AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Oram v Derby Gem Pty Ltd

Lawler VP, Kaufman SDP, Blair C

8, 10, 19 December 2003; 22 July 2004

Appeal — Application for extension of time to appeal — Leave to appeal — Decision to summarily dismiss application — Failure to comply with directions for filing documents — Misconduct of party's representative resulted in miscarriage of justice — Public interest that leave to appeal should be granted — Workplace Relations Act 1996 (Cth), s 45(2).

Australian Industrial Relations Commission — Powers regarding advocates — Conduct of advocate who was not a legal practitioner — Commission having power to make findings about conduct of an advocate — Conduct to be relevant to an issue in dispute between the parties — Finding of serious misconduct may provide basis to refuse leave to representative to appear in future matters — Workplace Relations Act 1996 (Cth), s 42(3).

Australian Industrial Relations Commission — Apprehended bias — Application for Full Bench of Australian Industrial Relations Commission to disqualify itself — Hearing relating to conduct of advocate — Fair-minded observer would not conclude that Full Bench had prejudged matter against advocate — Commission may introduce material at its own initiative — Commission may take interventionist approach to oral evidence — Workplace Relations Act 1996 (Cth), s 110(2).

The appellant sought leave to appeal from two decisions of a Senior Deputy President of the Australian Industrial Relations Commission. The first decision related to an order made by the Senior Deputy President summarily dismissing the appellant's application for relief for termination of her employment by the respondent. The application was dismissed due to failure to comply with directions for filing documents. The second decision involved the Senior Deputy President rejecting an application for revocation of the order under s 170JD of the *Workplace Relations Act 1996* (Cth).

The appellant applied for an extension of time to file her appeal and leave to appeal the two decisions of the Senior Deputy President. The Full Bench was also required to make findings in relation to the conduct of the appellant's agent. The agent made an application to the Full Bench to disqualify itself on the ground of apprehended bias.

Held: (1) The extension of time for lodging the appeal should be granted.

(2) It was in the public interest to grant leave to appeal. In circumstances where the evidence establishes, prima facie, that the misconduct of a party's

representative resulted in a miscarriage of justice the matter would generally be of such importance that in the public interest leave to appeal should be granted, and pursuant to s 45(2) of the Act, must be granted.

(3) Where the Senior Deputy President was shown to err, the Full Bench of the Australian Industrial Relations Commission was entitled to exercise its own discretion in its rehearing. The appeal was allowed and the Senior Deputy President's decisions and orders set aside.

(4) It is clearly within the power of the Commission to make findings about conduct by an advocate where that conduct is relevant to an issue in dispute between the parties. Where the findings so made are that there has occurred serious misconduct, the Commission may observe that the conduct so found may provide a proper basis to refuse leave to the representative to appear in future matters before the Commission.

(5) A fair-minded observer would not have concluded that the Full Bench had prejudged the matter as against the advocate.

(6) It was entirely appropriate, and within the power conferred by s 110(2) of the Act, for the Commission to introduce material at its own initiative and to take a far more interventionist approach to the oral evidence than would ordinarily be appropriate. This cannot, of itself, give rise to a reasonable apprehension of bias.

Cases Cited

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Re (unreported, AIRC, Commonwealth of Australia, M9753, Ross VP, Maher DP, McDonald C, 1 March 1996).

Briginshaw v Briginshaw (1938) 60 CLR 336.

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

Dundovich v P & O Ports (unreported, Australian Industrial Relations Commission, FC, PR923358, 8 October 2002).

House v The King (1936) 55 CLR 499.

Immigration and Multicultural Affairs, Minister for v Jia Legeng (2001) 205 CLR 507.

Johnson v Johnson (2000) 201 CLR 488.

JRL, Re; Ex parte CJL (1986) 161 CLR 342.

Kaycliff Pty Ltd v Australian Broadcasting Tribunal (1989) 90 ALR 310.

Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70.

Livesey v NSW Bar Association (1983) 151 CLR 288.

Lusink, Re; Ex parte Shaw (1980) 55 ALJR 12.

Municipal Officers Association of Australia v City of Greater Brisbane (1927) 25 CAR 932.

New South Wales Bar Association v Evatt (1968) 117 CLR 177.

Oram v Derby Gem Pty Ltd (unreported, Australian Industrial Relations Commission, Senior Deputy President Williams, PR932855, 11 June 2003).

Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146.

R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546.

R v Watson; Ex parte Armstrong (1976) 136 CLR 248.

Richmond River Broadcasters Pty Ltd v Australian Broadcasting Tribunal (1992) 34 FCR 385.

Smith v Moore Paragon Australia Ltd (2004) 130 IR 446.
Vakauta v Kelly (1989) 167 CLR 568.
Victorian Lawyers RPA Ltd v Bailey [2000] VSC 162.
Webb v The Queen (1994) 181 CLR 41.

Appeal

G Devries for the appellant.

M Bromley for the respondent.

D Baker for Gary Bailey.

Cur adv vult

The Commission.

Preliminary Observation

1 Sandra Oram ("the appellant" or "Ms Oram") seeks leave to appeal from an order made on 3 April 2003 by Senior Deputy President Williams[1] summarily dismissing her application for relief filed consequent upon the termination of her employment by Derby Gem Pty Ltd ("the respondent"). His Honour dismissed Ms Oram's application for relief because she had failed to comply with directions for the filing of documents. On 11 June 2003 his Honour also dismissed an application by Ms Oram that he vary or revoke his order.[2] The appeal, which was filed out of time, was initially against only the order of 11 June 2003. With the consent of the respondent, leave was granted to amend the Notice of Appeal so that what we now have before us is an appeal against both orders. As leave to appeal is required, these proceedings also deal with that issue as well as Ms Oram's application for leave to appeal out of time.

2 These reasons for decision are considerably lengthier than an appeal against a dismissal of a claim due to a failure to file documents in accordance with directions issued by the Commission would normally warrant. However, as serious issues relating to the conduct of an advocate in proceedings in the commission have arisen, we have felt it necessary to go into considerable detail and to quote much more extensively from the transcript than would normally be the case.

The Proceedings

3 On 12 December 2002 an application for relief in respect of termination of employment pursuant to s 170CE of the *Workplace Relations Act 1996* ("the Act") was filed on behalf of the appellant by Mr G Bailey, a non-legally qualified advocate.

4 Conciliation was conducted on 5 February 2003. The matter did not settle. A Form R25 Election to Proceed to Arbitration was filed by facsimile transmission on 17 February 2003. On 20 February 2003 the matter was listed for mention and/or arbitration at 9.00 am on 7 April 2003. Directions attached to the notice of listing required the applicant to file her outline of submissions and evidence by no later than noon on 17 March 2003. The President's Practice Note of 24 January 2002 was also attached. Nothing was filed on behalf of the applicant by the due date. The respondent filed its documents by facsimile transmission on 27 February 2003 in accordance with the directions, as well as a Notice of

1 Decision given in transcript

2 *Oram v Derby Gem Pty Ltd* (unreported, AIRC, Williams SDP, PR932855, 11 June 2003).

Motion to dismiss the application for want of jurisdiction. On 21 March 2003 the hearing listed for 7 April 2003 was cancelled and the matter was listed for a "Non Compliance" hearing on 3 April 2003.

5 Part of the directions issued on 20 February 2003 stated:

> 4. *NON-COMPLIANCE: It is necessary that parties comply with these directions. If the applicant does not comply, the matter may DEEMED TO HAVE BEEN DISCONTINUED.*

(Original emphasis.)

6 On 3 April 2003 the matter came before Senior Deputy President Williams. The applicant was represented by her agent, Mr Bailey. Mr Bailey provided an explanation for the applicant's non-compliance with the directions issued by the Commission. Senior Deputy President Williams was not satisfied with the explanation and dismissed Ms Oram's application for relief. The transcript of that hearing is short. For reasons that will become apparent later in these reasons we reproduce it in full.

> PN1
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> MR G. BAILEY: I seek leave to appear for the applicant.
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> PN2
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> THE SENIOR DEPUTY PRESIDENT: Thank you.
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> PN3
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> MR M. BROMLEY: I seek leave to appear on behalf of the respondent, Derby Gem.
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> PN4
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> THE SENIOR DEPUTY PRESIDENT: Leave is granted in each case. Yes, Mr Bailey.
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> PN5
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> MR BAILEY: Sir, a week and a half ago I had spoken to the respondent's solicitors with a view to settling this matter and it was unfortunate that we couldn't. We were quite hopeful of settling it and I have had contact with the client as early as last week, who ensures me that she can get some money to me to run her case. She wishes to proceed and we could issue witness statements and submissions within the next fortnight.
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> PN6
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> THE SENIOR DEPUTY PRESIDENT: Is there - - -
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> PN7
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> MR BAILEY: The reason for non-compliance, sir, is because we thought the matter would settle. We had regular contact with Brian Williams, who is the counsel's instructor and however, those talks have been unsuccessful.
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> PN8
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> THE SENIOR DEPUTY PRESIDENT: Notwithstanding that, there has been no request at an earlier stage made for an extension of time or for a variation to the directions in any shape or form.
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> PN9
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> MR BAILEY: Well, sir, as I said, the reason for that is because we thought the matter would settle and unfortunately it hasn't.
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> PN10
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> THE SENIOR DEPUTY PRESIDENT: And were you - did you make your client aware of the possible effect of non-compliance?
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> PN11

MR BAILEY: Sir, I did. However, I said that due to the circumstance that it put her in, she should get an extension.
PN12
THE SENIOR DEPUTY PRESIDENT: What do you mean by that? That she should apply for an extension?
PN13
MR BAILEY: No. I advised her that the Commission should grant an extension in the circumstances. I have been talking to the other side about this matter and - well - - -
PN14
THE SENIOR DEPUTY PRESIDENT: Did she instruct you to seek an extension of time?
PN15
MR BAILEY: Yes, she has now.
PN16
THE SENIOR DEPUTY PRESIDENT: But she didn't a week and a - - -
PN17
MR BAILEY: I spoke to her last week.
PN18
THE SENIOR DEPUTY PRESIDENT: Well when did you speak to her, last week?
PN19
MR BAILEY: Yes.
PN20
THE SENIOR DEPUTY PRESIDENT: But she didn't instruct you then to do so?
PN21
MR BAILEY: To seek - - -
PN22
THE SENIOR DEPUTY PRESIDENT: To seek an extension of time.
PN23
MR BAILEY: Well, sir, she has instructed me to proceed. She is not up with what is an extension of time and what is required by the rules of the Commission but she has given me full instructions to go ahead with her case.
PN24
THE SENIOR DEPUTY PRESIDENT: You then proceeded, did you Mr Bailey, on the basis that notwithstanding the instructions last week to proceed, it wouldn't be necessary to have any contact with the Commission until the matter was listed for non-compliance?
PN25
MR BAILEY: Well I had been in Brisbane for five - since last Friday and I got back Monday night, so I thought it would be best if we leave the matter until today to put to you.
PN26
THE SENIOR DEPUTY PRESIDENT: Mr Bromley.
PN27
MR BROMLEY: Yes, your Honour. We seek that this matter be struck out on the basis that there has been no notification to either us, my instructing solicitors or the Commission. There has been no request for an extension. I should point out, your Honour, that in this case, the directions were received by us and I assume by Mr Bailey on 20 February and the applicant was supposed to file documentation on 17 March. Between that

> date, we actually applied for a - lodged a form 21A together with, in effect, our material, together with our outlines of evidence, so in some respects, the applicant has had an easier ride since they had an opportunity to peruse our - in effect our case, your Honour. In spite of all of that, there is no request for an extension to either us or the Commission and on that basis, we say that the matter should be struck out.
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> PN28
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> THE SENIOR DEPUTY PRESIDENT: Mr Bailey, do you have anything further to say?
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> PN29
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> MR BAILEY: Nothing further, sir.
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> PN30
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> THE SENIOR DEPUTY PRESIDENT: In this particular matter, the directions of the Commission were issued on 20 February 2003 requiring, in respect to the applicant, compliance in the filing and service of her material by 17 March 2003. Those directions were sent by post to the applicant and by fax to the applicant's representative. It is obvious that there has been no compliance and indeed that is not contested.
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> PN31
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> There does not, in my view, appear to have been any attempt by or on behalf of the applicant to comply with the directions and indeed, there has been no request for an extension of time or some variation to those directions to meet the needs or perceived needs of the applicant. The basic explanation given for the failure to comply is that the applicant and or her representative was of the view that the matter would settle and indeed discussions had taken place. The Commission, however, issues directions for a purpose. It doesn't do it just for the practice of issuing directions. It expects that directions will be complied with or alternatively, requests will be made for variations to those directions. Anyone who has practised in this jurisdiction for any time would, or at least should, be aware of the Commission's requirements in relation to compliance with its directions and what is sometimes termed the generous approach of the Commission to granting extensions where requested.
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> PN32
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> I am not satisfied that in this case there is any satisfactory explanation for the failure to comply and as the applicant has not complied and has not provided any satisfactory explanation for that non-compliance, there is no evidence or other material before the Commission on which it might be able to consider the applicant's substantive application, or at least evidence or material provided by the applicant. On that basis, the application is therefore dismissed.

7 Some six weeks later, on Thursday, 15 May 2003, Mr Bailey, on behalf of the applicant filed an Application for Variation or Revocation of Orders pursuant to s 170JD of the Act. That Application was constituted by a 4-page facsimile transmission and is part of the Commission's original file, which is Exhibit 10 on this appeal. It consists of a covering page, the formal Application for Variation or Revocation of Orders, a copy of a single page email purporting to be from "GS Bailey" dated 17 March 2003 at 5:02:47 pm to "kevin.donnellan@air.gov.au". Mr Donnellan is an officer in the Commission's Registry. There is nothing to suggest that that email was forwarded to the respondent or its representatives.

8 The grounds of the revocation application were:

1. That a reasonable attempt was made to have the Said Directions extended by way of a letter sent to the Commission dated 17 March 2003.
2. No response to this letter was received by the applicant's representatives.
3. A follow up phone call was made by the applicant's representatives to the Commission in respect of this matter.

9 The body of the email dated 17 March 2003 states simply:

> Dear Kevin
>
> Please find enclosed Attachment for your attention.
>
> Gary Bailey

10 The final document in the application for revocation of 15 May 2003 is an undated document entitled Facsimile Transmission which, one infers, is the attachment referred to in the email dated 17 March 2003. That document reads:

> To: Kevin Donnellan Australian Industrial Relations Commission on 8661 7760
>
> From: Gary S Bailey
>
> Dear Kevin,
>
> *Re: Oram, Sandra v Derby Gem Pty Ltd*
>
> *Commission Reference Number: U2002/6951*
>
> As discussed today, this matter may well settle. The respondents solicitors have advised us that they would get back to us tomorrow with an answer to our request of 4 weeks payment in full and final settlement of this matter to our client.
>
> *Should this matter not settle, we would request that the Commission extend the time for the said directions until Friday 21 March 2003.*
>
> Yours faithfully,
>
> *GARY S. BAILEY*

(Our emphasis.)

11 As it transpires, it seems that the email of 17 March 2003 with its attachment had not been received by Senior Deputy President Williams prior to the filing of the application for revocation. We infer from the submissions of Mr Bromley of counsel, who appeared for the respondent on 3 April 2003, that the respondent had also not received the email of 17 March 2003. There is nothing on the face of the email to suggest that it was sent to the respondent or its representatives.

12 By letter dated 16 May 2003, in response to the application for revocation of the previous day, the associate to Senior Deputy President Williams wrote to Mr Bailey on behalf of his Honour including, inter alia:

> The Senior Deputy President does not propose to list your application at the present time.
>
> He does, however, *direct* the applicant to file in the Registry and serve upon the respondent by "not later than 12.00 noon on Friday 23 May 2003" any written submissions upon which she seeks to rely in support of that application.
>
> After the specified date, the Senior Deputy President will consider the material now before him and any submissions filed in accordance with the above directions. The parties will then be advised as to whether or not he will determine the application without either receiving any further submissions from the respondent and/or without the need for a formal hearing.

(Original emphasis.)

13 On the same day the solicitors for the respondent, in opposition to the application for revocation of the order of 3 April 2003, sent a facsimile transmission to the Commission and Mr Bailey enclosing a facsimile transmission they had sent to Mr Bailey on 18 March 2003.

14 The Commission files contain a 15-page facsimile from Mr Bailey to the chambers of Senior Deputy President Williams, dated 23 May 2003, with a covering note that includes:

> Please find attached our documents as per your directions dated 16 May 2003 in this matter.

15 In addition to the coversheet, the facsimile includes a 2-page written "Submission of the applicant" signed by Mr Bailey, an 8-page document provided by the applicant to Mr Bailey constituted by a list of people "aware of the situation" (apparently a list of persons the applicant was nominating as potential witnesses to Mr Bailey), a section headed "General Notes" and a section headed "Incidents", which is essentially a chronology of the events relevant to the applicant's claim to have been unfairly dismissed by the respondent. The facsimile also contains a letter of 5 December 2002 from one of the respondent's principals to the applicant asserting that the applicant's separation was by way of voluntary resignation, two Medical Certificates provided to the applicant in respect of stress relating to her work situation and an Employment Separation Certificate.

16 On 23 May 2003 the solicitors for the respondent sent a letter to Senior Deputy President Williams noting that they had, that day, "received from Gary Bailey at 12.02 pm … the submission of the applicant dated 23rd May 2003". The letter notes "the material in that submission is the first time we have seen these particulars or have been aware of the list of witnesses". The letter goes on to raise various matters adverse to the applicant's position and notes that the solicitors will be unable to attend to the matter during the month of June.

17 In a written decision dated 11 June 2003, Senior Deputy President Williams, without hearing further from the parties, rejected the applicant's Application for revocation.[3]

18 His Honour summarised the proceedings of 3 April 2003 as well as the submissions of Mr Bailey in support of a revocation order. He noted the correspondence from the respondent's solicitors which he had received on 16 May 2003 and which included their response to Mr Bailey's offer of 17 March. His Honour observed that it was open to conclude that the email request of 17 March for an extension of time was a recent invention given that Mr Bailey had not referred to it at the hearing on 3 April and, we infer, because it was not on the Commission's file. He also noted that another conclusion was that Mr Bailey was ill-prepared for the non-compliance hearing and had utterly failed in his duty to properly and adequately represent his client's interests at that hearing, or that Mr Bailey was of the view that the Commission does not take its directions seriously. His Honour found that, in any event, the email of 17 March, even if it had been sent, did not constitute an application for an extension of time; it merely foreshadowed such an application should the matter not have settled. His Honour also doubted that Mr Bailey had made a follow-up telephone call as again there was no record of this on the file, nor had Mr Bailey mentioned it at the 3 April hearing. Given that no attempt had been made by or on behalf of the applicant to comply with the direction out of time or within the extended time period allegedly requested, his Honour was not satisfied that either the applicant or Mr Bailey on her behalf took reasonable or adequate steps to request a variation of the directions. He also found that that failure

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3 *Oram v Derby Gem Pty Ltd* (unreported, AIRC, Williams SDP, PR932855, 11 June 2003).

resulted in there being no material on the file to determine whether the substantive application had any merit; a matter relevant to the exercise of the discretion to extend a time period. His Honour declined to revoke his order dismissing the substantive application.

19 As noted above, this is an appeal from the decisions of Senior Deputy President Williams of 3 April 2003 to dismiss the substantive application and the decision to refuse to vary or revoke that order, being the decision made in writing on 11 June 2003. The Notice of Appeal was filed out of time and, consequently, the appellant applies also for an extension of time in which to file her appeal and, necessarily, also seeks leave to appeal from the two decisions.

20 The appellant filed an affidavit in support of her applications. That affidavit gives a brief overview of her case against the respondent. Commencing at para 23, the balance of the affidavit is concerned with the appellant's dealings with Mr Bailey and, briefly at the conclusion of the affidavit, her retainer of the solicitors who act for her in the present appeal. Upon reading that affidavit, it was apparent to us that if Ms Oram's evidence in relation to her dealings with Mr Bailey were to be accepted, then having regard to what Mr Bailey submitted to Senior Deputy President Williams at the compliance hearing on 3 April 2003, Mr Bailey's conduct may well have involved gross negligence, dishonesty, and a deliberate attempt to mislead the Commission. The relevant portions of Ms Oram's affidavit, insofar as Mr Bailey is concerned, follow:

> 32. I immediately contacted Mr Bailey's office and was notified that the Form R25 had been completed and filed with the Commission.
> 33. Very shortly after 20 February 2003 I received from the Commission a Notice of Listing for 9am 7 April 2003 with Directions attached dated 20 February 2003. The Directions had attached to them the Commission's Practice Note — Victoria (Application for Relief in Respect of Termination of Employment) dated 24 January 2003. Now produced and shown to me marked "SO7" is a true copy of the Notice of Listing, Directions and Practice Note received by me shortly after 20 February 2003.
> 34. Noting that my submissions were due to be filed 17 March 2003 I forwarded Mr Bailey further correspondence and instructions on 10 March 2003. I expected, and had no reason to doubt, that Mr Bailey would immediately proceed to prepare and lodge my submissions which I understood to be a written statement of my case.
> 35. On or about 24 March 2003 I was extremely surprised to receive a further Notice of Listing from the Commission dated 21 March 2003, advising that the listing for 7 April 2003 had been vacated because I had not complied with the directions set for 17 March 2003 and the matter was now listed for Non-Compliance before the Arbitration Roster at 10.30am 3 April 2003. I still do not know why Mr Bailey did not comply, on my behalf, with the Directions. He had full instructions from me, I had given him the go ahead and I knew then, and know now, of no impediment to his compliance.
> 36. Consequently, straight after I received the Notice of Listing of 21 March 2003, I telephoned Mr Bailey's office to advise of receipt of this letter and to enquire as to how this came about. I was told by Mr Bailey's Assistant, Tanya, that Mr Bailey was unavailable but that the matter was "under control".
> 37. On 25 March 2003 Mr Bailey told me this matter now depended upon

whether I wanted to go on and that there would be more costs involved. Whilst I was a little mystified by this advice I asked Mr Bailey to proceed.

38. To that end, on 26 March 2003 I telephoned Mr Bailey's office to pass on contact details of a potential witness.
39. On or about 2 April 2003, I received an account from Mr Bailey seeking a further $770. A cheque was sent for this amount on 9 April 2003.
40. Between 2 April 2003 and 12 June 2003 I made a number of calls to Mr Bailey's office being advised on each occasion — sometimes by Mr Bailey and sometimes by members of his staff — that the matter was "under control". I cannot recall the precise dates of the calls made by me in that period.
41. On or about 12 June 2003 I received a copy of the Decision of Senior Deputy President Williams of 11 June 2003, the subject of this Application.
42. That was the first notification to me of the hearing of 3 April 2003, the application to revoke or vary the order of 3 June 2003 and their respective outcomes.
43. I was shocked and horrified by what I read on 12 June 2003.
44. Apart from what I read in documents sent to me by the Commission I had never been advised by Mr Bailey, or anyone else, that:
    a. there had been any discussions with the respondent or its representatives;
    b. there had been negotiations, or there were negotiations underway, with the respondent or its representatives;
    c. he had received the respondent's documents including its Form 21A — these have still not been provided to me by Mr. Bailey or anyone else;
    d. Mr Bailey had made written submissions to the Commission for either the hearing of 3 April 2003 and/or in respect of the application determined on 11 June 2003 — Mr Bailey had refused to provide me with copies of those documents. I have had to instruct my present Solicitors to seek those documents, and others, from the Commission;
    e. save for the invoice received on 2 April 2002, that I was indebted to Mr Bailey, that I should pay certain moneys to him by a certain date or what were the consequences of non-compliance were contrary to what Mr Bailey told the Commission on 3 April 2003, there were never any discussions about there being a delay in me getting money to him nor were there any such delays;
    f. Mr Bailey would repeatedly make misleading submissions, purportedly on my behalf, to the Commission — I never instructed Mr Bailey to lie to the Commission and if he had raised it with me I would have expressly instructed him not to lie on my behalf;
    g. I would require an extension of time for any reason. To the contrary I thought that my prompt actions at all times would mean that we would never have problems with meeting deadlines;
    h. Mr Bailey would fail to make timely approaches to the Commission and the respondent concerning his failure to ensure compliance with Directions of the Commission of 20 February 2003;
    i. the respondent had made the offer referred to at paragraph 9 of Senior Deputy President Williams' Decision of 11 June 2003 - I never instructed Mr Bailey to reject the offer and, in fact, never had any opportunity to consider either its acceptance or rejection;

j. the Commission had written to Mr Bailey on 16 May 2003 with further Directions;
k. there was an impediment to Mr Bailey lodging appropriate documentation prior to 23 May 2003;
l. Mr Bailey would be ill-prepared to represent me at the non-compliance hearing;
m. Mr Bailey would fail to represent my interests at the non-compliance hearing adequately or at all; or
n. Mr Bailey would incorrectly lead the Commission to believe that I had failed to provide him with adequate or timely instructions or funds.

45. I never instructed Mr Bailey to lie for me. His lies and misrepresentations to the Commission were of his own initiative and totally outside the authority given by me to him.
46. Although I was never particularly flush with funds I never delayed in making payment to him whenever I was requested to do so.
47. I never had any hesitation in instructing Mr Bailey to proceed and do all that was necessary to prepare my matter for hearing.
48. Having taken the weekend to digest the matters suddenly brought to my attention by the documents sent to me by the Commission, on Monday 16 June 2003 I telephoned Mr Bailey's office to find he was either not in or not available. I left a message for him to call back after 5 pm. He did not.
49. Having not heard from Mr Bailey by Tuesday 17 June 2003 I again rang Mr Bailey's office but was told to call him on his mobile. I did so and he told me he did not have a copy of the decision and asked me to facsimile a copy to him, after receipt of which he would call me back.
50. Although I facsimiled Mr Bailey a copy of the Decision on 17 June 2003 he did not call me back.
51. On Friday 20 June 2003, at about 2.45 pm, not having heard from Mr Bailey, I again telephoned his office and left another message for him to call me back. He did not.
52. On 20 June 2003, at about 4.30 pm, again not having heard from Mr Bailey I once more telephoned his office. His Assistant, Melody, told me that Mr Bailey was in the process of preparing a letter regarding the matter. That letter never arrived.
53. On Tuesday, 1 July 2003 I again called Mr Bailey's office. On this occasion he spoke with me and I asked him for an explanation of the current status of my matter.
54. Mr Bailey informed me he was still preparing a letter and his "barrister mate Peter Cash" would be taking over the matter for me.
55. On Wednesday 16 July 2003 Tanya, Mr Bailey's Assistant, telephoned me to tell me that attempts were being made to arrange a conference with Peter Cash at his office. I told her that I was still awaiting the letter from Mr Bailey.
56. In desperation I, on or about the end of the first week of August 2003 sought the assistance of the Law Institute of Victoria Referral Service and was subsequently referred to my present Solicitors. It was at that stage I discovered that Mr Bailey was not, and never had been, a Solicitor.

21 A proper exercise of the discretion to extend time in which to file an appeal turns, inter alia, on the Commission finding that there is an acceptable reason for the delay in filing the appeal. The respondent opposed an extension of time. Accordingly, the correctness of what Ms Oram alleged against Mr Bailey was

placed in issue as to whether time for filing the appeal should time be extended. It is also relevant to issues arising in connection with the determination of whether leave to appeal should be granted and, if leave is granted, on the appeal proper.

22 We will return to the conduct and evidence of Mr Bailey in detail. As will be apparent from that discussion and the findings that we make in relation to Mr Bailey, we were wholly unimpressed with the evidence of Mr Bailey. We formed the clear view that Mr Bailey was prepared, on occasions, to say anything that he perceived would advance his position without regard for the truthfulness of what was being said. A consideration of the transcript of the hearing before us demonstrates the unsatisfactory nature of Mr Bailey's evidence. On the other hand, we were impressed with the evidence of Ms Oram. She struck us as a careful and truthful witness. To the extent that she made concessions or admissions against interest in cross-examination we did not see this as detracting from her credibility but, rather, they tended to underscore the apparent care and truthfulness with which she approached the giving of evidence in the witness box. We generally prefer and accept the evidence of Ms Oram wherever it conflicts with that of Mr Bailey. For present purposes we make the following findings:

- At all material times Ms Oram's instructions to Mr Bailey were to prepare her case and proceed to a hearing.
- Well before 17 March 2003 Ms Oram had provided Mr Bailey with detailed instructions in relation to the circumstances relating to the termination of her employment and had identified potential witnesses.
- At all material times Ms Oram was ready and willing to provide to Mr Bailey such further instructions as may have been necessary for the preparation of her case.
- Ms Oram, while aware of the directions given on 20 February 2003 requiring the filing of submissions and evidence by 17 March 2003, reasonably assumed that Mr Bailey would act in accordance with her instructions and would proceed to prepare and file material in accordance with those directions.
- At no time did Mr Bailey notify Ms Oram that he, as her agent, was not able to comply, or would not be complying, with those directions.
- At no time did Mr Bailey discuss with Ms Oram the possible consequences of non-compliance with the directions;
- At no time prior to 3 April 2003 did Mr Bailey discuss with Ms Oram the need to seek a variation to the directions or an extension of time within which to comply with the directions.
- Mr Bailey did not inform Ms Oram of the listing of the matter for a "show cause" hearing. Rather, Ms Oram learned of the "show cause" hearing through correspondence from the Commission and was assured by Mr Bailey's office that the matter was "under control".
- On 25 March 2003 Mr Bailey told Ms Oram that the matter now depended upon whether she wanted to go on and that there would be more costs involved. Ms Oram gave Mr Bailey instructions to proceed and in no way suggested that she would be unwilling or unable to pay Mr Bailey's fees and disbursements.
- Ms Oram promptly attended to memoranda of fees rendered by Mr Bailey.

- Mr Bailey did not consult with Ms Oram, or seek her instructions, in relation to settlement offers passing between the representatives of the parties in the period leading up to the "show cause" hearing on 3 April 2004.

Implicit in these findings is a finding that there was no conversation between Mr Bailey and Ms Oram on or about 17 March 2003 as alleged by Mr Bailey.

23 Set against these findings, Mr Bailey conducted himself before Senior Deputy President Williams in a way that was deceitful and dishonest and deliberately intended to mislead the Commission.

24 Mr Bailey's first substantive statement to Senior Deputy President Williams on 3 April 2003 was:

> MR BAILEY: Sir, a week and a half ago I had spoken to the respondent's solicitors with a view to settling this matter and it was unfortunate that we couldn't. *We were quite hopeful of settling it and I have had contact with the client as early as last week, who ensures me that she can get some money to me to run her case.* She wishes to proceed and we could issue witness statements and submissions within the next fortnight.

(Our emphasis.)

In context, Mr Bailey, in making the emphasised remark, was seeking to convey to Senior Deputy President Williams that lack of funds had been an impediment to the proper preparation of the case until that point. Such an intimation was false.

25 The explanation given by Mr Bailey to Senior Deputy President Williams for the failure by the applicant to comply with the directions was the expectation of Mr Bailey and the applicant that the matter would settle:

> PN7
> MR BAILEY: *The reason for non-compliance, sir, is because we thought the matter would settle*. We had regular contact with Brian Williams, who is the counsel's instructor and however, those talks have been unsuccessful.
> PN8
> THE SENIOR DEPUTY PRESIDENT: Notwithstanding that, there has been no request at an earlier stage made for an extension of time or for a variation to the directions in any shape or form.
> PN9
> MR BAILEY: *Well, sir, as I said, the reason for that is because we thought the matter would settle* and unfortunately it hasn't.

(Our emphasis.)

We are satisfied that the emphasised statements were deliberately false and misleading. The reason for non-compliance was because Mr Bailey, no doubt in the hope that the matter would settle, had failed to carry out Ms Oram's instructions and neglected to undertake the preparation necessary to comply with the directions. In context, the emphasised statements sought to convey to Senior Deputy President Williams that, with a view to limiting her expense, a conscious decision had been made by the client to refrain from preparing the case in the expectation — both of Mr Bailey and the client — that the matter would settle. In fact, Mr Bailey at no time discussed offers of settlement with Ms Oram. When regard is had to the correspondence between the representatives of the parties we do not think that an advocate in Mr Bailey's position could reasonably have formed the view that the matter would settle or

would be likely to settle. In particular, the letter from the respondent's solicitors opposing the revocation application discloses the implausibility of Mr Bailey's assertion to Senior Deputy President Williams. In their facsimile transmission of 16 May 2003 they expressed outrage as to the basis of the application and attached a copy of a fax they had sent to Mr Bailey the day after the appellant's material had been due. That facsimile was apparently in reply to a telephone conversation of the previous day with Mr Bailey. The only offer the respondent was prepared to make was "as a matter of compromise and only to save the time of appearing at the hearing our client is prepared to pay your client's costs to be fixed at $1,200.00." The fax went on to indicate that it was the only offer that would be made and it was open to 5.00 pm the following day after which it was withdrawn. Mr Bailey was drawing a long bow in suggesting that the matter had been likely to settle.

26 Mr Bailey misled Senior Deputy President Williams on the issue of whether there had been a request for an extension of time. The transcript records the following exchange:

> PN8
> THE SENIOR DEPUTY PRESIDENT: Notwithstanding that, there has been no request at an earlier stage made for an extension of time or for a variation to the directions in any shape or form.
> PN9
> MR BAILEY: Well, sir, as I said, the reason for that is because we thought the matter would settle and unfortunately it hasn't.

Mr Bailey's response to the statement by the Senior Deputy President implicitly accepted that there had been no request for an extension of time in which to comply with the directions and sought to advance an explanation for that omission. However, such an application had in fact been made, albeit that the document had not found its way to the Commission file. Mr Bailey's response wrongly implied that there had been no such application. This inexplicably misled Senior Deputy President Williams contrary to the interests of his client.

27 At Transcript PN10 Senior Deputy President Williams asked whether Mr Bailey made his client "aware of the possible effect of non-compliance". Mr Bailey replied:[4]

> *Sir, I did*. However, I said that due to the circumstance that it put her in, she should get an extension.

(Our emphasis.)

We are satisfied that at no time did Mr Bailey make Ms Oram aware of the possible consequences of non-compliance and his assertion to the contrary to Senior Deputy President Williams was a deliberate lie.

28 At transcript PN13 Mr Bailey said to Senior Deputy President Williams:

> I advised [Ms Oram] that the Commission should grant an extension in the circumstances.

We are satisfied that Mr Bailey gave Ms Oram no such advice and that this assertion to Senior Deputy President Williams was a deliberate lie.

29 At transcript PN14 Senior Deputy President Williams asked Mr Bailey: "Did [Ms Oram] instruct you to seek an extension of time?" Mr Bailey replied: "Yes, she has now". Again, we are satisfied that the question of an extension of time

4 Transcript PN11.

was not discussed with Ms Oram and Mr Bailey's assertion that Ms Oram had "now" given him instructions to seek an extension of time was a deliberate lie. Indeed, when Senior Deputy President Williams pressed Mr Bailey on whether Ms Oram gave instructions to him to seek an extension of time, he stated:[5]

> Well, sir, she has instructed me to proceed. *She is not up with what is an extension of time* and what is required by the rules of the Commission but she has given me full instructions to go ahead with her case.

(Our emphasis.)

30 It was true that Ms Oram had given Mr Bailey "full instructions to go ahead with her case". However, those had been Ms Oram's consistent instructions since the commencement of the matter and to imply, as Mr Bailey did, that instructions of that sort had only latterly been given following the failure of settlement negotiations involved a deliberate deception on the part of Mr Bailey.

31 The truth of the matter was that the fault for non-compliance with the directions lay entirely with Mr Bailey. Ms Oram had given Mr Bailey instructions to prepare the case and proceed to a hearing; she had provided Mr Bailey with extensive instructions and the names of potential witnesses and she had promptly attended to the memoranda of fees rendered by Mr Bailey. No doubt Mr Bailey had hoped that the matter would settle and he may have believed that the matter would settle, albeit that we do not accept that a reasonable advocate in Mr Bailey's position could have held such a belief. The simple fact of the matter is that the directions were not complied with because Mr Bailey had failed to do what he had been retained to do. An advocate observing the basic standards of candour and honesty expected of advocates in the Commission would have admitted responsibility for the non-compliance and craved the indulgence of the Commission on the basis that it would be unfair to visit the neglect of the representative on the client. Instead, Mr Bailey made a series of statements to Senior Deputy President Williams that, taken together, misled Senior Deputy President Williams as to his, Mr Bailey's, own responsibility for the non-compliance and falsely insinuated that such responsibility lay with his client. Mr Bailey's conduct in this regard is nothing short of disgraceful and a gross breach of the fiduciary duties he owed to Ms Oram.

The Appeal

Extension of Time to Appeal

32 The notice of appeal was filed on 14 October 2003. It was accompanied by an application for an extension of time to institute an appeal. The appeal is made under s 45(1)(g) of the Act and is said to be "against a decision not to revoke or vary an order dismissing an application for relief …". At the hearing before us leave was granted, with the consent of the respondent, to the appellant to amend the notice of appeal so as to also make it an appeal against the decision of 3 April 2003 dismissing Ms Oram's substantive application.

33 The first order was made on 3 April 2003, and the refusal to revoke it occurred on 11 June 2003. It is self evident that the appeal was instituted well beyond the 21 days allowed by R.11(2).

34 Given the overlap of issues arising on the application for extension of time, the application for leave to appeal and, if leave is granted, the appeal proper,

5 Transcript PN23.

with the concurrence of the parties, the matter proceeded on the basis that we were dealing with the two applications for leave and the appeal proper concurrently.

35 In a nutshell Ms Oram contends that she was misled by her representative, Mr Bailey, and that it was only when she obtained alternate independent advice that she knew what to do. In her affidavit Ms Oram detailed the chronology of her dealings with Mr Bailey. She discovered that there had not been compliance with the directions only when she received the notice of listing on 21 March 2003 advising that the listing for 7 April had been vacated and that the matter had been listed for a non-compliance hearing on 3 April 2003. She immediately contacted Mr Bailey and kept in touch with his office. She was thereafter led to believe by his office that the matter was under control. She was not informed that the hearing had gone ahead on 3 April or that her application for relief had been dismissed on that day. Indeed, it would appear that she was not told of the application to revoke or its result and that she only learned of that application when she received a copy of Senior Deputy President Williams' decision from the Commission on Thursday 12 June 2003. On the following Monday she attempted to contact Mr Bailey. She rang him again the next day and was told by him that he did not have a copy of the decision. Ms Oram sent him a copy of it by facsimile transmission that day. He did not call her back as he had said he would. Despite several attempts she was not able to speak with him until 1 July, when he told her that he was preparing a letter for her and that a barrister would be taking over the matter. On 16 July, Mr Bailey's assistant phoned her to tell her that attempts were being made to arrange a conference with the barrister. Ms Oram told her that she had still not received the letter from Mr Bailey.

36 Ms Oram waited for a couple of weeks during which time she heard nothing more from Mr Bailey. At the end of the first week of August she contacted the Law Institute of Victoria's referral service, at which time she discovered that Mr Bailey was not a solicitor. She was subsequently referred by the Law Institute to her present solicitors, who she contacted during the first week of September. She was asked if she could wait a week until Mr Duggal commenced employment there as its employment law specialist. She instructed Mr Duggal on 12 September and he briefed counsel on 16 September. Her solicitors then contacted the Law Institute of Victoria to seek its assistance, but as Mr Bailey was not a solicitor, no assistance was forthcoming. The Notice of Appeal was filed on 14 October.

37 In opposing the extension of time to file the appeal Mr Bromley points to the delay of some three weeks between the last contact Ms Oram had with Mr Bailey's office on 16 July and her engaging her present solicitors, as well as the delay from then until the appeal was lodged; a little over a month. Mr Bromley referred us to *Dundovich v P & O Ports*[6] for an exposition of the principles guiding the exercise of the discretion to extend time for the filing of an appeal. We agree that the matters relevant to the exercise of the Commission's discretion include:

- Whether there is a satisfactory reason for the delay;
- The length of the delay;

6 *Dundovich v P & O Ports* (unreported, AIRC, PR923358, 8 October 2002).

- The nature of the grounds of appeal and the likelihood of one or more of those grounds being upheld if time was extended; and
- Any prejudice to the respondent if time was extended because of developments after the time for lodgment had expired

Reason for the Delay

38 We have set out the appellant's explanation for the delay. It is apparent that Ms Oram had put her trust in Mr Bailey, who she had no reason to suppose would act for her other than with integrity and in a professional manner. Mr Bailey holds, and held, himself out as a specialist consultant. She acted with reasonable diligence until the time that she received Senior Deputy President Williams' decision on 12 June 2003. We have set out the sequence of events after 12 June. We accept the she has a satisfactory explanation for the time it took her to engage her solicitors. She had been continually fobbed of by Mr Bailey and his staff until she finally despaired and approached the Law Institute. In the circumstances we also accept that there is a satisfactory reason for the delay between the time she engaged her solicitors and the lodging of the appeal. Ms Oram had placed her faith in her new legal representatives who acted with reasonable diligence in acting for her. We doubt that she was in any position to have them proceed with greater alacrity. Accordingly, we find that there is a satisfactory explanation for the delay.

The Length of the Delay and Prejudice to the Respondent

39 The delay is substantial, but in the absence of prejudice to the respondent, having accepted that there is a satisfactory explanation for the delay, we do not believe that the lengthy period of the delay is fatal to the application for extension of time. Mr Bromley properly conceded that apart from the effect on witnesses' memories, his client was not prejudiced by the delay.

The Prospects of Success on the Appeal

40 For reasons that we will later articulate we are satisfied that, if Ms Oram's version of events is accepted, the appellant has a reasonable prospect of success on both the question of leave to appeal and on the substantive appeal.

Conclusion on the issue of Extension of time to Appeal

41 It follows that we have decided to grant the extension of time sought. Pursuant to R.(11)(2)(c) we extend the time period for lodging the appeal until the date upon which it was lodged.

Leave to Appeal and the Appeal

42 We extract and adopt the following summary of relevant principles by Full Bench in *Smith and Kimball v Moore Paragon Australia Ltd*:[7]

> [6] An appeal to the Full Bench lies only by leave of a Full Bench: s 45(1). A Full Bench must grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted: s 45(2). Otherwise, a grant of leave is governed by the conventional considerations for the grant of leave to appeal by an appellate court which include whether the decision is attended with sufficient doubt to warrant its reconsideration or whether substantial injustice may result if leave is refused. However, "[t]hese 'grounds' should not be seen as fetters upon the broad discretion conferred by s 45(1), but as examples of circumstances

7 *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446.

which will usually be treated as justifying the grant of leave" although "[i]t will rarely, if ever, be appropriate to grant leave unless an arguable case of appealable error is demonstrated. This is so simply because an appeal cannot succeed in the absence of appealable error".

[7] The need for an appellant to demonstrate error is made explicit in the case of appeals from orders made in connection with an application under s 170CE. In particular, s 170JF(2) provides:

> For the avoidance of doubt, an appeal to a Full Bench under section 45 in relation to an order made by the Commission under Subdivision B of Division 3 may be made only on the grounds that the Commission was in error in deciding to make the order.

[8] The decision of the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309 makes it clear that [because a Full Bench of the Commission has power under s 45(6) to receive further evidence on appeal],an appeal under s 45 "is properly described as an appeal by way of rehearing", that the powers under s 45(7) "are exercisable only if there is error on the part of the primary decision-maker" and that this is so "regardless of the different decisions that may be the subject of an appeal under s 45".

(Footnotes deleted.)

43 We consider it to be manifestly in the public interest to grant leave to appeal in this case. For the reasons that appear later, we find that Mr Bailey deliberately misled and deceived both the Commission and his client. In circumstances where the evidence establishes, prima facie, that the misconduct of a party's representative resulted in a miscarriage of justice the matter would generally be of such importance that in the public interest leave to appeal should be granted, and pursuant to s 45(2) of the Act, must be granted.

Did Senior Deputy President Williams Err?

44 This case raises difficult questions about what constitutes "error". That is so because a good deal of any error was caused by the dishonesty and incompetence of Mr Bailey. For instance, when Mr Bailey said to Senior Deputy President Williams "…and I have had contact with the client as early as last week, who ensures me that she can get some money to me to run her case." there can be little doubt that he was seeking to have the inference drawn that a reason for the delay was that Ms Oram had not paid Mr Bailey's fees prior to the deadline for the filing of her material. It is clear from Mr Bailey's and Ms Oram's evidence before us that that was certainly not the case. To the extent that his Honour may have relied on the fact that Ms Oram had not prosecuted her case with due diligence because she had not paid Mr Bailey, that was an error. However, it was an error that must be sheeted home to the dissembling submission of Mr Bailey. Yet, at the time, it was not erroneous for his Honour to accept what Mr Bailey had told him as there was nothing to indicate that he wasn't being truthful. This raises the question of whether in the circumstances Senior Deputy President Williams was in error in deciding to make the order to dismiss the substantive application.

45 The basis of Senior Deputy President Williams' decision of 3 April was that there was no attempt by the appellant to comply with the directions, nor had there been any request for a variation to or extension of them. His Honour, finding that there was no satisfactory explanation for the failure to comply, nor material upon which he could consider the merits of the substantive application,

dismissed it. Although his Honour cannot be criticized in relation to his finding that there had been no request for an extension of time — this was what Mr Bailey had told him — we now know that such a request had in fact been sent to the Registry. It seems to us, therefore, that his Honour's finding involved an error for the purposes of, and as contemplated by, s 170JF(2). Putting aside jurisdictional facts where the issue is not whether the finding was open but whether the finding was correct, it will typically be the case that a finding of fact cannot be characterised as involving error where such finding was reasonably open on the evidence and material actually before the member. However, it is otherwise if the fact in question relates to what did or did not occur in the Registry. In relation to such matters the issue is what in fact occurred.

46 On the application for revocation Mr Bailey relied on different grounds to those advanced at the original hearing. They are set out in paragraph 7 of these reasons. Not surprisingly, given that Mr Bailey had not mentioned at the hearing of 3 April that he had emailed a letter seeking an extension on 17 March, nor had he mentioned that he had made a follow up telephone call, the Senior Deputy President was doubtful that either of those events had occurred. As we now know, having had the benefit of a search conducted by Mr Donnellan, a facsimile transmission from Mr Bailey was received in the Registry on 17 March 2003. Mr Donnellan could not open the attachment, and appeared not to have placed a copy of the fax on the file. As indicated at paragraph 8 of these reasons the facsimile merely stated "please find enclosed Attachment for your attention." Mr Donnellan could not recall the telephone call with Mr Bailey.

47 Upon receipt of the respondent's objection to the revocation application his Honour required Mr Bailey to file and serve submissions in support of the application. His Honour indicated that he might decide the matter on the papers, which he ultimately did.

48 Mr Bailey filed a two page submission and attached what appears to have constituted the bulk of his file. The submissions repeated Mr Bailey's assertions that he had written to the Commission on 17 March 2003 and followed up with a telephone call to Mr Donellan. The submission contended that "the Applicants (sic) representatives did take reasonable steps in notifying the Commission of its request" and that insufficient time to deal with evidence could lead to a denial of natural justice. Mr Bailey went on to say that his client's case was meritorious and referred to the attachments to the submission. Extraordinarily, the attachments comprised Ms Oram's instructions to Mr Bailey and some other documents and were also sent to the solicitors for the respondent with the submission. There is no suggestion that Mr Bailey sought his client's instructions to the privilege or confidentiality subsisting in those documents.

49 At para 16 of his decision Senior Deputy President Williams found that even were he to accept that the letter of 17 March 2003 had in fact been sent, it nevertheless did not constitute a request for an extension of time. He held that to the extent that it did contain a request it was contingent on there being no settlement of the matter. We disagree. In our view, properly construed, the letter of 17 March was a request for an extension of time for filing the documents required by the directions. The relevant paragraph reads: "Should this matter not settle, we would request that the Commission extend the time for the said directions until Friday 21 March 2003." That seems to us to be a request that the

time for compliance with the directions be extended by four days. Implicit in the request is an indication that the matter might settle, in which case there would, of course, not be any need to comply with the directions.

50 It seems to us that his Honour's finding that there was no request was understandably influenced by his well-founded scepticism as to whether the letter had indeed been sent. Mr Bailey was negligent and grossly incompetent in not referring to that letter at the hearing of 3 April, and that led his Honour into error.

51 Although his Honour erred in finding that there had been no request, he correctly observed that in any event no documents were filed by 21 March. This led him to conclude that he was "not satisfied that either the applicant or Mr Bailey on her behalf took either reasonable or adequate steps to request from the Commission a variation to the Commission's directions."[8] Thus at the time of the non-compliance hearing on 3 April 2003, although there had been a request for an extension of time to 21 March, no documents had been filed. Mr Bailey's implausible explanation for that is that not having heard whether his request had been granted he thought it better to wait until the non-compliance hearing.

52 We are also of the view that his Honour erred in holding at paragraph 20 that the failure of the appellant to comply with his directions resulted in there being nothing before the Commission to enable him to form a view as to whether her case had sufficient merit to warrant her being permitted to pursue her application. In accordance with his Honour's direction on the revocation application Mr Bailey filed the documents to which we have referred. A perusal of the appellant's instructions to Mr Bailey discloses that if her version of events is believed she may well have a case for relief in respect of the termination of her employment. That material was before the Senior Deputy President.

The Rehearing

53 Having granted leave to appeal, the appeal proceeds by way of a rehearing. The appellant's case is essentially that she was blameless and should not be penalized for the misconduct of her representative. Her unwavering instructions to Mr Bailey were that he was to pursue her claim, she was at all times ready and able to do what was necessary to comply with the directions, she paid Mr Bailey's fees promptly, she provided him with the information that he would have needed in order to comply with the directions in adequate time, she immediately pursued Mr Bailey when she found out about the non-compliance hearing and she was unaware that Mr Bailey was dealing with her case in the Commission in the manner to which we have previously referred.

54 For the respondent it is put that on the material before him Senior Deputy President Williams came to the correct conclusion, and that in any event Ms Oram has not prosecuted her appeal with alacrity. We have dealt with these matters on the issue of extension of time to appeal. We do not accept the respondent's contention that we should hold against the appellant the fact that she did not comply with the directions after Mr Bailey sought the revocation of

8 *Oram v Derby Gem Pty Ltd* (unreported, AIRC, Williams SDP, PR932855, 11 June 2003) at [18].

the order dismissing her substantive application. There was no point in her doing so unless and until the order was revoked. Indeed, there were no extant proceedings, other than her application for revocation.

55 It was also put that the sins of Ms Oram's representative should not be visited upon the respondent and that Ms Oram had the ability to seek redress against Mr Bailey. As is clear from his inability to provide security for costs, Mr Bailey is apparently impecunious, so any rights Ms Oram might have against him may be more illusory than real.

56 The respondent submits that given the short period of the appellant's employment, some 16 weeks, the relief available to her would have little practical effect, should the appeal be allowed and should she succeed on her substantive application. We are not persuaded by this argument. Ms Oram has already invested a good deal of time and energy into the prosecution of her case. It is a matter for her as to whether to continue with it should she be granted that right by us.

57 Finally, the respondent contends that here has been no miscarriage of the exercise of Senior Deputy President Williams' discretion such that, applying the principles enunciated in *House v The King*,[9] this Full Bench would be justified in interfering with his Honour's decisions. Whilst we accept that because this an appeal against a discretionary decision the *House v The King* principles are applicable, we are of the view that the Senior Deputy President's discretion miscarried in that, not being fully apprised of the facts, as we are now, he failed to take into account the highly material consideration of Mr Bailey's conduct and erred in the manner we have identified.

58 In this rehearing we are accordingly entitled to exercise our own discretion and given that we have the material to do so we allow the appeal and set aside his Honour's decisions and orders. The appellant is to file and serve the material required by the directions within fourteen days of the date of this decision, the respondent within fourteen days thereafter, and the matter will be heard by Commissioner Blair on a date to be fixed by Commissioner Blair. Any costs application in relation to the applications and appeal before us will be heard by Vice President Lawler.

The Role of the Commission in Relation to Misconduct by Advocates

59 Section 42 of the Act relevantly provides:

> 42(1) [*Appearance in person*] A party to a proceeding before the Commission may appear in person.
>
> 42(2) [*Prescription*] Subject to this and any other Act, a party to a proceeding before the Commission may be represented only as provided by this section.
>
> 42(3) [*Counsel*] A party (including an employing authority) may be represented by counsel, solicitor or agent:
>
> (a) by leave of the Commission and with the consent of all parties;
>
> (b) by leave of the Commission granted on application made by a party, if the Commission is satisfied that, having regard to the subject-matter of the proceeding, there are special circumstances that make it desirable that the parties may be so represented; or

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9 *House v The King* (1936) 55 CLR 499.

(c) by leave of the Commission, granted on application made by the party, if the Commission is satisfied that the party can only adequately be represented by counsel, solicitor or agent.

60 If one of the criteria in s 42(3) is satisfied, a party may, *with the leave of the Commission*, be represented by "counsel, solicitor or *agent*". In the major capital cities there are industrial advocates who, while not admitted to practise as solicitors or barristers, regularly seek, and are granted, leave appear on behalf of applicants and/or respondents as "agent" in proceedings before the Commission. There is no system of registration for industrial advocates.

61 It is essential to the proper administration of justice generally, and the interests of justice in particular matters, and clearly in the public interest, that representatives who appear for parties in the Commission act with, and observe, the highest standards of probity, candour and honesty. The capacity for members to rely upon the honesty and integrity of representatives and place faith in what they say and do before the Commission is essential to the proper dispatch of the Commission's business.

62 A grant of leave to appear pursuant to s 42(3) of the Act is based upon a presumption that is so obvious that it ought not need to be stated; namely, that the representative to whom leave is granted will conduct him or herself with probity, candour and honesty. The duty of advocates in that regard has long been recognised by the Commission. For example, in *AFMEPKIU v Energy Developments Ltd*[10] a Full Bench noted:[11]

> It is a long standing principle of this Commission and its predecessors that there is a duty on persons appearing before the Commission to ensure that there is full and frank disclosure of all matters which are relevant to the proper determination of the matter before the Commission [see *Municipal Officers Association of Australia v City of Greater Brisbane* (1927) 25 CAR 932 at 935 per Lukin J].

63 Legal practitioners throughout Australia are subject to disciplinary regimes under which an appropriate authority can take action in relation to professional misconduct and other improper behaviour by a legal practitioner. The ultimate sanction when such misconduct is established is the removal of the legal practitioner's right to practise. It is well established that the purpose of such disciplinary proceedings is protective rather than punitive.[12] It is fundamental to the proper administration of justice and the protection of the public that persons who behave dishonestly have no place appearing as solicitor or counsel before a Court.

64 There is no equivalent disciplinary regime in relation to industrial advocates who are not legal practitioners but who regularly appear before the Commission. Accordingly, when the Commission is confronted with evidence that suggests an industrial advocate may have engaged in dishonest or disgraceful behaviour it falls to the Commission to take appropriate action. The Commission is a creature of statute and can only exercise such powers as are conferred on it explicitly or implicitly by Parliament. Within the limits of those

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10 *Re Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (unreported, AIRC, CM9753, Ross VP, Maher DP, McDonald C, 1 March 1996).

11 *Re Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (unreported, AIRC, CM9753, Ross VP, Maher DP, McDonald C, 1 March 1996) at p 5.

12 See, for example, *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183-184 per Barwick CJ, Kitto, Taylor, Menzies and Owen JJ.

powers, the Commission is entitled to, and should, in an appropriate case, take action in the public interest to protect the integrity of its own processes.

65 We take the view that it is an affront to the interests of justice in the broadest sense for there to be behaviour on the part of an advocate which involves dishonesty or a deliberate attempt to mislead the Commission, and that it is in the interests of justice and in the public interest for the Commission to take such steps as are properly available to it to ensure that this does not occur. We take the view that it is clearly within the power of the Commission to make findings about conduct by an advocate where that conduct is relevant to an issue in dispute between the parties.[13]

66 Where the findings so made are that there has occurred serious misconduct, the Commission may observe that the conduct so found may provide a proper basis to refuse leave to the representative to appear in future matters before the Commission. We recognise that the discretion conferred by s 42 cannot be fettered so that, where such an observation is made, members of the Commission in future matters must retain a discretion pursuant to s 42 to grant leave to the representative in question notwithstanding the observation. It goes without saying that an observation of the sort to which we have referred ought not be made unless the representative in question has been given a proper opportunity to be heard and any allegations of deceit or dishonesty or other serious misconduct have been established to the standard referred to in *Briginshaw v Briginshaw*.[14]

67 Moreover, where, in an appropriate case, the protective function identified above has been enlivened, we take the view that it is entirely appropriate, and within the power conferred by s 110(2) of the Act, for the Commission to introduce material at its own initiative and to take a more interventionist approach to the questioning of witnesses than would ordinarily be appropriate.

Mr Bailey

68 As we stated earlier, Mr Bailey's conduct is an issue in these proceedings and it has been necessary that we make findings in relation to it. As has already become clear, the findings are of an extremely serious and troubling nature. Their ramifications will also have serious consequences for Mr Bailey. We have been at pains to ensure that he has had a reasonable opportunity to put whatever he wanted to in relation to the allegations made against him.

69 In order to have Mr Bailey give evidence on her behalf, the solicitors for the appellant had arranged for a summons to give evidence and to produce documents to be served on Mr Bailey. That summons[15] required Mr Bailey to attend before this Full Bench at 10.00 am on Monday, 8 December 2003 (being the date that the appeal and associated applications were listed for hearing) "and so from day to day until the hearing of the abovementioned matter is completed or until you are excused from further attendance, *to give evidence on behalf of Ms Oram*". The summons required Mr Bailey to bring with him and produce documents, namely:

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13 It is conceivable that such findings might also be made in the context of determining application for leave to appear pursuant to s 42(3) of the Act.

14 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

15 Exhibit 1.

> Your file in respect of the appellant's Unfair Termination Application (U2002/6951) and any additional materials held by you in relation to this application.

70 Shortly after 10.00 am on 8 December 2003, the summons to Mr Bailey was called on. There was no appearance by him. Vice President Lawler's associate, Ms Janine Webster, then made contact with Mr Bailey by telephone and had three separate conversations with him. She gave evidence of those conversations and her evidence, given by reference to a contemporaneous file note is as follows:

> The first call at approximately 10.14 am, I called Mr Bailey on a mobile number provided by the applicant, Ms Oram. I said words to the effect, hello, is that Mr Bailey and he replied yes. I then said, it is Janine Webster here, associate to Vice President Lawler from the Federal Industrial Relations Commission. He replied, can you hold on, I have someone else on the other line. I replied, certainly. I was then placed on hold for a short time before Mr Bailey returned. When Mr Bailey came back to the call I said words to the effect, I am calling on behalf of the Full Bench in the matter that you are being subpoenaed to attend before today; are you on your way to the Commission. Mr Bailey replied, no, I am not coming, the side that has subpoenaed me haven't given me any money. I said, Mr Bailey, I think that you should attend, anyway. The Bench has indicated that this is a significant matter. He said, well, I am not coming down, I have something else I need to attend to today and they haven't given me any money. I said, okay, then, I will convey that to the Bench. In relation to the second call, I called Mr Bailey back at approximately 10.l8 am, I told him that the Full Bench has indicated that there does not need to be compliance money given to you to attend and that you should attend to answer the subpoena. He said, look, the file is in the mail, anyway. I said, what file is that, you mean the Oram file? He said, yes. I said, I think you should attend, anyway, the Bench has asked me to convey to you that this is a matter of personal significance to you. Mr Bailey said, what do they mean by that? And I replied, I don't know exactly, I am just conveying the message to you. I said that if you do not turn up the incident will be referred to the appropriate authorities. He said, well, I am not turning up. At this point there was a short silence which I broke by saying, well, I need to convey to you that the Full Bench has said that this is a matter of high importance and that they think that you should attend. He replied, okay, thank you for your call. The third call I made at approximately 10.53 am, I called Mr Bailey in front of the Vice President Lawler and Bronwyn Corless and I said words to the effect, Mr Bailey, it is Janine Webster here again. The Full Bench has asked me to read you a message that they want me to convey to you, so if you can just bear with me. I then read the following words to Mr Bailey:
>
> > PN76
> >
> > You have been served with a summons to attend to give evidence and produce documents in matter number C2003/5961 being an appeal by Sandra Oram, a former client of yours. The appellant's case in support of her applications for leave to extend time to appeal, leave to appeal and her substantive appeal properly raise factual issues which directly affect your interests. The Full Bench is minded to grant you leave to intervene in this matter as a person who should be heard because your interests are potentially adversely affected by the issues that fall for determination. The allegations made against you by the appellant amount to allegations of gross negligence, deceit and dishonesty and intentionally misleading the Commission. You are on notice that unless you attend, forthwith, in compliance with the summons the Bench may proceed to hear and determine this matter in your absence. You are on notice that if the

appellant's factual contentions are established this could involve inter alia the Full Bench making observations to the effect that your conduct in this matter, together with other material on the public record including, in particular, the decision of Ashley J in *Victorian Lawyers RPA Ltd v Bailey* [2000] VSC 162 and provides a compelling basis for Members of the Commission refusing you leave to appear in the future in other matters before the Commission. Unless you tell me that you will be attending, forthwith, the Full Bench will assume that you have chosen not to attend in answer to the summons and that you do not wish to afford yourself an opportunity to be heard in relation to the factual matters raised in the appeal and in relation to any observations the Full Bench may make adverse to your interests.

PN77

I then said to Mr Bailey, did you hear — words to the effect, did you hear and understand everything that I said? Mr Bailey then replied, yes, well I have to speak to my solicitors. I asked, are you going to attend, Mr Bailey? And he said, no, I reserve my right to legal advice on that. And I said, the Full Bench says that you should attend, and he responded, I will seek legal advice on that. I then concluded the call.

71 We note that the decision of Ashley J in *Victorian Lawyers RPA Limited v Bailey* had been included in the respondent's list of authorities.

72 It is apparent from what Ms Webster said to Mr Bailey, that he was made aware of the seriousness of the allegations against him made by Ms Oram as well of the possible consequences if the Commission accepted her evidence.

73 Following the conversations with Ms Webster, Mr Bailey faxed a letter to the presiding member. Although it was marked "Without Prejudice" we do not accept that we may not refer to it in setting out the chronology of events. He confirmed his intention to attend on 9 December, and indicated that he wished to be represented but had failed to secure any representation. He asked to be provided with a copy of the transcript of proceedings of 8 December, sought directions for the exchange of documents and any other matters that the Commission deemed fit. Finally, Mr Bailey acknowledged receipt of the summons to witness received by his office on 4 December 2003 and indicated that he declined to answer the summons "on the basis that I might incriminate myself in any future proceedings current and otherwise that may be filed against me by Ms Oram in a court of competent jurisdiction."

74 After Ms Webster's conversation with Mr Bailey it came to the attention of the Bench that at the time of at least some of the calls made by her and referred to above, Mr Bailey was, in fact, in the Commission premises representing another applicant in conciliation proceedings. The Bench arranged for officers of the Registry to seek out Mr Bailey and indicate that his attendance was required forthwith before the Full Bench in compliance with the summons. Mr Nassios, the Deputy Industrial Registrar, and Mr McLeod gave evidence of identifying Mr Bailey in conference room 3A on level 34 of the Commission premises and having a conversation with him in which they indicated that his attendance was required forthwith before the Full Bench in compliance with the summons. By 2:15 pm on 8 December 2003, Mr Bailey had still not appeared in answer to the summons, the phone calls from the associate to Vice President Lawler or the communication by Mr Nassios. In the meantime, the Commission had heard evidence from Ms Oram, who had been cross-examined by Mr Bromley for the respondent. The respondent did not object to an

adjournment of the matter and it was adjourned to Wednesday, 10 December 2003 at 10.00 am to provide a further opportunity to obtain the attendance of Mr Bailey and the production of the documents covered by the summons. Vice President Lawler's associate wrote a letter to Mr Bailey informing him of this fact and, repeating the terms of the message from the Full bench that she had earlier orally conveyed to him. In subsequent communications with Mr Bailey, he indicated to the associate to Vice President Lawler that he was unable to attend the Commission at 10.00 am on Wednesday, 10 December 2003, but that he could attend at 9.00 am on that day. The Full Bench relisted the matter for 9.00 am on 10 December 2003 on the basis that nothing substantively affecting the interests of the respondents would be dealt with until counsel for the respondent was available, anticipated to be later on that day.

75 As well as the letter to Mr Bailey referred to above, copies of relevant documents including the transcript of proceedings on 8 December 2003 and the affidavit of Ms Oram were handed to Mr Bailey at about 2:30 pm on 9 December 2003.

76 When the Full Bench resumed hearing the matter shortly after 9.00 am on Wednesday, 10 December 2003, Mr Bailey was in attendance.

77 The transcript records what occurred at that point:

> PN571
> VICE PRESIDENT LAWLER: I note the appearances of Mr Devries and Mr Bromley. Would you be Mr Bailey?
> PN572
> MR G. BAILEY: Yes, your Honour, I am and I appear for myself today.
> PN573
> VICE PRESIDENT LAWLER: Thank you, Mr Bailey.
> PN574
> MR BAILEY: Thank you, your Honour.
> PN575
> VICE PRESIDENT LAWLER: Mr Bailey, there has been correspondence between my associate and yourself - - -
> PN576
> MR BAILEY: There has and I thank you for that, your Honour, and that correspondence at this point in time is being delivered to my solicitors. I have been instructed by them to seek an adjournment today on the basis that they haven't had enough time to prepare or read the material and he is in another matter in another court all week so - - -
> PN577
> VICE PRESIDENT LAWLER: Who is "he", Mr Bailey?
> PN578
> MR BAILEY: That will be Mr Cash, Peter Cash.
> PN579
> VICE PRESIDENT LAWLER: Mr Peter Cash. You say Mr Peter Cash is in another matter right now at 9 o'clock - - -
> PN580
> MR BAILEY: He is. He has got an armed robbery on, sir, I am told, in the Magistrates Court in Melbourne. He has had since Monday.
> PN581
> VICE PRESIDENT LAWLER: Now, Mr Bailey, the solicitors that you are taking advice from are who?
> PN582

MR BAILEY: I have had advice from two lots of firms, sir. One from Cash & Stavroulakis, Lawyers, of Queen Street in Melbourne, and the other from Beaumont Christiansen, Lawyers, of Camberwell. The reason I - I had a colleague of mine who I work with in the industrial relations field who referred me to Beaumont Christiansen due to the fact that Mr Cash was unavailable during the week and they have basically said the same thing: Get an adjournment and send the material to us and, of course, they want moneys in trust and etcetera, etcetera, certainly a conference and - - -

PN583

VICE PRESIDENT LAWLER: Well, Mr Bailey, you are not a party in this appeal.

PN584

MR BAILEY: I am sorry, your Honour?

PN585

VICE PRESIDENT LAWLER: You are not a party in this appeal.

PN586

MR BAILEY: No, I am not.

PN587

VICE PRESIDENT LAWLER: You have been served with a summons which required you to attend to give evidence yourself and to produce certain documents.

PN588

MR BAILEY: Yes, sir.

PN589

VICE PRESIDENT LAWLER: And the summons was issued properly in the sense that the factual issues that arise between the parties to the appeal directly bear upon your interactions with Ms Oram and therefore you have an interest in the resolution of those factual matters.

PN590

MR BAILEY: Yes, sir.

PN591

VICE PRESIDENT LAWLER: And consequently we have foreshadowed that we would be minded to grant leave to intervene should you seek leave to intervene in the proceedings whereby you would become …

78 After hearing argument from the parties and from Mr Bailey, the Bench determined that Mr Bailey ought be granted leave to intervene pursuant to s 43(1) of the Act. Mr Bailey then made an application for an adjournment,[16] which application was refused. Mr Devries on behalf of the appellant then called on the summons to Mr Bailey. Mr Bailey then produced documents in answer to the summons. The documents produced by Mr Bailey were marked as MFI 1 and subsequently admitted into evidence as Exhibit 16. Mr Bailey was asked by the presiding Member whether he said this production was a complete answer to the summons. Mr Bailey replied, “I do, sir, yes.”.[17] In the meantime, a second summons dated 8 December 2003 had been issued by the Commission and served on Mr Bailey. He was asked by the presiding Member whether he produced any further documents in response to that summons. Mr Bailey replied, “No, I don’t, your Honour.”[18] Mr Bailey was then sworn for the purposes of examination in relation to the production of documents pursuant to

16 PN 697.

17 PN 717.

18 PN 720.

the summons. He reaffirmed on oath that the documents produced were a complete answer to the summons, Exhibit 1, and that "there is no additional materials".[19] Mr Bailey had previously told the associate to Vice President Lawler that the documents covered by the summons had been posted. He said in cross-examination that they had been placed in an envelope and given to office staff for posting on the previous Friday, 5 December 2003 and he later discovered that they had not been posted.[20]

79 Mr Bailey, pursuant to leave granted, was cross-examined by Mr Devries on the summons. He confirmed that what he had produced to the Commission (MFI 1, Exhibit 16) was his complete file[21] and this was reiterated in the following exchange:[22]

> PN779
>
> Are there any other documents at your office or in the hands of any representatives of yours, legal representatives or anyone else, that relate to this matter? - - - No there is not.
>
> PN780
>
> That every single document that is in existence that has been in your power, possession or control in relation to this matter, is in that bundle of documents? - - - That is correct.
>
> PN781
>
> Does that include all copies of documents? - - - Every document is in the file.
>
> PN782
>
> So you have not a single document left that is not in that file? - - - That is correct, sir.

80 Mr Devries then asked whether the file contained "all [Mr Bailey's] file notes". Mr Bailey answered: "No, it doesn't". The following exchange then occurred:[23]

> PN784
>
> Where are those file notes? - - - I have kept them, based on legal advice. I was told, sir, on legal advice, that I could pull out the file notes.
>
> PN785
>
> VICE PRESIDENT LAWLER: Mr Bailey, when I asked you earlier on, today, was the bundle which is marked MFI1 a complete answer to the summons, you answered yes. Are you now saying that that answer you gave was wrong?---No, I just - I was - upon legal advice I was given that file notes, my own notes, are - - -
>
> PN786
>
> Where are those file notes, Mr Bailey? - - - At home, sir.
>
> PN787
>
> Who gave you this legal advice? - - - A solicitor.
>
> PN788
>
> Which solicitor? - - - David Robinson.

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19 PN 723.

20 Transcript PN 736ff.

21 PN 778.

22 PN 779-782.

23 PN 784-788.

81 Mr Bailey's claim to have received this advice from Mr Robinson is implausible. Putting aside the basic fact that any privilege is the privilege of the client and could therefore not be asserted against Ms Oram, a solicitor of even marginal competence would certainly know that there are only two acceptable ways for resisting the production of allegedly privileged documents: the first is to seek to have the summons or subpoena set aside in advance of the return date or, certainly no later than, the occasion of the return of the summons, or, secondly, by producing the allegedly privileged documents as a separate bundle marked so as to indicate that a claim of privilege is made, which claim will then be determined before any access to the documents is allowed to the party as whose request the summons was issued.

82 Mr Bailey claimed to have received the advice from Mr Robinson by phone on the evening of 9 December 2003. And yet on the preceding Friday when Mr Bailey had allegedly bundled the documents in answer to the summons for postage to the Registry, the file notes in question had not been included in the bundle. The following exchange occurred:[24]

> PN803
>
> When you did that did that bundle of documents that you were going to have posted to the Commission, contain your file notes? - - - Include my notes, no, they didn't.
>
> PN804
>
> Why not? - - - Because I keep them, all my notes, separately.
>
> PN805
>
> You had not received the alleged advice from Mr Robinson at that stage, had you? - - - Well, I had my file notes in a book.
>
> PN806
>
> COMMISSIONER BLAIR: Mr Bailey, why didn't you include your file notes in the material that you were going to send to the summons before you received this advice from Mr Robinson? - - - I just chose not to.
>
> PN807
>
> Why did you choose not to? - - - Because I didn't think they were relevant.

83 When pressed further as to why he chose not to include the file notes in the envelope of documents in response to the summons he was going to send to the Commission, Mr Bailey gave the following evidence:[25]

> PN808
>
> Mr Bailey, you are not incompetent in reading a summons, in fact, you have had several summonses issued by this Commission on this very issue about summonsing of documents and appropriate filing. So you understand the terminology used in summonses and therefore you have the ability to understand what they mean. Why did you choose to not provide, in the envelope that you were going to send your file or the file to the Commission, why did you choose not to add in your file notes? - - - Over the years, sir, I have been taught that file notes of a solicitor or an advocate are privileged and don't have to be included in a file on discovery of documents on a summons.
>
> PN809

24 PN 803-807.

25 PN 808-809.

> So does that mean, now, that any time you wish to have a summons issued by the Commission in relation to a matter that you are dealing with that the Commission is to ignore any request from you for the production of file notes for the respondent in any matter that you are dealing with. Is that right? - - - I am not sure, sir. I can't answer that. I don't know.

84 Mr Bailey was then informed by the Full Bench that the summons did require the production of his file notes and Mr Bailey, when asked when the Full Bench could have those file notes, replied "later this week".[26] Upon learning that Mr Bailey lived in Abbotsford, perhaps a 5-minute tram ride from the Commission premises, the Commission adjourned to provide Mr Bailey with an opportunity to go to his home, retrieve the documents and return with them to the Commission. The presiding Member said this:[27]

> PN816
> VICE PRESIDENT LAWLER: … The compliance with a summons is a serious matter and the party issuing the summons is entitled to have it complied with. The Commission expects it will be complied with unless the party, on whom the summons is served, moves the Commission to have it set aside on some proper basis. That has not occurred in this case and I cannot conceive of any basis upon which this summons could properly be set aside. You are required to produce those documents. Are there any other documents, apart from your file notes, which you have not produced which in any way relate to Mr Oram's application? - - - No.

85 Mr Devries on behalf of the appellant then asked whether the file produced by Mr Bailey included "all of the banking documents relating to the banking of monies received by you from Ms Oram, in relation to this matter". Mr Bailey conceded that it did not. When asked where those documents were, he responded "I don't have documents for that. They would be bank statements, I suppose".[28] The following exchange then occurred:[29]

> PN820
> VICE PRESIDENT LAWLER: Just wait, Mr Devries. You have just said you don't have documents in relation to that, that is the banking and moneys received by Ms Oram. Is that the truth, Mr Bailey? - - - Yes, it is, sir.
> PN821
> COMMISSIONER BLAIR: Are there any receipts? Do you issue a receipt to people who pay you money, Mr Bailey? - - - Yes, they would be in a receipt book at the office, there would be receipts.
> PN822
> VICE PRESIDENT LAWLER: So there are documents? - - - Well - - -
> PN823
> There is at least a receipt, at the moment, in a receipt book? - - - Yes, in a receipt book back at my office, yes, in Collins Street.
> PN824
> And you accept that Ms Oram has paid you money on - - -? - - - Yes, she has.
> PN825

26 PN 813.

27 PN 816.

28 PN 819.

29 PN 820-827.

> - - - two occasions? - - - Yes.
>
> PN826
>
> So there are two receipts that would relate to money paid by her in respect of her unfair dismissal application?---There should be.
>
> PN827
>
> Why should we not conclude that when you said, a short moment ago, on your oath, that there were no further documents and you didn't have any documents of that sort, being the sort that Mr Devries referred to, why should we not assume that the answer you gave was a deliberate lie? - - - I don't know, sir.

86 Mr Devries then cross-examined Mr Bailey further on categories of documents that ought to have been produced under the summons, but were not, in fact, produced. Mr Bailey claimed that he did not keep all his bank statements, although on a reading of the summons, we can understand why Mr Bailey may have come to the view that bank statements were not caught by the summons.

87 Given that there did not appear to be a live issue as to whether Ms Oram had paid Mr Bailey promptly, he was not required to produce his bank statements.[30]

88 The production of original documents by Mr Bailey on the morning of 10 December 2003 was incompatible with the documents having been posted as claimed in the conversation with the associate. Mr Bailey did not dispute the accuracy of the conversation as recorded by the associate and, instead, explained the matter on the basis that "they were put in an envelope and ready to be sent, but I was understanding — see, the way my office set-up is, I have a secretarial service that take care of my administration, that mail hadn't gone and that is how you come to get the original documents, today. I was on the understanding that they would have been sent."

89 We find that Mr Bailey had made a decision by the afternoon of Friday, 5 December 2003, that he would not deliver documents to the Commission in response to the summons.[31] Mr Bailey well knew that the summons required production of documents at 10.00 am on the morning of Monday, 8 December 2003. He could not reasonably have supposed that posting the documents on Friday afternoon would ensure that they were in the hands of the Commission at 10.00 am on Monday, 8 December 2003, and thus available for the purposes of the Appeal listed on that day. In fact, it emerged that Mr Bailey had made a deliberate decision to deal with the documents in such a way that they would not be before the Commission for the hearing of the Appeal. This is made clear by the following passage of transcript.

> PN905
>
> COMMISSIONER BLAIR: Mr Bailey, if you made that decision on Friday afternoon, what basis did you have for thinking that the documents could conceivably be with the Commission by Monday morning at 10 am when they were required for production? - - - Well, a day - sir, I don't know how long Australia Post - normally if you post something on Monday, someone could get it Tuesday. You post something on Friday, well, they may get it Monday.
>
> PN906

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30 PN 890.

31 PN 903.

Was it the case that you were seeking to create a situation where the documents would be in the post and would not be available come what may for the hearing on Monday? - - - Sir, I can't answer that question.

PN907

Mr Bailey on what time on Friday did you decide that you would post? - - - Some time in the afternoon.

PN908

So if that was the case your staff didn't do a post drop-off - - -? - - - That is right.

PN909

- - - on Friday afternoon? - - - That is correct.

PN910

So there was no way this Commission was going to get the documents anyway? - - - That is right.

PN911

So you made a conscious decision that - not to provide those documents to this Commission? - - - At that point in time.

PN912

And why did you do that? You had not received legal advice at that time so why did you do that? - - - Sir, I wanted to seek legal advice.

PN913

Did you make any effort to contact the presiding member to see whether or not you could be allowed to seek legal opinion? - - - No, I didn't.

PN914

So you had no intentions of complying with the summons, did you? - - - Until I saw legal advice.

PN915

Okay, thank you.

As is probably clear by now we consider that Mr Bailey's explanation in relation to the issue of attempting to post the documents is yet another example of his saying whatever he thinks will advance his cause without any regard for the truth.

90 Part way during the proceedings on 10 December 2003, Mr Baker of counsel sought and was granted leave to appear for Mr Bailey.

91 Mr Baker applied for an adjournment. We concluded that the interests of justice required us to refuse that adjournment application. In the circumstances, we were satisfied that Mr Bailey had had an appropriate opportunity to secure properly instructed legal representation, but had failed to avail himself properly of that opportunity. More importantly, in circumstances where Mr Bailey was not prepared to give an unqualified undertaking to pay the costs of the appellant and respondent thrown away by reason of such adjournment, the costs prejudice accruing to the appellant and respondent as a result of an adjournment meant that, in accordance with the principles laid down by the High Court in *The State of Queensland v J L Holdings Pty Ltd*,[32] the interests of justice favoured a refusal of the adjournment application.

92 Subsequently, it was necessary to further adjourn the matter on 10 December 2003 because Mr Bailey was unwell and could not proceed further.

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32 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.

93 The matter was resumed on 19 December 2003. Mr Baker again appeared for Mr Bailey. Transcript of the earlier days had been provided to Mr Bailey. Mr Baker made an oral application for this Full Bench to disqualify itself on the ground of apprehended bias.[33] The Bench dismissed that application instanter and gave an ex tempore outline of its reasons for so doing,[34] indicating full reasons would be provided in due course. We provide those reasons at the end of this decision.

94 Mr Baker then cross-examined the appellant. During the course of that cross-examination, Mr Baker put to the appellant the terms of a telephone conversation said to have occurred between her and Mr Bailey on 17 March 2003, which, if accepted, would seriously undermine the version of events asserted by Ms Oram in her affidavit. Specifically, it was put to Ms Oram that Mr Bailey had warned Ms Oram that there would be further significant expense in taking the matter to a hearing and that Ms Oram had flagged the possibility of difficulties in meeting that expense, that statements were due to be filed that day in accordance with the directions of the Commission and that it was necessary to seek an extension of time. Mr Baker produced, for the first time, a photocopy of a handwritten file note of the conversation said to have been made at the time by Mr Bailey. Mr Bailey subsequently gave evidence consistent with what Mr Baker had put to Ms Oram in cross-examination.

95 The file note of 17 March 2003 is a critical document. A photocopy of that file note is reproduced hereunder.

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33 Transcript PN2377ff esp at PN2390ff.

34 Transcript PN2508 to PN2538; see also PN2493 to PN2507.

MFI 9

Ex 15

17 March - 03.

- Sandra Quinn. Telephone Call.
- funds ? #.
- Cost / time / Direction
- Settlement !! #. (4 wks ?)
- Short Service — ? Compensation

96 The original of the file note was not in court. Mr Bailey indicated that the original was at home. This, of course, involved yet another failure to comply with the summons which is all the more remarkable because of its critical significance together with the fact that Mr Bailey had been sent from the Commission on 10 December for the express purpose of bringing all of his file notes to the Commission. He was questioned about the nature of the original document and indicated as follows:

- The file note was written on a piece of standard A4 pad paper.
- The file note had been written with a ballpoint pen.

- The file note had been detached from the A4 pad the previous day for the purposes of a conference with Mr Baker.
- At the time the file note was detached from the A4 pad, there were two other pages of notes on unrelated matters that were attached to the pad immediately above the file note. Those pages were also detached at the time the file note was detached.
- No further pages had been detached from the pad.

97 The Commission adjourned to enable Mr Bailey to attend his home and return with the file note and the pad from which it had been detached. Ms Oram had no recollection of a telephone conversation with Mr Bailey on or about 17 March 2003, but conceded that it was "possible" that she had had a conversation with Mr Bailey on 17 March in which these matters were discussed. She subsequently gave evidence that, having thought about the matter, she was now certain that there was no such conversation. The earlier concession of the possibility of such discussion needs to be seen in the context in which it was made. The following excerpts from the transcript of Ms Oram's cross-examination by Mr Baker are relevant:

> PN2734
>
> Mr Bailey will say that on 17 March he had a telephone conversation with you. Do you recall having a conversation on that date? - - - Not particularly, no.
>
> PN2735
>
> You say not particularly. Does that mean that there could have been a conversation? - - - Could have been. I am just - - -…
>
> PN2741
>
> MR BAKER: Well, just in order to assist you, 17 March was the final date for compliance with the directions and the decision to disallow you to continue related specifically to the fact that there had not been compliance with directions given for 17 March. Does that help you in remembering the date? - - - Yes, it does.
>
> PN2742
>
> Now, can you say whether you had a - do you have a note of whether you had a conversation on that date? - - - I don't have a note.
>
> PN2743
>
> Yes? - - - I don't recall talking to Gary Bailey on that date either.
>
> PN2744
>
> Is it possible that you did speak to him? - - - It is possible.
>
> PN2745
>
> He will say that - - -
>
> PN2746
>
> VICE PRESIDENT LAWLER: Madam, the word possible is a word that is capable of being quite ambiguous. It is possible that the earth will be hit by a meteor that hasn't been detected by astronomers this afternoon and we will all be destroyed. That is very unlikely. And the word possible then can be used in relation to - - -
>
> PN2747
>
> MR BAKER: The future.
>
> PN2748

VICE PRESIDENT LAWLER: - - - matters which are far more probable than that. When you say it is possible, are you saying you cannot exclude it as a possibility or do you think that there is some likelihood that you did? - - - The first one. I cannot exclude it as a possibility.
PN2749
On 24 March - - -
PN2750
MR BAKER: And the - - -
PN2751
VICE PRESIDENT LAWLER: Yes, sorry. Yes, Mr Baker.

[Although the following portion of transcript was marked "In-confidence" so as not to disclose to the respondent what appellant might have been prepared to accept by way of settlement, we consider it necessary to reproduce it in these reasons. Those portions that might have a tendency to disclose such material have been removed as indicated.]

PN2752
MR BAKER: On the 17th what Mr Bailey will say, and what he will produce a note of is that on 17 March he discussed with you the question of extension of time for directions; do you recall that? - - - No.
PN2753
Did he at any stage tell you that it was - that it would be likely that there would be - that if application was made for an extension of time, that such an extension would be granted; well, if you could just tell me without looking at your notes, is it possible? - - - It is possible.
PN2754
Yes, and that a discussion about - - -
PN2755
VICE PRESIDENT LAWLER: Mr Baker, can I just stop you there because this is quite important. I didn't understand that question to be related to a conversation on 17 March. Were you meaning to put to the witness - - -
PN2756
MR BAKER: Yes, yes.
PN2757
VICE PRESIDENT LAWLER: - - - that on 17 March Mr Bailey indicated that it may be necessary to - it may or would be necessary to apply for an extension of time, and that the extension of time would be likely to be granted?
PN2758
MR BAKER: That is correct. That was the - that was one of the matters discussed on 17 March. Do you recall that? - - - No.
PN2759
May that - could that have occurred, or could that have been discussed? - - - What day was 17 March? Do you know what day it was?
PN2760
COMMISSIONER BLAIR: It was a Monday? - - - A Monday. No, I don't recall that at all. I did send him a letter on 6 March with instructions.
PN2761
MR BAKER: Did you have a discussion on 17 March about - or any other date about how much you would be prepared to accept in settlement of your case? - - - We had a discussion at the arbitration hearing about that.
PN2762

Yes. Did you at any stage have a discussion about accepting [deleted]?…

PN2777

MR BAKER: In fairness to you, Ms Oram, what I put to you was not strictly correct. What Mr Bailey will say, is that when he spoke to you on the 17 March about the possibility of settlement, he suggested to you that [deleted] would be fair, and you said that you would leave it to him. Do you recall that? - - - No.

PN2778

SENIOR DEPUTY PRESIDENT KAUFMAN: Does that mean you didn't say it, or you don't recall it? - - - I don't recall it.

PN2779

VICE PRESIDENT LAWLER: When people say they don't recall things, madam, they can mean one of two things. It may have been said, but I don't recollect it, or, I don't recall it because if it had been said I would recall it, and I don't recall it, therefore it didn't happen. Which of those two - - -? - - - I don't recall having a conversation with Gary Bailey on 17 March, full stop. And certainly in my affidavit, although I realised there was a submission that was to be in on the 17th, I don't recall having any conversation with him until later when I got a notice, saying that it - that submission hadn't been complied with.

PN2780

And do you have any note of a conversation with Mr Bailey, on the 18 March? - - - No.

PN2781

And Mr Bailey will say that on the 18 March, he had a conversation with you in which he informed you of the fact that an offer of - an offer had - of settlement had been made and that offer was totally inadequate. Do you recall that? - - - No.

PN2782

Is that possible that that was conveyed to you? - - - It is possible it was conveyed, but I don't recall it, so I will say no.

PN2783

Yes.

[The matter then continued in open hearing. Ms Oram was re-examined.]

PN3937

MR DEVRIES: I will try and do this as quickly as possible. You have heard Mr Bailey's evidence about what he says occurred in a conversation that he says took place with you on 17 March? - - - Yes.

PN3938

And included - sorry, I won't go on with that.

PN3939

VICE PRESIDENT LAWLER: I think you are entitled to draw attention, in a leading fashion, to the subject matter about which you wish to ask a question.

PN3940

MR DEVRIES: He has given the Commission a fair bit of detail about what you discussed in that conversation, including the fact that you raised with him the question of an extension of time? - - - Yes.

PN3941

Having heard his evidence, and the matters that he says was discussed with you on 17 March, what do you say about firstly whether there was a conversation between you and him on 17 March - - -

PN3942

MR BAKER: The witness has already answered that in cross-examination, sir.

PN3943

VICE PRESIDENT LAWLER: Yes, Mr Devries, I don't think that is a - - -

PN3944

MR DEVRIES: I am entitled - normally I would be entitled to ask her that in re-examination. Given that Mr Bailey has raised a whole lot of matters that were not put to her, I submit, with the greatest respect that I am entitled to put that to her.

PN3945

VICE PRESIDENT LAWLER: Relevance is not the issue. It is a question - the rules of evidence don't apply, Mr Baker. We are disposed to allow it. Yes.

PN3946

MR DEVRIES: What do you say about whether or not a conversation took place between you and Mr Bailey on 17 March? - - - No, it didn't take place.

PN3947

Did you have any conversation with Mr Bailey where you raised with him the need for an extension of time? - - - No.…

PN3952

COMMISSIONER BLAIR: Sorry. Just one question. At any time on the 17th, or around about the 17th, did you have a conversation with Mr Bailey where you indicated that you were "not flush with funds"? - - - No, I did not.

PN3953

VICE PRESIDENT LAWLER: Mr Baker has got to be allowed to ask further questions if he wishes to, at this point. Do you wish to ask further questions, Mr Baker?

PN3954

MR BAKER: Well, re-examination, examination - I would make my submissions, if necessary, on the evidence. I say - I will put this question, if I may.

PN3955

MR BAKER: So when you gave evidence earlier, before this tribunal, probably an hour ago, and you were asked:

PN3956

Is it possible that there was a telephone conversation on the 17th?

PN3957

And you said it was possible, was that an untruth? - - - No, it wasn't an untruth, but having regard to the conversations after that, and the content that Mr Bailey contends, it is clear to me there was no conversation on that day.

PN3958

So when you say after that, you mean subsequent telephone calls or what do you mean? - - - When - - -

PN3959

VICE PRESIDENT LAWLER: The evidence that has been given. That is clear from - - -

PN3960

MR BAKER: You mean that as a result of having heard the evidence, you say there was no telephone call? - - - Yes.

PN3961

Yes, so - you don't like the contents, but you still admit that there was a possibility of a telephone call? - - - There is no possibility - there was a telephone call - - -

PN3962

Are you - - -? - - - on the 17th, or the 18th, that I had with Mr Bailey.

PN3963

What now makes you so sure of that when you weren't sure of that earlier? - - - Because if I had spoken to Mr Bailey on the 17th, I would have asked him how the submission was going - - -

PN3964

Yes? - - - And I know that I never ever asked him about that.

PN3965

So it is not from memory, it is from what you deduce from what may have happened, I see. Thank you.

98 There were issues related to the emergence of the 17 March 2003 file note which cause us considerable concern. First, the file note had not been produced in answer to the summons when Mr Bailey produced the documents that are now Exhibit 16. More importantly, after an inadequate compliance with the summons through non-production of Mr Bailey's file notes had been exposed and Mr Bailey had returned home for the express purpose of producing all of his file notes, the critical file note was still not produced. Secondly, the reference to "4 wks?" in the fourth dash point in the critical file note is heavily underscored such that if the note had been written in the ordinary fashion in which an A4 pad is used then, on Mr Bailey's evidence, an impression from that heavy underscoring ought be discernible on the top page of the pad from which it had been detached. No such scoring is discernible. Given the critical importance of whether or not there had been a conversation on 17 March 2003 as alleged by Mr Bailey and consistent with the power conferred by s 110(2)(b), at our request, the Registrar retained a document examination expert to examine the critical file note and the pad.

99 The document examiner prepared a report, copies of which were sent to Mr Bailey and the representatives of the other parties. The covering letter to Mr Bailey, dated 20 February 2004, was in the following terms:

Dear Mr Bailey

ORAM V DERBY GEM PTY LTD — C2003/5961

I write this letter to you on behalf of the Full Bench in the above matter.

Pursuant to s 110(2)(b) of the *Workplace Relations Act 1996* the Commission can, in proceedings before it, "inform itself on any matter in such manner as it considers just". That general power is of course, subject to any specific restrictions in the Act or emerging from the established jurisprudence governing the functions of the Commission.

Given the circumstances surrounding the late production of your file note of 17 March 2003 and the potential significance of the alleged conversation on that date in connection with the issues that arise for determination in this matter, the Full Bench determined that pursuant to s 110(2)(b) the Commission should, of its own motion, have the file note (and the pad produced with it) subjected to document examination.

> Please find enclosed a copy of a report prepared by Mr Neil Holland of Scientific Document Services Pty Ltd.
>
> The Full Bench is minded to admit that report into evidence on the application for leave to extend time in which to appeal and the application for leave to appeal. If you wish, the Full Bench will provide you with an opportunity to cross-examine Mr Holland, call expert document examination evidence of your own and/or make such further submissions as you consider appropriate on whether the report ought be admitted into evidence and, if so, the impact of the report on the issues that arise for determination.
>
> Please advise by 4.00pm on Tuesday 27 January 2004 whether you wish to avail yourself of any or all of these opportunities. If I do not hear from you by that time the Full Bench will proceed to make its decision without hearing from you further.

100 The associate to Vice President Lawler contacted Mr Bailey's office and confirmed receipt of the letter. No response was forthcoming from Mr Bailey. Neither of the other parties sought to call further evidence or make further submissions.

101 The other parties did not seek to cross-examine the document examiner, lead any further evidence or make any submissions on the document examiner's report. We admit the report of Mr Holland into evidence as Ex 19. The document examiner subjected the file note to an ESDA process, which reveals latent impressions left from writing from other documents which have been written on top of the subject document.

102 Relevantly for present purposes, the results of the examination were as follows:

> (a) …The loose printed A4 note pad page item 2 was examined for indentations and a number were revealed which could be from handwritten entries written on several different pages.
>
> …
>
> (b) Those indentations that could be partially deciphered are15 Dec 2003
> Comp--t--
> Link
> St--t-- --at---
> All Pal M--h-- ---P--
> to w--k --h- sh---
> S
> To --t-- talking s--
> to yo---
> 8-- p--d Co-- St---
> $ 2500 C-sh a---
> A--t
> Y-- t k--
> C
> $1700 ---
> The dashes "-" represent areas that the indentations could not be deciphered.

103 We find that Mr Bailey fabricated the file note dated 17 March 2003 shortly before it was presented to the Commission by him as an allegedly authentic contemporaneous record. We make that finding on the balance of probabilities,

but with the degree of satisfaction referred to in *Briginshaw v Briginshaw*.[35] On Mr Bailey's sworn evidence the critical file note of 17 March 2003 was still attached to the A4 pad the time it was written, as were other unrelated notes immediately above the critical file note. The exact alignment of the ESDA impressions with the pre-printed lines on the critical file note make it highly probable that one of the pages in the A4 pad above the critical file note was the file note dated "15 Dec 2003" that gave rise to the ESDA impressions, and thus highly probable that the critical file note, being a later page in the A4 pad, was written after 15 December 2003. The only explanations consistent with the critical file note being an authentic contemporaneous document notwithstanding the ESDA impressions are:

(i) Mr Bailey wrote the file note dated 15 December 2003 before 17 March 2003;

(ii) Mr Bailey does not write notes on an A4 pad in the usual fashion (ie, with each successive note being written on the next available blank page) but, rather, on 17 March 2003 he turned over blank pages in the pad, wrote the critical file note and then, many months later, he wrote the note dated "15 Dec 2003" on one of those previously passed over blank pages with the 17 March 2003 file note still in the pad; or

(iii) the note of 15 December 2003 giving rise to the ESDA impressions was written on an unrelated piece of paper that was fortuitously and coincidentally positioned directly on top of the critical file note, and aligned exactly with it.

Each of these possibilities is, we think, highly improbable. Our degree of satisfaction in so finding is heightened by the failure of Mr Bailey to produce the critical file note on 10 March 2003, when he had been sent to his home for the express purpose of collecting and producing all file notes relating to this matter.

Application for this Bench to Disqualify Itself for Apprehended Bias

104 On 19 December 2003, counsel for Mr Bailey made an oral application for this full bench to disqualify itself on the ground of apprehended bias.[36] The bench dismissed that application instanter and gave an ex tempore outline of its reasons for so doing,[37] indicating full reasons would be provided in due course. We now give those reasons.

105 In summary, the matters relied by counsel for Mr Bailey as giving rise to a reasonable apprehension of bias were that, during the hearing of the appeal, members of the bench:

(i) made reference to fraud on the part of Mr Bailey, particularly when an allegation of fraud did not form part of the contentions of the parties;

(ii) made a threat that if certain findings of fact were made against Mr Bailey by this full bench, then such findings would provide a basis for members of the Commission to exclude or refuse Mr Bailey leave to appear in matters in the future;

(iii) demanded, on 10 December 2003, that Mr Bailey give an undertaking to pay the costs of an adjournment sought by Mr Bailey on that day;

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35 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

36 Transcript PN2377ff esp at PN2390ff.

37 Transcript PN2508 to PN2538; see also PN2493 to PN2507.

(iv) demanded the presence of Mr Bailey's doctor on 19 December and said that a medical certificate would not be sufficient to justify the grant of a further adjournment on the basis of illness

106 Counsel for Mr Bailey subsequently also placed reliance on the level of intervention from the bench while Mr Bailey was giving evidence and the fact that a "flyer" and pages from a website associated with Mr Bailey had been introduced by the Bench rather than by one of the parties thereby indicating a determination on the part of this full bench to find something to the detriment of Mr Bailey.[38]

107 The test to be applied in Australia in determining whether a judicial officer is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.[39] In *Laws v Australian Broadcasting Tribunal*[40] Gaudron and McHugh JJ noted:[41]

> When suspected prejudgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion irrespective of the evidence or arguments presented to him or her.

108 The relevant ground for disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially and without prejudice, rather than that he or she will decide the case adversely to one party.[42] Mere predisposition or inclination for or against a particular argument or conclusion is not sufficient. In *Minister for Immigration and Multicultural Affairs v Jia*[43] Gleeson CJ and Gummow J, with whom Hayne J agreed, said:[44]

> Decision makers, including judicial decision makers, sometimes approach their task with a tendency of mind or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. The fact that, in the case of judges, it may be easier to persuade one judge of a proposition than it is to persuade another does not mean that either of them is affected by bias.
>
> The test which was applied both by French J and by the Full Court was orthodox. It accords with the decisions of this court in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 and *Johnson v Johnson* (2000) 201 CLR 488. The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.

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38 Transcript PN2486 to PN2490.

39 *Johnson v Johnson* (2000) 201 CLR 488 at [11]; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41.

40 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

41 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 100.

42 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

43 *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507.

44 *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 at 531-532.

109 Moreover, judicial officers have a duty *not* to accede too readily to a disqualification application In *Re JRL; Ex parte CJL*,[45] Mason J, in an oft-quoted passage, stated:

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 and *Livesey v NSW Bar Association* (1983) 151 CLR 288 has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *Watson*; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

(footnotes omitted)

110 Far from being inappropriate, the expression of a provisional view on a particular issue or warning parties of the consequences of a provisional view will typically be entirely consistent with the requirements of procedural fairness. In *Johnson v Johnson*[46] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ noted:[47]

> Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case." Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not

45 *Re JRL; Ex parte CJL* (1986) 161 CLR 342.

46 *Johnson v Johnson* (2000) 201 CLR 488.

47 *Johnson v Johnson* (2000) 201 CLR 488 at [13].

> on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

(footnotes omitted)

111 In *Kaycliff Pty Limited v Australia Broadcasting Tribunal*,[48] the Full Court of the Federal Court observed:[49]

> For our part we respectfully concur in the view that expression by a court or tribunal of its current view of an issue may be advantageous, on occasions, rather than otherwise. The rules as to apparent bias must be balanced against the desirability of a thoroughly fair contest and the latter may positively favour a disclosure, without any equivocation, of an opinion held by the court or tribunal at a particular stage of the proceedings. In the absence of such disclosure, there may be a justified resentment on the losing side, based on their not having been made aware of the direction of the thinking of the court or tribunal on a particular issue and not having been given a fair opportunity to turn it into another path.

112 In *Richmond River Broadcasters Pty Limited v Australian Broadcasting Tribunal*,[50] Wilcox J referred to this passage and continued:

> I respectfully agree with this comment. It is an every day event for judges to indicate to counsel, during the course of hearing, their impressions of a case, including their impressions of witnesses and of the facts. They do so to assist counsel. It is always an advantage for counsel to know the way in which the judge's mind is working; submissions may be targeted to the aspect of the case which is troubling the judge. Where a judge takes this course nobody would suggest that the judge ought then to be disqualified from concluding the case. The reason is that the judge is merely expressing a tentative view and inviting a response which he or she may take into account in determining whether to adhere to, or abandon, that view in the final decision. The readiness to listen and be persuaded is the critical matter.

113 We do not accept that a fair-minded observer would have concluded from the statements upon which Mr Baker relies that this bench had prejudged the matter as against Mr Bailey in the way in which the authorities explain that notion. Specifically, we do not accept that there is any foundation for a conclusion that the references to "fraud" or "fraudulent" in the passages of transcript relied upon by Mr Baker give rise to the relevant apprehension. On the contrary, what is recorded in those places is expressed in conditional language. Paragraph 87 of the transcript simply identifies as an issue "the extent *to which Mr Bailey's behaviour* was or was not *fraudulent*". Paragraph 93 of the transcript is in the following terms:

> The *risk* as I see it to Mr Bailey at the moment, which was foreshadowed to him or of which he was put on notice through Ms Webster's conversation with him, was that this Bench *might*, *if [Ms Oram's] factual contentions were established*, *and after doing procedural fairness to Mr Bailey*, make an observation, the effect of which would be that members of the Commission — individual members of the

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48 *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310.

49 *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310 at 319.

50 *Richmond River Broadcasters Pty Ltd v Australian Broadcasting Tribunal* (1992) 34 FCR 385 at 395.

> Commission would be invited to decline leave to Mr Bailey to appear in all matters in the future in the Commission, recognising, of course, the discretion under section 42 is a discretion which each member has to exercise on the facts before them.

(Our emphasis.)

Paragraph 2160 refers to material adverse to Mr Bailey relied upon by counsel for the appellant and notes, correctly, that this material gives rise to a "suspicion" of fraud. Such statements do not give rise to a reasonable apprehension of bias.

114 We have already dealt with the proper role of the Commission when faced with apparent misconduct by a representative. We do not accept that foreshadowing possible consequences that may flow **if** certain facts are established can properly be characterised as a "threat" or that this could conceivably give rise to a reasonable apprehension of bias in the relevant sense.

115 We do not accept that the hypothetical fair minded observer would have regarded the requirement to provide an undertaking to pay the costs thrown away as a condition of a grant of an adjournment as indicating partiality or prejudgment in the relevant sense. The principle governing the grant of an adjournment is whether or not the adjournment is in the interests of justice. The costs prejudice suffered by other parties is certainly a relevant factor in determining whether it was in the interests of justice to grant an adjournment. In circumstances were there must be some doubt about the power of the Commission to *order* that Mr Bailey pay the costs of the adjournment, it was entirely reasonable for the Bench to address that prejudice by requiring Mr Bailey to undertake to pay the costs thrown away as a result of the adjournment as a condition of granting the adjournment. Such an approach does not give rise to a reasonable apprehension of bias.

116 The indication given by this Bench on 10 December 2003 that it would require the attendance of a doctor, and not merely the production of a medical certificate, in the event that Mr Bailey sought a further adjournment on the next occasion must be considered in its proper context. The adjournment of the matter from 8 December 2003 to 10 December 2003 had been necessitated by Mr Bailey's failure to attend in accordance with a properly issued summons. On 10 December 2003, after the bench had indicated that it would sit late in order to complete the evidence in the interests of limiting the parties' costs, Mr Bailey indicated that he was ill and could not continue. In opposing an adjournment of the matter, counsel for the appellant made a submission to the effect that Mr Bailey had a track record for feigning illness when, as it were, the going got tough. Counsel claimed that this behaviour had been recorded in a number of the Commission's decisions. Given the costs consequences for the other parties of yet a further adjournment on the next occasion, we did not regard it as inappropriate to indicate that we would require something more than a bland medical certificate if yet another adjournment was to be sought on medical grounds on the next occasion. We do not accept that the course we took could properly be seen as giving rise to an apprehension of bias, rather it demonstrated a concern to balance the competing interests of the parties.

117 Pursuant to s 110(2)(b) of the Act, In the hearing and determination of an industrial dispute or in any other proceedings before the Commission

(b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, *but may inform itself on any matter in such manner as it considers just*;

118 That is a statutory warrant which permits the Commission to introduce material of its own initiative in an appropriate case. We have already recorded our view that in a case such as the present it is entirely appropriate, and within the power conferred by s 110(2) of the Act, for the Commission to introduce material at its own initiative and to take a far more interventionist approach to the oral evidence than would ordinarily be appropriate. This cannot, of itself, give rise to a reasonable apprehension of bias. Mr Bailey had been put on notice through what Ms Webster had said to him during the third phone call on 8 December that other material on the public record was material which may be relevant and, specifically, reference was made to the decision of Ashley J in *Victorian Lawyers RPA Ltd v Bailey* [2000] VSC 162. The "flyer" in question is one that Mr Bailey had distributed to members of the public, including within the Commission's premises. The website material was drawn from the website printed on letterhead produced by Mr Bailey as part of his answer to the summons. Both of those documents contain statements that appear to be incompatible with the injunction issued by Ashley J. Given the context, we considered the introduction of that material as appropriate and just. In context, the introduction of that material at the initiative of the bench would not have been seen by a hypothetical observer as demonstrating that the bench may be biased in the relevant sense.

119 In summary, none of the matters relied upon by Mr Baker demonstrated apprehended bias.

Summary of Findings in Relation to Mr bailey

120 We have already found that Mr Bailey deliberate misled Senior Deputy President Williams on 3 April 2003 and, in particular, that he told deliberate lies to Senior Deputy President Williams.[51] We shall refer this matter to the appropriate authority.

121 We are satisfied that Mr Bailey, in flagrant contempt of the Commission, deliberately failed to answer the Summons to Witness that had been served upon him. We intend to refer this matter to the appropriate authority.

122 We also find, with the satisfaction referred to in *Briginshaw*, that Mr Bailey lied on his oath to this Full Bench when he was trying to explain why the documents that had been subpoenaed had not been produced on 8 December 2003. We shall also refer this matter to the appropriate authority.

123 Having regard to Mr Bailey's web page and the "flyer" he put about advertising his services, we think it clearly arguable that Mr Bailey has breached the injunction of the Supreme Court of Victoria that "Gary Stephen Bailey be restrained from engaging in legal practice in Victoria and be restrained from representing or advertising that he is qualified to engage in legal practice, unless and until he is admitted to legal practice and holds a practising certificate." We told Mr Bailey, during the course of the hearing,[52] that, having regard to Ms Oram's evidence, we would not find that Mr Bailey had held

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51 See para [22]ff above.

52 PN.

himself out to her as a legal practitioner, albeit she had formed that view. However, a possible breach of the Supreme Court's injunction is another matter and we will refer this matter to the appropriate authority.

124 We have found that Mr Bailey fabricated the file note of 17 March 2003 and lied on his oath before this Full Bench in relation to the conversation with Ms Oram that he alleged took place on that date and as to the making of the file note. We will refer this matter to the appropriate authority.

Consequences for Mr Bailey

125 The conduct of Mr Bailey considered in these reasons for decision, including, in particular:

- The knowingly deceitful and dishonest statements made by Mr Bailey to Senior Deputy President Williams on 3 April 2003;
- Mr Bailey's contumelious contempt of the Commission in failing to properly comply with the summons issued at the request of Ms Oram's present legal representatives and his dishonest evidence in that regard; and
- Mr Bailey's fabrication of the file note of 17 March 2003 and his dishonest reliance on that document in this proceeding as an authentic contemporaneous record,

is, we think, such as to render Mr Bailey not a fit and proper person to appear as an advocate before the Commission. Members of the Commission are entitled to rely upon these findings as a proper basis for refusing Mr Bailey leave to appear in future matters. We recognise that the discretion conferred by s 42 cannot be fettered by a "direction" from this full bench and that members of the Commission in future matters retain a discretion pursuant to s 42 to grant leave to Mr Bailey notwithstanding our findings and observations.

(PR946375.)

Appeal allowed

ANDREW EDGAR