

SUPREME COURT OF QUEENSLAND

CITATION: *Le Grand v CJC* [2001] QCA 383
PARTIES: **PIERRE MARK LE GRAND**
(applicant/appellant)
v
CRIMINAL JUSTICE COMMISSION
(respondent/respondent)

FILE NO/S: Appeal No 7658 of 2001
No number allocated below

DIVISION: Court of Appeal
PROCEEDING: General Civil Appeal
ORIGINATING
COURT: Supreme Court at Brisbane
DELIVERED ON: 14 September 2001
DELIVERED AT: Brisbane
HEARING DATE: 29 August 2001
JUDGES: Davies and Williams JJA and White J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **1. Appeal dismissed.**
2. Order that the appellant pay the respondent's costs.

CATCHWORDS: CRIMINAL LAW - FEDERAL AND STATE
INVESTIGATIVE AUTHORITIES - QUEENSLAND -
application under s 34(1)(a) of the *Criminal Justice Act* 1989
for an order pursuant to s 120(1)(a) that the Director of the
Official Misconduct Division of the Criminal Justice
Commission continue to conduct and cause to be conducted
an investigation - whether there was an investigation "being
conducted unfairly" within the meaning of s 34(1)(a) - where
the terms of the section require there to have been an unfair
act or omission in the course of the continuous conduct of an
investigation at the time of application - whether an
investigation was being continuously conducted at the time of
application - where investigation had been placed into
abeyance because another statutory body was expected to
investigate the matter - where the conduct of such
investigation had not been recommenced

STATUTES - ACTS OF PARLIAMENT -
INTERPRETATION - PARTICULAR WORDS AND
PHRASES - SPECIFIC INTERPRETATIONS - s 34(1) of
the *Criminal Justice Act* 1989 - meaning of "is being
conducted unfairly"

Criminal Justice Act 1989 (Qld), s 34(1)(a), s 120(1)(a),
s 127(2)

Carruthers v Connolly [1998] 1 QdR 339, referred to
 COUNSEL: A Boe (sol) for appellant
 M D Hinson SC for respondent
 SOLICITORS: Boe & Callaghan for appellant
 Clayton Utz for respondent

- [1] **DAVIES JA:** This is an appeal from a decision of the Chief Justice given on 20 August 2001 refusing an application by the appellant for an order that the Director of the Official Misconduct Division of the Criminal Justice Commission ("the Commission") continue to conduct and cause to be conducted the investigation known as the investigation into "The Grice and Nicholls Allegations against Mr Mark Le Grand and the Criminal Justice Commission" in accordance with certain specified guidelines. The application was made under s 34(1)(a) of the *Criminal Justice Act* 1989 ("the Act") and the orders were sought pursuant to s 120(1)(a) of the Act.
- [2] Orders had also been sought and were made by his Honour for the application to be heard in closed Court and for non-disclosure of the application and affidavits. Similar applications were made to this Court and dealt with in orders made on 29 August.
- [3] The learned Chief Justice refused the primary application because he held that there was no such investigation "being conducted unfairly" by the Official Misconduct Division within the meaning of s 34(1)(a) which is in the following terms:
- "(1) A person who claims -
 (a) that an investigation by the official misconduct division is being conducted unfairly; ...
 ...
 may make application to a judge of the Supreme Court for an order in the nature of a mandatory or restrictive injunction addressed to the Commission."
- His Honour so held because he found that no such investigation at all was being conducted by the Official Misconduct Division at the time the application was made to him. His Honour therefore concluded that he had no jurisdiction to make the orders sought.
- [4] There is no doubt that, if his Honour was correct in concluding that there was no such investigation then being conducted, his Honour's conclusion and refusal of the application were correct. The first question which arises therefore is whether, at the time this application was made, 16 August 2001, such an investigation was being conducted by the Official Misconduct Division. But Mr Hinson SC, for the respondent, submitted that, even if such an investigation was then being conducted, it was not being conducted unfairly because the unfairness to which s 34 refers is unfairness in the manner of conduct of the inquiry, not as to the subject matters being investigated; and the unfairness alleged by the appellant was a failure to investigate specific subject matters. That is the second question which may arise.
- [5] On the first question both parties sought to put further evidence before this Court, each party in the event consenting to the reading of affidavits by the other. In the circumstances of this case, especially that it involves the possibility of the

institution of proceedings against the appellant for an offence, the Court admitted that further evidence in the interests of justice, and in my opinion should also admit an affidavit by Mr Clair filed after the conclusion of argument in this Court to which no objection was made by the respondent. With the possible exception of that last affidavit, that evidence seems to make a little more clear what in fact occurred.

- [6] The investigation which Mr Boe, for the appellant, contended satisfies the criterion of being conducted by the Official Misconduct Division on 16 August 2001, may be, he submitted, either of two investigations commenced. In the first place, it may be an investigation commenced by the Official Misconduct Division in consequence of an allegation by Mr Allan Grice on 13 September 1996. On that day Mr Grice, a Member of the Legislative Assembly, made a statement in the Queensland Parliament alleging that the appellant, then Director of the Official Misconduct Division, unlawfully disseminated confidential operational information to Mr Christopher Nicholls in May 1994. On 23 October 1996, according to the present Chairperson of the Commission, the information referred to by Mr Grice was recorded by the Commission as a complaint with Mr Grice shown as the complainant and the appellant as the subject officer.¹
- [7] Alternatively, Mr Boe submitted, it may be an investigation commenced by the Official Misconduct Division in consequence of Mr Boe's memorandum to the Commission of 10 August 2001. That memorandum was registered by the Complaints Section of the Official Misconduct Division in accordance with the Act and the established procedures of the Commission.
- [8] A previous complaint by Mr Duncan Kerr, the then Commonwealth Minister for Justice, involving much the same facts but describing the subject of the complaint as an unknown Commission officer, was finalized on 5 February 1996 by the then Chief Officer of the Complaints Section noting that, having regard to the advice and report of Mr Hanson QC, the view was that the allegation had not been substantiated.
- [9] It does not matter, for the purpose of considering whether the first of these asserted investigations was being conducted at the relevant date, whether there was ever a complaint made initiating the investigation because the Official Misconduct Division may operate of its own initiative as well as in response to complaint or information received concerning misconduct.² Mr Clair, the Chairperson of the Commission until 30 November 1998, has sworn that he received advice that the Commission had a statutory obligation to investigate the Grice matter and that it should commence its own preliminary investigation of it with a view to at least identifying, gathering and preserving all relevant evidence. However it is unclear what, if any, investigation was conducted by the Official Misconduct Division into the matter on or after 23 October 1996.
- [10] Shortly after the making of the allegations by Mr Grice the Government announced the establishment of a Commission of Inquiry to investigate matters which included

¹ It is convenient hereafter to refer to Mr Grice's allegation as "the Grice matter".

² *Criminal Justice Act* s 29(2).

the facts relating to this matter. That Inquiry was prohibited from proceeding further by order of the Supreme Court on 5 August 1997. It is unlikely that any investigation was conducted into the matter by the Official Misconduct Division during the period from that announcement to that order.³

- [11] After the order of 5 August 1997 Mr Clair considered commencing the investigation and informed the Parliamentary Criminal Justice Committee of his intention of doing so. The latter responded by requesting the Commission not to appoint someone to conduct that investigation but to await the creation of the Office of Parliamentary Commissioner which would be given responsibility to deal with the Grice matter. Amendments to the Act commencing 8 December 1997 established the office of Parliamentary Criminal Justice Commissioner and conferred certain powers and functions on him or her. Shortly afterwards a Commissioner under those provisions was appointed.
- [12] In consequence of the response from the Parliamentary Criminal Justice Committee, a special meeting of the Commissioners of the Commission on 28 October 1997 resolved to hold any further substantive investigations of the matter in abeyance. It noted however that there would be a need to secure documentary and other material and for there to be a completion of certain forensic testing that was already underway.⁴ It noted that it had been agreed between the Commission and the Crown Solicitor who was acting on behalf of the Director-General of the Department of Justice that those tests should be completed.⁵ The Crown Solicitor had interim custody of the relevant records of the Commission of Inquiry and that, presumably, was the reason for the agreement.
- [13] In his affidavit filed by leave given on 29 August 2001 Mr Clair swore that it was his view that, if the Parliamentary Commissioner did not investigate the matter fully, or at all, then the Commission should and would investigate the matter, in all probability supervised by counsel from the private bar. Mr Clair's concerns that the matter be fully investigated was expressed in a confidential letter to the Chairperson of the Parliamentary Criminal Justice Committee of 24 December 1997. This view is repeated at much greater length, and in several different ways, in his affidavit filed by leave given after the conclusion of argument before this Court. That affidavit also makes several statements about the law which are unnecessary and unhelpful. I do not think it adds anything useful to the evidence given in the previous affidavits.
- [14] On 5 January 1998 the complaints file was noted by the Chief Officer of the Complaints Section that, as the Parliamentary Commissioner would investigate the Grice matter, no further action by the Commission was necessary at that stage. On

³ Mr Clair has sworn that, when he was informed of the Government's announcement to establish that Commission, he decided to refrain from appointing an independent person to investigate the Grice allegations as he had intended to.

⁴ The evidence does not disclose when this forensic testing commenced or whether it had been commenced by the Commission or the Commission of Inquiry. Nor does it disclose whether any material was "secured" or what forensic testing was done, other than that disclosed in the report by Dr Strach of 7 August 1998.

⁵ It is clear that they have never been completed.

5 May 1998 the Parliamentary Criminal Justice Committee requested the Parliamentary Commissioner, pursuant to s 118R(2)(b) and (c) of the Act to investigate the complaint made against the appellant, the conduct of the respondent in relation to the matter and the allegations against the appellant.

- [15] However on 2 November 1998 the Supreme Court held that the Parliamentary Commissioner was not empowered to investigate or continue to investigate the Grice matter beyond identifying an investigation matter within the meaning of s 118U of the Act. Notwithstanding that, and Mr Clair's opinion that, if the matter were not investigated properly or to finality elsewhere, then the Commission had a statutory and practical obligation to complete the task, no commencement or resumption of any investigation of the matter by the Commission or its Official Misconduct Division appears to have taken place.
- [16] The present Chairperson of the Commission, Mr Butler, has sworn that the Grice matter was finalized by the notation of 5 January 1998 but that does not appear to be correct, in the light of the evidence of the previous Chairperson, Mr Clair and the then Chief Officer of the Complaints Section, Mr Barnes. I would accept that, in the light of this evidence, any investigation by the Commission was put in abeyance pending the government inquiry and remained in abeyance pending the possibility of inquiry into the matter by the Parliamentary Commissioner and, later, by the Commissioner of Police under the supervision of the Director of Public Prosecutions.
- [17] In April 1999 and October 1999 the Parliamentary Commissioner identified two investigation matters and referred them to the Parliamentary Criminal Justice Committee. Then on 22 June 2000 the Parliamentary Committee determined, apparently under s 118F(3), to ask the Director of Public Prosecutions to examine the available evidence in relation to these matters, which, in substance included the Grice matter, request the Commissioner of Police to assign senior police investigators to undertake any further investigations he considers necessary, supervise any such further investigations and determine whether any criminal charges are open against any person.⁶ Then on 1 June this year the Director of Public Prosecutions advised the appellant's representative that there was sufficient credible evidence to warrant the prosecution of the appellant for an abuse of office pursuant to s 127(2) of the Act and that she had recommended to the Police Commissioner that the appellant be so charged.
- [18] It appears from the letter of the Commissioner of Police to the appellant's solicitor dated 4 June 2001 that he has not, automatically, accepted the Director's recommendation but is independently assessing the question whether the appellant should be charged.
- [19] No criticism is or could be made of the Commission's decision on 28 October 1997 to put in abeyance any investigation into the matter by the Official Misconduct Division. What the appellant submitted was unfair in the conduct of the investigation was the failure of the Official Misconduct Division to resume that investigation; more specifically, its failure to investigate three identified aspects of

⁶ This course had been urged by the appellant.

it. It is this unfairness which, it was submitted, meant that that investigation by the Official Misconduct Division was being conducted unfairly on 16 August 2001.

- [20] Alternatively he submitted that the failure to proceed with the investigation which commenced on or shortly after the registration by the Commission of Mr Boe's memorandum of 10 August 2001 constituted the relevant unfairness.
- [21] As to the first of these it seems that nothing has relevantly changed since the judgment of the Supreme Court on 2 November 1998. Mr Boe, for the appellant, contended for an even earlier date, 5 August 1997, as the date from which relevant unfairness existed. But he submitted that the recommendation by the Director of Public Prosecutions that the appellant should be charged with an offence materially worsened that unfairness. He conceded that the reason for the Commission's placing any investigation into abeyance was that there was an "arms length" investigation being or about to be conducted into the matter by another agency but submitted that this state of affairs ceased upon the Director's recommendation on 1 June 2001.
- [22] The learned Chief Justice concluded that, on the material before him, no investigation was "now being conducted" by the Official Misconduct Division, his Honour's reference to "now" being a reference to 16 August 2001, the date of the application before him. It follows from the terms of the section - "is being conducted" being in the continuous present - that there must have been some act or omission in the course of the continuous conduct of an investigation by the Official Misconduct Division on 16 August 2001 which was unfair. So the first question is whether an investigation was continuously being conducted by the Official Misconduct Division on that date. His Honour, having answered that question adversely to the appellant, did not need to answer the further question whether it was being conducted unfairly.
- [23] Whether on a particular date an investigation is being continuously conducted is, in my opinion, a question of fact. It would be notwithstanding that nothing had been done for some time by those conducting it if, for example, that was because they were waiting on information from an expert or a factual source. But where, as here, the investigation has, subject to the completion of some minor matters, been put in abeyance because it was expected that the matter the subject of the investigation would be investigated by another statutory body, I do not think it can be said to remain continuously being conducted. On the contrary, it has ceased being conducted, albeit not permanently. Nor do I think that the fact that, as Mr Clair swore, it always remained his intention to investigate the matter if the other body or bodies did not do so, casts any doubt on that conclusion.
- [24] It is unclear whether any and if so what steps were taken by the Official Misconduct Division in the securing of material or the furtherance of forensic testing, as contemplated, between 28 October 1997 and 4 June 1999 though it is possible that the latter of these is reflected in Dr Strach's report of 7 August 1998.⁷ What is clear

⁷ The report appears on its face to be prepared on behalf of the Commission but not, in terms, on behalf of the Official Misconduct Division. It may have been prepared on behalf of the Commission for submission to the Parliamentary Commissioner. The report by Mr McGrath of 25 March 1998 analysing all alleged phone conversations between the appellant and Nicholls was, it seems, prepared for that purpose.

from the affidavit of Mr Bevan, the Director of the Official Misconduct Division since 4 June 1999, is that there was no conduct by that Division involving gathering of evidence or undertaking of actions or steps normally associated with investigating processes in relation to this matter since that date.

- [25] It is a proper inference to draw from the resolution of 28 October 1997 and the evidence of Mr Bevan, in the light of the referral of the investigation into the Grice matter to the Commission of Inquiry, the purported referral of it to the Parliamentary Commissioner and the referral of it to the Director of Public Prosecutions, that neither the Commission or its Official Misconduct Division had by 16 August 2001 recommenced the conduct of the investigation into that matter. Indeed it is implicit in the appellant's submission to this Court that it is the failure to investigate, which is of long standing, which constitutes the unfairness.
- [26] I would therefore conclude, as the learned Chief Justice has, that no investigation was being conducted by the Official Misconduct Division in relation the Grice matter on 16 August 2001. It is, accordingly, unnecessary to consider whether, if any investigation was being conducted on that day, it was being conducted unfairly. This conclusion may be reached with equal conviction in respect of the investigation said to have been commenced in consequence of Mr Boe's memorandum of 10 August 2001.
- [27] It follows that, in my opinion, the appeal should be dismissed with costs.
- [28] There is nevertheless cause for concern that the Director of Public Prosecutions should recommend prosecuting the appellant for an offence pursuant to s 127(2) of the Act substantially on the basis of evidence by Nicholls as appears from Mr Martin SC's recollection of his conversation with the Director on 4 June 2001. In the first place Nicholls is plainly a witness of dubious credibility. In his reasons for prohibiting the Commission of Inquiry from proceeding on 5 August 1997, Thomas J (as his Honour then was) referred to Nicholls' "propensity to resort to the use of lies, false identities and false allegations to secure his ends".⁸ Secondly and more specifically, any evidence by Nicholls that it was the appellant who disclosed confidential information to him is likely to be met by evidence from other, apparently more reliable witnesses, that Nicholls had made statements to the contrary. Thirdly there appear to be at least two other persons, either of whom may have disclosed this confidential information to Nicholls. According to Mr Boe, his inquiries indicate that investigations so far conducted by police have concentrated solely on obtaining evidence to support a case that it was the appellant who disclosed the information rather than, as should have been done, seeking evidence to prove who disclosed such information. And finally none of the evidence put before this Court suggests any benefit or advantage which would accrue to the appellant from the disclosure of this information.
- [29] Nothing which I have said in the preceding paragraph is intended, in any way, to inhibit any power or discretion of the Director of Public Prosecutions or the Commissioner of Police. On the contrary it is intended merely to point out the apparent inadequacy, on the material before this Court, of any case against the

⁸ *Carruthers v Connolly* [1998] 1 QdR 339, 369.

appellant under s 127(2) and of the investigation which has so far been conducted by police in this matter.

Orders

1. Appeal dismissed.
2. Order that the appellant pay the respondent's costs.

[30] **WILLIAMS JA:** The facts are fully set out in the reasons for judgment of Davies JA which I have had the advantage of reading. It is then a matter of applying the relevant statutory provision to those facts. There is nothing I can add to the reasoning of Davies JA for concluding that the evidence does not establish "an investigation . . . being conducted unfairly . . .". I also specifically agree with the observations he has made in paras [28] and [29] of his reasons. I agree with the orders proposed.

[31] **WHITE J:** Davies JA has set out the chronology and other relevant facts relating to this appeal and there is little, if any, contest between the parties about them. Once established, as his Honour has done, it is a straight forward process to ascertain whether there is "an investigation by the official misconduct division [which] is being conducted unfairly". It would be straining the language beyond the permissible to conclude that an investigation which is in abeyance and which has lain dormant for a very long time can be described as "being conducted".

[32] Neither could the failure to proceed with the investigation after the registration by the Commission of the memorandum of 10 August 2001 fall within s 34(1)(a) of the *Criminal Justice Act 1989*.

[33] I particularly wish to be associated with Davies JA's observations set out in paragraphs 28 and 29 of his reasons for judgment.

[34] I agree with the orders which his Honour proposes.