judge took into account that the Cabcharge reporting assertion had been subsequently excluded from the statement of claim filed by Ashby. Harmer's evidence as to this was however, given within the confines of his client's claim for legal privilege, that this action was taken after counsel was briefed but without further elaboration.

194 There are other possible reasons for the inclusion of para [55(e)] in the originating application.

195 First, as Ashby submits, the manner in which the Cabcharge conduct, which was argued to be objectively a breach of the implied term of trust and confidence, impacted on Ashby personally and subjectively was relevant in a number of ways: it was potentially part of all the circumstances that are taken into account in determining whether, looked at objectively, the employer's conduct was likely to destroy or seriously damage the degree of trust and confidence the employee was reasonably entitled to have in his employer. The particular employee's subjective response is also relevant to the nature of the remedy which will be available to the employee: *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 at 34-35.

196 This reason for including the Cabcharge reporting assertion in the originating application was alluded to in the submissions made by Ashby to the effect that:

(a) the Cabcharge allegations were relevant to, among other things, the alleged breach by Slipper of the implied trust and confidence term, which arose from a series of events over time; and

(b) the statement in [55(e)] of the originating application must be considered in this context, namely it informs that Ashby considered the conduct to be so serious (subjectively and objectively) as to warrant report to and investigation by the Australian Federal Police.

197 Moreover Dr Phillips in his report referred to Ashby's alarm and worry by the conduct which is, in this proceeding, described as the Cabcharge allegations, and which Ashby thought at the time and continued to believe may have been unlawful conduct.

198 Dr Phillips observed that:

> Almost certainly the main cause for Mr Ashby's psychological decompensation in late 2011/2012 was the increasing psychological trauma which he experienced in his professional relationship with Mr Slipper.

199 The observations concerning the conventional perception in *Neat Holdings* to which we have referred are apt also in this context. The possible alternative inference set out above, and there may be others, as to the reasons for including para [55(e)] in the originating application is, at least, equally as probable, as the improper reason ultimately inferred by the primary judge. That his Honour settled on that inference was no doubt influenced by the other adverse findings concerning Ashby's purpose in instituting the proceedings; those related to the Harmer issues and perhaps particularly those concerning the media issue.

200 We accept the submission that the absence of evidence from Harmer on this crucial issue is not surprising. Harmer was not cross-examined, nor (as we have concluded) was he given adequate notice, prior to the close of Ashby's case, that the Court might make findings against him to the effect that his inclusion in the originating application of the Cabcharge reporting assertion was unprofessional conduct and was, of itself, an abuse of process, or that he intended to cause harm to Slipper by including scandalous and irrelevant allegations in the originating application and accordingly, for this reason alone, the proceedings were an abuse of process.

201 At no stage in the proceedings was notice given to Harmer that the Court might find or assume that he was in some manner involved in an intentional delay in reporting the Cabcharge allegations to the police.

202 The primary judge regarded the inclusion of the Cabcharge reporting assertion in the originating application as a breach by Harmer of his professional obligation not to misuse his privilege to make allegations under absolute privilege in court documents. His Honour, in doing so, drew an analogy between Harmer's conduct and that of Clyne in *Clyne*. However, the facts in the proceedings were materially distinguishable from *Clyne* in at least one significant respect.

203 Clyne, by his own admission, was aware that he had no evidence at all of the serious allegations that he made. He made that attack in extravagant terms, alleging fraud, perjury and blackmail. He knew that he had no evidence to substantiate such allegations.

204 By contrast, before filing the originating application Harmer sought to obtain, and at the time of filing the originating application he believed on reasonable grounds that he had obtained, prior to any Court timetable compelling him to do so, sworn or affirmed evidence, and, in the case of text messages, actually obtained an independent forensic Information Technology assessment and report supporting each of the allegations made.

205 It follows that we reject the submission put by senior counsel for Slipper that the primary's judge's conclusion at [181] of the primary judgment that the inclusion in the originating application of the assertion that Ashby intended to report the Cabcharge allegations to the Australian Federal Police gave rise to an abuse of process is unassailable.

206 We are of the opinion that there was an inadequate basis in the evidence, given Harmer's unchallenged evidence, the summary nature of the application and the considerations in s 140(2) of the Evidence Act, for making the adverse findings in respect to the inclusion of the Cabcharge allegations. In reaching that view, we do not wish to be taken as indicating that in our view the Cabcharge reporting assertion was a proper part of the material asserted in the originating application. It is difficult on the information before both the primary judge and this Court to discern its real relevance as a material fact (or as a particular of a material fact) to the causes of action raised. It is easy to understand how it might be seen as having been included in the originating application for an extraneous purpose. However, for the reasons given, we do not think it was appropriate in the circumstances to make the general adverse findings made about the Cabcharge allegations, or to make particular adverse findings about the Cabcharge reporting assertion.

The genuine steps statement

207 The genuine steps statement, dated 20 April 2012, was both drawn and filed by Harmer pursuant to s 6 of the *Civil Dispute Resolution Act 2011* (Cth) (CDR Act). It indicated that no steps had been taken to try to resolve the issues in dispute as the matter was

urgent, involved aspects of victimisation and that alerting Mr Slipper and the Commonwealth to the matter would only increase the opportunity for victimisation.

208 There is no evidence that Ashby saw the genuine steps statement, was aware of its existence or instructed Harmer as to its content. Harmer deposed that he prepared it.

209 His Honour inferred, without it being put to Harmer, that the only need for urgency in the filing of the originating application was because Slipper was overseas and would have great difficulty, while travelling, in responding and putting his position. No such inference was contended for by Slipper and was not, in my opinion, an inference to be drawn on the balance of probabilities.

210 His Honour also held that there was no basis for 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 and that the subsequently filed statement of claim pleaded no acts of victimisation: at [192] (the genuine steps findings).

211 In the circumstances of the case and having regard to s 140(2) of the Evidence Act, there was, in our opinion, insufficient evidence on which his Honour could make the genuine steps findings.

212 Despite the unchallenged evidence of Harmer, constrained as he believed himself to be by a claim for client legal privilege, that he believed that the genuine steps statement was true and the various alternative steps identified by the Commonwealth and relied on by his Honour were not "practical or appropriate given the circumstances in which Ashby found himself", and in the absence of any elaboration by Harmer as to his reasons for this view, his Honour inferred that there was no reason for Ashby to have not pursued a range of alternative remedies before commencing the proceedings and based significant adverse findings against Harmer on this assumption at [192]-[194].

213 There were other reasons, at least equally compelling, why the filing of the originating application was considered to be urgent, and why alternative steps were not considered appropriate or practical in the circumstances. For example, the following considerations are apt to explain such urgency.

214 By reason of the provisions of ss 4, 6(4) and 16(c) of the CDR Act, Ashby was required to file a genuine steps statement only to those parts of the proceeding that were not "excluded proceedings". Proceedings under the FW Act are, by virtue of s 16(c), excluded proceedings. Accordingly it was only the fact that the originating application sought additional relief for breach of contract that meant Ashby, in relation to that cause of action, was required to file a genuine steps statement. However, he was not precluded from filing a genuine steps statement which was directed to the relief sought under the FW Act. This is an important consideration for these reasons. Ashby was employed to be a member of Slipper's personal staff at the level of Advisor. Ashby's employment was under Part III of the MOPS Act and was subject to the arrangements provided for in relation to personal employees under the Enterprise Agreement. The introduction to the Enterprise Agreement explained that *"Employees are employed by Members on behalf of the Commonwealth and are responsible to their employing Member."* Termination of employment, like the offer of employment itself, was undertaken by the Member. In addition, Ashby's employment would terminate if Slipper ceased being the Speaker: s 16(2)(a) of the MOPS Act. Any notice alerting Slipper or the Commonwealth to Ashby's intended course of action prior to commencing proceedings opened the possibility of the immediate termination of his employment to prevent him being able to commence proceedings in this Court. That is, upon dismissal, Mr Ashby could not have approached this Court for timely relief by reason of the operation of ss 365 and 371 of the FW Act and s 46PO(1) of the *Australian Human Rights Commission Act 1986* (Cth).

215 Further, the genuine steps statement has two paragraphs. Only the second paragraph refers to concern about increasing the opportunity for further victimisation. The first paragraph simply says: "*The matter is urgent."* This did not necessarily mean that the only possible urgency related to a fear of victimisation. Having not been cross-examined or put on proper notice of the genuine steps findings, or of the reasoning intended to be adopted by the primary judge in reaching them, Harmer was deprived of the opportunity (assuming that he was able, given his client's claim of privilege) to elaborate on his intended meaning when preparing the genuine steps statement.

216 In reaching his conclusions it is apparent that his Honour also inferred that when Harmer referred in the genuine steps statement to the matter being "urgent", the relevant urgency related to the conduct of the proceedings, and not just their initiation. This explains

the inclusion in the reasons of the primary judge that Ashby was not "ready to litigate" the matter and to delays in his receipt of medical evidence. Accordingly, another at least equally probable inference is that when Harmer referred to the issue of urgency in the genuine steps statement, he referred to the need to commence proceedings promptly, rather than needing to conduct them promptly once commenced. Having not been cross-examined or put on proper notice of the genuine steps findings, or of the reasoning intended to be adopted by his Honour in reaching them, Harmer was deprived of the opportunity, assuming that he was able, given his client's claim of privilege, to elaborate on his intended meaning when preparing the genuine steps statement.

217 In the context of reaching the genuine steps findings we note that the primary judge, in observing that the statement of claim filed on 15 May 2012 made no reference to "the allegations that anything that Slipper had done amounted to, or threatened, victimisation of Ashby" (at [118] and [192]), has not referred to some material to the contrary. The originating application asserted a claim, as I mentioned, based in "adverse action" including attempts by Slipper to victimise him at paras [24], [34], [35], [49] and [50]. In turn, the statement of claim incorporated Ashby's victimisation claims by:

(a) detailing the conduct that formed the basis of the victimisation claim (at [17]);

(b) including such conduct in the definition of "Relevant Conduct" (at [21]);

(c) pleading that the "Relevant Conduct" constituted adverse action by the Commonwealth against Mr Ashby that was taken for reasons that contravened ss 340 and 351 of the FW Act (at [22]-[29]); and

(d) pleading that Slipper was also involved in, and under s 550(1) of the FW Act was therefore taken to have also committed, contraventions of ss 340 and 351 of the FW Act (at [30]-[32]).

218 We are of the opinion, for these reasons, that the adverse findings inferred as against Harmer and in turn Ashby, concerning the genuine steps statement ought not to have been made.

The media involvement

219 The primary judge appears to have placed considerable store by the fact that Harmer employed the services of a media consultant, McClellan.

220 The primary judge correctly found that Harmer "knew that the proceedings would attract significant publicity and that is why he recommended McClellan be engaged by Mr Ashby." Harmer gave evidence, to which we have referred, that his firm was not equipped to deal with the level of media inquiry and interest in cases involving high profile respondents and that he came to the conclusion some years ago that there was a need for his firm to engage the services of an expert media consultant in such cases. An awareness by a law firm of media issues and interest is neither unusual nor, of itself, objectionable. An illustration of this is that Slipper's then solicitor acknowledged that the firm of solicitors that employed her, a large and well-known national law firm, has a practice of issuing press releases announcing the commencement and result of proceedings.

221 The direct evidence did not support an inference on the balance of probabilities that Harmers may have informed the media that the originating application had been, or would be, filed in Court before it was emailed to Slipper so as to cause the allegations to receive maximum publicity, while 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 Brough.

222 Such an inference was speculative and was contrary to the unchallenged evidence of Harmer. The employment of McClellan as a media consultant has an obvious alternative, benign and indeed more likely explanation which, again, was proffered by Harmer and not challenged in cross-examination. Harmer was not given any opportunity to elaborate on this issue by cross-examination or otherwise.

223 As to the journalist Lewis and Harmer, the primary judge found that:

(a) Ashby secretly travelled to, and stayed in Sydney, in accommodation paid for by News Limited and arranged by Lewis, in order to meet with Lewis, Harmer and his firm and to bring these proceedings;

(b) Lewis knew that the commencement of proceedings was likely to be imminent once Ashby was in Sydney in "lock down" with Harmers as he arranged for Ashby to fly to and stay in Sydney at News Limited's expense while he conferred with Harmers;

(c) Ashby and Harmer 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 and so damage Slipper's reputation and credibility; and

(d) the Cabcharge assertion "came on the heels" of Ashby's intention to file the originating application after "Mr Lewis had set the scene" by publishing earlier stories relating to other incidents related to Slipper's use of travel entitlements.

224 These findings rather suggest some form of arrangement between Harmer and Lewis although precisely what arrangement is not clear. As with Harmer, Lewis was not found to have been part of the alleged combination. There was no evidence that at the relevant time Harmer knew Lewis, knew that News Limited was paying for Ashby's flight or accommodation in Sydney or had any arrangement with Lewis. That Ashby attended a meeting with Harmers when he was in Sydney on a trip paid for by News Limited does not prove any knowledge of, or involvement by, Harmer or Harmers with Lewis or News Limited. An equally probable inference is that Harmer did not know Lewis, had no knowledge about who had paid for Ashby's trip and had no arrangement whatsoever with either Lewis or News Limited.

Conclusion

225 We are satisfied that the evidence before the primary judge did not warrant the adverse finding said to constitute an abuse of the Court's process on the two bases found and did not warrant the rejection by his Honour of the sworn and unchallenged evidence of each of Ashby and Harmer.

226 We would give Ashby leave to appeal and allow Ashby's appeal. There should be an order accordingly. The order dismissing the proceeding should be set aside and in lieu thereof there should be orders that Slipper's interlocutory application be dismissed with costs.

Slipper should pay the costs of the application by Ashby for leave to appeal as well as the appeal.

227 There should be an order that Harmer's application for leave to appeal be dismissed with costs.

I certify that the preceding two hundred and twenty-seven (227) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield & Gilmour.

Associate:

Dated: 27 February 2014

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 22 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **JAMES HUNTER ASHBY**
Applicant

AND: **PETER SLIPPER**
Respondent

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 31 of 2013**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **MICHAEL DANIEL HARMER**
Applicant

AND: **PETER SLIPPER**
First Respondent

JAMES HUNTER ASHBY
Second Respondent

JUDGES: **MANSFIELD, SIOPIS AND GILMOUR JJ**
DATE: **27 FEBRUARY 2014**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

SIOPIS J:

228 The *Federal Court Rules 2011* contemplate that an originating application commencing a proceeding in the Court will set out concisely the relief that an applicant claims. The factual basis of the relief claimed is to be pleaded in an accompanying document, called a statement of claim, or deposed to in an accompanying affidavit. The rules

have prescribed this process as the means of commencing a proceeding in this Court for many years, and it has been the practice of legal practitioners to comply with the prescribed process in commencing a proceeding.

229 However, on Friday, 20 April 2012, a very experienced solicitor caused the application the subject of this appeal to be commenced in the New South Wales District Registry of this Court by a means which did not conform to the rules and the longstanding professional practice. That practitioner was Mr Michael Harmer, the sole principal of the firm, Harmers Workplace Lawyers, a firm whose main office is located in Sydney. In commencing the application, Mr Harmer was acting on behalf of Mr James Ashby, a Queensland resident, who in the preceding week had been flown to Sydney to consult with Mr Harmer for the purpose of bringing, in the New South Wales Registry, legal proceedings against Mr Peter Slipper and the Commonwealth of Australia.

230 At the time the application was filed, Mr Slipper was the Member of the House of Representatives for Fisher, a constituency located in Queensland, and the Speaker of the House of Representatives. In November 2011, Mr Slipper had, in controversial circumstances, resigned from the Liberal National Party and taken up the position of Speaker. In December 2011, Mr Slipper had engaged Mr Ashby as an adviser and Mr Ashby had entered into a contract of employment with the Commonwealth in order to give effect to this engagement.

231 Mr Harmer commenced the legal proceeding against the Commonwealth and Mr Slipper by causing to be filed an originating application, which he had drafted, which ran to 14 pages and contained allegations in much greater detail than is contemplated by the rules and established legal practice. These allegations were sensational. The allegations set out verbatim text message exchanges between Mr Ashby and Mr Slipper of a sexual nature in support of a claim that Mr Slipper had sexually harassed Mr Ashby and that the Commonwealth had breached Mr Ashby's employment contract. The allegations also contained an account, in graphic detail, of the contents of a videotape said to have been taken in 2003 of Mr Slipper engaging in a consensual sexual encounter with another man and an allegation that in 2003 the contents of the videotape had been reported to an aide to Prime Minister John Howard. Further, the allegations claimed that Mr Ashby had seen

Mr Slipper hand blank Cabcharge vouchers to a driver of a vehicle in which they had travelled together and that he intended to report this conduct by Mr Slipper to the police. Mr Ashby alleged that the Commonwealth and Mr Slipper were liable for conduct which contravened sections of the *Fair Work Act 2009* (Cth), and the Commonwealth had breached his contract of employment.

232 A few hours after the originating application had been filed in the Court, a journalist attended the New South Wales Registry and inspected a copy of the originating application. Over the ensuing weekend a number of stories were published in the national and international press repeating the allegations made in the originating application, including the allegations relating to the videotape of Mr Slipper's 2003 sexual encounter and the allegations regarding Mr Ashby's intention to report Mr Slipper's Cabcharge conduct to the police. About three weeks later, Mr Harmer's firm filed a statement of claim and an application to amend the originating application which withdrew the 2003 videotape allegations and the allegations in relation to Mr Slipper's use of the Cabcharge vouchers.

233 In early June 2012, each of the Commonwealth and Mr Slipper applied to dismiss Mr Ashby's application on the grounds that it was an abuse of process. They alleged, inter alia, that the originating application was commenced for the predominant purpose of harming Mr Slipper politically. They also alleged that, by reason of Mr Slipper's high public profile, Mr Harmer knew that the filing of the originating application would attract widespread publicity, and that his purpose in including the 2003 videotape allegations and the Cabcharge allegations in the originating application, only to withdraw them after they had been extensively reported, was to cause maximum harm to Mr Slipper.

234 On 4 October 2012, the Commonwealth and Mr Ashby reached a settlement of Mr Ashby's claim against the Commonwealth. However, no settlement was reached between Mr Ashby and Mr Slipper and Mr Slipper's interlocutory application to dismiss Mr Ashby's originating application was heard and determined by the primary judge. The primary judge upheld Mr Slipper's application and dismissed Mr Ashby's originating application on the grounds that it was an abuse of process.

235 Each of Mr Ashby and Mr Harmer applies for leave to appeal from that decision.

BACKGROUND

236 In November 2011, Mr Slipper was the member of the Liberal National Party in Queensland representing the constituency of Fisher in the House of Representatives. During that month, Mr Slipper was in communication with Mr James Ashby, a gay man in his early 30s, who was a member of the Liberal National Party. Mr Ashby had some experience in working in the media in Queensland. In November and early December 2011, Mr Ashby offered Mr Slipper informal media advice. Each of Mr Ashby and Mr Slipper was an enthusiastic user of the text message as a means of communication. An examination of the text messages exchanged between them during that time shows that Mr Slipper demonstrated a close interest in the personal relationships which Mr Ashby was then pursuing with other men.

237 On 24 November 2011, Mr Slipper resigned from the Liberal National Party, continuing to sit in Parliament as an independent member and took up the office of the Speaker of the House of Representatives.

238 On 11 December 2011, Mr Ashby entered into a contract of employment with the Commonwealth as an adviser to Mr Slipper.

239 In January 2012, Mr Ashby, in his role as an adviser, accompanied Mr Slipper to Canberra. Mr Ashby stayed at Mr Slipper's residence. Mr Ashby alleges that whilst there, Mr Slipper asked him to massage his neck. Mr Ashby says that he obliged and, in the course of the massage, Mr Slipper made noises of pleasure. Also, alleges Mr Ashby, Mr Slipper showered with the door open and suggested that Mr Ashby adopt the same practice. Mr Ashby declined to do so. On the way back to Queensland, said Mr Ashby, Mr Slipper told Mr Ashby that he looked "fat" in the shirt he was wearing.

240 On 27 January 2012, according to Mr Ashby, he travelled in a vehicle with Mr Slipper which was not a Commonwealth car and was not obviously a taxi. Mr Ashby alleges that at the end of the journey, Mr Slipper gave the driver of the vehicle three blank Cabcharge vouchers which Mr Slipper had signed. Mr Ashby alleges that Mr Slipper engaged in the same practice on 5 and 11 February 2012 in his presence.

241 In mid-January 2012, Mr Slipper sent Mr Ashby text messages which asked some very personal and intrusive questions about Mr Ashby's sexual practises. Mr Ashby advised Mr Slipper that those types of questions were not appropriate. On 1 February 2012, Mr Slipper exchanged text messages with Mr Ashby in which he suggested that he and Mr Ashby have a "closer" relationship. Mr Ashby declined the suggestion. These text messages from Mr Slipper and Mr Slipper's conduct referred to in [239] above, were at the forefront of Mr Ashby's complaints of sexual harassment in his application which he filed in this Court on 20 April 2012.

242 In his originating application, Mr Ashby alleged that the events, referred to at [239] and [241] above, as well as two other subsequent events referred to at [245] and [250] below, caused him considerable stress, humiliation and illness.

243 On 2 February 2012, Mr Ashby went to see Mr Mark McArdle, a senior member of the Liberal National Party in Queensland and a member of the Queensland Legislative Assembly, about the text messages which he had received from Mr Slipper.

244 Following his meeting with Mr McArdle, Mr Ashby continued to work as Mr Slipper's adviser. Mr Ashby worked alongside Ms Karen Doane, who was employed as Mr Slipper's media adviser. In the course of carrying out his employment duties, Mr Ashby monitored the way in which Mr Slipper was portrayed in the media, had regard to the means whereby Mr Slipper could enhance his public image, communicated with journalists by text message and other means, and produced material which could be used on "YouTube" to enhance Mr Slipper's media image and distributed and monitored that material.

245 On 1 March 2012, according to Mr Ashby, he and Mr Slipper were standing in proximity to each other looking at a YouTube video which Mr Ashby had produced for Mr Slipper, when Mr Slipper stroked Mr Ashby's arm and stated that Mr Ashby had done a "beautiful job" with the video. Mr Ashby said, in his originating application, that this encounter with Mr Slipper was a further incident of sexual harassment by Mr Slipper which contributed to causing him considerable stress, humiliation and illness.

246 In early March 2012, Mr Ashby learnt that Mr Slipper had been invited to go on a trip to Hungary later that month as part of a Parliamentary delegation. Mr Ashby asked

Mr Slipper whether he could accompany Mr Slipper on that trip. Mr Ashby said that he would be prepared to pay his own expenses. On 16 March 2012, Mr Slipper told Mr Ashby that he could not accept Mr Ashby's "excellent" suggestion on the basis of there was a risk of creating an adverse public perception.

247 At the time that Mr Ashby took up employment as Mr Slipper's adviser, there were two persons who, to Mr Ashby's knowledge, Mr Slipper regarded as having interests hostile to his interests.

248 One person was Mr Malcolm Brough, a former minister of the Commonwealth, who was proposing to contest the Liberal National Party preselection for Mr Slipper's seat of Fisher. The other person was Mr Steve Lewis, a Sydney based journalist for the *Daily Telegraph* newspaper who had an interest in investigating Mr Slipper's use of his Commonwealth travel entitlements.

249 Mr Ashby, at different times had, in colourful terms, told Mr Slipper that he shared Mr Slipper's antipathy for each of these persons.

250 On 20 March 2012, according to Mr Ashby's originating application, he and Ms Doane had, through their efforts, thwarted the publication of an article by Mr Lewis, and Mr Slipper, who was pleased with the outcome, asked if he could "kiss you both". Mr Ashby interpreted the question as being directed to him alone and he relied on this incident in his originating application as a further incident of sexual harassment by Mr Slipper, which he alleged contributed to causing him considerable stress, humiliation and illness.

251 On 24 March 2012, the Liberal National Party won the Queensland election. Mr Slipper left for overseas around this time.

252 On 26 March 2012, Mr Ashby advised Mr McArdle that he had decided to progress the matter which he had discussed with Mr McArdle in early February 2012.

253 Further, without advising Mr Slipper (who, as I have said, was out of the country) of their intention to do so, Mr Ashby and Ms Doane contacted Mr Brough and Mr Lewis and started supplying each of them with copies of extracts from Mr Slipper's diaries in order to

assist Mr Lewis in his investigation of Mr Slipper's use of his travel entitlements. Mr Lewis said he was interested in tracking Mr Slipper's movements on certain dates, and Mr Ashby and Ms Doane obliged by sending copies of extracts from Mr Slipper's diary for dates in 2009 and 2010 which Mr Lewis had nominated. On one occasion, Mr Brough expressed dissatisfaction with the legibility of the diary extract which had been sent to him by Mr Ashby and asked him to provide a more legible copy of the diary extract. Mr Ashby did so.

254 In continuing to supply copies of the extracts from Mr Slipper's diary to Mr Brough and Mr Lewis, Mr Ashby acted surreptitiously. At no time did Mr Ashby advise Mr Slipper that he was cooperating with Mr Brough and Mr Lewis in their efforts to undermine Mr Slipper.

255 On 30 March 2012, Mr Ashby stated in a text message to Ms Doane that they were "fixing the black mark" of being associated with Mr Slipper. Ms Doane expressed similar feelings of antipathy about Mr Slipper. They wanted, if possible, to obtain employment positions associated with the new Liberal National Party government in Queensland. Mr Ashby was also prepared to pursue a position associated with the Liberal National Party at the Federal level. To that end they sought the assistance of Mr Brough in seeking to procure for them such employment. Mr Brough, in due course, circulated the curriculum vitae of each of Mr Ashby and Ms Doane to persons occupying senior positions in the Liberal National Party. Mr Brough also knew that Mr Ashby wanted legal advice about his potential claim against Mr Slipper. Mr Brough organised for Mr Ashby to consult with Mr Russell QC, a senior member of the Liberal National Party in Queensland. Mr Russell was, and is, a practising Queen's Counsel.

256 On 4 April 2012, Mr Lewis flew from Sydney to the Sunshine Coast and met with Mr Ashby at a cafe on the Sunshine Coast. After they had concluded their discussions, Mr Lewis went to the airport on his way back to Sydney. The following text message exchange between Mr Lewis and Mr Ashby occurred whilst Mr Lewis was at the airport on his way back to Sydney:

> 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!"

Mr Ashby: "Thanks for coming up".

Mr Lewis: "I am here to help!!!"

257 On Friday, 6 April 2012, Mr Ashby met with Mr Russell QC at his home. Also in attendance at the meeting was Mr Brough, who had arranged the meeting, and Ms Doane. Mr Russell QC discussed with Mr Ashby the ramifications of Mr Ashby commencing legal proceedings against Mr Slipper alleging sexual harassment. There was also discussion about the use of Cabcharge vouchers by Mr Slipper and the prospect of Mr Ashby obtaining employment with the Liberal National Party. Mr Russell discouraged Mr Ashby from expecting that the Liberal National Party, at either the Federal or State level, would be able to employ him.

258 On the same day, but after the meeting with Mr Russell QC, Mr Ashby sent a text message to a friend of his named Glen saying that he had had a "[v]ery good meeting this morning. It's all systems go! Lots going to take place during the next week."

259 After the meeting with Mr Russell QC, Mr Ashby and Ms Doane continued for the next few days to provide more information about Mr Slipper for the purpose of assisting Mr Lewis in his investigation of Mr Slipper's use of travel entitlements.

260 On Tuesday, 10 April 2012, Mr Ashby sent a text message to his friend, Glen. He said: "I'm officially in lockdown and I'm being flown out tonight. This is extremely quick!" Mr Ashby also said to Glen he probably would not see him for a while. Mr Ashby did not say who was responsible for flying him out that night, but the primary judge found that it was News Limited. This finding was not challenged by Mr Ashby.

261 On the same day, Mr Ashby sent a text message to another friend of his, Mr Nagle, which stated:

> Lots going on. Just a quick note to say its [sic] 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 8 pm pro bono.

262 Also, on 10 April 2012, Mr Ashby claimed two weeks sick leave. At 7:40 am on 10 April 2012, Mr Ashby sent a text message to Ms Michelle Ellis, another member of Mr Slipper's staff saying: "I am not well today I'm sorry. I'll get a doctor's certificate and send it through today with a bit of luck." Later in that day, in response to an email from Mr Slipper, Mr Ashby sent an email to Mr Slipper in which he stated that he had visited the doctor and "they've insisted I have two weeks off. I'm really concerned with my health at the moment and they're even more so. I will make sure Michelle gets a copy of the doctors [sic] certificate this week. I will ask Will to drop it in on his way past if possible." Mr Ashby did not provide a medical certificate to Mr Slipper or his staff.

263 There was, however, a medical certificate which was produced in evidence. It was an annexure to Mr Harmer's affidavit of 26 September 2012. It purported to be a medical certificate dated 5 April 2012 signed by Dr Shaiza Mazhar from Landsborough Medical Centre. It was very succinct. All the medical certificate said was:

> Mr James Ashby has a medical condition and will be unfit for work from 10/04/2012 to 22/04/2012 inclusive.

264 Mr Ashby then flew to Sydney on 10 April 2012 and that night met with Mr Lewis.

265 On 11 April 2012, Mr Lewis, sent Mr Ashby a text message saying that Mr Ashby could continue staying at his hotel and that News Ltd would sort out payment while Mr Ashby saw Harmers.

266 Also on 11 April 2012, Mr Ashby consulted with Harmers. On the basis of those consultations, an affidavit was ultimately drafted. Mr Harmer advised Mr Ashby to engage a media consultant, Mr Anthony McClellan, in anticipation of the commencement of his proposed legal proceeding. Mr McClellan agreed to act for Mr Ashby on a contingency fee basis of $550 per hour.

267 In the evening of 11 April 2012, Mr Ashby arranged to meet with Mr Lewis for a drink.

268 On 12 April 2012, Ms Doane sent Mr Ashby a text saying that Mr Slipper (who was still overseas) had emailed her 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. Later in the day, in response to a text from Mr Slipper asking how he was, Mr Ashby said that he was "Pissing blood. Lots of it. Not well." Mr Slipper responded saying he was sorry to hear this and expressed concern, hoping that Mr Ashby was getting some tests done and asking to be kept informed.

269 Also on that day, Mr McClellan advised Mr Ashby not to talk to any journalists except through him. Later in the day, Mr Ashby sent Ms Doane a text advising her of this development and also sent a text to Mr Lewis telling him that they had to communicate through Mr McClellan. In the meanwhile, Ms Doane and Mr Brough continued to communicate with each other in relation to the continuing developments involving Mr Lewis and Mr Ashby.

270 On Friday, 13 April 2012, Mr Ashby emailed Ms Doane saying that he had been reading document after document and that Mr McClellan had told him that Mr Lewis had given him a warning that they would be releasing the "FOI stories" on the weekend. Also on that date, Mr Ashby affirmed a 44 page affidavit in relation to the proceeding which he proposed to bring against Mr Slipper and the Commonwealth. This affidavit was the product of the consultations between Mr Ashby and Harmers during the preceding three days.

271 On Monday, 16 April 2012, an article appeared in the *Daily Telegraph* newspaper under Mr Lewis' by-line to the effect that there were irregularities and excesses in Mr Slipper's use of his Commonwealth travel entitlements.

272 On Friday, 20 April 2012, Mr Harmer caused the originating application to be filed electronically with the Court. The originating application claimed relief under the *Fair Work Act* on the grounds of sexual harassment and allegations that the Commonwealth had breached its contract of employment with Mr Ashby. The 14 page originating application purported to plead a detailed mixture of assertions, facts and evidence, in 56 paragraphs.

273 As mentioned, the originating application set out in detail the text messages and incidents relied on by Mr Ashby for his claim that he had been sexually harassed by

Mr Slipper, and also contained the description of the contents of the videotape of Mr Slipper's 2003 sexual encounter with a male member of his staff and an allegation of a report by the man of Mr Slipper's rough treatment of him (the 2003 allegations), allegations that Mr Slipper had handed over blank Cabcharge vouchers and that Mr Ashby intended to report Mr Slipper's conduct in doing so to the police (the Cabcharge allegations).

274 Accompanying the originating application was also a "genuine steps statement" filed by Harmers. This statement said that before filing the originating application, Mr Ashby had not taken any steps to discuss the allegations made in the originating application with the Commonwealth or Mr Slipper because the application was urgent and the matter involved victimisation, which would be exacerbated if Mr Slipper was alerted to Mr Ashby's complaint.

275 Also, on that day, Mr Harmer sent a letter to the Commonwealth Minister for Finance asserting that Mr Ashby had been "absent from work on sick leave because [his] health had been affected by conduct associated with [his] employment". The letter asked that Mr Ashby be put on special paid leave.

276 At 3:54 pm on the 20 April 2012, Harmers sent to Mr Slipper, who was still out of Australia, a copy of the originating application filed in Court earlier that day. About 3½ hours later, Mr Lewis sent Mr Slipper an email stating that his newspaper would be running a story involving "allegations of sexual harassment…[and] potential fraud against the Commonwealth, according to court documents".

277 On Saturday, 21 April 2012, the day after the filing of the originating application, an article appeared in *The Australian* newspaper. The headline was "Slipper accused of sexual harassment, funds misuse." The article referred to the 2003 allegations and the Cabcharge allegations made in the originating application. The article stated that the Australian Federal Police would be "asked to investigate conduct by Mr Slipper in relation to the use of public funds".

278 An article to similar effect was also published that day by the *Courier Mail* newspaper under Mr Lewis' by-line. The first paragraph read:

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

279 On 15 May 2012, Harmers filed on behalf of Mr Ashby, a statement of claim which had been settled by senior counsel. The statement of claim withdrew the 2003 allegations and the Cabcharge allegations. It also pleaded the allegations of sexual harassment more succinctly.

280 On 18 May 2012, Mr Ashby filed an application to amend the originating application. The substance of the amended originating application comprised one page, rather than the 14 pages of the originating application drafted by Mr Harmer.

281 On 8 June 2006, Mr Slipper filed an interlocutory application claiming summary judgment in respect of Mr Ashby's application on the grounds that it was an abuse of process. At about the same time, the Commonwealth also filed a summary judgment application.

282 On 22 June 2012, each of the Commonwealth and Mr Slipper filed points of claim which set out the grounds upon which each contended that Mr Ashby's application was an abuse of process. In substance, Mr Slipper and the Commonwealth alleged that the originating application was an abuse of process in that Mr Ashby's predominant purpose in commencing the proceeding, was to vilify Mr Slipper and inflict political harm on Mr Slipper, and not to vindicate his employment rights. There ensued a response from Mr Ashby, and an exchange of detailed submissions between the parties.

283 The hearing took place over a number of different days during the period July 2012 to October 2012. During that period the Commonwealth settled Mr Ashby's claim on the basis it paid Mr Ashby $50,000. However, no settlement was reached between Mr Ashby and Mr Slipper. Mr Slipper represented himself on 4 October and 5 October 2012, the last two days of the hearing.

284 In support of his application for summary judgement, Mr Slipper relied upon the affidavits of two of his former solicitors and a trainee solicitor. Mr Ashby also relied upon

affidavits sworn by legal practitioners, namely, Mr Russell QC and Mr Michael Harmer. There was one affidavit from Mr Russell QC and five affidavits from Mr Harmer.

285 Neither Mr Slipper nor Mr Ashby sought to read any affidavit which each had made, as part of his respective case at the interlocutory hearing. However, we were advised by senior counsel that during the course of the hearing that when the Commonwealth was still a party, the Commonwealth sought to tender a portion of Mr Ashby's affidavit of 13 April 2012 but it was admitted into evidence on the basis that the affidavit would be evidence both in Mr Slipper's proceeding and the Commonwealth's proceeding. None of Mr Russell QC, Mr Harmer or Mr Ashby was cross-examined.

286 There was, however, in evidence, the verbatim transcript of all of the text messages received and sent from Mr Ashby's mobile phone during the period in question. The transcript of the messages comprised about 270 pages. The primary judge also received into evidence comments which Mr Ashby had made to Mr Harmer in relation to some of the text messages.

287 On 12 December 2012, the primary judge summarily dismissed Mr Ashby's application against Mr Slipper on the grounds that the proceeding was an abuse of process.

288 The primary judge found that the originating application was an abuse of process on two bases.

289 First, the primary judge found that the originating application was used by Mr Ashby for the predominant purpose of causing political damage to Mr Slipper, and not for the predominant purpose of vindicating his employment rights. In relation to this finding, the primary judge observed at [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.

290 Secondly, the primary judge found that the bringing of the application was an abuse of process because Mr Harmer included in the originating application, the 2003 allegations

and the impugned aspect of the Cabcharge allegations, in order to maximise the harm caused to Mr Slipper by the publicity given to these allegations, and for no legitimate forensic purpose.

291 On 19 December 2012, Mr Slipper filed an interlocutory application for an order for indemnity costs against Harmers and Mr Ashby.

292 On 14 January 2013, Mr Ashby, now represented by a different firm of solicitors, filed an application for leave to appeal from the judgment of the primary judge.

293 On 14 January 2013, Mr Harmer filed an application for leave to appeal, as a non-party, from the judgment of the primary judge.

294 By reason of the conclusion to which I have come, it is convenient that I deal with Mr Harmer's application for leave to appeal before I deal with that of Mr Ashby.

MR HARMER'S APPLICATION FOR LEAVE TO APPEAL

295 Mr Harmer is a solicitor and the sole proprietor of a law firm which trades under the name, Harmers Workplace Lawyers. In accepting a retainer to act for Mr Ashby in relation to this proceeding, Mr Harmer was authorised to act as Mr Ashby's agent in relation to the conduct of the litigation. Mr Harmer incurred duties to Mr Ashby, his client, pursuant to the retainer.

296 Further, Mr Harmer, by reason of being a legal practitioner who was admitted to practice in this Court, owed duties to the Court in the manner in which he conducted the litigation on behalf of Mr Ashby. One of those duties was not to abuse the privilege which is given to a legal practitioner to make damaging allegations against members of the public as part of the litigation process.

297 In his capacity as a legal practitioner retained by Mr Ashby, Mr Harmer prepared, or supervised the preparation of, the originating application on behalf of Mr Ashby which was filed in the Court on 20 April 2012. The same is true in relation to the genuine steps statement which was filed on 20 April 2012 with the originating application.

298 Mr Harmer was also a witness in Mr Ashby's case in the interlocutory application made by each of the Commonwealth and Mr Slipper for the summary dismissal of Mr Ashby's application. The Commonwealth and Mr Slipper claimed that the 2003 allegations and the impugned aspect of the Cabcharge allegations were irrelevant, scandalous and served no legitimate forensic purpose and the fact that they were included in the originating application fed the inference that the proceeding was commenced for an improper purpose. By his evidence, Mr Harmer sought to rebut this claim. Notwithstanding Mr Harmer's evidence, in respect of which he was not cross-examined, the primary judge found that the inclusion of the 2003 allegations and the impugned aspect of the Cabcharge allegations in the originating application had no legitimate forensic purpose, and they were included to damage Mr Slipper.

299 There were five affidavits affirmed by Mr Harmer which were read as part of Mr Ashby's case. These affidavits were affirmed by Mr Harmer on 17 May 2012, 23 July 2012, 31 August 2012, 26 September 2012 and 2 October 2012.

300 In his reasons for judgment, the primary judge made a number of findings which were critical of Mr Harmer's professional conduct in relation to the manner in which he prepared and filed the originating application and the genuine steps statement. In particular, as mentioned, the primary judge found that, independently of Mr Ashby's purpose for commencing the originating application, Mr Harmer had abused the process of the Court by including the 2003 allegations and the impugned aspect of the Cabcharge allegations in the originating application.

301 In support of his application as a non-party for leave to appeal, Mr Harmer read an affidavit dated 14 January 2013.

302 The affidavit discloses that Mr Harmer is entitled to practise as a solicitor in the Federal Court of Australia and is the sole proprietor of Harmers Workplace Lawyers. Mr Harmer said that he commenced work in 1987 with the law firm, Freehill Hollingdale and Page, and in 1989 was elected a partner of that firm. Mr Harmer went on to depose that he remained a partner of that firm until 1996 when he established the practice now known as Harmers Workplace Lawyers. Mr Harmer said that his practice has offices in Sydney,

Melbourne and Brisbane and has approximately 50 employees, and approximately 2,000 clients. Mr Harmer deposed that his firm had won a number of awards.

303 Mr Harmer went on to depose that the findings which the primary judge made in respect of his professional conduct had received wide publicity and had the capacity adversely to affect his reputation as a legal practitioner and so adversely impact upon the practice of his firm. Specifically, Mr Harmer deposed that the findings of the primary judge were "serious in nature and have the capacity to detrimentally impact my reputation, my status as a practitioner, the reputation of Harmers and the ongoing viability of the firm".

304 In his draft notice of appeal, Mr Harmer referred to the following proposed grounds of appeal:

(a) the primary judge erred in finding that the predominant purpose of Mr Ashby for bringing the proceeding was to pursue a political attack against Mr Slipper and not to vindicate any legal claim he may have, and, accordingly, that the proceeding was an abuse of process;

(b) the primary judge erred in finding that Mr Harmer intended to cause harm to Mr Slipper by including scandalous and irrelevant allegations in the originating application and, accordingly, the proceeding was an abuse of process;

(c) the primary judge erred in making speculative findings against Mr Harmer and Mr Ashby, in circumstances where Mr Harmer was instructed by Mr Ashby to maintain claims for legal professional privilege;

(d) the primary judge erred in failing to accord Mr Harmer procedural fairness by making "serious and adverse findings in relation to Mr Harmer", in circumstances where Mr Harmer had, among other things, not been given adequate prior notice of the primary judge's intention to make most of the findings, and Mr Harmer was not a party, had not been represented and had not been cross-examined.

305 Mr Harmer also adopted the appeal grounds relied upon by Mr Ashby. The proposed grounds of appeal contained a substantial number of complaints about the fact-finding process undertaken by the primary judge in respect of the adverse findings made against Mr Harmer. In his draft notice of appeal, Mr Harmer sought orders that the appeal be allowed and that the orders made by the primary judge be set aside and, in lieu thereof, that

Mr Slipper's interlocutory application dated 8 June 2012 be dismissed and Mr Slipper pay Mr Ashby's costs. There are alternative orders also sought.

306 In order to determine whether leave to appeal as a non-party should be given to Mr Harmer, it is necessary to have regard to the statutory foundation which provides for an appeal from an interlocutory judgment of this Court.

307 Section 24(1) of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act) provides for appeals to be brought in respect of final judgments and provides as follows:

> Subject to this section and to any other Act, whether passed before or after the commencement of this Act (including an Act by virtue of which any judgments referred to in this section are made final and conclusive or not subject to appeal), the Court has jurisdiction to hear and determine:
>
> (a) appeals from judgments of the Court constituted by a single Judge exercising the original jurisdiction of the Court.

308 Section 24(1A) deals with appeals from interlocutory judgments and provides as follows:

> An appeal shall not be brought from a judgment referred to in subsection (1) that is an interlocutory judgment unless the Court or a Judge gives leave to appeal.

309 The reference to "judgment" in s 24(1) and s 24(1A) of the Federal Court Act is a reference to "orders"; and not to reasons for judgment (*Driclad Pty Ltd v Commissioner of Taxation* (1968) 121 CLR 45 at 64, *The Queen v Ireland* (1970) 126 CLR 321). Accordingly, appeals whether in respect of final or interlocutory judgments, do not lie against the reasons for judgment.

310 The Federal Court Act does not make any express provision for the circumstances in which a non-party can appeal from a final judgment or seek leave to appeal from an interlocutory judgment. However, the authorities demonstrate that a non-party with the necessary standing may obtain leave to appeal from a final or an interlocutory judgment. The question is whether Mr Harmer has the necessary standing.

The standing of a non-party to obtain leave to appeal

311 In *Witness v Marsden* (2000) 49 NSWLR 429 (*Marsden*) a witness who had been subpoenaed to give evidence in a defamation case brought by the defendant, Mr Marsden, applied for an order that he be permitted to give evidence under a pseudonym. The primary judge refused to make that order. The witness applied to the New South Wales Court of Appeal for leave to appeal against the judge's refusal to grant the pseudonym order.

312 Heydon JA (as his Honour then was) accepted that an appeal would only lie against a judgment or order and not against the reasons for judgment. Further, Heydon JA found that even though a person was not a party, and could not have been made a party to the substantive proceeding, this did not disqualify that person from having standing to obtain leave to appeal. Standing depended on whether the non-party was affected or aggrieved by the order made. At [68], Heydon JA observed as follows:

> The law permits non-parties to apply for leave to appeal from orders affecting them.

313 In support of that proposition, after having referred with approval to *Re Markham, Markham v Markham* (1880) 16 Ch D 1 and *In re Securities Insurance Company* [1894] 2 Ch 410 at 413, Heydon JA cited with approval the following observations of Lord Denning MR in *Senior v Holdsworth, Ex parte Independent Television News Ltd* [1976] 1 QB 23 at 32:

> > If the judge makes an order with which the witness is aggrieved, the witness will have an appeal to this court. Although he is not a party to the suit, he is a person who is aggrieved by the order: and he is entitled, by leave, to appeal against it: see *In re Markham, Markham v Markham* and *In re Securities Insurance Co.* (Footnotes omitted.)

314 Heydon JA went on to find that the primary judge's decision to refuse the pseudonym was in substance an order, and that the witness's application was in essence "an application for leave to appeal against an order by a person substantially affected by its operation". Accordingly, leave to appeal was granted to the witness.

315 In the case of *Commonwealth v Construction Forestry Mining and Energy Union* (2000) 98 FCR 31 (*CFMEU*), the Union had brought a proceeding for the imposition of a penalty on the Employment Advocate pursuant to the *Workplace Relations Act 1996* (Cth).

316 In the course of the proceeding, a copy of a letter from a Federal Minister to the Prime Minister was discovered by the Advocate. The Union sought inspection of the copy letter. The Advocate resisted giving inspection on the grounds of public interest immunity privilege. The dispute came before the primary judge in an interlocutory hearing. The Commonwealth filed and served an affidavit by an officer in support of a claim by the Commonwealth for public interest immunity in respect of the copy letter. The Commonwealth was represented at the interlocutory hearing before the primary judge. The primary judge made an order permitting the Union to inspect the copy letter. The Commonwealth filed a notice of appeal.

317 The Full Court considered an application for leave to appeal as a non-party by the Commonwealth against an interlocutory order made by the primary judge. The Union argued that the Commonwealth was not a party to the substantive proceeding and, therefore, had no standing to appeal against the primary judge's decision.

318 The Full Court cited with approval the decision in *Marsden*. The Full Court also adopted the approach of Heydon JA in that case, and gave the Commonwealth leave to appeal against the interlocutory order permitting inspection of the copy letter in respect of which it had asserted public interest immunity.

319 On the basis of these authorities, the question of whether a non-party to a proceeding has standing to appeal against an interlocutory order made in that proceeding, will depend upon the extent to which that person is aggrieved by the operation of the interlocutory order.

320 In this case, it is apparent that Mr Harmer could never have been a party to the main proceeding which embraced the controversy between Mr Ashby and Mr Slipper and the Commonwealth. Mr Harmer's involvement in that controversy arises from his retainer as a legal practitioner and agent of Mr Ashby for the purposes of Mr Ashby prosecuting his claim against Mr Slipper and the Commonwealth, and, also, from the fact that he was a witness in the interlocutory proceeding. Therefore, Mr Harmer, having no personal interest in the controversy between the parties to the proceeding, is not adversely affected by the interlocutory order dismissing the proceeding to which he was not a party.

321 Rather, as is apparent from his affidavit of 14 January 2013, Mr Harmer's complaint is in relation to the findings which were made by the primary judge in the reasons for judgment published by the primary judge. It is those findings and criticisms which, said Mr Harmer, have affected, or have the potential to affect, his professional reputation and, consequently, his financial interests and that of his firm. It is those findings which Mr Harmer challenges. However, as is evident from the authorities referred to above, this is not a sufficient basis for a non-party to obtain leave to appeal. Rather the non-party must show that he or she is in the words of Heydon JA "substantially affected" by the operation of the interlocutory order.

322 Mr Harmer relied upon the case of *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2011) 281 ALR 38 (*Fortress Credit*). In that case, the Full Court considered an application by Fortress Credit Corporation (Australia) II Pty Ltd (Fortress) for leave to appeal against the decision of the primary judge. The primary judge who had made an order, under s 477(2B) of the *Corporations Act 2001* (Cth), approving the entry by Octaviar Ltd (Receivers and Managers Appointed) (In Liquidation) (Octaviar) into an agreement for the funding of public examinations of Fortress's officers and for the funding of proceedings against Fortress by Octaviar. The funder under each of the two agreements was a related company, Octaviar Administration Pty Ltd (Octaviar Administration), which was also in liquidation. The application before the primary judge was made by the liquidators of Octaviar, who were also the liquidators of Octaviar Administration.

323 Fortress had a charge over the assets of Octaviar and so was a secured creditor of Octaviar, which was indebted to Fortress in the sum of approximately $71 million. An asset of Octaviar's was a debt due by Octaviar Administration to Octaviar. If the Fortress charge was valid, the funding agreements, the subject of the order of the primary judge, would have the effect of diminishing an asset over which the charge subsisted to the detriment of Fortress. When Fortress found out about the orders it applied for leave to appeal against the orders.

324 In my view, the *Fortress Credit* case does not assist Mr Harmer. In that case, the orders made by the primary judge had a direct impact upon the financial position of Fortress

in that it had the potential to diminish its security as a secured creditor. Fortress was within the bounds of the principle applied in *Marsden* and adopted in *CFMEU*.

325 Mr Harmer's position in this case is quite different from the position of Fortress. As previously mentioned, Mr Harmer cannot demonstrate that he is adversely affected by the order of the primary judge dismissing Mr Ashby's application. There may, however, be cases where a court order may have an adverse effect upon the reputation of a non-party, in which case the non-party may have sufficient standing to appeal (*Harmer v Oracle Corporation Australia Pty Ltd* (2013) 299 ALR 236). However, this is not such a case.

326 As mentioned, there were two capacities in respect of which Mr Harmer was involved in the interlocutory application, namely, as a legal practitioner, and as a witness for his client.

327 It is the case that the primary judge commented adversely on Mr Harmer's conduct in carrying out his professional duty as a solicitor. In my view, however, there is nothing arising from that circumstance as would take Mr Harmer outside of the operation of the ordinary principles referred to above on the standing of a non-party to obtain leave to appeal.

328 There will be a variety of circumstances where a court may have occasion to comment adversely upon the manner in which a legal practitioner has acted in the conduct of a proceeding before the court. These occasions will arise from time to time, even in circumstances where the practitioner has not been a witness in the proceeding. I refer below to some such circumstances. Of course, the reference to these circumstances is not intended to be exhaustive.

329 One such circumstance may arise in the context of a court being concerned to prevent its process from being abused. It is well recognised that the Court has a duty as part of its inherent or, more accurately, implied jurisdiction, to prevent its process from being abused (*Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 201 (*Clyne*), *Jago v The District Court of New South Wales* (1989) 168 CLR 23).

330 The importance of that duty and its rationale, is explained in the following observations of Richardson J in *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 at 9:

> Misuse of the judicial process tends to produce unfairness and to undermine confidence in the administration of justice. In a number of cases in recent years this Court has had occasion to consider the inherent jurisdiction of the High Court, and on appeal this Court, to take such steps as are considered necessary in a particular case to protect the processes of the Court from abuse. (See particularly *Moevao v Department of Labour* [1980] 1 NZLR 464 and *Taylor v Attorney-General* [1975] 2 NZLR 675.) In exercising that jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. The public interest in the due administration of justice necessarily extends to ensuring that the Courts' processes are fairly used and that they do not lend themselves to oppression and injustice. The justification for the extreme step of staying a prosecution or striking out a statement of claim is that the Court is obliged to do so in order to prevent the abuse of its processes. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 Lord Diplock began his judgment, which was concurred in by the other members of the House, with these words:
>
> > My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.
>
> Such is the fundamental importance of the doctrine to the fair and proper administration of justice that Lord Diplock characterised the exercise of the power in appropriate cases as a duty rather than a discretion.

331 The duty on a court to prevent an abuse of its process extends to abuses which come to the attention of the court, even if the abuse is not part of a pleaded case before the court. In the case of *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84, a case whose facts bear some resemblance to the facts in this case, Cooke J observed at 89, as follows:

> Moreover the inherent jurisdiction to strike out a statement of claim as an abuse of process is one which the Court may come under a duty to exercise. It is more than a matter of discretion: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8. With this in mind we heard argument extending beyond the scope of the abuse of process ground as formulated in the letter already mentioned. Mr Gazley, while opposing any widening of the ground, was heard on the whole matter. I think that this Court would be failing in its responsibility if we did not approach the issue of abuse of process in a broad way.

332 Somers J, at 95, made observations to similar effect:

> It is not in my view material that the League and Mr Riddoch have not pleaded abuse of process save in a limited way. The Court in this field is concerned with proceedings which are ex facie lawful, that is to say are within the rules about procedure. But to prevent those rules being used oppressively the Court will intervene proprio motu if necessary. It recognises that the literal application of the law itself can be a tyranny.
>
> In this case Mr O'Brien wishes to recover damages for a slur which he considers has been cast upon his integrity. He has had one action on the subject heard out. And although it produced no verdict on whether the newspaper article was defamatory those proceedings were sufficiently analogous and relief upon such similar matter that to allow the present action to proceed would be to permit an unfair harassment of the League. It would be to permit an abuse of its procedure by the Court.

333 A court has a duty to supervise the conduct of its officers in order that the public is protected from abuses by its officers and that confidence in the administration of justice is maintained. In *Clyne*, the High Court cited with approval the following observations of Lopes LJ from the case of *Royal Aquarium and Summer and Winter Garden Society Limited v Parkinson* [1892] 1 QB 431 at 451, in respect of the privilege accorded to legal practitioners in the conduct of litigation:

> This "absolute privilege" has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that the Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.

334 Further, in *Caboolture Park Shopping Centre Pty Ltd (In liquidation) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 233-234 (*Caboolture Park*), the Full Court observed as follows:

> It is of the utmost importance for the administration of justice in this Court that legal practitioners acting in proceedings before the Court are honest, candid with the Court and neither obstruct the administration of justice by the Court, nor abuse the Court's process. *It can hardly be accepted that the Court must stand idly by when practitioners appearing before it, or acting in matters in the Court, act with impropriety.* (Emphasis added.)

335 It is convenient at this juncture, to observe, in passing, that these authorities are inconsistent with senior counsel for Mr Harmer's confidently expressed contention that once the primary judge had determined that Mr Harmer did not share Mr Ashby's pleaded purpose

in commencing the originating application, the primary judge erred by going on to make the findings of abuse of process founded on the impropriety of Mr Harmer's conduct as a legal practitioner. In my view, it was not only open to the primary judge to proceed as he did, but it was his duty to do so. Lord Diplock did not mince his words in describing a court as being under a "duty" to intervene when it is apprised of conduct amounting to an abuse of process. The Full Court in *Caboolture Park* was also emphatic as to the duty of the court to intervene in cases of abuse of process by practitioners appearing before the court. The New Zealand Court of Appeal also stated specifically that it was open to a court to find an abuse of process even if it was not part of a pleaded case.

336 A court may, also, have occasion to comment adversely on a legal practitioner's conduct in the criminal law context where the court is called upon to consider whether the manner in which the impugned legal practitioner has conducted the proceeding has caused a miscarriage of justice (*Libke v The Queen* (2007) 230 CLR 559, *R v Birks* (1990) 19 NSWLR 677, *AJ v The Queen* (2011) 32 VR 614).

337 A further circumstance is where the conduct of the legal practitioner in question has fallen below the minimum standards of professional competence that should be expected in an application to a court where the applicant is represented by a legal practitioner (*Ex-Christmas Islanders Assn Inc v Attorney General (Cth)* (2005) 149 FCR 170).

338 A court may also comment adversely about a legal practitioner's conduct of a proceeding in the course of determining whether an indemnity costs order should be made against the legal practitioner's client (*Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397, *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299, *Grace Worldwide Group v Roberts* [2012] NSWSC 1111, *Cirillo v Consolidated Press Property Ltd (formerly known as Citicorp Australia Limited) (No 2)* [2007] FCA 179. See also the observations of Tomlinson J in *Three Rivers District Council v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), particularly, at [135].)

339 In all of these circumstances, a court's findings or observations may have the propensity adversely to affect the professional reputation of the legal practitioner concerned. However, the authorities do not support a contention that, in relation to standing to appeal, a

non-party legal practitioner whose complaint is no more than that he or she has been the subject of adverse judicial comment, is to be treated differently from any other non-party who has been the subject of adverse judicial comment with a propensity to affect his or her professional reputation. Rather, the authorities show that an aggrieved non-party will have the standing to obtain leave to appeal only if that non-party is adversely affected by an order made by the court.

340 Section 43 of the Federal Court Act empowers the Court to order that a legal practitioner pay the costs of a party of a proceeding personally. In the course of considering an application for such an order, the conduct of the legal practitioner against whom the costs order is sought, will be scrutinised, and may well be the subject of adverse comment in the reasons for judgment. However, in the event that an order is made that the legal practitioner pay the costs personally, consistent with the principles referred to above, the practitioner, being substantially affected by the order made by the Court, will have the necessary standing to obtain leave to appeal as a non-party against that order.

341 In this case, Mr Slipper has applied to the Court for orders for indemnity costs and for an order that Harmers pay his costs personally. Accordingly, Mr Harmer will have an opportunity at the hearing of that application to give further evidence and make such further submissions as he may see fit in opposition to the personal costs order sought from his law firm. In the event that costs are ordered against his law firm, Mr Harmer, as proprietor of the firm, will be directly affected by the order and will, on the authorities, have a sufficient interest to give him standing to obtain leave to appeal as a non-party.

342 Further, Mr Harmer did not point to any case where a non-party witness in respect of whom a judge had made findings which had the propensity adversely to affect his or her professional reputation, had been given leave to appeal as a non-party.

343 As I have previously said, Mr Harmer was called to give evidence by his client, Mr Ashby, to rebut Mr Slipper's claim that there was no legitimate forensic purpose in including the 2003 allegations and the impugned Cabcharge allegations in the originating application and that those allegations were included to maximise the damage to Mr Slipper. Mr Ashby has, in his draft notice of appeal, challenged the adverse findings made in relation to Mr Harmer's conduct in drafting and filing the originating application and the genuine

steps statement. Senior counsel for Mr Ashby, as he did before the primary judge, made submissions before this Court, seeking to impugn the primary judge's findings in relation to the evidence given by his client's witness, Mr Harmer. This is the usual way in which findings made in respect of a witness to which objection is taken, is dealt with. It is not for the witness to bring his or her own appeal. In any event, the fact that Mr Ashby is challenging the findings made in relation to Mr Harmer's professional conduct would be a factor which would militate against granting Mr Harmer leave to appeal as a non-party in his own right.

344 It follows that I reject Mr Harmer's application for leave to appeal as a non-party against the judgment of the primary judge.

345 I would also add that, in any event, contrary to the contentions of Mr Harmer, in my view, Mr Harmer was given sufficient notification that the Court may make findings that, in preparing an originating application which contained the 2003 allegations and the impugned Cabcharge allegations, Mr Harmer abused the privilege given to legal practitioners to make serious allegations in court documents, and so abused the Court's process.

346 First, in their respective points of claim and submissions, the Commonwealth and Mr Slipper made allegations in respect to the contents of the originating application which Mr Harmer had drafted, which called into question the propriety of Mr Harmer's professional conduct. For example, at para 53 of Mr Slipper's amended points of claim, Mr Slipper pleaded that by making, and subsequently withdrawing, the 2003 allegations and the Cabcharge allegations, Harmers and Mr Ashby:

> [I]ntended to expose Mr Slipper to the maximum degree of vilification, opprobrium, sensation and scandal, and to cause the maximum damage to his reputation, to the political advantage of the LNP and Brough".

347 Also, at para 112 of its submissions, the Commonwealth referred to "the impropriety of including sensational but unsupported allegations in the originating application" and then withdrawing them "after they had received blanket media coverage and the predominant purpose of damaging Mr Slipper had been achieved". The Commonwealth went on to contend that this conduct was an abuse of process because:

> This use of the Court as a launching pad for publicising damaging allegations against

Mr Slipper undermines confidence in and respect for the authority of the Court.

348 Mr Harmer responded to those allegations in his affidavit of 23 July 2012. I will refer in more detail to Mr Harmer's response later in these reasons.

349 Secondly, in his affidavit of 26 September 2012, Mr Harmer recognised in express terms that the Commonwealth's submissions in reply dated 21 September 2012, accused him of engaging in "serious professional misconduct". At para 4, Mr Harmer deposed as follows:

> In the CRS, the allegation is made (at [32]) that the matters pleaded in paragraphs 5 to 9 of the originating application "do not appear to have been pleaded in aid of any legitimate cause of action…their inclusion and subsequent withdrawal, is consistent only with the a purpose of harming Mr Slipper". I decided what allegations would be included in the originating application. If true, the Commonwealth's allegation would, in my view, have constituted me engaging in serious professional misconduct. In the course of my professional career I have never included material "only with the purpose of harming" another person and I would not engage in such conduct.

350 This affidavit was sworn a week before Mr Ashby was to open his case in response to the interlocutory application. However, notwithstanding that Mr Harmer recognised that he stood accused of, in his own words, "serious professional misconduct", Mr Harmer did not seek his own representation, nor did he seek to be joined as a party to the proceeding, but continued to represent Mr Ashby as his solicitor.

351 Thirdly, in his affidavit of 2 October 2012, in opposition to a further adjournment of the hearing, Mr Harmer again expressly recognised, in terms, that Mr Slipper's amended points of claim made "very serious allegations" against him which called into question his professional conduct. At para 6 and para 13 of his affidavit, Mr Harmer deposed:

> 6. First, the allegation made in the Speaker's amended points of claim was foreshadowed as long ago as 18 May 2012 and involves very serious allegations not only against the applicant but also against third parties including Karen Doane, Mal Brough, Steve Lewis, Anthony McLellan, me (and my employees).
>
> …
>
> 13. Eighthly, the allegations made against my professional conduct by the Speaker have caused and are causing me distress and I want them resolved as soon as possible.

352 Fourthly, during the hearing on 4 October 2012, the primary judge referred senior counsel for Mr Ashby to the case of *Clyne* and raised with him his concerns as to whether, by the inclusion of the 2003 allegations and the impugned Cabcharge allegations, Mr Harmer had a legitimate forensic purpose and whether he had breached his professional obligations.

353 Contrary to Mr Harmer's submissions, the primary judge made known his concerns regarding Mr Harmer's conduct during Mr Ashby's case and before evidence in support of that case had closed. The primary judge first made a reference to the observations at 200-201 of *Clyne*'s case in the context of his concern that Mr Harmer's conduct may have amounted to an abuse of process, before any of Mr Harmer's affidavits, other than that of 17 May 2012, had been accepted into evidence. (See, Transcript, 4 October 2012, at 67-69, 71-76.) The primary judge's concern was whether, even if Mr Harmer had an evidential basis to support the 2003 allegations, Mr Harmer had a legitimate forensic purpose in including those allegations in the originating application.

354 Further, at the end of the Court sitting on 4 October 2012, the following exchange occurred (107-108 of the transcript):

> HIS HONOUR: As I have mentioned to you, I have looked at what *Clyne*'s case is and about the use of absolute privilege and I have got a concern about all that.
>
> MR LEE: All right. Well, can I address that now perhaps. It might be – I won't finish in five minutes but I can start on that topic because - - -
>
> HIS HONOUR: No, no.
>
> MR LEE: - - - it's obviously one that's a matter of interest to in *Clyne*.
>
> HIS HONOUR: You do it in your own order, Mr Lee, but I just want to make clear that I have a concern about the use of the court's process. In particular, those that the pleading of both of those matters in the originating application and when I look at what is said by – in the last sentence on paragraph 9:
>
> > *After viewing the video, Ms Hobson formed the view the relationship was consensual.*
>
> You just wonder what on earth that had to do with anything legitimately being pleaded in the proceedings, the paragraphs 5 to 9. And when I look at the way paragraph 55 and 56 are – 55 is pleaded with the Cabcharge allegations, I just do not understand how that was done.
>
> MR LEE: Well, let me - - -
>
> HIS HONOUR: And I'm mindful of those pages in *Clyne*'s case that I referred to.

> MR LEE: Yes. Well, I will squarely deal with those – I will read those overnight and - - -

355 Immediately thereafter, the primary judge observed that the issue was "very troubling" and that he regarded the matter as one of "great concern".

356 Then, a short time later (109 of the transcript), the following exchange occurred:

> MR LEE: …Now, that involves an analysis of his subjective intention. This is the first matter I want to take you to and then I will take your Honour more directly to the issue that your Honour wishes to address by reference to the comments in *Clyne*'s case and the like.
>
> HIS HONOUR: Well, there are two possible issues and you may need to help me about this but Mr Ashby is the litigant. His conduct was to start these proceedings and he had agents in your instructing solicitors and Mr Harmer. In a situation like this, Mr Harmer may have had a different purpose to your client. The question may or may not be as whether the court's process is being abused by the filing of this document in this form.
>
> MR LEE: Well - - -
>
> HIS HONOUR: I mean, there are plenty of paragraphs in there that have got a perfectly cognisable and objectively understandable forensic purpose that could be proved by admissible and relevant evidence but I don't, at the moment, have any conception how paragraphs 5 to 9 and 55 could have led to anything ever being run in this case.
>
> MR LEE: Well, I - - -
>
> HIS HONOUR: It doesn't seem to me to give rise to any cause of action for which relief could be given or to allow this material to be deployed…..
>
> MR LEE: Well, I have taken that on board. I know I have to address that.
>
> HIS HONOUR: So that's – that is what I am concerned about.
>
> MR LEE: I'm grateful to your Honour. Your Honour mentioned a case that the pages of *Clyne* is particularly - - -
>
> HIS HONOUR: Yes, 200 to 201.
>
> MR LEE: 200 to 201. I may – I'm – well, what I would propose to do overnight is prepare a short note directed precisely to that point.
>
> HIS HONOUR: Yes.

357 The primary judge's comments on 4 October 2012, clearly put Mr Harmer on notice that the primary judge may make findings to the effect to which he had referred. In response

to the comments from the primary judge, Mr Harmer did not seek to be independently represented, nor did he apply to be joined as a party. Nor, importantly, did Mr Ashby in response to the primary judge's comments, seek to lead further evidence on these matters from Mr Harmer either before Mr Ashby closed his case, or by way of an application to reopen. Instead, senior counsel on behalf of Mr Ashby duly prepared written submissions which addressed the question of whether Mr Harmer had acted in abuse of process by including the 2003 allegations and the impugned Cabcharge allegations. Oral submissions addressing these questions were made by senior counsel for Mr Ashby on 5 October 2012.

MR ASHBY'S APPLICATION FOR LEAVE TO APPEAL

358 As already mentioned, the primary judge found that the claim made by Mr Ashby was an abuse of process on two grounds.

359 First, the primary judge found that Mr Ashby's predominant purpose in bringing the proceeding was to pursue a political attack on Mr Slipper and not to vindicate a claim that the Commonwealth breached his contract of employment and that he was the subject of adverse action by the Commonwealth and Mr Slipper under the *Fair Work Act*.

360 Secondly, the primary judge found that the actions of Mr Harmer in including in the originating application the 2003 allegations and the allegation that Mr Ashby intended to report Mr Slipper's use of Cabcharge vouchers to the police had no legitimate forensic purpose and were included so as to cause harm to Mr Slipper.

361 Mr Ashby's application for leave to appeal was dated 11 January 2013. The grounds of the appeal in the draft notice of appeal were to the following effect:

> First, that the primary judge erred in finding that Mr Ashby's predominant purpose for bringing the proceeding was to pursue a political attack against Mr Slipper and not to vindicate any legal claim he may have and that accordingly the proceedings were an abuse of process.
>
> Secondly, the primary judge erred in finding that Mr Michael Harmer intended to cause harm to the respondent by including scandalous and irrelevant allegations in the originating application and accordingly that the proceedings were an abuse of process.
>
> Thirdly, that the primary judge erred in dismissing the proceedings pursuant to r 26.01 of the *Federal Court Rules 2011* in reliance upon the preceding findings.

362 Mr Ashby's draft notice of appeal then went on to complain about the fact-finding process undertaken by the primary judge. In summary, first, Mr Ashby complained that the primary judge did not give proper regard to s 140(2) of the *Evidence Act 1995* (Cth). Secondly, Mr Ashby said that the primary judge wrongly rejected unchallenged evidence which was not inherently incredible or improbable. Thirdly, Mr Ashby contended that the primary judge's factual findings involved the drawing of inferences that were not open as they were the product of conjecture and speculation. Also it was said that the primary judge failed to take Mr Ashby's case at its highest, contrary to the established approach to the hearing of summary applications.

363 In my view, Mr Ashby should have leave to appeal. However, for the reasons that follow, it is my view that it was open to the primary judge to find that there was an abuse of process on the grounds that Mr Harmer included the 2003 allegations and the impugned Cabcharge allegation in the originating application for the purpose of causing harm to Mr Slipper.

364 This is a sufficient basis upon which to dismiss Mr Ashby's appeal.

365 At [185], the primary judge made the following important findings:

> 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.

366 The matter proceeded before the primary judge on the basis that each of the Commonwealth and Mr Slipper filed points of claim in support of their interlocutory application for summary dismissal. Thereafter, each of the Commonwealth and Mr Slipper

filed submissions in support of their application for summary dismissal on 13 July 2012 and 16 July 2012 respectively. On 23 July 2012, Mr Ashby filed a response to each of the Commonwealth's and Mr Slipper's points of claim. On 31 August 2012, Mr Ashby filed written submissions.

367 Mr Slipper's points of claim was a detailed document. Importantly, the points of claim made it clear that Mr Slipper relied on the text messages for the inferences he relied upon to support the allegations he made. The points of claim pleaded the verbatim contents of some of the text messages. Otherwise, the text messages were specifically identified by the number allocated to each message on a spreadsheet which contained all of the text messages on Mr Ashby's mobile telephone during the relevant period. Mr Slipper gave particulars of the specific text messages relied upon, for the allegations made at paras 12, 14, 15, 17, 18, 19, 20, 21, 22, 23 24, 27, 29, 30, 31, 32, 33 and 34 of the points of claim. In addition, the verbatim content of text messages were pleaded in para 24 and para 27 of the points of claim.

368 In his submissions filed on 16 July 2012, Mr Slipper contended that the originating application contained the 2003 allegations and "the criminal allegations" (which the primary judge referred to as the Cabcharge allegations) and that, as Mr Ashby had intended by his "calculated conduct", these allegations, as well as the other allegations in the originating application, had received significant national and international media coverage over the weekend of 21 and 22 April 2012.

369 Mr Slipper also contended that Mr Ashby's originating application was commenced in a manner which was consistent with the "well-known and well-publicised litigation philosophy and approach of Harmers" whereby the settlement of sexual harassment claims was promoted by "by-passing the Human Rights Commission", and "mounting pressure associated with a sensitive public issue and taking it public very rapidly".

370 Mr Slipper also submitted that the content of Mr Ashby's originating application "went well beyond" what was required by r 34.05(1) and Form 81 of the *Federal Court Rules 2011*. It was also submitted that the originating application set out allegations about Mr Slipper's conduct that was "gratuitously salacious and immaterial". Further, Mr Slipper

contended that the 2003 allegations could not responsibly have been included in the originating application if the purpose for that application was legitimate.

371 At para 73 of his submissions, Mr Slipper contended :

> There is no acceptable explanation for the inclusion of the 2003 Allegations and the Criminal Allegations in the first place, only to be withdrawn. Contrary to the statement made by Ashby's counsel when the proceeding first came before the Court on 18 May 2012, Ashby has not brought any evidence about the circumstances in which those allegations were withdrawn.

372 At para 74 of his submissions, Mr Slipper contended:

> In the result, by making, providing to the media and subsequently abandoning the allegations referred to in the preceding paragraph Ashby and Harmers intended to expose 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 Brough.

373 The Commonwealth also made submissions to like effect. At para 16, the Commonwealth contended that:

> The proceedings were commenced for an illegitimate purpose. The evidence shows that the dominant purpose in commencing the proceedings was to damage the second respondent (*Mr Slipper*) and assist his political opponents. The principal matter on which the Commonwealth relies to establish that the proceedings were designed to damage Mr Slipper is that the applicant commenced the proceedings by filing a document that contained sensational and very serious allegations of unlawful and criminal conduct against both Mr Slipper and the Commonwealth. The document falsely claimed that the allegations were supported by sworn or affirmed evidence. The document did not conform with the pleading requirements in the *Federal Court Rules*. Mr Ashby made sure that the allegations received maximum publicity the moment the document was filed. The most serious allegations were then withdrawn before the first directions hearing. This conduct alone should be sufficient to found a conclusion that the proceedings are an abuse of process.

374 I have already referred to the fact that the Commonwealth relied upon this conduct as an instance of abuse of process by bringing the administration of justice into disrepute. (See [347] above.)

375 On 23 July 2012, Mr Harmer affirmed an affidavit. As mentioned previously, it was one of five affidavits made by Mr Harmer which were relied upon by Mr Ashby in response to the allegations made by the Commonwealth and Mr Slipper in the points of claim and the submissions. In that affidavit, Mr Harmer referred to some of the contentions made in

Mr Slipper's points of claim in the Commonwealth's submissions. I will refer to passages from that affidavit later.

376 On 31 August 2012, Mr Ashby filed submissions and an affidavit affirmed by Mr Harmer on that date. On 21 September 2012, the Commonwealth filed submissions in reply to Mr Ashby's submissions.

377 On 26 September 2012, Mr Harmer affirmed an affidavit which referred to the Commonwealth's submissions in reply. The affidavit uses the abbreviation "CRS" to refer to these submissions. I will refer further to the contents of this affidavit below.

378 As already mentioned, during the course of the hearing on 4 October 2012, the primary judge stated that he was concerned about the question of whether Mr Harmer, by including the 2003 allegations and the impugned Cabcharge allegation in the originating application, had breached his professional duties, abused the privilege given to legal practitioners to make allegations in legal proceedings, and thereby abused the process of the Court.

379 On 5 October 2012, Mr Ashby filed submissions responding to the primary judge's concern that Mr Harmer had, in preparing and filing the originating application, acted in breach of his professional duties to the Court, and thereby abused process.

The inclusion of the 2003 allegations

380 I deal first with the finding by the primary judge that the 2003 allegations were scandalous, had no legitimate forensic purpose and were included in the originating application to cause harm to Mr Slipper, and thereby constituted an abuse of process.

381 At [164] of the reasons for decision, the primary judge said:

> The form of 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. These matters have nothing to do with alleged sexual harassment. Both 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 obligation, such as Mr Harmer, could have justified referring to the video in the originating application at all.

382 By reason of the matters referred to at [367]-[377], Mr Ashby and Mr Harmer were, of course, aware before the opening of Mr Ashby's case, that each of Mr Slipper and the Commonwealth had alleged in their points of claim and submissions that the inclusion of the 2003 allegations were scandalous, had no legitimate forensic purpose, and had been included, only later to be withdrawn, for the purpose of causing the maximum amount of harm to Mr Slipper.

383 In his affidavit of 23 July 2012, Mr Harmer responded to the allegations to this effect, which had been made in para 52 and para 53 of Mr Slipper's points of claim. Mr Harmer referred in general terms to his client wishing to retain legal professional privilege, but it is clear from what followed in that affidavit and his affidavit of 26 September that Mr Harmer did not regard that claim as extending to his explanation for including the 2003 allegations and the Cabcharge allegations. Mr Harmer deposed as follows:

> I deny that…I intended (either alone or in combination with any other persons) 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.

384 Also, in his affidavit of 26 September 2012, Mr Harmer responded as follows to the Commonwealth's contention in its reply submissions that the 2003 allegations (being the allegations pleaded in paras 5-9 of the originating application) were not pleaded in aid of a legitimate cause of action and that their inclusion and subsequent withdrawal was consistent only with the purpose of harming Mr Slipper:

> In the CRS, the allegation is made (at [32]) that the matters pleaded in paragraphs 5 to 9 of the originating application "do not appear to have been pleaded in aid of any legitimate cause of action…their inclusion and subsequent withdrawal, is consistent only with the a purpose of harming Mr Slipper". I decided what allegations would be included in the originating application. If true, the Commonwealth's allegation would, in my view, have constituted me engaging in serious professional misconduct. In the course of my professional career I have never included material "only with the purpose of harming" another person and I would not engage in such conduct.
>
> I included paragraphs 5 to 9 in the originating application because I believe that they were matters relevant to a claim of breach of contract. In finalising and filing the

> originating application I believed as true what Mr Ashby deposed in Exhibit C1 (being paragraphs 258 to 260 of his affidavit sworn on 13 April 2012).

385 It is Mr Ashby's contention that, in light of this evidence from Mr Harmer, and the fact that Mr Harmer was not cross-examined, it was not open to the primary judge to find that the 2003 allegations were scandalous, had no legitimate forensic purpose and that, by including those allegations in the originating application, it was Mr Harmer's purpose to cause maximum harm to Mr Slipper.

386 In my view, for the following reasons, it was open to the primary judge to make the findings that he did, notwithstanding that Mr Harmer was not cross-examined.

387 First, contrary to Mr Ashby's argument, this is not a case where the rule in *Browne v Dunn* (1893) 6 R 67 has been transgressed by Mr Slipper contending, in the absence of cross-examination of Mr Harmer, that Mr Harmer's purpose in including the scandalous and irrelevant 2003 allegations in the originating application was to cause the maximum harm to Mr Slipper. This is because Mr Ashby and Mr Harmer had been given notice that Mr Slipper intended to contend that the 2003 allegations were scandalous, were irrelevant to any cause of action relied on by Mr Ashby, and that the inference to be drawn was that Mr Harmer's purpose in including the 2003 allegations was to cause maximum harm to Mr Slipper. It was apparent from their points of claim and their submissions filed between July and September 2012 that Mr Slipper and the Commonwealth were relying upon the scandalous content of the allegations, the irrelevance to Mr Ashby's pleaded causes of action, and the fact that they were withdrawn shortly after they were made, for the inference as to Mr Harmer's impugned purpose.

388 Not only did Mr Ashby and Mr Harmer appreciate the case that would be made by Mr Slipper and the Commonwealth at the hearing, Mr Ashby took the opportunity to lead evidence in rebuttal of these claims by calling evidence from Mr Harmer. However, Mr Harmer's evidence only addressed the allegations at a very high level of generality, namely, by way of a bare denial (in his affidavit of 23 July 2012) (see [383] above) and the declaration (in his affidavit of 26 September 2012) to the effect that he included the matters pleaded at paras 5-9 (that is, the 2003 allegations) because he believed the matters to be relevant to a claim of breach of contract (see [384] above). As mentioned, the

2003 allegations included a detailed description of the contents of the videotape of Mr Slipper's sexual encounter with his male adviser.

389 Among the matters mentioned in the 2003 allegations was the fact that Mr Slipper had gained access to the bedroom by the window and that he had urinated out of the window. Mr Harmer made no attempt in his evidence to explain why it was necessary to include the specific and obviously scandalous statements that Mr Slipper had gained access to the bedroom by the window or that he urinated out of the window, nor, how those allegations supported any cause of action.

390 In *White Industries (Qld)Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 (*White Industries)*, White Industries alleged that Flower & Hart, a firm of solicitors, had commenced a proceeding against it for the improper purpose of giving their client a "breathing space" to pay a debt which was due to White Industries. Mr Meadows was the Flower & Hart partner with responsibility for the litigation. Flower & Hart had consulted with senior counsel about the proceeding. In the course of those consultations, senior counsel had given opinions and been involved in settling letters of advice to the client. The contents of the opinions and the letters of advice supported the inference that Flower & Hart had commenced the proceeding for the impugned purpose. The senior counsel gave evidence by affidavit. In that affidavit, he did not seek to qualify or resile from anything stated in the opinions and letters of advice. The senior counsel was cross-examined but was not cross-examined in respect of the opinions and letters of advice. At the hearing before Goldberg J, White Industries sought to rely upon the opinions and letters of advice to support the inference that the proceeding had been commenced for the impugned purpose. Flower & Hart submitted that because there had been no cross-examination of senior counsel in respect of the opinions and letters of advice, there had been an infringement of the rule in *Browne v Dunn*, and White Industries could not rely upon the letters of advice and opinions to support the inferences that Flower & Hart commenced the proceeding for the impugned purpose. Goldberg J rejected that contention. Goldberg J observed at 211:

> …I am satisfied that Flower & Hart and its witnesses were on notice, before the commencement of the hearing, of the nature of the submissions and comments which were to be made by White in relation to the contents of a number of letters and opinions and accordingly had the opportunity, if they wished to take advantage of it, to explain, qualify or resile from statements made in these documents.

391 Goldberg J went on to observe that the senior counsel did not attempt to explain, qualify or resile from any statement made in his opinions and letters of advice and Mr Meadows had only done so to a limited extent.

392 At 218, Goldberg J, referring to the rule in *Browne v Dunn*, observed:

> The rule does not apply, in the sense that it is not transgressed, where the witness is on notice that his version is challenged or that an inference may be drawn against him and such notice may be found in the pleadings, in an opening or in the manner in which a case is conducted: *Seymour v Australian Broadcasting Commission* [1977] 19 NSWLR 219 at 224–5, 236; *Jagelman v FCT* (1995) 31 ATR 467 at 472–3; *Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 145 ALR 1 at 15.

393 At 218-219, Goldberg J went on to observe:

> In my opinion, Flower & Hart and all its witnesses were on notice that White was seeking to rely upon the letter of 18 December 1986 and the relevant contents of the particular opinions and advices of [senior counsel] for the purpose of establishing that Flower & Hart had the purpose of initiating the proceeding on behalf of its client to delay payment of the amount due to White in circumstances where it had formed the opinion that its client did not have a case that could be won. *It is not unfair, in my opinion, therefore for White to invite the court to draw inferences and make findings from the letter of 18 December 1986 and the opinions and advices of [senior counsel] adverse to him and to Flower & Hart and contrary to evidence otherwise given by its witnesses.* This is not a case where it can be said that Flower & Hart has been ambushed in final submissions by White's reliance on evidence, the existence of which Flower & Hart was unaware until the evidence was completed: cf *Dolan v Australian and Overseas Telecommunications Corp* (1993) 42 FCR 206 at 210; 114 ALR 231. (Emphasis added.)

394 At 220, Goldberg J observed:

> Flower & Hart cannot now be heard to complain about unfairness; in my opinion there was no unfairness. Flower & Hart should be bound by the course it adopted at trial, namely to be selective about the documents its witnesses wished to explain or qualify: *Rowe v Australian United Steam Navigation Co Ltd* (1909) 9 CLR 1 at 24; *Hoyts Pty Ltd v O'Connor* (1928) 40 CLR 566 at 576.

395 Goldberg J went on to assess the evidence. This included the evidence of Mr Meadows which sought to contradict the statements made in the letters and opinions. However, Goldberg J said at 221, that he preferred to base his findings on the objective contemporaneous documents rather than on the statements in the affidavit which was made some considerable time later.

396 Goldberg J also commented that a failure to observe the rule in *Browne v Dunn* did not mean that the court was bound to reject evidence or inferences drawn from the evidence where it is used to contradict evidence which was not the subject of cross-examination. Goldberg J observed at 221:

> Putting the matter another way a failure to observe the rule in *Browne v Dunn* does not mean that where evidence of a witness is not the subject of cross-examination and where evidence is led in contradiction of that evidence, the court is required to accept the former evidence: *Bulstrode v Trimble* at 849. It is a matter of weight for the court to take into account: *R v McDowell* [1997] 1 VR 473 at 482.

397 In my view, the series of observations made by Goldberg J in *White Industries* referred to above, are applicable to the circumstances of this case. In particular, they are relevant to the question of the weight to be given to Mr Harmer's evidence, notwithstanding, that it was not the subject of cross-examination. Of further relevance to the weight to be accorded to Mr Harmer's evidence by reason of it being pitched at such a high level of generality as to amount to a bare denial and a mere declaration of his "mental state", are the following observations of French CJ, Gummow, Hayne and Crennan JJ in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647 (*Barclay*) at [45]:

> …Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. (Footnotes omitted.)

398 At [141], Heydon J observed as follows:

> …Of course, "mere declarations" by a witness as to his or her "mental state" may not be sufficient to discharge the appellant's burden of proof under s 361. External circumstances could put into question the reliability or credibility of those declarations. (Footnote omitted.)

399 In support of his observations, Heydon J referred, in a footnote, to the following observations of Barton ACJ in *Pearce v WD Peacock & Company Limited* (1917) 23 CLR 199 at 203:

> The question was solely as to the reason for the dismissal. No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to but little regard, though in the present case they seem to have

been admitted without objection.

400 These observations were made in the context of cases where the employer bore the onus of establishing the reason for the dismissal of the employee. However, in my view, the observations apply more generally to the assessment of the weight to be accorded to the evidence of a witness's "mental state" which is pitched at a high level of generality.

401 An instructive case is the case of *Offstage Support Association Inc v Time of My Life Pty Ltd (No 2)* (2011) 284 ALR 362. In that case, Edmonds J considered an application for indemnity costs against a solicitor personally for commencing a winding-up application which Edmonds J had dismissed as an abuse of process. The basis upon which Edmonds J had dismissed that application was that the application enjoyed no prospect of success either in law or on the basis of the evidence which had been filed.

402 The solicitor in question filed an affidavit in response to the application that he pay costs personally on an indemnity basis. In the affidavit, the solicitor deposed in general terms that he formed the view prior to the commencement of the application, and also at a later stage in the proceeding, that the matter was "properly arguable", and did not involve an abuse of process. The solicitor was not cross-examined on those parts of his affidavit. Edmonds J accepted that there had not been cross-examination on those parts of the affidavit, but found the views which the solicitor deposed that he held, were:

> [N]ot views which, in my opinion, a competent solicitor experienced in this area of the law could reasonably come to; and I have no reason to doubt that Mr McCartney is a competent solicitor experienced in this area of the law. For those reasons, I attach no weight at all to what Mr McCartney deposes to…

403 Further, Mr Harmer, being the draftsman of the originating application, was the person who would be expected to give evidence of the reason for the inclusion of the obviously scandalous allegations relating to the contents of the videotape. Mr Harmer, having given evidence, chose not to address the specific complaint about the scandalous and gratuitous form of the pleading he had drafted, nor to depose to the basis for his belief that the 2003 allegations were relevant to a breach of contract.

404 In the case of *White Industries*, an issue also arose as to whether there was a basis for senior counsel to have pleaded an allegation of fraud. The statement of claim had been

drafted and settled by senior counsel. Senior counsel gave evidence by way of affidavit but did not address the question of how he came to plead fraud. Nor was there evidence from the solicitor who had briefed senior counsel of their discussions relating to the pleading of fraud. Flower & Hart submitted that the failure by senior counsel to turn his mind to the basis for the pleading of fraud should have been put to the witness. At 225, Goldberg J observed:

> The documentary evidence which White tendered is such that it raises the issue that fraud was alleged without any factual basis for the allegation and it was open to infer from that documentation that fraud was pleaded without any factual basis for it. *It is relevant to a consideration of that issue to know and understand how counsel and solicitors saw the basis for the fraud pleading.* In the absence of any evidence from them on that topic, squarely raised in White's amended statement of facts and contentions and White's contentions of fact and law, it is open for me to infer from the documentation that they did not at the time address the justification for pleading fraud. If I draw such an inference that assists me in reaching a conclusion that there was no factual basis for pleading fraud, certainly fraud with knowledge. (Emphasis added.)

405 Goldberg J went on to observe at 226:

> It would have been simple and straightforward in those circumstances for [senior counsel] and/or [junior counsel] to set out the basis for which, or the chain of reasoning by which, they pleaded fraud at least fraud with knowledge. They did not do so. I make these observations, conscious, as I have noted earlier, that the burden of proof lies on White to prove that fraud was pleaded where there was no factual basis for the allegation.

406 Goldberg J then cited with approval, the well-known observations of Handley JA in *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 (*Ferrcom*) at 418-419. Goldberg J then went on to say at 228:

> I approach the issue before me in the same way and decline to infer that counsel and [the solicitor] considered there was a justification and factual basis for alleging fraud. The allegation was squarely raised and the documentation upon which White relies was exhibited before [senior counsel] and [the solicitor] each swore their second affidavit. They did not respond or refer to the allegation. Accordingly, I do not consider that any inference favourable to those witnesses should be drawn when they either ignored or failed to deal with the issue.

407 These observations are germane to the assessment of Mr Harmer's evidence. The circumstances by reference to which the assessment of the weight to be given to Mr Harmer's evidence by the primary judge, were the following.

408 First, Mr Harmer's evidence was cast at a high level of generality, comprising a bare denial that he intended to harm Mr Slipper, and an assertion that he included the 2003 allegations because he believed that they were relevant to a claim in breach of contract. Mr Harmer did not depose to the facts or matters upon which he relied for the holding of the belief he expressed. If there was a rational basis for that belief it would have been a simple issue for Mr Harmer to depose to the basis for that belief. Nor did Mr Harmer attempt in his evidence to explain why it was necessary to make the 2003 allegations in the scandalous form they were made. By reason of the application of the principle in *Ferrcom*, Mr Harmer was not entitled to the drawing of any inference in his favour on this issue.

409 In the absence of any explanation of the basis for his asserted belief, and the obvious scandalous nature and irrelevance of the allegations in question, the primary judge was entitled to place no weight on Mr Harmer's evidence. In a manner similar to that adopted by Edmonds J, the primary judge assessed Mr Harmer's assertion as to his belief by reference to whether a reasonable lawyer would have held that belief. It was open to the primary judge to adopt this course and to come to the conclusion at [381] above that he did.

410 Secondly, an examination of the originating application shows that when he drafted that application in April 2012, Mr Harmer addressed his mind specifically to those paragraphs of the originating application which he believed were relevant to Mr Ashby's breach of contract claim. Mr Harmer identified in para 54 of the originating application those paragraphs of the originating application which he believed were relevant to the plea for breach of contract. Paragraph 54 reads:

> By the conduct described in paragraphs 18 to 27, 30 to 36, 37 to 42 and 44 to 48, the Respondents have breached the Applicant's contract of employment, including but not limited to the Trust and Confidence Term, the Good Faith Term, the Cooperation Term and the Safe Work Term.

411 As mentioned, the 2003 allegations are set out in paras 5-9 of the originating application. It is significant that paras 5-9 are not among those paragraphs identified by Mr Harmer in para 54 of the originating application as being relevant to Mr Ashby's claim for breach of contract. Accordingly, Mr Harmer's affidavit evidence given on 26 September 2012, that he included the 2003 allegations because he believed they were relevant to a claim in breach of contract, is inconsistent with the manifestation of his belief five months earlier

when he drafted the interlocutory application. The primary judge was entitled, also, for this reason, to place no weight on Mr Harmer's affidavit evidence. To use the language of Heydon J in *Barclay*, there were, in this case, "external circumstances" which undermined the reliability of Mr Harmer's mere declaration of his belief in April 2012, deposed to in his September 2012 affidavit. Plainly, in the absence of a reliable and plausible explanation for their inclusion, the overwhelming inference to be drawn from the obviously scandalous and irrelevant nature of the allegations, and the fact that Mr Harmer knew that the filing of the originating application would attract widespread publicity, was that Mr Harmer's purpose for including the allegations was to cause harm to Mr Slipper.

412 In my view, therefore, notwithstanding the seriousness of the finding in relation to Mr Harmer's conduct and the evidentiary consequence of that by reason of s 140(2) of the *Evidence Act*, it was, in my view, open to the primary judge to conclude, as he did, that Mr Harmer's purpose in including the description of the contents of the videotape as part of the 2003 allegations in the originating application was to cause harm to Mr Slipper and was, therefore, an abuse of process.

413 On the final day of the hearing before the primary judge, senior counsel for Mr Ashby submitted that Mr Harmer's purpose in including the 2003 allegations was in support of Mr Ashby's claims that the Commonwealth had breached two terms of his employment contract. These terms were the employer's obligation to provide a safe system of work and the employer's obligation not to undermine the relationship of trust and confidence between an employer and an employee. Senior counsel's contention was that Mr Harmer's purpose had been to allege that the Commonwealth had breached these terms in that it had failed to investigate the report to Mr Howard's aide of Mr Slipper's sexual encounter with the man on the videotape and, that had the report been investigated, it would have established that Mr Slipper had utilised his office to foster sexual relations with young male staff members. Senior counsel went on to say that the breach of the safe system of work and the trust and confidence term arose because the Commonwealth had failed to prevent a recurrence of Mr Slipper's misuse of his office.

414 The primary judge rejected senior counsel for Mr Ashby's contention. In my view, it was open to the primary judge to do so.

415 First, senior counsel's submissions made no attempt to justify the need to plead the scandalous contents of the videotape, and in particular, the fact that Mr Slipper had entered the bedroom through the window and that Mr Slipper had urinated out of the window, by reference to any of Mr Ashby's claims.

416 Secondly, Mr Harmer's evidence did not refer to the matters referred to by Mr Ashby's senior counsel as being the reason why he included the 2003 allegations in the originating application. As mentioned before, Mr Harmer's evidence comprised no more than an assertion that he believed the 2003 allegations were relevant to a claim in breach of contract. Also, as mentioned before, by reason of the failure of Mr Harmer to depose to any basis for his belief that the 2003 allegations related to Mr Ashby's claim of breach of contract, Mr Harmer was not entitled to the drawing of any inference in his favour in respect of that issue.

417 Thirdly, senior counsel's contentions as to Mr Harmer's belief in April 2012, are not reflected in the originating application Mr Harmer drafted in April 2012. As mentioned, para 54 of the originating application identifies the relevant paragraphs Mr Harmer then believed were relevant to the allegation he made that the Commonwealth had breached the safe system of work term and the trust and confidence term. No reference is made in the originating application, to the 2003 allegations as being relevant to that claim. Further, paras 5-9 of the originating application contained no allegation to the effect that, had the Commonwealth investigated the 2003 report, it would have discovered that Mr Slipper had utilised his office to foster sexual relations with young male staff members.

418 Senior counsel's contentions before the primary judge, have the tenor of being the product of counsel's ingenuity rather than being founded on the evidence. This is because, aside from the contentions to which I have already referred, another of senior counsel's contentions was that the 2003 allegations had been included because they were relevant to penalty. The difficulty with this contention is that in his evidence, Mr Harmer makes no reference at all to the fact that he included the 2003 allegations because he believed that they were relevant to penalty.

419 Further, support for the finding that the 2003 allegations were irrelevant is to be found in the fact that before the Commonwealth and Mr Slipper made any complaint as to the

propriety or otherwise of the inclusion of the 2003 allegations in the originating application, senior and junior counsel for Mr Ashby chose to exclude the 2003 allegations from the statement of claim. Mr Ashby called no evidence which explained that action. It is not open to Mr Ashby to contend that there was a legitimate reason for withdrawing these allegations and then not disclose the reason by claiming legal professional privilege (*Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 at 492-493).

420 Accordingly, as I have said, in my view, it was open to the primary judge to conclude that the inclusion of the 2003 allegations in the originating application was an abuse of process and, on that basis alone, the appeal should be dismissed.

421 Mr Ashby also sought to rely upon the following observations of Heydon, Crennan and Bell JJ in the case of *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [75] (*Kuhl*):

> There was no point in the trial judge mentioning his conclusion that the plaintiff's evidence was not frank and complete unless it played a role in his decision adverse to the plaintiff. In the absence of any challenge from the cross-examiner to the frankness and completeness of the plaintiff's evidence, it was incumbent on the trial judge, if his conclusion that the plaintiff had not been frank and complete was to play a role in his decision adverse to the plaintiff, to make the challenge himself. Perhaps the criticism in the judgment did not occur to the trial judge until after the plaintiff had left the box, or until after the hearing had concluded and before the judge's reserved judgment was given. It remained necessary either to recall the plaintiff or to have no regard to that aspect of the plaintiff's evidence.

422 In my view, the observations are not germane to Mr Harmer's evidence.

423 The observations of the High Court were addressed to the position of a party witness. That is apparent from the following observations of the High Court at [67]:

> It is not sound judicial technique to criticise a party-witness for deliberately withholding the truth in a fashion crucial to a dismissal of that party's claim unless two conditions are satisfied. First, reasons must be given for concluding that the truth has been deliberately withheld. Secondly, the party-witness must have been given an opportunity to deal with the criticism.

424 Also, the factual scenario in *Kuhl* was different from that which pertained in this case. In *Kuhl*, the plaintiff was a live party-witness and the judge, in effect, made an implied adverse credibility finding of which the plaintiff had no warning, based on the manner in

which the plaintiff had answered a question put to him by his own counsel. The High Court expressly distinguished that situation from the *Ferrcom* situation where, as in this case, a witness does not give evidence in respect of an issue which he or she would be expected to address in his or her evidence.

425 In any event, this is not a case where a damaging finding was made in a judgment, in respect of which no notice was given. As mentioned at [345]-[357] and [367]-[377] above, Mr Ashby and Mr Harmer were given notice on several occasions of the allegation of abuse of process before and during the hearing. Like Flower & Hart in *White Industries*, Mr Ashby and Mr Harmer cannot complain of unfairness, if having been notified of the case to be made against them, Mr Ashby and Mr Harmer chose to meet the case with evidence at a high level of generality which did not address the specifics of the allegations made against them. (See [394] above.)

The inclusion of the allegation that Mr Ashby intended to report Mr Slipper's use of Cabcharge vouchers to the police

426 In relation to the finding of abuse of process arising from the inclusion of the allegation that Mr Ashby intended to report Mr Slipper's conduct relating to the use of Cabcharge vouchers to the police, the primary judge made the following observations at [180]–[181]:

> 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…
>
> 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.

427 Mr Ashby also contended that it was not open to the primary judge to find that Mr Harmer's conduct in this respect was an abuse of process, because Mr Harmer had given evidence and was not cross-examined.

428 In para 8 of his affidavit of 26 September 2012, Mr Harmer deposed that he believed he had a reasonable basis for alleging as a matter of fact and law that Mr Ashby's contract of employment had been breached by the actions of Mr Slipper's "alleged travel misconduct".

429 Mr Harmer further deposed in his affidavit of 26 September 2012, that he turned his mind to the issue of whether the requirement for Mr Ashby to acquiesce in, or witness, Mr Slipper failing to comply with proper travel requirements could amount to a breach of an implied term of his employment contract. Mr Harmer then went on to depose in some detail as to what he perceived to be some uncertainty in the law relating to the implied term of trust and confidence in employment contracts.

430 However, the claim that was made was that Mr Harmer had no justification for including in the originating application, the plea that Mr Ashby intended to report Mr Slipper's Cabcharge conduct to the police, because it was not relevant to any cause of action pleaded by Mr Ashby. Mr Harmer's evidence did not address that issue and Mr Harmer did not disclose any basis upon which he believed the pleading of that fact to be relevant. More specifically, Mr Harmer did not depose to what Goldberg J in *White Industries* referred to as the basis or chain of reasoning for believing that the pleading of the allegation that Mr Ashby intended to report Mr Slipper's conduct to the police, was relevant to any cause of action relied on by Mr Ashby in the originating application.

431 It followed that Mr Harmer was not entitled to the drawing of any inferences as to the relevance of that pleading in his favour. In light of the fact that the pleading of Mr Ashby's intention to report Mr Slipper's conduct to the police was inherently irrelevant to any cause of action, it was open to the primary judge to find that there was no forensic purpose for Mr Harmer to include that allegation in the originating application, and that it was included for the purpose of harming Mr Slipper.

432 Accordingly, it was in my view, open to the primary judge to find that the inclusion of the allegation that Mr Ashby intended to report Mr Slipper's conduct in relation to the use of the Cabcharge vouchers to the police was an abuse of process, notwithstanding the seriousness of that finding and the evidentiary consequences thereof.

433 It follows also that this is a further basis upon which Mr Ashby's appeal should be dismissed.

The finding that Mr Ashby's predominant purpose in bringing the proceeding against Mr Slipper was to pursue a political attack on Mr Slipper

434 In light of the view to which I have come, it is unnecessary for me to have regard to the question of whether the primary judge erred in finding that Mr Ashby's predominant purpose in bringing of the proceeding against Mr Slipper was to pursue a political attack on Mr Slipper.

435 However, in my view, it was open to the primary judge to make that finding. I will set out briefly my reasons for coming to that view.

Mr Ashby's request to accompany Mr Slipper to Hungary

436 It was a central part of Mr Ashby's pleaded claim that he suffered considerable stress, humiliation and illness by reason of Mr Slipper's sexual harassment towards him. As mentioned, Mr Ashby did not read any affidavits as part of his own case. Rather, Mr Ashby's affidavit of 13 April 2012 was accepted into evidence when the Commonwealth sought to tender a part of that affidavit in support of its case. In that affidavit, sworn before the commencement of the proceeding, Mr Ashby deposed that he commenced the proceeding to vindicate his rights by reason of the injury that he had suffered as a result of the sexual harassment by Mr Slipper, and to prevent Mr Slipper from injuring other persons. He said that he had no other purpose in commencing the action.

437 The primary judge did not accept Mr Ashby's evidence as to his purpose for commencing the proceeding, notwithstanding that Mr Ashby had not been cross-examined on that evidence. To the contrary, the primary judge found that the weight of the evidence was inconsistent with that evidence. The primary judge relied on an aspect of Mr Ashby's conduct as being particularly inconsistent with his claim to have suffered considerable stress, humiliation and illness by reason of the alleged incidents of sexual harassment upon which he relied.

438 The evidence disclosed that in March 2012, Mr Ashby asked Mr Slipper if he could accompany him on a parliamentary trip to Hungary. Mr Ashby offered to pay his own expenses. The primary judge observed that this offer by Mr Ashby was made after the alleged Cabcharge incidents, and all but one of the alleged incidents of sexual harassment had already occurred. The primary judge went on to observe that if, as Mr Ashby now claimed, he had been seriously concerned about these matters at the time, "it defies belief that [Mr Ashby] 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".

439 Prior to the commencement of the hearing, Mr Ashby had been put on notice that Mr Slipper would rely upon Mr Ashby's offer to accompany Mr Slipper to Hungary for the inference that Mr Ashby had not been genuinely aggrieved by the incidents which he now alleged to be sexual harassment; in support of his contention that the predominant reason for Mr Ashby raising these matters in the proceeding was to cause Mr Slipper political harm and embarrassment. (See affidavit of Ms Siobhan Keating dated 12 June 2012.) Mr Ashby, however, did not give evidence in response to that evidence. In particular, Mr Ashby did not depose to matters which sought to explain the apparent incongruity of him volunteering to spend more time with Mr Slipper than he needed to, whilst at the same time contending that by his conduct, Mr Slipper had caused, and was continuing to cause, him considerable stress, humiliation and illness. The failure by Mr Ashby to depose to this issue meant that on the application of the *Ferrcom* principle, no inference could be drawn in his favour on this issue.

440 As mentioned, the primary judge relied strongly on the evidence that Mr Ashby had asked Mr Slipper if he could accompany him, at his own expense, to Hungary, to support the inference that Mr Ashby's predominant purpose in bringing the proceeding was to cause Mr Slipper political harm and embarrassment.

441 In my view, it was open to the primary judge to rely upon that objective evidence, which was not explained by any evidence from Mr Ashby, to draw the inference which he did.

442 Further, the primary judge did not err in drawing that inference, notwithstanding the expert opinion of the psychiatrist. Nowhere in the psychiatrist's report is there any indication that the psychiatrist took into account in expressing the views he did, of the fact that

Mr Ashby had after all but one of the events said by Mr Ashby to have been the cause of his stress, humiliation and illness, asked Mr Slipper if he could accompany him, at Mr Ashby's own expense, to Hungary.

The weight to be placed on Mr Ashby's affidavit evidence

443 It was one of Mr Ashby's main submissions that the primary judge had erred in failing to accept Mr Ashby's evidence as to the purpose for which he commenced the proceeding in circumstances where Mr Ashby had not been cross-examined.

444 For the reasons set out at [345]-[357] and [367]-[377] above, the rule in *Browne v Dunn* was not transgressed in this case. Mr Ashby's affidavit evidence was just one item of evidence going to his purpose for commencing the proceeding. As mentioned, Mr Ashby was a prolific user of the text message as a means of communication. A verbatim transcript was made of all messages sent and received by Mr Ashby during all but a few days of the period in question. The primary judge was in the position of having before him an accurate record of the original contemporaneous evidence from which to draw inferences in relation to Mr Ashby's predominant purpose for commencing the proceeding, and the involvement of third parties in Mr Ashby's endeavour.

445 On the other hand, Mr Ashby's evidence as to his purpose for bringing the application was at a high level of generality and fell into the category of a "mere declaration" as to his "mental state". The principles referred to at [390]-[406] above, applied to his evidence of purpose and the weight to be accorded to it. In my view, it was open to the primary judge to assess Mr Ashby's affidavit evidence of his purpose, along with the other evidence which was before the Court, to draw inferences in respect of Mr Ashby's purpose in commencing the proceedings. By reason of the highly probative evidential value of the verbatim transcripts of the text messages sent and received by Mr Ashby, which reflected an accurate record of contemporaneous dealings between Mr Ashby and others, the primary judge had a rich vein of reliable evidence against which to weigh Mr Ashby's affidavit evidence of his purpose. Like Goldberg J in *White Industries*, the primary judge preferred to base his findings on the highly probative objective evidence of the contemporaneous communications than on Mr Ashby's mere declaration of purpose in his affidavit. It was open to the primary judge to adopt this approach.

The primary judge's finding that Mr Ashby was physically fit during the period when Mr Ashby had claimed sick leave

446 Mr Ashby complained about the primary judge's finding that contrary to the representation he made to Mr Slipper on 10 April 2012 that he was too sick to work, Mr Ashby was, in fact, during the period 10 April to 13 April 2012, physically fit. Mr Ashby's main complaint was that the primary judge did not accept the "unchallenged evidence" of Dr Shaiza Mazhar that Mr Ashby had a medical condition and was unfit for work from 10 April 2012 to 22 April 2012. The "unchallenged evidence" to which Mr Ashby referred was no more than the receipt into evidence, as an exhibit to Mr Harmer's affidavit, of the medical certificate to which I have referred at [263] above.

447 Mr Ashby did not, in fact, read any affidavit evidence from Dr Mazhar explaining the circumstances and content of the medical certificate. Mr Harmer made no comment about these matters in his affidavit, nor as to the providence of the medical certificate. Also, Mr Ashby did not depose as to the medical condition from which he claimed he was suffering on 10 April 2012 and thereafter. This was notwithstanding the allegation made against him in para 32 of the amended points of claim that Mr Ashby "falsely informed Slipper and Slipper's office that he was unable to attend work because he was sick".

448 In my view, it was open to the primary judge to place no weight on the medical certificate of Dr Mazhar which was annexed to Mr Harmer's affidavit.

449 First, the terms of the medical certificate were curious in that the medical certificate was issued on 5 April 2012 in respect of an unspecified medical condition which would render Mr Ashby unfit for work five days hence. Further, this five day delay is incongruous with the immediacy of the doctor's concern as to the poor state of Mr Ashby's health reported by Mr Ashby in his email of 10 April 2012 to Mr Slipper (see [262] above). In that email, Mr Ashby stated that he had visited a doctor who was "even more" concerned about Mr Ashby's health than he was, and who had "insisted" that he take two weeks off from work. By reason of the failure to call Dr Mazhar to explain the nature of Mr Ashby's medical condition and the apparent incongruity to which I have just referred, no inferences in respect of the issue of the medical certificate favourable to Mr Ashby could be drawn.

450 Secondly, the fact that the medical certificate was dated 5 April 2012 is incongruous with the advice by Mr Ashby in his text message to Ms Ellis, from Mr Slipper's office, on the morning of 10 April 2012, that Mr Ashby would get a medical certificate (see [262] above).

451 It is incongruous because Mr Ashby relied upon a medical certificate which predated the message that he sent to Ms Ellis on 10 April 2012. Mr Ashby did not give any evidence seeking to explain this incongruity, nor the incongruity referred to in [449] above. Nor did he give an explanation for failing to supply to Mr Slipper's office the medical certificate to which he referred in his text message to Ms Ellis of 10 April 2012 and his email to Mr Slipper of 10 April 2012. Nor did he depose to the nature of the medical condition from which he was suffering, nor the element of the condition which disabled him from carrying out his normal employment duties. In the absence of Mr Ashby having deposed to these issues, he was not entitled to the inferences in his favour in respect of those issues.

452 Thirdly, the objective evidence did not support Mr Ashby's claim that during the period 10 April to 13 April 2012, he was unfit to carry out his employment duties. During this period, Mr Ashby was able to fly to Sydney, meet with Mr Lewis on two separate occasions - once to have drinks with Mr Lewis, read documents as part of the process of giving instructions to Harmers, attend at Harmers' premises and give instructions for the drafting of an affidavit, read and understand a lengthy affidavit, affirm the affidavit, communicate with other persons by telephone and text message. In short, the evidence demonstrated that none of the faculties which Mr Ashby needed in order to carry out his ordinary employment duties, which included communicating with journalists, – of whom Mr Lewis was one – was impaired during the period when he claimed that he was too ill to attend work.

453 In my view, it was open to the primary judge in those circumstances to make the findings in relation to Mr Ashby's health which he did.

454 On the appeal, counsel for Mr Ashby sought to explain Mr Ashby's absence from work on the basis that Mr Ashby did not want to be in Mr Slipper's presence. There are three difficulties with this submission. First, Mr Ashby gave no evidence to that effect, which, in any event, is contrary to what he claimed in April 2012. Therefore, Mr Ashby is not entitled to the drawing of any inference to that effect in his favour. Secondly, if

Mr Ashby had attended work from 10 April 2012 to 13 April 2012, he would not have been in Mr Slipper's presence because Mr Slipper was overseas at the time. Thirdly, there was no evidence as to why this affliction only moved Mr Ashby to apply for sick leave on the day he was due to be flown to Sydney to commence the process of bringing his application against Mr Slipper. There is no substance in this submission.

Not taking Mr Ashby's evidence at its highest

455 I reject Mr Ashby's complaint that the primary judge erred because he did not take Mr Ashby's evidence at its highest. This is because there is no universal rule that in all contested interlocutory applications, the Court is required to take the evidence of a party at its highest. The application of this principle will depend on the nature of the interlocutory application. Thus, for example, in a case where a respondent to an originating application brings an interlocutory application to dismiss the claim on the basis that it has no reasonable prospects of success, it may be appropriate to consider the evidence of the applicant at its highest. However, in a case such as this where the question was whether there had been an abuse of process on the grounds that a party had commenced a proceeding for an improper purpose, and there had been points of claim exchanged, all parties had filed extensive evidence, with the opportunity for cross-examination, it was appropriate, in my view, for the primary judge to assess the evidence as a whole, and accord such weight to Mr Ashby's affidavit evidence as was appropriate. None of the cases relied upon by Mr Ashby for his contention, were cases of abuse of process on the grounds of bringing a proceeding for an improper purpose.

Breach of natural justice

456 I also reject Mr Ashby's contention that the primary judge erred in finding there had been an abuse of process which involved Mr Ashby acting in combination with others, because the findings made by the primary judge were not in terms of the combination referred to in Mr Slipper's pleaded points of claim. As I have mentioned, there is a wider public interest in ensuring that the Court's process is not abused. It was open to the primary judge to find an abuse of process had occurred even though the abuse of process found was not in the form pleaded.

457 In any event, in relation to the abuses of process found by the primary judge in relation to the 2003 allegations and the impugned Cabcharge allegation, those abuses of process were, as I have found, pleaded by the Commonwealth and Mr Slipper.

458 Mr Ashby's appeal is dismissed with costs.

I certify that the preceding two hundred and thirty-one (231) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis.

Associate:

Dated: 27 February 2014