s 22 irrelevant to scope of request

4. s 46(a) initiated proceedings in the Federal Court of Australia against Judge Vasta, the Commonwealth and the State of Queensland. s 46(a) originating application and statement of claim filed on 7 December 2020 outline that he is seeking damages for false imprisonment from all respondents, and exemplary damages from Judge Vasta.

s 22 irrelevant to scope of request

s 22 irrelevant to scope of request

6. s 42(1)
s 22 irrelevant to scope of request

s 22 irrelevant to scope of request

FEDERAL COURT OF AUSTRALIA

Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020

File number:	ACD 57 of 2020
Judgment of:	**WIGNEY J**
Date of judgment:	30 August 2023
Catchwords:	**TORTS** – false imprisonment – where applicant imprisoned for contempt in matrimonial proceeding in Federal Circuit Court of Australia for purported non-compliance with disclosure orders – where judge's contempt declaration and imprisonment orders were set aside for invalidity – consideration of whether imprisonment order was valid until set aside and provided lawful justification for imprisonment – consideration of whether the judge exercised superior court powers to punish for contempt which meant orders remained valid until set aside – found that judge's orders, being of an inferior court and vitiated by jurisdictional error, were void ab initio and of no legal effect – found that no lawful justification for imprisonment **TORTS** – collateral abuse of process – whether the judge had an improper purpose or motive to coerce settlement of matrimonial proceeding – found it was not established that the judge's purpose in making the contempt declaration and imprisonment order was other than to punish for non-compliance with court order – found that it was not established that the judge's predominant purpose was "improper" – found that tort not made out **TORTS** – judicial immunity – whether common law judicial immunity protected inferior court judge from liability for tort of false imprisonment – consideration of scope of common law judicial immunity afforded to inferior court judges – consideration of circumstances where inferior court judges may lose that immunity – consideration of whether common law distinction between immunity of superior and inferior court judges remains in place – where judge made orders for which there was no proper foundation in law and was guilty of a gross irregularity of procedure and denial of procedural fairness – found that the judge lost the protection of judicial immunity afforded to inferior court judges because he acted without or in excess of jurisdiction

TORTS – justification defence – whether security, police and prison officers protected from liability in tort by common law justification defence when acting pursuant to an order or warrant made by an inferior court judge which was void ab initio but appeared regular on its face when executed – held that no such defence available at common law in respect of orders or warrants issued by inferior court judges – found that defence is only available to officers of the court or "ministerial officers" who are bound by a duty to the court to obey a warrant issued by the court which appeared regular on its face

STATUTORY INTERPRETATION – whether s 249 of the *Criminal Code Act 1899* (Qld) applies in the case of warrants issued by a federal court – whether Federal Circuit Court of Australia is "any court" under s 249 of the *Criminal Code Act 1899* (Qld) – whether s 35 of the *Acts Interpretation Act 1954* (Qld) applies to the interpretation of s 249 of the *Criminal Code Act 1899* (Qld) – found that s 35 does apply and the Federal Circuit Court of Australia is not a court "in and for" or "in and of" Queensland – found that defence not available

DAMAGES – claim for general, aggravated and exemplary damages for false imprisonment and deprivation of liberty – imprisonment of seven days in watch house and prison – consideration of principles that apply in assessing general, aggravated and exemplary damages for false imprisonment and deprivation of liberty – found that unlawful imprisonment of applicant warranted award of general damages – found that duration, nature and circumstances of imprisonment and hurt to feelings suffered by applicant warranted award of aggravated damages – found that judge's reckless disregard of applicant's rights and the rule of law warranted award of exemplary damages

DAMAGES – claim for general damages for personal injury – where applicant suffered post-traumatic stress disorder as a result of false imprisonment – award of damages assessed pursuant to *Civil Liability Act 2003* (Qld) and *Civil Liability Regulation 2014* (Qld) which require consideration of impairment caused by psychiatric injury – consideration of expert evidence regarding impairment – consideration of material non-disclosures by applicant regarding pre-existing conditions – found that award of general damages for a moderate mental disorder was warranted

DAMAGES – claim for damages for loss of earning capacity – consideration of principles applicable to

---

Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020

compensation for loss of earning capacity – found that some diminuation to earning capacity resulted from psychiatric injury – found that no substantial financial loss established but that psychiatric injury may cause future financial loss – found that modest award of damages for loss of earning capacity warranted

Legislation:

Constitution of the Commonwealth of Australia ss 80, 118, 120
Disability Discrimination Act 1992 (Cth)
Evidence Act 1995 (Cth) s 140(2)(c)
Extradition Act 1988 (Cth)
Family Law Act 1975 (Cth) Pts XIIIA, XIIIB, ss 4(3)(e)-(f), 35, 39(1A), 75(2), 79, 112AA, 112AB, 112AD, 112AE, 112AP, 121
Family Law Rules 2004 (Cth) rr 1.10(1), 13.04
Federal Circuit Court of Australia Act 1999 (Cth) ss 10(1)(a), 17
Federal Circuit Court Rules 2001 (Cth) rr 1.06, 14.04, 19.02, 24.03
Federal Court of Australia Act 1976 (Cth) s 51A
Judiciary Act 1903 (Cth) ss 24, 35
Acts Interpretation Act 1954 (Qld) ss 4, 35
Civil Liability Act 2003 (Qld) sch 2, ss 52, 61-62
Civil Liability Regulation 2014 (Qld) schs 4-7, regs 7-8
Corrective Services Act 2006 (Qld) s 276
Criminal Code Act 1899 (Qld) ss 119A, 249, 359A, 729(3)
District Court of Western Australia Act 1969 (WA)
Interpretation Act 1987 (NSW) s 12(1)
Judicial Officers Act 1986 (NSW) s 44B
Land and Income Tax Assessment Act 1895 (NSW)
Police Powers and Responsibilities Act 2000 (Qld) s 796
24 Geo II, c 44 (Constables Protection Act) 1750 (Imp) s 6
31 Car II, c 2 (Habeas Corpus Act) 1679 (Imp)
1 & 2 Vict, c 74 (Small Tenements Recovery Act) 1838 (Imp)
Magistrates' Courts (Northern Ireland) Act 1964 (NI) s 15

Cases cited:

Agnew v Jobson (1877) 13 Cox CC 625
Allen v Sharp (1848) 12 JP 693; 2 Exch 352
Andrews v Marris (1841) 1 QB 3; 113 ER 1030
Attorney-General (NSW) v Agarsky (1986) 6 NSWLR 38
Attorney-General (NSW) v Mayas Pty Ltd (1988) 14 NSWLR 342

Australian Iron & Steel Ltd v Greenwood (1962) 107 CLR 308; [1962] HCA 42

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34

Broome v Cassell & Co Ltd [1972] AC 1027; 1 All ER 801

Bulsey v The State of Queensland [2015] QCA 187

Butler v Simmonds Crowley & Galvin [2000] 2 Qd R 252; [1999] QCA 475

Butt v Newman (1819) 171 ER 850

Calder v Halket (1840) 3 Moo PC 28; 13 ER 12

Cameron v Cole (1944) 68 CLR 571; [1944] HCA 5

Coffey v State of Queensland [2010] QCA 291

Coleman v Watson [2017] QSC 343

Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220; [1935] HCA 45

Corbett v The King (1932) 47 CLR 317; [1932] HCA 36

Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2014] AC 366; [2013] 4 All ER 8

DAI v DAA (2005) 191 FLR 360; [2005] FamCA 88

Davis v Capper (1829) 10 B & C 28; 109 ER 362

Day v The Queen (1984) 153 CLR 475; [1984] HCA 3

Demer v Cook (1903) 88 LT 629; 20 Cox CC

Director of Public Prosecutions (NSW) v Kmetyk (2018) 85 MVR 25; [2018] NSWCA 156

Dr Drury's Case (1610) 8 Co Rep 141; 77 ER 688

DRJ v Commissioner of Victims Rights (No 2) (2020) 103 NSWLR 692; [2020] NSWCA 242

Eaves v Donnelly [2011] QDC 207

Ex parte Taylor; Re Butler (1924) 41 WN (NSW) 81

FAI Allianz Insurance Ltd v Lang (2004) 42 MVR 482; [2004] NSWCA 413

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22

Feather v Rogers (1909) 9 SR (NSW) 192

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34

Firth v Director of Public Prosecutions (NSW) [2018] NSWCA 78

Fleet v Royal Society for the Prevention of Cruelty to Animals [2005] NSWSC 926

Gallo v Dawson (1988) 63 ALJR 121; (1988) 82 ALR 401

Garthwaite v Garthwaite [1964] P 356; 2 All ER 233

Gerard v Hope [1965] Tas SR 15

Girginis v Kastrati (1988) 49 SASR 371

Goldie v The Commonwealth (No 2) (2004) 81 ALD 422; [2004] FCA 156

Graham v Baker (1961) 106 CLR 340; [1961] HCA 48

Gray v Motor Accident Commission (1998) 196 CLR 1; [1998] HCA 70

Groome v Forrester (1816) 5 M & S 314; 105 ER 1066

Gwinne v Poole (1692) 2 Lutw 935; 125 ER 522

Hadkinson v Hadkinson [1952] P 285; 2 All ER 567

Haines v Bendall (1991) 172 CLR 60; [1991] HCA 15

Haskins v The Commonwealth (2011) 244 CLR 22; [2011] HCA 28

Harrington v Lowe (1996) 190 CLR 311; [1996] HCA 8

Hazelton v Potter (1907) 5 CLR 445; [1907] HCA 63

Hemelaar v Walsh [2017] QDC 157

Henderson v Preston (1888) 21 QBD 362

Ho v Loneragan [2013] WASCA 20

Houlden v Smith (1850) 14 QB 841; 117 ER 323

In re McC (A Minor) [1985] 1 AC 528; [1984] 3 All ER 908

In the Marriage of Tate (No 3) (2003) 30 Fam LR 427; [2003] FamCA 112

In the Marriage of Schwarzkopff (1992) 106 FLR 274

Isaacs v Robertson [1985] AC 97; [1984] 3 All ER 140

Jones v Chapman (1845) 14 M & W 124; 153 ER 416

Kable v New South Wales (2012) 268 FLR 1; [2012] NSWCA 243

Keighly v Bell (1866) 4 F & F 763; 176 ER 781

Kuddas v Chief Constable of Leicestershire [2002] 2 AC 122; [2001] 3 All ER 193

Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10

Lamb v Cotogno (1987) 164 CLR 1; [1987] HCA 47

Lewis v Australian Capital Territory (2020) 271 CLR 192; [2020] HCA 26

Lindsay v Leigh (1848) 11 QB 455; 116 ER 547

London v Cox (1867) LR 2 HL 239

Love v Attorney-General (NSW) (1990) 169 CLR 307; [1990] HCA 4

Luck v University of Southern Queensland (2014) 145 ALD 1; [2014] FCAFC 135

M'Creadie v Thomson 1907 SC 1176

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638; [1990]

HCA 20

Maxwell-Smith v S & E Hall Pty Ltd (2014) 86 NSWLR 481; [2014] NSWCA 146

McFadzean v Construction, Forestry, Mining and Energy Union [2004] VSC 289

Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5

Mills v Stanway Coaches Ltd [1940] 2 KB 334; 2 All ER 586

Minchin v Public Curator of Queensland [1965] ALR 91

Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; [2001] HCA 17

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 (2021) 272 CLR 329; [2021] HCA 6

Moll v Butler (1985) 4 NSWLR 231

Mooney v Commissioners of Taxation (NSW) (1905) 3 CLR 221; [1905] HCA 61

Moravia v Sloper (1737) Willes 30; 125 ER 1039

Morrell v Martin (1841) 3 Man & G 581; 133 ER 1273

Morse v James (1738) Willes 122; 125 ER 1089

Myer Stores Ltd v Soo [1991] 2 VR 597

Nakhla v McCarthy [1978] 1 NZLR 291

New South Wales v Ibbett (2005) 65 NSWLR 168; [2005] NSWCA 445

New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57

New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26

New South Wales v Moss (2000) 54 NSWLR 536; [2000] NSWCA 133

New South Wales v Williamson (2012) 248 CLR 417; [2012] HCA 57

Nicholas v Walker and Carter (1634) Cro Car 394; 79 ER 944

O'Connor v Isaacs [1956] 2 QB 288; 2 All ER 417

O'Shane v Harbour Radio Pty Ltd (2013) 85 NSWLR 69; [2013] NSWCA 315

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (2021) 272 CLR 33; [2021] HCA 2

Obeid v Lockly (2018) 98 NSWLR 258; [2018] NSWCA 71

Oldham Justices; Ex parte Cawley (1996) 2 WLR 681; 1 All ER 464

Olliet v Bessey (1682) T Jones Rep 214; 84 ER 1223

Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404; [1994] HCA 54

Paff v Speed (1961) 105 CLR 549; [1961] HCA 14

Paul v Rendell (1981) 55 ALJR 371

Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19

Perkin v Proctor and Green (1768) 2 Wils KB 382; 95 ER 874

Permanent Trustee Co (Canberra) Ltd v Finlayson (1968) 122 CLR 338; [1968] HCA 85

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) 196 ALR 257; [2003] HCA 10

Polley v Fordham (No 2) (1904) 91 LT 525

Posner v Collector for Interstate Destitute Persons (Vic) (1946) 74 CLR 461; [1946] HCA 50

Price v Messenger (1800) 2 Bos & P 158; 126 ER 1213

R v Armstrong [1996] 1 Qd R 316

R v Deemal [2010] 2 Qd R 70; [2009] QCA 131

R v HBZ (2020) 4 QR 171; [2020] QCA 73

R v JAA [2019] 3 Qd R 242; [2018] QCA 365

R v Manchester City Magistrates' Court; Ex parte Davies [1988] 1 WLR 667; 1 All ER 930

R v Manchester City Magistrates' Court Ex parte Davies [1988] 3 WLR 1357; [1989] 1 All ER 90

R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section) (1951) 82 CLR 208; [1951] HCA 3

R v Paz [2018] 3 Qd R 50; [2017] QCA 263

R v Shetty [2005] 2 Qd R 540; QCA 225

R v Turnbull; Ex parte Taylor (1968) 123 CLR 28; [1968] HCA 88

Raad v New South Wales [2017] NSWDC 63

Rajski v Powell (1987) 11 NSWLR 522

Raven v Burnett (1895) 6 QLJ 166

Re Bolton; Ex parte Beane (1987) 162 CLR 514; [1987] HCA 12

Re Colina; Ex parte Torney (1999) 200 CLR 386; [1999] HCA 57

Re East; Ex parte Nguyen (1998) 196 CLR 354; [1998] HCA 73

Read v Wilmot (1672) 1 Vent 220; 86 ER 148

Robertson v The Queen (1997) 92 A Crim R 115

Romig v Tabcorp Holdings Ltd [2014] QSC 249

Ruddock v Taylor (2003) 58 NSWLR 269; [2003] NSWCA

Willis v Maclachlan (1876) 1 Ex D 376
Winters v Fogarty [2017] FCA 51
Wood v Fetherston (1901) 27 VLR 492
Yammine v Kalwy [1979] 2 NSWLR 151
Yeldham v Rajski (1989) 18 NSWLR 48

Abimbola Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford University Press, 1993)
Edward Lutwyche and William Nelson, *The Reports and Entries of Sir Edward Lutwyche* (Nutt and Gosling, 1718)
Enid Campbell, 'Inferior and Superior Courts and Courts of Record' (1997) 6 *Journal of Judicial Administration* 249
Halsbury's Laws of England (4th ed)
Harvey McGregor, *McGregor on Damages* (15th ed, 1988)
Mark Aronson and Harry Whitmore, *Public Torts and Contacts Law* (Law Book Co, 1982)
Sir Frederick Pollock, *The Law of Torts* (1st ed, 1887)
William Henry Watson, *A Practical Treatise on the Office of Sheriff* (Sweet, Maxwell, Stevens & Norton, 1848)
William Lambard, *Larmbard's Eirenarcha* (1614) Cap 4 370

Division:	General Division
Registry:	Australian Capital Territory
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	852
Date of hearing:	6 to 15 December 2021, 24 May 2022
Counsel for the applicant:	Mr P Herzfeld SC with Mr D Reynolds
Solicitor for the applicant:	Ken Cush & Associates
Counsel for the first respondent:	Mr J Kirk SC with Ms P Bindon
Solicitor for the first respondent:	King & Wood Mallesons
Counsel for the second respondent:	Mr T Howe QC with Mr D Hume
Solicitor for the second respondent:	Australian Government Solicitor

Counsel for the third respondent:	Mr J Horton QC with Mr D Favell
Solicitor for the third respondent:	Crown Law

ORDERS

ACD 57 of 2020

BETWEEN:	**MR STRADFORD** Applicant
AND:	**JUDGE SALVATORE PAUL VASTA** First Respondent
	COMMONWEALTH OF AUSTRALIA Second Respondent
	STATE OF QUEENSLAND Third Respondent

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **30 AUGUST 2023**

THE COURT ORDERS THAT:

1. Until further order, the applicant in this proceeding be given, for the purposes of this proceeding, the pseudonym Mr Stradford and the applicant's former wife be given the pseudonym Mrs Stradford.
2. Judgment be entered in favour of the applicant against the first, second and third respondents jointly and severally for personal injury and loss of earning capacity in the amount of $59,450.
3. Judgment be entered in favour of the applicant against the first and second respondents jointly for general and aggravated damages for false imprisonment and deprivation of liberty in the amount of $35,000 plus interest under s 51A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) from 6 December 2018 to the date of judgment at the pre-judgment rates specified in the Interest on Judgments Practice Note (GPN-INT).
4. Judgment be entered in favour of the applicant against the first and third respondents jointly for general and aggravated damages for false imprisonment and deprivation of liberty in the amount of $165,000 plus interest under s 51A of the FCA Act from 6 December 2018 to the date of judgment at the pre-judgment rates specified in the Interest on Judgments Practice Note (GPN-INT).

5. Judgment be entered in favour of the applicant against the first respondent for exemplary damages for false imprisonment and deprivation of liberty in the amount of $50,000.

6. The parties are to confer with a view to reaching agreement in respect of the appropriate order as to costs and in the event that no agreement is reached within two weeks from the date of judgment, the parties are to arrange to have the matter relisted for the purposes of hearing further submissions in respect of costs.

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

TABLE OF CONTENTS

REASONS FOR JUDGMENT

WIGNEY J

1 The applicant in this proceeding was the victim of a gross miscarriage of justice. He was detained and imprisoned for contempt following what could fairly be described as little more than a parody of a court hearing. He spent seven days in prison before being released. The order that resulted in his incarceration was subsequently set aside. The central issue in this proceeding is whether he is entitled to a remedy to compensate him for the injury and loss suffered by him as a consequence of that lamentable incident.

2 The applicant will be referred to as **Mr Stradford** in these reasons for judgment. That is not his real name. It is a pseudonym that was used in the proceedings that resulted in his imprisonment. It is appropriate to continue to use that pseudonym.

3 The person primarily responsible for Mr Stradford's imprisonment was the first respondent, a judge of the then Federal **Circuit Court** of Australia (the **Judge**). Mr Stradford and his former wife came to appear before the Judge in a matrimonial cause pursuant to the ***Family Law Act 1975*** (Cth). The Judge believed that Mr Stradford had not disclosed his true financial position to his former wife and ordered him to disclose certain documents. When the matter came back before the Judge on a later occasion, the Judge declared that Mr Stradford had not complied with those orders and was in contempt of court. He ordered that Mr Stradford be imprisoned for twelve months and issued a warrant to give effect to that order.

4 Private security guards contracted by the second respondent, the **Commonwealth** of Australia, detained Mr Stradford pursuant to the warrant and took him to a holding cell in the court complex. A short time later, Queensland Police officers, also acting pursuant to the warrant, took custody of Mr Stradford. He spent five miserable days in a police watch house in Brisbane before being transported to a correctional facility operated by the third respondent, the State of **Queensland**. He spent another two difficult days in that facility before he was released on bail pending an appeal.

5 There could be no real dispute that the Judge made a number of fundamental and egregious errors in the purported exercise of his power to punish Mr Stradford for contempt. He sentenced Mr Stradford to imprisonment for contempt without first finding that Mr Stradford had in fact failed to comply with the orders in question. He erroneously believed that another judge had made that finding, though exactly how he could sensibly have arrived at that position

in the circumstances somewhat beggars belief. He also failed to follow any of the procedures that he was required to follow when dealing with contempt allegations and otherwise failed to afford Mr Stradford any procedural fairness. He effectively pre-judged the outcome. Imprisonment was a fait accompli.

6 It perhaps came as no surprise, then, that on 15 February 2019, the Full Court of the Family Court of Australia (as it then was) (**FamCA Full Court**) set aside both the contempt declaration and the imprisonment order made by the Judge. It concluded that "to permit the declaration and order for imprisonment to stand would be an affront to justice" and that what had occurred to Mr Stradford constituted a "gross miscarriage of justice": ***Stradford*** *v Stradford* (2019) 59 FamLR 194; [2019] FamCAFC 25 at [9] and [73].

7 Mr Stradford's detention and the deprivations and indignities that he had to endure while imprisoned exacted a significant toll on him. There was no dispute that he continues to suffer from post-traumatic stress disorder and a major depressive disorder as a result of the incident.

8 Mr Stradford commenced this proceeding alleging that the Judge had committed the torts of false imprisonment and collateral abuse of process. He also alleged that the Commonwealth and Queensland were vicariously liable for the actions of their officers in falsely imprisoning him. He claimed damages for deprivation of liberty, personal injury and loss of earning capacity. The Judge, the Commonwealth and Queensland all denied liability.

9 The question whether the Judge, the Commonwealth and Queensland are liable as alleged by Mr Stradford raises a number of issues, some of which involve complex and difficult questions of fact and law.

10 The first issue concerns the precise nature of the errors made by the Judge in imprisoning Mr Stradford for contempt. The Judge admitted that he made a number of errors, though he disputed some of the other errors that were alleged against him. In particular, he disputed that, in instigating or pursuing the contempt allegation against Mr Stradford, he was motivated by an improper or collateral purpose. He therefore disputed that he committed the tort of collateral abuse of process. He also disputed that he pre-judged the outcome of the contempt allegation against Mr Stradford.

11 The second issue, which relates to the tort of false imprisonment, is whether the imprisonment order made by the Judge remained valid until set aside by the FamCA Full Court. If the order remained valid until set aside, it provided lawful justification for Mr Stradford's imprisonment.

If, however, the order was invalid from the outset because it was infected by jurisdictional error, it provided no lawful justification.

12 The third issue, which is perhaps the most fundamental issue insofar as the Judge's liability is concerned, is whether, even if it were to be found that Mr Stradford was falsely imprisoned, the Judge is nevertheless immune from any liability because he made the imprisonment order in his capacity as a judge. That issue is by no means straightforward. The Judge was a judge of an inferior court, not a superior court, and was not protected by any statutory immunity. The difficulty arises because the common law principles concerning judicial immunity that apply in respect of inferior court judges, at least in Australia, are somewhat unsettled. It is therefore necessary to embark on an excursion through a long line of cases, stretching back hundreds of years, which deal with the circumstances in which an inferior court judge may lose the protection of judicial immunity.

13 The question whether the Judge is protected by judicial immunity in the circumstances of this case raises four key questions: first, whether at common law inferior court judges lose their immunity from suit in respect of their judicial acts if they acted without, or in excess of, jurisdiction; second, if that is the case, what precisely does acting without, or in excess of, jurisdiction mean or entail in that context; third, did the Judge act without, or in excess of, jurisdiction in that sense when making the imprisonment order; and fourth, whether, despite being an inferior court judge, the Judge was nevertheless entitled to the immunity of a superior court judge in the circumstances of this case because he was exercising the Circuit Court's contempt powers.

14 The fourth issue, which concerns the liability of the Commonwealth and Queensland, is whether police and prison officers have available to them a common law defence to an action for false imprisonment if they did no more than act in accordance with an order or warrant issued by an inferior court judge which appeared valid on its face. This is another contentious issue. In order to resolve it, it is again necessary to trawl through another long line of somewhat obscure cases, again stretching back hundreds of years, concerning the liability of police and prison officers in such circumstances.

15 The fifth issue concerns whether Queensland has available to it a statutory defence based on s 249 of the ***Criminal Code*** *Act 1899* (Qld). The issue is, in essence, whether that provision, properly construed, can apply to a warrant issued by a federal court, in this case the Circuit

Court, simply because that court was sitting in Queensland when the warrant was issued and the warrant was therefore to be enforced in Queensland by officers located in Queensland.

16 The issues in this case are not, however, entirely limited to liability. If liability is established, significant issues also arise in relation to the assessment and quantification of damages. Those issues include: whether Mr Stradford is entitled to aggravated and exemplary damages for deprivation of liberty; the quantification of damages referrable to the psychiatric injury suffered by Mr Stradford as a result of his imprisonment; and the quantification for any loss of earning capacity suffered by Mr Stradford as a result of his psychiatric injury.

17 For the reasons that follow, most of the liability issues are resolved in favour of Mr Stradford. The Judge, the Commonwealth and Queensland are liable to Mr Stradford for the tort of false imprisonment. There was no lawful justification for Mr Stradford's detention. The Judge is not protected by judicial immunity because he relevantly acted without, or in excess of, his jurisdiction. The Commonwealth and Queensland do not have available to them, at least in the circumstances of this case, any defence based on the fact that their officers acted pursuant to a warrant which appeared regular on its face. Mr Stradford is accordingly entitled to an award of damages. As will be seen, however, those damages, properly assessed, are not nearly as large as Mr Stradford would have it.

FACTS RELEVANT TO LIABILITY

18 On 7 April 2017, Mr Stradford filed an initiating application in the Circuit Court (the **matter**) seeking property adjustment orders under s 79 of the Family Law Act in respect of the matrimonial assets owned by him and his then wife. As adverted to earlier, both Mr Stradford and his then wife were identified in the proceedings in the Circuit Court, and on appeal in the FamCA Full Court, by pseudonyms. The identities of parties to matrimonial disputes are generally protected: see s 121 of the Family Law Act. A pseudonym order will be made in this proceeding to maintain that protection.

19 The Circuit Court had jurisdiction in relation to the matter because it had jurisdiction to determine "matrimonial causes" of the kind referred to in the Family Law Act (subject to two presently irrelevant exceptions): s 39(1A) of the Family Law Act; s 10(1) of the *Federal Circuit Court of Australia Act 1999* (Cth) (**FCC Act**). The matter between Mr Stradford and his then wife was undoubtedly a matrimonial cause.

20 Following a number of earlier interlocutory hearings, on 19 June 2018 the matter was listed before Judge Spelleken for directions. Mr Stradford appeared unrepresented and Mrs Stradford did not appear. Judge Spelleken listed the matter for final hearing at 9.45 am on 10 August 2018 and made various procedural orders, including orders that each party file a case outline setting out a minute of the orders sought, a chronology, a list of affidavits to be relied on and a statement setting out the evidence applicable to the principles in ss 79(4) and 75(2) of the Family Law Act.

21 On 10 August 2018, the matter came before the Judge for final hearing. Mr Stradford and Mrs Stradford each appeared unrepresented.

22 The hearing did not progress smoothly. To begin with, Mr Stradford appears not to have fully complied with the orders made by Judge Spelleken on 19 June 2018. To make matters worse, Mrs Stradford alleged, and the Judge readily accepted, that Mr Stradford had not properly or adequately disclosed his financial circumstances. Mr Stradford's failure to properly disclose his financial circumstances plainly raised the Judge's ire. His Honour made his displeasure known to Mr Stradford and told him that he would have no hesitation in gaoling him in the event that he did not comply with any further disclosure orders. His Honour said:

> … And, you know, believe me, if there isn't the full disclosure there will be consequences, because that's what I do. **If people don't comply with my orders there's only [one] place they go.** Okay. And I don't have any hesitation in jailing people for not complying with my orders …
>
> (Emphasis added)

23 The following exchange, which occurred while Mr Stradford attempted to explain why he hadn't produced statements relating to one of his gambling accounts, rather typifies the tenor of the hearing:

> [MR STRADFORD]: From my – from my enquiries with UBET, because I couldn't find it on my transaction statement, that's what they had told me.
>
> HIS HONOUR: Rubbish.
>
> [MR STRADFORD]: So - - -
>
> HIS HONOUR: Rubbish.
>
> [MR STRADFORD]: Okay.
>
> HIS HONOUR: Rubbish – rubbish. Do not accept that for one second, one iota of a second.
>
> [MR STRADFORD]: Okay.

> HIS HONOUR: That is absolute rubbish. So do you understand what - - -
>
> [MR STRADFORD]: I just – a letter from the court would have helped.
>
> HIS HONOUR: Do not ever talk over the top of me.
>
> [MR STRADFORD]: Sorry.
>
> HIS HONOUR: I have told you, I will put you in jail in contempt of this court if you talk over the top of me. Do you understand? I am not happy at all with you, but I am happy for you to think about this, because your disclosure at this point has been absolutely abysmal. And if it is that I order this and you do not disclose your superannuation, your current bank accounts, all the accounts that you say have now been closed, and when they were closed and what the balance was when they were closed – all of those matters need to be given to [Mrs Stradford] by a certain time, and I would think it would be within two months. And if that isn't given to her – **if it is that she comes here, and she complains that she has asked for things and you have not given them to her, bring your toothbrush.** Okay. So you have a think about it.
>
> (Emphasis added)

24 The end result was that the Judge effectively adjourned the hearing of the matter and made a number of orders concerning the future progress of the matter. The orders included an order that Mr Stradford "make full and frank disclosure", including disclosure of certain categories of documents comprising bank statements, gambling account statements, personal tax returns and company tax returns and financial statements (the **disclosure orders**). Mr Stradford was also required to file an affidavit concerning his disclosure in accordance with the order. The matter was adjourned for mention on 26 November 2018. The orders made by the Judge included the following notations:

> A. If on the adjourned date the Court is of the opinion that the Applicant has not made full and frank disclosure in accordance with today's orders, he is to be dealt with for contempt of those orders.
>
> B. If a contempt hearing has to take place before [the Judge], it will be heard 10.00am 5 December 2018.
>
> C. If the Court is satisfied that [there] has been full and frank disclosure by the Applicant husband, the matter be set down for a final hearing, allocating one (1) day.

25 On 2 November 2018, Mr Stradford filed an affidavit which included his evidence regarding his disclosure of certain records to Mrs Stradford in compliance, or purported compliance, with the orders made by the Judge on 10 August 2018.

26 On 12 November 2018, Mrs Stradford filed an affidavit which included her evidence about the extent to which she said that Mr Stradford had complied with the orders made by the Judge on 10 August 2018. The effect of Mrs Stradford's evidence was that Mr Stradford had failed to disclose a number of categories of documents that he was required to disclose.

27 On 26 November 2018, the matter came before Judge Turner for directions. Mr Stradford and Mrs Stradford each appeared unrepresented. Judge Turner asked the parties to address her on compliance with the orders of the Judge of 10 August 2018. Her Honour made handwritten annotations on a copy of the orders, circling those categories of documents that Mrs Stradford claimed Mr Stradford had failed to disclose. The general effect of what Mr Stradford told Judge Turner was that he had produced all that he was physically capable of producing.

28 Judge Turner did not attempt to finally resolve the dispute between Mr Stradford and Mrs Stradford concerning disclosure. Rather, her Honour ordered that the matter be adjourned to 6 December 2018 "for hearing of the contempt application". It is important to emphasise that Judge Turner did not find that Mr Stradford had failed to comply with any of the disclosure orders, or that he had not made full and frank disclosure, or conclude that Mr Stradford was in contempt of the orders made by the Judge. Nor had any "contempt application" been filed.

29 On 6 December 2018, the matter came before the Judge. The hearing commenced shortly after 10.00 am. As before, both Mr Stradford and Mrs Stradford appeared unrepresented.

30 This is what the Judge said at the very commencement of the hearing:

> HIS HONOUR: All right. You're [Mr Stradford] and you're [Mrs Stradford]. All right. Okay. So when we were last together on 10 August, we had quite a talk about what the assets were that the two of you had. And I made a number of orders that needed to occur. And that has gone back into what Judge Turner has. But with regard to the matter that went back before her on 26 November, **I noted that if on the adjourned date the court, that is Judge Turner, was of the opinion that you, [Mr Stradford], had not made full and frank disclosure in accordance with the others, that you were to be dealt with for contempt of those orders,** and that that would take place before me. So that's that. So the matter can't go anywhere at this point in time, **because Judge Turner has determined that you are in contempt of the orders** that I made on 10 August. So that's where we are, it seems. So what do you want to say about that?
>
> (Emphasis added)

31 Mr Stradford then told the Judge that he had tried to provide full and frank disclosure, but that he was unable to produce some of the categories of documents. He endeavoured to explain why. His explanations included that he did not know anything about some of the bank accounts specified in the orders, that to the best of his knowledge some of the accounts did not exist and that he had produced all that he was able to produce. Mrs Stradford maintained that Mr Stradford's disclosure was deficient. She did not, however, file a contempt application, or even submit that Mr Stradford should be found to be in contempt.

32 It is worth pausing at this point to note that it would appear from the transcript that the Judge was proceeding under the misapprehension that Judge Turner had already found that Mr Stradford had not complied with the disclosure orders and was therefore in contempt. That had not occurred. It is also tolerably clear that Mr Stradford was maintaining that he had done all that he could do to comply with the disclosure orders. It is equally clear that the Judge did not believe Mr Stradford.

33 At that point, the Judge indicated that he was prepared to deal with Mr Stradford for contempt and asked Mrs Stradford what her attitude to that was. Mrs Stradford made it abundantly clear that she did not want Mr Stradford to go to gaol unnecessarily. She just wanted proper disclosure from him so they could arrive at a property settlement. His Honour indicated that he would adjourn the proceeding briefly to allow the parties to discuss whether they could reach an amicable settlement, failing which he would proceed to deal with Mr Stradford for contempt.

34 When the hearing resumed after the short adjournment, Mrs Stradford indicated that she had failed to reach any agreement with Mr Stradford concerning the property settlement. The following exchange then occurred:

> HIS HONOUR: So that's that. So, okay, well, it just means that **we will have to go ahead with the contempt hearing**. I've got something on at 11, so I will come back at quarter at 12. Okay. And we will sort this out. All right. **So I hope you brought your toothbrush**, [Mr Stradford].
>
> [MRS STRADFORD]: Sorry. No.
>
> HIS HONOUR: What's - - -
>
> [MRS STRADFORD]: Sorry, I said I don't want him to go to - - -
>
> HIS HONOUR: I don't care
>
> [MRS STRADFORD]: Okay.
>
> HIS HONOUR: This is - - -
>
> [MRS STRADFORD]: It's your decision.
>
> HIS HONOUR: This is my order.
>
> [MRS STRADFORD]: Okay
>
> HIS HONOUR: Not your order. You can't come to a conclusion, so therefore it means that this is still on foot. If this matter is still on foot, **he is in contempt. The only way he gets out of contempt is if this matter is not on foot any more**. You said that it cannot be settled, that he will not give you what you think is just and equitable. Therefore, it's still on foot. **Therefore, he is in contempt. Therefore, I am going to deal with him for contempt.** Okay. I've made that very, very clear. It's not your

> decision; it's my decision. You're not the one that's sending him to jail; I am. These are court orders and court orders need to be obeyed. Otherwise, what's the use of making the court orders. I made it very clear in August 2018 exactly what would happen if there was no compliance with these orders. Now, it's not your fault. **You're not the one who's sentencing him to jail; I am**. But he won't settle justly and equitably with you, the matter is on foot. You understand it. This is not anyone's fault but your own.
>
> (Emphasis added)

35 When the hearing resumed just before midday, the Judge repeated what he had said earlier about Judge Turner having found that Mr Stradford was in contempt and asked what it was that Mr Stradford wanted to say. Mr Stradford again endeavoured to tell the Judge that he had disclosed all that he was able to disclose, but his Honour summarily dismissed those protestations. There is no indication that the Judge had read or considered Mr Stradford's affidavit. The contents of that affidavit were certainly not the subject of any questioning, by either the Judge or Mrs Stradford. Mr Stradford's affidavit was certainly not formally read and Mr Stradford was not sworn-in or cross-examined on oath.

36 His Honour delivered an ex tempore judgment in which he found that Mr Stradford was in contempt of the orders made on 10 August 2018: *Stradford & Stradford* [2018] FCCA 3890 (**contempt judgment** or **CJ**). His Honour ordered that Mr Stradford be sentenced to imprisonment for a period of 12 months, to be served immediately, with Mr Stradford to be released from prison on 6 May 2019 and the balance of the sentence to be suspended for a period of 2 years.

37 In his judgment, the Judge outlined the history of the matter. That history included, according to his Honour, that Judge Turner had already found that Mr Stradford was in contempt for non-compliance with the orders made on 10 August 2018. His Honour noted that, having regard to that finding, it was up to him to assess "the criminality of that contempt": CJ at [21]. His Honour continued (at [22]-[28]):

> As I have stated both in the preamble to these remarks and in the course of the submissions that have been made in this Court, the gravamen of this contempt is that this matter that was supposed to be ready to proceed cannot proceed. The gravamen is that the wife is not cognisant of the true financial position of the Applicant, so that she can mount a meaningful case before this Court for a just and equitable property adjustment.
>
> I am of the view that these matters were matters where the Applicant, if he truly wanted, could have made proper disclosure. I am of the view that the Applicant was able to get those items and the Applicant was able to simply tell the wife exactly what sort of amount of money he was getting, how he was getting it, how it was being used or funnelled through different companies, what that meant for him "in the hand" and

where that money has been dissipated.

He has chosen not to. There can be no other inference available other than this is deliberate conduct so that the wife is kept in the dark and cannot make a proper, just and equitable submission to this Court as to what the property adjustment should be. It would leave the Court, as it was at 10 August 2018, looking at a negative property pool so that the Applicant husband did not have to in any way account for what it is that he has been doing with money that he has come into possession of, especially from the years 2014 to the present.

The mere fact that it seems that at least a million or something close to a million dollars has gone through gambling accounts shows that this is a proper inference to draw. That makes this contempt an extremely serious one.

The Court has very few weapons at its disposal to ensure that its orders are complied with. The Court must show to all litigants and to the whole of the community that when it makes orders, those orders must be complied with or there will be serious consequences and condign punishment to those who flout the orders of the Court.

In what I consider to be a very merciful submission, the wife has asked, even though she is not really a party to this part of the contempt proceeding, to say that she did not want the husband to be jailed because they have children together. It was obvious to me that she felt that she would be somehow responsible for this. Nothing could be further from the truth.

This is a matter where the responsibility lies wholly and solely with the husband. If it was that he had complied with these orders or shown to this Court that he had genuinely attempted to comply, then there would be no contempt. But there has been a contempt and notwithstanding how it is that the wife feels, it leads the Court only to one conclusion; that there must be an appropriate punishment for this contempt.

38 Following the delivery of his ex tempore judgment, the Judge made the following declaration and order:

THE COURT DECLARES:

A. That [MR STRADFORD] is in contempt of Order 3(a), (h), (j), (k), (l), (m), (n), and (o) of Orders made by [the Judge] on 10 August 2018 in that [MR STRADFORD] has failed to make full and frank financial disclosure.

THE COURT ORDERS:

1. That the Applicant [MR STRADFORD] be sentenced to a period of imprisonment in the Arthur Gorrie Correctional Centre for a period of twelve (12) months, to be served immediately with the Applicant to be released from prison on 6 May 2019, with the balance of the sentence to be suspended for a period of two (2) years from today's date.

39 At 12.25 pm on 6 December 2018, the Judge signed a document entitled "Warrant of Commitment". The body of the document was in the following terms:

WARRANT OF COMMITMENT

Family Law Act 1975

To: The Marshal

All Officers of the Australian Federal Police
All Officers of the State and Territory police forces
The Commissioner of Queensland Corrective Services

WHEREAS: [MR STRADFORD] of **[redacted]**, **in the State of Queensland** appeared before this Court on 6 December 2018.

AND WHEREAS the Court made an order, a copy of which is attached to this warrant, that the said person be imprisoned.

YOU, the said Marshal, all officers of the Australian Federal Police and all officers of the Police Forces of all the States and Territories of the Commonwealth of Australia are hereby directed to take and deliver the said person to the Commissioner of Queensland Corrective Services, together with this warrant.

AND YOU, the Commissioner of the Queensland Corrective Services are hereby directed to receive the said person into your custody, and to keep that person in accordance with the said order, a copy of which is attached to this warrant.

(Emphasis in original)

40 Shortly thereafter, two guards took custody of Mr Stradford. Those guards were employed by **MSS Security** Pty Ltd. At that time, MSS Security provided guarding services at the court complex occupied by the Circuit Court in Brisbane pursuant to a contract between it and the Commonwealth dated 28 November 2014.

41 One of the MSS guards had been called to the Judge's courtroom shortly before midday and was present in the courtroom from at least 12.05 pm during the delivery of the Judge's ex tempore judgment.

42 The two MSS guards escorted Mr Stradford to the door of the courtroom, through a public concourse for approximately 14 metres to a service door, though the service door to a goods lift and then to a holding cell in the court complex occupied by the Circuit Court. The MSS guards supervised Mr Stradford while he was detained in the holding cell.

43 There is no dispute that the conduct of the relevant MSS guards constituted a detention of Mr Stradford which was undertaken for and on behalf of the Commonwealth.

44 Between approximately 12.35 pm and 12.40 pm, officers of the Queensland Police Service arrived at court complex occupied by the Circuit Court. Between approximately 12.54 pm and 1.00 pm, those police officers left with Mr Stradford, handcuffed in their custody, and took him in a police van to the Roma Street Watchhouse.

45 For reasons that will become apparent, it is relevant to note that the Queensland Police Service had received a telephone call requesting the attendance of police officers at the Circuit Court

at 11.43 am on 6 December 2018. That was before the Judge recommenced the hearing during which he purportedly dealt with Mr Stradford for contempt.

46 Mr Stradford was transferred from the Roma Street Watchhouse to the Brisbane Correctional Centre on the morning of 10 December 2018. He was therefore imprisoned at the watch house by officers of the Queensland Police Service from 6 December 2018 to 10 December 2018; a total of 4 nights and 5 days. Further facts concerning Mr Stradford's imprisonment at the watch house will be detailed later in these reasons in the context of the assessment of damages.

47 There is no dispute that the conduct of the relevant officers of the Queensland Police Service between 6 December 2018 and 10 December 2018 constituted imprisonment of Mr Stradford.

48 Mr Stradford arrived at the Brisbane Correctional Centre on the morning of 10 December 2018. From that point in time he was detained by officers of Queensland Corrective Services.

49 On 12 December 2018, the matter was listed again before the Judge to hear an oral application to stay the orders made by his Honour on 6 December 2018. On this occasion Mr Stradford was legally represented by counsel and Mrs Stradford appeared unrepresented by telephone. By this time, Mr Stradford had filed an appeal against the judgment and orders of the Judge. The nub of the appeal was that the Judge had proceeded on the erroneous premise that Judge Turner had found that Mr Stradford was in contempt and that it was not open on the evidence to find to the requisite standard that Mr Stradford had acted in flagrant challenge the court's authority as required by s 112AP(1)(b) of the Family Law Act. The basis of the stay application was that if a stay was not granted, Mr Stradford would serve a significant proportion of his sentence of imprisonment and that to that extent the appeal would be rendered nugatory. Counsel for Mr Stradford also submitted that the appeal had reasonable prospects of success.

50 The Judge delivered an ex tempore judgment in which he granted the stay application: *Stradford & Stradford (No 2)* [2018] FCCA 3961 (**stay judgment** or **SJ**). His Honour effectively conceded that he erred in finding that Mr Stradford was in contempt and erred in sentencing him to imprisonment. In particular, his Honour appeared to accept that he incorrectly assumed that Judge Turner had already found that Mr Stradford was in contempt. His Honour's reasons for allowing the stay application were as follows (SJ at [1]-[15]):

> On 6 December 2018, I made an order that Mr Stradford was in contempt of orders that I had previously made on 10 August 2018.
>
> Specifically, I found him in contempt of order 3(a), (h), (j), (k), (l), (m), (n) and (o) of those orders. I had actually not found him in contempt of orders 3(k) or 3(l), but had

found him in contempt of the others.

My reason for doing so was that I had been given a list with markings from Her Honour, Judge Turner. My reasons for having made the orders on 10 August 2018 were to tell the Applicant husband that he needed to make this disclosure properly, especially since there had been previous orders for him to do so.

My notation was that the matter would go back to a duty judge; but if the duty judge was of the opinion that the Applicant has not made full and frank disclosure in accordance with today's orders, that he was to be dealt with for contempt of those orders.

That was to allow that Court to then deal with the contempt, or, if the Court so chose, they could send the matter back to me and I would deal with the matter as a contempt of my orders. My very clear memory is that I had told the Applicant that he would be looking at two years' imprisonment if I found that he was in contempt of my orders.

What has been shown to me is that I could very well have been in error in assuming that Her Honour had actually found, by the markings that she had given to me, that the Applicant was prima facie in contempt of my orders.

Whilst I had read the affidavit of the Applicant that he had filed on 2 November 2018, the only matters that I had really gone through in any depth were the G Group accounts and the tax returns; that is, making a finding that the G Group accounts and the online gambling accounts had not been properly disclosed. I had been given the documents that the Applicant had disclosed and they were totally insufficient for the purposes of affording the wife knowledge of the financial circumstances of the husband.

The husband had claimed that he had disclosed his tax returns but the fact was that he had not disclosed his tax returns; he had only disclosed his tax assessments and not his actual returns.

Those were the matters that I specifically highlighted as they were the matters that I felt were most illustrative of the contempt shown by the Applicant husband. I did not feel the need to explore any other aspect further because I had, in effect, proceeded upon the basis that Her Honour had already made a finding of contempt.

It seems, on the material, that this could well have been an incorrect assumption. If that was an incorrect assumption, then it is an error by me not to have actually gone through with each and every item on that list and made a ruling as to whether the Applicant father was in contempt of my orders.

To do that I would have had to have the Applicant sworn to give evidence and cross-examined upon the material. I could have then used that actual sworn evidence to decide whether the contempt had actually occurred. But I proceeded straight to a "sentencing" proceeding because I was of the view that the issue of whether the Applicant husband was in contempt had already been decided.

It seems to me if that is also the conclusion that is reached by a Court of Appeal (and I think that it would be), then that Court would really have no hesitation in allowing the appeal and remitting the matter back to me.

I have looked at the declaration that I made on 6 December 2018 and, after discussion with counsel, have come to the conclusion that I am *functus officio* with regard to that declaration. I do not have the power to stay that declaration, even though I am of the view that it should be stayed.

However, I can stay the orders that I had made, especially the one that the Applicant

> be sentenced to a period of imprisonment of 12 months, but to be released after serving five months. It seems to me that the basis upon which I made that order is almost certainly incorrect. Therefore, it would be totally unjust not to grant the relief that has been sought by the Applicant husband today.
>
> So, I will allow the oral application for a stay of order 1 sentencing the Applicant to imprisonment. That order is stayed pending the outcome of the appeal of that order and declaration.

51 The Judge stayed the order he had made on 6 December 2018 sentencing Mr Stradford to imprisonment for 12 months and ordered that Mr Stradford be forthwith released from custody pending the outcome of the appeal from his judgment.

52 Mr Stradford was released from the Brisbane Correctional Centre on 12 December 2018.

53 Mr Stradford was imprisoned at the Brisbane Correctional Centre by Queensland Corrective Services officers from 10 December 2018 to 12 December 2018; a total of two days and two nights. Further facts concerning Mr Stradford's imprisonment at the Brisbane Correctional Centre will be detailed later in the context of the assessment of damages.

54 There was no dispute that the conduct of the relevant officers of the Queensland Corrective Services 10 December 2018 and 12 December 2018 constituted imprisonment of Mr Stradford.

55 There is no dispute that the Judge's conduct in making the declaration and orders on 6 December 2018 was a direct or proximate cause of the whole of Mr Stradford's imprisonment from 6 December 2018 to 12 December 2018. Nor was there any dispute that the Judge's conduct in initiating and maintaining the contempt proceeding against Mr Stradford was a necessary cause of the whole of Mr Stradford's imprisonment from 6 December 2018 to 12 December 2018.

56 The appeal from the Judge's contempt judgment was swiftly heard and determined. On 15 February 2019, the FamCA Full Court delivered judgment unanimously allowing Mr Stradford's appeal from the orders made by the Judge on 6 December 2018: *Stradford*. The FamCA Full Court's view of the Judge's conduct of the proceeding which resulted in Mr Stradford being imprisoned is readily apparent from the following passage at the commencement of the judgment (*Stradford* at [9]):

> We are driven to conclude that the processes employed by the primary judge were so devoid of procedural fairness to the husband, and the reasons for judgment so lacking in engagement with the issues of fact and law to be applied, that to permit the declaration and order for imprisonment to stand would be an affront to justice …

57 The FamCA Full Court set aside both the declaration and the order made by the Judge on 6 December 2018 sentencing Mr Stradford to imprisonment. The key findings made by the FamCA Full Court may be summarised as follows.

58 First, the Judge proceeded in apparent ignorance or disregard of the provisions of the FCC Act and Family Law Act which separately deal with the punishment for a contempt of court committed in the face or hearing of the court (relevantly dealt with in Pt XIIIB of the Family Law Act and s 17 of the FCC Act) and the imposition of sanctions for failing to comply with orders (dealt with in Pt XIIIA of the Family Law Act).

59 Second, it was clear that the Judge had resolved or pre-determined, in advance of any finding that Mr Stradford had breached any of the disclosure orders, and irrespective of whether any application was made by Mrs Stradford, that he would, of his own motion, treat any non-compliance as a contempt, as distinct from a failure to comply with orders: *Stradford* at [13]-[20].

60 Third, and relatedly, the procedure adopted by the Judge was fundamentally flawed from the outset. The FamCA Full Court's conclusion in that regard is summarised in the following passage (at [19]):

> It can thus be seen that the primary judge's process failed from the outset on a number of levels. In advance of any breach of orders the primary judge pre-determined that any such breach, of whatsoever nature, would constitute "contempt" within the meaning of the Act. Moreover, the primary judge cast himself as prosecutor in any future proceeding for the offence of contempt. Both of these conclusions were reached by the primary judge without particularising any charge; establishing that the charges as particularised were prima facie established; and affording the husband any opportunity to be heard.

61 The FamCA Full Court considered that the Judge's pre-judgment as to how he would deal with Mr Stradford for non-compliance with the disclosure orders was "made all the more egregious by reason of the judge pre-judging imprisonment as the punishment before knowing the particulars of the offence or any matters in mitigation": *Stradford* at [21].

62 Fourth, the Judge in effect performed the roles of prosecutor, witness and judge and failed to follow the procedure mandated in r 19.02 of the *Federal Circuit Court Rules 2001* (Cth) (**FCC Rules**) for dealing with allegations of contempt other than contempt in the face or hearing of the court: *Stradford* at [22]-[27]. There was "no feature of this case which warranted, in the broader interests of justice, any departure from the fundamental principles of justice reflected in r 19.02": *Stradford* at [28]. The Judge did not "employ, by way of procedure, anything

remotely resembling the procedures specified in r 19.02 for the purposes of the hearing" on 6 December 2018: *Stradford* at [37].

63 Fifth, the Judge proceeded on the erroneous premise that Judge Turner had determined that Mr Stradford was in contempt, even though it could not possibly be inferred that any such determination had in fact been made: *Stradford* at [40]. The FamCA Full Court plainly found it difficult to comprehend how the Judge could possibly have come to believe that Judge Turner had already found that Mr Stradford was in contempt. The court also appears to have found that it was difficult to reconcile the Judge's belief in that regard with what occurred during the hearing. The FamCA Full Court said (at [41]-[43]):

> Further, if as is asserted, the primary judge was of the view that Judge Turner had already made a determination as to contempt, it is impossible to reconcile what follows in the transcript. There the primary judge can be seen questioning the husband as to his disclosure. Quite why that would be necessary if a determination of contempt had already been made is not at all apparent.
>
> It is also difficult to understand why, if the primary judge was of the view that Judge Turner had made the relevant determination as to contempt, it would be that the primary judge would himself ultimately make the relevant declaration or, indeed, to have heard the proceedings at all. Further, if Judge Turner had determined there was a contempt, it should be expected that, having followed the appropriate process, her Honour would move to sentence.
>
> Apart from erroneously stating that Judge Turner had made the determination, it is notable that the primary judge did not inform the husband of the particulars of the contempt if it can be construed that what the primary judge had purported to do was to receive submissions as to penalty.

64 Sixth, the FamCA Full Court found that, even putting to one side the Judge's failure to follow the processes and procedures mandated by the FCC Act and FCC Rules, the Judge's conduct of the proceeding constituted a clear denial of procedural fairness. Having considered the key parts of the transcript of the hearing on 6 December 2018, the FamCA Full Court concluded as follows (at [52]-[53]):

> It can be seen that without providing any particulars whatsoever as to the alleged contempt, the husband has purportedly been found guilty. The husband has had no opportunity whatsoever to be heard about that. Indeed, he could not be because he did not know what charge he was facing. Neither, thereafter, was the husband afforded the opportunity to be heard about any sanction. The primary judge announced to the husband that he will be "serving 12 months in jail" if, as the primary judge postulates, his Honour deals with "contempt today".
>
> It is difficult to envisage a more profound or disturbing example of pre-judgment and denial of procedural fairness to a party on any prospective orders, much less contempt, and much less contempt where a sentence of imprisonment was, apparently, pre-determined as the appropriate remedy.

65 Seventh, the Judge's conclusion that Mr Stradford had failed to comply with the orders made on 10 August 2018 was without any evidentiary foundation. Mr Stradford had joined issue as to whether he had failed to comply with the orders and yet there was "[n]o determination of contested evidence": *Stradford* at [56]. The Judge's failure to consider and reconcile Mr Stradford's sworn evidence constituted a "profound denial of procedural fairness": *Stradford* at [58].

66 The FamCA Full Court concluded that the making by the Judge of the declaration that Mr Stradford was in contempt and the order that Mr Stradford be imprisoned "constituted a gross miscarriage of justice": *Stradford* at [73].

ERRORS ALLEGEDLY MADE BY THE JUDGE

67 References to statutory provisions in these reasons should be taken to be references to the provisions as they were as at 6 December 2018.

68 Mr Stradford alleged that, in finding that he was in contempt and ordering that he be imprisoned for 12 months, the Judge made six separate errors. He also contended that, whether considered individually or cumulatively, those errors were such that the Judge acted without or in excess of his jurisdiction.

69 The first alleged error was that the Judge lacked power to make the imprisonment order because it was made without the Judge first finding that there had been a breach of any orders.

70 The second alleged error was that the Judge lacked power to make the imprisonment order because it was made in the absence of any finding that the failure to comply with the orders constituted a "flagrant challenge to the authority of the court" as required by s 112AP of the Family Law Act and otherwise did not comply with Pt XIIIA of the Family Law Act.

71 The third alleged error was that the Judge had failed to follow or apply the procedure for hearing and determining contempt allegations which was mandated in r 19.02 of the FCC Rules.

72 The fourth alleged error was that the Judge denied Mr Stradford procedural fairness.

73 The fifth alleged error was that the Judge pre-judged the issue of whether Mr Stradford was in contempt and whether he should be sentenced to imprisonment.

74 The sixth alleged error was that the Judge acted for an improper purpose in that he used the threat of imprisonment as a means of exerting pressure on Mr Stradford to settle the case outside the courtroom.

75 Some, but not all, of those errors were admitted or not disputed by the Judge, the Commonwealth and Queensland. The Judge and Queensland also admitted that the Judge's decision to imprison Mr Stradford was infected by jurisdictional error. It is nevertheless necessary to make findings concerning the individual errors alleged by Mr Stradford, particularly those which were not admitted.

Alleged error 1: failure to make any finding that there had been a breach of the orders

76 This alleged error may be dealt with in brief terms. The Judge and Queensland each admitted that the Judge made an order that he lacked the power to make in the particular circumstances of the case because he sentenced Mr Stradford to imprisonment for contempt without first finding that Mr Stradford had in fact breached or failed to comply with any orders.

77 The Commonwealth, however, denied that the Judge erred in this way. It contended that the Judge had found that there had been a breach of the orders made on 10 August 2018. It pointed, in that regard, to paragraph 20 of the contempt judgment.

78 While the Judge's reasons for judgment in respect of the finding of contempt lack clarity and are beset by ambiguities, it is in all the circumstances impossible to accept that he in fact made any finding that Mr Stradford breached the orders. Rather, he simply proceeded on the assumption, albeit an entirely erroneous and somewhat inexplicable assumption, that Judge Turner had somehow already found that Mr Stradford was in contempt. That is what the Judge said at the very commencement of the hearing: "… because Judge Turner has determined that you are in contempt of the orders that I made on 10 August". It is also what the Judge said in the contempt judgment at [13]-[14] and the stay judgment at [9]: "I had, in effect, proceeded upon the basis that Her Honour [Judge Turner] had already made a finding of contempt".

79 The Commonwealth's reliance on paragraph 20 of the contempt judgment is misplaced. In that paragraph, the Judge stated that "it seems to me that given everything that has been said, *and especially the fact that Judge Turner has already found that there is a contempt*, that the Applicant is in contempt for the non-compliance with orders of mine" (emphasis added). Read in context and in light of what the Judge said during the hearing, in the balance of the contempt judgment and in the stay judgment, it is quite clear that his Honour made no independent

finding that Mr Stradford had failed to comply with the orders. The Judge's reference to "everything that has been said" appears to be a reference to what Mr Stradford had said during the hearing, which his Honour characterised as amounting to an attempt to "give some excuses for his failure": CJ at [15].

80 It is also difficult to see how the Judge could possibly be said to have made an independent finding that Mr Stradford had failed to comply with the orders in circumstances where, as the FamCA Full Court found, Mr Stradford had denied breaching the orders and had sworn an affidavit concerning his compliance with the orders. It is abundantly clear from the transcript and the contempt judgment that the Judge in fact made no determination in respect of the contested evidence: see *Stradford* at [55]-[58]. It may also be noted in that regard that, to convict Mr Stradford of contempt, the Judge was required to find that all of the elements of the contempt, including non-compliance with the court orders, had been proved beyond reasonable doubt. At no point did the Judge state that he was satisfied beyond reasonable doubt that there had been non-compliance with the orders. Indeed, there is no indication that the Judge applied the criminal standard of proof to any of the elements that needed to be established before Mr Stradford could be found to have been in contempt.

81 Mr Stradford's claim that the Judge lacked power to make the imprisonment order by making it without first finding that there had been a breach of any orders must accordingly be upheld.

82 For reasons that will become apparent, it is important to emphasise that it is clear that the Judge had the means and ability to ascertain that Judge Turner had not in fact made any finding that Mr Stradford had breached any aspect of the disclosure orders and that Judge Turner had not found that Mr Stradford was in contempt. The Judge did not, in his submissions, contend otherwise. It is abundantly clear that the Judge ought to have known that Judge Turner had made no such finding.

Alleged error 2: failure to comply with Pts XIIIA and XIIIB of the Family Law Act

83 Mr Stradford contended that the Judge lacked power to make the imprisonment order in the circumstances because he did not comply with the provisions of Pts XIIIA and XIIIB of the Family Law Act. The requirements of Pts XIIIA and XIIIB of the Family Law Act are discussed in general terms in *Stradford* at [13]-[15], [18] and [67]-[70]. There could be little doubt that the Judge had no regard whatsoever to the provisions in those Parts of the Family Law Act. He was either entirely ignorant of the existence of those provisions or chose to completely ignore them.

84 Part XIIIA sets out a regime for the imposition of sanctions in respect of the contravention of orders under the Family Law Act, which included orders made under the *Family Law Rules 2004* (Cth) (**FamL Rules**) and orders made by the Circuit Court under the related FCC Rules: s 112AA and s 4(3)(e) and (f) of the Family Law Act. While it is somewhat unclear, the relevant disclosure orders made by the Judge must have been made under either the FamL Rules (see rr 1.10(1) and 13.04) or the FCC Rules (see rr 14.04 and 24.03). Either way, the order must be taken to be an order made under the Family Law Act and therefore subject to the provisions in Pt XIIIA.

85 Provisions in Pt XIIIA require that, before a court imposes a sanction on a person for contravening an order, the court must find: first, that the person intentionally failed to comply with the order, or made no reasonable attempt to comply with the order (s 112AB(1)(a) of the Family Law Act); and second, the contravention occurred without reasonable excuse: s 112AD(1) of the Family Law Act. The making of findings in respect of those matters is in effect a mandatory precondition to the imposition of sanctions for non-compliance of orders pursuant to Pt XIIIA of the Family Law Act. The Judge made no such findings.

86 Perhaps more significantly, s 112AD(2) of the Family Law Act specified the sanctions that a court was permitted to impose for contravening an order. Those sanctions included imprisonment. However, s 112AE(2) provided that a court was not permitted to impose a sentence of imprisonment for contravening an order unless the court was satisfied that "in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention pursuant to any of the other paragraphs of subsection 112AD(2)". It is abundantly clear that the Judge did not turn his mind to that issue. Indeed, as the FamCA Full Court effectively found, the Judge pre-judged imprisonment as the punishment before his Honour even knew the particulars of the contravention or any matters in mitigation: *Stradford* at [21].

87 Part XIIIB of the Family Law Act, which consists of s 112AP, deals specifically with contempt of court. Section 112AP(1) provides that the section applies to a contempt of court that either "does not constitute a contravention of an order under this Act" or "constitutes a contravention of an order under this Act and *involves a flagrant challenge to the authority of the court*" (emphasis added). Plainly the contempt for which the Judge imprisoned Mr Stradford allegedly involved a contravention of an order under the Family Law Act. It follows that, for s 112AP to apply, the Judge was required to find that the contravention involved a "flagrant challenge

to the authority of the court". His Honour made no such finding. And as the FamCA Full Court found, it is "difficult to envisage a case where failure to comply with orders for disclosure could be said to involve a flagrant challenge to the authority of the Court or where an established failure to fully disclose could be other than a contravention covered by Pt XIIIA of the Act and not Pt XIIIB": *Stradford* at [68].

88 The Judge did not dispute that he did not follow or comply with the requirements of either Pt XIIIA or s 112AP of the Act. Nor did the Commonwealth nor Queensland. The Judge and the Commonwealth submitted, however, that the failure to follow or comply with those requirements did not amount to an error because the Judge was empowered to deal with Mr Stradford for contempt pursuant to s 17 of the FCC Act, which does not prescribe or mandate any of the requirements or limitations found in Pt XIIIA and s 112AP of the Family Law Act.

89 Section 17 of the FCC Act provided as follows:

> (1) The Federal Circuit Court of Australia has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.
>
> (2) Subsection (1) has effect subject to any other Act.
>
> (3) The jurisdiction of the Federal Circuit Court of Australia to punish a contempt of the Federal Circuit Court of Australia committed in the face or hearing of the Federal Circuit Court of Australia may be exercised by the Federal Circuit Court of Australia as constituted at the time of the contempt.
>
> Note: See also section 112AP of the *Family Law Act 1975*, which deals with family law or child support proceedings.

90 Section 35 of the Family Law Act was in relevantly similar terms to s 17(1) of the FCC Act.

91 The Judge relied on judgments of the Supreme Court of New South Wales that tended to suggest that the predecessor provision to s 112AP of the Family Law Act (s 108 of the Family Law Act, repealed in 1989) was supplementary to and did not cut down the operation of s 35 of the Family Law Act, at least insofar as the Family Court's power to punish for contempt was concerned: ***Skouvakis*** *v Skouvakis* (1976) 11 ALR 204; [1976] 2 NSWLR 29 at 34; ***Moll v Butler*** (1985) 4 NSWLR 231 at 235-236. The Commonwealth also relied on dicta in the judgment of the High Court in ***Re Colina****; Ex parte Torney* (1999) 200 CLR 386; [1999] HCA 57, a case concerned with whether s 80 of the ***Constitution*** *of the Commonwealth of Australia* required that a person charged with contempt of the Family Court be tried before a jury.

92 There are a number of difficulties with the Judge's reliance on the decisions in *Skouvakis* and *Moll v Butler*. Both decisions concerned the contempt powers under the Family Law Act before

the substantial amendments to the Family Law Act in 1989, which included the insertion of Pts XIIIA and XIIIB. As already noted, both decisions concerned the operation of s 108 of the Family Law Act, which was the predecessor to s 112AP. Section 108 was, however, in materially different terms to s 112AP. In particular, s 108 did not contain the express limitation in s 112AP(1)(b), the effect of which is that s 112AP does not apply in the case of a contravention of an order unless that contravention involved a "flagrant challenge to the authority of the court". Both *Skouvakis* and *Moll v Butler* also concerned the jurisdiction or powers of superior courts to punish for contempt; the Supreme Court of New South Wales in the case of *Skouvakis* and the Family Court in the case of *Moll v Butler*. As was made clear in both *Skouvakis* (at 2 NSWLR 33-34) and *Moll v Butler* (at 236), superior courts have an inherent power to punish for contempt. That consideration appears to have influenced the reasoning in both *Skouvakis* and *Moll v Butler*. In contrast, the Circuit Court was an inferior court with no inherent power to punish for contempt.

93 Perhaps most significantly, since the 1989 amendments to the Family Law Act, the FamCA Full Court has held that Pt XIIIB of the Family Law Act is a "complete code for dealing with contempts": ***DAI*** *v DAA* (2005) 191 FLR 360; [2005] FamCA 88 at [47], [67]; see also ***Rutherford*** *v Marshal of Family Court of Australia* (1999) 152 FLR 299; [1999] FamCA 1299; *In the Marriage of* ***Schwarzkopff*** (1992) 106 FLR 274. It may be true, as the Judge submitted, that each of those cases dealt primarily with the question whether the sentencing principles in the *Crimes Act 1914* (Cth) applied when imposing sanctions for contempt under the Family Law Act. It is, however, nevertheless clear from the reasoning in each of the cases that the FamCA Full Court conluded that the contempt powers under the Family Law Act were exhaustively dealt with in Pt XIIIB. There was certainly no suggestion in any of the judgments that s 35 of the Family Law Act provided a separate and distinct power to punish for contempt that was not constrained by or subject to Pt XIIIB. In particular, there was no suggestion that a contempt involving contravention of an order could be punished pursuant to s 35 of the Family Law Act, even if there was no allegation or finding that the contravention of the order involved a flagrant challenge to the authority of the court as required by s 112AP(1) of the Family Law Act.

94 I should follow judgments of the FamCA Full Court, an intermediate appellate court, unless persuaded that they are plainly wrong. That is all the more so given that jurisdiction under the Family Law Act is a specialist jurisdiction and the Family Court is a specialist court in respect of that jurisdiction. I am not persuaded that the FamCA Full Court was wrong in concluding

that, properly construed in the context of the Family Law Act as a whole, Pt XIIIB constitutes a code for dealing with contempts arising in the context of jurisdiction under the Family Law Act. I should, in those circumstances, follow *DAI*, *Rutherford* and *Schwarzkopff* rather than the dicta in *Skouvakis* and *Moll v Butler*.

95 It is also clear that the FamCA Full Court in *Stradford* proceeded on the basis that Pt XIIIB was a code for dealing with contempts in the exercise of jurisdiction under the Family Law Act and that the Judge was required to, but did not, follow or apply that code. In particular, it held that the power to punish for contempts in s 17 of the FCC Act is a "power to punish contempts committed in the face or hearing of the Court" (*Stradford* at [13]). The court noted that the Family Law Act makes a distinction between such contempts and sanctions for failure to comply with orders and proceeded on the basis that contempts in the face or hearing of the court are to be dealt with in accordance with the provisions in Pt XIIIB of the Family Law Act, whereas sanctions for the non-compliance with orders are to be dealt with in accordance with Pt XIIIA, save for those that are found to constitute "flagrant challenges to the authority of the Court": *Stradford* at [14]. The FamCA Full Court considered that it could not "sensibly be conceived" that the Judge "had in mind to treat [Mr Stradford's] alleged breach or breaches of orders for disclosure made in financial proceedings as constituting contempt in the face of the court within the meaning of s 17 of the FCC Act or Pt XIIIB of the [Family Law] Act": *Stradford* at [15].

96 Even putting the FamCA Full Court authorities to one side, the legislative intent behind Pts XIIIA and XIIIB of the Family Law Act is clear. Part XIIIA and s 112AP were inserted in the Family Law Act in 1989 following a report by the Australian Law Reform Commission (**ALRC**) in relation to contempt (*Contempt*, Report No 35, 1987). In considering contempts arising from non-compliance with court orders, the ALRC report drew a distinction between considerations associated with orders in family law and general civil law and took the view that the purpose of punishment in family law proceedings was not so much upholding the court's authority as an end in itself, but in fulfilling the expectations of litigants that court orders will be obeyed: see *In the Marriage of Tate (No 3)* (2003) 30 Fam LR 427; [2003] FamCA 112 at [62]. That is why sanctions for non-compliance with orders are separately dealt with in Pt XIIIA of the Family Law Act, other than in the case where the non-compliance involves a flagrant challenge to the authority of the court and s 112AP applies.

97 The legislative purpose behind Pts XIIIA and XIIIB was in effect that those Parts of the Family Law Act would effectively constitute a code for dealing with non-compliance with orders and contempt in matrimonial causes. That legislative purpose would be defeated if courts exercising jurisdiction under the Family Law Act, including the Circuit Court, could simply choose to ignore those provisions and punish for contempts, including contempts allegedly arising from non-compliance with orders, pursuant to general power conferring provisions such as s 17 of the FCC Act. The prescriptive and exhaustive provisions in Pts XIIIA and XIIIB in effect excluded any other power to deal with contempt. A similar conclusion was reached in respect of relevantly analogous statutory provisions in *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208; [1951] HCA 3.

98 It is also important to emphasise in this context that s 17(2) of the FCC Act expressly provides that s 17(1) "has effect subject to any other Act". Plainly the Family Law Act is an "other Act". It is therefore clear that when the Circuit Court exercises jurisdiction under the Family Law Act, its power to punish for contempt pursuant to s 17(1) of the FCC Act gives way to, or is subject to, the exhaustive provisions in Pt XIIIA and Pt XIIIB of the Family Law Act. The result is that, while s 17(1) may provide the Circuit Court with a general power to punish for contempt, when that court exercises jurisdiction under the Family Law Act it must exercise that power pursuant to, or in accordance with, Pt XIIIB of the Family Law Act. If the alleged contempt relates to non-compliance with a court order, unless the court finds that the non-compliance constituted a flagrant challenge to the court's authority, the court must deal with the non-compliance in accordance with Pt XIIIA of the Family Law Act. It should also be noted in this context that the reliance by both the Judge and the Commonwealth on the well-known principle in *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 was misconceived. That is because the combined effect of s 17(2) of the FCC Act and Pt XIIIB of the Family Law Act is to impose an express, not implied, limitation on the Circuit Court's power to punish for contempt.

99 In all the circumstances, the better view, consistent with the FamCA Full Court's decision in *DAI*, is that in circumstances where the Judge was exercising the Circuit Court's jurisdiction under the Family Law Act, Pt XIIIB of the Family Law Act provided a complete code for dealing with contempts. His Honour plainly did not even turn his mind to the provisions in Pt XIIIB, or Pt XIIIA for that matter, let alone make any of the findings that he was required to make before imprisoning Mr Stradford for contempt. That is a particularly serious omission

given that the alleged contempt involved non-compliance with orders as opposed to a contempt in the face or hearing of the court.

100 As for the Commonwealth's reliance on *Re Colina*, I am also not persuaded that any of the reasoning in that case sheds any light on the issue. As noted earlier, *Re Colina* was concerned with the question of whether s 80 of the Constitution required that a person charged with contempt of the Family Court be tried before a jury. There was no discussion or consideration of whether, when exercising the contempt power conferred by s 35 of the Family Court Act, the Family Court was free to disregard s 112AP, or the rules made pursuant to it. Nor was there any suggestion that the Family Court could disregard Pt XIIIA in the case of non-compliance with orders. The contempt charge in question in *Re Colina* was particularly serious and involved "scandalising the court", so it is clear that s 112AP applied in the circumstances of the case.

101 The Commonwealth's contention, based on *Re Colina*, that the Circuit Court has an implied constitutional power to punish for contempt is considered in detail later in these reasons. It suffices at this point to note that the contention has no merit. In any event, for the reasons already given, even if the Circuit Court did have such an implied power, it would in any event give way to the code in Pt XIIIB when the court was exercising jurisdiction under the Family Law Act.

102 It should finally be noted that there is, in any event, no basis for concluding that, when the Judge imprisoned Mr Stradford, his Honour was exercising the Circuit Court's power under s 17(1) of the FCC Act, as opposed to the powers under either Pt XIIIA or Pt XIIIB of the Family Law Act. There is certainly no basis to conclude that his Honour disregarded those provisions in the Family Law Act because he considered that the power to punish for contempt under the FCC Act was not constrained or limited by Pt XIIIB of the Family Law Act. His Honour did not refer to s 17(1) of the FCC Act or any provision of the Family Law Act when purporting to deal with Mr Stradford for contempt, either during the hearing or in his judgment.

103 Mr Stradford's claim that the Judge lacked power to make the imprisonment order because he was required to, but did not, apply the provisions of either Pt XIIIA or Pt XIIIB of the Family Law Act is accordingly upheld. The Judge was not empowered to punish Mr Stradford for contempt unless or until he found that his alleged non-compliance with the disclosure orders contstiuted a "flagrant challenge to the authority of the court". That was effectively a

mandatory statutory precondition to the Judge's power to imprison Mr Stradford for contempt. His Honour made no such finding.

104 In the absence of such a finding, the Judge was restricted to applying sanctions for the alleged non-compliance pursuant to Pt XIIIA of the Family Law Act. If the Judge had proceeded down that route, before imposing a sentence of imprisonment he would have been required to find that Mr Stradford intentionally failed to comply with the disclosure orders, or that he made no reasonable attempt to comply with those orders (as required by ss 112AB(1)(a)(i) or (ii) of the Family Law Act), that any contravention of the orders occurred without reasonable excuse (as required by s 112AD(1) of the Family Law Act), and that it would not have been appropriate to impose a sanction other than imprisonment in respect of the contravention as required by s 112AE(2) of the Family Law Act. His Honour made no such findings.

105 The Judge's failure to follow or apply the provisions of either Pt XIIIB or Pt XIIIA of the Family Court Act was anything but a narrow or technical breach. Rather, it displayed a wholsesale disregard of important provisions in the very Act pursuant to which he was exercising his jurisdiction in the matter before him.

Alleged error 3: failure to follow r 19.02 of the FCC Rules

106 Rule 19.02 of the FCC Rules required the Judge to ensure that the following steps had been taken before dealing with Mr Stradford in respect of the alleged contempt.

107 First, an application was required to be made to the court. That application was required to be in the approved form, was required to state the contempt alleged, and was required to be supported by an affidavit which set out the facts relied on: r 19.02(2). The application also had to be made by either a party to the proceeding (in this case Mrs Stradford), the Marshal, or a police officer: r 19.02(3).

108 Second, the Judge was required to tell Mr Stradford of the allegation, ask him to state whether he admitted or denied the allegation and hear any evidence in support of the allegation: r 19.02(6).

109 Third, after hearing the evidence in support of the allegation, the Judge was required to decide whether there was a prima facie case: r 19.02(7). If there was no prima facie case, the application was required to be dismissed: r 19.02(7)(a). If the Judge decided that there was a prima facie case, he was required to invite Mr Stradford to state his defence to the allegation and, after hearing the defence, determine the charge: r 19.02(7)(b).

110 The Judge did not ensure that any of those steps were taken. None of the requirements were observed. It is once again readily apparent that the Judge either did not turn his mind to the requirements in r 19.02 of the FCC Rules, or chose to ignore those requirements.

111 The Judge admitted that he did not follow the procedures and processes in r 19.02 of the FCC Rules. He contended, however, that his non-compliance with r 19.02 did not amount to an error because he had the power, pursuant to r 1.06 of the FCC Rules, to dispense with compliance with the FCC Rules. There are a number of difficulties with that contention.

112 First, as has already been noted, there is no indication whatsoever that the Judge even turned his mind to the requirements of r 19.02, let alone to the question whether it was appropriate or open to him to dispense with compliance with that rule pursuant to r 1.06 of the FCC Rules.

113 Second, it is at best doubtful that r 1.06 could operate to permit a judge of the Circuit Court to dispense with compliance with a rule such as r 19.02, which imposes fundamental requirements or obligations on the court to ensure that it exercises its jurisdiction in a way which is procedurally fair. The proper construction of general dispensation rules such as r 1.06 of the FCC Rules is that they "enable the court in a proper case to relieve a party of an obligation to comply with particular provisions of the Rules, for instance, as to time or the filing of pleadings and suchlike": *Survival & Industrial Equipment (Newcastle) Pty Ltd v Owners of the Vessel "Alley Cat"* (1992) 36 FCR 129 at 138; [1992] FCA 319; *Harrington v Lowe* (1996) 190 CLR 311 at 321; [1996] HCA 8. General dispensation rules like r 1.06 of the FCC Rules should not be construed in such a way as to permit the court to unilaterally dispense with obligations imposed on it, particularly those plainly designed to ensure procedural fairness.

114 Third, if the Judge did turn his mind to the question of dispensation and decided to dispense with the requirements imposed by r 19.02, which is at best difficult to accept, that would have amounted to a manifestly unreasonable exercise of discretion. As the FamCA Full Court observed in *Stradford* at [28], there was "no feature of this case which warranted, in the broader interests of justice, any departure from the fundamental principles of justice reflected in r 19.02". Needless to say, the Judge did not give Mr Stradford the opportunity to make any submissions as to whether compliance with r 19.02 could or should be dispensed with.

115 Mr Stradford's claim that the Judge failed to comply with the processes and procedure that he was required by r 19.02 of the FCC Rules to apply in dealing with Mr Stradford for the alleged contempt is accordingly upheld.

116 It is important to emphasise that the Judge's manifest failure to follow the procedure mandated in r 19.02 of the FCC Rules was anything but a mere procedural irregularity, or a narrow or technical breach. It was of particular significance that Mr Stradford was never provided with a clear statement of the contempt alleged and of even more significance that not only was there no application filed by either a party, the Marshal or a police officer, but the other party to the proceeding, Mrs Stradford, effectively told the Judge that she did not want to proceed with any contempt application. The fact that Judge took it upon himself to be the prosecutor, witness and judge (cf *Stradford* at [22]-[27]) is of particular significance given the nature of the alleged contempt, which was an alleged failure to comply with orders, as opposed to a contempt in the face of the court.

Alleged error 4: denial of procedural fairness

117 There was no dispute that the Judge denied Mr Stradford procedural fairness. The Judge admitted that, at the purported hearing of the contempt allegation on 6 December 2018, he denied Mr Stradford procedural fairness in the following ways: not providing Mr Stradford with particulars of the allegation of contempt; not inviting Mr Stradford to state whether he admitted or denied the allegation; not inviting Mr Stradford to state his defence to the allegation; not hearing evidence in support of or against the allegation; not giving Mr Stradford the opportunity to make submissions in support of his defence to the allegation; and not making a finding that the allegation was established before proceeding to punishment.

118 The bare recital of the particulars of those procedural failings does not, however, adequately reflect the full gravity of the denial of procedural fairness. Throughout the hearing, the Judge acted in a thoroughly unsatisfactory and unjudicial manner. Even the most cursory perusal of the transcript of the hearing reveals that the Judge repeatedly interrupted, hectored, berated and bullied Mr Stradford. That was notwithstanding the fact that, as the FamCA Full Court noted in *Stradford* at [63], "at no point did [Mr Stradford] speak or behave in a disrespectful manner". It is also readily apparent that the Judge effectively pre-judged the outcome. It is unnecessary to give further examples of the Judge's unsatisfactory conduct. As the FamCA Full Court in *Stradford* observed at [53], it is "difficult to envisage a more profound or disturbing example of pre-judgment and denial of procedural fairness to a party on any prospective orders, much less contempt, and much less contempt where a sentence of imprisonment was, apparently, pre-determined as the appropriate remedy". That, in my respectful opinion, is an entirely accurate

and correct description of the manner in which the Judge dealt with the contempt allegation against Mr Stradford.

Alleged error 5: pre-judgment

119 Mr Stradford claimed that the Judge pre-judged the issue of whether Mr Stradford was in contempt and whether he should be sentenced to imprisonment. The Judge denied that he did so, and asserted that he had an open mind and was open to be persuaded one way or the other. The Judge did not, however, give evidence. The issue, therefore, is largely to be determined by reference to the transcript of the hearings before the Judge. There was, however, some other evidence that potentially bears on the question of pre-judgment.

120 The transcripts of the hearings clearly and inescapably support the conclusion that the Judge did not approach the matter with an open mind and that he had determined, at the outset, that Mr Stradford was in contempt and was to be imprisoned.

121 The rot set in, as it were, on 10 August 2018, the very first occasion that the parties appeared before the Judge. At that hearing, Mrs Stradford complained, from the bar table, that Mr Stradford's disclosure was inadequate or deficient. The Judge's response to that complaint was: "what do you want me to do, to adjourn the matter, expect full and frank disclosure; if not, charge him with contempt and jail him?". The thinly veiled threat that Mr Stradford would be gaoled if he failed to comply with any disclosure orders was repeated on numerous occasions throughout the balance of the hearing on 10 August 2018, for example: "[i]f people don't comply with my orders there's only [one] place they go"; "I don't have any hesitation in jailing people for not complying with my orders"; to Mr Stradford "I will have no hesitation in jailing you"; "I will have no hesitation in jailing you for three years"; if "she [Mrs Stradford] comes here, and she complains that she has asked for things and you have not given them to her, bring your toothbrush". The last statement is particularly significant. It suggests that the Judge considered that it would suffice, to support a finding of contempt by Mr Stradford, for Mrs Stradford to simply complain or allege that Mr Stradford had not disclosed certain matters.

122 As discussed earlier in these reasons, when the matter came back before the Judge on 6 December 2018, the Judge inexplicably stated, at the very commencement of the hearing, that Judge Turner had determined that Mr Stradford was in contempt. It is almost impossible to conceive how the Judge had arrived at that conclusion. Judge Turner had made no such order and had not delivered any judgment. The basis for the conclusion appeared to be that "Judge

Turner wouldn't have sent it to me [the Judge] without making a determination that you [Mr Stradford] had actually failed to do that".

123 The Judge then went through some of the categories of documents in the disclosure orders and sought Mr Stradford's response as to whether he had provided those documents. Mr Stradford responded to the Judge's questions. Mr Stradford's explanations included, in some instances, that the documents sought did not exist or could not be produced because, for example, the specified bank account did not exist, or Mr Stradford was unable to obtain access to the documents. Those explanations were broadly consistent with the explanations provided in an affidavit which Mr Stradford had filed. It is unclear whether the Judge had read the affidavit. Mrs Stradford was also not specifically asked to provide her response to those explanations.

124 Despite the very cursory consideration that was given to Mr Stradford's position, the Judge's response was "despite everything that [Mr Stradford] has said, I don't believe that he has complied fully with my orders". Worse still, before hearing anything further, the Judge said, addressing Mr Stradford: "You will be serving 12 months in jail". After a short break, the Judge indicated that he would "go ahead with the contempt hearing" and said "[s]o I hope you brought your toothbrush, [Mr Stradford]".

125 It is abundantly clear that, from this point, the Judge had determined that Mr Stradford had not fully complied with the orders and the result was that he would be imprisoned. That would appear to be the case even though the evidence, including Mr Stradford's affidavit, had not been formally read, let alone tested by cross-examination, and even though the contempt hearing had not commenced, or at least had not concluded – it was supposed to "go ahead" after the break. It is also clear from the transcript that Mrs Stradford had not submitted that Mr Stradford should be sentenced to imprisonment. Indeed, she had made it quite plain that she did not want that to occur.

126 The transcript reveals that the proceeding was adjourned between 10.46 am and 11.57 am. A document produced by the Queensland Police Service indicated that at 11.43 am on 6 December 2018, one of the MSS guards who was on duty at the Circuit Court building on that day, Mr Stuart **Dunn**, contacted the Queensland Police Service. The document contains the following note:

> ADVICE RE [THE JUDGE] WHO IS ISSUING WARRANT FOR POI [STRADFORD] TO BE HELD IN CUSTODY AND REQUESTING QPS ASSISTANCE TO HOLD POI.

127 It may be observed that the notation was not that the Judge might issue a warrant; it was that the Judge "is" issuing a warrant. Mr Dunn's evidence, based on a perusal of that document, was that he believed that he was "given advanced notice that [the Judge] would make an imprisonment order that day". The available or logical inference is that the "advanced notice" emanated from the Judge.

128 That is, in any event, readily apparent from what occurred when the court reconvened at 11.57 am. The Judge repeated to Mr Stradford that Judge Turner had already found that he was in contempt and asked Mr Stradford what he wanted to say. Mr Stradford began to respond to that question by saying that he had disclosed what he had been able to disclose, however the Judge almost immediately interrupted him and said: "You understand that's just rubbish". Given that response, it is perhaps not surprising that Mr Stradford said little more.

129 As Mr Stradford submitted, what occurred was at best a gross parody of a court hearing.

130 The Judge submitted that it cannot be inferred that he had pre-judged the question of Mr Stradford's guilt because he was operating under the mistaken belief that Judge Turner had already found that Mr Stradford was in contempt. The available inference, therefore, was not that he had pre-judged Mr Stradford's guilt, but that he did not think that he had to determine it. I am not persuaded by that submission.

131 As has already been observed, the Judge's statement that Judge Turner had already found that Mr Stradford was in contempt was confounding. It is difficult to understand how the Judge could reasonably have believed that Judge Turner had made any such finding. That is particularly the case given that Judge Turner had made no declaration or order to that effect. Nor had her Honour delivered any judgment concerning the alleged contempt. It is equally difficult to understand why or how the Judge would have thought that the matter had been referred to him to impose a sentence or sanction if Judge Turner had found that Mr Stradford was in contempt. The almost invariable course is that the judge who determines that a person is in contempt also imposes the sanction in respect of the contempt. There is nothing to suggest that the Judge turned his mind to any of those issues.

132 It is also extremely difficult to reconcile the Judge's stated belief that Judge Turner had already found that Mr Stradford was in contempt with what occurred at the hearing on 6 December 2018. Why, if he believed that Judge Turner had already decided that Mr Stradford was in contempt by failing to comply with the Judge's orders, did the Judge question Mr Stradford

about his compliance at the hearing on 6 December 2018? Why did the Judge say, in the course of that exchange with Mr Stradford: "I am really only here today to look at whether you are in contempt of my orders"? Why did the Judge, not Judge Turner, make the declaration that Mr Stradford was in contempt of the orders?

133 It is ultimately unnecessary to reach a concluded view concerning those imponderables. If the Judge genuinely believed that Judge Turner had already determined that Mr Stradford was in contempt, that belief was manifestly unreasonable, in the sense that it cannot be accepted that there was any reasonable basis for him to have formed that belief. More importantly, even if it be accepted that the Judge was operating under the mistaken belief that he did not need to determine whether Mr Stradford was in contempt because that determination had already been made by Judge Turner, the Judge was still required to determine the appropriate sanction or penalty to impose in respect of that contempt. He was plainly required to bring an open mind to that issue. It is, on the evidence as a whole, impossible to accept that he did so.

134 The almost inescapable inference from the available evidence is that the Judge had predetermined that the appropriate sanction for Mr Stradford's non-compliance with the disclosure orders was a substantial sentence of imprisonment. That inferience is supported, at least to some extent, by the note which recorded tht the police had been summoned prior to what was supposed to be the final part of the contempt hearing. I am, in all the circumstances, satisfied that the evidence as a whole establishes that the Judge was "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented": *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; [2001] HCA 17 at [72]. The evidence plainly demonstrates that nothing that Mr Stradford could have said or done could have diverted the Judge from imprisoning him for the contempt that the Judge had either assumed or believed he had committed.

135 I am, of course, mindful that an allegation that a judge had predetermined a matter is a particularly serious allegation, particularly where the outcome was a sentence of imprisonment. An allegation of pre-judgment, which amounts to an allegation of actual bias, is "about as serious an allegation as any that could be made against a judicial officer" because it "involves a finding of judicial impropriety and probably of judicial misconduct": *Spirits International BV v Federal Treasury (FKP) Sojuzplodoimport* [2013] FCAFC 106 at [13]. I take the seriousness of the allegation into account in determining whether the inference of pre-judgment is available and should be drawn: cf ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336; [1938]

HCA 34 and s 140(2)(c) of the ***Evidence Act 1995*** (Cth). I am nevertheless satisfied that the inference can and should be drawn.

136 It should finally be noted that, as the previous discussion of the judgment of the FamCA Full Court in *Stradford* revealed, the FamCA Full Court also clearly inferred and concluded that the Judge had pre-judged the issue of whether Mr Stradford was in contempt and whether he should be sentenced to imprisonment. At risk of repetition, the FamCA Full Court concluded that it was "difficult to envisage a more profound or disturbing example of pre-judgment and denial of procedural fairness to a party on any prospective orders, much less contempt, and much less contempt where a sentence of imprisonment was, apparently, pre-determined as the appropriate remedy" (at [53]). I have effectively reached the same conclusion independently, but also respectfully agree with the FamCA Full Court's reasoning and conclusion in that regard.

Alleged error 6: improper purpose

137 Mr Stradford alleged that the Judge acted for an improper purpose, in that he used the threat of imprisonment as a means of exerting pressure on Mr Stradford to settle the case outside the courtroom. The Judge, the Commonwealth and Queensland all denied that allegation.

138 Mr Stradford's allegation of improper purpose was almost entirely based on what was said during the hearing on 6 December 2018. He submitted that the transcript plainly revealed that the Judge was using the threat of imprisonment as a lever to force Mr Stradford to capitulate and agree to a property settlement which was acceptable to Mrs Stradford. The Judge, however, submitted that he was not making the threat of imprisonment to induce the parties to settle. Rather, he was merely observing what would be the likely course of events, including what would happen if the parties managed to resolve the matter.

139 As has already been noted, at the very commencement of the hearing on 6 December 2018, the Judge told the parties that Judge Turner had found that Mr Stradford was in contempt and had made it plain that he did not believe that Mr Stradford had fully complied with the disclosure orders. It was in that context that the Judge asked Mrs Stradford what she really wanted. Mrs Stradford indicated that what she really wanted was a property settlement. The following exchange then occurred:

> HIS HONOUR: And I'm prepared to deal with him for contempt. But, you know, I can see that that's not what you particularly want. You want an amicable settlement, because you've got children.
>
> [MRS STRADFORD]: We've got children.

> HIS HONOUR: And you don't want him to be going to jail unnecessarily, because that's exactly where he is going to be going.
>
> [MRS STRADFORD]: I know.
>
> HIS HONOUR: You do realise that. You will be serving 12 months in jail. So I'm happy to do that. I can deal with that contempt today. And I've told you what will happen. Or, if you want, I can in effect give you an adjournment until the new year. **If you come back with consent orders as to a proper property adjustment, even if he doesn't have the actual money to make good on that adjustment, given that $400,000 is going to have to come into the pool, if you can sort that out so that it is amicable, I'm happy to give you that time to do that, so that you don't feel as though in any way you have, you know, contributed to this**. But this is not your doing. This is all on [Mr Stradford].
>
> And I'm the one who sends him into jail, not you. You understand that. I don't want you to have that guilt or to feel that you have to explain to your children that, "Because I pursued this, you know, dad has had to go to jail." **Okay. I don't want for you to think that way. But I'm prepared to, you know, adjourn this over to January and for you to be able to come to me with a proper settlement**. If you can't, the matter will go back into the list for Judge Turner to allocate a trial date just on the material that we have. But that trial date will await [Mr Stradford's] release from prison, because that's what will happen in January.
>
> [MRS STRADFORD]: And that is my concern, is that I'm financially struggling and I've still got the cars, I've still got this as well.
>
> HIS HONOUR: I understand that. But I don't ---
>
> [MRS STRADFORD]: Yes. Yes, of course.
>
> HIS HONOUR: On what I'm seeing, on what I've got at the moment, I'm not seeing a very good outcome for you, because even if I order that you be paid, you know, $300,000 out of that pool, $100,000, you're not going to see that.
>
> [MRS STRADFORD]: Yes.
>
> HIS HONOUR: And, you know, nothing is going to happen and he will be in jail and you will have a piece of paper that says, "Yes, we've got the settlement", but, you know, it really isn't going to do anyone any good. **So I'm going to adjourn just for five minutes and then I will let you talk to Mr Stradford. And it will be only for five minutes. Then you can come back and you can tell me what you want to do. If it is that there's not going to be a resolution, I'm going to proceed with the contempt hearing**. It's as simple as that. Okay. Thank you. Okay. All right.
>
> [MRS STRADFORD]: Thank you, your Honour.
>
> (Emphasis added)

140 That exchange is somewhat puzzling. Initially the Judge seems to suggest that he would be prepared to adjourn the matter until January 2019 to enable the parties to settle. Subsequently, however, after indicating that Mr Stradford would be serving 12 months in gaol if the contempt hearing proceeded, the Judge allowed only a very short adjournment for the parties to determine if there was any prospect of a resolution. The Judge made it clear that if there was "not going to be a resolution", the contempt hearing would proceed. The Judge had also made it quite

clear that the inevitable outcome, if that were to occur, was that Mr Stradford would be imprisoned.

141 Not surprisingly, the parties were unable to resolve the matter in the five minutes that the Judge allowed them to discuss a possible resolution. After the short break, Mrs Stradford reiterated that she did not want Mr Stradford to go to gaol, but that she was not content with whatever Mr Stradford may have offered by way of property settlement. At that point, the Judge indicated that, because the parties had been unable to resolve their differences, the contempt hearing would proceed, though not before 11.45 am as the Judge had another commitment. The Judge also reiterated that the inevitable result of the contempt hearing would be that Mr Stradford would be imprisoned, this time by employing the well-worn cliché that he hoped that Mr Stradford had brought his toothbrush.

142 Before adjourning, however, the Judge made what appeared to be one last attempt to encourage the parties to settle the proceeding. In response to a further plea by Mrs Stradford that she did not want Mr Stradford to go to gaol, the Judge said:

> Not your order. You can't come to a conclusion, so therefore it means that this is still on foot. If this matter is still on foot, he is in contempt. **The only way he gets out of contempt is if this matter is not on foot any more. You said that it cannot be settled, that he will not give you what you think is just and equitable. Therefore, it's still on foot. Therefore, he is in contempt**. Therefore, I am going to deal with him for contempt. Okay. I've made that very, very clear. It's not your decision; it's my decision. You're not the one that's sending him to jail; I am. These are court orders and court orders need to be obeyed. Otherwise, what's the use of making the court orders. I made it very clear in August 2018 exactly what would happen if there was no compliance with these orders. **Now, it's not your fault. You're not the one who's sentencing him to jail; I am. But he won't settle justly and equitably with you, the matter is on foot. You understand it**. This is not anyone's fault but your own. Quarter to 12.
>
> (Emphasis added)

143 It is plainly open to infer that the statements emphasised in the above extracts, considered in context, were likely to have had the effect of exerting considerable pressure on the parties, though particularly Mr Stradford, to settle the property dispute. It was, in all the circumstances, entirely inappropriate and bordering on improper for the Judge to put the parties in that position. That was the conclusion effectively arrived at by the FamCA Full Court in *Stradford* when the court said: "[q]uite how it could be thought proper or appropriate behaviour for a judge to tell (self-represented) parties, in effect, 'settle outside the courtroom now or one of you will go to gaol' entirely eludes us" (at [50]). I agree. Despite that, I am not disposed to infer and conclude

that the Judge acted for an improper purpose when he told Mr Stradford that he proposed to sentence him to imprisonment.

144 A finding that a judge acted for an improper purpose is a particularly serious finding which should not be lightly made. In making such a finding, due consideration must be given to the gravity of the allegation and the inherent unlikelihood that a judge would act in such a manner: s 140(2)(c) of the Evidence Act; *Briginshaw* at 60 CLR 362 (Dixon J). While it was undoubtedly inappropriate for the Judge to have put the parties in the invidious position of having to engage in settlement discussions under the spectre of Mr Stradford almost certainly being imprisoned if the matter did not settle, I am ultimately not satisfied the Judge was motivated or actuated by an improper purpose.

145 The difficulty for Mr Stradford in relation to this allegation is that there is another possible inference, that being that the Judge was motivated by a somewhat misguided and misconceived sense of pragmatism. The Judge appears to have believed that it was in the best interests of both parties if they were able to reach an amicable property settlement. Despite the seriousness with which he apparently viewed Mr Stradford's supposed contempt, the Judge appears to have been prepared to effectively overlook that contempt if the parties were able to resolve their dispute. He told the parties as much.

146 It is very difficult to reconcile the Judge's apparent willingness to overlook the supposed contempt with the apparent seriousness with which the Judge had viewed the contempt. Moreover, if, as the Judge apparently believed, Mr Stradford had been found by Judge Turner to have committed a contempt, it was incumbent on the Judge to either refer the matter back to Judge Turner, or at least proceed to deal with Mr Stradford in respect of that contempt. It was entirely inappropriate and misconceived for the Judge to suggest that the contempt could be overlooked if the parties settled the principal proceeding – all the more so given the pressure that that suggestion was likely to place on the parties in the circumstances.

147 While it was undoubtedly inappropriate for the Judge to conduct the proceeding in the way he did, I am ultimately not satisfied, to the requisite standard, that his predominant or actuating purpose in pursuing or prosecuting the contempt allegation against Mr Stradford was to exert pressure upon the parties to settle the proceeding, or force Mr Stradford to capitulate. The Judge appears to have believed that Judge Turner had already found that Mr Stradford was in contempt and to have already formed the view that the appropriate penalty for that contempt was imprisonment. He obviously knew that Mr Stradford did not want to go to gaol. He also

knew that Mrs Stradford did not want Mr Stradford to go to gaol and had also formed the view that that would also not be in Mrs Stradford's best interests. He appears, in those circumstances, to have sent the parties outside for further discussions in the misguided belief that it was somehow in their best interests to do so, despite the obvious pressure that placed upon them. While the effect of the Judge's actions was to exert pressure upon the parties to settle, I am not persuaded that that was his predominant purpose for acting as he did. That is all the more so given the absence of any apparent advantage that the Judge may have derived from forcing the parties to settle, other than perhaps ridding the Judge of a case that he would otherwise have been required to hear and determine on its merits.

148 It follows that, not without some misgivings, I reject Mr Stradford's allegation that the Judge acted for an improper purpose in that he used the threat of imprisonment as a means of exerting pressure on Mr Stradford to settle the proceeding.

149 I should perhaps add that, even if it could be inferred that the threats of imprisonment that the Judge made during the course of the hearing on 6 December 2018 were made for the alleged improper purpose, it would not necessarily follow that the Judge exceeded or acted outside his jurisdiction in either declaring that Mr Stradford was in contempt, or ordering that Mr Stradford be imprisoned for that contempt. Mr Stradford did not allege that the Judge brought or pursued the contempt allegation against Mr Stradford for an improper purpose. Nor did he allege that the Judge made the imprisonment order for an improper purpose. Rather, Mr Stradford appeared to accept that the Judge believed that Judge Turner had found that he was in contempt and that the Judge considered in those circumstances that it was incumbent on him to punish Mr Stradford for that contempt. It is in those circumstances at least questionable whether it could be said that the Judge exceeded his jurisdiction in making the imprisonment order simply on the basis of threats made during the course of the hearing, even if those threats were made for the improper purpose of pressuring the parties to settle the matter. It is unnecessary to express a concluded view in respect of that issue given that I have, in any event, not accepted that the Judge's conduct in making the threats was actuated by an improper purpose.

THE TORTS ALLEGEDLY COMMITTED BY THE JUDGE

150 Mr Stradford's causes of action against the Judge were for the tort of false imprisonment and the tort of collateral abuse of process.

False imprisonment

151 The tort of false imprisonment essentially involves two elements: first, imprisonment or detention of the plaintiff; and second, the unlawfulness of the imprisonment or detention.

152 In *Lewis v Australian Capital Territory* (2020) 271 CLR 192; [2020] HCA 26, Gageler J described the elements of the tort of false imprisonment in the following terms (at [24]-[25]):

> "To constitute the injury of false imprisonment", as Sir William Blackstone put it, "there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention". Despite the onus shifting to the defendant to negative the element of unlawfulness where the plaintiff establishes the element of detention, it is detention in combination with unlawfulness that constitutes the tort. Through the tort, the "right to personal liberty" is protected by the common law - not from all restraints, but from those restraints for which "lawful authority" cannot be shown.
>
> The right to personal liberty continues to be protected by the tort of wrongful imprisonment though liberty is vulnerable to restraint in the exercise of lawful authority. Whether a citizen or an alien and whether subject to a sentence of imprisonment imposed by a court or not, a person whose status or prior conduct renders that person especially vulnerable to detention in the exercise of lawful authority is not an outlaw. The person is entitled to expect that if, when, and for so long as, detention occurs in fact it will occur only in accordance with law. If the person is in fact detained for any period otherwise than in the exercise of lawful authority, the person is entitled to maintain an action for wrongful imprisonment in which the person is entitled to obtain an award of compensatory damages if the compensatory principle is satisfied.
>
> (Footnotes omitted)

153 In ***Ruddock v Taylor*** (2005) 222 CLR 612; [2005] HCA 48, Kirby J said of the tort (at [140]):

> Throughout the common law world, the conclusion consistently reached by courts addressing this question is that, in the absence of statutory provisions that clearly afford an immunity or defence to the administrator, the result must favour the individual whose rights have been violated. Wrongful imprisonment is a tort of strict liability. Lack of fault, in the sense of absence of bad faith, is irrelevant to the existence of the wrong. This is because the focus of this civil wrong is on the vindication of liberty and reparation to the victim, rather than upon the presence or absence of moral wrongdoing on the part of the defendant. A plaintiff who proves that his or her imprisonment was caused by the defendant therefore has a prima facie case. At common law it is the defendant who must then show lawful justification for his or her actions.
>
> (Footnotes omitted)

154 As that passage from *Ruddock v Taylor* discloses, the tort of false imprisonment is one of strict liability. The applicant must first show that the imprisonment had occurred. If that is established, the onus then shifts to the respondent to show that the imprisonment had some lawful justification.

155 Any person who actively promotes and causes the complainant to be imprisoned may be liable: *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 616. That person may be held liable even if other

people who were involved in the imprisonment, including those who actually effected the imprisonment, are immune or have a defence: *Ruddock v Taylor* at [151]-[153].

156 There could be little doubt that the Judge, in ordering or directing that Mr Stradford be imprisoned, actively promoted and caused Mr Stradford to be imprisoned. The Judge admitted as much.

157 The Judge and the Commonwealth contended, however, that there was lawful justification for Mr Stradford's detention. That was said to be the case even though the FamCA Full Court in *Stradford* set aside both the declaration and order of the Judge pursuant to which he had been imprisoned, and even though both the Judge and the Commonwealth did not dispute that the declaration and order were both vitiated by jurisdictional error. The essence of the case advanced by the Judge and the Commonwealth in relation to lawful justification was that the imprisonment order and warrant remained valid and effective until set aside. Mr Stradford's imprisonment, so it was submitted, was lawfully justified until the order and warrant were set aside by the FamCA Full Court, by which time Mr Stradford had been released on bail in any event.

158 The issue of lawful justification is the critical, if not determinative, issue in respect of the Judge's liability for false imprisonment, save for the issue concerning judicial immunity.

Collateral abuse of process

159 The tort of collateral abuse of process is committed where the defendant employs a process of the court for some purpose other than the attainment of the principal claim for relief in an action. As Issacs J put it in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91; [1911] HCA 46: "[i]f the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process". Lord Sumption described the essence of the tort as follows in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 at [149]; [2013] 4 All ER 8:

> The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably owing from or connected with the relief sought. The paradigm case is the use of the processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do.

160 The abusive purpose must be the predominant or effective purpose of the moving party: ***Williams v Spautz*** (1992) 174 CLR 509 at 529; [1992] HCA 34.

161 It is also not enough for the plaintiff to simply prove an improper purpose or motive of the defendant. The plaintiff must also prove the "deployment of the relevant process, in furtherance of that purpose, by way of an overt act or threat, distinct from pursuit of the proceeding itself according to its ordinary course": *Maxwell-Smith v S & E Hall Pty Ltd* (2014) 86 NSWLR 481; [2014] NSWCA 146 at [54]. In other words, the plaintiff must prove "an improper act in the prosecution of the process": *Butler v Simmonds Crowley & Galvin* [2000] 2 Qd R 252; [1999] QCA 475.

162 The onus of proof on the plaintiff in order to succeed on a claim of collateral abuse of process is "a heavy one": *Williams v Spautz* at 529.

163 The case against the Judge for the tort of collateral abuse of process is somewhat out of the ordinary. Ordinarily the defendant is the moving party in the impugned proceeding. In this case, however, the defendant is the judge. The parties in the principal proceeding were Mr and Mrs Stradford. That said, it would not be entirely inaccurate to describe the Judge as the moving party in the contempt proceeding against Mr Stradford. As the FamCA Full Court observed, the Judge effectively assumed the role of prosecutor: *Stradford* at [19], [26] and [71].

164 Mr Stradford's case against the Judge for collateral abuse of process was that the Judge initiated the contempt proceeding against him and threatened to prosecute that proceeding through to completion as a means of putting pressure on Mr Stradford to capitulate in his litigation with Mrs Stradford. The overt acts were alleged to be the threats made by the Judge during the purported hearing of the contempt allegation.

LIABILITY OF THE JUDGE FOR COLLATERAL ABUSE OF PROCESS

165 I propose to first deal with Mr Stradford's case for the tort of collateral abuse of process. That is because it can be dealt with fairly shortly.

166 I am not satisfied that the Judge committed the tort of collateral abuse of process. That is so for a number of reasons.

167 First, I am mindful that the allegation that the Judge instigated or maintained the contempt proceeding against Mr Stradford for the improper purpose of forcing Mr and Mrs Stradford to settle their family law proceeding, or forcing Mr Stradford to capitulate in that litigation, is an

extremely serious allegation. I must take the seriousness of the allegation into account in determining whether the inference of improper purpose is available and should be drawn: *Briginshaw*; s 140(2)(c) of the Evidence Act.

168 Second, it is not entirely clear that the Judge instigated, or saw himself as the instigator of, the contempt proceeding against Mr Stradford. Rather, as discussed earlier, he proceeded under the mistaken belief that Judge Turner had already found that Mr Stradford had failed to comply with the court's orders and was therefore in contempt. Implausible as it may seem, he appears to have proceeded on the basis that, while Judge Turner had made the contempt finding, it was a matter for him to proceed to sentence Mr Stradford for that contempt.

169 Third, while it may be accepted that the Judge pursued or maintained the contempt proceeding against Mr Stradford in that regard, and to that extent can be regarded as the moving party, I am not satisfied to the requisite standard that the Judge's predominant purpose in pursuing the contempt allegation was a purpose other than that for which contempt proceedings of the sort in question are properly pursued. That purpose was to punish Mr Stradford for his non-compliance with the court's orders and thereby vindicate the court's authority. I would infer that the Judge believed that Mr Stradford had been found to be in contempt and that it was appropriate to proceed to deal with him for that contempt.

170 Fourth, it is true that in the course of the contempt proceeding the Judge indicated to the parties that if they settled the proceeding he would effectively forgive or overlook the contempt, but that if they did not settle Mr Stradford would be going to gaol. He told the parties to engage in settlement discussions with that in mind. That was entirely inappropriate and bordering on improper. I am not, however, satisfied to the requisite standard that the Judge's inappropriate statements and conduct in that regard were motivated or actuated by any improper purpose. Rather, for the reasons given earlier in the context of the allegation that the Judge acted for an improper purpose, the Judge appears to have acted in the pragmatic but nonetheless misguided belief that it was somehow in the parties' best interests to try to settle the proceeding and thereby avoid the spectre of Mr Stradford going to gaol. While it is difficult to imagine that the Judge was entirely oblivious to the pressure that his action put the parties under, I am not persuaded that his predominant purpose was to force the parties to settle the proceeding, or force Mr Stradford to capitulate.

THE LIABILITY OF THE JUDGE FOR FALSE IMPRISONMENT

171 As has already been noted, there could obviously be no dispute that Mr Stradford was imprisoned. There was also no dispute that the Judge's conduct in making the imprisonment order and issuing the warrant was the direct cause of Mr Stradford's imprisonment. Mr Stradford was imprisoned from the date that the Judge made the imprisonment order and issued the warrant (6 December 2018) until the date that the Judge stayed the imprisonment order and directed that Mr Stradford be released (12 December 2018), a total of seven days.

172 The critical issue is whether there was lawful justification for that imprisonment.

Lawful justification

173 Both the Judge and the Commonwealth contended that there was lawful justification for Mr Stradford's detention. They obviously did not dispute that the FamCA Full Court in *Stradford* set aside both the declaration and order of the Judge pursuant to which he had been imprisoned. They also conceded that the declaration and order were invalid and vitiated by jurisdictional error. That concession was properly made.

174 There could be little doubt that the Judge had the jurisdiction to entertain the matter between Mr and Mrs Stradford, and had the power to deal with any alleged contempt by Mr Stradford in the context of that litigation. In making the imprisonment order, however, the Judge acted outside or in excess of his jurisdiction by, among other things: making the imprisonment order and issuing the warrant without first finding that Mr Stradford was in contempt; failing to make findings that were necessary before the sanction of imprisonment could be imposed pursuant to the provisions in Pt XIIIA and Pt XIIIB of the Family Law Act; failing to comply with the procedure mandated by the FCC Rules for dealing with allegations of contempt; and denying procedural fairness to Mr Stradford in a manner described by the FamCA Full Court in *Stradford* as amounting to a "gross miscarriage of justice" (at [73]). Those errors unquestionably constituted jurisdictional errors.

175 The thrust of the Judge's and the Commonwealth's contention that the Judge's imprisonment order and warrant nonetheless provided lawful justification for the imprisonment of Mr Stradford was that the order and warrant were valid until set aside by the FamCA Full Court. They submitted that the source of the Circuit Court's power to punish for contempt carried with it the power to make orders which were valid until set aside. The Constitution was said to be the source of the Circuit Court's power to punish for contempt, because the power to punish

for contempt was said to be a feature of courts established under Ch III of the Constitution and the Circuit Court was a Ch III court. They also appeared to rely on the fact that s 17 of the FCC Act provided that the Circuit Court's powers to punish for contempt were the same as the powers that the High Court has to punish for contempt. It followed, in their submission, that when the Circuit Court exercises its jurisdiction under s 17, it exercises the jurisdiction of a superior court, or exercises its jurisdiction in effect as a superior court, or in the capacity of a superior court. It followed, so the Judge and the Commonwealth submitted, that contempt orders made by the Circuit Court are valid until set aside, which is the position that would apply in the case of a superior court.

176 The starting point in resolving this issue is to consider whether orders made by an inferior court generally are valid until set aside. Consideration can then be given to whether contempt orders made by an inferior court, or the Circuit Court specifically, fall into a different category.

Are orders made by an inferior court valid until set aside?

177 The first question, shortly stated, is whether, as a general proposition, orders made by an inferior court are valid until set aside, even if they are infected by jurisdictional error. The short answer to that question is "no".

178 There is no doubt that orders made by a superior court are valid until set aside: *New South Wales v* ***Kable*** (2013) 252 CLR 118; [2013] HCA 26 at [38]. The position is, however, different in the case of an inferior court, like the Circuit Court. As Gageler J explained in *Kable* (at [56]):

> There is, however, a critical distinction between a superior court and an inferior court concerning the authority belonging to a judicial order that is made without jurisdiction. A judicial order of an inferior court made without jurisdiction has no legal force as an order of that court. One consequence is that failure to obey the order cannot be a contempt of court. Another is that the order may be challenged collaterally in a subsequent proceeding in which reliance is sought to be placed on it. Where there is doubt about whether a judicial order of an inferior court is made within jurisdiction, the validity of the order "must always remain an outstanding question" unless and until that question is authoritatively determined by some other court in the exercise of judicial power within its own jurisdiction.
>
> (Footnotes omitted)

179 Similarly, in *Director of Public Prosecutions (NSW) v* ***Kmetyk*** (2018) 85 MVR 25; [2018] NSWCA 156, Leeming JA (with whom Meagher JA and Sackville AJA agreed) held that orders made by the District Court of New South Wales were vitiated by jurisdictional error and, because the District Court was an inferior court, those orders were "nullities" (at [43]).

Justice Leeming cited ***Pelechowski*** *v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; [1999] HCA 19 in support of that conclusion.

180 It may be accepted that there may be issues surrounding the use of the words "nullity", "void" and "voidable" in this context: cf *Kable* at [21]-[22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Be that as it may, the issue, in the present context, is whether the Judge's imprisonment order lacked legal force such as to provide a lawful basis for Mr Stradford's imprisonment. The better view is that, whatever issues may arise in respect of the use of words like "nullity", "void" and "voidable", an order made by an inferior court which is infected by jurisdictional error has no legal force or effect from the outset.

181 In *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33; [2021] HCA 2, the High Court considered, among other things, the legal effect of an order made by the Land Court of Queensland, an inferior court. That order had been set aside on the basis that it was affected or infected by apprehended bias and a denial of procedural fairness on the part of the court. The plurality (Kiefel CJ, Bell, Gageler and Keane JJ) said as follows as to whether the order only lacked legal force when it was set aside (at [48]):

> The circumstance that the Land Court has been established as an inferior court, as distinct from a superior court, means that failure to comply with a condition of its jurisdiction to perform a judicial function renders any judicial order it might make in the purported performance of that judicial function lacking in legal force. That is so whether or not the judicial order is set aside.
>
> (Footnotes omitted)

182 The Judge and the Commonwealth relied on the following passage from the judgment of McHugh JA (with whom Hope JA agreed) in *Attorney-General (NSW) v* ***Mayas*** *Pty Ltd* (1988) 14 NSWLR 342 at 357:

> If an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it cannot be a contempt. Such an order is a nullity. Any person may disregard it. Different considerations arise, however, if the order is of a kind within the tribunal's power but which was improperly made. In that class of case, the order is good until it is set aside by a superior tribunal. While it exists it must be obeyed.

183 That passage from *Mayas* was subsequently cited by McHugh J in *Pelechowski* in support of the proposition that "[a] long line of cases establishes that an order made by an inferior court, such as the District Court, will be null and void if that court did not have *jurisdiction* to make the order" (emphasis added). The passage from *Mayas* upon which the Judge and the Commonwealth rely has been understood and applied as drawing a distinction between cases

where the order made by the inferior court was made within jurisdiction, and those where the error was infected by jurisdictional error: see, for example, *Ho v Loneragan* [2013] WASCA 20 at [32]-[35]; *Firth v Director of Public Prosecutions (NSW)* [2018] NSWCA 78 at [19]-[20]. As noted earlier, in *Kmetyk*, Leeming JA cited *Pelechowski* (and therefore, in effect, *Mayas*) in support of the conclusion that orders made by an inferior court which were vitiated by jurisdictional error were nullities. It follows that the Judge's and the Commonwealth's reliance on *Mayas* was misplaced.

184 The Circuit Court was an inferior court. The Judge's imprisonment order was infected by jurisdictional errors. Subject to the contention advanced by the Judge and the Commonwealth that the imprisonment order should be approached differently because it was made on the basis of the Circuit Court's contempt powers, the order lacked legal effect from the outset and provided no lawful justification for Mr Stradford's imprisonment.

Was the imprisonment order nevertheless valid until it was set aside?

185 The Judge and the Commonwealth submitted that the imprisonment order was valid until set aside, despite the fact that the Circuit Court was an inferior court. They did not go so far as to say that all orders made by the Circuit Court are valid until set aside. Apart from their reliance on *Mayas*, they did not appear to directly challenge the general proposition, supported by the authorities referred to earlier, that orders made by inferior courts which are infected by jurisdictional error lack legal force whether or not they are set aside. Rather, they submitted that the imprisonment order was of a different nature because it was made in exercise of the Circuit Court's contempt powers. That was said to be so for two reasons.

186 First, they submitted that the Circuit Court had the power to punish for contempt by virtue of it having been invested with the judicial power of the Commonwealth. They submitted, relying on *Re Colina*, that the power to punish for contempt was an attribute of the judicial power of the Commonwealth which was vested in the Circuit Court as a court under Ch III of the Constitution. That amounted, in effect, to a submission that the Circuit Court had a constitutionally implied power to punish for contempt. That implied power, so it was submitted, was not subject to the provisions of Pt XIIIA and Pt XIIIB of the Family Law Act. Moreover, it followed that orders made pursuant to that power are by their nature valid until set aside.

187 Second, they appeared to rely on the fact that s 17 of the FCC Act provided that the Circuit Court's power to punish for contempt was the "same" as that possessed by the High Court.

Orders made by the High Court punishing for contempt are valid until set aside. It followed, in the Judge's and the Commonwealth's submission, that orders made by the Circuit Court pursuant to s 17 of the FCC Act possess the same quality. Orders made pursuant to s 17 of the FCC Act were said, in that regard, to have "superior court legal effect".

188 I am not persuaded that there is any merit in either of the arguments advanced by the Judge and the Commonwealth in support of the proposition that orders made by the Circuit Court in the exercise of its contempt powers are valid until set aside.

189 The argument based on *Re Colina* relied entirely on the following short passage in the judgment of Gleeson CJ and Gummow J (at [16]):

> Section 24 of the *Judiciary Act* and s 35 of the *Family Law Act* are not expressed to confer federal jurisdiction in respect of a particular species of "matter". They set out particular powers of this Court and the Family Court and should read as declaratory of an attribute of the judicial power of the Commonwealth which is vested in those Courts by s 71 of the Constitution. The acts constituting the alleged contempts by Mr Tomey are not offences against any law of the Commonwealth. That which renders such acts (if proved) liable to punishment has its source in Ch III of the Constitution. The power to deal summarily with contempts is, to use Isaacs J's phrase "inherent" and is "a power of self-protection or a power incidental to the function of superintending the administration of justice".
>
> (Footnotes omitted)

190 The Judge and the Commonwealth highlighted the statement that the powers "set out" in ss 24 and 35 of the *Judiciary Act 1903* (Cth) and the Family Law Act should be "read as declaratory of an attribute of the judicial power of the Commonwealth which is vested in" the High Court and Family Court. As can be seen, however, that statement concerns the attributes of the High Court and the Family Court as repositories of the judicial power of the Commonwealth, not the attributes of *all* courts that may be the repositories of federal jurisdiction. Moreover, the statement must be taken as being limited to superior courts that are repositories of federal jurisdiction. That is apparent from that part of the reasoning that refers to the inherent power of courts to deal summarily with contempts. That reasoning can only apply to superior courts because inferior courts like the Circuit Court have no inherent powers: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v **AAM17*** (2021) 272 CLR 329; [2021] HCA 6 at [26]. The Chief Justice and Gummow J emphasised that the Family Court was a superior court of record (see [15]).

191 It should also be noted that, while Hayne J agreed with the reasons of Gleeson CJ and Gummow J, McHugh J (with whom Kirby J relevantly agreed) did not (see [45]-[50] and [80]-[81]) and

Callinan J did not squarely deal with the issue addressed in the reasoning upon which the Judge and the Commonwealth rely.

192 In any event, even if the passage from *Re Colina* relied on by the Judge and the Commonwealth provides some support for the proposition that the Circuit Court's power to deal with contempts as conferred by s 17 of the FCC Act is declaratory of an inherent power it has as a repository of federal jurisdiction, it does not follow that orders made by the Circuit Court in the exercise of its contempt powers are somehow imbued with the characteristics of orders made by superior courts. Nor does it follow that orders made by the Circuit Court in the exercise of its contempt powers are valid until set aside. The passage from the judgment of Gleeson CJ and Gummow J says nothing at all about the nature or characteristics of orders made by Ch III courts in the exercise of contempt powers, or the effect or enforceability of such orders. Still less does that passage say anything about the effect or enforceability of orders made by Ch III courts which are inferior courts, like the Circuit Court. The Chief Justice and Gummow J said nothing concerning the contempt powers of inferior courts.

193 Another answer to the arguments advanced by the Judge and the Commonwealth based on *Re Colina* is that, when he made the imprisonment order, the Judge was not exercising the Circuit Court's powers pursuant to s 17(1) of the FCC Act. Nor was he exercising any inherent or implied power of which s 17 of the FCC Act was perhaps declaratory. Rather, as discussed earlier in these reasons in the context of the errors made by the Judge, while he may not have known or appreciated it, his Honour was exercising, or at least purporting to exercise, the court's powers under either Pt XIIIA or Pt XIIIB of the Family Law Act. Those provisions constituted a code for dealing with contempts when the Circuit Court was exercising jurisdiction under the Family Law Act. The operation of those prescriptive and exhaustive provisions effectively excluded or limited any other general powers the Circuit Court may have had to deal with contempts, in particular contempt of the sort in issue in this case.

194 That also provides an answer to the argument advanced by the Judge and the Commonwealth to the effect that, because the effect of s 17 of the FCC Act was to confer on the Circuit Court the High Court's powers to deal with contempts, the effect was that orders made in the exercise of the power in s 17 had a "superior court legal effect". In any event, even if the Judge was exercising the Circuit Court's power under s 17 of the FCC Act, the fact that the Circuit Court had the same power as the High Court in respect of contempts does not mean that orders made by the Circuit Court in exercise of that power are of the same nature, or have the same effect

or enforceability, as orders made by a superior court. Section 17 of the FCC Act says nothing about whether orders made by the Circuit Court in the exercise of its contempt powers under that provision are valid until set aside.

195 It follows that I am not persuaded that orders made by the Circuit Court pursuant to its power to punish for contempt, particularly when those orders are made in the context of the exercise of jurisdiction under the Family Law Act, have "superior court legal effect" or are otherwise valid until set aside. The better view is that, like other orders made by an inferior court, orders made by a judge of the Circuit Court in purported exercise of the power to punish for contempt are of no legal effect if they are infected by jurisdictional error. It is not the case that such orders are, or remain, valid until set aside. It follows that the order made by the Judge to imprison Mr Stradford, infected as it was by jurisdictional error, was of no legal effect. It provided no lawful justification for Mr Stradford's imprisonment.

Conclusion concerning the elements of the tort of false imprisonment

196 Mr Stradford was imprisoned for seven days as the direct result of the imprisonment order made, and the warrant issued, by the Judge.

197 For the reasons that have been given, there was no lawful justification for Mr Stradford's imprisonment. The imprisonment order and warrant were invalid and of no legal effect. The contention advanced by the Judge and the Commonwealth that the order and warrant remained valid until set aside is unmeritorious and rejected. It follows that the elements of the tort of false imprisonment have been made out.

198 The only remaining issue concerning the Judge's liability for the tort of false imprisonment is whether the Judge was immune from civil suit in respect of Mr Stradford's imprisonment by virtue of his status as a Circuit Court judge.

JUDICIAL IMMUNITY

199 The Judge contended that Mr Stradford's case against him must fail because he is entitled to the protection of judicial immunity. He was, he submitted, entitled to the protection of judicial immunity for two reasons.

200 The first reason was that, even if he was only entitled to the judicial immunity available to inferior court judges, the errors made by him were errors within jurisdiction and the judicial immunity available to inferior court judges is not lost as a result of such errors.

201 The second reason was that, in his submission, he was in any event entitled to the judicial immunity available to superior court judges. That immunity is only lost in circumstances where the judge acted in bad faith or knowingly without jurisdiction. No such allegation is made against him. The Judge submitted that the Court should find that there is either no distinction between the judicial immunity available to inferior and superior court judges, or if there is, that he was in any event effectively acting as a superior court judge, or was effectively exercising the powers of a superior court judge, when imprisoning Mr Stradford for contempt.

202 Mr Stradford contended that the Circuit Court was an inferior court and the Judge was an inferior court judge. There is, Mr Stradford submitted, a long line of cases that establish that an inferior court judge loses the protection of judicial immunity if the judge acts outside or in excess of jurisdiction. In Mr Stradford's submission, the Judge was acting outside or in excess of jurisdiction, insofar as that notion or concept is understood or applied in the relevant authorities. He submitted that this Court should not depart from that long line of cases, or hold that there is no longer any distinction between the immunity available to inferior and superior court judges.

203 The first step in resolving the controversy between the parties in respect of judicial immunity is to consider and determine precisely what the authorities establish in relation to the scope of the immunity available to inferior court judges at common law. Before delving into that difficult area, two brief points should be emphasised.

204 First, as has already been noted, the Circuit Court was undoubtedly an inferior court: ***AAM17*** at [26].

205 Second, many inferior court judicial officers are now protected by various forms of statutory immunity. For whatever reasons, judges of the Circuit Court were not protected by any statutory immunity.

The scope of judicial immunity of inferior court judges

206 It is well established that a superior court judge is not liable for anything he or she does while acting judicially, which is generally taken to mean when acting bona fide in the exercise of his or her office and under the belief that he or she has jurisdiction, though he or she may be mistaken in that belief: ***Sirros v Moore*** [1975] 1 QB 118 at 135D (Lord Denning MR); [1974] 3 All ER 776.

207 There is, however, also authority to the effect that "judges of courts other than superior courts are not immune if they act outside jurisdiction whether or not they did so knowingly (unless the excess of jurisdiction was caused by an error of fact in circumstances where the court had no knowledge of or means of knowing the relevant facts …)": ***Wentworth v Wentworth*** [2000] NSWCA 350 at [195] (Heydon JA, with whom Fitzgerald JA and Davies AJA relevantly agreed), citing *Halsbury's Laws of England* (4th ed) vol 1(1) at [216]; Abimbola Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford University Press, 1993) pp 64-65; and Enid Campbell, 'Inferior and Superior Courts and Courts of Record' (1997) 6 *Journal of Judicial Administration* 249 at 260. It should be noted that those parts of Heydon JA's judgment in *Wentworth v Wentworth* which deal with this issue are not reproduced in the reported version of the judgment: (2001) 52 NSWLR 602.

208 Putting aside, for the moment, the issue of whether the distinction between the immunity available to superior and inferior court judges still exists, or should be changed or departed from, the thorny question is precisely what acting "outside" or "in excess of" jurisdiction means in this context. In *Wentworth v Wentworth*, Heydon JA suggested that the answer to that question was "obscure" (at [195]). Given the somewhat protean or chameleon-like character of the word "jurisdiction", the safest guide would appear to be the cases in which inferior court judicial officers have been held liable in damages for consequences flowing from a purported exercise of jurisdiction held to be beyond the relevant limit: cf ***In re McC*** *(A Minor)* [1985] 1 AC 528 at 544F (Lord Bridge); [1984] 3 All ER 908.

209 Before embarking on a consideration of some of the key cases, three brief points should be noted.

210 First, Mr Stradford did not, as the Judge appeared to suggest, contend that an inferior court judge loses immunity from suit if the judge commits *any* form of jurisdictional error as that concept is understood in contemporary administrative law jurisprudence in Australia. The relevant authorities suggest that there are at least some types or categories of jurisdictional error that may not, or would not necessarily, result in an inferior court judge losing the immunity.

211 Second, Mr Stradford submitted that it was ultimately unnecessary for the Court to endeavour to determine the precise meaning, or precise metes and bounds, of the concept of "outside" or "in excess of" jurisdiction in this context. It is only necessary for the Court to determine whether the errors found to have been made by the Judge fell within the apparent metes and

bounds of that concept as established in the cases. There is in my view considerable merit in that submission.

212 Third, and flowing from the second point, I do not propose to attempt to address all of the many decided cases in this area. The cases stretch back over 400 years. Rather, I propose to primarily address those cases that directly bear on the issue having regard to the particular facts and circumstances of this case, particularly those where an inferior court officer has been held liable in circumstances comparable or analogous to those in this case.

Authorities dealing with the civil liability of inferior court judges

213 An early case dealing with the liability of inferior court judges, frequently cited in later judgments, was *The Case of the* ***Marshalsea*** (1612) 10 Co Rep 68b; 77 ER 1027. The Court of Marshalsea purported to issue a warrant for the arrest of the plaintiff. That court, however, only had jurisdiction over members of the King's Household. The plaintiff was not a member of the King's Household. The plaintiff brought an action of trespass of assault, battery, wounding and false imprisonment against the marshal of the court and the officers who executed the warrant. That action was held to lie against the defendants because the court had no "jurisdiction of the cause" (at 77 ER 1038).

214 There was no clear indication in *Marshalsea* that the liability of the defendants depended on their knowledge, or ability to ascertain, that the court lacked jurisdiction. As will be seen from the analysis of *Marshalsea* in later cases, however, it would appear that the defendants may at least have had the capacity to ascertain that the plaintiff was not a member of the King's Household. In any event, some 80 years later, the Court of Common Pleas in ***Gwinne v Poole*** (1692) 2 Lutw 935; 125 ER 522 distinguished *Marshalsea* and held, in comparable circumstances, that the inferior court officers in question were not liable because they did not know, and could not have known, "except by the Confession of the Plaintiff or Defendant", the facts that revealed that the court lacked jurisdiction: see *The Reports and Entries of Sir Edward Lutwyche* (1718, Nutt and Gosling) at 293-294.

215 In ***Groome v Forrester*** (1816) 5 M & S 314; 105 ER 1066, the plaintiff, the late overseer of the parish of Broseley, was convicted of not delivering over to the succeeding overseers of the parish a certain book (the no doubt aptly named "Bastardy Ledger"). Founded on that conviction, the defendants, two magistrates, committed the plaintiff to gaol "until he shall have yielded up all and every the books concerning his said office of overseer, belonging to the said parish" (at 105 ER 1067). The commitment was held to be invalid. The magistrates were only

authorised to commit the plaintiff to gaol until he returned the Bastardy Ledger. The question for the court was whether the defendants were liable to an action of trespass and false imprisonment for having so committed the plaintiff. The court found that they were.

216 Having reviewed a number of authorities, Lord Ellenborough CJ held (at 105 ER 1068):

> Upon these authorities, and the reason of the thing, we are obliged to pronounce that the commitment made in pursuance of the said adjudication in this case, as well as the adjudication itself, in respect to the imprisonment, being, in this particular, **a clear excess of jurisdiction**, was not warranted by law, and that the imprisonment thereunder was a trespass in the committing magistrates, for which this action is maintainable; which we cannot but regret, **as the facts of the case would have authorised a commitment, if the warrant had been framed in a manner conformable to the powers of the magistrates under the statute**.
>
> (Emphasis added)

217 The important point to note is that there was no doubt that the magistrates had jurisdiction to issue a commitment in respect of the Bastardy Ledger. The conviction upon which the commitment was founded was held to be valid. The problem for the magistrates was that the commitment that they issued in respect of "all and every the books concerning his said office of overseer" was too broad. It was only in that respect that they exceeded or acted outside their jurisdiction.

218 Another relatively early case concerning the liability of a magistrate arising from the issue of an invalid warrant was the decision of the Court of Queen's Bench in *Caudle v Seymour* (1841) 1 QB 889; 113 ER 1372. In that case, a magistrate issued a warrant to apprehend the plaintiff, a surgeon, and bring him before the magistrate to answer a complaint that had been made against him by a child who had alleged that she had been injured by the surgeon as a result of a bad surgical treatment. The problem for the magistrate was that he only had jurisdiction to issue that warrant if the complaint, or information, had been made on oath before him personally. That did not occur. The warrant was issued on the strength of a deposition taken by the magistrate's clerk. The warrant also did not state any information on oath, or state a charge. The magistrate's defence to the action for false imprisonment failed. Lord Denman CJ held as follows (at 1 QB 892-893):

> The warrant is clearly insufficient. It does not state any information on oath, or that the fact was really committed. **But then it is said (and the argument raises a question of great importance) that although the warrant was irregular, the justice was still protected against an action of trespass, having, as a magistrate, jurisdiction over the offence. But his protection depends (as my brother Coleridge has observed), not on jurisdiction over the subject matter, but jurisdiction over the individual arrested.** To give him that jurisdiction there should have been an information properly

> laid. Here the defendant went with his clerk to the complainant's residence, but never saw her; the clerk took the deposition, but not in his presence. The matter of fact, therefore, on which alone his defence could have been rested, fails; and he has acted without jurisdiction.
>
> (Emphasis added)

219 Thus it would seem that, while the magistrate had jurisdiction to issue warrants to apprehend persons to answer complaints or informations on oath – that is, "jurisdiction over the subject matter" – he acted without jurisdiction in the plaintiff's case because he did not personally take or receive the complaint on oath from the complainant. His defence, which appeared to be akin to a claim of judicial immunity, accordingly failed.

220 The following two cases are of particular importance because they were subsequently referred to and followed in at least one intermediate appellate court in Australia.

221 In ***Calder v Halket*** (1840) 3 Moo PC 28; 13 ER 12, the respondent, a judge and magistrate of the Foujdarry Court of the Zillah of Nuddeah, in Bengal, India, issued a form of order which resulted in the arrest and subsequent detention of the appellant. Unfortunately for the respondent, the appellant was a British-born subject and not amenable to the jurisdiction of the court. The appellant brought an action for trespass. The case ultimately found its way to the Privy Council where it was held, in effect, that the plaintiff's action failed on the basis that there was no evidence before the court suggesting that the judge knew, or ought to have known, of the defect of jurisdiction. Baron Parke delivering the advice of the Privy Council stated (at 13 ER 36):

> But the answer to the objection to the Defendant's jurisdiction, founded on the European character of the Plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the Defendant knew, or had such information, as that he ought to have known of that fact; and **it is well settled that a Judge of a Court of Record in England, with limited jurisdiction, or a Justice of the Peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction**. Thus in the elaborate judgment of Mr. Baron Powell, in *Gwynn v. Poole* (Lutw. App. 1566), it is laid down, that a Judge of a Court of Record in a Borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least, that he might have been cognizant, but for his own fault; which last proposition Mr. Baron Powell illustrates by a reference to the case of the *Marshalsea Court* [10 Co. Rep. 69], which had jurisdiction only in certain cases where the King's servants were parties, who being all enrolled, the Judge ought to have had a copy of the enrolment, and so would have known the character of the parties.
>
> (Emphasis added)

222 Thus, the Privy Council affirmed the principle that where the defect in the inferior court's jurisdiction arose because of the absence of a jurisdictional fact (in *Calder v Halket*, the fact that the plaintiff was not a native Indian), the magistrate or judge responsible for making the offending order will only be personally liable if they knew, or ought to have known, or had the means of knowing, that fact.

223 In ***Houlden v Smith*** (1850) 14 QB 841; 117 ER 323, a judge of the County Court of Lincolnshire at Spilsby issued a summons which was served on the plaintiff at Cambridge, where he resided, which was outside the district of the Spilsby Court. The summons was beyond jurisdiction as the relevant enactment only authorised a county court to issue a summons within its district. The plaintiff did not appear in answer to the summons and the judge ordered that, for his contempt in disobeying the summons, the plaintiff be committed to Cambridge gaol. A warrant issued accordingly and the plaintiff was arrested and imprisoned. The judge apparently knew that the plaintiff was a resident of Cambridge, however he mistook the law and believed that he had the power and authority to commit the plaintiff to imprisonment. The judge was found to be liable to the plaintiff for false imprisonment, subject to the opinion of the Court of Queen's Bench. That court affirmed the judgment in favour of the plaintiff, its reasons including as follows (at 117 ER 327):

> That this commitment was without jurisdiction is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the service of all the processes having been proved to have been made there, and the defendant having originally specially allowed the plaint to be made in his Court, within the jurisdiction of which the cause of action accrued, the defendant (the now plaintiff) residing in Cambridgeshire. This case is not therefore within the principle of *Lowther v. The Earl of Radnor* (8 East, 113, 119), or *Gwinne v. Poole* (2 Lutw. Appendix, 1560, 1566), where the facts of the case, although subsequently found to be false, were such as, if true, would give jurisdiction, and it was held that the question as to jurisdiction or not must depend on the state of facts as they appeared to the magistrate or Judge assuming to have jurisdiction. **Here the facts of the case, which were before the defendant and could not be unknown to him, shewed that he had not jurisdiction; and his mistaking the law as applied to those facts cannot give him even a prima facie jurisdiction, or semblance of any. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as the Judge of a Court of Record, in which case the plea of not guilty would be sufficient**; or whether he is protected by the provisions of any statute, and, if so, whether he can take advantage of such statute, having omitted the words "by statute" in his plea and the margin of it.
>
> As to the first question, although it is clear that the Judge of a Court of Record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the Court wrongfully done, not in pursuance of, though under colour of, a judgment of the Court, yet **we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he**

> **has no jurisdiction. Here the defendant had not only no jurisdiction to commit the plaintiff to the gaol of Cambridgeshire, but he had no jurisdiction to summon him to shew why he had not paid the debt.**
>
> (Emphasis added)

224 The significance of *Houlden v Smith* is that it is authority for the proposition that an inferior court judge is not immune from an action for false imprisonment where the plaintiff's imprisonment was a result of an order made by the judge in a proceeding in which the judge had no jurisdiction, but assumed he or she had jurisdiction as a result of a mistake of law.

225 The judgments in *Calder v Halket* and *Houlden v Smith* were referred to with approval by Griffith CJ in the Supreme Court of Queensland in ***Raven v Burnett*** (1895) 6 QLJ 166. It is unnecessary to recount the facts in *Raven v Burnett*. It suffices to note that the case concerned the personal liability of justices of a court of petty sessions in Queensland to pay damages arising from the setting aside of a judgment in a case they had no jurisdiction to entertain. In the course of considering whether the justices were immune from the suit, Griffith CJ said (at 168):

> In order to establish the jurisdiction of an inferior court it must be shown that the court had cognisance of the subject matter of the action, both as to amount and kind, had authority to call the defendant before it, and had authority to make an adjudication of the kind it purported to make. If either of these three elements is wanting, the judgment is ineffective and cannot be pleaded, even against the party who obtains it (*Briscoe v. Stephens*, 2 Bing., 213). A plaintiff executing the process of an inferior court in a matter beyond its jurisdiction is liable to an action, whether he knew of the defect or not. And judges and officers of the court are liable if they know of the defect (per Willis, J., in *Mayor of London v. Cox*, L.R., 2 H.L, at p. 263). **In the case of a judge, the rule is that he is not liable to an action for acting without jurisdiction unless he had knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction (*Calder v. Halkett*, 3 Moore, P.C. 28, 58)**. His liability depends, therefore, upon the facts as they appear to him when the matter comes before him for adjudication, and not as they may afterwards be shown to have existed. **But an erroneous, though honest, conclusion on a matter of law, on which his jurisdiction over the subject matter, or his authority to make the order which he makes, depends, will not protect him (*Houlden v. Smith*, 14 Q.B., 841**; *Agnew v. Jobson*, 47 L.J., M.C., 67).
>
> (Emphasis added)

226 It is noteworthy that Griffith CJ considered that an inferior court judge may be liable for acting without jurisdiction not only where the judge had no jurisdiction in respect of the "subject matter of the action", or authority to "call the defendant before it", but also where the court did not have the "authority to make an adjudication of the kind it purported to make". Chief Justice Griffith's judgment was upheld by the Full Court.

227 Both *Calder v Halket* and *Houlden v Smith* were also referred to with approval by the Full Court of the Supreme Court of Victoria in ***Wood v Fetherston*** (1901) 27 VLR 492. The plaintiff in that case sued two justices of the peace in the Court of Petty Sessions at Prahran for trespass. The justices had issued a warrant pursuant to which the plaintiff was ejected from his residence. His furniture was also damaged in the process of the execution of the warrant. The problem for the justices was that the giving of a valid notice of intention to recover possession by the landlord was a condition precedent to their issue of the warrant. The notice of intention given to the plaintiff was defective because it was served before the plaintiff's tenancy was terminated. The trial judge found that the justices acted bona fide and without malice. The question reserved for the Full Court was whether the plaintiff was entitled to maintain her action in trespass. The Full Court held that the justices had acted without jurisdiction and the plaintiff could proceed with her action. The reasoning of Williams J (with whom Hood and Holroyd JJ agreed) included the following (at 501-502):

> The authorities to which we have been referred seem to show this principle – that if justices have acted without jurisdiction, and they know the facts which, it is said, oust their jurisdiction, or ought to know them – have the means of knowing them – then an action of trespass may be successfully maintained against them. ***Calder v. Halket*** **is a high authority for the proposition that where justices have acted without jurisdiction, and know the facts or have the means of knowing them, then an action of trespass will lie against them. The cases also of *Houlden v. Smith* and *Willis v. McLachlan* show that where the facts are before the justices undisputed, and where from these facts which are known and undisputed they come to an erroneous conclusion of law which gives them jurisdiction, that this is no protection and does not excuse them, and for that erroneous assumption of jurisdiction, formed on a mistaken view of the law, they are liable to an action of trespass**. It appears to us that this is the case here. The justices here, on their own record, recite the facts proved before them: Notice to quit dated 2nd June, and notice of intention to apply and take proceedings under the Act dated 9th June; so that they show not only the facts, but knowledge of the facts. The obvious inference is that the justices came, upon these facts, to an erroneous conclusion in law – that is to say, they apparently did not know the law that the notice to quit did not expire until midnight on 9th June 1900; and while in that state of ignorance of the law they gave themselves jurisdiction to exercise this summary procedure under the *Landlord and Tenant Statute*, which they would not have had upon a right conclusion of law upon these facts.
>
> That being the state of things, it appears to us this action will lie. We therefore answer the question thus: That the plaintiff is entitled to maintain this action of trespass.
>
> It is a case of great importance, especially to justices of the peace, and shows the necessity of looking more carefully into questions such as have arisen in this case than the justices concerned have done. Presuming that they knew the law, if they had looked into the dates of these notices which they recite in their warrant they would have seen that the notice of intention to apply and proceed was premature, and could not have been given under the Act until the tenancy had expired. If they did not know the law that fact only shows the necessity for some care on their part in ascertaining the law.

(Emphasis added; footnotes omitted)

228 In summary, Williams J accepted *Calder v Halket* as "high authority" and followed and applied *Houlden v Smith*, concluding that the justices were liable for trespass because they made a mistake of law and wrongly concluded that they had jurisdiction to issue the warrant in question. It should perhaps be noted that there was no question that the justices had jurisdiction to entertain the application for the warrant. The problem was that they erroneously concluded that a condition precedent to the issue of a warrant had been met.

229 The judgment in *Houlden v Smith* was also cited with apparent approval by Davidson J in the Supreme Court of New South Wales in ***Ward v Murphy*** (1937) 38 SR (NSW) 85 as authority for the proposition that an inferior court judge cannot rely on judicial immunity in defence to an action for false imprisonment where the judge, acting on a mistaken view of the law, makes an order which the judge had no jurisdiction to make and which resulted in the imprisonment of the plaintiff. His Honour said that "[i]n the case of the [inferior court] judge, ignorance of the law is no excuse, if he was not misled and knew the facts which, in law, would show that there was no jurisdiction" (at [94]).

230 The next case worthy of consideration is the judgment of the Scottish Court of Session in ***M'Creadie v Thomson*** 1907 SC 1176. This case is of particular importance because it follows and applies *Groome v Forrester* and affirms that an inferior court judge is not immune from suit, and may be personally liable, not only where the judge purports to exercise jurisdiction in a matter which he or she had no jurisdiction to entertain, but also where the judge makes an order or imposes a sentence that he or she is not authorised or empowered to make or impose in the circumstances having regard to the terms of the enactment.

231 The facts in *M'Creadie v Thomson* were that the plaintiff was brought before a magistrate in a police court on charge that she used indecent language to the annoyance of a police constable. The relevant enactment provided that the penalty for that offence was a fine and that, if that fine was not paid, the offender could be imprisoned for up to one month until the fine was paid. The plaintiff pleaded guilty and the magistrate sentenced her to imprisonment for 14 days without first imposing any fine. The plaintiff brought an action for damages against the magistrate. The court rejected the magistrate's plea that the action was incompetent.

232 Delivering the judgment of the court, the Lord Justice-Clerk accepted that an immunity attached to inferior court judges and magistrates "when sitting in judgment", but held that the

immunity was limited, or may be lost in certain circumstances. His Lordship reasoned as follows (at 1183-1184):

> But while this is so, it is a totally different question whether a Magistrate who when sitting as such does official acts which he has no power to do under a statute in accordance with which he is bound to act, and which judicial acts have the effect of restraining the liberty of the subject, and subjecting him to penalty in his person, is immune from civil consequences for the wrong he has done. I do not think that this has ever been held, and the opposite has been held in many cases. Where a Magistrate, professing to sit as such, and dealing with a case which he has no jurisdiction to deal with at all, commits what is an undoubted wrong upon a citizen, both by principle and practice he is held liable for the wrong done. **If that is so, can it be said that a Magistrate who has before him a case which he can competently try under an Act of Parliament on which the complaint is founded, and who, instead of dealing with the case as it is before him, and on conviction awarding such punishment as the Act prescribes and allows, proceeds knowingly to pronounce a sentence which is not competent under the Act of Parliament, and thereby sends a person to prison contrary to the Act of Parliament, — I say, can it be said that he is in any more favourable position than a Magistrate trying a case in circumstances where he has no jurisdiction? In the one case his sentence is illegal, because he has no complaint before him on which he can pronounce a sentence at all. In the other he has a complaint before him, on which he cannot pronounce the sentence which he does pronounce. The wrong is as great in the latter case as in the former.** For as well might he have no jurisdiction at all as step outside the jurisdiction which he does possess, to do something which he could not do if he held himself within the limits prescribed to him by the law under which he was called to exercise his jurisdiction. The case of *Groome v. Forrester*, decided in England, is a forcible illustration of the fact that **there may be liability in a Magistrate, not merely for acting without jurisdiction, but for doing an act in excess of the jurisdiction he was called upon to exercise.** In that case, as here, the Magistrate could have pronounced an effective judgment, under which incarceration might have taken place. The mistake was made that while the thing complained of was that an overseer had refused to obey an order of Court by delivering up a certain book, he was committed till he should have delivered up "all and every, the books," &c. In that case, the Magistrates were held liable in damages for "a clear excess of jurisdiction".
>
> (Emphasis added)

233 It should be noted that in this passage, the Lord Justice-Clerk held, among other things, that an inferior court judge or magistrate may be liable where he or she "proceeds knowingly to pronounce a sentence which is not competent" under the relevant enactment. In *In re McC*, a decision that will be addressed in more detail later in these reasons, the House of Lords approved the judgment and reasoning of the court in *M'Creadie v Thomson*, save for the word "knowingly" in that sentence. Their Lordships could "not see how ignorance of the terms of the statute regulating their powers of sentence in any particular case could afford justices any defence" (at 1 AC 548-549 per Lord Bridge).

234 As noted earlier, the importance of the judgment in *M'Creadie v Thomson* is that it is clear authority for the proposition that an inferior court judge or magistrate may be liable "not merely

for acting without jurisdiction, but for doing an act in excess of the jurisdiction he was called upon to exercise".

235 Further support for that proposition may be found in the judgment in ***O'Connor v Isaacs*** [1956] 2 QB 288; 2 All ER 417.

236 In *O'Connor v Isaacs*, the plaintiff's wife took out a summons under a particular enactment alleging that the plaintiff had been guilty of persistent cruelty and seeking, on that basis, a separation and maintenance order. At the hearing of the summons, the magistrates made an order that the plaintiff pay his wife maintenance, even though the allegation of persistent cruelty had not been proved. The plaintiff fell into arrears in paying the maintenance and as a result was imprisoned. The plaintiff commenced proceedings against the magistrates who made the maintenance order seeking damages for false imprisonment. While that action ultimately failed because of a limitation issue, it is readily apparent that, but for that issue, the action would have succeeded.

237 It was conceded before the trial judge, Diplock J, that the magistrates had no jurisdiction to make the maintenance order because a finding that the plaintiff was guilty of a matrimonial offence (relevantly, that he was guilty of persistent cruelty) was a condition precedent to their making of that order. It appeared to be accepted that the magistrates had made a bona fide mistake of law in that regard. In addressing the question whether the magistrates could be held personally liable in respect of the plaintiff's imprisonment, that imprisonment having flowed from the making of the maintenance order, Diplock J referred, with apparent approval, to *Houlden v Smith*, and continued (at 2 QB 304):

> The law, therefore, appears to me to be clear that where a magistrate or any judge of an inferior court assumes jurisdiction where he has no jurisdiction as a result of a mistake of law, he is liable in trespass for acts done as a result of that erroneous assumption of jurisdiction, and if his mistake of law appears upon the face of the record itself, the setting aside of the order is not a condition precedent to the action at common law. In the present case it appears upon the face of the record that the magistrates made the order without jurisdiction.

238 It should be emphasised that it is clear that the magistrates had jurisdiction to entertain the summons. If they had made a finding concerning the alleged matrimonial offence, they would also plainly have had jurisdiction to make the maintenance order in question. Their error of law, it appears, was to proceed on the basis that they could make the order without first making a finding concerning the alleged matrimonial offence.

239 An appeal from Diplock J's judgment was dismissed, though not surprisingly the appeal focussed on the limitation issue.

240 The decisions in *Calder v Halket*, *Houlden v Smith* and *O'Connor v Isaacs* were referred to, albeit fairly fleetingly, in the judgment of Crisp J in the Supreme Court of Tasmania in ***Gerard v Hope*** [1965] Tas SR 15. The plaintiff in that case was convicted in a court of petty sessions of failing to lodge a tax return. That conviction was entered in the plaintiff's absence as he had not been personally served. The magistrate imposed a fine in respect of the conviction. Importantly, the magistrate did not order that the plaintiff be imprisoned if he failed to pay the fine, or make any order of committal. It would appear, however, that a clerk informally and incorrectly endorsed the court file with a note suggesting that the plaintiff be imprisoned for 14 days if he defaulted in paying the fine. At about this point in time, the plaintiff became aware of the proceedings. He contacted the Taxation Department and made appropriate arrangements in respect of his tax affairs. The Taxation Department wrote to the court and requested a stay of the proceedings against the plaintiff, however that letter was mislaid by the court. When the fine remained unpaid after the time for payment expired, the clerk who had entered the incorrect endorsement on the court file, purporting to act as a justice of the peace, issued a warrant of commitment in respect of the unpaid fine. The plaintiff was subsequently arrested and gaoled pursuant to the warrant. He subsequently sued the justice of the peace, the constable who arrested him and the controller of prisons for false imprisonment. They were all held liable.

241 The decision of Crisp J in respect of the liability of the constable and the gaoler will be discussed in more detail later. As for the justice of the peace, he endeavoured to defend the action by arguing that there were various statutory sources of jurisdiction which supported his issuing of the warrant. Those arguments all failed. While some of Crisp J's reasoning is, with respect, somewhat difficult to follow, it would appear that all of the defences advanced by the justice, both at common law and under statute, ultimately failed because his Honour found that the issuing of the warrant was "wholly beyond the jurisdiction of the justice" (at 53). Indeed, this was a case in which it would appear that the justice did not have "jurisdiction in respect of the subject matter" (at 62).

242 The next judgment which is necessary to consider is the judgment of the House of Lords in *In re McC*. This is a case of particular importance.

243 The facts in *In re McC* were fairly straightforward. The respondent, a juvenile, was charged with various offences. He appeared unrepresented before the appellants, the resident magistrate and two lay justices, in the Belfast Juvenile Court. He pleaded guilty and the appellants made an order which amounted to a sentence of detention. An enactment in Northern Ireland provided that, relevantly, a magistrates' court could not pass a sentence of detention on an offender who was unrepresented and had not previously been sentenced to that punishment unless the offender either applied for legal aid, or having been informed of his right to apply for legal aid, refused or failed to apply. The Divisional Court in Northern Ireland (Queen's Bench Division) subsequently quashed the detention order on the basis that it was not lawfully made because the respondent had not been informed of his right to apply for legal aid. The respondent commenced an action for damages for false imprisonment against the appellants.

244 The question of law that was ultimately considered by the House of Lords was whether the action for false imprisonment could proceed against the appellants. That question in turn depended on whether the action was precluded by s 15 of the *Magistrates' Courts (Northern Ireland) Act 1964* (NI) (**Magistrates' Court Act**), which provided:

> No action shall succeed against any person by reason of any matter arising in the execution or purported execution of his office of resident magistrate or justice of the peace, unless the court before which the action is brought is satisfied that he acted **without jurisdiction or in excess of jurisdiction**.
>
> (Emphasis added)

245 Without getting into the complexities of the matter, it was broadly accepted that s 15 of the Magistrates' Court Act gave statutory force to, and operated in much the same way as, the "old common law rule that justices were civilly liable for actionable wrongs suffered by citizens pursuant to orders made without jurisdiction" (see 1 AC 541F per Lord Bridge). The critical question was whether the detention order made by the appellants was made "without jurisdiction or in excess of jurisdiction".

246 The House of Lords held that the action could proceed because the appellants had acted without or in excess of jurisdiction.

247 The lead judgment was delivered by Lord Bridge. The other members of the House of Lords relevantly agreed with Lord Bridge's reasons, though Lord Templeman provided some additional reasons. In considering the meaning of the words "without jurisdiction or in excess of jurisdiction" in s 15 of the Magistrates' Court Act, Lord Bridge noted the "many different

shades of meaning" that the word "jurisdiction" has depending on the context in which it was used (at 1 AC 536B-C). His Lordship eschewed reliance on the "innumerable certiorari cases" in construing the expression "without or in excess of jurisdiction" and said that a "safer guide" was the "few cases since 1848 where persons exercising a limited jurisdiction have been held liable in damages for consequences flowing from a purported exercise of the jurisdiction held to be beyond the relevant limit" (at 1 AC 544F).

248 Lord Bridge then considered a number of cases, including *Houlden v Smith*, in which damages had been awarded against inferior court judges or magistrates in circumstances where the judge or magistrate had no "jurisdiction of the cause" (at 1 AC 546A). His Lordship then said (at 1 AC 546E-547B):

> But once justices have duly entered upon the summary trial of a matter within their jurisdiction, only something quite exceptional occurring in the course of their proceeding to a determination can oust their jurisdiction so as to deprive them of protection from civil liability for a subsequent trespass. As *Johnston v. Meldon*, 30 L.R.Ir. 15 shows, an error (whether of law or fact) in deciding a collateral issue on which jurisdiction depends will not do so. Nor will the absence of any evidence to support a conviction: *Rex (Martin) v. Mahony* [1910] 2 I.R. 695; *Rex v. Nat Bell Liquors Ltd*. [1922] 2 A.C. 128. It is clear, in my opinion, that no error of law committed in reaching a finding of guilt would suffice, even if it arose from a misconstruction of the particular legislative provision to be applied, so that it could be said that the justices had asked themselves the wrong question. I take this view because, as I have intimated earlier, I do not believe that the novel test of excess of jurisdiction which emerges from the *Anisminic* case [1969] 2 A.C. 147, however valuable it may be in ensuring that the supervisory jurisdiction of the superior courts over inferior tribunals is effective to secure compliance with the law and is not lightly to be ousted by statute, has any application whatever to the construction of section 15 of the Northern Ireland Act of 1964 or section 45 of the Act of 1979.
>
> Justices would, of course, be acting "without jurisdiction or in excess of jurisdiction" within the meaning of section 15 if, in the course of hearing a case within their jurisdiction they were guilty of some gross and obvious irregularity of procedure, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence, or of the rules of natural justice, as for example if the justices refused to allow the defendant to give evidence. But I would leave for determination if and when they arise other more subtle cases one might imagine in which it could successfully be contended in judicial review proceedings that a conviction was vitiated on some narrow technical ground involving a procedural irregularity or even a breach of the rules of natural justice. Such convictions, if followed by a potential trespass to person or goods would not, in my opinion, necessarily expose the justices to liability in damages.

249 The following propositions flow from this passage. First, justices can lose their protection from civil liability for trespass even in cases where they have jurisdiction of the cause, or subject-matter jurisdiction. Second, in such cases, something "quite exceptional" must occur to deprive the justice of their protection. Third, justices would be acting "without jurisdiction

or in excess of jurisdiction" if in the course of the proceeding they were "guilty of some gross and obvious irregularity of procedure".

250 Lord Bridge noted (at 1 AC 547C-D) that there was no question that the appellants had jurisdiction to entertain the proceedings against the respondent. His Lordship then considered a number of cases where inferior court judges or magistrates who had jurisdiction of the cause had nevertheless been found to be liable for damages for trespass or false imprisonment on the basis that they had acted in excess of jurisdiction. The cases considered by Lord Bridge, with apparent approval, in that context included *Groome v Forrester*, *M'Creadie v Thomson* and *O'Connor v Issacs*. Lord Bridge concluded that those cases established the "the clear principle that justices, though they have 'jurisdiction of the cause' and conduct the trial impeccably, may nevertheless be liable in damages on the ground of acting in excess of jurisdiction if their conviction of the defendant before them or other determination of the complaint against him does not provide a proper foundation in law for the sentence imposed on him or order made against him and in pursuance of the sentence or order he is imprisoned or his goods are seized" (at 1 AC 549C-D).

251 Lord Bridge concluded that, despite having had jurisdiction of the cause, the appellants nevertheless had acted without jurisdiction, or in excess of jurisdiction, because the statutory precondition to the imposition of the detention order (informing the respondent of his right to apply for legal aid) was essential to support the appellants' jurisdiction to impose the detention order.

252 As noted earlier, the other members of the House of Lords, including Lord Templeman, agreed with Lord Bridge's reasons, though Lord Templeman gave some additional reasons. His Lordship reviewed the authorities, including *Marshalsea, Gwinne v Poole*, *Groome v Forrester*, *Calder v Halket*, *Houlden v Smith*, *M'Creadie v Thomson*, and *O'Connor v Issacs* and expressed the following opinion (at 1 AC 558D-G):

> In my opinion the authorities disclose that a magistrate is not liable in damages for the consequences of an unlawful sentence passed by him in his judicial capacity in a properly constituted and convened court if he has power to try the offence and the offender, duly convicts the offender of the offence and imposes a sentence which he has power to impose for the offence and on the offender. If the magistrate fails to convict the offender of the offence or if he imposes a sentence which he has no power to impose on the offender for the offence he acts without jurisdiction and if the sentence results in imprisonment, is liable to the accused in a civil action for damages for false imprisonment.
>
> If in the course of a trial which a magistrate is empowered to undertake, the magistrate

> misbehaves or does not accord the accused a fair trial, or is guilty of some other breach of the principles of natural justice or reaches a result which is vitiated by any error of fact or law, the decision may be quashed but the magistrate acting as such acts within jurisdiction. Similarly if the magistrate after a lawful trial imposes a sentence which he is authorised to impose on the defendant for the offence, but follows a procedure which is irregular, the sentence may be quashed but the magistrate acts within jurisdiction.

253 While Lord Templeman also agreed with Lord Bridge's reasons, his Lordship's separate reasons might appear, at least at first blush, to be slightly narrower than Lord Bridge's. That is because his Lordship expressed the opinion that a magistrate who "misbehaves or does not accord the accused a fair trial, or is guilty of some other breach of the principles of natural justice" nevertheless relevantly acts within jurisdiction. It is, however, possible to reconcile that opinion with Lord Bridge's reasons because Lord Bridge's opinion was that only "gross and obvious" irregularities of procedure or breaches of the rules of justice would support a conclusion that a magistrate had acted without or in excess of jurisdiction. In any event, as all of the other members of the House of Lords agreed with Lord Bridge's reasons, his opinion reflects the majority position.

254 The decision in *In re McC* is highly persuasive authority in relation to the metes and bounds of the judicial immunity available to inferior court judges, including in Australia. While strictly speaking the case may have involved the construction of a form of statutory immunity, it is clear that the House of Lords effectively proceeded on the basis that the statutory immunity in question reflected the position at common law. It was on that basis that the common law authorities were closely considered and analysed. I was not taken to any case, in England or Australia, which doubted Lord Bridge's careful analysis of the authorities and his Lordship's conclusion concerning the scope of an inferior court judge's immunity.

255 There is another aspect of *In re McC* that is of some importance. That is whether the distinction between superior and inferior courts in respect of judicial immunity continues to apply. That issue is considered separately later in these reasons.

256 The decision in *In re McC* was followed and applied by the High Court of England and Wales in ***R v Manchester City Magistrates' Court****; Ex parte Davies* [1988] 1 WLR 667; 1 All ER 930. In that case, a rating authority issued a distress warrant to the applicant in respect of outstanding rates and, upon non-payment, applied for a warrant of committal in the Manchester City Magistrates' Court. The relevant legislation provided that, before issuing a warrant of committal, it was necessary for the court to be satisfied that the applicant's failure to pay the rates was due to culpable neglect. The magistrates issued a warrant of committal and the

applicant was imprisoned. That decision was subsequently quashed on the basis that, while the magistrates' were of the opinion that the applicant was guilty of culpable neglect in failing to follow his accountant's advice, they had no regard to the necessity of it being established that the applicant's failure to pay the rates was due to that culpable neglect. The applicant claimed damages from the magistrates. The main question for the court was whether the magistrates had exceeded their jurisdiction.

257 Justice Simon Brown considered and applied the decision in *In re McC* and concluded as follows (at 1 AC 673A-B):

> Although I would not go so far as to characterise the insufficiency of the justices' inquiry here as a gross and obvious irregularity, I believe it right to equate the justices' plain failure to address themselves to the question whether or not the applicant's failure was 'due … to his culpable neglect' within the plain meaning of [the relevant enactment] with the justices' failure in *In re McC.* to satisfy the requirements of the Irish order.

258 It can be seen that Simon Brown J picked up and applied Lord Bridge's formulation of one of the categories of cases in which an inferior court justice loses judicial immunity. His Honour's decision was affirmed on appeal: *R v Manchester City Magistrates' Court Ex parte Davies* [1988] 3 WLR 1357; [1989] 1 All ER 90. Lord Justice O'Connor concluded that the need to find that the applicant's non-payment of the rates was due to culpable neglect was "a statutory condition precedent to the imposition of a sentence of imprisonment and its fulfilment [was] essential to support the justices' jurisdiction to impose it" (at 3 WLR 1363). Similarly, Neill LJ held that a "statutory condition precedent to the exercise by the justices of their power to issue a warrant under [the relevant enactment] was not satisfied" and that the justices' failure to examine whether the applicant's non-payment of the rates was due to culpable neglect was not "merely a procedural irregularity" (at 3 WLR 1367).

259 Mr Stradford identified a number of other cases where magistrates or inferior court judges had been held liable for actions in trespass, false imprisonment or similar torts in circumstances where they had made orders, or issued warrants in good faith (or at least without malice) but without or in excess of their jurisdiction. Those cases included: *Scavage v Tateham* (1600) Cro Eliz 829; 78 ER 1056; *Smith v Bouchier* (1734) 2 Str 993; 93 ER 989; *Davis v Capper* (1829) 10 B & C 28; 109 ER 362; *Lindsay v Leigh* (1848) 11 QB 455; 116 ER 547; *Willis v Maclachlan* (1876) 1 Ex D 376; *Agnew v Jobson* (1877) 13 Cox CC 625 and *Polley v Fordham (No 2)* (1904) 91 LT 525. It is, in light of the preceding discussion, unnecessary to give any detailed consideration to any of these cases. It suffices to note that they provide further support for the

proposition that at common law, an inferior court judge who makes an order, or issues a warrant, in circumstances where they did not have jurisdiction to do so, is not protected from suit by judicial immunity, except where they did not know, or have the means of knowing, the facts which deprived them of their jurisdiction.

260 Mr Stradford also relied on the decision of Owen J in the Supreme Court of New South Wales in *Ex parte Taylor; Re Butler* (1924) 41 WN (NSW) 81. In that case a personal costs order was made against a magistrate because the magistrate denied a party procedural fairness and "disregarded his judicial position" (at 84). That case, however, does not greatly assist in resolving the issue in the present case. The reasoning of Owen J does not specifically address the principles concerning judicial immunity.

Cases relied on by the Judge concerning the notion of jurisdiction in the context of judicial immunity

261 In his submissions, the Judge was somewhat dismissive of many of the authorities concerning the judicial immunity available to inferior court judges. Indeed, he contended that the common law in respect of that issue was "deeply unsatisfactory". He submitted that the law had evolved and changed since many of the older cases had been decided. He relied on what he called the "modern case law" on the notion of "jurisdiction" in the context of judicial immunity. He contended, in essence, that the modern case law established that the meaning of "jurisdiction" in the context of judicial immunity, including the immunity that attaches to inferior court judges, meant "subject matter jurisdiction". That, in his submission, meant that so long as a judge had jurisdiction in respect of the subject-matter of the case, the judge was immune from any damages suit irrespective of the nature or character of any errors made by the judge in the exercise of that jurisdiction. As will be seen, however, all but one of the cases relied on by the Judge in that regard were cases that concerned the judicial immunity attaching to superior court judges.

262 The main cases relied on by the Judge were: *Sirros v Moore*; ***Nakhla v McCarthy*** [1978] 1 NZLR 291; *Moll v Butler*; ***Rajski v Powell*** (1987) 11 NSWLR 522; ***Gallo v Dawson*** (1988) 63 ALJR 121; (1988) 82 ALR 401; and ***Fingleton*** *v The Queen* (2005) 227 CLR 166; [2005] HCA 34.

263 *Sirros v Moore* is a confusing case and has been subject to criticism. The facts were that the plaintiff, a citizen of Turkey, was convicted of an offence and fined by a magistrate. The magistrate also made a recommendation to the Home Secretary that the plaintiff be deported,

though he ordered that the plaintiff should not be detained pending the Home Secretary's decision. The plaintiff appealed to the Crown Court. A judge in the Crown Court dismissed the appeal. As the plaintiff was leaving the Court, the judge directed a police officer to detain the plaintiff and subsequently refused him bail. A writ of habeas corpus was subsequently issued on the basis that the judge had been functus officio when he ordered the plaintiff to be detained. The plaintiff subsequently filed a writ claiming damages for assault and false imprisonment. That writ was struck out. The question for the Court of Appeal was whether the judge was immune from suit. The Court held that the judge was immune from suit, though each of the judges gave somewhat different reasons.

264 Lord Denning MR proceeded on the basis that the Crown Court was a superior court and that a judge of a superior court "is not liable for anything done by him while he is 'acting as a judge'" and "is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, though he may be mistaken in that belief" (at 1 QB 135C-D). His Lordship held that, while the judge had no jurisdiction to detain the plaintiff, "he acted judicially and for that reason no action will lie against him" (at 1 QB 137B).

265 In obiter dicta relied on by the Judge in his submissions, Lord Denning MR distinguished between the liability of a judge in respect of acts within jurisdiction and acts done outside his jurisdiction. In the case of the former, Lord Denning MR maintained that it had been accepted that "no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him" (at 1 QB 132D). In the case of the latter, his Lordship recognised that "in the old days … there was a sharp distinction between the inferior courts and the superior courts" (at 1 QB 136A). In relation to inferior courts, according to Lord Denning MR, it had been "established for centuries that a judge of an inferior court was only immune from liability when he was exercising – albeit wrongly – a jurisdiction which belonged to him" and that the immunity "did not exist when he went outside that jurisdiction" (at 1 QB 133B). Lord Denning MR also asserted that the reason for the distinction between inferior and superior courts in respect of judicial immunity "is no longer valid" and that "as a matter of principle the judges of superior courts have no greater claim to immunity than the judge of the lower courts" (at 1 QB 136A-B).

266 Lord Denning MR's suggestion that the distinction between superior and inferior courts in respect of judicial immunity should no longer apply is discussed in more detail later. It suffices to say that it was subsequently rebuffed by the House of Lords in *In re McC*. Indeed, the House

of Lords in *In re McC* did not embrace any of Lord Denning MR's reasoning. Lord Bridge supported the decision in *Sirros v Moore* on the very narrow ground expressed in the judgment of Buckley LJ.

267 Perhaps more importantly, Lord Denning MR's reasoning has also been criticised as wavering "confusingly between different senses of the expression 'jurisdiction'" and as arguably stating the immunity "more narrowly than in former times": *Wentworth v Wentworth* at [260] (Heydon JA). I respectfully agree with those criticisms. Lord Denning MR's short summation of the immunity attaching to inferior court judges is difficult, if not impossible, to reconcile with the authorities discussed in detail earlier in these reasons.

268 Lord Justice Buckley proceeded on the basis that, in exercising its appellant jurisdiction, the Crown Court was an inferior court. His Lordship concluded, in effect, that the judge in the Crown Court had the power to determine whether the plaintiff should or should not be detained in custody consequent on hearing the appeal, that he was therefore acting within jurisdiction and that, while he adopted an erroneous course of procedure, that was an error of practice, not jurisdiction (at 1 QB 143E-144F).

269 Lord Justice Ormrod, like Lord Denning MR, appeared to proceed on the basis that the Crown Court was a superior court. His Lordship recognised that there was a dichotomy in the common law concerning judicial immunity in superior and inferior courts. That dichotomy was that a "judge of a superior court was not answerable for anything said or done by him when acting in a judicial capacity" whereas a "judge of an inferior court was personally liable if he acted outside his jurisdiction" (at 1 QB 148F). Like Lord Denning MR, however, Ormrod LJ was of the view that the "old rules should be modified", that judges of inferior courts should be given "enhanced protection" and that the formulation of that protection that should be adopted was that a judge be protected where he "makes an order, in the bona fide exercise of his office, and under the belief of his having jurisdiction, though he may not have any" (at 1 QB 149G).

270 The Judge's submission concerning the meaning of "jurisdiction" in this context finds some support in some of Ormrod LJ's reasons. His Lordship expressed the view that the word "jurisdiction" in this context is used in the "strict sense" and that "a judge of an inferior court acts outside his jurisdiction when he exceeds the limits imposed on his court; but not when, having jurisdiction over the subject-matter, he assumes a power which has not been given to him" (at 1 QB 150C-D). It followed, according to Ormrod LJ, that if the Crown Court was to be classified as an inferior court, the plaintiff was subject to its jurisdiction, the court had the

power, or jurisdiction, to cause the plaintiff to be lawfully detained and the order that was made was only invalid because "appropriate steps had not been taken" (at 1 QB 150G).

271 I have, with respect, considerable difficulty reconciling Ormrod LJ's views concerning the meaning of jurisdiction in this context with the authorities considered in detail earlier in these reasons, including *In re McC*. The House of Lords in *In re McC* certainly did not embrace or approve Ormrod LJ's reasoning in *Sirros v Moore*.

272 Overall, I do not consider that the dicta in *Sirros v Moore* concerning the principles applicable to the immunity of inferior court judges to be of much assistance. I certainly do not consider it to be persuasive, particularly in light of the decision in *In re McC*.

273 I should note in that context, however, that the reasoning of Lord Denning MR was followed by Wood J in *Moll v Butler*, a case referred to earlier in these reasons in the context of the Family Court's powers in respect of contempt. It concerned the immunity of a judge of the Family Court, a superior court. It is also clear that Wood J only followed Lord Denning MR's reasoning insofar as it related to the position of superior court judges. That is apparent from the passage in Wood J's judgment where his Honour accepted that the House of Lords in *In re McC* had doubted the reasoning in *Sirros v Moore* insofar as it equated the position of inferior and superior courts, but noted that "there is nothing in their Lordships' speeches [in *In re McC*] providing any support for the proposition that the immunity of judges of superior courts is less than was stated by the majority in *Sirros*" (at 243F-G).

274 The Judge also placed considerable reliance on the judgment of the New Zealand Court of Appeal in *Nakhla v McCarthy*. *Nakhla v McCarthy* involved an action against the President of the New Zealand Court of Appeal for damages for "abuse of legal process". It therefore concerned the immunity of superior court judges, not inferior court judges.

275 The rather unusual facts of the case were that the plaintiff appealed against his conviction for an offence. One of his grounds of appeal challenged the trial judge's directions of law concerning the elements of the offence. The Court of Appeal's judgment dismissing the appeal was handed down by the President. The written judgment made no reference to the ground of appeal concerning the trial judge's direction. The President subsequently explained that a page of the judgment which dealt with that ground of appeal had been omitted from the published judgment as a result of an administrative error. The plaintiff nevertheless commenced an action against the President alleging that in failing to adjudicate on that ground the President had acted

without jurisdiction. The plaintiff's statement of claim was struck out and he appealed to the Court of Appeal.

276 The Court of Appeal upheld the striking out of the statement of claim on the basis that, contrary to the plaintiff's central allegation, the President acted within his jurisdiction. In the course of so doing, Woodhouse J, who delivered the judgment of the Court, dealt with the principle of judicial immunity. In his submissions, the Judge relied in particular on the following passage from the judgment of Woodhouse J (at 300):

> So far as we are able to understand his case the plaintiff accepts the age-old principle that whatever the rank of a judge, whether his court is a superior court or a court of limited jurisdiction, his exemption from civil liability is absolute in respect of all of his acts done within the jurisdiction that belongs to him. The plaintiff's counsel referred us to numerous cases all of which accept that principle without qualification although there are variations in nuance or approach in the case of a judge who should act outside his jurisdiction. But for the moment we are concerned only with acts done within jurisdiction and, as we say, counsel appear to be agreed that here the immunity is absolute.

277 Justice Woodhouse went on to express the view that the court was "in no doubt that when the principle of judicial immunity is discussed in the cases in relation to acts done within the jurisdiction of the judge that word must be regarded as referable to the broad and general authority conferred upon his court and upon himself to hear and to determine issues between individuals or between individuals and the Crown" (at 301).

278 A number of points should be made in respect of that statement.

279 First, as has already been noted, the case before the court concerned judicial immunity of a superior, not inferior, court judge.

280 Second, while Woodhouse J referred to what had been discussed in the cases in relation to acts done within jurisdiction, his Honour referred to only three cases. The first was *Calder v Halket* which was a case, as the discussion earlier in these reasons makes clear, which concerned acts done by an inferior court judge who had no jurisdiction over the plaintiff because the court only had jurisdiction over persons of Indian nationality and the plaintiff was a British-born subject. The second case was the case of *Garthwaite v Garthwaite* [1964] P 356; 2 All ER 233, a case which was not at all concerned with the principle of judicial immunity. The third case was *Sirros v Moore*, a case primarily concerned with judicial immunity of superior court justices. For the reasons already given, the dicta in *Sirros v Moore* concerning immunity of inferior court judges is somewhat questionable and has been criticised in later cases.

281 Importantly, there is no indication that the court in *Nakhla v McCarthy* was taken to the authorities concerning the immunity of inferior court judges, such as *Groome v Forrester*, *M'Creadie v Thomson* and *O'Connor v Issacs*, which establish that an inferior court judge may not be immune from suit, despite having had "jurisdiction of the cause", if the judge acts in excess of jurisdiction.

282 In all the circumstances, to the extent that the observations made by Woodhouse J in *Nakhla v McCarthy* concerned the immunity of inferior court judges, those observations should be viewed with considerable caution and, with respect, given limited weight.

283 In his submissions, the Judge relied on the fact that the decision in *Nakhla v McCarthy* has been referred to with approval in a number of Australian cases. It is, however, clear upon analysis that those cases all concerned the immunity of superior court judges, or the statutory immunity of judges in terms which reflected the immunity of superior court judge.

284 The first of the Australian cases relied on by the Judge was *Moll v Butler*. As noted earlier, *Moll v Butler* was a case, like *Nakhla v McCarthy* itself, which concerned the immunity of a superior court judge. Justice Wood's acceptance of the approach taken in *Nakhla v McCarthy* must be considered in that context.

285 The next case relied on by the Judge was *Rajski v Powell*. That case concerned an action commenced by a rather notorious self-represented litigant, Mr Leszek **Rajski**, against a judge of the Supreme Court of New South Wales for damages caused by allegedly unlawful acts by the judge. Mr Rajski's summons was struck out by the Court of Appeal. The case therefore, again, concerned the immunity of a superior court judge. It is also abundantly clear that the reasoning of both Kirby P (as he then was) and Priestley JA (with whom Hope JA agreed) applied the principles applicable to superior court judges. President Kirby's reference, with apparent approval, to *Nakhla v McCarthy*, should be understood in that context. President Kirby had also earlier referred to the distinction that had been drawn between the immunity of superior and inferior judges. While his Honour noted that the distinction had been criticised, he did not hold that the distinction had been, or should be regarded as having been, abolished (see 528G-529A).

286 *Rajski v Powell* was cited in ***Re East****; Ex parte Nguyen* (1998) 196 CLR 354; [1998] HCA 73 at [30], however that was an administrative law case which did not directly concern judicial immunity.

287 *Gallo v Dawson* was another case in which an unrepresented applicant sought damages against a superior court judge, this time a justice of the High Court of Australia. The plaintiff alleged that, since his appointment to the High Court, the defendant had "shown noticeable discrimination against the plaintiff in cases in which she has been involved and that he has failed in his duty as a Justice" (at 63 ALJR 121). Perhaps not surprisingly, the action was summarily dismissed. Justice Wilson noted that there was no suggestion that the defendant lacked jurisdiction to perform the acts alleged. His Honour cited *Nakhla v McCarthy* in support of the proposition that "jurisdiction" in that context meant "the broad and general authority … to hear and determine a matter" (at 63 ALJR 122) and cited *Sirros v Moore* in support of the proposition that "no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him" (at 63 ALJR 122). Not surprisingly, given the nature of the case, Wilson J did not suggest that those principles applied in the case of an inferior court judge.

288 The judgment of the Court of Appeal in ***Yeldham v Rajski*** (1989) 18 NSWLR 48 likewise does not advance matters any further. In this case, Mr Rajski charged, by summons, a judge of the Supreme Court of New South Wales with contempt. Mr Rajski alleged that, in refusing him leave to prosecute a third party for perjury, the judge had made defamatory statements which were unsupported by evidence. The Court of Appeal, again perhaps not unsurprisingly, dismissed Mr Rajski's summons because, among other things, the judge, a superior court judge, was immune from civil proceedings in respect of his judicial acts. President Kirby cited *Nakhla v McCarthy*, along with other cases concerning superior court judges, in support of the rather anodyne statement that the usual context in which judicial immunity is raised is in cases where a plaintiff brings a claim against a judge for a civil wrong (at 58). Justice Hope, with whom Priestley JA agreed, held that the judge had jurisdiction to hear the application for leave to prosecute and cited the statement by Wilson J in *Gallo v Dawson*, in which his Honour cited *Nakhla v McCarthy*, concerning the meaning of "jurisdiction" in that context. There was no consideration of the applicable principles in respect of judicial immunity of inferior court judges.

289 The decision in *Wentworth v Wentworth*, a case referred to earlier in these reasons, was also relied on by the Judge. It is a complex case which requires careful analysis. It raised a number of issues, however the issue of relevance to this case was whether a taxing officer of the Supreme Court of New South Wales, who occupied the position of a Deputy Registrar, was protected by judicial immunity from a personal costs order. A determination made by the

taxing officer had been set aside on the basis of apprehended bias. The primary judge found that the taxing officer had the same protection as a superior court judge and did not fall outside that immunity because he had not deliberately acted beyond power and there had been no finding of actual bias.

290 On appeal, Fitzgerald JA proceeded on the basis that, when a taxing officer carried out a judicial function of the Supreme Court, he or she had the same immunity as a judge of that court, a superior court (see [58]-[59]). His Honour's consideration of the applicable principles in relation to judicial immunity must be approached on that basis. His Honour concluded that a costs order should not be made against the taxing officer because he was entitled to immunity in respect of the conduct which the appellant alleged against him.

291 Justice Fitzgerald referred to *Sirros v Moore* in the context of rejecting the appellant's submission that the doctrine of judicial immunity was "inapplicable" to allegations of actual bias and malice (see [23]-[27]). His Honour noted, in that context, that there was "no present purpose in investigating whether … there is a difference between the immunity afforded at different levels of the judicial hierarchy" (at [26]). That was no doubt because his Honour had determined that the immunity at issue in the case was the immunity afforded to superior court judges.

292 Justice Fitzgerald also referred with apparent approval to the statement in *Nakhla v McCarthy* that a judge is acting within jurisdiction if he or she is exercising jurisdiction which the court possesses and that "jurisdiction" in that context means the broad and general authority conferred upon the court to hear and determine issues (at [28]). His Honour also referred to *Gallo v Dawson*, *Rajski v Powell* and *Yeldham v Rajski* in that context (at [29]-[42]) and concluded that the authorities established that judicial immunity extends to whatever a judge does in the exercise of the broad and general authority conferred upon the court to hear and decide the matter (at [43]).

293 Justice Heydon, with whom Davies AJA agreed, approached the matter differently. His Honour ultimately concluded that there was no ground upon which the taxing officer should be ordered to pay costs. He therefore reserved to a future occasion, where the analysis was crucial to the outcome, the "important questions of what the tests are for judicial immunity from suit" including the "correctness and scope" of the "tests for judicial immunity of judges of superior courts stated in *Sirros v Moore*" (at [260]). It should be noted that his Honour

considered that *Sirros v Moore* concerned the immunity which attaches to a superior court judge.

294 Justice Heydon did, however, make a number of observations concerning the immunity of judges other than judges of superior courts. Some of those observations have already been adverted to, however, it is appropriate to set out the entire passage from his Honour's judgment (at [195]):

> There is authority before *Sirros v Moore* [1975] QB 118 that **judges of courts other than superior courts are not immune if they act outside jurisdiction whether or not they did so knowingly (unless the excess of jurisdiction was caused by an error of fact in circumstances where the court had no knowledge of or means of knowing the relevant facts**: *Halsbury's Laws of England* (4th ed) vol 1(1) para 216 n 0; AA Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford University Press, 1993) pp 64-65; Enid Campbell "Inferior and Superior Courts and Courts of Record" (1997) 6 JJA 249 at 260 n 24). Let it be assumed that Santow J was wrong to apply *Sirros v Moore* and wrong to treat the Taxing Officer as having the same immunity as is possessed, according to that case, by a superior court judge. Let it be assumed that Santow J should have treated the Taxing Officer as having only the traditional immunity of a non-superior court judge. An immunity of that kind might be defeated by proof of malice, since it is controversial whether acting maliciously causes a non-superior court to act in excess of jurisdiction: see cases discussed in Campbell, op cit p 252 n 25; Margaret Brazier, "Judicial Immunity and the Independence of the Judiciary" [1976] PL 397 at 398-9 n 6; AA Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford University Press, 1993), pp 65-66; *Halsbury's Laws of England* (4th ed) vol I(1) para 216 n 1). But even if malice does cause a non-superior court to act in excess of jurisdiction, malice was not found in the reasons for judgment dated 6 February 1998, and it was too late to seek to establish it after that date. Precisely what "acting outside jurisdiction" means in this context is obscure. Thus in *In re McC (A Minor)* [1985] AC 528 at 456-7, Lord Bridge contemplated that a "gross and obvious irregularity of procedure", or a breach of the rules of natural justice by reason of justices refusing to permit a defendant to give evidence would be outside jurisdiction, while other breaches of the rules of natural justice might not. Lord Templeman said at 558: "If in the course of a trial which a magistrate is empowered to undertake, the magistrate … does not accord the accused a fair trial or is guilty of some other breach of the principles of natural justice … the decision may be quashed but the magistrate acting as such acts within jurisdiction." Even assuming, which is questionable, that merely acting so as to give an appearance of bias is to act outside jurisdiction, the position of the Taxing Officer cannot be worse than if he had no immunity at all, and even if he had no immunity at all, for reasons about to be given, there is no ground on which he should be ordered to pay costs: [196]-[199].
>
> (Emphasis added)

295 It should be noted, for the sake of clarity, that this passage does not appear in the reported version of the judgment: see (2001) 52 NSWLR 602.

296 The "authority before *Sirros v Moore*" to which Heydon JA refers would almost certainly include some or all of the cases referred to earlier in these reasons.

297 Ultimately I am not persuaded that the decision and reasoning in *Wentworth v Wentworth* greatly assists in resolving the critical issue in this case. The principles discussed in the case would appear to be those applicable to superior, not inferior, court judges. The obiter observations of Heydon JA are, however, instructive.

298 The next case relied on by the Judge was *Fingleton*. *Fingleton* was a case which involved an inferior court officer, the Chief Magistrate of Queensland. The immunity that was considered by the High Court, however, was a statutory immunity from criminal responsibility which applied to all judicial officers, including not only judges, but also magistrates, members of tribunals, arbitrators and umpires. The Chief Magistrate, therefore, was entitled to the same immunity under that statutory provision as a superior court judge.

299 Section 30 of the Criminal Code provided:

> Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions, although the act done is in excess of the officer's judicial authority, or although the officer is bound to do the act omitted to be done.

300 The High Court concluded that the statutory immunity provided by s 30 of the Criminal Code applied to the relevant acts engaged in by the Chief Magistrate and accordingly set aside the Chief Magistrate's conviction.

301 While *Fingleton* concerned a statutory immunity that applied to all judicial officers, it is nevertheless relevant to consider closely what Gleeson CJ said concerning judicial immunity generally. The Chief Justice said as follows (at [34]-[35]):

> The Code now defines "judicial officer". The definition was inserted, with effect from 19 July 2002, by the *Criminal Law Amendment Act 2002* (Qld). The explanatory notes to the Bill said: "A new definition of 'judicial officer' is now included. As well as judges or magistrates the definition of 'judicial officer' includes members of tribunals, persons conducting hearings of the Crime and Misconduct Commission, arbitrators and umpires." That reflects the view, which was common ground in this appeal, that, from the outset, "judicial officer" in s 30 included magistrates. In any event, it certainly included magistrates by September 2002. **In dealing generally, and in the same manner, with all "judicial officers", s 30 put aside distinctions between various levels in the judicial hierarchy which existed at common law in relation to judicial immunity. Those distinctions attracted strong criticism in the United Kingdom from the Court of Appeal in *Sirros v Moore* and the House of Lords in *Re McC*. Section 30 treats all judicial officers in the same way**, and confers immunity from criminal responsibility for acts or omissions by the judicial officer in the exercise of the officer's judicial functions, even where an act done is in excess of authority, or an officer is bound to do an act omitted.
>
> The immunity provided by s 30 is limited, not only by the introductory words of the

> section, but also by the words which confer the immunity. It applies only to acts or omissions in the exercise of judicial functions, although conduct in excess of authority has the benefit of the protection. **The Code's use of the words "excess of authority" reflects what courts applying the common law have held to be the sense in which "jurisdiction" is used in the context of judicial immunity, that is to say, "the broad and general authority conferred upon [a judicial officer's] court and upon [the judicial officer] to hear and to determine issues between individuals or between individuals and the Crown".**
>
> (Emphasis added; footnotes omitted)

302 The Chief Justice cited *Nakhla v McCarthy* as support for the proposition concerning the sense in which "jurisdiction" is used in the context of judicial immunity.

303 The Chief Justice went on to refer to the policy of the common law in respect of judicial immunity and, in that context, to what Lord Denning MR had said in *Sirros v Moore* in relation to judicial immunity generally (at [36]). His Honour also referred to a passage from the judgment of Lord Bridge in *In re McC* (at [37]). It is unnecessary to repeat what was said earlier in these reasons concerning *Sirros v Moore* and *In re McC*.

304 It should also be noted that the judgments of the other members of the High Court in *Fingleton* did not deal with the issue of common law judicial immunity, save for a brief reference by Kirby J to what his Honour considered to be the "artificial distinctions" drawn at common law between judicial officers at different ranks in the hierarchy (at [137]).

305 The following points may be made in respect of these passages from the Chief Justice's judgment.

306 First, as already noted, his Honour was dealing with a statutory immunity which treated all judicial officers equally, whatever level they may occupy in the judicial hierarchy.

307 Second, the Chief Justice accepted that the common law drew a distinction between judicial officers at different levels of the hierarchy.

308 Third, while the Chief Justice noted that the distinction between superior and inferior court judges in this context had been criticised in England in *Sirros v Moore* and *In re McC*, his Honour did not suggest that the distinction no longer existed, or did not apply in the common law of Australia, or should be overruled or not applied in Australia.

309 Fourth, the Chief Justice's statement concerning the meaning of "excess of authority" and what was said in *Nakhla v McCarthy* concerning the meaning of "jurisdiction" in the context of judicial immunity should be read in light of the fact that the High Court was dealing with a

statutory provision which equated judicial officers at all levels of the judicial hierarchy. It is difficult to read the Chief Justice's reference to what was said in *Nakhla v McCarthy*, a case concerning the immunity of a superior court judge, as applying to the position in respect of inferior court judges at common law. Indeed, his Honour subsequently noted that "the present case does not fall to be determined under the common law, it is unnecessary to explore the precise boundaries of the common law immunity from criminal responsibility in the exercise of judicial functions" (at [41]).

310 Fifth, while the Chief Justice referred to *In re McC*, the Chief Justice did not disapprove of anything that was said in that case in respect of the immunity of inferior court judges at common law. As already noted, his Honour indicated that, given that the case fell to be determined on the basis of the statutory immunity, it was unnecessary for him to determine the precise boundaries of judicial immunity at common law, including in respect of inferior court judges.

Conclusion as to the meaning of "jurisdiction" in the context of judicial immunity

311 Two conclusions can be drawn from the cases relied on by the Judge in respect of the notion or meaning of "jurisdiction" in the context of judicial immunity.

312 First, a superior court judge is immune from civil action or liability for acts done by him or her within his or her jurisdiction.

313 Second, "jurisdiction", in that context, means the broad or general authority conferred on the judge and his or her court to hear and determine issues between the parties in the matter before them.

314 It is difficult to draw any firm conclusions beyond that. That is because the cases concerning the meaning of jurisdiction in the context of judicial immunity, or at least those that were relied on by the Judge, all relate to either superior court judges, or to statutory forms of immunity that apply whether or not a judge is an inferior or superior court judge. The Judge submitted that none of the cases said that the word "jurisdiction" should be given a different meaning in the context of the immunity available to inferior court judges. That may be so, though that was most likely because the cases did not involve the immunity available to inferior court judges. It might also be said that the cases did not expressly or explicitly say that the word jurisdiction should be given the same meaning in the context of the immunity available to inferior court judges.

315 The Judge submitted that it would be unusual if the word "jurisdiction" in the context of judicial immunity meant something different depending on whether the judge in question was a superior or an inferior court judge. While there may be some force in that submission, the fact that it might be unusual does not mean that the long line of cases which deal expressly with the issue in respect of inferior court judges can be simply dismissed or disregarded. Moreover, and perhaps more significantly, the answer to what is the critical question in this matter – what are the precise boundaries of the common law immunity of inferior court judges? – may not in any event be resolved by simply determining what is meant by "jurisdiction" in the context of judicial immunity.

316 Even if it be accepted that "jurisdiction", in the context of judicial immunity, means the authority conferred on the judge to determine the issues in the matter, that may not be the end of the inquiry when it comes to determining the scope or boundaries of judicial immunity in respect of inferior court judges. That is because many of the authorities concerning judicial immunity referred to in detail earlier in these reasons tend to indicate that, even in a case where an inferior court judge has jurisdiction in the matter in that sense, the judge may still lose that immunity if he or she acts outside or exceeds that jurisdiction. Once that is accepted, as it must or should be, the critical question is this: what are the categories of cases where an inferior court judge who had jurisdiction to hear and determine the issues between the parties in the matter before them, can be said to have acted outside or exceeded their jurisdiction such as to deprive them of the protection of judicial immunity? That is effectively the way that the issue was approached in *In re McC*.

317 Before addressing that question, it is necessary to consider a further contention that was advanced by the Judge. That contention was that the distinction between superior and inferior courts as it applies to judicial immunity either has been abolished, or can and should be abolished by this Court.

Abolition of the distinction between superior and inferior courts in respect of judicial immunity

318 The starting point in respect of this topic is the reasoning of Lord Denning MR and Ormrod LJ in *Sirros v Moore*.

319 Lord Denning MR did not doubt that the authorities had distinguished between inferior and superior court judges when it came to judicial immunity. His Lordship noted that judges of superior courts had been "very strict" against the courts below them, in particular justices of

the peace, and quoted the statement by Lambard that superior courts "now and then correct the dulnesse of these justices, with some strokes of the rodde, or spur": *Larmbard's Eirenarcha* (1614) Cap 4 370 at 13H. Lord Denning MR, however, was plainly of the view that the distinction between superior and inferior courts in respect of judicial immunity should be abolished. His Lordship said in that regard (at 1 QB 136):

> In the old days, as I have said, there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid. There has been no case on the subject for the last one hundred years at least. And during this time our judicial system has changed out of all knowledge. So great is this change that it is now appropriate for us to reconsider the principles which should be applied to judicial acts. In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment", it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to tum the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.
>
> This principle should cover the justices of the peace also. They should no longer be subject to "strokes of the rodde, or spur". Aided by their clerks, they do their work with the highest degree of responsibility and competence – to the satisfaction of the entire community. They should have the same protection as the other judges.

320 Lord Justice Ormrod expressed a similar view, at least in respect of inferior court judges, though his Lordship spoke in terms of "modifying" the "old rules" (at 1 QB 149):

> In my judgment, these rules in their old form are not appropriate to the conditions of today. There is no ground today for drawing a distinction between judges of different status or between judges and magistrates. The Courts Act 1971 provides, in effect, the reductio ad absurdum. By section 4(1) the Crown Court is declared to be a superior court of record. But by subsequent provisions, the court consists of High Court judges, circuit (formerly county court) judges and, sometimes, lay magistrates. So far as trials on indictment are concerned, it is a superior court, though staffed largely by judges who are judges of inferior courts when not sitting in crime. At the same time, when hearing appeals from magistrates' courts, it has one of the stigmata of an inferior court: the prerogative writs will go to it (section 10(5)). Moreover, in cases arising under the Matrimonial Causes Acts, High Court judges sit as county court judges, and county court judges sit as deputy High Court judges as occasion demands.
>
> I, therefore, agree with Lord Denning MR that it is impossible to maintain double

> standards in so important a matter as a personal liability of judges, and that, accordingly, the old rules should be modified by giving judges of inferior courts (including magistrates) enhanced protection.

321 In *In Re McC*, however, Lord Bridge effectively suppressed Lord Denning MR's judicial activism in this respect. In relation to the position of justices and magistrates, his Lordship said that the "sweeping judgment of Lord Denning MR in favour of abolishing the distinction between superior and inferior courts in this respect cannot possibly be supported in relation to justices" (at 1 AC 550F). In relation to inferior court judges, his Lordship said (at 1 AC 550F-G):

> The narrower question whether other courts of limited jurisdiction can and should be given the same immunity from suit as the superior courts, in which Lord Denning MR was supported in his view by Ormrod LJ, is one on which I express no concluded opinion, though my inclination is to think that this distinction is so deeply rooted in our law that it certainly cannot be eradicated by the Court of Appeal and probably not by your Lordships' House, even in exercise of the power declared in the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 made by the House. So fundamental a change would, in my present view, require appropriate legislation.

322 Lord Templeman also expressed the view that the "time is ripe for the legislature to reconsider the liability of a magistrate" (at 1 AC 559A) and that a "possible solution is to extend to magistrates the immunity which protects the High Court judge acting as such" (at 1 AC 559E-F).

323 The criticism of the distinction between superior and inferior court judges in respect of judicial immunity has been noted in some cases in Australia. There has also been some suggestions, mostly based on what was said in *Sirros v Moore*, that the law had changed, or may have changed. None of the Australian cases, however, provide any support, let alone compelling or persuasive support, for the contention that the distinction at common law has been abolished or that the law has changed.

324 As noted earlier, in *Rajski v Powell,* Kirby P noted the distinction that had been drawn between superior and inferior court judges in respect of judicial immunity and observed that the basis of the distinction had been criticised (at 528G-529A). His Honour did not, however, go so far as to say that the distinction had not been, or was not, recognised in Australia, or that it should be abolished.

325 In *Fingleton*, Kirby J, then in the High Court, also appeared to suggest that the "rules … that formerly drew artificial distinctions in this respect [judicial immunity] between judicial officers at different ranks in the hierarchy" had been "overtaken by statute and the common law" (at

[137]). With great respect to Kirby J, the cases that his Honour cited in support of that proposition, including *Sirros v Moore* and his Honour's own decision in *Rajski v Powell*, in fact provide no support for such a sweeping conclusion. In any event, none of the other judges in *Fingleton* agreed with the reasons of Kirby J.

326 In *Yeldham v Rajski*, Hope AJA, in the context of considering the question of contempt in relation to the conduct of judges of superior courts, referred to some textbooks which suggested that judges of inferior courts and magistrates could be punished for contempt, but then noted that "the law may now have changed and that judges of inferior courts and magistrates may be in the same position as judges of superior courts" (at 67). His Honour cited *Sirros v Moore* in support of that proposition. His Honour noted, however, that it was unnecessary to "stay to consider" that matter as the defendant was a judge of the Supreme Court.

327 In his submissions, the Judge relied on statements made in a number of Australian cases which he submitted supported the conclusion reached in *Sirros v Moore* that the distinction had been or should be rejected. Those statements, however, for the most part comprise broad and general obiter dicta concerning the nature and scope of judicial immunity generally, though almost invariably in the context of a case concerning the judicial immunity enjoyed by a superior court judge: see *Attorney-General (NSW) v Agarsky* (1986) 6 NSWLR 38 at 40 (Kirby P); *Rajski v Powell* at 528-529 (Kirby P) and 538-539 (Hope JA); *Re East* at [29]-[30]; *Wentworth v Wentworth* at [26] (Fitzgerald JA); and *Fingleton* at [34]-[36] (Gleeson CJ).

328 Many, if not most, of the statements relied on by the Judge in relation to this issue have already been addressed in one way or another in the preceding analysis of the authorities. I do not propose to address them further. Suffice it to say that none of the statements support the broad proposition that the distinction between inferior and superior court judges is either not recognised in the common law of Australia, or should no longer be recognised. None of the cases in which the statements were made refer to, let alone disapprove of or overrule, the long line of cases, albeit mostly English cases, referred to earlier in these reasons, which consider the judicial immunity that applies in respect of inferior court judges, as opposed to superior court judges.

329 The Judge also relied on the judgment of Beazley JA in *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 69; [2013] NSWCA 315 at [87]-[88]. That was a particularly curious case in which a magistrate who sued a media organisation for defamation then attempted to rely on her judicial immunity to prevent the media organisation from running a truth defence. The

majority in the Court of Appeal, perhaps not surprisingly, held that judicial immunity could not be relied on "offensively", or as a sword, to prevent a defendant in a defamation action pleading a truth defence. Despite making that finding, Beazley P made some obiter observations concerning the application of the principles of judicial immunity to a magistrate. Her Honour referred to *Sirros v Moore* in that context. Those obiter observations, with respect, are not helpful. There is no indication that the scope or boundaries of judicial immunity as it applies to magistrates was the subject of any argument, or that the court was taken to any authorities that actually addressed that issue.

330 It follows that the Judge's contention that the distinction between superior and inferior courts as it applies to the common law in respect of judicial immunity has been abolished must be rejected. To the extent that the judgment of Lord Denning MR in *Sirros v Moore* can be construed as amounting to the abolition of the distinction, as opposed to a recommendation that it be abolished, that aspect of the judgment must be regarded as obiter dicta. In any event, that aspect of Lord Denning MR's judgment was expressly disapproved of by the House of Lords in *In re McC*. Moreover, while the criticism of the distinction in *Sirros v Moore* has been referred to in some Australian cases, none of those cases held that the distinction has been abolished or no longer applies.

331 As for the suggestion that this Court should abolish the distinction, the Judge submitted that there were a number of policy reasons why inferior court judges should have the same immunity as superior court judges. Some of those policy reasons appeared to have some merit. There would also appear to be some force in some of the sentiments expressed by both Lord Denning MR and Ormrod LJ in *Sirros v Moore* in respect of that issue. In particular, while there may in the past have been some legitimate justification or rationale for affording inferior court judges a more qualified immunity than that available to superior court judges, it is at best doubtful that any such justification or rationale still applies in the case of modern-day magistrates and inferior court judges in Australia. That is no doubt why many States and Territories have enacted legislation which provides that all judicial officers have the same immunity as a superior court judge: see for example s 44B of the ***Judicial Officers Act*** *1986* (NSW).

332 The fact that there may be some sound policy reasons for abolishing the common law distinction between inferior and superior court judges when it comes to judicial immunity is, however, somewhat beside the point for present purposes. The role and duty of a single judge

exercising the original jurisdiction of this Court is to apply the law, not change it. As Lord Bridge noted in *In re McC*, the distinction is "deeply rooted" in the common law of England. The distinction has also been recognised and applied in the common law of Australia, though there have been few cases where it has been decisive. If the distinction is to be abolished, that is a matter for the legislature, or perhaps the High Court, not a single judge of this Court.

Additional cases relied on by the Commonwealth

333 The Commonwealth advanced some submissions on the topic of judicial immunity. In its written submissions, it referred to a number of the cases relied on by the Judge. The Commonwealth's submissions concerning those cases have effectively already been addressed in the preceding discussion. The Commonwealth addressed three additional cases in its oral closing submissions. It remains to briefly address those cases.

334 In ***Fleet*** *v Royal Society for the Prevention of Cruelty to Animals* [2005] NSWSC 926, Johnson J heard an appeal by an unrepresented litigant against a decision of a Master to strike out his pleading on the basis that it was embarrassing. The causes of action that the plaintiff had endeavoured to plead included misfeasance in public office on the part of the District Court of New South Wales. When one considers the pleading of that cause of action (reproduced at [24]) it is, to say the very least, hardly surprising that the appeal in respect of the dismissal of that part of the pleading was dismissed.

335 Nevertheless, in the course of addressing the plaintiff's case against the District Court, Johnson J considered some authorities concerning judicial immunity. The pleaded cause of action accrued before s 44B of the Judicial Officers Act commenced operation. That provision conferred on all judicial officers, including judges of the District Court, "the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge". It might be noted parenthetically that the enactment of that provision would hardly have been necessary if, at common law, the protection and immunity of an inferior court judge was the same as that of a superior court judge. In any event, because the cause of action accrued before the commencement of the Judicial Officers Act, Johnson J proceeded on the assumption that he was required to consider the common law principles surrounding the doctrine of judicial immunity with respect to inferior court judges (at [31]).

336 The difficulty, however, is that many of the passages from the cases to which his Honour subsequently referred either concerned the immunity of a superior court judge, or at least dealt with immunity generally without distinguishing between superior and inferior court judges.

For example, his Honour referred to general statements concerning judicial immunity in *Re East*, however the immunity that applied to the judicial officers in that case was likely to have been affected by the operation of the Judicial Officers Act. His Honour also referred to Fitzgerald JA's judgment in *Wentworth v Wentworth*, however the passages his Honour referred to were those that concerned the immunity available to a superior court judge. As discussed earlier, Fitzgerald JA had found that the Supreme Court taxing officer had the same immunity as a Supreme Court judge. Justice Johnson also referred to a passage from the judgment of Gleeson CJ in *Fingleton*, however Gleeson CJ had noted that the operation of the legislation in question in that case had eliminated the distinction between superior and inferior court judges in respect of judicial immunity. It also appears that his Honour was not taken to any of the cases that pre-dated *Sirros v Moore*. While his Honour noted that Gleeson CJ in *Fingleton* had referred to *In re McC*, Johnson J did not himself address that case or its significance.

337 In all the circumstances I am, with respect, not persuaded that anything said by Johnson J in *Fleet* is of any assistance in resolving the issue concerning the scope of judicial immunity available to an inferior court judge.

338 The Commonwealth also relied on a passage from a judgment of the Full Court of this Court in *Luck v University of Southern Queensland* (2014) 145 ALD 1; [2014] FCAFC 135. In that case, an unrepresented litigant argued on appeal that the primary judge, a judge of this Court, somehow breached the *Disability* ***Discrimination Act*** *1992* (Cth) in refusing her adjournment application. Perhaps not surprisingly, that contention was given short shrift, the court concluding that "[a]t least in the performance of judicial functions, judicial officers are not subject to the [Discrimination Act] and any claim of discrimination would be precluded by the principle of judicial immunity" (at [41]). Needless to say, the primary judge was a judge of a superior court and the court was not required to consider the immunity of an inferior court judge. Nor does it appear that the court was taken to any relevant authorities in respect of that issue.

339 Finally, the Commonwealth relied on a judgment of a single judge of this Court in ***Winters*** *v Fogarty* [2017] FCA 51. *Winters* was another case involving a strike out application. That application required the presiding judge to give some consideration to the statutory immunity given to a mediator, which was the same immunity as a judge of this Court. Once again, therefore, the lengthy discussion in that case concerning judicial immunity did not concern the

immunity of an inferior court judge. In any event, his Honour ultimately found it unnecessary to "try and chart the outer perimeter of the judicial immunity" (at [133]). In the circumstances, I do not propose to consider the reasoning in this case. It does not assist the resolution of the issue in this proceeding concerning the scope of judicial immunity available to inferior court judges.

Conclusion as to the scope of judicial immunity of inferior court judges

340 Cases stretching back over 400 years have drawn a distinction between the scope and boundaries of judicial immunity applicable to inferior court magistrates and judges, as opposed to superior court judges. While those cases are mostly English, they have been applied in some cases in Australia: see in particular *Raven v Burnett* and *Wood v Fetherston*. While the rationale or policy behind the distinction has been questioned, no case in England or Australia has authoritatively determined that the distinction has been abolished. No case in Australia has authoritatively determined that the distinction does not apply in the common law of Australia.

341 It may perhaps be accepted that the common law concerning the metes and bounds of the judicial immunity available to inferior court judges may not be entirely pellucid and to that extent may be said to be somewhat unsatisfactory. The clarity of the law in this area has not been assisted by the often unhelpful and, with the greatest respect, sometimes ill considered or inadequately reasoned obiter dicta in cases concerning statutory immunity or the immunity available to superior court judges. Be that as it may, it is necessary and incumbent on me to endeavour to distil the applicable principles from the authorities. In *In re McC*, Lord Bridge described that task, insofar as the common law of England was concerned, to be "daunting" (at 1 AC 537B). It is, in my view, all the more daunting insofar as the common law of Australia is concerned.

342 The principles that, in my view, emerge from the authorities concerning the scope and boundaries of the judicial immunity enjoyed by inferior court judges may be summarised as follows.

343 First, an inferior court judge may be held liable, and will not be protected by judicial immunity, where the judge makes an order in a proceeding or cause in which the judge did not have "subject-matter" jurisdiction; that is, no jurisdiction to hear or entertain in the first place. It does not matter whether the judge knew, or did not know, that he or she did not have jurisdiction to hear or entertain the proceeding. It also does not matter whether the judge believed or assumed that he or she had jurisdiction in the proceeding as a result of a mistake of fact or a

mistake of law. The only exception is where the judge had no knowledge, or means of ascertaining, the fact or facts that relevantly deprived him or her of jurisdiction to hear or entertain the proceeding. The cases which support this principle include: *Marshalsea*; *Calder v Halket*; *Houlden v Smith*; *Raven v Burnett*; and *Wood v Fetherston.*

344 Second, in certain exceptional circumstances, an inferior court judge may be held liable, and will not be protected by judicial immunity, where the judge, despite having subject-matter jurisdiction in the proceeding, nevertheless makes an order without, or outside, or in excess of the jurisdiction he or she had to hear or entertain the proceeding.

345 Third, one of the exceptional circumstances in which an inferior court judge may lose the protection of judicial immunity and be held liable is where, despite having jurisdiction to hear or entertain the proceeding, the judge is guilty of some gross and obvious irregularity in procedure, or a breach of the rules of natural justice, other than an irregularity or breach which could be said to be a merely narrow technical. The cases which support this principle include: *In re McC* at 1 AC 546H-547B and *R v Manchester City Magistrates' Court* at 1 WLR 671E-F.

346 Fourth, another exceptional circumstance in which an inferior court judge may be held liable is where, despite having jurisdiction to hear or entertain the proceeding, the judge acts in excess of jurisdiction by making an order, or imposing a sentence, for which there was no proper foundation in law, because a condition precedent for making that order or sentence had not been made out. The cases which support this principle include: *In re McC* at 1 AC 549C-D and 558; *Groome v Forrester*; *M'Creadie v Thomson*; *O'Connor v Issacs*; and *R v Manchester City Magistrates' Court*.

347 I do not suggest that the latter two principles exhaustively define or catalogue the circumstances in which an inferior court judge, despite having subject-matter jurisdiction, may nevertheless lose the protection of judicial immunity by making an order which was without, outside, or in excess of, that jurisdiction. For reasons that will become apparent, it is unnecessary for me to go further than identifying what appear from the authorities to be the established circumstances where an inferior court judge will not be able to rely on judicial immunity to protect them from suit.

348 Before endeavouring to apply these principles to this case, it is necessary to briefly deal with the Judge's contention that, despite being an inferior court judge, he should nevertheless have the protection afforded to superior court judges in the circumstances of this case.

Was the Judge entitled to the immunity of a superior court judge in the circumstances?

349 The Judge contended that when he imprisoned Mr Stradford, he was acting judicially in the exercise of a superior court power. That is because he was, in his submission, acting pursuant to s 17 of the FCC Act, which provided that the Circuit Court had the "same power to punish contempts of its power and authority as possessed by the High Court in respect of contempts of the High Court". The High Court is a superior court of record. Accordingly, so the Judge submitted, the immunity that attaches to a superior court judge should apply to his exercise of that power.

350 The Judge relied, in support of that submission, on the following statement by Latham CJ in ***Cameron v Cole*** (1944) 68 CLR 571 at 585; [1944] HCA 5:

> An inferior court such as a county court may be made a superior court for a particular purpose. Thus where a court is described in a statute as a branch of a principal court and is also given the jurisdiction of the Court of Chancery for purposes of bankruptcy jurisdiction, it may, though a county court (and therefore an inferior court) in its ordinary jurisdiction, be a superior court in relation to bankruptcy proceedings.

351 I am not persuaded that the Judge was acting as a superior court judge when he imprisoned Mr Stradford, or that he was entitled to the immunity afforded a superior court judge.

352 It may be accepted that, as *Cameron v Cole* establishes, legislation can provide that an inferior court may be deemed, or taken to be, a superior court for certain purposes. Section 17 of the FCC Act does not, however, provide, either expressly or by necessary implication, that the Circuit Court is deemed, or taken to be, a superior court when exercising the contempt power conferred on it by that provision.

353 It may also be accepted that in some circumstances where a statute confers certain specified superior court jurisdiction on an inferior court, the inferior court may, by necessary implication, be taken to be a superior court when exercising that jurisdiction. In ***Day v The Queen*** (1984) 153 CLR 475 at 479; [1984] HCA 3, the High Court held, in effect, that a sentence imposed on a person convicted on indictment by the District Court of Western Australia (an inferior court) had the same effect and operation as a sentence imposed by a superior court. That was because a provision in the *District Court of Western Australia Act 1969* (WA) provided that the District Court had "all the jurisdiction and powers that the Supreme Court has in respect of any

indictable offence" and that "[i]n all respects … the practice and procedure of the Court as a Court of criminal jurisdiction shall be the same as the practice and procedure of the Supreme Court in like matters".

354 Section 17 of the FCC Act, however, is far removed from the sort of statutory provision considered in *Day v The Queen*. Section 17 of the FCC Act is far more confined in its scope and operation. It does not confer any jurisdiction on the Circuit Court. It simply provides that the Circuit Court has the same power to punish for contempt as the High Court. Section 17 also does not provide that, in exercising that power, the Circuit Court's practice and procedure was the same as the High Court's practice and procedure, or that orders made in the exercise of that power are taken to have the same effect, in terms of enforceability, as orders made by the High Court in the exercise of its contempt powers.

355 I am not persuaded that the effect of s 17 of the FCC Act is that an order made by the Circuit Court in the exercise of its contempt powers is taken or deemed to be an order of a superior court. Still less am I persuaded that the effect of s 17 of the FCC was such that a Circuit Court judge who exercises that court's contempt powers is taken to be a superior court judge, or to be acting as a superior court judge, in particular for the purposes of judicial immunity.

356 There is, in any event, no sound basis for concluding that the Judge was exercising the power under s 17 of the FCC Act when he imprisoned Mr Stradford. Nothing that was said or done by the Judge indicates that he was exercising that power. More importantly, as discussed in detail earlier, Pt XIIIB of the Family Law Act has been held to be a "complete code for dealing with contempts": *DAI* at [47], [67]. The jurisdiction that the Judge was exercising in Mr Stradford's proceeding was jurisdiction under the Family Law Act. Accordingly, when exercising, or purporting to deal with Mr Stradford's alleged contempt, the Judge was exercising the power in Pt XIIIB of the Family Law Act, not the powers under s 17 of the FCC Act.

357 I was not taken to any persuasive authority in support of the proposition that a judge of an inferior court should be considered to be a superior court judge, and thereby attract the immunity of a superior court judge, when exercising contempt powers conferred on the inferior court in terms similar to s 17 of the FCC Act. Nor am I satisfied that the Judge was exercising the Circuit Court's powers pursuant to s 17 of the FCC Act when imprisoning Mr Stradford. In those circumstances, I am not persuaded that the Judge's potential liability should be

considered on any basis other than that he is entitled to the judicial immunity afforded to an inferior court judge.

Is the Judge immune from liability arising from his imprisonment of Mr Stradford?

358 Having regard to the principles applicable to the judicial immunity of an inferior court judge that I have outlined, I consider that the Judge is liable for any loss or damage suffered by Mr Stradford arising out of his unlawful imprisonment. As an inferior court judge, the Judge was not protected from liability arising from his imprisonment of Mr Stradford. That is so for a number of reasons.

359 First, while the Judge obviously had jurisdiction to hear and entertain the proceeding between Mr and Mrs Stradford, being a proceeding pursuant to the Family Law Act, it is clear that when he imprisoned Mr Stradford, purportedly for contempt, he acted without or in excess of jurisdiction. That is because, as discussed earlier in these reasons, he imposed that sanction without first finding that Mr Stradford had in fact failed to comply with the relevant orders and was in fact in contempt.

360 It may be accepted, for present purposes, that when the Judge ordered that Mr Stradford be imprisoned for contempt, his Honour did so on the basis of a mistaken belief or assumption that Judge Turner had already found that Mr Stradford had failed to comply with the disclosure orders and was therefore in contempt. The problem for the Judge, however, is that his Honour plainly had the means to ascertain whether Judge Turner had in fact made any such findings. The Judge plainly should have been aware that her Honour had made no such findings. Judge Turner had made no order or declaration to that effect and had delivered no judgment. The Judge could readily have ascertained that Judge Turner had not found that Mr Stradford had failed to comply with the disclosure orders and had certainly not made any finding that Mr Stradford was in contempt. There is no evidence to suggest that the Judge made any attempt to speak with Judge Turner or consult the court records which, no doubt, would have revealed that no such finding had been made.

361 In this respect, the circumstances of this case are entirely analogous to the circumstances in *Wood v Fetherston*; *O'Connor v Issacs*; *In re McC* and *R v Manchester City Magistrates' Court* in particular. A finding of contempt was a condition precedent to the imposition of the sanction imposed by the Judge. There was no proper foundation in law for the making of the imprisonment order. In imposing a sentence of imprisonment in the absence of any such finding, the Judge acted without or in excess of jurisdiction in the requisite sense.

362 Second, for the reasons given earlier, as the alleged contempt by Mr Stradford was a failure to comply with orders made in the exercise of jurisdiction under the Family Law Act, the Judge was required, before imprisoning Mr Stradford, to satisfy himself of certain matters under either Pt XIIIA or Pt XIIIB of the Family Law Act.

363 If the matter were to proceed under Pt XIIIB, the Judge had to be satisfied not only that there had been a contravention of the disclosure orders, but also that the contravention involved a "flagrant challenge to the authority of the court". The Judge made no such finding.

364 If the matter were to proceed under Pt XIIIA, the Judge had to be satisfied not only that Mr Stradford had contravened the disclosure orders, but also that he did so without reasonable excuse and that, in all the circumstances of the case, it would not be appropriate to impose one of the other sanctions provided in ss 112AD(2)(a), (b) or (c). The Judge did not satisfy himself of any of those matters.

365 The making of the required findings under either Pt XIIIA or Pt XIIIB were, in effect, conditions precedent to the Judge imposing a sentence of imprisonment. In imposing a sentence of imprisonment in the absence making any of those findings, his Honour acted without or in excess of jurisdiction in the requisite sense. There was no proper foundation in law for the making of the imprisonment order. In that regard, the circumstances of this case are again analogous to the circumstances in *Wood v Fetherston*, *O'Connor v Issacs*, *In re McC*, and *R v Manchester City Magistrates' Court.*

366 Third, in conducting the contempt proceedings against Mr Stradford in the way he did, the Judge was guilty of a "gross and obvious irregularity of procedure": cf *In re McC* at 1 AC 546H. The statutory procedure for contempt, other than contempt in the face of the court, was prescribed in r 19.02 of the FCC Rules. The procedure followed by the Judge did not comply with any of the requirements of r 19.02. There was no application in the approved form and no supporting affidavit. The Judge did not clearly advise Mr Stradford of the contempt allegation, or ask him to state if he admitted or denied that allegation. Nor did his Honour hear any evidence in support of the allegation, or determine if there was a prima facie case, or invite Mr Stradford to state his defence and, after hearing that defence, determine the charge. For the reasons given earlier, it was not open to the Judge to dispense with the procedure in r 19.02. Nor did he do so. The available inference is that he either ignored it, or proceeded in complete ignorance of it.

367 The Judge's complete failure to comply with the procedure in r 19.02 of the FCC Rules could not possibly be seen as a "narrow technical ground": cf *In re McC* at 1 AC 547A.

368 The gross and obvious irregularity of procedure that infected the Judge's purported exercise of his contempt powers meant that he acted without or in excess of his jurisdiction in the requisite sense.

369 Fourth, the Judge was guilty of a gross denial of procedural fairness and breach of the rules of natural justice having regard not only to his complete failure to comply with the procedure in r 19.02 of the FCC Rules, which was clearly designed to ensure procedural fairness, but also more generally. As the FamCA Full Court found in *Stradford*, the Judge pre-judged that the alleged contravention of the order would constitute a contempt within the meaning of the Family Law Act (at [20]); pre-judged the penalty for the contravention without first knowing the particulars of the alleged contravention (at [21]); performed the roles of prosecutor, witness and judge (at [22]-[27]); and made findings concerning the alleged contravention without any evidentiary foundation (at [57]). As the FamCA Full Court said at [53]:

> It is difficult to envisage a more profound or disturbing example of pre-judgment and denial of procedural fairness to a party on any prospective orders, much less contempt, and much less contempt where a sentence of imprisonment was, apparently, pre-determined as the appropriate remedy.

370 The FamCA Full Court concluded that the entire episode constituted a "gross miscarriage of justice" (at [9] and [73]).

371 Needless to say, the denial of procedural fairness in this case could not possibly be characterised as a "narrow" or "technical" breach. It constituted, at the very least, a "gross and obvious irregularity of procedure", to use the words of Lord Bridge in *In re McC* (at 1 AC 546H). The result of it was that the Judge acted without or in excess of jurisdiction in the requisite sense.

372 The four findings just outlined, considered either individually or cumulatively, deprive the Judge of judicial immunity in respect of the impugned acts.

CONCLUSION – LIABILITY OF THE JUDGE

373 For the reasons given earlier, Mr Stradford established against the Judge all of the elements of the tort of false imprisonment. Mr Stradford was imprisoned as a result of the imprisonment order made, and the warrant issued, by the Judge on 6 December 2018. Mr Stradford's

imprisonment was not lawfully justified because the imprisonment order and warrant were invalid and of no effect. They were infected by manifest jurisdictional error.

374 For the reasons that have been given, the Judge was not immune from Mr Stradford's suit on the basis of his status as an inferior court judge. That is because he is an inferior court judge and when he made the imprisonment order was made, and issued the warrant, he acted without or in excess of jurisdiction.

375 It follows that the Judge is liable to Mr Stradford in respect of the tort of false imprisonment.

THE TORTS FOR WHICH THE COMMONWEALTH AND QUEENSLAND ARE ALLEGEDLY LIABLE

376 Mr Stradford contended that both the Commonwealth and Queensland were vicariously liable to him in or for the tort of false imprisonment.

377 As for the Commonwealth, Mr Stradford contended that on 6 December 2018, after the Judge delivered ex tempore reasons and ordered that he be imprisoned, he was escorted to a holding cell in the Circuit Court building by MSS guards. He was detained in the cells, under the supervision of the MSS guards, until he was taken into custody by officers of the Queensland Police service. The conduct of the MSS guards in that respect constituted a detention of Mr Stradford which was undertaken for and on behalf of the Commonwealth. If that detention had no lawful justification, the Commonwealth was vicariously liable for the conduct of the MSS guards which constituted false imprisonment.

378 As for Queensland, Mr Stradford contended that officers of the Queensland Police Service attended the Circuit Court building on 6 December 2018 and took custody of Mr Stradford. He was initially taken to and detained at the Roma Street Watchhouse. On 10 December 2018, he was transported to the Brisbane Correctional Centre where he was imprisoned until 12 December 2018, that being the date that the Judge stayed his imprisonment order. In those circumstances, Mr Stradford contended that he was imprisoned by officers of the Queensland Police Service and Queensland Corrective Services. If that imprisonment had no lawful justification, Queensland was vicariously liable for the conduct of those officers which constituted false imprisonment.

379 As previously discussed, the Commonwealth contended that there was lawful justification for Mr Stradford's detention by the MSS guards because the Judge's imprisonment order and warrant were valid until set aside by the FamCA Full Court. For the reasons given earlier, that

contention is unmeritorious and is rejected. The order made by the Judge, being an order made by a judge of an inferior court, lacked legal force from the outset and therefore provided no lawful basis for Mr Stradford's imprisonment.

380 The Commonwealth also contended that it was a principle of the law of tort that if a compulsive order is made, or warrant issued, by a judicial officer, including a judge of an inferior court, "enforcing officials" who execute that compulsive process are protected against any liability in tort if the order or warrant is subsequently found to be invalid, at least if the order or warrant appeared to be regular on its face. That was said to be so irrespective of the nature of the error made by the judge that led to the order or warrant being found to be invalid.

381 The Commonwealth did not contend that the MSS guards, or the Commonwealth, were protected, or afforded a defence, by any statutory provision. The Commonwealth also admitted that, if the detention effected by the MSS guards was found to be without lawful justification, it was vicariously liable.

382 While Queensland mainly relied on a statutory defence, it also embraced the Commonwealth's argument as to the existence of a common law principle or defence, which protected from liability persons who executed a warrant which appeared valid on its face, even if the warrant was subsequently set aside. In Queensland's submission, that principle also protected the officers of the Queensland Police and Queensland Corrective Services from any liability arising from Mr Stradford's imprisonment. Queensland also submitted that the authorities established that executing officers could only be held liable in respect of the execution of a warrant in circumstances where the warrant was a "nullity" because the issuing justice or inferior court judge had no jurisdiction to issue the warrants. In that regard, Queensland submitted that "no jurisdiction" meant that there was a "total absence of jurisdiction, of no general authority to decide, of no authority to enter upon the question". That was said not to be the case in respect of the warrant issued by the Judge. Finally, Queensland relied on a statutory provision which it contended provided it with a defence.

383 Mr Stradford disputed the existence of the common law principle articulated by the Commonwealth and Queensland. He submitted that no such principle had ever been recognised in the relevant case law. Indeed, he submitted that the common law principle articulated by the Commonwealth was contrary to many authorities stretching back hundreds of years. He accepted that there were some authorities that supported the proposition that certain officers of inferior courts, often referred to in the cases as "ministerial officers", had a

"special" defence when they were obeying an order made by the court of which they were officers, which appeared valid on its face, but turned out to be invalid. He submitted, however, that police officers and "gaolers" who were not officers of the court did not have the benefit of any such special defence. They were liable for any tortious acts they committed in execution of the court's order, though the perceived harshness of that circumstance had been overridden or ameliorated by statute in England and some other jurisdictions. In Mr Stradford's submission, the MSS guards were not officers of the Circuit Court, or ministerial officers, and therefore did not have the benefit of any special defence. The same could be said in respect of the officers of the Queensland Police Service and Queensland Corrective Services.

384 The critical question for the Court to resolve in respect of this issue is whether, at common law, police officers and gaolers who detain or imprison a person pursuant to an order or warrant of an inferior court, later found to be invalid and of no effect, have available to them a defence to the tort of false imprisonment, at least when the defect or invalidity of the order was not apparent on the face of the order or warrant. Resolution of that question, like the question of the scope of judicial immunity available to an inferior court judge, requires a deep dive into the common law authorities, some of which date back hundreds of years. Once again, the parties cited or relied on a plethora of cases in support of their respective positions. Once again, I propose to focus mainly on those that the parties emphasised in their closing submissions, or which have some apparent precedential or persuasive authority.

385 Before delving into the authorities, however, it is necessary to resolve a pleading issue or complaint raised by the Commonwealth. It is also necessary to briefly consider whether the MSS guards were officers of the court, or ministerial officers, as that expression is understood in the authorities.

386 I will deal with the statutory provisions relied on by Queensland after the consideration of the position at common law.

A pleading point?

387 In its closing submissions, the Commonwealth complained that Mr Stradford had shifted position and departed from his pleaded case in respect of the liability of the Commonwealth. It contended that in his pleadings, Mr Stradford had described the MSS guards as "court security officers" and had alleged that the MSS guards placed him in the custody of the Acting Marshal of the Circuit Court who was an employee of the Commonwealth in respect of whom the Commonwealth was vicariously liable. Those allegations were admitted in the

Commonwealth's defence. Mr Stradford did not file any reply. The Commonwealth submitted that Mr Stradford should be held to his pleaded case and not be permitted to deny that the MSS guards were officers of the Circuit Court, or "ministerial officers" as that expression is understood in the authorities.

388 I am not persuaded that the Commonwealth's complaint concerning the pleadings has any merit. Nor am I satisfied that the Commonwealth was prejudiced in any way by the manner in which Mr Stradford pleaded his case. Indeed, if anything, the Commonwealth's pleading was deficient.

389 I do not agree that the manner in which Mr Stradford pleaded his case involved an acceptance that the MSS guards were officers of the court or "ministerial officers". While Mr Stradford's pleading used the shorthand expression "court security officers" to describe the MSS guards, his particulars clearly indicated that the security services provided by the MSS guards were provided pursuant to a contract between the Commonwealth and MSS Security.

390 Mr Stradford's pleading also alleged that the conduct of the MSS guards "constituted imprisonment of [Mr Stradford]" in respect of which there was no lawful justification. That constituted an allegation that the MSS guards falsely imprisoned Mr Stradford. That said, it appears that Mr Stradford also alleged that Mr Stradford was in the custody of the Acting Marshal, that the Acting Marshal was liable to Mr Stradford for false imprisonment and that the Commonwealth was vicariously liable for the false imprisonment committed by the Acting Marshal.

391 The Commonwealth appears to have accepted that Mr Stradford had alleged that the MSS guards had falsely imprisoned him. In its defence, it admitted, among other things, that the MSS guards detained Mr Stradford for and on behalf of the Commonwealth and that "if the detention effected by the court security officers was without lawful justification, the Commonwealth would, in respect of that detention, be liable to [Mr Stradford] for the tort of false imprisonment". Importantly, the Commonwealth did not plead in its defence, at least explicitly, that the MSS guards were "officers of the court", or "ministerial officers". Moreover, while the Commonwealth pleaded, in answer to Mr Stradford's plea that his detention by the MSS guards was without justification, that the MSS guards were executing orders made by the Judge which "appeared to have been regularly made and issued", it did not explicitly plead that the officers therefore had available to them a defence based on the fact that they were officers of the court, or ministerial officers.

392 It would therefore appear from the pleadings that the parties were proceeding on the basis that Mr Stradford was alleging that the Commonwealth was vicariously liable for the conduct of the MSS guards in detaining him and that the Commonwealth's defence to Mr Stradford's case against it was that there was lawful justification for Mr Stradford's imprisonment. Moreover, while the Commonwealth's defence also uses the shorthand expression "court security officers" to describe the MSS guards, the Commonwealth did not explicitly plead that the MSS guards had available to them a common law defence based on the fact that they were ministerial officers, or officers of the court.

393 The central issue on the pleadings was clearly whether there was lawful justification for Mr Stradford's detention. In those circumstances, the fact that Mr Stradford did not file a reply is of no moment. That is all the more so given that, as discussed earlier in the context of the elements of the tort of false imprisonment, if the MSS guards detained Mr Stradford, which was admitted, the onus was on the Commonwealth to establish lawful justification. There was a clear joinder of the issue concerning lawful justification.

394 The fact that both Mr Stradford and the Commonwealth proceeded on the basis that the central issue was lawful justification is also readily apparent from the statement of agreed facts. It was an agreed fact that the "conduct of the MSS employees … constituted a detention of [Mr Stradford] which was undertaken for and on behalf of the Commonwealth" and that "[i]f that detention was unlawful, the Commonwealth is liable to [Mr Stradford] for that false imprisonment". The agreed facts make no mention of the Marshal. Nor is there any agreed fact that the MSS guards were officers of the court, or ministerial officers. It was, however, agreed that MSS Security Pty Ltd provided guarding services at the Circuit Court pursuant to a contract.

395 It follows from this analysis of the pleadings that if, as the Commonwealth contended, there was any deficiency or lack of clarity in the pleadings concerning the status of the MSS guards, or whether the Commonwealth had available to it a defence based on the fact that the MSS guards were officers of the court, or ministerial officers, that issue lies as much at the feet of the Commonwealth as Mr Stradford.

396 In any event, if there was any issue in the pleadings in that regard, I am far from persuaded that the Commonwealth suffered any prejudice arising from that issue. It was clear from Mr Stradford's opening submissions, oral and written, that his case against the Commonwealth hinged on the proposition that the MSS guards detained Mr Stradford for and on behalf of the

Commonwealth and that that detention was not lawfully justified. It was also clear from Mr Stradford's opening submissions that his case was that the MSS guards were not officers of the Circuit Court, but rather were akin to police officers. The Commonwealth did not raise any issue concerning the pleadings at that point. Indeed, the Commonwealth did not raise any issue concerning the pleadings until it filed its written outline of closing submissions.

397 The Commonwealth suggested, albeit rather faintly, that if it had known that Mr Stradford alleged that the MSS guards were not officers of the court, or denied that they were, it would have called evidence, perhaps from the Marshal. It is, however, unclear what that evidence would have been. It is equally unclear how any evidence from the Marshal could or would have added to the evidence that the Commonwealth had already filed concerning the role and status of the MSS guards. The Commonwealth filed an affidavit sworn by one of the MSS guards. That affidavit was read without objection and the guard was not cross-examined. The guard's evidence included that he had access to the court's premises, facilities and resources and that he reported to the Marshal. What more could the Marshal have said?

398 In any event, despite knowing how Mr Stradford put his case concerning the Commonwealth's liability from, at the very least, the time he filed his written outline of opening submissions, the Commonwealth failed to raise any issue concerning the pleadings and, more significantly, made no attempt to adduce evidence from the Marshal. Had the Commonwealth sought to adduce evidence from the Marshal during the course of the trial, it is highly likely that I would have permitted the Commonwealth to do so.

399 In all the circumstances, I reject the Commonwealth's complaints concerning Mr Stradford's pleading. I do not consider that Mr Stradford should be constrained in the way he puts his case in the manner contended by the Commonwealth.

Were the MSS guards officers of the Circuit Court?

400 As noted earlier, there is arguably a line of authority concerning the liability of officers of the court, or "ministerial officers", who execute or act in obedience with orders made, or warrants issued, by the court of which they are officers. Mr Stradford contended that that line of authority was distinct from, or developed separately to, the line of authority concerning the liability of police officers and gaolers who executed invalid orders or warrants of an inferior court.

401 The Commonwealth contended that there was no relevant distinction in the authorities between officers of the court, or ministerial officers, and other persons who executed orders or warrants issued by an inferior court. It also appeared to argue that, even if there was any such distinction, the MSS guards were officers of the court, or ministerial officers.

402 The authorities that address the position of officers of the court, or ministerial officers, will be considered in detail shortly. It is, however, convenient to first consider the Commonwealth's contention that the MSS guards were officers of the Circuit Court. That involves a short foray into the evidence.

403 The MSS guards were employees of MSS Security. MSS Security entered into a contract for the provision of services to the Commonwealth. Those services were defined, somewhat vaguely, in the contract as "consultancy and/or professional services". The services were to be provided at a number of sites throughout Australia, including, relevantly, the Harry Gibbs Commonwealth Law Courts Building in Queensland. The Circuit Court occupied that building, along with certain other occupants, including the Family Court and the Federal Court. The "main objective" of the services was "to ensure that all sites including all external areas, are secured to protect the Judges, property, staff and general public at all times". The contract identified a number of duties which the guards supplied by MSS Security would perform pursuant to the contract. None of the specified duties included executing orders made, or warrants issued, by a judge, or detaining persons pursuant to such orders or warrants.

404 As has already been noted, the Commonwealth adduced evidence from one of the MSS guards who provided services on behalf of MSS Security in discharge of its contractual obligations. The evidence of that officer, Mr Dunn, concerning his employment, role and duties was as follows. He was employed by MSS Security and in that capacity worked at the relevant time as a "Security Supervisor" at the Family Court and Circuit Court in the Harry Gibbs Commonwealth Law Courts Building in Brisbane. His role was to "supervise a team of court security officers and manage their day to day security operations". He "reported to the Marshal of the Federal Circuit Court about Federal Circuit Court security matters". Mr Dunn's evidence was that it was "relatively unusual for court security to detain a person following a judge issuing a warrant of commitment".

405 As discussed earlier in these reasons, Mr Dunn gave evidence about the "events" of 6 December 2018, that being the day Mr Stradford was detained, though he had no recollection of those events. His evidence was based on the documentary record. The important point to emphasise,

in this context, is that there is nothing in the documentary record, or Mr Dunn's evidence, to suggest that the Marshal had anything to do with Mr Stradford's detention. There is certainly no suggestion that Mr Dunn's involvement in Mr Stradford's detention was on the instructions of the Marshal, or that Mr Dunn reported to the Marshal in respect of his actions.

406 I am unable to see how it could possibly be concluded that Mr Dunn was an officer or "ministerial officer" of the Circuit Court who was, by virtue of that office or position, required to obey orders of that court or its judges. Mr Dunn plainly was not appointed under the FCC Act. Nor was he in any sense employed by the Circuit Court, or even the Commonwealth. While Mr Dunn's evidence was that he reported to the Marshal of the Circuit Court, it could not be said that he was subject to the direct control of the Marshal, or any other officer of the Circuit Court, or that he was subject to any sanction or disciplinary action by the court, if he failed to perform any of his duties. That is because he was not appointed under the FCC Act, or even employed by the Circuit Court or the Commonwealth. If Mr Dunn failed to comply with his duties in any way, or failed to comply with any direction from the Marshal or any other officer of the Circuit Court, that may have had contractual implications for MSS Security, or implications for Mr Dunn's employment by MSS Security. He was not, however, subject to any sanction or action by the Marshal or the Circuit Court itself.

407 I should also note, in this context, that the MSS guards who were responsible for detaining Mr Stradford were not identified or referred to in either the order made, or warrant issued, by the Judge, either by name or office.

408 I accordingly reject the Commonwealth's contention that the MSS guards were officers of the court, or ministerial officers, for the purpose of considering the availability of any common law defence based on the fact that the officers were purportedly acting pursuant to the warrant issued by the Judge. The MSS guards were no more than private security guards who were retained, through their employer, to provide security services at the court complex in which the Circuit Court was housed.

Were the officers of the Queensland Police and Queensland Corrective Services officers of the Circuit Court?

409 Queensland did not expressly or clearly contend that the Queensland Police officers and Queensland Corrective Services officers who were involved in Mr Stradford's detention or imprisonment were officers of the court, or ministerial officers, for the purposes of any common law defence that may be available. Queensland did, however, submit that the officers

were required to, and did, act in obedience to the warrant issued by the Judge. It was said that they therefore acted "ministerially". To the extent that that submission may amount to a submission that the Queensland Police and Queensland Corrective Services officers were ministerial officers, as that expression is used and understood in the common law authorities, I should deal with it.

410 As will be seen, the line of authority concerning the liability of officers of the court, or ministerial officers, in respect of their conduct in executing warrants issued by a court, make it clear that only officers who occupy specific positions in the court which issued the warrant are afforded any protection. That protection derives from the officers' duty of obedience to the court of which they were an officer.

411 The Queensland Police officers and Queensland Corrective Services officers who were involved in Mr Stradford's imprisonment plainly enough were not officers of the court. They were obviously not appointed or employed by the Circuit Court. They also owed no duty of obedience to the Circuit Court. It may be accepted that they may have been obliged to assist in the execution and enforcement of warrants issued by judges, including judges of the Circuit Court. Any such obligation, however, arose by virtue of their respective positions as officers of the Queensland Police Service, or Queensland Corrective Services, as the case may be. It did not arise by virtue of any position they occupied with, or any duty they owed to, the Circuit Court.

412 Accordingly, to the extent that the common law authorities indicate that officers of the court, or ministerial officers, are afforded a special defence in circumstances where they execute warrants, that defence does not apply in the case of the officers of the Queensland Police and Queensland Corrective Services.

LIABILITY AT COMMON LAW OF CONSTABLES AND "GAOLERS" ACTING ON ORDERS OF AN INFERIOR COURT

413 A number of points should be noted or reiterated before addressing the authorities concerning the liability at common law of constables and "gaolers" acting pursuant to orders made, or warrants issued, by an inferior court.

414 First, the relevant question is whether police officers and gaolers have a defence when their otherwise tortious acts were committed in the execution of an order made, or warrant issued, by an *inferior* court which was later found to be invalid. The question does not arise in respect

of orders made, or warrants issued, by a superior court. That is because, as discussed earlier, such orders are valid until set aside. There is, therefore, no doubt that constables and prison officers who detain or imprison a person pursuant to an order made by a superior court are not liable if that order is subsequently set aside.

415 Second, as already noted, Mr Stradford accepted that different principles perhaps apply in the case of officers, or "ministerial officers", of inferior courts who execute orders or warrants issued by such courts. The Commonwealth disputed that there was any relevant distinction in the authorities between ministerial officers and police and prison officers. It will be necessary to resolve that issue in due course. At this point it suffices to observe that the cases which concern the liability of court officers and ministerial officers should be approached with some caution and with that potential distinction in mind.

416 Third, some of the English authorities should also be approached with caution. That is because the perceived harshness of the common law concerning the liability of police officers and gaolers when acting in execution of warrants issued by magistrates or inferior court judges was ameliorated in England by statute as long ago as 1750. The *24 Geo II, c 44 (**Constables Protection Act**) 1750* (Imp) was, as its name suggests, an "act for the rendering justices of the peace more safe in the execution of their office; and for indemnifying constables and others acting in obedience to their warrants". Section 6 of the Constables Protection Act provided protection to "any constable, headborough or other officer, or … any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace". The phrase "other officer" was held to extend to a gaoler: see *Butt v Newman* (1819) 171 ER 850; *Gerard v Hope* at 63.

417 Putting aside the obvious point that it is difficult to see why there would have been a need for the Constables Protection Act if the common law recognised a defence for constables acting in obedience to a warrant, the other point to emphasise is that the protection afforded by that Act essentially became part of the fabric of the law in England insofar as the liability of constables was concerned. Broad statements of principle in some of the English cases accordingly must be approached with caution lest they be based on the "suppressed premise" that the defence or protection afforded to constables acting in obedience to warrants was in fact the statutory defence or protection (cf ***Kable v New South Wales*** (2012) 268 FLR 1; [2012] NSWCA 243 at [48] per Allsop P).

Cases relied on by Mr Stradford

418 Mr Stradford cited a number of very early English cases in which executing officers were held liable for conduct engaged by them in execution of orders or warrants subsequently found to be invalid: see *Nicholas v Walker and Carter* (1634) Cro Car 394; 79 ER 944; *Read v Wilmot* (1672) 1 Vent 220; 86 ER 148; *Shergold v Holloway* (1734) Sess Cas KB 154; 93 ER 156; also 2 Str 1002; 93 ER 995; *Morse v James* (1738) Willes 122; 125 ER 1089; and ***Perkin*** *v Proctor and Green* (1768) 2 Wils KB 382; 95 ER 874. It is unnecessary to consider those cases further, save to note that, aside from *Perkin*, they were all decided prior to the enactment of the Constables Protection Act.

419 A convenient starting point is the decision in ***Morrell v Martin*** (1841) 3 Man & G 581; 133 ER 1273.

420 In *Morell v Martin*, a constable seized the plaintiff's property (two stacks of wheat) under the authority of two justices of the peace for the non-payment of rates levied for the repair of highways. The plaintiff sued the constable in replevin for the return of the goods. In his defence, the constable pleaded reliance on the warrant, though that plea did not aver facts that would have established that the justices had jurisdiction to issue the warrant, including that the plaintiff was an occupier and had been duly assessed. This case was heard after the commencement of the Constables Protection Act, however that Act did not apply because an action for replevin was not within its terms. The question whether the constable's plea was good was therefore determined on the basis of the common law.

421 The court found in favour of the plaintiff. Chief Justice Tindal, who delivered the judgment of the court, reasoned as follows (at 133 ER 1278-1279):

> But notwithstanding the inference to be derived from these cases, we think the sounder construction is, that in the case of a justification at common law by a constable under the warrant of a justice of the peace, the plea is bad which does not shew the justice had jurisdiction over the subject-matter upon which the warrant is granted. If, at the common law the constable might have justified under the warrant simply, and independently of the consideration, whether the justice who issued it had jurisdiction or not, there would surely have been no necessity for the enactment contained in the sixth section of the 24 G. 2, c. 44 [Constables Protection Act], that if after a demand of the warrant, the action is brought against the constable without making the justice of peace defendant, the jury shall give their verdict for defendant, "notwithstanding any defect of jurisdiction in the justice of the peace;" and if such action be brought jointly against them both, then, on proof of such warrant, the jury shall find for such constable, "notwithstanding such defect of jurisdiction"; a provision which necessarily implies, as it appears to us, that at common law, and before the statute, the want of jurisdiction in the justice took away the protection of the constable who executed the warrant.

422 After referring to some earlier authorities, his Honour continued (at 133 ER 1279):

> Upon these grounds it appears to us, that when a limited authority only is given, as in the present case, if the party to whom such authority is given, extends the exercise of his jurisdiction to objects not within it, his warrant will be no protection to the officers who act under it; and that, by necessary consequence, where an officer justifies under a warrant so granted by a court of limited jurisdiction, he must shew that the warrant was granted in a case which fell within such limited jurisdiction; and that the present plea containing no sufficient allegation to bring the case within the jurisdiction of the justices, is bad, and that there must be judgment, on such plea, for the plaintiff.

423 It can be seen that the constable's plea failed because the warrant in question was issued by an inferior court and the constable did not plead or show that the warrant was issued within the court's jurisdiction. The main thrust of Tindal CJ's reasoning was that if, at common law, a constable could rely on the warrant in his defence, despite the fact that the warrant was invalid as a result of a "want of jurisdiction" on the part of the issuing justice, there would have been no need to enact the Constables Protection Act.

424 The next case of significance is the decision of the Full Court of the Supreme Court of New South Wales in ***Feather v Rogers*** (1909) 9 SR (NSW) 192. This case is of particular significance because it is a decision of an intermediate appellate court in Australia. The facts of the case were fairly straightforward. A justice issued a search warrant in respect of the plaintiff's premises. The defendant aided a constable in the execution of that warrant. The warrant was subsequently held to be void. That was because, before issuing the warrant, the justice had to be satisfied by evidence on oath that he had reasonable cause to suspect certain things. The evidence did not establish that the issuing justice had in fact been so satisfied.

425 It would appear, that at this point in time, the Constables Protection Act was in force in New South Wales. That was not, however, brought to the attention of the trial judge. It was for that reason that the Full Court ultimately ordered a new trial. Importantly, however, each of the judges on the Full Court held that the defendant had no defence available to him at common law and that, apart from the statutory defence, there should have been a verdict for the plaintiff. Acting Chief Justice Simpson delivered the lead judgment. His Honour said (at 196-197):

> I never entertained a doubt from the commencement of this case, and I do not entertain the slightest doubt now, that the Justice acted without jurisdiction in issuing this warrant. It is utterly immaterial whether the form has been in use for years or not. The warrant which was issued, founded upon the information, was issued without jurisdiction. If a constable executes a warrant which the Magistrate had no jurisdiction to issue, the warrant affords him no protection at common law, and if a person, aiding the constable, commits a trespass on the lands or house of another, a warrant issued without jurisdiction is at common law no protection to that person. Apart, therefore, from the Statute 24 Geo. II. [Constables Protection Act], there ought to have been, a

> verdict for the plaintiff for something His Honour, however, directed a verdict for the defendant upon the case as it was presented to the jury. In my opinion the learned Judge, so far as the common law is concerned, should have left the case to the jury and directed them in accordance with the first ground of the rule *nisi*. I am also of opinion that the defendant failed to prove his plea of justification.

426 Justice Cohen, who agreed with Simpson ACJ, said (at 198):

> I concur in the conclusion arrived at by the Acting Chief Justice, and I quite agree with him that at common law the defendant would have had no answer to the action. That is perfectly patent from the Statute 24 Geo. II. [Constables Protection Act], in which it is recited that the purport of the statute is to relieve constables and persons acting in aid of them from the liability to which they are exposed in executing warrants which they are bound to execute. That obviously shows that at common law their liability in executing warrants which are issued without jurisdiction exists.

427 Justice Rogers agreed with both Simpson ACJ and Cohen J that, but for the Constables Protection Act, "the defendant would have been without any defence whatever" (at 200).

428 It should be emphasised that, while both Simpson ACJ and Cohen J referred to the issuing justice having acted "without jurisdiction", it is readily apparent that the justice in question had the jurisdiction to entertain the application to issue the warrant and also to issue search warrants of the sort in question. As noted earlier, the problem for the defendant was that he was unable to prove that a necessary condition for the issue of the warrant in question – that the justice was satisfied by evidence given on oath that he had reasonable cause to suspect certain things – had been met. The use by both Simpson ACJ and Cohen J of the expression "without jurisdiction" must be understood in that context.

429 It should also be noted that the reasoning of both Simpson ACJ and Cohen J did not suggest that the defendant was only liable because that deficiency was apparent on the face of the warrant. Indeed, the deficiency was not readily apparent on the face of the warrant. The warrant stated that the officer who applied for the warrant had "made information and complaint on oath" before the justice that the officer had reasonable cause to suspect the requisite things. That is not to say that the issuing justice was not himself satisfied, based on the information put before him, that there was reasonable cause to suspect those things.

430 Mr Stradford also relied on the decision of Crisp J in *Gerard v Hope*. The facts of that case were outlined earlier. It will be recalled that the plaintiff was arrested by a constable and imprisoned on the basis of a warrant issued by a justice of the peace who had no jurisdiction to issue the warrant in question. The plaintiff successfully sued the justice, the constable and the gaoler. The liability of the justice was discussed earlier. The gaoler pleaded that he was not liable because he had obeyed a warrant which was valid on its face. That plea, which was said

to have been based on the common law, not statute, was found to be unsound. Judge Crisp's reasons for rejecting the plea were as follows (at 62):

> It is unsound because it does not allege that the justice had jurisdiction in respect of the subject matter nor does the evidence establish that he had. It is sufficient to cite *Burn's Justice of the Peace*, 30th edn., Vol. 1, p. 1021:
>
> > "Where a constable justifies his acts at common law under the warrant of a justice of the peace, the justification is insufficient, unless it shows that the justice had jurisdiction over the subject-matter upon which the warrant was granted. And though no want of jurisdiction appears on the face of the warrant, still the officer is not protected by it for what he does under it, unless the justice who issued it had jurisdiction in the case. (*Morell v. Martin*, 4 Scott, N.R. 306. But see *Andrew v. Marris*, 1 Q.B. 3; *Carratt v. Morley*, 1 Q.B. 18.)"
>
> and I have in any event as far as the defendant Hornibrook is concerned negatived its possible application by my findings as to the apparent invalidity of the warrant with which we are concerned. In my opinion if the plea is still regarded as being relied upon it does not avail.

431 Thus it would appear that the gaoler was found liable both because he was unable to show that the justice had jurisdiction to issue the warrant *and* because the invalidity of the warrant was apparent on its face.

432 Both the gaoler and the constable also relied on the Constables Protection Act, which was in force in Tasmania at the time. It is unnecessary to consider Crisp J's reasons as to why the defences based on that Act, as well as other statutory defences, were not made out.

433 The next case of importance is the decision of the High Court in ***Corbett v The King*** (1932) 47 CLR 317; [1932] HCA 36. The Commonwealth also relied on this decision, though Mr Stradford submitted that when the reasons of Gavan Duffy CJ, Rich and Dixon JJ are closely analysed, they in fact support his case.

434 The facts of the case were that a magistrate issued a warrant under the ***Landlord and Tenant Act*** 1899-1930 (NSW) which directed the police to enter certain premises, eject the occupants and give possession to the owner of the property. That warrant was executed by police officers, however the occupants resisted and were, as a result, charged with resisting and wilfully obstructing the police in the execution of their duty. The occupants defended that charge on the basis that the police were not acting in the exercise of their duty because the warrant did not comply with the requirements of the Landlord and Tenant Act.

435 At the trial of the occupants, the trial judge held that even if the warrant was invalid, it was not invalid on its face and that a constable who executed such a warrant was acting in the exercise

of his duty. Chief Justice Gavan Duffy, Rich and Dixon JJ held, however, that that proposition was too widely stated. They reasoned as follows (at 47 CLR 327-328):

> The constables whom the defendants resisted were attempting in the execution of a warrant of possession to evict a tenant from a dwelling. There could be no doubt that the constables were acting according to the exigency of the warrant, but the contention is made that the warrant conferred no authority upon them because it was not issued or granted in accordance with the provisions of the *Landlord and Tenant Act 1899* and was a nullity. The Supreme Court did not decide whether any of the objections made to the warrant were well founded. The Court assumed that the warrant did not comply with the requirements of the statute, but held that the warrant did not appear upon its face to be invalid, and that a constable, who, in good faith, executed such a warrant, acted in the execution of his duty. This proposition is somewhat too widely stated. The cases decided upon enactments making penal the obstruction or resistance to an officer in the course of the execution of his duty show that, when the alleged duty arises from a warrant, the charge cannot be sustained unless the warrant did operate in law as an authority to the officer, and, unless when he was resisted, he was in the course of executing that authority according to law (*R. v. Sanders*; *Codd v. Cabe*; *R. v. Cumpton*; *R. v. Levesque*). **It is not enough that the officer was acting bona fide in obedience to a warrant, which, although bad, appeared to be good. It is true that generally, in such a case, he would not be liable as for an actionable wrong. But he is not protected from liability because it is his duty to execute a bad warrant. The protection is conferred upon him because "the public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected" (*Price v. Messenger*, 24 Geo. II. c. 44 [the *Constables' Protection Act*]; cf. *Landlord and Tenant Act 1899*, sec. 28, and *Jones v. Chapman*)**.
>
> (Emphasis added; footnotes omitted)

436 Both the Commonwealth and Mr Stradford relied on the emphasised portion of this passage from the judgment. The Commonwealth submitted that that part of the reasoning supported the proposition that a constable is generally not liable for an actionable wrong when executing a warrant which, while apparently valid on its face, turns out to have been invalid. Mr Stradford submitted, however, that their Honours were saying no more than that a constable is only "protected" in those circumstances by operation of the Constables Protection Act. In other words, the constable is not protected at common law. That was said to be apparent from their Honours' citation of ***Price v Messenger*** (1800) 2 Bos & P 158; 126 ER 1213, the Constables Protection Act, s 28 of the Landlord and Tenant Act and ***Jones v Chapman*** (1845) 14 M & W 124; 153 ER 416. There is considerable merit in that submission.

437 *Price v Messenger* was a case in which the operation of the Constables Protection Act was decisive. A magistrate issued a warrant which authorised the police to search for and seize a quantity of sugar "concealed or deposited" at the plaintiff's premises on the basis that it was suspected of being stolen. The warrant also authorised the police to bring the person in whose custody the sugar was found before the magistrate. Some constables went to the plaintiff's

premises and found some sugar, as well as "a bag of nails and two parcels of tea of which no satisfactory account was given". Because the warrant did not refer to nails and tea, the constables contacted the magistrate for instructions and were ordered to seize the nails and tea, as well as the sugar. The plaintiff was also taken to the magistrate. The plaintiff was subsequently discharged and his property returned on the basis that insufficient evidence had been produced against him. He sued the constables for assault, imprisonment and the seizure of his property. The trial judge directed the jury that the warrant authorised the assault, imprisonment and seizure of the sugar, but not the seizure of the tea and nails. The plaintiff was awarded damages in respect of that seizure.

438 It is quite clear from the judgment on appeal, which upheld the judgment of the trial judge, that the constables were only protected from liability in respect of the assault, imprisonment and seizure of the sugar because of the operation of the Constables Protection Act. They were held liable in respect of the seizure of the tea and nails because those items were not specified in the warrant. Lord Eldon said that "[t]he public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected" and referred, in that context, to the fact that "[t]he statute [the Constables Protection Act] provides that no action shall be brought against an officer for any thing done in obedience to any warrant of any justice of the peace" (at 126 ER 1215). It is clear, therefore, that the protection that Lord Eldon was referring to was provided by the statute, not the common law.

439 Another passage of Lord Eldon's judgment is instructive as to the position at common law. His Lordship said, in relation to the operation of the Constables Protection Act (at 126 ER 1215):

> The act therefore takes it for granted, that an officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity. For it is as much a defect of jurisdiction, if the justice grant an improper warrant in a case over which he has jurisdiction, as if he had no jurisdiction over the case at all.

440 That passage would tend to support the proposition that, save for the protection provided by the Constables Protection Act, a constable would be liable for acts performed in obedience to a warrant issued by a justice if the warrant turned out to be invalid either because the justice had no jurisdiction to issue the warrant, or because, despite having jurisdiction, the justice issued an "improper warrant".

441 The citation of s 28 of the Landlord and Tenant Act also suggests that the protection being referred to in the relevant passage in *Corbett v The King* was statutory protection. Section 28

of the Landlord and Tenant Act, like the Constables Protection Act, provided statutory protection to constables who executed warrants to evict tenants.

442 The other case cited in *Corbett v The King*, *Jones v Chapman* was a case like *Price v Messenger*, which concerned the execution of a warrant for possession. The defendants, including some constables, entered the plaintiff's premises pursuant to a warrant issued by justices which authorised them to enter those premises and deliver possession of the premises to the owner. The defendants' plea sought to justify their entry of the premises on the basis that they were acting pursuant to the warrant. They relied on a statute (*1 & 2 Vict c 74 (Small Tenements Recovery Act) 1838* (Imp)) which, like s 28 of the Landlord and Tenant Act, provided that it was not lawful to bring an action against a constable for executing a warrant under the statute by reason that the person on whose application the warrant was issued did not have the lawful right to the possession of the premises. That plea was held to be bad because protection under the statute was only provided to constables of the district in which the premises were located and the defendants had not established that to be the case. The report of the case also notes that "the plea clearly cannot be regarded as a sufficient justification at common law" and notes that the observations of Tindall CJ in *Morrell v Martin* were "applicable to this point" (at 153 ER 419).

443 The relevant passage from the judgment of Gavan Duffy CJ, Rich and Dixon JJ in *Corbett v The King* was obiter dicta because the court held that the warrant in question in that case was valid. As can be seen, the passage in any event provides no support for the Commonwealth's position. Indeed, if anything, it provides support for Mr Stradford's contention that at common law, a constable who executes a warrant issued by an inferior court may be held liable for acts committed in the course of executing the warrant if the warrant is found to have been invalidly issued, even if the warrant appeared valid on its face.

Cases relied on by the Commonwealth (and Queensland)

444 The main cases relied on by the Commonwealth were (in chronological order): ***Dr Drury's Case*** (1610) 8 Co Rep 141; 77 ER 688; ***Andrews v Marris*** (1841) 1 QB 3; 113 ER 1030; ***Mooney*** *v Commissioners of Taxation (NSW)* (1905) 3 CLR 221; [1905] HCA 61; ***Hazelton v Potter*** (1907) 5 CLR 445; [1907] HCA 63; ***Smith v Collis*** (1910) SR (NSW) 800; *Corbett v The King*; *Commissioner for Railways (NSW) v* ***Cavanough*** (1935) 53 CLR 220; [1935] HCA 45; ***Posner*** *v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461; [1946] HCA 50; ***Robertson v The Queen*** (1997) 92 A Crim R 115; ***von Arnim*** *v Federal Republic of*

Germany (No 2) [2005] FCA 662; *Kable v New South Wales* and ***Haskins*** *v The Commonwealth* (2011) 244 CLR 22; [2011] HCA 28.

445 As noted earlier, Queensland essentially agreed and supported the Commonwealth's submissions concerning the position at common law. It relied on the same cases that were relied on by the Commonwealth, though it did not advance any separate submissions of substance in relation to those authorities.

446 The starting point, so far as the Commonwealth was concerned, was *Dr Drury's Case.* That case has been cited as authority for the principle that if acts are done in accordance with a judicial order, later set aside, they are protected as "acts done in the execution of justice, which are compulsive": see *Cavanough* at 53 CLR 225 (Rich, Dixon, Evatt and McTiernan JJ); *Kable v New South Wales* at [25] (Allsop P). That statement of principle, however, must be considered in context and treated with caution. *Dr Drury's Case* concerned the liability of a sheriff for acts which he was "commanded and compelled by King's writ" to do. The passage from which the statement of principle is apparently drawn is as follows (at 77 ER 691):

> There is a difference between mean acts done in the execution of justice, which are compulsive, and acts which are voluntary: and, therefore, if an erroneous judgment is given in debt, and the sheriff, by force of a *fieri facias* sells a term of the defendant, and afterwards the judgment is reversed by a writ of error, yet the term shall not be restored, but only the sum, &c. because the sheriff was commanded and compelled by King's writ to sell it, &c.
>
> (Footnotes omitted)

447 The Latin phrase "fieri facias" refers to a writ of execution which directs a specified officer, usually a sheriff, to take control of a piece of property and sell it in order to satisfy the owner's debt obligations.

448 At the time *Dr Drury's Case* was decided, a sheriff was not simply an officer of the court. His "powers and duties could be described as being 'either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff'": *R v Turnbull; Ex parte Taylor* (1968) 123 CLR 28 at 44 (Windeyer J); [1968] HCA 88. The point to emphasise is that the liability of sheriffs and other "ministerial officers", who were bound to execute orders of the court of which they were officers, appears to have been treated differently to the liability of other persons who were not so bound. In particular, a sheriff was not required, before executing an order of the court, to examine its legality. In Watson, *A Practical Treatise on the Office of Sheriff* (Sweet, Maxwell, Stevens & Norton, 1848) it was said (at 67):

> When a writ is delivered to a sheriff, he is *bound* to execute it, according to the exigency thereof, without inquiring into the regularity of the proceeding whereon the writ is grounded; and it will be found, by a variety of cases, that although the process, under which the sheriff takes the person or goods of the defendant, be voidable, or erroneous, and of which the defendant might have availed himself in the original action, yet such writ is a sufficient justification for the sheriff in an action for trespass brought against him, for the sheriff is a ministerial officer in the execution of writs, and is not to examine their legality.
>
> (Emphasis in original; footnotes omitted)

449 Similarly, in Churchill and Bruce, *The Law of the Office and Duties of the Sheriff* (1879, Stevens and Sons), it was said (at 278) that in "an action of trespass against the sheriff, the writ is a sufficient justification, for the sheriff, being a ministerial officer in the execution of writs, is not required to examine into their legality".

450 It appears, therefore, to be tolerably clear that the principle derived from *Dr Drury's Case* applies only to Sheriffs and similar court officers. The same can be said concerning the next case relied on by the Commonwealth.

451 In ***Moravia v Sloper*** (1737) Willes 30; 125 ER 1039, Willes LCJ said that "in the case of an officer, who is obliged to obey the process of the Court and is punishable if he do not, it may not be necessary to set forth that the cause of action arise within the jurisdiction of the Court" (at 125 ER 1041). The Lord Chief Justice explained that the reason that sheriffs and other officers of the court were treated differently in that regard was (at 125 ER 1042):

> For the inferior officer is punishable as a minister of the Court if he do not obey it's commands; and it would be unjust that a man should be punished if he does not do a thing and should be liable to an action if he does.

452 The next case relied on by the Commonwealth, *Andrews v Marris*, was also a case concerned with ministerial officers of the court which issued the warrant. That is apparent from the fact that the court followed *Moravia v Sloper*.

453 The facts of *Andrews v Marris* were that a clerk of the Caistor Court of Requests issued a warrant against the plaintiff in respect of an amount that was said to have been the subject of a judgment but remained unpaid. The warrant was directed to "John Whitham, one of the serjeants of the said Court" and commanded and required the "serjeant" to "take and carry … the body" of the plaintiff to the prison at Kirton. The plaintiff was arrested and imprisoned. The plaintiff sued the clerk and the "serjeant", Mr Whitham, for false imprisonment. The court found that the clerk did not have the jurisdiction or authority to issue the warrant. The action against the clerk succeeded, however the action against the "serjeant" failed, essentially

because his situation as an officer of the court was considered to be analogous to that of a sheriff. Lord Chief Justice Denman's reasons included as follows (at 113 ER 1036):

> The case of the defendant Whitham, however, stands on very different grounds. He is the ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not. There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff in respect of process from a Superior Court; and it is the well known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must shew the judgment in pleading, as well as the writ; but for the latter it is enough to shew the writ only; *Cotes v. Michill* (3 Lev. 20); *Moravia v. Sloper* (Willes, 30, 34).

454 It is worth reiterating at this point that, for the reasons given earlier, the MSS guards could not be said to have been ministerial officers of the Circuit Court. Their situation could not be said to be analogous to the sheriff in *Dr Drury's Case*, or the "serjeant" in *Andrews v Marris*. They simply provided security services to the Circuit Court pursuant to a contract between their employer and the Commonwealth. Unlike the serjeant in *Andrews v Marris*, they were not named or referred to in the warrant and were not commanded or compelled to do anything under the warrant. Nor were they subject to any punishment if they did not obey the warrant.

455 The Commonwealth relied on a short passage in the judgment of Griffith CJ in *Mooney* in which the decision in *Andrews v Marris* was cited. *Mooney* was not, however, a case concerning the liability in tort of a ministerial officer of a court who acted in obedience to an invalid warrant issued by an inferior court. Indeed, it did not concern the liability of anyone for acting in obedience to a warrant. It was a tax case.

456 The facts in *Mooney* were that the Commissioners of Taxation assessed the appellant as being liable to pay tax under the *Land and Income Tax* ***Assessment Act*** *1895* (NSW) in respect of an amount he received as the purchase money of a mine. The appellant did not appeal the assessment to the Court of Review in the manner prescribed in the Assessment Act. The Commissioners sued for the amount of tax assessed and relied upon the "assessment book" as conclusive evidence of their claim pursuant to a provision in the Assessment Act. The High Court held (per Griffith CJ and Barton J, O'Connor J dissenting), that the assessment by the Commissioners was in excess of their jurisdiction and the appellant was therefore not bound to appeal the assessment to the Court of Review. He was entitled to wait until he was sued and then dispute his liability in that action.

457 One of the critical questions for the court in *Mooney* was whether the Commissioners had jurisdiction to issue the assessments. That was said to depend on whether their jurisdiction was limited to assessing the taxes payable by persons who in fact and law were liable to pay them, or whether it also extended to determining whether persons alleged to be liable were in fact and law so liable. The Commissioners argued, based on the decision in ***Allen v Sharp*** (1848) 12 JP 693; 2 Exch 352, that their jurisdiction extended to determining whether persons alleged to be liable were in fact and law so liable. Chief Justice Griffiths (with whom Barton J relevantly agreed) held that the decision in *Allen v Sharp* turned upon the language of the statute in question in that case and did not assist the Commissioners. It was in that context that Griffiths CJ said (at 3 CLR 241-242):

> It is also to be remembered that there is a well known distinction between the case of an action for trespass brought against an executive officer for executing the warrant of a tribunal as to a matter *prima facie* within its jurisdiction and the case of a similar action against the person by whom, or the party at whose instance, the warrant is issued. In the former case the action will not lie. In the latter it will, if the matter were not in fact and law within the jurisdiction of the tribunal. (See *Andrews v. Marris*). In my judgment, therefore, the case of *Allen v. Sharp*, does not govern the present case, which depends upon a Statute framed on quite different lines.
>
> (Footnotes omitted)

458 The Commonwealth relied on this passage from the judgment of Griffith CJ, apparently on the basis that it approved the decision in *Andrews v Marris*. Even if that be so, the decision in *Andrews v Marris* related to the liability for trespass of ministerial officers of the court, such as sheriffs and sergeants, for acts engaged by them in execution of warrants issued by their court. Chief Justice Griffith uses the expression "executive officer" to describe such officers. As has already been noted, the MSS guards were not ministerial officers of the court.

459 In all the circumstances, the Commonwealth derives little assistance from *Mooney*. That is all the more so given that the case did not concern or involve the liability of anyone in respect of the execution of a warrant. The decision in *Andrews v Marris* also appears to have been cited by Griffith CJ for the purpose of distinguishing cases where a tribunal's jurisdiction extended to determining whether matters were within the tribunal's jurisdiction from cases where the tribunal's jurisdiction was limited to matters which were in fact and law within its jurisdiction.

460 The Commonwealth's reliance on the decisions of the High Court in *Hazelton v Potter* and *Haskins* is equally questionable.

461 *Hazelton v Potter* was only fleetingly addressed in the Commonwealth's submissions. It accordingly warrants only fleeting attention in these reasons. The Commonwealth submitted no more than that the whole of the reasoning in the case supported the proposition that, if an "enforcing official" executes a warrant which is not defective on its face, the official is "protected". The Commonwealth did not direct attention to any particular passage in the judgment which was said to support that submission.

462 I am unable to see how the Commonwealth is able to derive any assistance from *Hazelton v Potter*, or how that case could be said to be authority for the proposition advanced by the Commonwealth. The police officer who purported to execute the warrant in question in *Hazelton v Potter* was found liable essentially because the warrant did not authorise the officer's conduct at all. The police officer "was not within the terms of the persons described in the warrant" and the warrant provided "no justification of the conduct pursued towards the appellant" (Barton J at 5 CLR 463).

463 The Commonwealth's reliance on *Haskins* can also be dealt with shortly. In that case, an able seaman was found guilty by the Australian Military Court of misusing a travel card. He was sentenced to, and served, a period of detention. The provisions in the Act which established the Australian Military Court were subsequently declared to be invalid. Parliament then enacted legislation to restore the system of military discipline. The able seaman brought a claim in the High Court alleging that the new legislation was invalid because, among other things, it extinguished his cause of action against the Commonwealth for the tort of false imprisonment. The High Court considered, in that context, the availability of an action for false imprisonment.

464 The Commonwealth relied on the following passages from the judgment of the majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (at [64] and [67]):

> The present case should be decided on the footing that the acts of which the plaintiff complains were acts done by one member of the defence force to another in obedience to what appeared to be a lawful command. The acts were not done for any reason other than the bona fide application of a kind of disciplinary measure for which the Discipline Act provided. That is, the punishment imposed was a lawful form of punishment. The punishment was executed in the manner prescribed by law. The complaint of false imprisonment is founded wholly on the invalidity of the law that established the body that imposed the punishment. No allegation of improper purpose, "malice" (whether that is understood as spite, ill will, ulterior motive, or otherwise) or oppression is made or was available. The plaintiff's detention was effected in obedience to commands made by a warrant that those to whom the warrant was directed had no occasion to believe were other than lawful commands.

…

> To permit the plaintiff to maintain an action against those who executed that punishment (whether service police or the officer in charge of the Corrective Establishment) would be destructive of discipline. Obedience to lawful command is at the heart of a disciplined and effective defence force. To allow an action for false imprisonment to be brought by one member of the services against another where that other was acting in obedience to orders of superior officers implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force. It would be destructive of discipline because to hold that an action lies would necessarily entail that a subordinate to whom an apparently lawful order was directed must either question and disobey the order, or take the risk of incurring a personal liability in tort.

465 The Commonwealth's reliance on those passages from the judgment of the majority in *Haskins* is problematic. That is because the principles discussed in those passages plainly concern military justice, discipline and punishment. Nothing of any relevance is said about the principles that apply in respect of the liability of non-military police and gaolers for acts done to civilians in the execution of invalid warrants issued by civilian inferior courts. That is readily apparent from even a cursory consideration of what is said in the passages in question. It is made crystal clear in the paragraphs of the judgment which are sandwiched between the two paragraphs relied on by the Commonwealth. The majority refer (at [65]) to what was said by Willes J in *Keighly v Bell* (1866) 4 F & F 763; 176 ER 781 and Pollock in *The Law of Torts* (1st ed, 1887) about the liability of a subordinate soldier for acts done in obedience to his commanding officer. Their Honours then observe (at [66]):

> The application of a principle expressed in the form adopted by Willes J or by Pollock to acts done by a member of the defence force to civilians would raise very different issues from those that arise here, but those issues need not be explored. Attention is confined to acts done by one member of the force to another in intended execution of orders that reasonably appeared to be lawful orders of a superior officer.

466 In my view, nothing said in *Haskins* provides any support for the proposition advanced by the Commonwealth in this case.

467 The judgment in *Corbett v The King* was discussed earlier. In my view, the passage from the judgment in *Corbett v The King* that is relied on by the Commonwealth in fact provides support for Mr Stradford's contentions concerning the relevant principles.

468 The Commonwealth relied on the decision of the Full Court of the Supreme Court of New South Wales in *Smith v Collis*. That case concerned an action against the governor of a gaol for a penalty under s 6 of the *31 Car II, c 2 (**Habeas Corpus Act**) 1679* (Imp) for having *knowingly* imprisoned the plaintiff for the same offence for which he had been imprisoned before and freed upon the issue of a writ of habeas corpus. The plaintiff contended that the

governor's knowledge in that respect could be inferred from the "material before him when he received the plaintiff into his custody" (at 813). The court rejected that contention and found that the evidence "clearly stops short of the proof required to make [the governor] liable" (at 813). It was in that context that the Chief Justice said (at 813):

> In the ordinary course of things the discharge of the governor's duties would become impossible if he were called upon to decide upon the validity of a warrant good on the face of it, and his duty is simply to obey and not to question. In the case of actions for false imprisonment this has been made absolutely clear. In the case of *Demer v. Cook* (20 Cox C.C., at p. 448), it is said, "The authorities cited by the Attorney-General: *Olliet v. Bessey* (Sir Thomas Jones' Reps. 214, 215); *Butt v. Newman* (Gow 97); *Countess of Rutland's Case* (6 Rep. 54a); *Henderson v. Preston* (59 L.T. Rep. 334, 21 Q.B.D. 362), and *Greaves v. Keene* (40 L.T. Rep. 216; 4 Ex. D. 73) – are, in my opinion, conclusive to show that where a gaoler receives a prisoner under a warrant which is correct in form, no action will lie against him if it should turn out that the warrant was improperly issued, or that the Court had no jurisdiction to issue it." And at p. 449 "the warrant and nothing else is the protection of the gaoler, and he is not entitled to question it or go behind it."

469 Mr Stradford submitted that this passage from the judgment of the Chief Justice was no more than an explanation of the legislative policy supporting his Honour's construction of the Act. That is somewhat difficult to accept, though it may be accepted that the passage was obiter dicta given that the question whether the governor could rely on the warrant was not the decisive issue in the case. Rather, the decisive issue was whether the governor had knowingly imprisoned someone contrary to the Habeas Corpus Act. That said, the passage from the judgment in ***Demer v Cook*** (1903) 88 LT 629; 20 Cox CC quoted by the Chief Justice does seem to suggest that an action cannot lie against a gaoler for receiving a prisoner under a warrant which is correct in form.

470 The persuasive force of the obiter observations of the Chief Justice is, however, undermined somewhat when close consideration is given to the main case cited by his Honour, *Demer v Cook,* and the authorities cited in it. In *Demer v Cook*, the gaoler in question was in fact found to be liable for acting under an invalid warrant (cf *Kable v New South Wales* at [47]), or at least acting pursuant to documents that could not be said to constitute a valid warrant. The citation, in *Demer v Cook,* of the decisions in ***Olliet v Bessey*** (1682) T Jones Rep 214; 84 ER 1223 and ***Henderson v Preston*** (1888) 21 QBD 362, is also somewhat questionable. The problem in *Olliet v Bessey* was not that the warrant in question was invalid. Rather, the problem was that the officers who arrested the person pursuant to a valid warrant acted outside the geographical limits of the warrant. The gaoler was held not to be liable in tort because he was presented with a valid warrant and he was not duty bound to inquire as to whether the arresting officers

had acted within the terms of the warrant. *Henderson v Preston* similarly involved a valid warrant which the gaoler complied with its terms. The problem in that case was that, unbeknownst to the gaoler, the prisoner had already spent a night in custody.

471 The Commonwealth did not expressly rely on *Demer v Cook* or the other cases identified in the relevant passage from the judgment of the Chief Justice in *Smith v Collis*. While it might have cited some of those cases in its lengthy written submissions, and may have fleetingly, though parenthetically, referred to them in its oral submissions, it did not take the Court to those cases or the reasoning in them. There is a limit to whether the Court must chase every rabbit down every burrow. I am nevertheless prepared to proceed on the basis that those cases appear, at first blush at least, provide some support for the Commonwealth's position and appear to be inconsistent with the authorities that deal with the liability of constables who act pursuant to a warrant.

472 The next decision that it is necessary to consider is the judgment in *Cavanough*. The Commonwealth relied on *Cavanough* because *Dr Drury's Case* is cited as authority for the proposition that "[a]cts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice, which are compulsive'" (at 53 CLR 225). As discussed earlier, however, that statement of principle must be considered with some caution because in *Dr Drury's Case* it was effectively confined to the issue of the liability of the sheriff, who was an officer of the court. Moreover, the citation of *Dr Drury's Case* in *Cavanough* must be considered in the context of the issues which were addressed in that case.

473 *Cavanough* did not concern the liability of an officer of the court, still less a constable or a gaoler, for acts committed in the execution of a warrant issued by an inferior court. Rather, the case concerned an officer of the Commissioner for Railways who was convicted of the offence of larceny. He was then suspended from his job. The officer's conviction was subsequently set aside on appeal. He sued the Commissioner for his salary during the period of his suspension. The Commissioner relied on a statutory provision which provided that an officer convicted of a felony shall be deemed to have vacated his office. The High Court held that, upon the setting aside of the officer's conviction, the conviction was avoided ab initio. It followed that he could not be deemed to have vacated his office. It was in that context that *Dr Drury's Case* was cited, including for the proposition that "[a]cts done according to the exigency of a judicial order afterwards reversed are protected" (at 53 CLR 225). It is, in those

circumstances, doubtful that the reasoning in *Cavanough* greatly assists in resolving the issue in question in this case.

474 The decision in *Posner* requires closer consideration. *Posner* did not itself concern the liability of an officer in respect of acts carried out in execution of an order or warrant issued by an inferior court. The judgments in *Posner* do, however, refer to some cases that do concern that scenario. The facts of the case were, in summary, that Mr Posner was served in Victoria with a maintenance order which had been made against him in Perth. He also received a demand for the payment of arrears under that order. A summons was subsequently issued calling on him to show cause why he should not be imprisoned for failing to pay moneys in accordance with the order. Mr Posner persuaded the Court of Petty Sessions that he had not been served with any process in Perth in respect of the maintenance order and the court held that the order was a nullity. The court nevertheless held that it was bound to give effect to the order. Mr Posner applied for a review of that order. The High Court held, by majority, that the maintenance order was not a nullity and could properly be made the subject of the proceeding in Victoria. It was in that context that reference was made to the authorities concerning the execution of invalid warrants.

475 Justice Starke said (at 74 CLR 476):

> A party, however, executing the process of an inferior court in a matter beyond its jurisdiction is liable to action and cannot justify under such process whether he knows the defect or not but the magistrate is only liable if he knew of the defect of jurisdiction (*Calder v. Halket*; *Houlden v. Smith*; Mayor etc. of *London v. Cox*). And an officer executing and obeying such process is protected (ibid).
>
> (Footnotes omitted)

476 Justice Dixon said (at 74 CLR 481-482):

> Another rule was expressed by Denman C.J. in *Andrews v. Marris*. Speaking of one of the defendants, his Lordship said: - "He is the ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not. There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff in respect of process from a Superior Court; and it is the well known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must show the judgment in pleading, as well as the writ; but for the latter it is enough to show the writ only; *Cotes v. Michill*; *Moravia v. Sloper*. It was said, indeed, for the plaintiff, that these and the numerous other authorities which might be cited to the same effect all went upon the principle that the proceeding, however irregular, was the Act of the Court." Thus a conviction or order might be inefficacious in favour of a party but might

> have some operation as against the other party in favour of officers etc.
>
> (Footnotes omitted)

477 Mr Stradford submitted that these passages from the judgments of Starke J and Dixon J in *Posner* do not take the matter any further. Rather, they simply confirm the distinction between ministerial officers of the court and other offices. In his submission, that analysis was supported by the fact that Dixon J quoted from the reasons of Denman CJ in *Andrew v Marris* and Starke J cited ***London v Cox*** (1867) LR 2 HL 239 at 263 in support of the statement that "an officer executing and obeying such process is protected". The page from the judgment of *London v Cox* cited by Starke J in turn cites *Moravia v Sloper* and *Andrews v Marris*.

478 There is some merit in Mr Stradford's submission that the judgments in *Posner* do not take the matter any further. As already noted, *Posner* did not concern the liability, or potential liability, of any officer for acts done in the execution of the warrant. The safer course, in those circumstances, is to address what is actually decided in cases such as *Andrews v Marris* and *Moravia v Sloper*, as opposed to the summary of those cases in what were effectively obiter observations made by Starke J and Dixon J concerning those cases.

479 The next case relied on by the Commonwealth, *Robertson v The Queen*, cannot so readily be put to one side. It provides some support for the defence relied on by the Commonwealth and Queensland. Mr Stradford submitted, however, that the case was wrongly decided and that I should not follow it.

480 *Robertson v The Queen* was a decision of the Full Court of the Supreme Court of Western Australia. Ordinarily, of course, I should follow a decision of a State intermediate appellate court: cf *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [135]. I am, however, confronted by conflicting decisions of intermediate appellate courts. The decision in *Robertson v The Queen* appears to conflict with the decision in *Feather v Rogers*. In those circumstances, I can "only proceed to determine the issue by considering which approach is correct in principle": *Obeid v Lockly* (2018) 98 NSWLR 258; [2018] NSWCA 71 at [170] (Bathurst CJ).

481 The facts in *Robertson v The Queen* were that the appellant was sentenced to imprisonment for an offence. He was subsequently convicted of further offences in respect of which fines were imposed by a magistrate. The magistrate ordered that if the appellant defaulted in the payment of the fines he would be required to serve short periods of imprisonment which were to be served cumulatively. The warrant of commitment, however, incorrectly stated that the terms

of imprisonment would not only be cumulative on each other, but also cumulative on any other sentence the appellant was serving. As a result of that error, and the fact that he did not pay the fines, the appellant served 56 more days in prison than was in fact required by the default sentences. He sued the State of Western Australia on the basis that it was vicariously liable for the act of the responsible prison authority. The trial judge dismissed that action on the basis that the appellant's imprisonment had in fact been correctly calculated. The Full Court found otherwise, but nonetheless dismissed the appellant's appeal on the basis that the prison superintendent did not act unlawfully in imprisoning the appellant pursuant to the warrant of commitment even if the warrant was incorrect and unlawful.

482 Justice Steytler, with whom Malcolm CJ and Franklyn J agreed, held, in essence, that the prison superintendent could not be held liable for acting on a warrant which was valid on its face, but which turned out to have been wrongly issued. That conclusion was based on his Honour's review of various authorities, including *Sirros v Moore*, *London v Cox*, *Posner*, *Oldham Justices; Ex parte* ***Cawley*** (1996) 2 WLR 681; 1 All ER 464 and ***Isaacs*** *v Robertson* [1985] AC 97; [1984] 3 All ER 140. His Honour concluded (at AC 125):

> In the circumstances of this case, and in the light of the authorities to which I have referred, it seems to me that, if it be accepted that the warrant was unlawful and subject to being set aside, that did not render unlawful the conduct of the prison superintendent in acting upon the warrant. Rather, the warrant, being ex facie an order of a court of competent jurisdiction, was required to be obeyed by the prison authorities until discharged by a court of competent jurisdiction.

483 Mr Stradford submitted that Steytler J's conclusion was wrong and his Honour's reasoning was defective. That was said to be the case for the following reasons. First, Steytler J did not refer to the earlier intermediate appellate court decision in *Feather v Rogers*. There is no indication that counsel drew that decision to his Honour's attention. Second, Steytler J failed to take into account the likelihood that the statements made by Lord Denning MR in *Sirros v Moore* upon which his Honour relied were premised on or influenced by the operation of the Constables Protection Act. Third, in relying on what was said in *London v Cox* and *Posner,* Steytler J failed to have regard to the fact that the line of authority referred to in those cases concerned ministerial officers of the court, not constables and gaolers. Fourth, his Honour appears to have been influenced by the irrelevant consideration that modern legislation does not favour the invalidation of orders of magistrates or other inferior courts. Fifth, his Honour was wrong in saying that Simon Brown LJ in *Cawley* had cited, with apparent approval, Romer LJ's judgment in ***Hadkinson*** *v Hadkinson* [1952] P 285; 2 All ER 567 because the passage of the judgment in *Cawley* which refers to *Hadkinson* was simply a recitation of counsel's

submissions. Sixth, his Honour was wrong to rely on the decision of Lord Diplock in *Isaacs* because that case concerned an order made by a superior court.

484 There is merit in Mr Stradford's submission that *Robertson v The Queen* was wrongly decided and that I should not follow it. I am not persuaded that Steytler J's reasoning or assessment of the authorities was accurate or complete. It is, as Mr Stradford submitted, of some significance that his Honour did not refer to *Feather v Rogers*. As for some of the other authorities considered by his Honour, it is unnecessary to repeat what I have already said about the decisions in *Posner* and *London v Cox*. The authorities considered in those cases primarily concern the liability of ministerial officers of the court, such as sheriffs and sergeants. The generalised statement by Lord Denning MR in *Sirros v Moore* is also deserving of little weight in circumstances where it was supported by minimal reasoning and the Constables Protection Act was in force in any event.

485 Perhaps more significantly, in my view, Steytler J erred in relying, it appears to a significant extent, on the judgment of Simon Brown LJ in *Cawley*. Properly considered, *Cawley* provides no support for the conclusion reached by his Honour. *Cawley* did not concern the liability of an officer, such as a prison warden, who acted in execution of a warrant subsequently found to be void. While it did involve warrants of commitment issued by inferior courts which were found to be defective, the issue before the court in *Cawley* was whether writs of habeas corpus should issue to secure the release of the minors who were the subject of those warrants. The court held that writs of habeas corpus should not issue because an applicable statutory provision provided, in effect, that the warrants were not void and that the detention under the warrants was therefore not unlawful until the warrants were quashed. The court also held that habeas corpus was not a necessary, recognised or appropriate means by which a defective warrant of commitment could be challenged. It is also correct, as Mr Stradford submitted, that Simon Brown LJ did not cite the passages from *Hadkinson* referred to in his Lordship's judgment. Those passages were identified or referred to as part of counsel's submissions. His Honour also only referred to *Isaacs* as part of counsel's submissions.

486 My consideration of the relevant authorities, including those referred to and relied on by Steytler J in *Robertson*, leads me to conclude that *Robertson* was wrongly decided.

487 The next case relied on by the Commonwealth was *von Arnim*. In that case, the applicant sued the Commonwealth and the Minister for Justice and Customs for, among other things, false imprisonment arising from his arrest and subsequent imprisonment pursuant to warrants issued

pursuant to the ***Extradition Act*** *1988* (Cth). The applicant was released when the Commonwealth Attorney-General was advised that a German court had dismissed the arrest warrant which had issued in Germany and which had provided the basis for the extradition process and proceedings in Australia. It is important to note, however, that the warrants issued under the Extradition Act had not been challenged, let alone set aside, by a court of competent jurisdiction. It was in that context that Finkelstein J made some brief observations about what his Honour considered to be the assumptions underlying the applicant's claim.

488 First, his Honour said that it was "by no means clear that a warrant which on its face appears to have been regularly issued can be disregarded" and that the "few cases" his Honour had looked at suggested that "the opposite is likely to be true" (at [5]). His Honour cited, in the context of that observation, the decisions in *Posner*, *Hadkinson* and *Cawley*.

489 Second, his Honour observed that the applicant's case proceeded on the assumption that, if he was able to show that the two warrants issued under the Extradition Act "should not have been issued" that would "make good his claim that his imprisonment was unlawful" (at [6]). His Honour observed that that assumption was "probably false" and that "[a]ccording to the authorities there can be no action for false imprisonment if the imprisonment is in execution of an order which appears to have been regularly made by a judicial officer, even if the order is without jurisdiction" (at [6]). His Honour cited, in support of that proposition, *London v Cox* and *Ward v Murphy* and *Andrew v Marris*.

490 In my view, the observations made by Finkelstein J do not take the issue much further. They were no doubt obiter dicta and were in any event highly qualified.

491 The first observation was based on his Honour's consideration of only a "few cases" and his observation was qualified by the words "it is by no means clear". The decisions in *Posner*, *Hadkinson* and *Cawley* have been addressed earlier in these reasons.

492 The second observation was that the assumption that the applicant's case would be made out if the warrants should not have been issued was "probably false". The decisions in *London v Cox* and *Andrews v Marris* have been addressed earlier in these reasons. As for *Ward v Murphy*, it concerned the liability of a sheriff – a ministerial officer – who declined to immediately release someone on the basis of correspondence which advised that the order pursuant to which a person had been imprisoned had been quashed. The court held, among other things, that the sheriff was entitled to a reasonable time in order to make inquiries and that it would be

unreasonable for the jury to find that he acted unreasonably in leaving his inquiries in that regard until the morning. It provides little support for his Honour's observation and even less support for the Commonwealth's case in this matter.

493 The final case relied on by the Commonwealth was *Kable v New South Wales*. The applicant in that case was imprisoned by order of a Supreme Court judge made under a statute which was subsequently held to be constitutionally invalid. He brought an action against the State which included a claim for false imprisonment on the basis that the State was vicariously liable for the conduct of its officers, including those who were responsible for detaining him. The State sought to rely on what it said was a common law principle that, whether or not the order was of a superior court, persons who obeyed court orders were protected from suit. The trial judge struck out the applicant's claim for false imprisonment.

494 On appeal to the Court of Appeal of New South Wales, it was held that the claim for false imprisonment should not have been struck out. In respect of the State's plea that it was protected by the common law principle that persons who obeyed court orders were protected from suit, Allsop P and Basten JA (with whom the other members of the court agreed on this point) held, in effect, that if such a principle existed, it did not extend to protect officers who were acting pursuant to, or in execution of, an order that was a wholly invalid exercise of non-judicial power. While Allsop P and Basten JA did not, and did not need to, determine the existence of the asserted common law principle and its boundaries, it is nevertheless instructive to consider some of the observations made by their Honours in respect of that issue.

495 The judgment of Allsop P contains a fairly detailed analysis of the authorities that bear on the existence and scope of the principle in question, including *Dr Drury's Case*; *Cavanough; London v Cox; Posner; Hadkinson*; *Sirros v Moore; Robertson v The Queen*, and *Gerard v Hope*. Those cases have all been considered earlier in these reasons and it is unnecessary to rehearse Allsop P's analysis of them, save as to note the following brief points.

496 First, his Honour noted that the breadth of the proposition advanced by the State – that persons who obeyed court orders were protected from suit whether or not the order was of a superior court – "makes one immediately pause for thought, in particular in the light of what was said by Simpson ACJ in *Feather v Rogers*" (at [22]). His Honour then referred to the passage from the judgment of Simpson ACJ at 197:

> It is no doubt very hard upon police officers who are bound to execute the warrants of Justices, that they should be made liable for so doing on the ground that the Justice

> issuing the warrant exceeded his jurisdiction. It is very hard on laymen that they should have to take the risk of the warrant being irregular. It is more important, however, that the law should be upheld, notwithstanding the liability of constables and other persons.
>
> It was because of this hardship that the Act 24 Geo. II. c. 44 [Constables Protection Act], s. 6, was passed.

497 Second, Allsop P appears to have accepted, or at least noted, the distinction drawn in the authorities between officers of a court who were bound to obey orders made by the court of which they were an officer, and police and prison officers. After referring to *London v Cox* and *Posner*, his Honour said (at [35]):

> In such cases, the courts are protecting third parties such as court officers or garnishees from the consequences of an invalid order (not being limited to an order of a superior court). Implicit and explicit in them is the protection of the authority of judicial proceedings. Further, **there is every reason to consider that an officer of a court should be protected by his actions in obedience to an order of the court of which he is either part or an officer. Orders directed to police or gaolers in the form of a court order, not issued in the course of judicial process, but having the true legal character of an executive warrant, which is wholly lacking authority, do not stand as necessarily bringing the same protection to those who obey them as might be thought appropriate to officers of the court itself**, even in such circumstances. It is unnecessary to explore this possible distinction. **An invalid warrant gives a policeman no protection from the consequences of invasion of common law rights of person or property; it is statute that protects him**: *Feather v Rogers* and *Carroll v Mijovich* (1991) 25 NSWLR 441 at 446-447 and 457.
>
> (Emphasis added)

498 It should be noted that Allsop P's observation concerning the protection afforded to the police and gaolers, as opposed to officers of the court, related to the execution of executive orders, not judicial orders. His Honour's observation nevertheless tend to support the existence of a distinction between court officers who were bound by their duties to obey orders made by the court of which they were an officer, and other third parties such as the police and gaolers. His Honour's reference to garnishees was no doubt a reference to *London v Cox*, in which a garnishee was said to be entitled to the same protection as an officer.

499 Third, in relation to *Sirros v Moore*, Allsop P equated the position of the police in that case with that of "officers of the court" as they were "acting under the immediate orders of a judicial officer after the exercise of a judicial process" (at [38]). His Honour also noted that the Constables Protection Act was also available at that time, which perhaps may have explained Lord Denning MR's broad statement concerning the protection available to the police in question. Moreover, Allsop P also noted (at [43]) that the correctness of *Sirros v Moore* and the "existence of any generalised common law protective principle" had been doubted by

Professors M Aronson and H Whitmore in *Public Torts and Contacts Law* (Law Book Co, 1982).

500 Fourth, while Allsop P referred to *Robertson v The Queen*, his Honour noted that the parties had not argued that the decision in that case was plainly wrong (at [42]). It nevertheless is apparent that his Honour did not consider that the decision compelled him to accept the existence of the principle identified or articulated by Steytler J in that case. Nothing his Honour said could be regarded as an endorsement or approval of the decision in *Robertson*. His Honour distinguished it on the basis that it dealt with a judicial order.

501 Fifth, Allsop P noted that in *Gerard v Hope*, Crisp J had "perceived a restriction on the defence of a constable following an order of an inferior court to orders which the judicial officer had jurisdiction to make" (at [44]). His Honour noted that Crisp J had referred to *Morrell v Martin* and said (at [44]):

> Certainly the judgment of Tindal CJ in *Morrell v Martin* supports that limitation. Tindal CJ (at 3 Man & G at 593-597; 133 ER at 1278-1279) said that the action of the justices of the peace in issuing the warrant outside their jurisdiction, as opposed to merely irregularly, was fatal to a plea of justification by the person to whom the warrant was directed. Tindal CJ identified the terms of the statute (the 1750 Act) as indicative of a matter to be dealt with by the Parliament and not (as Steytler J reasoned in *Robertson* at 125) indicative of the conformance of the common law to the statute.

502 His Honour also referred to cases in which the matter was not so limited.

503 Ultimately Allsop P had the luxury of not having to decide the issue concerning the existence or scope of the common law principle advanced by the State. His Honour concluded (at [48]):

> The existence of any such common law principle and its boundaries need not be finally decided upon to resolve this case. A number of matters are less than clear, including the place or influence of the 1750 Act as a suppressed premise, the influence of courts protecting their own processes and the extent to which this general rule applies to inferior courts acting without jurisdiction, and the meaning of jurisdiction in this context.

504 I respectfully agree with his Honour's assessment that "[a] number of matters are less than clear". I, however, do not have the luxury of not having to finally decide whether the principle exists and, if it does, what its boundaries may be.

505 Like Allsop P, Basten JA did not find it necessary to decide whether the common law principle relied on by the State existed because, whatever common law protection may have been available, it did not extend to the "constitutionally invalid statutory detention order" in question (at [165]). That said, his Honour also plainly did not accept that the common law principle

upon which the State relied existed. Indeed, there are indications in Basten JA's judgment that his Honour considered that such protection as may be afforded to the police and others who execute invalid warrants and orders made by inferior courts is ordinarily to be found in legislation, not the common law.

506 After considering the decision of the High Court in *Love v Attorney-General* (NSW) (1990) 169 CLR 307; [1990] HCA 4 and the distinction between judicial and non-judicial orders, Basten JA said that that distinction was "consistent with the proposition that only orders made by a judge of a superior court in the exercise of judicial power are valid until set aside and thus provide immunity to those executing them in good faith" (at [160]). His Honour continued (at [161]):

> The result of that conclusion may be that, absent statutory protection, public officers are exposed to potential liability in damages for obeying what they reasonably believe to be a valid court order. However, the conclusion means no more than that the order was of the kind which could be made by the Supreme Court under the *Listening Devices Act*, by a District Court judge or by a magistrate: **to obtain protection, as has long been recognised, statutory protection is required**.
>
> (Emphasis added)

507 Justice Basten went on to explain that the "potential difficulties faced by the police seeking to execute a void warrant have long been recognised, but have found their solution, not in the general law, but in statute" and that "a constable executing an invalid search warrant has been held to have no protection at common law in this State, but to enjoy protection originally available provided in England by the [Constables Protection Act]" (at [162]). His Honour cited *Feather v Rogers* in support of that proposition. After referring to the terms of the Constables Protection Act, his Honour said (at [164]):

> The *Constables Protection Act* has not operated in New South Wales since the *Imperial Acts Application Act 1969* (NSW); nevertheless, the existence of the statutory protection, dating from 1750, may well explain remarks in cases, made without supporting authority, to the effect that a court officer or other person executing an apparently valid order (though not of a superior court) is protected from liability: eg, *Sirros v Moore* [1975] QB 118 at 137, Lord Denning asserting that no action would lie against police officers acting in response to a judge's direction, though the direction was invalid where they did not know of the invalidity; see also Aronson and Whitmore, at 151-152. Further, gaolers in New South Wales have enjoyed statutory protection under State legislation preceding the repeal of the *Constables Protection Act*: *Prisons Act*, s 46.

508 Justice Basten's observation in that regard is consistent with Allsop P's reference, noted earlier, to the possibility that the Constables Protection Act may have operated as a "suppressed

premise" in some of the discourse concerning the protection available to constables in the execution of orders and warrants.

509 In my view, the relevant observations in the judgments of both Allsop P and Basten JA provide more support for Mr Stradford's case than they do the Commonwealth's case.

Conclusion as to the availability of any relevant common law defence?

510 As the preceding discussion of the authorities has no doubt revealed, there is considerable uncertainty as to whether there exists, at common law, any general principle that a person who acted pursuant to an order made, or warrant issued, by an inferior court, which was void or invalid, cannot be held liable in respect of those actions so long as the invalidity or irregularity of the order or warrant was not apparent on its face.

511 There is also considerable uncertainty as to the precise scope or boundaries of any such principle, if it indeed exists or is recognised. In particular, there is some uncertainty as to whether the principle, if it exists, only applies in respect of officers of the court which issued the warrant who are obliged by that office to obey the order or warrant, or if it applies to third parties generally. There is also some uncertainty as to whether the principle, if it exists, does not apply where the justice or judge who made the order did so without, or in excess of, jurisdiction and if so, exactly what "jurisdiction" means in that context.

512 Having reviewed and analysed what appear to be the main authorities concerning this area of the law, I am not persuaded that the common law principle relied on by the Commonwealth and Queensland exists, or can be, or has been, recognised as being part of the common law of Australia.

513 I accept that there is some authority in support of the proposition that an officer of the court (or "ministerial officer"), such as a sheriff, who is required by virtue of their office, and under pain of punishment, to obey an order or warrant made or issued by the court of which they were an officer, may be immune from action if the defect or irregularity was not apparent on the face of the order, or was otherwise not apparent to the officer. That protection would, in the circumstances of this case, perhaps extend to the Marshal of the Circuit Court, which perhaps explains why Mr Stradford's case focussed, at the end of the day, on the actions of the MSS guards rather than the Marshal. For the reasons given earlier, however, the MSS guards could not be said to be, or to be akin to, officers of the Circuit Court who were obliged, by their office, to obey the order made or warrant issued by the Judge. The MSS guards were not

referred to or identified in either the order made or warrant issued by the Judge, either by name or office.

514 I am also not satisfied that officers of the Queensland Police, or officers of Queensland Corrective Services, fall under the rubric "officer of the court" or "ministerial officer" in this context. Queensland relied, albeit faintly, on statutory provisions which it contended imposed upon the police and corrective service officers a statutory duty of obedience. Those provisions were s 796 of the *Police Powers and Responsibilities Act 2000* (Qld) and s 276 of the *Corrective Services Act 2006* (Qld). Properly construed, however, those provisions simply required police officers, in the execution of their duties, to comply with lawful orders (in the case of the former provision) or required corrective service officers to obey the directions of the chief executive (in the case of the latter provision). They did not create any duty of obedience to the Circuit Court, and did not require the officers to obey an invalid order or warrant made by that court. More significantly, those provisions could not sensibly be said to confer on the police or prison officers the status of officers of the court, or ministerial officers, as those expressions are used or understood in the relevant authorities.

515 I do not accept that the authorities unequivocally support the proposition that *any person* who acts pursuant to an order made, or warrant issued, by an inferior court is protected or immune from any civil action if the order or warrant was invalid or void. While there may be some broad and general statements in some cases that might tend to suggest that third parties who act in accordance with warrants are protected, if the warrant appears valid on its face, those statements may be explained on the basis of the suppressed premise of statutory protection. Otherwise, in my view, they are wrong. The preponderance of authority supports the conclusion that only officers of the court who are bound, by their office, to obey the order or warrant are afforded any protection if the order or warrants turns out to be invalid or void.

516 There is in particular no clear or unequivocal line of authority to the effect that, absent statutory protection, a police officer who arrests, or a prison officer who detains, a person on the basis of an invalid order or warrant made or issued by an inferior court, is immune or protected from civil suit if the invalidity of the order or warrant is not apparent on its face. Indeed, a number of the cases to which I have referred suggest that it was precisely because the common law provided no such protection to the police and gaolers that statutes like the Constables Protection Act were enacted. There are also numerous cases where police and prison officers who detained or imprisoned someone on the strength of an invalid inferior court order or warrant

have been held liable for trespass or false imprisonment, even where the invalidity was not apparent on the face of the order or warrant. That is generally because their plea or defence had failed to assert or establish that the order or warrant had been made or issued within jurisdiction and was therefore valid. Police and prison officers have been held to have had no lawful justification for detaining or imprisoning someone in those circumstances.

517 The authorities also do not clearly or unequivocally establish, as Queensland contended, that police and prison officers have only been, or can only be, pursued civilly for their actions in executing an invalid warrant where it had been held that the court which made or issued the order or warrant in question acted wholly without "subject-matter jurisdiction" – that is, as Queensland put it, "a total absence of jurisdiction, of no general authority to decide, of no authority to enter upon the question". Queensland was unable to point to any authoritative decision that established that to be the case. There are also decisions that run directly contrary to that contention. *Feather v Rogers* was one such case.

518 There could be no doubt that the justice who issued the warrant in *Feather v Rogers* had subject-matter jurisdiction, or authority to decide whether to issue a search warrant on the application of Mr Rogers. The warrant was not held to be invalid because the issuing justice had no general authority to decide, or no authority to enter upon the question, of whether to issue the warrant. Rather, the defendant's plea or defence of justification failed because the defendant failed to prove that the issuing justice had reasonable cause to suspect certain things as required by the statutory provision which conferred the power to issue search warrants. It was in that context that Simpson ACJ concluded that the justice had acted "without jurisdiction" (at 196). His Honour also made it clear that police officers could be held liable for executing a warrant in circumstances where "the Justice issuing the warrant exceeded his jurisdiction" (at 197).

519 I should also refer, in this context, to what Lord Eldon said in *Price v Messenger*, a case which, as discussed earlier, concerned whether officers who acted in obedience to a warrant were protected by the Constables Protection Act. That Act provided protection to the officer "notwithstanding any defect of jurisdiction in [the issuing] justice". Lord Eldon said, in that context (at 126 ER 1215):

> The act therefore takes it for granted, that an officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity. **For it is as much a defect of jurisdiction, if the justice grant an improper warrant in a case over which he has jurisdiction, as if**

he had no jurisdiction over the case at all.

(Emphasis added)

520 It may be accepted, as Allsop P noted in *Kable v New South Wales*, that where the authorities in respect of this issue refer to the warrant being issued, or the order being made, "without jurisdiction", the meaning of "jurisdiction" in that context is "less than clear" (at [48]). That is no doubt in part because many of the cases were decided well before the evolution and refinement of the contemporary law of jurisdictional error. That said, I am not persuaded that, when the cases in this area refer to inferior court justice or judges acting "without jurisdiction", that is confined to cases where the court had no subject-matter jurisdiction. That is all the more so in cases, such as *Feather v Rogers*, where the relevant principle is expressed in terms of whether the issuing justice "exceeded his [or her] jurisdiction".

521 It is unnecessary for me to finally decide precisely what is encompassed by the expressions "acting without jurisdiction", or "exceeding jurisdiction", in this context. It suffices for me to consider and determine whether, in making the imprisonment order and issuing the warrant in question, the Judge relevantly acted without jurisdiction, or exceeded his jurisdiction. In my view, for essentially the same reasons as given earlier in the context of the question whether the Judge's conduct attracted judicial immunity, it can safely be concluded that, at the very least, the Judge relevantly exceeded or acted outside his jurisdiction. I do not accept that the mere fact that the Judge may have had subject-matter jurisdiction means that it cannot be concluded, in this particular context, that his Honour nevertheless acted without, outside, or in excess of, his jurisdiction.

522 Without unnecessarily repeating what has been said earlier in these reasons, the Judge: ordered that Mr Stradford be imprisoned for contempt arising from his non-compliance with an order without first finding that Mr Stradford had failed to comply with the order and was therefore in contempt; ordered that Mr Stradford be imprisoned for contempt without considering or applying the relevant code in respect of non-compliance with orders and contempt in Pts XIIIA and XIIIB of the Family Law Act and, in that regard, imprisoned Mr Stradford without first finding that some other form of punishment was appropriate (as required by s 112AE(2) of the Family Law Act) and without first finding that any non-compliance with an order by Mr Stradford involved a "flagrant challenge to the authority of the court" (as required by s 112AP(1) of the Family Law Act); failed to consider or apply the provisions in the FCC Rules which mandated the procedures that the Judge was required to follow in dealing with the contempt allegation against Mr Stradford; denied Mr Stradford a fair hearing of the allegation

that he was in contempt; and pre-judged not only whether Mr Stradford was in contempt, but also the appropriate punishment for the contempt. The combined effect of the last-mentioned errors were described by the FamCA Full Court as constituting a "gross miscarriage of justice".

523 I am satisfied that, whether the catalogue of errors made by the Judge in ordering the imprisonment of Mr Stradford are considered individually or cumulatively, it can be safely concluded that the Judge acted without jurisdiction, or at least exceeded his jurisdiction, for the purposes of any available common law justification defence relied on by the Commonwealth and Queensland.

524 It follows that, in all the circumstances, I am not persuaded that the Commonwealth and Queensland can avail themselves of any common law defence by reason of the fact that their officers acted pursuant to, or in accordance with, a warrant which appeared regular on its face. The invalid order and warrant provided no lawful justification for the MSS guards or the Queensland police and prison officers to detain Mr Stradford.

A STATUTORY DEFENCE?

525 Queensland relied, albeit belatedly, on what it contended was a statutory defence under s 249 of the Criminal Code. That defence was not pleaded in Queensland's defence as filed, though Mr Stradford took no issue with that pleading deficiency. The agreed statement of issues prepared by the parties made no mention of any statutory defence. The Commonwealth initially embraced that defence (though perhaps only tentatively) as also applying to the MSS guards and therefore the Commonwealth vicariously. Upon consideration and reflection, however, the Commonwealth abandoned any reliance on the statutory defence and indeed advanced helpful and persuasive submissions as to why the defence was not available, including to Queensland.

526 Section 249 of the Criminal Code provides as follows:

> It is lawful for a person who is charged by law with the duty of executing a lawful warrant issued **by any court** or justice or other person having jurisdiction to issue it, and who is required to arrest or detain another person under such warrant, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the directions of the warrant.
>
> (Emphasis added)

527 The critical question is whether s 249 of the Criminal Code can apply to the circumstances of this case given that the warrant in question was issued by the Circuit Court, which is a federal court, not a Queensland Court.

528 Queensland contended that the Circuit Court was "any court" for the purposes of s 249 of the Criminal Code because that expression was broad enough to include any court which was physically or geographically within the State of Queensland. It submitted that s 35 of the *Acts **Interpretation Act** 1954* (Qld), which provides that a reference in a Queensland Act to an "entity" or "thing" is a reference to such an entity or thing "in and for" or "in and of" Queensland, does not apply to s 249 of the Criminal Code and that, even if it did, the circumstances of this case were such that the Circuit Court was a court "in and for" or "in and of" Queensland.

529 Both Mr Stradford and the Commonwealth contended that, properly construed, s 249 of the Criminal Code was incapable of applying to a warrant issued by the Circuit Court, even if the court happened to be sitting in Queensland at the time the warrant issued. In their submission, s 35 of the Interpretation Act applied in construing s 249 of the Criminal Code and that the Circuit Court could not be said to be a court "in and for" or "in and of" Queensland.

530 I will first deal with whether s 35 of the Interpretation Act applies when construing s 249 of the Criminal Code. I will then deal with the question whether, assuming that s 35 of the Interpretation Act applies, the Circuit Court could be said to be a court "in and for" or "in and of" Queensland when the Judge issued the warrant in question.

Does s 35 of the Interpretation Act apply?

531 Queensland submitted that s 35 of the Interpretation Act did not apply when construing s 249 of the Criminal Code because the Criminal Code was a code and "contains its own exhaustive treatment of the meaning of terms". It followed, so it was submitted, that the Interpretation Act was displaced by a "contrary intention": see s 4 of the Interpretation Act.

532 Queensland's contention that s 35 of the Interpretation Act does not apply, or has been excluded, when it comes to construing s 249 of the Criminal Code, or the Criminal Code generally, may be dealt with briefly. In short, it is wrong and is rejected.

533 First, the submission that the Interpretation Act does not apply to the construction of the Criminal Code generally is contradicted by many cases in which the Interpretation Act has been applied in construing provisions in the Criminal Code: see, for example, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 at [45]-[46]; *R v Armstrong* [1996] 1 Qd R 316 at 318; *R v Shetty* [2005] 2 Qd R 540; QCA 225 at [22]; *R v Deemal* [2010] 2 Qd R 70;

[2009] QCA 131 at [23]; *R v Paz* [2018] 3 Qd R 50; [2017] QCA 263; *R v HBZ* (2020) 4 QR 171; [2020] QCA 73 at [33]; and *R v JAA* [2019] 3 Qd R 242; [2018] QCA 365 at [107].

534 Second, contrary to Queensland's submission, the Criminal Code plainly does not purport to make exhaustive provision as to the rules governing its own interpretation to the exclusion of the Interpretation Act. Some provisions of the Criminal Code include a note or cross-reference to the Interpretation Act: see for example ss 119A and 359A of the Criminal Code. Some provisions in the Criminal Code also expressly exclude the operation of specific provisions in the Interpretation Act: see for example s 729(3) of the Criminal Code. That would be unnecessary if the operation of the Interpretation Act was excluded generally in respect of the Criminal Code. It is also clear that some provisions of the Criminal Code would be difficult to apply if the Interpretation Act did not apply to its provisions. For example, the Criminal Code contains provisions that concern the time in which things need to be done, but the Criminal Code itself contains no provision concerning the reckoning of time. Section 38 of the Interpretation Act fills that lacunae.

535 Third, there is no sound basis for the submission that the terms of s 249 of the Criminal Code itself provides a basis for excluding the operation of s 35 of the Interpretation Act. That argument appeared to be based on the generality of the language used in s 249, in particular the generality of the expression "any court". The generality of the language in s 249 of the Criminal Code provides no basis for excluding the operation of s 35 of the Interpretation Act. Indeed, quite to the contrary. In my view, the very generality of the language in s 249 provides a compelling reason why s 35 of the Interpretation Act should be applied in construing that provision.

The Circuit Court was not a court "in and for" or "in and of" Queensland

536 When s 249 of the Criminal Code is read in conjunction with s 35 of the Interpretation Act, the question becomes whether, when the Judge issued the warrant in question, the Circuit Court could be said to be a court "in and for" Queensland, or a court "in and of" Queensland. Queensland's submissions focussed on the fact that, when the Judge issued the warrant, the Circuit Court was physically sitting in, or located in, Queensland. Queensland also relied on the fact that the Judge was acting within a constitutional mechanism set by s 120 of the Constitution, which provides, in summary, that the States must make provision for the detention of persons convicted of Commonwealth offences and that the Commonwealth Parliament may make laws which give effect to that provision. Queensland also submitted, in

that context, that s 118 of the Constitution requires that full faith and credit be given to State laws, including s 249 of the Criminal Code.

537 Queensland's contentions concerning the construction of s 249 of the Criminal Code have no merit and must be rejected. The Circuit Court cannot be said to be a court "in and of" or "in and for" Queensland for a number of reasons.

538 First, that would be contrary to decisions concerning the longstanding general rule of construction which effectively confines references in State enactments to State courts, proceedings and officers. It would also be contrary to a number of decisions which concern the operation of "localising" provisions such as s 35 of the Interpretation Act.

539 In ***Seaegg*** *v The King* (1932) 48 CLR 251; [1932] HCA 47, the High Court said the following in respect of the application of the general rule of construction in construing the meaning of the word "indictment" in a State statute (at 48 CLR 255):

> "Indictment" is defined to include any information presented or filed as provided by law for the prosecution of offenders. We do not think that the State enactment by these general words intends to refer to prosecutions on indictment preferred by the law officers of the Commonwealth for offences against the laws of the Commonwealth. Such prosecutions are governed by the special provisions contained in secs. 69-77 of the Judiciary Act 1903-1927, which deal not only with the manner in which they shall be instituted and the jurisdiction in which they shall be tried, but with the nature and extent of the appeal from a conviction and the power of the Court hearing that appeal. **Apart from the general rule of construction requiring an interpretation which would restrain the general words so that they would not apply to Federal proceedings so regulated and would confine the State enactment to State proceedings**, the State statute contains specific references to the Attorney-General of the State and to the Minister of Justice which place its meaning beyond doubt (see secs. 13, 16, 24 and 17(2)) and show that the right of appeal it confers is limited to convictions upon indictment preferred according to State law.
>
> (Emphasis added)

540 More recently, the plurality in *Solomons v District Court of New South Wales* (2002) 211 CLR 119; [2002] HCA 47 said the following in relation to the operation of the s 12(1) of the *Interpretation Act 1987* (NSW), which is in equivalent terms to s 35 of the Interpretation Act, in construing the words "court" and "Judge" in a New South Wales statute (at [9]):

> **There is a "general rule of construction" which would confine the State enactment to State proceedings and officers**. In any event, the "Justices" referred to in s 2 of the Costs Act are Justices of the Peace. This follows from the definition in s 21 of the *Interpretation Act 1987* (NSW). **The power conferred by s 2 "was clearly intended to be conferred on all New South Wales courts, at whatever level, exercising criminal jurisdiction". The "Court[,] Judge [and] Justices" identified in s 2 of the Costs Act, and the phrase therein "any proceedings relating to any offence", do not extend to federal courts created by the Parliament under Ch III of the**

> **Constitution or to this Court or to judicial officers of the Commonwealth**, and the offences in question do not include offences under a law of the Commonwealth. This follows as a matter of construction of s 2 of the Costs Act in the light of s 12(1) of the *Interpretation Act*.
>
> (Emphasis added; footnotes omitted)

541 *Seaegg* was cited by the court as authority for the "general rule of construction" referred to in this passage.

542 Second, Queensland's contention focussed almost entirely on the fact that when the Judge issued the warrant, the Circuit Court was sitting in Queensland. In a loose sense it might perhaps be said that the Circuit Court was "in" Queensland when the warrant was issued, at least in a geographic sense. Even if that were to be accepted, it entirely ignores whether the Circuit Court, as an "entity", could be said to be "for" Queensland, as required by s 35(1)(a) of the Interpretation Act, simply because it was sitting in Queensland. Plainly it could not. The words "for" in that context plainly requires that the court in question be an entity "for" Queensland, in the sense of Queensland as a polity, not a place.

543 That point was was made clear in *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692; [2020] NSWCA 242. That case concerned the New South Wales analogue of s 35 of the Interpretation Act. Justice Leeming (with whom Bell P and Meagher JA agreed) explained the operation of the provision as follows (at [97]):

> [T]he words "New South Wales" are used in two different senses. **In paragraph (a), they are references to the *polity* within the Australian federation.** In paragraph (b), they are references to a *place* within the Australian continent. One paragraph is institutional; the other geographical. "Officer", "office" and "statutory body" all have an essential institutional relationship with New South Wales as a polity, which need not necessarily be geographically confined. **A New South Wales statute referring, say, to a "judicial officer" would prima facie apply to a judge of the Supreme Court of New South Wales (and might well apply even if he or she was taking evidence on commission in London), but not to a judge of the Supreme Court of Western Australia visiting Sydney on holiday.**
>
> (Italics emphasis in original; bold emphasis added)

544 It might also be added, in this context, that the Circuit Court could also be said to be a "thing" for the purposes of s 35(1)(b) of the Interpretation Act. A warrant is also a "thing". Paragraph (b) of s 35(1) also refers to "jurisdiction". It follows that s 249 of the Criminal Code must be construed as referring to a warrant "of" Queensland issued by a court "of" Queensland having jurisdiction "of" Queensland. That could hardly be said to be the case in respect of a warrant issued by a federal court exercising federal jurisdiction, even if the court issuing the warrant happens to be geographically sitting in Queensland at the time. The requirement that the

relevant jurisdiction be "of" Queensland indicates that the jurisdiction in question be conferred by a Queensland law. The Judge's jurisdiction to issue the warrant could hardly be said to be jurisdiction "of" Queensland in that sense.

545 Third, Queensland's reliance on s 120 of the Constitution is misconceived. The fact that s 120 of the Constitution required Queensland to make laws in respect of the imprisonment of federal offenders, and that the Commonwealth is able to make laws in that regard, does not shed any light on the construction of s 249 of the Criminal Code. It certainly does not follow, expressly or by implication, that any Queensland laws, including the Criminal Code, must be construed in such a way as to ensure that Queensland officers who imprison federal offenders pursuant to warrants issued by federal courts are protected from any liability that might arise from their actions in that regard.

546 Of course, both the Queensland and Commonwealth Parliaments could enact legislation which explicitly protected Queensland officers in those circumstances. The fact that they have not done so says nothing about how s 249 of the Criminal Code should be construed. In particular, it does not require that s 249 be construed in a way which ignores the fact that, by operation of s 35 of the Interpretation Act, the court which issues the warrant for the purposes of s 249 must be a court "in and for" Queensland, and the jurisdiction pursuant to which the warrant was issued must be jurisdiction "in and of" Queensland.

547 Section 118 of the Constitution also does not assist. That section operates in respect of State laws after they have been properly construed: *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338 at 343; [1968] HCA 85.

548 It follows that s 249 of the Criminal Code does not apply to the circumstances of this case. Queensland's attempt to call it in aid of its defence is futile and must be rejected.

CONCLUSION – LIABILITY OF THE COMMONWEALTH

549 There is no dispute that the MSS guards detained and imprisoned Mr Stradford.

550 For the reasons that have been given, Mr Stradford's detention and imprisonment was unlawful and unjustified. Both the order that was made, and the warrant that was issued, by the Judge were invalid and of no legal effect. They provided no lawful justification for the detention and imprisonment.

551 For the detailed reasons that have been given, there is no recognised common law defence available to the MSS guards based merely on the fact that they acted pursuant to a warrant that appeared regular on its face. Nor are the MSS guards able to avail themselves of any common law defence that may be available to court officers, or ministerial officers, in those circumstances. They were not officers, or ministerial officers, of the Circuit Court. The MSS guards were also unable to avail themselves of any statutory defence.

552 It follows that the MSS guards committed the tort of false imprisonment. They imprisoned Mr Stradford without lawful justification.

553 The Commonwealth is vicariously liable for the tort committed by the MSS guards.

CONCLUSION – LIABILITY OF QUEENSLAND

554 There is no dispute that officers of Queensland Police and officers of Queensland Corrective Services detained and imprisoned Mr Stradford.

555 For the detailed reasons that have been given, Mr Stradford's detention and imprisonment was unlawful and unjustified. Both the order that was made, and the warrant that was issued, by the Judge were invalid and of no legal effect. They provided no lawful justification for the detention and imprisonment.

556 For the detailed reasons that have been given, there is no recognised common law defence available to the officers of Queensland Police and officers of Queensland Corrective Services based merely on the fact that they acted pursuant to a warrant that appeared regular on its face. Nor are the Queensland officers able to avail themselves of any common law defence that may be available to court officers, or ministerial officers, in those circumstances. They are not officers, or ministerial officers, of the Circuit Court. The Queensland officers are also unable to avail themselves of any statutory defence. Section 249 of the Criminal Code does not apply in the circumstances of this case.

557 It follows that the officers of Queensland Police and officers of Queensland Corrective Services who were involved in Mr Stradford's detention and imprisonment committed the tort of false imprisonment. They imprisoned Mr Stradford without lawful justification.

558 Queensland is vicariously liable for the tort committed by the relevant officers of Queensland Police and Queensland Corrective Services.

DAMAGES – OVERVIEW

559 Mr Stradford claimed damages arising from his false imprisonment under a number of heads.

560 First, he claimed general and aggravated damages for deprivation of liberty. He also claimed exemplary damages from the Judge for deprivation of liberty.

561 Second, he claimed damages for personal injury. That injury was a psychiatric injury in the form of post-traumatic stress disorder. He called evidence from a psychiatrist, Dr Malcolm **Foxcroft**, in respect of that diagnosis and the extent to which it impaired aspects of his life.

562 Third, he claimed damages for loss of earning capacity. He called evidence from an accountant, Ms Julia **Bossert**, with a view to quantifying that loss.

563 The Judge, the Commonwealth and Queensland agreed that if Mr Stradford succeeded in proving that they were liable for false imprisonment, he was entitled to *an* award of general damages for deprivation of liberty, though there was disagreement as to what award would be appropriate in that regard. The Judge, the Commonwealth and Queensland all submitted that an award of aggravated damages was inappropriate in the circumstances. The Judge also submitted that an award of exemplary damages would not be appropriate in the circumstances.

564 The Judge, the Commonwealth and Queensland all agreed that if Mr Stradford established liability, it was appropriate to award him damages for personal injury on the basis that he had been diagnosed with post-traumatic stress disorder. They disagreed, however, with Mr Stradford's contentions concerning the quantification of the damages for personal injury. They called evidence from a psychiatrist, Dr Scott **Harden**, in respect of Mr Stradford's diagnosis and prognosis. Dr Harden agreed with Dr Foxcroft's diagnosis of post-traumatic stress disorder, but disagreed with significant elements of Dr Foxcroft's assessment of Mr Stradford's impairment resulting from that condition. There was also disagreement between Dr Foxcroft and Dr Harden concerning Mr Stradford's prognosis.

565 There was also considerable disagreement between the parties concerning Mr Stradford's claim of damages for economic loss and lost earning capacity. Mr Stradford initially claimed damages in excess of $3 million in respect of his loss of earning capacity, that being the quantification of damages arrived at by Ms Bossert based on various assumptions concerning Mr Stradford's past and anticipated future earning capacity. Evidence which emerged as the trial progressed, however, significantly undermined the assumptions upon which Ms Bossert's evidence was based. Mr Stradford eventually abandoned any reliance on Ms Bossert's

evidence. The Judge, the Commonwealth and Queensland ultimately submitted that no award for future economic loss should be made.

566 Before considering and making assessments concerning the particular heads of damages claimed by Mr Stradford, I should make some brief observations concerning Mr Stradford's evidence.

Mr Stradford's credibility and the reliability of his evidence relevant to damages

567 As might be expected, Mr Stradford gave oral evidence concerning the circumstances in which he came to be imprisoned and, more significantly, what happened to him when he was detained and imprisoned, including how he felt about what was happening to him at the time. Most of Mr Stradford's evidence in that regard was not challenged at all in cross-examination.

568 Mr Stradford's evidence concerning his experiences while detained and imprisoned was compelling. It was readily apparent, both from Mr Stradford's demeanour when giving evidence in respect of this issue and from the content of his evidence, that he was doing the best he could to give truthful and accurate evidence concerning his detention and imprisonment, including how he reacted and felt at the time. When he was, perhaps not surprisingly, unable to recall precise details concerning his detetntion and imprisonment, he readily conceded as much.

569 The position was, however, very different when it came to other aspects of Mr Stradford's evidence relevant to his economic damages claim. That was particularly the case with respect to his evidence concerning his earning acapciaty and work and employment situation, both prior to and after his period in prison. It was also the case in respect of any evidence concerning his financial dealings and position generally.

570 Mr Stradford's evidence concerning his work and financial dealings was, at best, very vague, general and fairly unpersuasive. It was also, for the most part, not corroborated by any cogent or reliable documentary evidence. The problems with Mr Stradford's evidence concerning his work history and financial position, however, really came to the fore when he was cross-examined on those topics. That was particularly the case when he was asked about prior statements he had made concerning his employment and financial position, including in affidavits and other documents filed in his family law proceedings in the Circuit Court. When confronted with those statements, Mr Stradford became argumentative and his evidence was frequently non-responsive, evasive, defensive and obfuscatory. That was apparent not only

from his answers, but also from his demeanour. He also appeared to be unwilling to make any concessions in respect of his evidence concerning those topics, particularly when such concessions may have been, or been perceived by him to be, against his interests in the present proceeding.

571 It perhaps suffices to give one example to illustrate the evasiveness that permeated much of Mr Stradford's evidence in respect of his employment and financial position. In April 2017, Mr Stradford filed a financial statement in his family law proceedings in the Circuit Court. He was legally represented at the time. In that financial statement he acknowledged, on oath, that he was aware that he had an obligation to make a full and frank disclosure of his financial circumstances and that the information in the financial statement was true. He stated in the financial statement, among other things, that his total average weekly income was zero. When asked about that statement, he gave the following evidence:

> [MR HORTON:] This is a financial statement that you filed in the Family Court?
>
> [MR STRADFORD:] Mmm.
>
> [MR HORTON:] Or the Federal Circuit Court, I'm sorry?
>
> [MR STRADFORD:] Mmm.
>
> [MR HORTON:] And you have crossed that box there on the right-hand side about halfway down the page about your knowledge that you have an obligation to make full and frank disclosure in what you're doing here?
>
> [MR STRADFORD:] Yes.
>
> [MR HORTON:] If you turn to page 4417. As at this date, 7 April 2017, you had zero total average weekly income?
>
> [MR STRADFORD:] I don't recall, but it would – it's quite possible. I – yes. I mean, that was three and a half years ago. There was periods where I had zero income. So I can't recall.
>
> [MR HORTON:] Well, this is average weekly income, so it's – let's just focus on average. I'm just focusing on the words there at 2(a). Your total average weekly income as at the date you signed this financial statement was zero?
>
> [MR STRADFORD:] And what date was this?
>
> [MR HORTON:] It's 7 April '17. We can see that from page 4416?
>
> [MR STRADFORD:] Well, I didn't have an employed position, if that's what you're talking about.
>
> [MR HORTON:] It's a much simpler question than that. It's your total average weekly income was zero as at 7 April 2017.
>
> …
>
> [MR HORTON:] I'm asking you to confirm the truth of what you have asserted at page

> 4417 that's before you, Mr Stradford, regarding your total average weekly income?
>
> [MR STRADFORD:] In terms of my total average weekly income, I – I – I – I don't know how to quantify that, or perhaps I – I – I don't know at this point what you're actually talking about. I do know that at some points, I didn't have any money. Other times, I had money.
>
> …
>
> HIS HONOUR: Well, let me ask you this, Mr Stradford. Do you agree that as at 7 April 2017 your total average weekly income was zero?
>
> [MR STRADFORD:] If at that moment I was not employed and I was not receiving an average weekly income, I possibly would have put zero. Whether I need to – I had to go back through my accounts and average out the income that I had received, I don't know. But at that point, if I was receiving zero, I would have put zero.

572 This was by no means an isolated example. On the whole, I considered Mr Stradford to be a most unimpressive and unreliable witness when it came to evidence concerning his work and employment history and financial position. His evidence in respect of those issues, for the most part, was entirely lacking in credibility. The reliability and credibility of some specific evidence given by Mr Stradford in respect of those issues will be discussed later in these reasons in respect of the head of damage concerning future economic loss.

573 The issues or problems with Mr Stradford's credibility and the reliability of his evidence was not entirely limited to evidence concerning his work and employment history and financial position. Indeed, my firm impression was that Mr Stradford became argumentative, evasive and obfuscatory in cross-examination in respect of any topic that he perceived to be potentially against his interests in the litigation. It is perhaps useful to give another example. After being questioned about his heavy gambling during 2017, Mr Stradford was asked some questions about the reports prepared by his psychiatrist, Dr Foxcroft. He agreed that he had read Dr Foxcroft's first report. The following exchange then occurred:

> [MR HORTON:] I understand. Do you remember him saying in his first report that there was no history of excessive gambling?
>
> [MR STRADFORD:] What he wrote in his notes has nothing to do with me. I – I was upfront about every single aspect. If he didn't ask a question, I wouldn't have given him an answer, and I noticed from that report, there were a few discrepancies from what I told him. He was writing physical notes. So he wasn't sitting there recording my – so there was a couple of discrepancies in there that I noticed.
>
> [MR HORTON:] Yes?
>
> [MR STRADFORD:] But, again, I'm not the expert and I'm not going to ring him up and say, hey, we've – you've made – like, there's a few little things I've noticed in your notes that you must have reconstituted and possibly not expressed in the correct way.

> [MR HORTON:] Yes. I'm not trying to blame you for his notes for a minute, but I just wanted to ask you whether you, when you saw him, before he prepared this report, you've mentioned the gambling history?
>
> [MR STRADFORD:] The question wasn't asked of me. He was asking the questions and I was giving the answers, sir.
>
> [MR HORTON:] I understand. I understand. And had – did you later tell him, when you next saw him, about that background?
>
> [MR STRADFORD:] The same story. The – the question hadn't been brought up and, if it was, as you can see, I'm extremely forthcoming with it.
>
> [MR HORTON:] I see. So is the answer that – take away blame for the moment – just as a bare fact - - -?
>
> [MR STRADFORD:] If Dr Foxcroft asked me, I would have - - -
>
> [MR HORTON:] Sir, can you just let me finish, because, otherwise - - -?
>
> [MR STRADFORD:] Sorry.
>
> [MR HORTON:] - - - the transcript won't reflect what I've asked. I'm sorry?
>
> [MR STRADFORD:] Okay.
>
> [MR HORTON:] But did you tell Dr Foxcroft on the second occasion about the gambling in any way?
>
> [MR STRADFORD:] Dr Foxcroft asked me the questions and I gave the answers.
>
> MR HORTON: Yes.
>
> HIS HONOUR: Well, I'm not sure that answers Mr Horton's question?
>
> [MR STRADFORD:] I don't recall the gambling even being mentioned or brought up. So anything he has mentioned in relation to that, is not because of any answers I have given, it has been in absence or assumptions that he possibly may have made, because I don't recall – or having a specific conversation about gambling. If not, I would have told him.

574 Putting to one side the rather evasive and dissembling nature of Mr Stradford's answers to the questions put to him on this topic, the evidence also tended to conflict with Dr Foxcroft's evidence. Dr Foxcroft's recollection was that he specifically asked Mr Stradford whether he had any history of excessive gambling and that Mr Stradford had denied any problem gambling. Further issues in relation to Mr Stradford's disclosure to the psychiatrists are discussed later. It suffices at this point to note that the evidence as a whole raised concerns about whether Mr Stradford had been entirely frank and forthright about his circumstances during his consultations with the psychiatrists.

DAMAGES FOR DEPRIVATION OF LIBERTY

575 There was no dispute that, if false imprisonment was established, Mr Stradford was entitled to an award of general damages for deprivation of liberty. There was, however, a dispute as to whether an award of aggravated damages was appropriate.

Overview

576 Mr Stradford submitted that an appropriate award of general and aggravated damages in respect of the brief period he was detained by the MSS guards at the court complex was $50,000. He submitted that an award of general and aggravated damages in respect of the lengthier period during which he was detained and imprisoned by officers of the Queensland Police Service and Queensland Corrective Services was $250,000. He also submitted that he was entitled to an award of exemplary damages of $400,000 against the Judge.

577 The Judge submitted that there was no basis for an award of aggravated or exemplary damages. He also submitted, in effect, that the damages sought by Mr Stradford for deprivation of liberty were excessive. The Commonwealth submitted that an award against it in respect of general damages for deprivation of liberty should be nominal and as low as $500. Queensland submitted that an award of general damages of about $100,000 would be appropriate. Both the Commonwealth and Queensland submitted that an award of aggravated damages was not appropriate.

Relevant principles – damages for deprivation of liberty

578 In ***Spautz v Butterworth*** (1996) 41 NSWLR 1 at 14, Clarke JA (with whom Priestley and Beazley JJA agreed) referred with approval to the following passage from *McGregor on Damages* (15th ed, 1988, at [1619]) in respect of damages for false imprisonment:

> The details of how the damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury's or judge's discretion. The principal heads of damage would appear to be the injury to liberty, ie. the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, ie. the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status. This will all be included in the general damages which are usually awarded in these cases: no breakdown appears in the cases.

579 Justice Clarke noted that a difficulty in the assessment of damages in false imprisonment arises because "the distinction between ordinary and aggravated compensatory damages may become blurred" in false imprisonment cases (at 15). His Honour referred, in that context, to the

following statement by Lord Diplock in ***Broome v Cassell*** *& Co Ltd* [1972] AC 1027 at 1124; 1 All ER 801 as being useful in "explaining the complexities in this area":

> The three heads under which damages are recoverable for those torts for which damages are 'at large' are classified under three heads: (1) compensation for harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon physical hurt, as in assault, upon curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or the motive for which the defendant did it. This Lord Devlin calls 'aggravated damages'. (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls 'exemplary damages'.

580 While *Broome v Cassell* concerned damages for libel, the principles referred to in it have frequently been applied in the context of damages for false imprisonment, no doubt because, like cases involving libel or defamation, the heads of damages in cases involving false imprisonment include hurt to feelings, humiliation and disgrace. In particular, it has been generally accepted that the three heads of damages referred to in *Broome v Cassell* – general damages, aggravated damages and exemplary damages – are recoverable for the tort of false imprisonment.

581 It should be noted in that context that it was common ground that the ***Civil Liability Act*** *2003* (Qld) applied in respect of the assessment of damages for personal injury in this case. It was also effectively common ground that s 52 of the Civil Liability Act, which precludes the award of exemplary or aggravated damages in relation to a claim for personal injury damages, does not prevent a court from awarding aggravated and exemplary damages in respect of the tort of false imprisonment: ***Bulsey*** *v The State of Queensland* [2015] QCA 187 at [92]-[103] (Frazer JA, with whom Atkinson and McMeekin JJ agreed). That is because a claim for damages for deprivation of liberty is not a claim for personal injury damages within the meaning of s 52 of the Civil Liability Act and like provisions: see *New South Wales v Williamson* (2012) 248 CLR 417; [2012] HCA 57 at [34] (French CJ and Hayne J); *New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445 at [21] (Spigelman CJ); *Coffey v State of Queensland* [2010] QCA 291 at [28]-[30] (Fraser JA, Muir JA and Cullinane J agreeing).

General damages

582 The duration during which Mr Stradford was deprived of his liberty is obviously relevant in assessing general damages for deprivation of liberty: *Goldie v Commonwealth (No 2)* (2004) 81 ALD 422; [2004] FCA 156 at [14] (French J). Such damages should not, however, be calculated as if there were an applicable daily rate; a substantial portion of the ultimate award should be referrable to the initial shock of being arrested: *Ruddock v Taylor* (2003) 58 NSWLR 269; [2003] NSWCA 262 at [49] (Spiegelman CJ, with whom Ipp JA agreed). It is permissible to have regard to awards in other false imprisonment cases: *Spautz v Butterworth* at 13 (Clarke JA, with whom Priestley and Beazley JJA agreed). The assessment of general damages is "at large" and does not depend on proof of actual injury or special damage: ***McFadzean*** *v Construction, Forestry, Mining and Energy Union* [2004] VSC 289 at [98] (Ashley J).

Aggravated damages

583 Aggravated damages are "a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing": *New South Wales v* ***Ibbett*** (2006) 229 CLR 638; [2006] HCA 57 at [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). They are given not to punish the defendant but to "compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done": ***Uren*** *v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 149 (Taylor J); [1996] HCA 40. False imprisonment is a tort which by its very nature generally gives rise to aggravated damages: *McFadzean* at [101].

584 As Clarke JA observed in *Spautz v Butterworth*, the distinction between ordinary or general damages and aggravated damages in false imprisonment cases may become blurred. That is no doubt partly due to the fact that both general and aggravated damages are compensatory. What then, distinguishes general damages from aggravated damages given that both are awarded to compensate a plaintiff for injury to feelings? In *State of New South Wales v* ***Riley*** (2003) 57 NSWLR 496; [2003] NSWCA 208, Hodgson JA (with whom Sheller JA and Nicholas J relevantly agreed) explained the distinction as follows (at [127]-[131]):

> ...Ordinary compensatory damages are supposed to be an amount adequate to compensate the plaintiff for all consequences of the defendant's wrongful conduct that are not too remote; so what room is there for additional damages, which although dependent on some aggravating feature of the defendant's wrongful conduct, are still supposed to do no more than compensate for consequences of that conduct?
>
> In cases where the wrongful conduct is trespass to land, for which damages for psychological injuries are not generally awarded, one can say that aggravated damages

> are compensatory damages for injury to the plaintiff's feelings by the manner of the trespass, which would not otherwise have been awarded.
>
> But aggravated damages are also awarded in cases where ordinary compensatory damages for injury to feelings are generally awarded, such as assault or defamation.
>
> If, in addition to ordinary compensatory damages for injury to feelings, aggravated damages are to be awarded, then plainly it is important to avoid double counting; and the question arises, what can the additional aggravated damages be compensation for when injury to feelings have already been included in ordinary compensatory damages?
>
> In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt damages neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

585 In assessing compensatory damages in false imprisonment cases, the Court can take into account any conduct of the defendant up to the time of verdict which may have the effect of increasing the injury to the plaintiff's feelings, including, for example, the absence of an apology; however, for a plaintiff to be entitled to aggravated damages, he or she must show that the conduct of the defendant was neither bona fide nor justifiable: *Spautz v Butterworth* at 17-8; see also *Triggell v Pheeney* (1951) 82 CLR 497 at 514; [1951] HCA 23. It should be noted, in this context, that there was no suggestion that the Judge, the Commonwealth or Queensland had apologised to Mr Stradford.

Exemplary damages

586 As explained in the passage of Lord Diplock in *Broome v Cassell* which was referred to earlier, unlike general and aggravated damages, exemplary damages are punitive, not compensatory. Exemplary damages are generally only awarded where the defendant's conduct has been high-handed, insolent or vindictive, or exhibited "conscious wrong doing in contumacious disregard of the plaintiff's rights": *Whitfield v De Lauret and Co Ltd* (1920) 29 CLR 71 at 77; [1920] HCA 75; *Lamb v Cotogno* (1987) 164 CLR 1 at 13; [1987] HCA 47; *Gray v Motor Accident Commission* (1998) 196 CLR 1; [1998] HCA 70 at [14]. It is, however, not necessary for a plaintiff to show that the defendant acted with malice or conscious wrong-doing. As Hodgson JA explained in *Riley* (at [138]):

> In my opinion, as made clear in *Gray*, while "conscious wrong-doing in contumelious disregard of another's rights" describes the greater part of the field in which exemplary

> damages may properly be awarded, it does not fully cover that field. Similarly, malice is not essential: *Lamb v Cotogno*. Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrong-doing. However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the court's disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrong-doer.

587 An award of exemplary damages may serve a "valuable purpose in restraining the arbitrary and outrageous use of executive power" and "oppressive, arbitrary or unconstitutional action by the servants of the government": *Ibbett* at [39] quoting Devlin LJ in *Rookes v Barnard* [1964] AC 1129 at 1226; 1 All ER 367. The power to award exemplary damages in certain cases "serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct": *Kuddas v Chief Constable of Leicestershire* [2002] 2 AC 122 at 149 (Hutton LJ); [2001] 3 All ER 193, referred to with apparent approval in *Ibbett* at [40].

Relevant evidence and factual findings

588 The basic facts concerning Mr Stradford's detention and imprisonment were set out earlier in these reasons. It is necessary to provide some further detail for the purposes of determining the appropriate damages for deprivation of liberty. Ultimately there was no significant dispute concerning the nature and circumstances of Mr Stradford's detention and imprisonment. Indeed, Queensland ultimately submitted that the Court could proceed on the basis of Mr Stradford's oral evidence, which was not seriously challenged in cross examination.

589 Mr Stradford's oral evidence concerning his time in detention and prison was compelling. It was readily apparent from Mr Stradford's demeanour while recounting his time in detention and prison that, while he may not have recalled some of the finer details, his general recollection of the events and his feelings at the time was vivid and ingrained. There could be little doubt that Mr Stradford was and remains deeply affected by his time in custody. At times during his evidence about his time in custody he became quite emotional. There was no reason to doubt the authenticity of his emotions. Nor was there any basis for doubting the reliability of this aspect of Mr Stradford's evidence.

590 The following short summary of the evidence concerning Mr Stradford's incarceration is based primarily on Mr Stradford's evidence, but draws also on the documentary evidence and the affidavit evidence from one of the MSS guards (Mr Dunn) and numerous Queensland Police and Queensland Corrective Services officers. Perhaps not surprisingly, the individual guards and officers had no, or very limited, direct recollection of any engagement with Mr Stradford

and their evidence was essentially based on the documentary record. Mr Stradford's evidence is recounted in more anodyne terms that it was actually given.

Detention by the MSS guards

591 Mr Stradford's evidence was that he was quite fearful when he appeared before the Judge, unrepresented, on 6 December 2018. That was essentially because the Judge had appeared to be angry and upset during Mr Stradford's earlier appearance before him on 10 August 2018. While the Judge did not appear to be as angry at the commencement of the hearing on 6 December 2018, he became angrier as the hearing progressed. During the lunch adjournment, Mr Stradford called his best friend, Mr Aaron **Irwin**, and asked him to come to the courthouse as he thought he was going to be sent to gaol.

592 When Mr Stradford returned to the courtroom after the lunch adjournment, there were more people in the courtroom. Mr Irwin was there, as well as two court officers. So too, obviously, was Mrs Stradford. Mr Stradford's evidence was that he was berated by the Judge, in the presence of his former wife and Mr Irwin, and sentenced to imprisonment for a year. He was then escorted from the courtroom by two officers – the MSS guards. This occurred at about 12.27 pm.

593 The two MSS guards escorted Mr Stradford for about 40 to 50 meters through a public area which included public seating, a security desk, interview rooms and a lift lobby. Mr Stradford was not physically restrained by the MSS guards. He was then taken down a goods lift to the basement of the building. At that point he was frisk searched by one of the MSS guards and asked to remove his cufflinks, belt and shoes. He was then placed in a holding cell, which was about two by three meters in size with glass walls. While the cell was small, Mr Stradford's evidence was that he did not feel like he was in a "tiny box", perhaps because of the glass walls.

594 Mr Stradford's evidence was that he felt shocked and fearful in the holding cell and was thinking about how he had let everyone down. He also thought about what was going to happen to his children and fiancée.

595 Queensland Police officers attended the holding cells and departed with Mr Stradford in their custody at about 12.54 pm. It follows that Mr Stradford was detained by the MSS guards for no more than 30 minutes.

Detention and imprisonment by Queensland officers

596 Queensland Police officers arrived at the courthouse at about 12.40 pm on 6 December 2018. After speaking with officers at the courthouse and attending to certain administrative tasks, the police officers obtained custody of Mr Stradford at about 12.54 pm. It should be noted that the evidence of one of the police officers was that she read the warrant that had been issued by the Judge.

597 Mr Stradford was transported from the courthouse to the police "watch house" in Brisbane in the back of a police van or "paddy wagon". Mr Stradford thought that he was handcuffed at this time. The back of the van was small and Mr Stradford felt claustrophobic; "like you're a dog in the back of a cage". The watch house was about three city blocks from the courthouse.

598 Mr Stradford was brought into the watch house at about 1.29 pm. At that point, custody of Mr Stradford was transferred from the police officers who had picked him up at the courthouse to the officer in charge of the watch house.

599 When he arrived at the watch house, Mr Stradford was placed in an "interim cell". He was then taken to a counter where he was "processed" by police officers who were behind the counter. The officers asked him questions. Evidence adduced by Queensland indicated that those questions concerned Mr Stradford's mental and physical health. Mr Stradford's evidence was that one of the officers confused him by saying: "so you owe money". Another quipped: "well, you will have a tough time in here". He was also told that he might be in the watch house for months, which did not make him feel good as it appeared to be a "bad place full of bad people".

600 Mr Stradford was then strip searched. He had to remove his clothing and was told to lift his legs and spread his buttocks so the police could check whether he had concealed anything in his anus. Not surprisingly, he felt degraded during that procedure.

601 A police officer then gave Mr Stradford some clothes to wear. The officer said that he could not find any shorts for Mr Stradford so he would get him a pair from the "women's pile". The shorts he was given were denim, unlike the green shorts the other inmates were wearing. While Mr Stradford initially thought nothing of that, when he encountered the first group of inmates, they taunted him with questions like: "where did you get your shorts" and "are you a cop"? About an hour or so later, Mr Stradford was given some track pants which he could wear over the top of the shorts. It should be noted, in this context, that evidence adduced by Queensland

indicated that clothing in the watch house was "unisex". Mr Stradford was not given any shoes or socks while at the watch house.

602 Mr Stradford was next taken to a long narrow holding cell which was about three metres long and just over one metre wide. There were four other inmates in that cell sitting on a bench along the side of the cell. Shortly after he was placed in the cell, one of the other inmates punched the wall above Mr Stradford's head. He tried to laugh it off, but was in fact panicking. He felt terrified and overwhelmed. At this time Mr Stradford was still wearing the shorts he had been given earlier and this was when the inmates taunted him about the shorts. He was called "constable" or "copper" throughout his time in the watch house. He believed that was because he was clean shaven and had a neat haircut, unlike the other inmates. He was also called "cheeseball". He believed that was because he called one of the guards "mate", which was seen to be "sucking up" to the guards.

603 Mr Stradford was next taken to his first "pod". Evidence adduced by Queensland referred to this area as the "overnight cells". Records indicated that Mr Stradford was taken to the overnight cells at about 1.47 pm. Mr Stradford's evidence was that he shared the pod with five other inmates, though he had his own cell. His cell in the pod had a bed which was just a "lump of concrete", though he was given a mattress and blanket. He was not given a pillow. At this point Mr Stradford felt upset and distressed. He put the blanket over his head, however an officer told him to take the blanket off his head or it would be taken from him. The cell also had a bubbler and sink. The bubbler in the cell where Mr Stradford spent his first few nights was not working. The cell had a metal toilet. There was, however, no toilet paper. He had to be asked to be provided with tissue paper. There was a shower at the end of the pod where inmates showered in the morning. He was given a towel and a toothbrush, however the toothbrush was taken from him each time after he used it. Mr Stradford recalled that the watch house was bitterly cold. As noted earlier, he was not given any shoes or socks to wear. He asked for, but was refused, a second blanket.

604 Inmates were locked in their cells during mealtime. The meals were passed through a hatch in the door and they were required to return their rubbish through the hatch. They were given takeaway chicken ("Red Rooster") for lunch. Indeed, it appears that "Red Rooster" was on the menu for each lunch and dinner at the watch house.

605 Mr Stradford was permitted to make a telephone call. He rang his fiancée. Records produced by Queensland indicated this call was made at 3.33 pm. Mr Stradford's telephone conversation

with his fiancée did not make him feel "very nice" as he knew how devastated she would be. Mr Stradford was taunted by other inmates after he made that telephone call.

606 Records produced by Queensland indicated that at 6.21 pm Mr Stradford was given dinner in his cell.

607 After his first night in the watch house, Mr Stradford was moved to a different pod. In that pod, he shared a cell with another inmate. That inmate told Mr Stradford that he was "coming off ice and heroin", had been "in and out of mental health wards" and had been homeless at various times. On the first night he shared the cell with this cell mate, he woke up to find the cell mate's hands around his throat. He felt intimidated having to sleep in that environment. According to Mr Stradford, his cell mate also had no regard for his personal hygiene and did not use toilet paper. He considered that the cell was not cleaned properly and was "disgusting".

608 Mr Stradford was using a prescription medication for the treatment of rosacea, a skin inflammation that affects the face. He requested that he be provided with that medication, but that request was refused. He also requested that he be provided with a non-prescription cream that was available at pharmacies, however that request was also refused. Without medication, Mr Stradford's skin would break out in a rash. Evidence adduced by Queensland indicated that Mr Stradford was seen by a nurse at 9.06 am on 7 December 2018. Arrangements were made to obtain the appropriate cream, however Mr Stradford was told that it would take at least two days for the cream to be obtained.

609 Records produced by Queensland indicated that Mr Stradford was given lunch and dinner on 7 December 2018 while in his cell with his cell mate. His cell mate was apparently named Mr Strange.

610 Mr Stradford witnessed various episodes of violence and aggression between the inmates in the watch house. According to Mr Stradford, the guards were not always watching the inmates. On one occasion Mr Stradford was punched in the head by another inmate and told, with the addition of expletives, to "shut up". Mr Stradford did not report that incident to the guards as he considered that it would be dangerous to do that. He considered that it was better for him to shut his mouth, "deal with things" and "conform" with other inmates.

611 Mr Stradford did not sleep well while he was at the watch house. He worried about his family and worried about what his children would think of him. He started to "struggle mentally".

612 Mr Stradford was able to contact his then lawyers, but was told that they could not assist him "without money" and that they would need between $15,000 and $20,000. Records produced by Queensland suggested that this telephone call was made at 2.46 pm on 7 December 2018. Mr Stradford said that he also contacted Legal Aid, but was told that Legal Aid could not assist him until he was moved to his "final" gaol.

613 Mr Stradford's evidence was that, at this point, he felt hopeless and helpless. He felt that he was "spiralling" into a "very bad mental state". He had suicidal thoughts. On one occasion, he took some preliminary steps towards a suicide attempt. On that occasion, a guard had not closed the food hatch in the door of his cell. Mr Stradford made a noose out of a blanket or towel and hung it on the hatch, thinking that he could strangle himself by twisting it around his neck. The only reason he did not take that step was that he heard his daughter's favourite song playing on the radio at the time. This was one occasion where Mr Stradford became particularly emotional while giving his evidence.

614 Evidence adduced by Queensland indicated that Mr Stradford received breakfast in his cell with Mr Strange at 6.49 am on 8 December 2018 and that at 10.17 am he was seen by a nurse, at his request. Records of that consultation indicted that Mr Stradford was very "teary" and had stated that he was feeling overwhelmed and distressed, but that he denied any "suicidal ideation, plan or intention". Mr Stradford received lunch and dinner in his cell with Mr Strange on 8 December 2018.

615 Evidence and records adduced by Queensland also indicated that Mr Stradford received breakfast in his cell with Mr Strange on 9 December 2018 and, more importantly, was again seen by a nurse at 10.15 am. Records of that consultation recorded that Mr Stradford was "very teary on account of situational crisis" and that Mr Stradford had stated that he was "not coping". Approval was obtained for Mr Stradford to be given diazepam, which he received at 8.28 pm. The records also indicated that Mr Stradford was given time in the "exercise yard" during the morning and afternoon of 9 December 2018 and was given lunch and dinner in the usual manner.

616 The records produced by Queensland in respect of Mr Stradford's time at the watch house clearly corroborate Mr Stradford's evidence concerning the circumstances giving rise to the mental and emotional anguish that he suffered as a result of the nature and circumstances of his detention at that facility.

617 Mr Stradford was transferred from the watch house to the Brisbane Correctional Centre on 10 December 2018. Records produced by Queensland indicated that Mr Stradford left the watch house at about 6.30 am and arrived at the prison at 8.05 am. It follows that he was at the watch house for a total of four nights and five days.

618 Mr Stradford was handcuffed during his transfer from the watch house to the Brisbane Correctional Centre. Mr Stradford recalled that the transport van was divided into "boxes" and he was placed into a box with two other inmates. Mr Stradford described the box as "tiny" and that he felt like "a dog in a cage on the back of a greyhound trailer". He was "freaking out" and started to bang the side of the van. That prompted one of the other inmates to tell him to shut up. The other inmate put his hands over Mr Stradford's head. The officers in the van did not intervene. Records produced by Queensland indicated that officers in the van could observe what was happening in the van via a camera. Those records did not, however, indicate that the officers in fact saw any incident involving Mr Stradford.

619 Evidence adduced by Queensland indicated that the Brisbane Correctional Centre was a "reception centre" where newly sentenced male prisoners were received for "assessment and processing", including an assessment to determine the best correctional centre placement for each prisoner. Prisoners only tended to remain at the Brisbane Correctional Centre for a relatively short time.

620 Mr Stradford's evidence was that, when he arrived at the Brisbane Correctional Centre, the officer who opened the door of the van asked Mr Stradford whether it was his first time in prison and said "you're going to love Christmas". That made him think of his children. He felt "like crap".

621 Shortly after arriving at the Brisbane Correctional Centre, Mr Stradford was taken to see a psychologist. He told the psychologist that he was "not doing all that well". As a result, he was placed under observation. That in turn meant that he received fewer "privileges". Later, other prison inmates told him that, because he was on observation, he would stay in a maximum security prison, which made him feel very anxious. He understood from other inmates that his chances of being detained at a minimum security prison would improve if he presented as being mentally well.

622 Evidence adduced by Queensland indicated that Mr Stradford was assessed by a psychologist at 8.30 am on 10 December 2018. The psychologist recommended that Mr Stradford be placed

on "low level" observations, which was the least intensive observation level and which occurred every 120 minutes. A prisoner is generally placed on that level if they "present with some potential risk factors", which may include that the prisoner is a first time offender or demonstrates signs of anxiety or depression, or has a history of suicidal ideation or behaviour. Mr Stradford was also assessed by a nurse at 10.00 am.

623 After seeing the psychologist, Mr Stradford was again strip searched. Queensland adduced evidence concerning what ordinarily occurred during a strip search. It is unnecessary to detail that evidence. It suffices to note that prison officers do not touch the prisoner during the process, though the process again involved Mr Stradford parting his buttocks so the officers could ensure that he had not secreted anything in his anus.

624 Mr Stradford's evidence was that he again requested medication for the treatment of his rosacea. He also asked to see a doctor. He said, however, that he did not receive any medication during his imprisonment. As a result, his rosacea flared up and became itchy.

625 Evidence adduced by Queensland indicated that after Mr Stradford went through the admissions process, he was allocated to a particular unit of the centre which was designated primarily for those experiencing their first time in prison, or for prisoners who were subject to "at-risk observations".

626 Mr Stradford's evidence was that the dimensions of his cell in the Brisbane Correctional Centre were approximately two metres by three metres. His cell contained a bed, desk, television, toilet and shower. The shower could only be used for approximately three minutes and was scalding hot. There were periods of time during the day when Mr Stradford was locked down in his cell.

627 Evidence adduced by Queensland indicated that prisoners in the unit in which Mr Stradford was housed: were taken out of their cells by around 8.00 am in the morning and placed in a common area; were offered cell access at about 10.30 am to retrieve any possessions they wanted for the afternoon; received lunch in the common area at 12.00 pm; received dinner in the common area at 3.45 pm; and were returned to their cells and locked down at 6.10 pm. Throughout his imprisonment, Mr Stradford was observed every 120 minutes and an observation log was completed.

628 Mr Stradford's evidence was that he felt that he had to be "very careful" while at the Correctional Centre. He referred in his evidence to two incidents involving other inmates. On

one occasion, an inmate grabbed Mr Stradford's backside during a "muster" and told him that he would "look a lot sexier" if he shaved his legs. That night, Mr Stradford used his razor and soap to shave his legs. The fact that Mr Stradford did that perhaps demonstrates the extraordinary impact that imprisonment was having on his mental state. On another occasion, an inmate elbowed Mr Stradford in the side of the head and said "don't fucking touch" while he was lining up for a piece of toast at breakfast. Mr Stradford did not report that incident, essentially because it was apparent to him that an inmate's life in gaol was "not going to be very good" if they reported such incidents to the guards.

629 While Mr Stradford's description of his experience at the correctional centre was harrowing, it should be noted that he did not suggest that any prison officer mistreated him, or acted inappropriately towards him, during his time in prison. His evidence was that most of the officers he encountered were "quite cordial".

630 On his last day at the Correctional Centre, Mr Stradford was informed by prison officers that he would soon be sent to a maximum security prison. Mr Stradford telephoned his friend to tell him this so his friend could tell his fiancée. His friend, however, told him that he was going to be released as he had won his appeal. Mr Stradford again became very emotional as he gave that evidence. He recalled being in a state of euphoria when he received that news. His evidence was, in effect, that if he had known from the start that he was only going to be in prison for a relatively short time, he would have been able to handle it much better than he did.

631 Mr Stradford was released from the Brisbane Correctional Centre at 4.25 pm on 12 December 2018. He therefore spent a total of two days and two nights at that prison.

632 The total period during which Mr Stradford was imprisoned by the Queensland Police and Queensland Corrective Services was seven days and six nights.

Aggravated damages?

633 Mr Stradford submitted that an award of aggravated damages was warranted in respect of the conduct for which the Judge and the Commonwealth were jointly liable because: he was sentenced in front of his former wife, his best friend and others; he was escorted through a public place for a "considerable distance"; he was made to remove items of clothing and was frisk searched; he was confined in a small space without knowing how long he would be there; he felt shocked, fearful and apprehensive; he later "capitulated" and settled the property

proceedings with his former wife; he suffered a psychiatric injury as a result of his imprisonment; and at no time has either the Judge or the Commonwealth apologised to him.

634 Mr Stradford submitted that an award of aggravated damages was warranted in respect of the conduct for which the Judge and the Queensland were jointly liable because, in summary: he was transported in confined vehicles while handcuffed; he was confined at the watch house in "small, freezing and dirty cells"; he was twice strip searched; he was forced to wear women's clothing and taunted by other inmates as a result; he was left barefoot in the watch house for four days; he was subjected to assaults by other inmates; he was given meagre bedding at the watch house; he was required to share a toilet with a "drug-affected cellmate" at the watch house who "left its surrounds filthy"; he was fed "Red Rooster" through a hatch in the door of his cell for lunch and dinner every night; throughout his imprisonment he was unable to access medication for his skin condition; he was unable to sleep properly at the watch house and became so distressed that he tried to take his own life; he was placed on observation at the Brisbane Correctional Centre; his movements and communications were highly restricted during his incarceration; throughout his imprisonment he believed that he would be in prison for many months; as a result of his experience he settled his property proceedings by a complete capitulation; he suffered psychiatric injury as a result of his experience; and at no time has either the Judge or Queensland apologised to him.

635 The Judge submitted that there should be no award of aggravated damages because there was no particular feature by which Mr Stradford's sense of injury from his false imprisonment had been "heightened by the manner in which or the motive for which the defendant did it": cf *Broome v Cassell* at 1124-1126 (Lord Diplock) cited in *Spautz v Butterworth* at 15 (Clark JA). The Judge conceded that he had fallen into error in imprisoning Mr Stradford and that he had expressed himself in "critical, strong and candid" language, however that was said not be an "uncommon occurrence in courts around the country". While Mr Stradford had said that he felt intimidated, shocked and fearful, in the Judge's submission that was not indicative of a heightened sense of injury on his part.

636 The Commonwealth also submitted that aggravated damages should not be awarded as there was no evidence of hurt to feelings, or any special need to compensate Mr Stradford for the manner in which the tort was committed. It contended that Mr Stradford had given no evidence of any "special hurt from his time in Commonwealth custody" which would warrant an award of aggravated damages. The evidence did not indicate that Mr Stradford had been forcibly

escorted out of the courtroom, or that there had been any "touching". In the Commonwealth's submission, the fact that Mr Stradford's friend and former wife were present was not an aggravating feature. Mr Stradford had also not suggested that he suffered any particular hurt because he was escorted through a public concourse, or required to remove various "accessories".

637 Queensland submitted that Mr Stradford's experience at the watch house and prison was "not exceptional" and did not make out a basis for awarding aggravated damages against it. In Queensland's submission, the behaviour that Mr Stradford described during his time at the watch house and prison was not so "outrageous" that an increased award was necessary to compensate any injury to Mr Stradford's feelings of dignity and pride. Rather, what Mr Stradford had described was nothing more than "an ordinary prison experience".

638 While the issue as to whether Mr Stradford should be awarded aggravated damages is by no means easy, I am persuaded that the compensatory damages payable to him should include a component reflecting the aggravating circumstances in which he was detained and imprisoned.

639 In relation to the period of imprisonment for which the Judge and the Commonwealth are jointly responsible and liable, the aggravating circumstances almost entirely relate to the manner in which the Judge dealt with Mr Stradford. It is unnecessary to repeat what was said earlier concerning the Judge's treatment of Mr Stradford. Even accepting that the Judge believed that Mr Stradford was in contempt for not complying with his orders, his Honour conducted the contempt proceeding in an entirely unsatisfactory way. His general demeanour and attitude to Mr Stradford was high-handed and unnecessarily demeaning, contemptuous and dismissive. That, in my view, exacerbated and amplified the shock, humiliation and fear that Mr Stradford unquestionably felt as he was escorted by the MSS guards though public areas to the cells. I do not consider that anything done by the MSS guards could be considered as aggravating the hurt and distress that was felt by Mr Stradford during his imprisonment at the courthouse. The MSS guards were simply doing their job and did nothing to increase Mr Stradford's sense of hurt.

640 It should be noted, in this context, that the Commonwealth submitted that it was not responsible for any of the Judge's actions in the context of determining whether an award of aggravated damages was warranted. I disagree. The Judge and the Commonwealth were jointly liable in respect of the period during which the MSS guards imprisoned Mr Stradford. The MSS guards were present when the Judge ordered that Mr Stradford be imprisoned and immediately took

him into custody. It may perhaps be accepted that Mr Stradford's aggravated feelings of hurt, distress and fear during the period he was imprisoned by the MSS guards were largely the product of the manner in which he had been dealt with by the Judge, and the initial shock of being sentenced to imprisonment and then immediately detained. The actions of the MSS guards themselves may not have specifically or materially contributed to the aggravation of Mr Stradford's feelings of hurt, distress and fear. It does not, however, follow that the Commonwealth can escape liability for aggravated damages relating to Mr Stradford's detention by and on behalf of the Commonwealth. Aggravated damages are compensatory, not punitive in nature. It is not to the point for the Commonwealth to point the finger of blame at the Judge. The fact remains that Mr Stradford is entitled to be compensated for the aggravated feelings of hurt, distress and fear he felt and experienced during his initial detention for and on behalf of the Commonwealth.

641 I should also add that there was no suggestion that neither the Judge nor the Commonwealth had ever apologised to Mr Stradford. While both the Judge and the Commonwealth conceded, or at least did not dispute, that the Judge had erred in finding that Mr Stradford was in contempt and in ordering that he be imprisoned, they nevertheless maintained that his imprisonment was lawful and justified. That alone provides some basis for the award of aggravated damages. The failure to offer any apology to Mr Stradford in all the circumstances was unjustifiable, even accepting that the Judge and the Commonwealth believed that they had a reasonable defence to his claim.

642 As for the period of imprisonment in respect of which the Judge and Queensland are jointly responsible and liable, the aggravating circumstances are again primarily to be found in the conduct of the Judge. I would infer from the evidence as a whole that the high-handed, unnecessarily contemptuous and dismissive manner in which the Judge dealt with Mr Stradford continued to exacerbate the distress, humiliation and fear that Mr Stradford felt while he was imprisoned both at the Brisbane watch house and the Brisbane Correctional Centre. In any event, I also consider that the thoroughly humiliating, demeaning and degrading manner in which Mr Stradford was dealt with and housed, both at the watch house and the gaol, significantly aggravated the injury to Mr Stradford's feelings and mental state during that period of imprisonment. It is no answer to say that Mr Stradford suffered no more than the "ordinary prison experience", whatever that may mean. The fact remains that Mr Stradford did not deserve to be treated in the thoroughly demeaning, degrading and humiliating manner

in which he was, at times, treated while imprisoned at the watch house and gaol for which Queensland was responsible.

Exemplary damages against the Judge?

643 Mr Stradford submitted that an award of exemplary damages was warranted because the Judge had acted in a manner which was "high handed" and exhibited a "flagrant" and "contumelious disregard for [his] rights": cf *Uren* at 117 CLR 129 (Taylor J) and 154 (Windeyer J); *Australian Consolidated Press v Uren* (1966) 117 CLR 185 at 212 (Windeyer J). In Mr Stradford's submission, the Judge's conduct cannot be explained away as simply involving a mistake. Rather, at best it demonstrated a reckless disregard for the serious consequences to Mr Stradford of imprisoning him for contempt. An award of exemplary damages was necessary, so it was submitted, both to punish the Judge and to deter him and others from such conduct in the future. Such an award was also said to be warranted both to vindicate Mr Stradford's rights and vindicate "the strength of the rule of law".

644 The Judge submitted that an award of exemplary damages was not warranted. In his submission, if it came to it, the very fact of him being held liable and ordered to pay compensatory damages would suffice to deter both him and judges generally from behaving in the way he did. No further action would be required to punish him or mark the Court's condemnation of his conduct. He also pointed out that he had obtained no ill-gotten benefit by imposing the imprisonment order. The Judge's submissions also lamented the "significant" publicity and opprobrium which the Judge had already been exposed to by the initiation of this proceeding.

645 There is some merit in the Judge's submissions concerning exemplary damages. It is highly unusual, at least in modern-day Australia, for a judge to be held liable for false imprisonment. That finding alone would undoubtedly have a salutary effect on the Judge and other decision-makers in a similar position to him. I also unquestionably accept that the Judge made no ill-gotten gain and has already been the subject of some adverse publicity and opprobrium arising from this matter. More to the point, I also accept that the Judge did not act with malice and did not appear to be conscious of his wrongdoing at the time.

646 That said, as I have already explained, the Judge's conduct towards Mr Stradford was, on just about any view, high-handed and demonstrated a thoroughly reckless disregard of, if not outright contempt for, Mr Stradford and his rights. Indeed, to a certain extent his Honour's actions displayed an almost contemptuous disregard for the rule of law, which of course

involves due process and procedural fairness. While the Judge's actions have already been condemned by the FamCA Full Court, in my view his actions warrant an award of exemplary damages in all the circumstances. I am not satisfied that the award of compensatory damages, including aggravated damages, sufficiently expresses or reflects the Court's disapproval of the Judge's conduct and treatment of Mr Stradford. I also consider that an award of exemplary damages, while somewhat exceptional, will serve to deter any repetition of such a thoroughly unacceptable abuse of judicial power in the future.

Assessment of damages for deprivation of liberty

647 To unlawfully deprive a person of their liberty is to deprive them of their most basic and fundamental human right. As Mason and Brennan JJ said in *Williams v The Queen* (1986) 161 CLR 278 at 292; [1986] HCA 88:

> The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause': *Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp 120-121, 130-131. He warned:
>
> > 'Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities'.
>
> …
>
> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.

648 In *Ruddock v Taylor*, McHugh J (at [120]) and Kirby J (at [138]) cited with approval the following statement by Deane J in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; [1987] HCA 12 (at 162 CLR 528-529):

> The common law of Australia knows no letter de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. **Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. That being so, it is the plain duty of any such officer to satisfy himself that he is acting with the authority of the law in any case where, in the name of the Commonwealth, he directs that a person be taken and held in custody.** The lawfulness of any such administrative direction, or of actions taken pursuant to it, may be challenged in the courts by the person affected: by application for a writ of habeas corpus where it is available or by reliance upon the constitutionally entrenched right to seek in this Court an injunction against an officer of the Commonwealth. **It cannot be too strongly stressed that these basic matters are not**

> **the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land.** They represent a bulwark against tyranny. They provide the general context of the present case.
>
> (Emphasis added)

649 The damages awarded to Mr Stradford should adequately reflect the fact that he was deprived of his elementary and absolute right to personal liberty. What occurred to him was undoubtedly a grievous denial and deprivation of that right. He was not "treated as one might expect in a civilised society governed by the rule of law": *Bulsey* at [119] (Atkinson J).

650 The parties relied on some comparative cases in which damages have been awarded for false imprisonment. I accept that I should have regard to the awards of damages in those cases, though ultimately the awards in those cases themselves are of fairly limited assistance given that the facts and circumstances of each were materially different to the facts and circumstances of this case.

651 Mr Stradford primarily relied on *Bulsey*. In that case, six armed police officers forcibly entered the appellants' house, shouted commands at the second appellant, entered the first appellant's bedroom, took him from his bed, handcuffed him and dragged him out to the street. The first appellant was held in police custody and questioned for two days before he was charged with certain offences, taken before a magistrate and remanded in custody. The charges were subsequently withdrawn. The trial judge awarded the first appellant damages of $80,000 for assault, battery and false imprisonment. That award was found on appeal to be manifestly inadequate.

652 The Court of Appeal of the Queensland Supreme Court (Fraser JA, with whom Atkinson and McMeekin JJ agreed) awarded the first appellant damages of $165,000, comprising damages (including aggravated damages) of $60,000 for assault, battery and false imprisonment during the wrongful arrest, damages of $100,000 for false imprisonment after the wrongful arrest (ending when the first appellant was taken before the magistrate) and general damages of $5,000 for personal injury (the latter being the same award granted at first instance, and not in issue). Justice Fraser considered that a "very substantial award of damages [was] required to compensate the first appellant for the wrong done to him by that wrongful exercise of executive power over a citizen" and that the award should take into account "the violence and the particularly distressing and humiliating circumstances of the torts" (at [109]). The second appellant, whose false imprisonment was very short, was awarded damages of $70,000, an increase from $30,000 as granted by the trial judge. In arriving at that award, Fraser JA took

into account, among other things, the "extraordinarily traumatic atmosphere" and "very real indignity" felt by the second appellant (at [112]).

653 The Judge submitted that the facts and circumstances in *Bulsey* were "vastly different" to the facts and circumstances of this case. That is no doubt the case. The wrongful arrest in *Bulsey* involved violence and the award included damages for assault and battery. However, the award of $100,000 for two days in police detention was for false imprisonment alone and is somewhat instructive. The award of $70,000 to the second appellant is also somewhat instructive given the very short duration of her false imprisonment (which consisted of her being directed, during the police raid, to walk around and remain in different areas of her house).

654 Mr Stradford also referred, in the context of the award against the Judge and the Commonwealth, to the award of damages in ***Vignoli*** *v Sydney Harbour Casino* (2000) Aust Torts Reports 81-451; [1999] NSWSC 1113. In that case, Mr Vignoli had been gambling at the Sydney Harbour Casino. At about 6.00 pm on the evening in question he was prevented from leaving the Casino by various Casino employees on the basis that the Casino believed that he had been overpaid. He was subsequently detained in various rooms of the Casino until approximately midnight. The police were called, as was Mr Vignoli's solicitor, and Mr Vignoli was eventually permitted to leave shortly after midnight. Justice Bergin, in the Supreme Court of New South Wales, accepted that the incident had been a "searing experience" for Mr Vignoli; he "felt deep humiliation and disgrace" and "experienced a deal of mental anguish and discomfort" (at [108]). Her Honour awarded total damages of $75,000 comprising general damages of $30,000, aggravated damages of $10,000 and exemplary damages of $35,000.

655 The Commonwealth submitted that the award of damages in *Vignoli* was not an appropriate comparator. Again, there can be no doubt that the facts and circumstances of *Vignoli* differ in a number of material respects from the facts and circumstances of this case. That said, *Vignoli* suggests that a not insubstantial award of damages may be warranted even when the period of detention is relatively short, Mr Vignoli having only been detained at the Casino for approximately six hours. As for the Commonwealth's suggestion that the circumstances of Mr Vignoli's detention were more distressing than Mr Stradford's detention by the MSS guards at the Circuit Court, I doubt that being detained at a Casino could be regarded as being any more humiliating or distressing than being escorted by guards through a public area, taken down a goods lift, frisked and detained in a cell in the basement of a court complex for a period while waiting to be taken to prison by the police or prison authorities.

656 In its submissions, Queensland noted that most of the cases concerning false imprisonment in Queensland involved a plaintiff being imprisoned for relatively short periods of time. Queensland referred to "comparatives": ***Hemelaar*** *v Walsh* [2017] QDC 151; ***Eaves*** *v Donnelly* [2011] QDC 207; and ***Coleman*** *v Watson* [2017] QSC 343. In *Hemelaar*, fairly modest awards of general damages of $4,000 and $5,000 were awarded to two appellants who were unlawfully detained by police officers for about five hours. In *Eaves*, compensatory damages of $30,000 were awarded for the plantiff's false imprisonment in circumstances where she had been detained for approximately two and a half hours following her unlawful arrest. In *Coleman*, Cullinane J in the Supreme Court of Queensland awarded the plaintiff general damages of $20,000 for false imprisonment in circumstances where the plaintiff was unlawfully arrested and detained in a police watch house for about five hours before being granted bail.

657 Queensland also referred to the decision in *Raad v New South Wales* [2017] NSWDC 63. In that case, Mr Raad was unlawfully arrested by police officers outside a hotel in the early hours of the morning. He was handcuffed, placed in the back of a police van and detained for slightly less than two hours. In respect of the tort of false imprisonment, Mr Raad was awarded $15,000 in general damages and $5,000 in aggravated damages. He was also awarded damages of $25,000 for malicious prosecution.

658 I do not consider that any of the cases referred to by Queensland greatly assist the assessment of damages in this case.

659 As noted earlier, Mr Stradford submitted that damages should be assessed as follows: an award of general damages (including aggravated damages) of $50,000 in respect of the period of detention for which the Judge and the Commonwealth were jointly responsible and liable; an award of general damages (including aggravated damages) of $250,000 in respect of the period of detention for which the Judge and Queensland were jointly responsible; and an award of exemplary damages of $400,000. An award of exemplary damages of that magnitude was said to be warranted because the Judge sentenced Mr Stradford to imprisonment for one year, and $400,000 represented the Judge's annual salary.

660 The Judge submitted that there was no basis for an award of either aggravated or exemplary damages. He did not proffer an amount that would represent an appropriate award of general damages.

661 The Commonwealth submitted that there was no basis for an award of aggravated damages in respect of the period of imprisonment for which it was responsible. It submitted that any award in relation to loss of liberty should be "extremely low, towards nominal" given the very short time Mr Stradford was detained by the MSS guards and the fact that the MSS guards did not mistreat Mr Stradford in any way.

662 Queensland submitted that an appropriate award of general damages for the period in which it and the Judge were jointly liable was $100,000. It submitted that an award of aggravated damages was not warranted.

663 In my view, the following awards of damages are appropriate in all the circumstances.

664 First, in respect of the period of imprisonment for which the Judge and the Commonwealth are jointly liable, being the time from when the Judge ordered that Mr Stradford be imprisoned to the time that custody of Mr Stradford was transferred from the MSS guards to the Queensland Police (from about 12.27 pm to about 12.54 pm on 6 December 2018), there should be an award of compensatory damages, including aggravated damages, of $35,000. While I accept that this period of false imprisonment was short, I am nevertheless satisfied that Mr Stradford suffered significant injury to his feelings as a result of this period of imprisonment, including considerable shock, distress, fear and humiliation. As discussed earlier, those feelings were aggravated by the high-handed and unnecessarily demeaning, contemptuous and dismissive manner in which he was treated by the Judge. The Judge's treatment of Mr Stradford no doubt heightened the sense of distress, fear and hopelessness that Mr Stradford experienced during his time in detention by the Commonwealth.

665 Second, in respect of the period of imprisonment for which the Judge and Queensland are jointly liable, being the time from which Queensland Police officers took custody of Mr Stradford to the time Mr Stradford was released from the Brisbane Correctional Centre (from about 12.54 pm on 6 December 2018 to 4.25 pm on 12 December 2018), there should be an award of compensatory damages (including aggravated damages) of $165,000. The period of imprisonment for which the Judge and Queensland are jointly liable was lengthy – seven days and six nights. He is entitled to a significant award of damages to compensate him for the breach of his fundamental right to liberty during that period. The conditions and events that Mr Stradford suffered and endured during that period were also demeaning, humiliating and distressing, regardless of whether or not they represented a normal prison experience. Mr Stradford's feelings of fear, distress and hopelessness during this period, going as far as suicidal

ideation, were, not surprisingly in the circumstances, extreme and aggravated by the overall circumstances in which he came to be in prison, including the contemptuous actions of the Judge.

666 Third, there should be an award of exemplary damages against the Judge in the sum of $50,000. I do not accept that an award of exemplary damages in the amount sought by Mr Stradford is warranted or would be appropriate in all the circumstances. Nevertheless, as discussed earlier, I consider that that an award of exemplary damages, albeit in the fairly modest sum of $50,000, is warranted and appropriate to both express the Court's disapproval of the high-handed conduct of the Judge and his Honour's reckless disregard of due process and the rights of Mr Stradford. Such an award should also deter the repetition of such conduct.

GENERAL DAMAGES FOR PERSONAL INJURY

667 The parties broadly agreed that if Mr Stradford made out his case in respect of liability, he was entitled to an award of damages for personal injury. That was because it was essentially common ground that Mr Stradford had been diagnosed with a psychiatric condition, post-traumatic stress disorder, that was caused by his imprisonment. He was also jointly diagnosed with major depressive disorder, though it was essentially a "secondary condition". The evidence and submissions focussed almost entirely on Mr Stradford's post-traumatic stress disorder. It was also common ground that that award of damages in respect of that injury was to be assessed having regard to the provisions of the Civil Liability Act and *Civil Liability **Regulation** 2014* (Qld). That was where the common ground ended.

Summary of issues concerning the assessment of damages for personal injury

668 The main area of disagreement between the parties concerned the appropriate calculation of the damages for Mr Stradford's psychiatric injury under the Civil Liability Act and Regulation. The disagreement related to the determination of the appropriate "injury scale value" in respect of Mr Stradford's psychiatric injury. That disagreement primarily flowed from a disagreement between the two psychiatrists who had consulted with Mr Stradford, Dr Foxcroft and Dr Harden, as to the extent of Mr Stradford's impairment and, more specifically, where Mr Stradford's impairment was situated within the Psychiatric Injury Rating Scale (**PIRS**), a scale used to rate the impairment caused by psychiatric disorders which is scheduled to the Regulation. Dr Foxcroft's opinion was that Mr Stradford's mental disorder was moderate and that the applicable impairment rating was 15%. Dr Harden's opinion that Mr Stradford's mental disorder was mild and that the appropriate or applicable impairment rating was 6%.

669 The determination of the issue concerning the extent of Mr Stradford's impairment and the appropriate injury rating was complicated by two matters: first, the complexity and opacity of the applicable statutory provisions and criteria; and second, the fact that the psychiatrists' opinions relevant to the impartment ratings were no doubt a product, at least in part, of what Mr Stradford had told them during their respective consultations throughout 2020 and 2021. The problem in that regard was that it soon became apparent, mainly as a result of evidence which emerged in the course of the cross-examination of Mr Stradford, that Mr Stradford had not been entirely frank and open with the psychiatrists. In particular, it appeared that he had not revealed certain facts that may have been relevant to whether he had been suffering from a pre-existing psychiatric condition, as well as certain facts that may have been relevant to an accurate assessment of Mr Stradford's functional impairment relevant to his ability to concentrate and his employability.

670 There was also a disagreement between the psychiatrists in respect of Mr Stradford's prognosis, though ultimately that issue is of more significance in the context of Mr Stradford's claim for economic loss or loss of earning capacity.

671 Mr Stradford ultimately submitted that he was entitled to an award of $39,350 in respect of his psychiatric injury, together with an amount of $13,560 for future or ongoing medical expenses.

672 The Judge submitted that Mr Stradford was entitled to an award of $9,450 in respect of his psychiatric injury. Queensland's submission was more or less the same. Queensland also allowed a sum of $15,000 for future medical expenses. The Commonwealth submitted that the opinion expressed by Dr Harden should be accepted and that Mr Stradford had not established that he will incur any future costs in connection with any ongoing psychiatric treatment.

673 There is also a separate issue as to whether the Commonwealth is liable at all in respect of any damages arising from the injury suffered by Mr Stradford. The Commonwealth submitted, in short, that it was not liable for any damages arising from Mr Stradford's injury because the evidence did not establish that the very short period in which Mr Stradford was detained by the MSS guards, on behalf of the Commonwealth, was a cause of Mr Stradford's injury. That issue is dealt with separately later in these reasons.

Applicable statutory provisions

674 The calculation of general damages for personal injury is governed by ss 61 and 62 of the Civil Liability Act. Relevantly, schedule 2 of the Civil Liability Act defines "personal injury" to include a psychological or psychiatric injury.

675 Section 61 of the Civil Liability Act provides as follows:

> **61 Assessment by court of injury scale**
>
> (1) If general damages are to be awarded by a court in relation to an injury arising after 1 December 2002, the court must assess an injury scale value as follows–
>
> (a) the injured person's total general damages must be assigned numerical value (**injury scale value**) on a scale running from 0 to 100;
>
> (b) the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind;
>
> (c) in assessing the injury scale value, the court must –
>
> (i) assess the injury scale value under any rules provided under a regulation; and
>
> (ii) have regard to the injury scale value given to similar injuries in previous proceedings.
>
> (2) If a court assesses an injury scale value for a particular injury to be more or less than any injury scale value prescribed for or attributed to similar particular injuries under subsection (1)(c), the court must state the factors on which the assessment is based that justify the assessed injury scale value.
>
> (Emphasis in original)

676 Regulation 7 of the Regulation provides the relevant rules for the assessment of the injury scale value for an injury. It provides as follows:

> **7 Rules for assessing injury scale value – Act, s 61(1)(c)(i)**
>
> (1) This section and schedules 3 to 6 provide the rules under which a court must assess the injury scale value for an injury.
>
> (2) Schedule 4 provides the ranges of injury scale values for particular injuries that the court is to consider in assessing the injury scale value for those injuries.
>
> (3) In assessing an injury scale value for an injury not mentioned in schedule 4, a court may have regard to the ranges prescribed in schedule 4 for other injuries.
>
> (4) Schedule 3 provides matters to which a court may or must have regard in applying schedule 4.
>
> (5) Schedule 6 provides the PIRS that may be used with schedule 4.
>
> (6) Schedule 5 provides –

(a) matters relevant to the application of schedule 6; and

(b) requirements with which a medical expert must comply in assessing a PIRS rating for a mental disorder of an injured person.

677 As can be seen from reg 7(2) above, schedule 4 sets out the ranges of injury scale value (**ISV**s) for various kinds of injuries. The items in schedule 4 which are relevant to this matter are item 11 "serious mental disorder", which is defined as a "mental disorder with a PIRS rating between 11% and 30%" and specifies an ISV range of 11 to 40; and item 12 "moderate mental disorder", which specifies a "mental disorder with a PIRS rating between 4% and 10%" and specifies an ISV range of 2 to 10.

678 Schedule 5 to the Regulation sets out how PIRS ratings are assessed. It contains a number of rules which assist in assessing a PIRS rating. Two provisions in schedule 5 are of particular relevance to this case. They are items 5 and 11 which deal with pre-existing mental disorders. Those provisions are in the following terms:

5 Assessment if pre-existing mental disorder

(1) If an injured person has a pre-existing mental disorder, a medical expert must—

(a) work out a percentage impairment for the pre-existing mental disorder at the time immediately before the injury using the steps set out in section 4 (the **pre-injury rating**); and

(b) work out a percentage impairment for the current mental disorder using the steps set out in section 4 (the **post-injury rating**); and

(c) subtract the pre-injury rating from the post-injury rating.

(2) The remaining percentage impairment is the PIRS rating assessed by the medical expert for the mental disorder of the injured person.

Editor's note—

See also section 11 (Pre-existing mental disorder).

…

11 Pre-existing mental disorder

If a medical expert assessing a PIRS rating for a mental disorder of an injured person considers the injured person had a pre-existing mental disorder, the medical expert must—

(a) make appropriate enquiry into the pre-existing mental disorder; and

(b) consider any psychiatric or psychological reports made available to the medical expert.

(Emphasis in original)

679 Schedule 6 to the Regulation identifies different classes of PIRS ratings in respect of various areas of impairment. The areas of impairment include: self-care and personal hygiene; social and recreational activities; travel; social functioning; concentration, persistence and pace; and adaptation (which includes employability). As discussed later in these reasons, Dr Foxcroft and Dr Harden's evidence addressed each of these areas of impairment. Their PIRS ratings in respect of some of those areas were the same. They arrived at different ratings in respect of other areas.

680 It is finally necessary to have regard to s 62 of the Civil Liability Act and reg 8 of the Regulation. Section 62 provides as follows:

> **62 Calculation of general damages**
>
> (1) For an injury arising after 1 December 2002, general damages must be calculated by reference to the general damages calculation provisions applying to the period within which the injury arose.
>
> (2) In this section—
>
> ***general damages calculation provisions***, applying to a period, means the provisions prescribed for the period under a regulation.
>
> (Emphasis in original)

681 Regulation 8 of the Regulation contains the relevant general damages calculation provision for the purposes of s 62 of the Civil Liability Act:

> **8 General damages calculation provisions— Act, s 62(2), definition *general damages calculation provisions***
>
> (1) For each period stated in a table in schedule 7, this section and that table are the general damages calculation provisions for the period.
>
> (2) For an injury within the injury scale value stated in an item of a table, the general damages are the sum of—
>
> (a) the base amount for the item (if any); and
>
> (b) the variable amount for the item.
>
> (3) In this section—
>
> ***variable amount*** means the amount worked out in the way stated in the column of a table with the heading 'variable amount'.
>
> (Emphasis in original)

682 The applicable table in schedule 7 of the Regulation is Table 9 which provides as follows:

Table 9—For an injury arising from 1 July 2018 to 30 June 2019 (dates inclusive)			
Item	**Injury scale value**	**Base amount**	**Variable amount**
1	5 or less	—	Injury scale value x $1,530
2	10 or less but more than 5	$7,650	(Injury scale value - 5) x $1,800
3	15 or less but more than 10	$16,650	(Injury scale value - 10) x $2,120
4	20 or less but more than 15	$27,250	(Injury scale value - 15) x $2,420
5	25 or less but more than 20	$39,350	(Injury scale value - 20) x $2,710
6	30 or less but more than 25	$52,900	(Injury scale value - 25) x $3,030
7	35 or less but more than 30	$68,050	(Injury scale value - 30) x $3,340
8	40 or less but more than 35	$84,750	(Injury scale value - 35) x $3,640
9	50 or less but more than 40	$102,950	(Injury scale value - 40) x $3,910
10	60 or less but more than 50	$142,050	(Injury scale value - 50) x $4,170
11	70 or less but more than 60	$183,750	(Injury scale value - 60) x $4,440
12	80 or less but more than 70	$228,150	(Injury scale value - 70) x $4,740
13	90 or less but more than 80	$275,550	(Injury scale value - 80) x $5,010
14	100 or less but more than 90	$325,650	(Injury scale value - 90) x $5,290

683 As can be seen, once an injury scale value for an injury is calculated or assessed in accordance with the provisions of the Regulation referred to earlier, Table 9 specifies a base amount and a variable amount. The sum of the base amount and variable amount comprises the general damages for the injury. Mr Stradford submitted, based on Dr Foxcroft's assessment, that the applicable item in Table 9 was item 4. The Judge and Queensland submitted, based largely on Dr Harden's assessment, that the applicable item in Table 9 was item 2. The Commonwealth submitted that the applicable item was either item 1 or 2.

Issues arising from the evidence of the psychiatrists

684 Dr Foxcroft prepared three reports for the purposes of the proceedings: his first report dated 14 February 2020; a second report dated 7 September 2021; and a short supplementary report

dated 6 October 2021. In his supplementary report, Dr Foxcroft noted that he had read Dr Harden's report and confirmed his PIRS assessment arising from his earlier assessments. Dr Harden prepared a report dated 6 September 2021. The psychiatrists conferred and prepared a joint report dated 8 November 2021. They gave oral evidence concurrently at the trial. There was no dispute concerning the qualifications and expertise of either Dr Foxcroft or Dr Harden, though notably Dr Harden purported to have received specific training in the PIRS.

685 It is perhaps useful to first address the matters about which Dr Foxcroft and Dr Harden were in agreement.

686 First, they both diagnosed Mr Stradford as suffering from post-traumatic stress disorder and a major depressive disorder. Dr Foxcroft referred to the latter diagnosis as "secondary".

687 Second, they agreed that "the psychiatric diagnosis and subsequent impairment relate to the incarceration". It will in due course be necessary to say something further about this issue in the context of the submissions advanced by the Judge, the Commonwealth and Queensland to the effect that Mr Stradford did not disclose to either of the psychiatrists that he had suffered from depression prior his imprisonment.

688 Third, they agreed on the appropriate PIRS ratings in respect of three areas or "domains" of impairment, those being "travel", "social functioning" and "adaptation".

689 It is unnecessary to say anything further concerning the psychiatrists' agreed ratings in respect of the travel and social functioning domains. Despite the psychiatrists' agreement, in the joint report, concerning the appropriate rating in the "adaptation" domain, it will be necessary to address an issue that arose in relation to that assessment. That issue concerns whether Mr Stradford adequately disclosed all of his post-imprisonment employment to the psychiatrists and, if not, whether disclosure of the circumstances of that employment may have impacted the PIRS rating in respect of the adaptation domain.

690 The main issue that divided the experts in their respective reports, and their joint report, was their PIRS assessments in the "self-care and personal hygiene", "social and recreational activities" and "concentration, persistence and pace" domains. As a result of their divergent assessments in respect of those three domains was that their overall PIRS ratings diverged. Dr Foxcroft's overall rating was 15% and Dr Harden's overall rating was 6%. As the preceding discussion concerning the statutory scheme reveals, those differing PIRS ratings necessarily result in different awards of general damages for personal injury.

691 It will ultimately be necessary to make a finding about whether Dr Foxcroft's opinions or assessments in respect of the appropriate PIRS ratings in the disputed domains is to be preferred to Dr Harden's opinions and assessments, or vice versa. Before directly addressing that issue, however, it is necessary to consider whether, as contended by each of the Judge, the Commonwealth and Queensland, Mr Stradford had not been entirely frank and open with Dr Foxcroft and Dr Harden and did not disclose some facts that would, or at least might have, impacted not only their assessments in respect of the disputed domains, but also their assessment as to whether Mr Stradford had a pre-existing psychiatric condition. If Mr Stradford had been found to have been suffering from a pre-existing condition, that also may have led to a reduction in the overall impairment rating by virtue of schedule 5 to the Regulation, which requires the pre-injury impairment rating to be subtracted from the post-injury rating.

692 The final issue that must be resolved concerns Mr Stradford's prognosis and the prospects of his condition improving, or even being cured, in the future. That issue is of particular importance to determining the future economic loss head of damages.

Material non-disclosures to the psychiatrists?

693 The Judge, the Commonwealth and Queensland each contended that Mr Stradford had failed to disclose certain facts to both Dr Foxcroft and Dr Harden that, in their submission, would have been material to the assessment of Mr Stradford's impairment rating. Those facts related, in broad terms, to three topics: first, that Mr Stradford had a history of excessive gambling; second, that Mr Stradford had experienced severe depression and suicidal thoughts before he was imprisoned by the Judge; and third, that after being released from prison Mr Stradford had worked in responsible real estate positions that involved him working significant hours, and training and mentoring another person.

694 There was ultimately no dispute that, well prior to his imprisonment, Mr Stradford had reported that he had a serious gambling habit or problem. He said as much in an affidavit he filed in his family law proceeding in the Circuit Court. There was equally no dispute that Mr Stradford had reported, in the same affidavit, that from as early as January 2017 he was "severely depressed" and "suicidal". In that affidavit, which was sworn on 24 November 2018, Mr Stradford stated that he was in a "suicidal emotional state" because his access to his children had, so he said, been restricted by Mrs Stradford. He also said that in January 2017 he had gone from "being depressed to severely depressed" and was "suicidal and gambling heavily

what money [he] had as means of escape". Mr Stradford appeared to attribute that depression to the fact that he had been overpaid by a developer, but had spent that money and was gambling to try to clear his debt. He had also stated:

> I have realised my gambling behaviour from **psychologists** is akin to an unhealthy video game, or means to **escape reality because I have been severely depressed over my feelings of inadequacy during childhood**, then the feelings of inadequacy resulting from this marriage and the emotional trauma afterwards inflicted by Mrs Stradford. Yet the consequences of gambling only compounded this depression and placed myself in a further and further desperate situation.
>
> (Emphasis added)

695 Mr Stradford went on to state that he realised that he had spent over $300,000 on gambling since 2014. Two things may be noted from that statement in Mr Stradford's affidavit. First, it appears that he had consulted with a psychologist or psychologists regarding "severe depression" in the past; and second, he attributed his gambling problem to issues not directly related to his marriage difficulties.

696 Mr Stradford did not tell either Dr Foxcroft or Dr Harden about what plainly appeared to be a serious gambling problem. In his first report, Dr Foxcroft stated that there was "no history of excessive gambling". Dr Foxcroft agreed, when questioned about this, that Mr Stradford did not tell him that he had a history of excessive gambling. Dr Foxcroft's evidence was that he recalled asking Mr Stradford about whether he had any history of excessive gambling. Dr Foxcroft also essentially agreed that excessive gambling would be relevant to the assessment of Mr Stradford's historical ability to make good decisions. While Dr Foxcroft said that Mr Stradford's gambling may not have been relevant to his opinion "in relation to the development of post-traumatic stress [disorder]", that is not to say that it may not have been of some relevance to his opinions concerning the existence of a pre-existing psychiatric disorder, or his opinions concerning impairment generally. Dr Harden's evidence was that he did not specifically inquire about gambling and was not given any information about it by Mr Stradford.

697 Mr Stradford also did not tell Dr Foxcroft that he had previously experienced severe depression. Indeed, it appears that he did not tell Dr Foxcroft that he had experienced any depression. Dr Foxcroft's first report stated that Mr Stradford had "no previous psychiatric history" and that "[h]e had never had any history of depressive or anxiety conditions". In his second report, Dr Foxcroft stated that Mr Stradford had "no evidence of any pre-existing psychiatric conditions

and was functioning well through a bitter divorce". It is well-nigh impossible to reconcile those statements with the contents of affidavit Mr Stradford filed in the Circuit Court.

698 When questioned regarding Mr Stradford's non-disclosure of this history of severe depression and suicidal ideation, Dr Foxcroft initially suggested that "emotional responses" to Family Court proceedings are "often situation-specific". Ultimately, however, he agreed that if Mr Stradford had experienced severe depression and suicidal thoughts prior to his imprisonment, that might have been material to his assessment. He was, however, unable to say whether that was so because he did not have that information when he was doing his assessment. He also agreed that, if Mr Stradford had told him that prior to his imprisonment he had been suicidal, had "moved from being depressed to severely depressed" and that his severe depression had extended over a period of at least 18 months, that information would have led him to further question Mr Stradford to seek to ascertain if there was some pre-existing psychiatric condition.

699 Dr Harden's evidence was much to the same effect. Dr Harden stated in his report that Mr Stradford "denied any pre-existing psychiatric history" but had "reported some feelings of depression, emotional distress and unhappiness regarding the failure of his marriage, conflict with his ex-wife, difficulty seeking his children and business problems during 2018 and possibly dating back as far as 2016". That could scarcely be said to be a frank or fulsome disclosure by Mr Stradford of his past psychiatric history given the contents of the affidavit he filed in the Circuit Court. Dr Harden's evidence was that the psychiatric history that was given to him by Mr Stradford did not amount to a pre-existing psychiatric disorder. That is not surprising given the very limited, if not inaccurate, history that Mr Stradford had disclosed. As to the materiality of information about whether Mr Stradford had suffered severe depression and experienced suicidal ideation in the past, Dr Harden gave the following evidence:

> MR KIRK: Okay. If Mr Stradford had indicated to you that in the previous few years, he had been suicidal and regarded himself as moving from being depressed to severely depressed, and over a period extending perhaps over at least 18 months, that sort of information would certainly have led to further questioning; do you agree with me?
>
> ASSOC PROF HARDEN: Yes, that's correct.
>
> MR KIRK: And might have led you to conclude that perhaps there was a pre-existing psychiatric condition.
>
> ASSOC PROF HARDEN: Yes, as I discussed further in – previously in my evidence, it would have particularly led to a consideration of whether there was an adjustment disorder or an early depressive disorder.

700 He also agreed that if there had been such a disorder, there may have had to be some discount off the impairment assessment.

701 It was submitted, on Mr Stradford's behalf, that it was irrelevant that Mr Stradford did not disclose his gambling problem and past psychological issues to Dr Foxcroft and Dr Harden. That information was said to be irrelevant to their opinions. I do not agree. Both Dr Foxcroft and Dr Harden effectively agreed that, if Mr Stradford had fully disclosed his previous gambling and psychiatric issues, that would at the very least have caused them to inquire further into those issues for the purposes of determining whether Mr Stradford had a pre-existing psychological condition. It is also difficult to accept that such information could have had no bearing on their opinions concerning impairment. The fact that Mr Stradford did not disclose his gambling problems and past psychological issues to the psychologists also tends to cast some doubt on the accuracy and reliability of Mr Stradford's responses to the psychiatrists' inquiries generally.

702 It would also appear that Mr Stradford did not fully disclose, to Dr Foxcroft at least, the true nature and extent of his employment in 2021. In his first report, Dr Foxcroft expressed the opinion, in fairly emphatic and unqualified terms, that Mr Stradford was "totally incapacitated for work and likely to remain so for the foreseeable future", and "totally incapacitated for all forms of work in real estate … due to his PTSD symptoms". That opinion turned out to be incorrect, or at least to be unduly pessimistic. As discussed in more detail later, the evidence adduced at trial ultimately revealed that by the beginning of 2021, Mr Stradford was working in two jobs. The first was a full time job with "Freedom Money" which involved marketing properties. The second was a position as a buyers' agent with "Propertybuyer" in which Mr Stradford was remunerated by way of commission. The second position also involved Mr Stradford training and mentoring an employee. While Mr Stradford had been dismissed from his position with Freedom Money after about six months, his position with Propertybuyer was ongoing at the time of his second consultation with Dr Foxcroft and his consultation with Dr Harden. Indeed, the evidence suggested that at the time of those interviews Mr Stradford was experiencing considerable success and fulfilment in that position. He was certainly earning a very large amount of money.

703 While it appears that at some point Mr Stradford told Dr Foxcroft that he was working in real estate, it is readily apparent that Mr Stradford did not reveal the true nature and extent of his employment or work, or the success that he was achieving at Propertybuyer. Dr Foxcroft's

evidence was that he was unaware that Mr Stradford had been working for up to 40 hours per week during 2021, or that his role with Propertybuyer involved an element of mentoring and training. It is also abundantly clear that Mr Stradford did not tell Dr Foxcroft anything about the successful and fulfilling role he had at Propertybuyer, a role which Mr Stradford said he was "very passionate" about. That is apparent from, among other things, what Dr Foxcroft said in his second report concerning Mr Stradford's capacity to work, which was:

> Mr Stradford has significant impairment in economic capacity. He has lost considerable income, has lost job opportunities and job capacity. He has failed a number of lesser jobs. His business had declined and ceased whilst he was incarcerated and as a consequence of his psychiatric symptoms arising from the incarceration including impaired concentration, irritable moods, agitation, emotional numbing and depression leading him to have difficulty interacting with clients when he is functioning in a relatively high-level property marketing position. He is currently incapable of working in the capacity or level of work that he was performing previously. He has difficulty interacting with clients, has periods of irritability and angry outbursts, has struggled with working and following scripts and prescribed job performance as in his most recent job from the middle of 2021. He has difficulty with commission jobs. He has difficulty engaging with clients and supervisors. He has difficulty with work motivation. He has low energy levels and has significant problems of poor concentration and irritable moods. He has low energy and is currently not capable of working more than 20 hours per week and in doing so, is less efficient than he was previously.

704 While this description of Mr Stradford's capacity to work might perhaps be compatible with the evidence concerning Mr Stradford's position with Freedom Money, it is almost impossible to reconcile it with the evidence concerning Mr Stradford's work experience and success at Propertybuyer. It is clear that at various points in time Mr Stradford was working for more than 20 hours and that, if he had been experiencing "difficulty with commission jobs", that did not prevent him from succeeding in his lucrative role with Propertybuyer. It can be inferred that Mr Stradford either did not tell Dr Foxcroft anything about his role at Propertybuyer, or if he did, the account he gave was cursory and certainly not a frank or accurate account.

705 It appears that Mr Stradford was slightly more forthcoming with Dr Harden in respect of his engagement with Propertybuyer. In his report, after recounting Mr Stradford's description of his employment with Freedom Money, Dr Harden stated:

> Concurrently from February or March 2021 he had worked for "the [P]roperty buyer" on a commission only basis. He had taken this on as a second job in case the first job did not work out. Again it was based in Sydney and a buyers agent type role. He said "I really enjoy it". He said the company were very supportive. He said he did not have an office or a vehicle and it was hard to organise himself at home and he had to borrow his fiancée's car or catch the bus in order to do things that required visits. He said he found that he couldn't deal with multiple people at one time anymore. He also described long periods where he would procrastinate and avoid undertaking tasks. As

> an example he described a time where he spent an entire working day undertaking a search online which should have taken about 10 minutes. He said "they should have sacked me by now" but he continued to be somewhat hopeful and said "I want to achieve an income".

706 While the account that Mr Stradford gave Dr Harden concerning his work with Propertybuyer appears to be more accurate than the account, if any, he appears to have given Dr Foxcroft, it is again difficult to reconcile with the evidence concerning Mr Stradford's obvious success with Propertybuyer. In particular, Dr Harden went on to state, no doubt on the basis of what Mr Stradford had told him, that Mr Stradford was not "successfully undertaking the work he is doing currently". That is difficult to reconcile with the objective evidence that indicated that Mr Stradford earned upwards of $200,000 from his role at Propertybuyer. While Mr Stradford described in his evidence some difficulties he was having working at Propertybuyer, he nevertheless described the experience as "amazing" and "fantastic". There could be little doubt that, on the whole, he was successfully carrying out his job at Propertybuyer.

707 Mr Stradford was not directly cross-examined about what he told the psychiatrists regarding his work with Freedom Money and Propertybuyer during 2021. Nor was the cross-examination of Dr Foxcroft and Dr Harden on this topic extensive. Nevertheless, the inference that I would draw from the evidence as a whole is that the account of his work experiences that Mr Stradford gave Dr Foxcroft and Dr Harden was far from frank and was in some respects incomplete and inaccurate. That, in my view, undoubtedly influenced the opinions that Dr Foxcroft and Dr Harden ultimately offered in respect of Mr Stradford's adaptability and employability.

708 Both Dr Foxcroft and Dr Harden assessed Mr Stradford as having a class 3 "moderate impairment" in respect of adaptation, which was the area of functional impairment that dealt with employability. The example indicators for a class 3 impairment (as identified in schedule 6 to the Regulation) in respect of adaptation were: "can not work at all in the pre-injury position; only able to work less than 20 hours a week in a different position where performance of the relevant duties requires less skill or is otherwise less demanding, for example, less stressful".

709 In his first report, Dr Foxcroft gave the following reasons for his class 3 assessment:

> He has long term partial incapacity for work and will **never return to real estate work** due to his symptoms of PTSD and depression. He has poor concentration, poor capacity to focus, feelings of shame and overwhelming self-reproach. He has difficulty working efficiently. He is disorganised in his thinking. He has anxiety symptoms and panic attacks. He has a long term partial incapacity for work. **He is currently totally incapacitated for work**.

(Emphasis added)

710 Dr Foxcroft did not alter this assessment in his second report. He described an "ongoing incapacity for work" and confirmed his previous PIRS assessment. It is difficult to see how Dr Foxcroft came to confirm his opinion that Mr Stradford would never return to real estate work, or was totally incapacitated for work, in light of what he had been told about Mr Stradford's work at Freedom Money. It is even more difficult to see how Dr Foxcroft could have maintained that opinion if Mr Stradford had frankly and accurately disclosed the nature and circumstances of his engagement with Propertybuyer.

711 Dr Harden gave the following reasons for arriving at his class 3 assessment:

> Although working in a role in a similar position he is not working successfully in such a role **on his description**. He has been unable to successfully achieve academically during this period as well. It is likely that he would be able to work in a less demanding role for less than 20 hours a week."
>
> (Emphasis added)

712 Dr Harden's assessment, and in particular his statement that Mr Stradford was not working successfully at that time, was based on Mr Stradford's description. Given the nature of the evidence at trial concerning Mr Stradford's relative success in his role at Propertybuyer, I would infer that the description that Mr Stradford gave Dr Harden about his work at Propertybuyer was not entirely frank or accurate.

713 Overall, it is difficult to avoid the conclusion that Mr Stradford gave Dr Foxcroft and Dr Harden inaccurate and incomplete accounts of his employment experience, particularly at Propertybuyer. It is also difficult to avoid the conclusion that the inaccurate and incomplete information that Dr Foxcroft and Dr Harden were given in that regard influenced their impairment assessment in respect of the "adaptation" area of functional impairment. I doubt that they would have given a class 3 assessment if they had been given accurate information. A varied assessment of the adaption domain would, in turn, have impacted the overall PIRS rating assessed by both experts.

714 As will be seen later, the fact that Mr Stradford was not entirely full and frank with Dr Foxcroft and Dr Harden concerning his employment experience and his relative success at Propertybuyer is also a highly relevant consideration when it comes to considering whether, or to what extent, Mr Stradford suffered any economic loss arising from a partial loss of earning capacity.

Appropriate PIRS ratings in the disputed domains

715 Dr Foxcroft and Dr Harden broadly agreed that the PIRS ratings or assessments that they arrived at in respect of the six functional impairment domains were based essentially on their observations of Mr Stradford and the responses given by him to questions they put to him during their consultations, together, of course, with their professional training. They also agreed that their different assessments might simply be the product of different answers that Mr Stradford gave them during their separate consultations, which took place over 2020 and 2021.

716 Not surprisingly, Mr Stradford submitted that Dr Foxcroft's opinions or assessments were to be preferred. The Judge, the Commonwealth and Queensland submitted that Dr Harden's opinions and assessments were to be preferred.

Self-care and personal hygiene

717 In this domain, Dr Foxcroft assessed Mr Stradford as having a class 3 moderate impairment and Dr Harden assessed Mr Stradford as having a class 2 mild impairment.

718 The example indicators for a class 2 impairment are: "can live independently; looks after himself or herself adequately, although may look unkempt occasionally; and sometimes misses a meal or relies on takeaway food". The class 3 indicators are: "can not live independently without regular support; needs prompting to shower daily and wear clean clothes; does not prepare own meals; frequently misses meals; if living independently, a family member or community nurse visits, or needs to visit, 2 to 3 times a week to ensure a minimum level of hygiene and nutrition".

719 Dr Foxcroft's reasons for his class 3 assessment were:

> He has difficulty engaging in self care and personal hygiene activities. He has difficulty with regular showing. He has no motivation to cook or care for himself. He is dishevelled. He requires support and supervision from his partner, Kerry.

720 Dr Harden's reasons for his class 2 assessment were:

> Mr Stradford takes less care in his appearance than previously. He showers every 2 to 3 days rather than every day as previously. He is able to undertake a range of care activities for his children including shopping and cooking. He may neglect his own care in such respects at times.

721 In cross-examination, Dr Harden agreed that he had not noted suicidal ideation as being relevant to his assessment in relation to this domain, though he explained that that was because

that would only be recorded if any suicidal ideation was active at the time of assessment. He considered that was not the case in respect of Mr Stradford. He denied that a moderate assessment was appropriate given Mr Stradford's description of past suicidal ideation and the fact that Mr Stradford had reported that he took less care with his appearance than prior to his imprisonment. Dr Foxcroft was not directly cross-examined about his assessment in respect of this domain. During his evidence, however, he said that Mr Stradford had reported ongoing suicidal ideation which he assessed as requiring assistance or supervision.

Social and recreational activities

722 In this domain, Dr Foxcroft assessed Mr Stradford as having a class 3 moderate impairment and Dr Harden assessed Mr Stradford as having a class 2 mild impairment.

723 The example indicators for a class 2 impairment are: "occasionally goes to social events without needing a support person, but does not become actively involved, for example, by dancing or cheering a team". The class 3 indicators are: "rarely goes to social events, and usually only when prompted by family or friend; does not become involved in social events; will not go out without a support person; remains quiet and withdrawn".

724 Dr Foxcroft's reasons for his class 3 assessment were:

> He has no recreational pursuits or activities to speak of. He has withdrawn from any recreational activities. He is socially avoidant. He rarely leaves his house. He has no active interests in going to the gym or engaging in other social or recreational activities. He is tearful, anxious and hypervigilent when he leaves the house.

725 Dr Harden's reasons for his class 2 assessment were:

> He has some anxiety about attending social events but is able to go to the pub about once a week and to go out with his fiancée approximately once a week for dinner. He has restricted his previous involvement in organised sport but has some interest in returning to the area.

726 In cross-examination, it was pointed out to Dr Harden that some of the observations he had made earlier in his report which were relevant to this domain had not been replicated in his reasoning in respect of the assessment. Dr Harden explained, however, that he did not record all his "comprehensive notes" in that part of the report which summarised his assessment. That was, in my view, a fair response to that apparent criticism. Dr Harden was also taken to parts of Dr Foxcroft's report and the indicators in schedule 6, but was not at all shaken from his class 2 assessment in respect of this domain. Dr Foxcroft was not directly cross-examined about his assessment in respect of this domain.

Concentration, persistence and pace

727 In this domain, Dr Foxcroft assessed Mr Stradford as having a class 3 moderate impairment and Dr Harden assessed Mr Stradford as having a class 2 mild impairment.

728 The example indicators for a class 2 impairment are: "can undertake a basic or standard retraining course at a slower pace; can focus on intellectually demanding tasks for up to 30 minutes, then may feel fatigued or develop headaches". The class 3 indicators are: "can not read more than newspaper articles; finds it difficult to follow complex instructions, for example, operating manuals or building plans; can not make significant repairs to motor vehicles or type long documents; can not follow a pattern for making clothes or tapestry or knitting".

729 Dr Foxcroft's reasons for his class 3 assessment were:

> He is disorganised. He cannot perform serial sevens and other concentration tests on clinical examination. He is distractible. He has difficulty with focussing on task, difficulty with intrusive thoughts and flashbacks and performs work less efficiently.

730 Dr Harden's reasons for his class 2 assessment were:

> He has reduced concentration compared to previously and has failed university subjects when he has attempted to study. He reports the ability to concentrate for a period (30 to 60 minutes) on email or work tasks. He has reduced efficiency in those tasks. He is able to read documentation, emails and course notes. He was able to tolerate interviews up to 90 minutes or longer with reasonable objective concentration.

731 Dr Harden was cross-examined about his class 2 assessment in respect of this domain, but was not shaken from his opinion. Nor did the cross-examination reveal any flaws in his assessment.

A pre-existing injury?

732 Both Dr Foxcroft and Dr Harden expressed the opinion in their respective reports that Mr Stradford had not suffered from any pre-existing psychological condition. Their opinions in that regard were based entirely on the history that Mr Stradford had recounted to them. As discussed earlier, that history omitted that Mr Stradford had, on his own account, previously suffered from severe depression and had experienced suicidal ideation. Both Dr Foxcroft and Dr Harden agreed that if they had been provided with that psychiatric history, they would have made further inquiries to ascertain whether Mr Stradford had a pre-existing psychiatric condition.

733 If that finding had been made, it would have required a deduction from the otherwise applicable impairment rating. As discussed earlier, item 11 of schedule 5 of the Regulation requires a

medical expert to make "appropriate enquiry" into any potential pre-existing mental disorder. Item 5 of schedule 5 provides that if there is a pre-existing mental disorder, the medical expert must work out a percentage impairment for that "pre-injury" disorder and subtract that percentage from the percentage impairment in respect of the current or "post-injury" mental disorder.

734 It cannot, in all the circumstances, be concluded that this would have been the inevitable outcome if Mr Stradford had fully and frankly disclosed his psychiatric history. In my view, however, the possibility that it may have been the result cannot be ignored. In other words, the possibility that, after appropriate inquiry concerning Mr Stradford's past mental health issues, Dr Foxcroft and Dr Harden may have diagnosed a pre-existing mental disorder that may have led to a percentage impairment referable to that disorder being subtracted from the overall percentage impairment in respect of Mr Stradford's extant disorder, is at least relevant to any assessment of the appropriate impairment rating for Mr Stradford's current condition.

Findings concerning impairment

735 It is difficult to determine the appropriate impairment rating for Mr Stradford's condition. Dr Foxcroft and Dr Harden were both qualified and experienced psychiatrists who were no doubt doing their best to accurately and reliably assess the appropriate impairment rating. Their assessments depended to a large extent on the accuracy and reliability of the responses Mr Stradford gave during their consultations with him. The differences between their ratings were fairly nuanced and minor.

736 While the issue was finely balanced, I am ultimately satisfied that the assessment arrived at by Dr Harden is to be preferred. That is so for a number of reasons.

737 First, having read their respective and joint reports and heard and observed their concurrent oral evidence, I was swayed by and generally prefer Dr Harden's overall assessment of Mr Stradford's psychiatric condition. On the whole, I considered that Dr Foxcroft tended to exaggerate some of Mr Stradford's symptoms and generally prefer a more pessimistic or negative characterisation of those symptoms. During cross-examination he appeared at times to be overly defensive of his position and displayed an unwillingness to make concessions where appropriate. He appeared unwilling, for example, to shift from his initial opinion that Mr Stradford was totally incapacitated for work, even when asked to assume that Mr Stradford had in fact worked for up to 76 hours per fortnight, and had assumed a position which involved mentoring and training an employee. He considered that the employment that Mr Stradford

had engaged in since his first consultation reflected only a "mild improvement" in his condition.

738 Second, some of Dr Foxcroft's assessments are difficult to sustain when consideration is given to Mr Stradford's oral evidence, some of which was unfortunately only given in cross-examination after Dr Foxcroft and Dr Harden had concluded their concurrent evidence. For example, in relation to the social and recreational activities domain, Dr Foxcroft assessed a class 3 impairment on the basis that Mr Stradford had "no recreational pursuits or activities to speak of" and "had withdrawn from any recreational activities" and "rarely leaves his house". In his evidence, however, Mr Stradford described how he had attended a polo event not long after his release from imprisonment. He also agreed that he was "quite socially active" after the incident, though less than he had been before. Similarly, in relation to the concentration, persistence and pace domain, Dr Foxcroft assessed a class 3 impairment on the basis that Mr Stradford was "disorganised", "distractible" and had "difficulty with focussing" on tasks. In his evidence, however, Mr Stradford revealed that in the first half of 2021, he had managed to hold down a full time job for some time working around 40 hours per week. He was also successfully working for Propertybuyer, a role which notably involved some mentoring and training of an employee.

739 Third, while both Dr Foxcroft and Dr Harden both arrived at a class 3 "moderate impairment" assessment in relation to the "adaptation" domain, it is difficult to see how that assessment could be sustained in light of Mr Stradford's evidence concerning his work at Propertybuyer and, to a lesser extent, at Freedom Money. The example indicators for the adaptation domain in schedule 6 to the Regulation are: "can not work at all in the pre-injury position" and "only able to work less than 20 hours a week in a different position where performance of the relevant duties requires less skill or is otherwise less demanding, for example, less stressful". Dr Foxcroft assessed Mr Stradford as having a class 3 impairment because, among other things, he "has a long term partial incapacity for work and will never return to real estate work". Dr Foxcroft affirmed that assessment in his second report without qualification. As has already been noted, however, it is difficult to see how that assessment could possibly be sustained in light of Mr Stradford's evidence concerning his work at Freedom Money and Propertybuyer. In cross-examination, Dr Foxcroft agreed that, if Mr Stradford had been able to work for 76 hours for a sustained period, that "would have to have changed the assessment to him functioning better in the workplace". Dr Foxcroft agreed that a "sustained period" in that context would be about six months. It should also be reiterated that it is, in any event, tolerably

clear that Mr Stradford did not fully disclose the nature and extent of his work at Propertybuyer to either Dr Foxcroft or Dr Harden.

740 Fourth, while both Dr Foxcroft and Dr Harden concluded in their reports that Mr Stradford did not have any pre-existing mental disorder or psychiatric injury, that conclusion was essentially based on the fact that Mr Stradford had told them, incorrectly, that he had no previous psychiatric history. In fact, Mr Stradford had stated, on oath, in an affidavit filed in his Circuit Court proceedings, that he had a history of severe depression and had previously experienced suicidal emotional states. As discussed earlier, both Dr Foxcroft and Dr Harden agreed that, if Mr Stradford had told them that, they would have made further inquiries. Those inquiries may have altered their conclusions that Mr Stradford did not have a pre-existing psychiatric condition. If they had altered their conclusions in that respect, that may have resulted in a lower overall impairment rating, even if their ratings in respect of the individual functional impairment domains otherwise remained intact.

741 Fifth, while Mr Stradford criticised aspects or Dr Harden's report and submitted that there were deficiencies in some of his reasoning, I am not persuaded that those criticisms or asserted deficiencies were either made out, or materially affected the reliability or cogency of Dr Harden's assessments. In particular, I am not persuaded that Dr Harden ignored or had insufficient regard to any of the information which he elicited from Mr Stradford, as referred to in the body of his report, simply because he did not expressly refer to that information again in the part of his report that summarised the reasons for his particular assessments. The balance of the criticisms which were directed at Dr Harden's report and reasoning were based on contestable assertions as to what Mr Stradford had said during his consultations, or contestable assertions about Mr Stradford's actual level or degree of functional impairment.

742 In all the circumstances, I conclude that Dr Harden's whole person impairment rating of 6% should be accepted in preference to Dr Foxcroft's assessment. In those circumstances: the injury is a "moderate mental disorder" which applies to mental disorders with a PIRS rating of between 4% and 10% and the applicable injury scale value is 2 to 10 (as stated in Table 12 of schedule 4 to the Regulation); the injury is below the mid-range for moderate mental disorders (with the mid-range being 7, halfway between 4% and 10%); it is in those circumstances appropriate to select or allocate a mid-range injury scale value to the injury; an appropriate injury scale value is 6; applying that injury scale value to the formula in s 62 of the Civil

Liability Act and reg 8 of the Regulation, along with Table 9 in schedule 7 of the Regulation, the result is a damages calculation of $7,650 + ((6 – 5 = 1) x $1,800) = $9,450.

Assessment of general damages for personal injury

743 I therefore assess Mr Stradford's general damages for his personal injury as $9,450. I accept that an award of $9,450 is, all things considered, a meagre amount. That, however, is largely a product of the Civil Liability Act which (like similar legislation in other jurisdictions) appears to be specifically designed not only to befuddle when it comes to the assessment of general damages for personal injury, but also to produce relatively meagre assessments.

Ongoing medical expenses

744 Mr Stradford claimed that he was entitled to be compensated for the ongoing treatment of his psychiatric condition. He relied on Dr Foxcroft's evidence in his second report that he would require extensive treatment for his condition involving fortnightly counselling for a two year period. Dr Foxcroft's evidence that the costs of those sessions would be $240 per session. He also indicated that Mr Stradford should be prescribed an antidepressant medication for a three year period at a cost of $30 per month. The total cost of that treatment would accordingly be $13,560. Dr Harden affirmed this recommendation in his oral evidence. No evidence regarding past medical expenses was adduced.

745 Dr Harden's evidence in his report was that if Mr Stradford was to undertake further treatment, he would recommend treatment by an appropriate psychiatrist which would require intermittent monitoring for approximately two years with monthly appointments. That psychiatrist would consider the issue of medication. Dr Harden also referred to the possible utilisation of group therapy. Dr Harden noted in his report, however, that Mr Stradford had had both a "very limited attempt at psychological therapy" and limited treatment with an antidepressant that he had ceased.

746 The Judge and Queensland did not appear to oppose the award of compensation for future medical expenses, if claimed. The Commonwealth submitted, however, that the onus was on Mr Stradford to establish that he will incur future costs in respect of psychiatric treatment and that he had not discharged that burden. Indeed, in the Commonwealth's submission, it appeared that Mr Stradford had no intention of seeking any treatment.

747 It is tolerably clear from the evidence as a whole that, other than consulting with Dr Foxcroft and Dr Harden for the purpose of their preparing medico-legal reports for use in this

proceeding, Mr Stradford had done little, if anything, in terms of seeking professional treatment for his claimed psychiatric condition. As already noted, Dr Harden stated in his report that Mr Stradford "had very limited treatment to date with prescription of an antidepressant with possibly some benefit that has now ceased and a very limited attempt at psychological therapy". He also reported that Mr Stradford was "reluctant to undertake formal psychiatric or psychological treatment".

748 In his oral evidence, Mr Stradford effectively confirmed that he had no present intention of seeking any further professional treatment in respect of his psychiatric condition. His evidence was:

> [MR HERZFELD:] Apart from seeing the experts in this matter, have you seen a psychiatrist or psychologist since getting out of prison?
>
> [MR STRADFORD:] Yes, I think I saw one when I first go out, maybe. Like, the January or February. I – I can't recall when it was. They're a waste of time.
>
> [MR HERZFELD:] Why do you say that?
>
> [MR STRADFORD:] Just like today, you go in, you share your story. It's not like they give you something that's going to switch something on in your head to make you feel better. You walk out of there completely exhausted. You've just unloaded your story. They don't give you anything to make you feel better. And then you walk out of there in a mental state that's horrible. And do I want to go through that? I've got a mental health plan, I think, for five visits. I went to one, maybe two. I can't remember. But – well, I think it was one, because what's the point of just exhausting yourself and putting yourself into that mode and having to recount your whole life – like today – only to come out at the end exhausted with nothing. It's not like they give you something that's going to make you feel better. And people have said to me, "It takes time," and all of that. So what's going to happen, every time, go there, go through the worst moments of my life again and what are they going to do? Like, they're not – they don't give you anything. They don't make you walk out of there feeling better, and that's the problem and I think that's – you know, that's my personal opinion. Other people might find benefit, but I don't feel better about sharing this. This – this just makes me feel horrible.

749 Mr Stradford confirmed, in cross-examination, that he was "extremely reluctant" to seek further treatment because the consultations made him feel "embarrassed and horrible". He went on to say that, in any event, he did not have the time or "emotional energy" to attend consultations that don't offer a "fix overnight" and the he did not believe that "a few psychological appointments" were going to benefit him.

750 It was also tolerably clear from Mr Stradford's evidence that, having had one unhappy experience with anti-depressant medication, he had no present intention of taking any further medication to treat his psychiatric condition.

751 It may readily be accepted that Mr Stradford's reluctance to seek further treatment is most unfortunate. Dr Harden agreed in cross-examination that one of the symptoms of post-traumatic stress disorder was an attempt to avoid thinking about a traumatic event. He also agreed that any form of treatment involving a psychologist was likely to require Mr Stradford to think about the traumatic events he had suffered. Dr Harden also agreed that it was possible that Mr Stradford's avoidance of treatment was a consequence of his condition, though he suggested that it was more likely related to Mr Stradford's "underlying temperament and general approach to things, which is that he should be able to fix them".

752 Be that as it may, the fact is that it is highly unlikely that Mr Stradford will incur any costs in respect of ongoing treatment for his psychiatric condition. In those circumstances, there should be no award of damages in respect of future medical treatment.

Prognosis

753 Dr Foxcroft expressed a very pessimistic opinion concerning Mr Stradford's prognosis. In his second report, Dr Foxcroft stated:

> Post-traumatic stress disorder, once well established tends to carry a poor prognosis especially when associated with depressive disorders. Mr Stradford's overall prognosis is poor. His symptoms are likely to persist.

754 As discussed earlier, Dr Foxcroft also expressed the opinion in his first report that Mr Stradford was "totally incapacitated for work and likely to remain so for the foreseeable future". Whilst his adaptability rating remained unchanged, Dr Foxcroft's opinion in that regard was tempered somewhat in his second report, no doubt because Mr Stradford had by then reported that he was engaged in some work. Dr Foxcroft's opinion was that Mr Stradford was "currently incapable of working in the capacity or level of work that he was performing previously" and was "unlikely to be capable of working more than 20 hours per week in a lesser role than his previous roles". In his oral evidence, Dr Foxcroft described Mr Stradford's improvement from February 2020 as "mild", expressed the view that any improvement had "plateaued" and stated that the "realistic prospects for him improving were limited or "quite dim". As discussed earlier, however, it is tolerably clear that Mr Stradford had not told Dr Foxcroft about his engagement with Propertybuyer, or at least the full nature and extent of his success in and fulfilment from that engagement.

755 Dr Harden's prognosis was more optimistic. In his report he stated:

> His longer term prognosis is hard to predict. I would be hopeful of steady ongoing

> improvement, albeit not as fast as he would like. There is however a significant risk that his symptoms will remain chronic and plateau. In my view he is not stable and stationary at this time as there is a significant chance that he might improve over the next 12 to 24 months to an extent that would alter his level of impairment in a meaningful way.
>
> There is no doubt there has been some significant improvement. His drive to improve and get better is a good prognostic factor as is his supportive relationship with his fiancée, his stable circle of friends and his ability to function in terms of caring for his children.
>
> Poor prognostic factors include the now chronic nature of his symptoms, his high level of internal self criticism and his reluctance to seek formal treatment.

756 When questioned about the prospects of Mr Stradford's condition improving, Dr Harden's evidence was as follows:

> ASSOC PROF HARDEN: Thank you. Look, I think there's a realistic prospect of improvement with treatment. That's not to say it's 100 per cent. And I really wouldn't have recommended treatment if I didn't think there was a realistic prospect of improvement, because, as has been outlined, the psychological therapy can be unpleasant, and the medications can have side effects.
>
> MR HORTON: So in terms of the pathways you described earlier, Dr Harden, is there any way of being able to assess which of those that Mr Stradford might be on?
>
> ASSOC PROF HARDEN: Not given our current state of knowledge, as far as I'm aware.
>
> MR HORTON: I see. But you seem equally – you're not able to say that he's not on the pathway of not recovering, in effect?
>
> ASSOC PROF HARDEN: I think he has had significant improvement, and I think there is significant improvement in him. Yes. That would be my clinical opinion.
>
> MR HORTON: Yes. And with treatment then, is it your view there's a realistic possibility of there being a return to work as a real estate agent longer term?
>
> ASSOC PROF HARDEN: Yes. In my view, I think there is. I can't give you a percentage on that, but I think there is a realistic prospect of that.

757 It was put to Dr Harden in cross-examination that the general course of post-traumatic stress disorder, once established, is that improvement plateaus. His response was:

> ASSOC PROF HARDEN: I think that there's a number of pathways. There's a group of people who don't improve much after the first few months. There's a group of people who show a slow step-wise improvement. And there's people who improve over one to two years and – and have a good outcome. So it's not – there's not one course for PTSD.

758 It was also put to Dr Harden that the time for Mr Stradford to improve had passed, to which Dr Harden's response was:

> ASSOC PROF HARDEN: Well, I think there has been improvement, so there's a difference of opinion, as you know, in that area. I actually think he has improved

> significantly with compared with the measurement in February 2020. I agree that he may not get full recovery, but I actually don't believe – he's what we would call stable and stationary.

759 It is plainly difficult to make any definite or emphatic finding concerning Mr Stradford's prognosis and the prospects of his condition improving over the coming years. It is nevertheless necessary to determine whether the somewhat pessimistic opinion of Dr Foxcroft is to be preferred to the more optimistic opinion of Dr Harden, or vice versa. Such a finding is particularly important in the context of the assessment of future economic loss, which is the next head of damage to be considered and assessed.

760 For essentially the same reasons as those given earlier in the context of the impairment assessment, I ultimately prefer the opinion of Dr Harden to the opinion of Dr Foxcroft. Dr Foxcroft had already been shown to be overly pessimistic concerning Mr Stradford's prospects of improvement and capacity for work. He appeared somewhat defensive and unwilling to budge from his pessimistic assessment and outlook, despite being confronted with facts concerning Mr Stradford's employment which appeared to suggest that Mr Stradford's improvement had, as Dr Harden stated, been "significant".

DAMAGES FOR LOSS OF EARNING CAPACITY

761 Mr Stradford contended that the personal injury that he suffered as a result of being falsely imprisoned had caused him to suffer a loss of earning capacity. He claimed compensatory damages in respect of that loss. The case that he presented at trial concerning the assessment of this head of damages, however, turned out to be fundamentally flawed and, not surprisingly, was effectively abandoned when it came to final submissions.

762 Mr Stradford had claimed, on the strength of two reports prepared by a chartered accountant, Ms Bossert, that his damages for loss of earning capacity totalled somewhere in the vicinity of $3 million. The essential facts and assumptions that were said to support that calculation were, in summary: first, that in the years prior to his imprisonment, Mr Stradford had been earning about $350,000 per annum before tax; second, but for his imprisonment and the injury from it, Mr Stradford would have continued to earn income at that rate; third, following his imprisonment and injury, Mr Stradford earned about $78,000 per annum before tax, based on his employment with Freedom Money; fourth, it was assumed by Ms Bossert (on the basis of Mr Stradford's instructions) that, as a result of the injury he suffered from his false imprisonment, Mr Stradford would continue working in the real estate industry at about that salary ($78,000 per annum) until the end of 2024; and, fifth, at that point in time, Mr Stradford

would either continue working at that salary in the real estate industry, or commence work as an employed solicitor on a salary starting at about $73,000 and gradually progressing to about $120,000.

763 Ms Bossert produced a second report in which she adjusted her calculations on the basis that it had by then been revealed (largely, it seems, as a result of pre-trial steps taken by or on behalf of the Commonwealth) that post-injury Mr Stradford had in fact been earning a significantly larger income than Ms Bossert had assumed. Ms Bossert appears not to have been informed of the income that Mr Stradford had, in fact, been earning from commissions at Propertybuyer. That new information affected Ms Bossert's calculation of Mr Stradford's likely income going forward. Ms Bossert was instructed to assume, however, that the arrangement pursuant to which Mr Stradford had been earning that income at Propertybuyer would cease at the end of December 2021. The basis for that assumption would appear to have been that the arrangements between the Propertybuyer, Mr Stradford and a colleague, Ms Lisa **Whayman**, would cease at that time. More will be said later concerning the evidence, such as it was, concerning Mr Stradford's working relationship with Ms Whayman. It suffices at this point to note that, as events transpired, there was no sound evidentiary basis for the assumption that Ms Bossert was instructed to apply in her calculations.

764 It is unnecessary to linger on Ms Bossert's reports. To put it succinctly and bluntly, the facts and assumptions pursuant to which Ms Bossert prepared her reports turned out to be fundamentally flawed and unsustainable, if not manifestly contrived and misleading. In his closing submissions, Mr Stradford abandoned any reliance on Ms Bossert's reports. Even if he had not done so, I would in any event have wholly rejected Ms Bossert's analysis and opinions. While Ms Bossert's evidence may be safely put to one side when it comes to assessing any damages for any loss of earning capacity by Mr Stradford, it will be necessary to say something later about the how the manifest flaws in the assumptions underlying Ms Bossert's analysis were exposed during the course of the trial.

765 The alternative case in respect of damages for loss of earning capacity which Mr Stradford advocated, for the first time, in his closing submissions may be summarised as follows.

766 Mr Stradford maintained that he was entitled to damages for loss of earning capacity, albeit assessed on an entirely different basis than that which had previously been put. He contended that the appropriate assessment of damages for loss of earning capacity was $800,000. The essential steps in the argument in support of that assessment were as follows.

767 First, the applicable "notional" income (the income that, but for the injury, Mr Stradford could have expected to receive in the future) was $140,000 per year. That figure was based on job market statistics included in a report prepared by another accountant, Mr Stuart **Benjamin**, on the joint instructions of Queensland, the Judge and the Commonwealth. The statistics suggested that a "Real Estate Agency Principal" could earn up to $140,000 per annum before tax.

768 Second, Mr Stradford had, so it was contended, suffered a 50% reduction in earning capacity. The basis of that calculation of reduced earning capacity was said to be Dr Foxcroft's apparent or implicit acceptance that after his injury Mr Stradford is "only able to work less than 20 hours a week in a different position where performance of the relevant duties requires less skill or is otherwise less demanding" (that being one of the example impairment indicators for a class 3 assessment of impairment in the adaptation functional area). Mr Stradford also relied on Dr Harden's statement, in the same context, that "it is likely that [Mr Stradford] would be able to work in a less demanding role for less than 20 hours per week".

769 Third, it was contended that an appropriate assessment of Mr Stradford's financial loss over his working life resulting from his loss of earning capacity was $800,000. That assessment was based on a notional income of $140,000 (before tax) and a 50% loss of earning capacity. That figure, however, was said to be an underestimate of the value of Mr Stradford's loss of earning capacity, because there was evidence which suggested that Mr Stradford's pre-injury income was likely to be higher than $140,000. That evidence, so it was said, was to be found in some bank statements of the companies through whom Mr Stradford had worked and been remunerated. It was submitted, on that basis, that an additional $200,000 should be added to the figure representing the financial loss suffered by Mr Stradford. The result was a financial loss of $1 million.

770 Fourth, there should be a deduction of 20%, or $200,000, from that figure of $1 million, for "vicissitudes". The appropriate assessment of the damage due to loss of earning capacity was therefore said to be $800,000.

771 The Judge, the Commonwealth and Queensland submitted that Mr Stradford's entirely new case in respect of damages for loss of earning capacity was unmeritorious and should be rejected. It was, in their submission, entirely unsupported by, if not contrary to, the evidence. In particular, there was no sound basis for concluding that Mr Stradford's "notional" income

was $140,000, or that he had suffered a 50% loss of or impairment to his earning capacity as a result of his psychiatric injury.

Applicable legal principles

772 The applicable principles in respect of damages for loss of earning capacity arising from an injury may shortly be summarised as follows.

773 First, the "settled principle" governing the assessment of compensatory damages in actions in tort, including damages to compensate a party for a loss of earning capacity, is that "the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if … the tort had not been committed: *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); [1991] HCA 15.

774 Second, the party claiming compensatory damages in an action in tort, including damages for loss of earning capacity, bears the onus of proving, on the balance of probabilities, not only that he or she suffered damage, but also the amount of the loss he or she sustained "with as much precision as the subject matter reasonably permit[s]": ***Placer*** *(Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257; [2003] HCA 10 at [37] (Hayne J, with whom Gleeson CJ, McHugh and Kirby JJ agreed at [6]).

775 Third, to recover damages for loss of earning capacity, a plaintiff must establish two "distinct but related requirements"; the first being that the plaintiff's earning capacity has in fact been diminished by reason of the injury and the second being that the diminution of earning capacity is or may be productive of financial loss: *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 3, 9 (Deane, Dawson, Toohey and Gaudron JJ); [1995] HCA 5; *Graham v Baker* (1961) 106 CLR 340 at 346-347 (Dixon CJ, Kitto and Taylor JJ); [1961] HCA 48.

776 Fourth, if there is at least some evidence of an impaired capacity to earn, it would generally be wrong to conclude that damages to compensate for that impaired capacity to earn should only be nil or nominal: *New South Wales v* ***Moss*** (2000) 54 NSWLR 536; [2000] NSWCA 133 at [65] (Heydon JA). Where a plaintiff "demonstrates some loss of earning capacity lasting past the date of trial then notwithstanding difficulty in assessing an amount for future economic loss, courts are bound to award something for future economic loss unless, on the material before the court, it can be seen very confidently that notwithstanding the loss of capacity the plaintiff will not in fact suffer any damage of the future economic kind because of that lack of

capacity": *Younie v Martini* (unreported, NSWCA, 21 March 1995, Priestley JA at 3, with whom Powell JA agreed).

777 Fifth, the usual method of proving damages for loss of earning capacity is to prove what the plaintiff was likely to have earned in the future, had he or she not been injured, and what the plaintiff is likely to earn in the future after the injury: ***Paff*** *v Speed* (1961) 105 CLR 549 at 559; [1961] HCA 14. The failure to call such evidence, however, "does not necessarily result in selection of only a nil or nominal figure as damages for impaired earning capacity": *Moss* at [66]; *Yammine v Kalwy* [1979] 2 NSWLR 151 at 155. Where, however, the plaintiff calls incomplete evidence and there is only a low award for diminution of earning capacity, it is difficult for the plaintiff to complain: *Moss* at [69]; citing *Minchin v Public Curator of Queensland* [1965] ALR 91 at 93; *Girginis v Kastrati* (1988) 49 SASR 371 at 375.

778 Sixth, damages to compensate for loss of earning capacity in the future are by their very nature incapable of mathematical calculation: *Moss* at [70]; *Paff* at 105 CLR 559. The "ascertainment of earning capacity involves an evaluation of possibilities, not establishing a fact as a matter of history": ***Malec*** *v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 639 (Brennan and Dawson JJ); [1990] HCA 20. Similarly, "questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof": *Malec* at 169 CLR 643 (Deane, Gaudron and McHugh JJ). The exercise is one "in estimation of possibilities, not proof of probabilities": *Moss* at [71]. In *Paul v Rendell* (1981) 55 ALJR 371, Lord Diplock, somewhat cryptically, but perhaps more realistically, described the factors underlying the assessment of damages for diminished earning capacity as "matters of prophecy or judicial guesses" (at 376).

779 Seventh, the fact that the quantum of damages may be difficult to assess does not mean that the plaintiff is not entitled to damages, or only entitled to a nominal sum: *Moss* at [72]. In particular, "where earning capacity has unquestionably been reduced but its extent is difficult to assess, even though no precise evidence of relevant earning rates is tendered, it is not open to the court to abandon the task and the want of evidence does not necessarily result in non-recovery of damages": *Moss* at [87]. The following observations of Hayne J in *Placer* (at [38]) are, however, worthy of note in that context:

> It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff *cannot* adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff *has not* adduced such evidence. In the former kind of case it may be that estimation, if not guesswork, may

> be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind. This case did not invite attention to such questions. Placer [the plaintiff] sought to calculate its damages precisely.
>
> (Emphasis in original)

780 Having regard to these principles, I propose to address the question whether Mr Stradford is entitled to an award of damages for loss of earning capacity by posing and answering three questions: first, did Mr Stradford suffer a diminution in earning capacity as a result the injury caused by his false imprisonment; second, if the answer to the first question is yes, did any diminution of earning capacity result in, or was it likely to result in, any financial loss to Mr Stradford; and third, if the answer to the second question is yes, what is the best estimate or assessment of that loss having regard to the evidence as a whole.

Did Mr Stradford suffer a diminution of earning capacity?

781 The first question which must be addressed is whether Mr Stradford suffer a diminution in earning capacity as a result of the injury caused by his false imprisonment. Mr Stradford submitted that he did suffer a diminution of earning capacity. Ultimately, he relied primarily on the evidence of Dr Foxcroft and Dr Harden in that regard. That said, it is also relevant to have regard to Mr Stradford's own evidence concerning his capacity to earn income after his imprisonment.

782 The Judge, the Commonwealth and Queensland appeared at times to suggest that Mr Stradford did not suffer any diminution of earning capacity. Their submissions in that regard focussed on the evidence which revealed that, despite his psychiatric injury, Mr Stradford had in fact earned a significant commission income from his work for Propertybuyer. That evidence and the submissions based on it are perhaps more appropriately considered in the context of the question whether any impairment was likely to be productive of loss. That said, the evidence concerning Mr Stradford's work at Propertybuyer may suggest, as Queensland submitted, that Mr Stradford's earning capacity had "returned to its pre-incident level".

783 The evidence concerning the alleged diminution of Mr Stradford's earning capacity was far from satisfactory. Nor, considered as a whole, was the evidence in respect of this issue particularly compelling insofar as Mr Stradford's case was concerned. On balance, however, I am satisfied that Mr Stradford did suffer some diminution of his earning capacity as a result of the psychiatric injury he sustained as a result of his false imprisonment. I am not, however,

satisfied that the diminution of earning capacity was significant. It was certainly not as significant as contended by Mr Stradford in his closing submissions.

784 The starting point is Mr Stradford's own evidence. Mr Stradford gave fairly detailed evidence concerning his mental state since his release from prison. The evidence relevant to his earning capacity included that his memory was "patchy" and that he did not have the "intellectual capacity to recall and to be able to do things accurately as much as [he] used to". He also had difficulty concentrating. He gave the following evidence about his "work efficiency":

> [MR HERZFELD:] And what about work efficiency? How would you describe your efficiency at doing work?
>
> [MR STRADFORD:] I used to be a guy that used to be able to have things going at once and I was able to handle it. Now, I can't – I struggle with one thing going at once. I get complaints about me weekly to fortnightly at work, and my boss is so understanding. He's so lovely. He just says, "What can I do to make it better?" Like, you know, who does that? You know, what a – what a good person. And I'm just – I just have – like, as a – like, you know, I'm all show and no go. I can talk to a client, you know, for half an hour, you know, and they love the fact I've got 20 years experience and all of that. I can talk to them for half an hour, an hour; I can talk to them about buying a property, but if you ask me to actually deliver that, I will let them down. And I'm just very thankful for where I am now with – with having – having the support with Lisa.

785 The reference to "Lisa" was a reference to Ms Whayman. More will be said later concerning Mr Stradford's evidence regarding Ms Whayman. Mr Stradford also gave evidence concerning his level of motivation and mood which was relevant to his performance at work:

> [MR HERZFELD:] And how would you describe your level of motivation?
>
> [MR STRADFORD:] I internally would love to be successful again. I want to be – I want to have a better life for – for my fiancée, for my children, and I – and I – and I'm trying my best to do that. But my – the reality is everyone – everyone has dreams, but you've got to put it into action, and that's where I find I don't have that – the best capacity to be able to deliver what I want in my mind to be able to do, and – and deliver for other people and deliver for my employer, which, in effect, will deliver for me.
>
> [MR HERZFELD:] How would you describe your general mood?
>
> [MR STRADFORD:] I get agitated. Like, another example: my boss, when he rings up and people make a complaint about me, I'm just aggressive in return. Like, how has he not – you know, he's just such a wonderful man. I get aggressive if people push me. I – I then can't think straight. I then can't concentrate. If I – you know, if someone says a bad word to me or – or whatever, I – I can't handle it and I just act out like a baby. So it's just – but I – like, I also – at the same time, I try my best. You know, like, I – like, I watch YouTube videos and watch all these videos about, you know, managing your state and, you know, "you've got to try and put away everything in your life and focus on that moment", and all of that. And, look, if I can do a one-hour Zoom meeting, often I can focus for that one-hour Zoom meeting, but all the things I've promised in that one-hour Zoom meeting, I'm not going to deliver them. And I sort of know that internally.

786 Mr Stradford described how he had been dismissed from a job which he had secured at an organisation called First Home Buyers Club. His evidence was that his boss had told him that he was being dismissed because he was moody, didn't follow instructions, didn't fit in and was rude to clients. It may be inferred that at least some of those traits may have been a product of the psychiatric injury that Mr Stradford suffered as a result of his incarceration.

787 Mr Stradford also gave some evidence about why he had resigned from his position at Freedom Money. His evidence was, in summary, that he wasn't following his employer's marketing "script" and as a result felt that he was under "a bit of pressure". It is open to infer that his inability to follow the script was at least in part referrable to his psychiatric condition. It was not put to Mr Stradford otherwise in cross-examination, at least directly.

788 Mr Stradford's evidence concerning his work at Propertybuyer has already been touched on. There could be little doubt that he was able to work effectively and successfully at Propertybuyer. As noted earlier, he earned commissions totalling in excess of $200,000. In his evidence, Mr Stradford sought to attribute that success to the assistance he was receiving from Ms Whayman. It is difficult to accept that Mr Stradford's success at Property Developer could be wholly attributed to Ms Whayman. I found much of Mr Stradford's evidence in that regard rather implausible and self-serving. That said, much of the cross-examination on that topic was directed at the issue whether the financial arrangements pursuant to which Ms Whayman was working at Property Buyer were to continue, not whether Ms Whayman was in fact significantly assisting Mr Stradford as he claimed.

789 Putting Mr Stradford's working relationship with Ms Whayman to one side for the moment, Mr Stradford nevertheless described some problems that he had encountered when working at Propertybuyer. He attributed those problems, at least in part, to his mental state. He said that he became "overwhelmed" if he had more than a couple of clients and was at times aggressive towards his boss. He also said that he had some difficulty researching and writing detailed reports. Again, it is at least open to infer that some of those difficulties might be attributed to his psychiatric condition.

790 Mr Stradford's evidence concerning the difficulties that he was experiencing in his employment was not directly challenged in cross-examination.

791 The next body of evidence to consider in relation to this question is the evidence of Dr Foxcroft and Dr Harden. That evidence was discussed in detail earlier in these reasons in the context of

the assessment of general damages for personal injury. Without rehearsing what was said earlier, it is clear that both Dr Foxcroft and Dr Harden expressed the opinion that Mr Stradford's post-traumatic stress disorder had, among other things, impaired his adaptation and employability. They assessed or rated that impairment as being moderate or 'class 3'. For the reasons given earlier, there is some cause to doubt the accuracy of that assessment. That is because it is clear that Mr Stradford did not fully or frankly reveal the extent and nature of his work at Propertybuyer to Dr Foxcroft and, although perhaps to a lesser extent, Dr Harden. It could not, however, seriously be suggested that, had Mr Stradford fully disclosed the nature and extent of his success at Propertybuyer, Dr Foxcroft and Dr Harden would have found that Mr Stradford's employability was not impaired at all. The more likely scenario is that they might have downgraded their assessment of Mr Stradford's employability impairment.

792 It is also important to emphasise in this context, that while Dr Foxcroft was cross-examined about what Mr Stradford had disclosed to him concerning his employment at Freedom Money and Propertybuyer, it was not put to Dr Foxcroft that, had the full nature and extent of Mr Stradford's employment at those organisations been fully disclosed to him, he would have determined that Mr Stradford's employability was not impaired at all. Nor was Dr Harden cross-examined in respect of that issue.

793 In my view, the evidence of Mr Stradford, considered together with the evidence of Dr Foxcroft and Dr Harden, supports the conclusion that Mr Stradford's post-traumatic stress disorder had impaired his "employability" and ability to perform at work at least to some extent. Mr Stradford's evidence concerning the difficulties he was experiencing in his employment was largely unchallenged. In summary, he was not able to perform as efficiently or effectively as he was before his injury. The evidence of Dr Foxcroft and Dr Harden also indicated that Mr Stradford's psychiatric condition had been and was impairing his work. While Mr Stradford did not fully disclose the details of his employment to Dr Foxcroft and Dr Harden, it cannot safely be concluded that, had full disclosure been made, Dr Foxcroft and Dr Harden would have expressed the view that Mr Stradford's employability had not been impaired at all.

794 I do not accept that the fact that Mr Stradford had earned very large commissions from his position at Propertybuyer necessarily means that his earning capacity was not impaired at all by the injury that resulted from his imprisonment. Nor can it safely be concluded, as Queensland contended, that Mr Stradford's earning capacity had "returned to its pre-incident level". It may readily be accepted that Mr Stradford was able to effectively and successfully

work at Propertybuyer. The point remains, however, that the evidence indicates that his ability to function in that position was impaired at least to some extent by his injury.

795 In all the circumstances I conclude that Mr Stradford did suffer some diminution in his earning capacity as a result the injury caused by his false imprisonment.

Did any diminution of earning capacity result in any financial loss?

796 Having found that the injury caused to Mr Stradford by his false imprisonment resulted in a diminution of his earning capacity, the next question is whether the diminution of earning capacity resulted in, or was likely to result in, any financial loss to Mr Stradford. This is a very difficult question to answer given the highly unsatisfactory state of the evidence adduced by Mr Stradford concerning this issue.

797 As touched on earlier, Mr Stradford set out to prove that the diminution of his earning capacity caused him substantial financial loss – in excess of $3 million. He did so by effectively seeking to prove three things: first, that his income in the period immediately preceding his imprisonment was very high (as high as $350,000 per annum); second, that but for the injury he sustained as a result of his imprisonment, he was likely to continue to receive that very high income until his retirement; third, that the income he had received from the time he suffered the injury resulting from his imprisonment until the time of the trial was comparatively low (as low as $78,000 per annum); and fourth, that he would continue to receive a modest income, comparable to the income he had received in the year or so prior to the trial, into the future.

798 His efforts to prove any of those four pillars of his case on damages failed miserably. That is no doubt why, when it came to final submissions, the damages case that Mr Stradford had advanced at trial was effectively abandoned.

799 As for his income prior to his imprisonment, Mr Stradford sought to prove that his average taxable income was about $350,000 by tendering his income tax returns for the financial years ending 30 June 2017 and 30 June 2018. The evidence clearly demonstrated, however, that those tax returns were, to say the very least, a highly unreliable indication of what Mr Stradford had in fact earned in the years preceding his imprisonment. That was so for a number of reasons, including: first, there were virtually no contemporaneous business, financial or accounting records concerning Mr Stradford's income earning activities, or the financial affairs of the companies through which he supposedly earned his income; second, the tax returns were, it may safely be inferred, prepared specifically for the purposes of, or in the context of, this

litigation and Mr Stradford's efforts to prove his financial loss; third, the tax returns were prepared solely on the basis of a demonstrably unreliable analysis of some bank statements of the companies through which Mr Stradford was said to earn his income, in circumstances where it was abundantly clear that those bank statements recorded a mix of personal and business transactions and many of the descriptions of the transactions were at best opaque; fourth, Mr Stradford's tax returns for the financial years 30 June 2001 to 30 June 2016 (excluding 2008), which were prepared by different tax accountants, recorded that Mr Stradford's taxable income was substantially less than the annual income declared in his 2017 and 2018 tax returns (ranging from $10,000 to $40,000, excluding outliers, and averaging approximately $24,000); fifth, Mr Stradford had sworn and filed affidavits and financial statements in his Circuit Court family law proceedings in which he stated that his average weekly income was nil (as at 7 April 2017) or $1,156.74 (as at 26 October 2017); and sixth, Mr Stradford's oral evidence concerning his earnings was, at best, vague, general and unreliable.

800 Mr Stradford ultimately failed to adduce any reliable evidence whatsoever concerning his income in the years immediately preceding his imprisonment. The contention that his average income prior to his imprisonment was $350,000 and that he had been likely to continue to receive an income at that level into the future was entirely unmeritorious and entirely unsupported by the evidence. Ms Bossert's reliance on that flawed contention, as one of the assumptions supporting her analysis of the damage suffered, was one of the many reasons why her evidence was effectively worthless.

801 It should perhaps be added, in this context, that Mr Stradford, through Ms Bossert, endeavoured to explain his relatively low taxable income in the financial years ending 30 June 2001 to 30 June 2016 on the basis that he and Mrs Stradford had, though their then accountant, engaged in some form of "income-splitting". That contention, however, rose no higher than a mere hypothesis. It was unsupported by any reliable evidence. To the extent that statements made by Ms Bossert in respect of that could be said to constitute her expert opinion that some exercise in income-splitting had in fact been engaged in, I reject that opinion. It may also be noted in this context that Mr Benjamin disagreed with the suggestion that there was any basis for concluding that Mr and Mrs Stradford had engaged in income-splitting. In any event, even if some income-splitting had been engaged in, Mr Stradford's tax returns for this period suggested that it was highly unlikely that his taxable income ever exceeded $100,000. That is, of course, unless Mr Stradford had been deliberately understating his income during those

years. Mr Stradford did not suggest, in his evidence, that he had deliberately understated his income in those years.

802 As for his income in the period from the time he was released from prison to the date of the trial, Mr Stradford's evidence was, in effect, that he had stopped working prior to his imprisonment so he could deal with his family law proceedings and that, in effect, he did not really attempt to find work again until after he had finalised those proceedings. His first job after the proceedings were finalised was with First Home Buyers Club in October 2020. He worked in that job until Christmas of 2020. Then, in February 2021, he commenced work at Freedom Money and, almost simultaneously, with Property Buyer.

803 Mr Stradford's tax return for the financial year ending 30 June 2021 declared income from his employment totalling approximately $25,000, which equated to an annual salary of just over $70,000. It does not appear that the income he declared in his tax return for the 2021 financial year included any income he received from First Home Buyers Club. In any event, Mr Stradford's damages case, at least initially as reflected in Ms Bossert's first report, was that the salary he received from Freedom Money represented the diminished income he had received, and was likely to continue to receive into the future, following and as a result of his injury.

804 The problem for Mr Stradford was that he failed to disclose to his tax accountants and Ms Bossert that he was not just earning income from Freedom Money at this time. He was also receiving substantial commission payments. Evidence effectively uncovered by the Commonwealth revealed that Mr Stradford received income of about $69,000 from Propertybuyer from about February 2021 to June 2021, and that from 1 July 2021 to 13 October 2021, Mr Stradford had received commission payments of $92,818.19 (exclusive of GST), which equated to $322,875 on an annualised basis. Mr Stradford did not declare the income he received from Propertybuyer between February and June 2021 in his tax return for the year ending 30 June 2021.

805 The evidence of the substantial income Mr Stradford had received, and was continuing to receive at the time of the trial, significantly undermined the contention that Mr Stradford had received, and was only likely to continue to receive, an annual income of about $70,000 following the injury he received as a result of his imprisonment.

806 That appears not to have deterred Mr Stradford from pursuing his substantial claim in respect of loss of earning capacity. Once the full extent of Mr Stradford's earnings from Propertybuyer

were revealed, Ms Bossert was instructed to assume that much of that income was attributable to an arrangement whereby he was assisted by Ms Whayman, but that the arrangement was to come to an end in December 2021. Mr Stradford in due course gave evidence which, broadly speaking, sought to substantiate that instruction and assumption.

807 The difficulty, however, was that, for reasons it is unnecessary to fully detail, Mr Stradford's evidence concerning the anticipated end of the arrangement with Ms Whayman was manifestly implausible and entirely unreliable. It was, on my assessment, a nakedly self-serving and contrived attempt to explain away the evidence concerning the substantial income that he had received, and was continuing to receive, from Propertybuyer. While ultimately Mr Stradford abandoned his case based on Ms Bossert's evidence and calculations, I should nevertheless make it clear that I reject the evidence that Mr Stradford's income from Propertybuyer was likely to substantially reduce as a result of any change to his working arrangement with Ms Whayman. Ms Bossert's reliance on the flawed assumption concerning Mr Stradford's income from Propertybuyer completely undermined her supplementary report.

808 It should also be noted in this context that Ms Bossert was also instructed to calculate the damages suffered by Mr Stradford on the assumption that he would, in the future, complete a law degree, leave the real estate industry and become a lawyer. Ultimately, however, that hypothesis was abandoned as a means of calculating Mr Stradford's damages.

809 What, then, is the Court to make of this farrago of evidence?

810 First, as already noted, there is no reliable evidence concerning Mr Stradford's income in the years immediately preceding his incarceration. Putting to one side his manifestly unreliable tax returns for the 2017 and 2018 financial years, Mr Stradford's tax returns tended to suggest that his taxable income never rose higher than $100,000 between 2001 and 2016. Statements on oath made by him in documents filed in the Circuit Court proceedings suggested that Mr Stradford's income during 2017 was next to nothing – either nil (as at April 2017), or an average weekly income of just over $1,000 by about October 2017.

811 Second, in the period leading up to his incarceration, Mr Stradford gave evidence that he had effectively stopped working so he could focus on his family law proceedings. The effect of his evidence was that he had made no active attempt to obtain further work until October 2020, after the family law proceedings in the Circuit Court had been finalised. Mr Stradford did not

contend, at least clearly or explicitly, that the fact that he did not obtain employment until October 2020 was attributable to the injury that he received as a result of his incarceration.

812 Third, from February 2021, Mr Stradford began to receive income from both Freedom Money and Propertybuyer. The income he received from those sources, if annualised, would have represented a taxable income exceeding $100,000. More importantly, from 1 July 2021, Mr Stradford received very substantial payments of commission from Propertybuyer. Those payments, if annualised, represented a taxable income well exceeding $300,000. The evidence, such as it was, did not suggest that the income that Mr Stradford had received, and was continuing to receive, from Propertybuyer was less than the income that Mr Stradford had received from his various endeavours at any time prior to his imprisonment and injury. Indeed, the evidence, such as it was, tended to suggest that Mr Stradford was earning more from his engagement with Propertybuyer than he had ever earnt before, at least on a regular basis.

813 In my view, the evidence tends strongly against a finding that, to the extent that Mr Stradford suffered an impairment to his earning capacity as a result of the post-traumatic stress disorder and depression that resulted from his imprisonment, that impairment did not result in any financial loss to Mr Stradford. Moreover, in the absence of any reliable evidence that Mr Stradford's successful engagement with Propertybuyer was likely to end, or was an aberration, the evidence does not support a finding that the impairment to Mr Stradford's earning capacity was likely to result in any financial loss or damage into the future. As Heydon JA noted in *Moss*, "[w]here there is impairment in earning capacity it will usually be reflected in financial loss before the trial" (at [64]). The problem for Mr Stradford is that the evidence simply does not support a finding that he suffered any financial loss before the trial. Nor does the evidence provide any real or firm basis for a finding that he is likely to suffer any financial loss arising from any loss or diminution of earning capacity in the future.

814 I am conscious that the authorities tend to suggest that, where there is some evidence that a plaintiff's earning capacity has been impaired, it would generally be wrong to award no damages, or only nominal damages, unless the Court is confident that no financial loss has, or is likely to be suffered as a result of that impairment. That said, Mr Stradford bore the onus of proving, on the balance of the probabilities, not only that he suffered an impairment to his earning capacity, but that that impairment resulted, or was likely to result, in a financial loss to him.

815 Despite my considerable misgivings concerning the state of the evidence as to whether the impairment to Mr Stradford's earning capacity was productive, or was likely to be productive, of any financial loss to him, I am prepared to accept that Mr Stradford *might* at some point in the future suffer some financial loss. For the reasons that follow, however, I consider that the likelihood of Mr Stradford suffering a financial loss arising from his impairment is fairly low and that any such financial loss would be fairly minimal. I do not accept that Mr Stradford has suffered, or is likely to suffer in the future, any persistent, ongoing, or large financial loss arising from the psychiatric injury he suffered as a result of his imprisonment.

What is the appropriate assessment of damages for loss of earning capacity?

816 The authorities suggest that, while the evidence may be imprecise, I must nevertheless do my best to arrive at a figure that would compensate Mr Stradford for the financial loss he might suffer as a result of the impairment of his earning capacity. As discussed earlier, the authorities also indicate that the assessment of damages involves an evaluation of possibilities or even judicial guesswork. That may be so, however the state of the relevant evidence in this matter is such that I would liken my task in assessing damages for impairment of earning capacity to that of "a blind man looking for a black hat in a dark room": cf *Mills v Stanway Coaches Ltd* [1940] 2 KB 334 at 349; 2 All ER 586; referred to by Windeyer J in *Australian Iron & Steel Ltd v Greenwood* (1962) 107 CLR 308 at 326; [1962] HCA 42.

817 I should first squarely address Mr Stradford's submissions concerning the assessment of damages for loss of earning capacity. As noted earlier, in his final submissions Mr Stradford effectively abandoned his case in respect of damages for loss of earning capacity that had occupied much time at trial. In particular, he abandoned, for good reason, Ms Bossert's evidence and analysis based on the difference between what was assumed or believed to be Mr Stradford's income prior to the injury and what was assumed or believed to be his income after the injury up to trial. Instead, it was submitted that Mr Stradford's financial damage resulting from his loss of earning capacity over his working life was $800,000 based on a "notional income" of $140,000, a 50% reduction in earning capacity, an uplift of $200,000 and a discount of $200,000 for vicissitudes.

818 Mr Stradford's new case concerning the assessment of damages for loss of earning capacity had almost as little merit as the case he put at trial. It is not supported at all by the evidence.

819 First, the assumption of a notional income of $140,000 per annum – the income Mr Stradford would supposedly have continued to earn but for the injury he sustained as a result of his

imprisonment – is unrealistic and not supported by the evidence. As noted earlier, Mr Stradford plucked the figure of $140,000 from job market statistics in Mr Benjamin's report.

820 It was somewhat ironic that Mr Stradford ultimately came to embrace the job market statistics in Mr Benjamin's report. Mr Benjamin had included those statistics in his report in an endeavour to calculate a notional income given the paucity and unreliability of the objective information concerning the income that Mr Stradford had actually earned prior to his imprisonment. Mr Benjamin made it clear that he did not rely entirely on the statistics. He did, however, express the opinion, based on the statistics, that a person "working full time in the real estate industry as a real estate agent or principal, could reasonably expect to derive pre-tax earnings of around $100,000 to $140,000". Mr Benjamin adopted $120,000 as the mid-point of that range.

821 Mr Benjamin was cross-examined about his reliance on the job statistics. Among other things, it was put to Mr Benjamin that the activity in which Mr Stradford had most recently been engaged in the real estate industry (though it was put to Mr Benjamin as an assumption) was "not a typical real estate agent model". Mr Benjamin's response was that he could not comment because he was not an expert in the real estate industry. Ms Bossert, however, expressed the view, based on her understanding of what Mr Stradford's past business activities had involved, that Mr Stradford's activities did not fit well within any of the job descriptions in the job market surveys and that his activities were "quite different to" a more typical real estate agent's career or job description. While Ms Bossert also agreed that she had no particular expertise in respect of job descriptions in the real estate industry, nevertheless there appeared to be some merit in her general observation that Mr Stradford's job history was fairly unique and fairly far removed from that of a typical real estate agent or agency principal.

822 In my view, the job statistics in Mr Benjamin's report provide a fairly unsatisfactory and unreliable basis for estimating what Mr Stradford's income was likely to be in the future had he not been injured. Prior to effectively ceasing work as a result of his disputes with his then wife, Mr Stradford had been mostly self-employed, or had effectively operated his own businesses through various corporate entities, which he owned, part-owned, or controlled. None of those businesses could fairly be described as a typical real estate agency business. Mr Stradford's business activities had been fairly eclectic, if not somewhat haphazard and bespoke. Some of his business activities had been successful, other not so. Mr Stradford's income from those activities was far from steady or regular.

823 The suggestion that a salary of $140,000 reflected the sort of income Mr Stradford had received in the past and was likely to have continued to earn into the future had he not been injured was also inconsistent with the evidence, such as it was, in relation to what Mr Stradford had actually earned in the years preceding his injury. As discussed in detail earlier, the income that Mr Stradford declared in his tax returns between 2001 and 2016 largely ranged between $10,000 and $40,000. There was no sound basis to conclude that those relatively meagre income declarations were the result of income-splitting or, for that matter, underreporting. Mr Stradford did not himself suggest that he had underreported his income. As also discussed earlier, the evidence concerning Mr Stradford's earnings in 2017 and 2018 was also particularly unreliable. According to the affidavit evidence filed by Mr Stradford in his family law proceedings, by early to mid-2017 his income was very modest indeed.

824 I also reject the contention that Mr Stradford suffered a 50% diminution of his earning capacity as a result of the injury he suffered because of his incarceration. Mr Stradford submitted that that contention was supported by the evidence of Dr Foxcroft and Dr Harden. I disagree. The evidence of Dr Foxcroft and Dr Harden provided limited, if any, support for that contention.

825 It may be accepted that both Dr Foxcroft and Dr Harden assessed Mr Stradford as having a class 3 "moderate impairment" in respect of adaptation. As set out earlier in these reasons, the example indicators for such an assessment included "can not work at all in the pre-injury position; only able to work less than 20 hours a week in a different position where performance of the relevant duties requires less skill or is otherwise less demanding, for example, less stressful". It may also be accepted that in his report Dr Harden said "[i]t is likely that he [Mr Stradford] would be able to work in a less demanding role for less than 20 hours a week".

826 I do not, however, accept that either the class 3 assessment by Dr Foxcroft and Dr Harden, or Dr Harden's statement about the hours per week that Mr Stradford would be able to work, constitute an opinion that Mr Stradford had suffered a 50% impairment of his capacity to work or earn. Neither Dr Foxcroft nor Dr Harden expressed their opinions in terms of capacity to work. Nor were they directly questioned about capacity to work when they gave oral evidence. It was certainly not put to them that Mr Stradford had suffered a 50% impairment in respect of his capacity to earn, or that such a conclusion could somehow be extrapolated from their apparent acceptance that Mr Stradford was only able to work in a less demanding position for less than 20 hours a week. Extrapolating a 50% reduction in earning capacity from that assessment would require a number of assumptions to be made, including that Mr Stradford

would otherwise have worked standard 40 hour weeks and that there was a linear relationship in Mr Stradford's line of work between hours worked and income. There was no evidence capable of establishing either of those assumptions.

827 In any event, for the reasons given in detail earlier, evidence adduced at trial clearly supported the inference that Mr Stradford was not entirely frank or forthcoming with Dr Foxcroft and Dr Harden in respect of his recent employment experiences, particularly with Propertybuyer. Mr Stradford did not tell either psychiatrist that he had in fact been working for up to 40 hours per week and that he had achieved success and fulfilment in his role at Propertybuyer. That omission undoubtedly affected both Dr Foxcroft's and Dr Harden's impairment assessment in the adaptation or employability functional area. It is highly doubtful that either psychiatrist would have arrived at a class 3 assessment if Mr Stradford had been frank and honest with them.

828 The contention that Mr Stradford had suffered a 50% impairment of his capacity to earn is also inconsistent with the objective evidence concerning Mr Stradford's employment after his injury, in particular with Propertybuyer. Even accepting that Mr Stradford continued to suffer some issues with his memory, mood and concentration during his employment with Propertybuyer, he was nonetheless able to succeed and prosper in that role. If Mr Stradford had continued to suffer memory, mood and concentration issues, he was apparently well-able to overcome those difficulties and prosper in his employment.

829 The contention that Mr Stradford will continue to suffer a constant 50% impairment in his earning capacity until his retirement is also inconsistent with Dr Harden's more positive prognosis in respect of Mr Stradford's condition. For the reasons given in detail earlier, I prefer Dr Harden's more optimistic prognosis to Dr Foxcroft's demonstrably unduly pessimistic prognosis. Mr Stradford's condition had significantly improved by September 2018. While Dr Harden was understandably cautious and indicated that the longer term prognosis was hard to predict, he was nonetheless hopeful that there would be a steady ongoing improvement in Mr Stradford's condition. Had Dr Harden been provided with accurate information concerning Mr Stradford's successful and fulfilling employment with Propertybuyer, his prognosis may have been even more optimistic.

830 In all the circumstances, I do not accept that Mr Stradford has suffered anything like a 50% reduction in his earning capacity, let alone that such an impairment will persist well into the future.

831 Two final points should be made concerning Mr Stradford's submission that $800,000 was a fair or reasonable estimate of the loss he has suffered as a result of the impairment of his earning capacity.

832 First, Mr Stradford's final calculation was arrived at by adding the sum of $200,000 to the calculation of his estimated loss of income. The basis for that addition was said to be that the entries in the bank statements of the companies through which Mr Stradford operated his businesses, together with Mr Stradford's optimistic evidence of future projects which he might be able to exploit, indicated that Mr Stradford's income may in fact have been more than $140,000 per annum. I reject the submission that the bank statements, alone or in combination with Mr Stradford's evidence, can somehow be used in an "indicative" way to support the addition of $200,000 to the estimation of Mr Stradford's financial loss. The bank statements included a hotchpotch of personal and business credits and debits, as well as many entries for which there was no reliable explanation. Mr Stradford's optimism concerning future projects must also be taken with a grain of salt given some of his past business failures and the notorious vagaries of the property industry, including on the Gold Coast.

833 Second, as noted earlier, Mr Stradford suggested that, after including an additional $200,000 to the calculation to supposedly make up for an under-estimation of future income, the same amount should then be deducted from the calculation for "vicissitudes". A deduction for "vicissitudes" is common when assessing damages for future economic loss giving that it involves predicting what might happen in the future. The deduction is intended to take into account the fact that events may occur in the future which would have the effect of reducing the plaintiff's likely income. The conventional or customary discount is 15%: see, for example, *FAI Allianz Insurance Ltd v Lang* (2004) 42 MVR 482; [2004] NSWCA 413 at [18]; *Romig v Tabcorp Holdings Ltd* [2014] QSC 249 at [79].

834 The Commonwealth submitted, however, that the deduction for vicissitudes in this matter should be far greater than the conventional discount and more than the 20% discount suggested by Mr Stradford. In the Commonwealth's submission, the discount for vicissitudes in this case, if it came to it, should be 33% having regard to the fact the real estate business is notoriously risky, as evidenced by Mr Stradford's own career in that industry, and because Mr Stradford's prognosis may be overly pessimistic. For reasons that will become apparent, it is unnecessary for me to reach a concluded position in relation to any discount for vicissitudes. If it had come to it, however, I would have considered it appropriate to apply a very large discount for

vicissitudes, particularly given the somewhat chaotic nature of Mr Stradford's pre-injury work history and the uncertainties and unpredictable nature of the real estate industry generally.

835 I accept that a common method of assessing the financial loss caused by an impairment to earning capacity is to: first, assume or estimate the income that the plaintiff would have received but for the injury; second, assume or estimate, in percentage terms, the extent to which the plaintiff's earning capacity was impaired; and third, calculate the future loss over the plaintiff's work life based on the those two figures and, if necessary, taking into account tax and interest rates. That, however, is not the only way to assess the financial loss arising from an impairment to earning capacity. Nor is it necessarily the most appropriate method. Much will depend on the circumstance of the case and the available evidence.

836 In this matter, it is very difficult to come up with an estimate of the amount that Mr Stradford was likely to have earnt in the future but for his injury. There are simply too many uncertainties and vagaries. Perhaps more significantly, it is even more difficult to estimate, in percentage terms, the extent the impairment to Mr Stradford's earning capacity going forward, let alone arrive at a percentage figure representing the impairment which remains stable until the end of Mr Stradford's working life. Any such figure in the circumstances of this case would in reality be the product of little more than guesswork or speculation dressed up as an estimate. In my view, the most that can be said, based on the evidence, is that Mr Stradford *might* suffer some very modest or minor impairment in his earning capacity within the next few years and that any such impairment is likely to only manifest itself in a relatively small financial loss.

837 It my opinion it would be entirely inappropriate in this case to assess Mr Stradford's financial loss arising from the impairment to his earning capacity by conjuring up a percentage figure representing the impairment and applying that to a rough guess of what he might have earned but for the injury. I use the words "conjuring" and "guess" advisably. That is all that I would be doing if I came up with a percentage figure representing the impairment and a figure for expected future earnings. I propose instead to award a fairly nominal sum of $50,000 as, in effect, a buffer to compensate Mr Stradford for some fairly minor impairment to his earning capacity that he might experience in the future.

Conclusion in respect of damages for loss of earning capacity

838 I have concluded, not without some considerable doubts, that Mr Stradford is entitled to an award of damages to compensate him for financial losses that might arise from an impairment

to his earning capacity resulting from his psychiatric injury. I have, however, concluded that the appropriate award of damages in that regard is the fairly modest figure of $50,000.

Causation – is the Commonwealth liable for damages arising from Mr Stradford's injury?

839 The final issue that must be determined arises from the Commonwealth's submission, at the very heel of the hunt, that it was not liable for any loss arising from Mr Stradford's psychiatric injury because it had not been shown that the injury had been caused by the very limited period during which Mr Stradford was detained by the MSS guards. In the Commonwealth's submission, Mr Stradford had not discharged his onus of proving that the period during which he was detained by the MSS guards was a cause of his injury. That was said to be because Mr Stradford "gave no evidence of experiencing the Commonwealth custody as a discrete stressor". It was also submitted that, while Dr Foxcroft and Dr Harden may have agreed that Mr Stradford's psychiatric injury related to his imprisonment, there was "no disaggregation of the legally and factually distinct periods of time" during which Mr Stradford was imprisoned. The evidence suggested, so it was submitted, that Mr Stradford's psychiatric injury was solely caused by his imprisonment by the Queensland Police and Queensland Corrective Services officers.

840 It may readily be accepted that Mr Stradford was only detained by the MSS guards for a relatively short period of time. It may also be accepted that Mr Stradford did not specifically or explicitly state, that any specific actions by the MSS guards caused him any particular distress. I do not, however, accept that there was insufficient evidence to support a finding that Mr Stradford's detention by the MSS guards was at least *a* cause of his injury. Mr Stradford's unchallenged evidence was that, after the Judge imposed the sentence of imprisonment, the MSS guards escorted him down to the cells, required to take off his cufflinks, shoes and belt and then placed him in a small cell. When asked what he was feeling the time, Mr Stradford said: "[s]hock, fear, thinking about how much I must have let everybody down and what's going to happen with my kids, what's going to happen with my fiancée; that sort of stuff". Mr Stradford's evidence in that regard was not challenged in cross-examination. Nor was it put to Mr Stradford in cross-examination that his time in the effective custody of the MSS guards was not a "discrete stressor".

841 As for the evidence of the psychiatrists, it may be accepted that, when expressing the opinion that Mr Stradford's post-traumatic stress disorder was caused by his imprisonment, they did

not distinguish between Mr Stradford's imprisonment by the MSS guards, as opposed to his imprisonment by the Queensland Police and Queensland Corrective Services officers. Nor did they specifically state that Mr Stradford's detention by the MSS guards was a cause of his psychiatric injury. That said, the psychiatrists did not solely attribute the injury to Mr Stradford's time at the Brisbane watch house, or the Brisbane Correctional Centre. It was, of course, open to the Commonwealth to cross-examine Dr Foxcroft and Dr Harden concerning the cause or causes of Mr Stradford's psychiatric condition. It did not do so. The Commonwealth, through its counsel, could have put to the psychiatrists that they did not, or could not, say that Mr Stradford's detention by the MSS guards was a cause of his injury. That proposition was not put to the psychiatrists. Indeed, the suggestion that the period during which Mr Stradford was detained by or on behalf of the Commonwealth was not a cause of his injury was raised for the very first time in the Commonwealth's oral closing submissions.

842 In my view it is open to infer from the evidence as a whole that Mr Stradford's detention by the MSS guards in the immediate aftermath of the making of the imprisonment order by the Judge was at the very least a cause of his psychiatric injury. I reject the Commonwealth's submission to the contrary.

SUMMARY – ASSESSMENT OF DAMAGES

843 The compensatory damages jointly payable by the Judge and the Commonwealth for deprivation of Mr Stradford's liberty are assessed at $35,000.

844 The compensatory damages jointly payable by the Judge and Queensland for deprivation of Mr Stradford's liberty are assessed at $165,000.

845 Exemplary damages payable by the Judge in respect of the deprivation of Mr Stradford's liberty are assessed at $50,000.

846 The damages jointly and severally payable by the Judge, the Commonwealth and Queensland in respect of the personal injury suffered by Mr Stradford as a result of his unlawful imprisonment are assessed at $9,450.

847 The damages jointly and severally payable by the Judge, the Commonwealth and Queensland in respect of Mr Stradford's financial loss arising from future loss of earning capacity as a result of his injury are assessed at $50,000.

DISPOSITION

848 Judgment will be entered in favour of Mr Stradford against the Judge, the Commonwealth and Queensland jointly and severally for personal injury and loss of earning capacity in the amount of $59,450.

849 Judgment will be entered in favour of Mr Stradford against the Judge and the Commonwealth jointly for general and aggravated damages for false imprisonment and deprivation of liberty in the amount of $35,000 plus interest under s 51A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) from 6 December 2018 to the date of judgment at the pre-judgment rates specified in the Interest on Judgments Practice Note (GPN-INT).

850 Judgment will be entered in favour of Mr Stradford against the Judge and Queensland jointly for general and aggravated damages for false imprisonment and deprivation of liberty in the amount of $165,000 plus interest under s 51A of the FCA Act from 6 December 2018 to the date of judgment at the pre-judgment rates specified in the Interest on Judgments Practice Note (GPN-INT).

851 Judgment will be entered in favour of Mr Stradford and against the Judge for exemplary damages for false imprisonment and deprivation of liberty in the amount of $50,000.

852 I am unable to see any reason why the Judge, the Commonwealth and Queensland should not be ordered to pay Mr Stradford's costs of the proceeding as agreed or taxed. Mr Stradford, however, has requested to be heard further in respect of the appropriate costs order. I will accordingly reserve on the question of costs. If the parties are unable to agree on the appropriate order as to costs, the matter should be relisted so arrangements can be made for the hearing of further submissions in respect of that issue.

I certify that the preceding eight hundred and fifty-two (852) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate:

Dated: 30 August 2023

