SUPREME COURT OF QUEENSLAND

CITATION:	*White v Australian Securities and Investments Commission & Ors* [2013] QCA 357
PARTIES:	**CRAIG ROBERT WHITE** (appellant) **v** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (first respondent) **ACN 101 634 146 (in liquidation)** (second respondent) **MICHAEL CHRISTODOULOU KING** (third respondent) **GUY HUTCHINGS** (fourth respondent) **DAVID MARK ANDERSON** (fifth respondent) **MARILYN WATTS** (sixth respondent)
FILE NO/S:	Appeal No 10638 of 2013 SC No 12122 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore 14 November 2013 Reasons delivered 3 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2013
JUDGES:	Muir and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 14 November 2013:** **1. The appeal be dismissed.** **2. The appellant pay the costs of and incidental to the appeal of the first, fourth and sixth respondents.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – STAY OF CIVIL PROCEEDINGS PENDING CRIMINAL PROCEEDINGS – where, in October 2009, ASIC commenced proceedings for breach of s 601FC of the *Corporations Act* 2001 (Cth) against the

second respondent, a company in liquidation, as well as the appellant and the third, fourth, fifth and sixth respondents, as directors or senior officers of the company – where, following numerous interlocutory proceedings, the six week trial commenced on 4 November 2013 – where, on 31 October 2013, the New Zealand Financial Markets Authority filed two criminal charges against the appellant and the fifth respondent – where the New Zealand proceedings are substantially different in nature from the present proceedings – where, on 4 November 2013 in reliance upon the privileges against self-incrimination and exposure to penalty, the appellant and the fifth respondent sought a stay of the proceedings until the determination of the New Zealand prosecution – where the primary judge found that the New Zealand criminal trial would not be concluded until mid-2015 at the earliest – where the primary judge applied the principles in *McMahon v Gould* and refused to grant a stay of the proceedings – where the appellant submits, in reliance upon the primary judge's finding that there were substantial areas of overlap between the present proceeding and the New Zealand prosecution, that his privileges against self-incrimination and exposure to a civil penalty were so fundamental that they outweighed competing considerations – where the appellant characterised the present circumstances as a form of practical compulsion – where the third, fourth and sixth respondents are anxious to have the proceedings, which involve serious allegations of dishonesty, resolved and have expressed concern that further delay will render it difficult to secure the attendance at trial of 47 witnesses, "inevitably degrade memories", create duplication and waste and deplete their litigation fund – where the appellant has no absolute right to a stay – whether the principles in *McMahon v Gould* should be reconsidered in the light of *Re AWB Ltd (No 1)* – whether the primary judge, in refusing a stay, elevated case management principles above the appellant's fundamental common law right to the preservation of his privilege against self-incrimination – whether a stay should be granted

CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – STAY OF CIVIL PROCEEDINGS PENDING CRIMINAL PROCEEDINGS – where, given the state of the evidence before him, the primary judge was not satisfied that the evidence of the appellant and the fifth respondent would tend to incriminate them in the New Zealand prosecution – where the primary judge held that the appellant and the fifth respondent had not demonstrated that there was a real risk that they would face the dilemma of having to decide whether to give evidence or cross-examine witnesses so as to reveal their instructions – where the primary judge held that the injustice to the other respondents and the detriment to the public interest outweighed any

injustice that may be suffered by the appellant and the fifth respondent – where the appellant submits that the primary judge erred in imposing a requirement that the appellant go into evidence and thus waive his privilege against self-incrimination – where the appellant submits that the primary judge erred in failing to infer prejudice to the appellant – where the primary judge concluded that the appellant and the fifth respondent would lose an advantage if they chose to give evidence and put questions to ASIC's witnesses as the New Zealand prosecution would have advance notice and additional time to prepare – whether the primary judge characterised the appellant's prejudice as nothing more than the loss of a "mere tactical advantage" – whether the primary judge erred in failing to infer prejudice to the appellant

CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – STAY OF CIVIL PROCEEDINGS PENDING CRIMINAL PROCEEDINGS – where the appellant submits that s 1317N of the *Corporations Act* 2001 (Cth) evinces a legislative intent that criminal offences arising out of the same factual matrix be heard ahead of civil penalty proceedings – where the primary judge found that the elements of the New Zealand offence are quite different from the conduct constituting the contravention – where s 1317N of the Act is not applicable to foreign criminal proceedings – whether the primary judge erred in failing to find that s 1317N of the Act applied

Corporations Act 2001 (Cth), s 9, s 601FC, s 1317N
Securities Act 1978 (NZ), s 58

Anderson & Ors v Australian Securities and Investments Commission (2012) 297 ALR 546; [2012] QCA 301, related
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, cited
Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 5) [2013] FCA 369, cited
Australian Securities and Investments Commission v Craigside Company Ltd (2013) 93 ACSR 176; [2013] FCA 201, cited
Australian Securities and Investments Commission v Managed Investments Limited & Ors No 4 [2013] QSC 15, related
Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5) [2013] QSC 313, related
Bishopsgate Insurance Australia Ltd (In liq) v Deloitte Haskins & Sells [1999] 3 VR 863, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Ketteman v Hansel Properties Ltd [1987] AC 189; [1988] 1 All ER 38, cited
McMahon v Gould (1982) 7 ACLR 202, applied

Re AWB (No 1) (2008) 21 VR 252; [2008] VSC 473, considered
Re AWB Limited (No 2) [2009] VSC 70, cited
Reid v Howard (1995) 184 CLR 1; [1995] HCA 40, considered
Rich v Australian Securities and Investments Commission (2004) 220 CLR 129; [2004] HCA 42, cited
Spitfire Nominees Pty Ltd v Thompson & Hall [1999] VSC 12, cited

COUNSEL: R P S Jackson, with N Andreatidis and A Nicholas, for the appellant
P J Riordan SC, with M Brady and J Moore, for the first respondent
No appearance for the second respondent
P J Davis QC, with D Piggott, for the third respondent
D L Williams SC, with C H Withers, for the fourth respondent
No appearance for the fifth respondent, the fifth respondent's submissions were heard on the papers
P A Freeburn QC, with P D Hay, for the sixth respondent

SOLICITORS: Bartley Cohen Litigation Lawyers for the appellant
Corrs Chambers Westgarth for the first respondent
No appearance for the second respondent
Tucker & Cowen Solicitors for the third respondent
Kennedys for the fourth respondent
DibbsBarker for the fifth respondent
James Conomos Lawyers for the sixth respondent

[1] **MUIR JA**: **Introduction** On 14 November 2013, this Court ordered that the appellant's appeal against a decision of a judge of the Trial Division dismissing his application for a stay of proceedings brought against him by the Australian Securities and Investments Commission (ASIC) claiming civil penalties and disqualification orders (the proceedings) be dismissed. It was also ordered that the appellant pay the costs of and incidental to the appeal of the first, fourth and sixth respondents. The following are my reasons for those orders.

[2] In the proceedings ASIC alleges that the second respondent, a company in liquidation, was the responsible entity for a registered scheme under the *Corporations Act* 2001 (Cth) (the Act) and, as such, breached certain duties imposed on it under s 601FC of the Act. The five natural persons named as defendants are alleged to be either directors or senior officer holders of the company and to have either brought about the company's contraventions or to have derivative liability for them. They are the appellant and the third, fourth, fifth and sixth respondents in this appeal.

[3] The nature of the proceedings was summarised as follows by Philip McMurdo J, with whose reasons the other members of the Court agreed, in *Anderson & Ors v Australian Securities and Investments Commission*:[1]

1 [2012] QCA 301.

> "[6] … The claim against the [second respondent] is that it contravened s 601FC(5) of the *Corporations Act* in various ways between November 2007 and April 2008. ASIC alleges that this company, as the responsible entity for a registered managed investment scheme, misapplied more than $100,000,000 by paying it for the benefit of a related party or parties, rather than for the purposes of the scheme. It is also alleged to have contravened s 601FC(5) by providing false information to its auditors, bankers, compliance officers and external lawyers and within its half yearly report lodged with ASIC, as to its dealings with those funds.
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> [7] There are some differences between the cases against the [appellant and the third to sixth respondents], but each is alleged to have been involved in one or more of the contraventions by the [second respondent] of its duties as a responsible entity, so that he or she also contravened s 601FC. And all but one of [them] is alleged to have contravened also s 209(2) and s 601FD of the *Corporations Act*. Each of those sections is a civil penalty provision according to s 1317E(1). If ASIC proves a contravention of any of them by [the appellant or the third to sixth respondents], then he or she may be ordered to pay a pecuniary penalty pursuant to s 1317G."

[4] Philip McMurdo J then observed:[2]

> "[8] Therefore, it is plain that the very nature of these proceedings attracts a claim for the privilege against exposure to a penalty. It is also conceded by ASIC that the privilege against self-incrimination might be relevant. None of the arguments suggests that there is any practical difference between the two privileges for the way in which the pleading rules should give way to their operation."

The history of the proceedings

[5] The proceedings were commenced by originating application in October 2009. In December 2009 it was ordered that the proceedings continue as if started by a claim. The first statement of claim was filed in that month.

[6] The second respondent does not contest the claim or claims against it.[3] The appellant and the third, fourth, fifth and sixth respondents have defended the claims against them vigorously and there have been numerous interlocutory proceedings, including the appeal to this Court.[4] It has taken over four years to prepare the proceedings for trial and the primary judge considered that the costs incurred "must already be measured in millions of dollars".[5] The current statement of claim,

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2 *Anderson & Ors v Australian Securities and Investments Commission* [2012] QCA 301.

3 *Australian Securities and Investments Commission v Managed Investments Limited & Ors No 4* [2013] QSC 15.

4 *Anderson & Ors v Australian Securities and Investments Commission* [2012] QCA 301.

5 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [3].

incorporating full particulars, exceeds 200 pages. The trial, which commenced on 4 November 2013, is estimated to take six weeks. ASIC has filed and served affidavits provided by prospective witnesses, 47 of whom are required for cross-examination.

[7] Directions given in December 2009 exempted the appellant and the third, fourth, fifth and sixth respondents from compliance with the pleading rules of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR) so far as was necessary to allow such parties to make a claim of privilege against self-incrimination or exposure to penalties. Those directions were subsequently varied to further protect the rights of the appellant and the third, fourth, fifth and sixth respondents in respect of privilege.

[8] This Court, in *Anderson*, further varied the procedural orders with a view to ensuring that the appellant and the third, fourth, fifth and sixth respondents were not bound to observe any of the pleading rules of the UCPR which might impinge on their rights in respect of the privileges against self-incrimination and exposure to a civil penalty.

The criminal proceedings in New Zealand

[9] The primary judge explained:[6]

> "[5] On Thursday 31 October, the New Zealand Financial Markets Authority filed two criminal charges in the Auckland District Court against two of the defendants, Mr White and Mr Anderson. They received notice of those charges on that day. Each is charged under s 58 of the *Securities Act 1978* (NZ) first, that between 14 September 2007 and 31 January 2008 he signed a registered prospectus for a company called MFS Pacific Finance Ltd which was distributed and which contained untrue statements; and second, that between the same dates he was a director of that company, it was an issuer of debt securities and it distributed an advertisement which included untrue statements. The maximum penalty for each offence is imprisonment for five years or a fine of $300,000."

[10] It is apparent from the above that the New Zealand proceedings are substantially different in nature from the present proceedings, which relate principally to the misapplication or misappropriation of investors' money.

The stay application

[11] On 4 November 2013, the appellant and the fifth respondent applied for a stay of the proceedings until the determination of the New Zealand prosecution. The trial was adjourned pending determination of the stay applications by the primary judge. The stay applications were heard by the primary judge on 5 and 6 November and judgment was given on 11 November 2013. The primary judge found that the New Zealand criminal trial would not be concluded until mid-2015 at the earliest. That estimate did not take into account the length of time for the hearing and determination of any appeal. The fourth and sixth respondents opposed the grant of

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6 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313.

a stay and the third respondent informed the court that he wished the trial to proceed, but not if the court thought that the appellant and the fifth respondent should have a stay. The stay was opposed by ASIC.

Applicable principles

[12] It was common ground before the primary judge that the following principles, expounded by Wootten J in *McMahon v Gould*,[7] applied:

> "I approach the decision of this matter with the following guidelines:
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> (a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court;
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> (b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds;
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> (c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with;
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> (d) Neither an accused nor the Crown are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;
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> (e) The court's task is one of 'the balancing of justice between the parties', taking account of all relevant factors;
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> (f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors;
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> (g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's 'right of silence', and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding. I return to this subject below;
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> (h) However, the so-called 'right of silence' does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules *merely* because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding;
>
> (i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings;

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[7] (1982) 7 ACLR 202 at 206–208.

(j) In this regard factors which may be relevant include:

(i) the possibility of publicity that might reach and influence jurors in the civil proceedings;

(ii) the proximity of the criminal hearing;

(iii) the possibility of miscarriage of justice eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses;

(iv) the burden on the defendant of preparing for both sets of proceedings concurrently;

(v) whether the defendant has already disclosed his defence to the allegations;

(vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him;

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant's obligation to the plaintiff;

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed.

In considering the reasons why 'the right of silence' exists (para (g) above), one enters a realm of controversy (see, for example, the discussion of the Eleventh Report of the English Criminal Law Revision Committee (1972) Cmnd 4991 in *The Right of Silence*, being papers presented at a seminar of the Sydney University Law School Institute of Criminology in June 1973). The phrase is a convenient rubric for several rules and practices which have various origins and serve various purposes. In the process of investigation of crime and the interrogation of suspects it comprehends the fact that it is not normally an offence to refuse to answer questions or to fail to provide an explanation or account of events. Not only is refusal or failure not an offence, but it cannot be used to draw an adverse inference against the person concerned at his trial. This aspect of the right of silence was greatly strengthened by the Judges' Rules which provided for the cautioning of suspects. Serving some of the same purposes but of different origin is the law relating to confessions in criminal cases, which cannot be used unless they are fully voluntary.

In terms of procedure at a criminal trial, the 'right of silence' covers the situation that the accused is not obliged to give evidence – indeed he may make an unsworn statement about which he cannot be questioned – and for the most part no comment can be made to the jury on his failure to go in the box.

> Finally, in legal proceedings generally, civil and criminal, a witness has a privilege to refuse to answer a question which might tend to incriminate him. Naturally this does not apply to a defendant who chooses to give evidence in a criminal case.
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> …
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> In this context there are some consequences of the 'right of silence' which no one, so far as I am aware, puts forward as legitimate reasons for its existence. These include the opportunity it may give the accused to remain silent till the end of the evidence against him at the trial, and then produce a fabricated story perfectly tailored to meet that evidence. They include the possibility of depriving the prosecution of any opportunity to check the accused's story and obtain evidence to refute it before the trial is over. In one particular matter – the last minute production of alibis – the injustice was so frequent and obvious that the legislature made an inroad into the 'right of silence' by requiring notice of such an intended defence.
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> These are advantages which 'the right of silence' gives to an accused, but they cannot reasonably be regarded as part of the reason why the right exists. In exercising its discretion to stay civil proceedings the court need not be concerned to preserve these advantages. It should be concerned to avoid the causing of unjust prejudice by the continuance of the civil proceedings, not to preserve the tactical status quo in the criminal proceedings whether it be just or unjust." (citations omitted)

[13] The appellant reserved the right to challenge the accuracy of the above principles on appeal. It was also accepted at first instance and on appeal that the common law privileges against self-incrimination and exposure to penalty applied in respect of the New Zealand proceedings.

The appellant's contentions

[14] The following appellable errors in respect of the primary judge's exercise of discretion were alleged by the appellant:

(a) Instead of inferring prejudice to the appellant, the primary judge wrongly imposed as a requirement for the favourable exercise of the discretion to grant a stay that the appellant go into evidence and thus waive the fundamental common law right he sought to protect.

(b) The primary judge characterised the advantage to the New Zealand prosecution in knowing in advance the nature of the evidence the appellant would likely give in his defence as nothing more than the loss by the appellant of a tactical advantage.

(c) The effect of the refusal of the stay was to elevate case management principles above the appellant's fundamental common law right to the preservation of his privilege against self-incrimination, contrary to authorities.

(d) The primary judge erred in failing to find that s 1317N of the Act evidenced a legislative intent that criminal offences arising out of the same factual matrix be heard ahead of civil penalty proceedings.

Consideration

Case management principles

[15] In respect of the third of these complaints, the appellant relies upon the primary judge's treatment of delay. It is submitted that the primary judge ascribed fault or blame for some part of the delay to the appellant. This complaint lacks a factual foundation. Although the primary judge made reference to the delays that had previously been incurred as a consequence of "numerous complex and no doubt expensive interlocutory proceedings"[8] and the delays that would inevitably be incurred if a stay was granted, his Honour did not insinuate that the appellant was at fault or to blame.

[16] The primary judge expressly accepted the submissions of counsel for the fifth respondent that the exercise of his discretion involved "the balancing of competing interests", subject only to the addition of the words "and any public interest" to the balancing process.[9] He noted that it was common ground that the guidelines articulated in *Gould* should be applied as such and not as if they were a statutory formula.[10] His Honour then expressly considered: the prejudicial effect of delay;[11] the fundamental nature of the privilege against self-incrimination and the possibility that the cases of the appellant and the fifth respondent may be damaged if, in order to preserve the benefit of their privilege claims, they chose not to give evidence or to put their instructions to ASIC witnesses;[12] other possible disadvantages that the appellant and the fifth respondent may suffer if a stay was not granted;[13] and the countervailing considerations of injustice to the other respondents and the detriment to the public interest which would result from the staying of the proceedings.[14]

[17] The primary judge held that, contrary to the conclusion of Wootten J in *Gould*, a legitimate use of the privilege against self-incrimination and the "right to silence" was to deprive the prosecution of any opportunity to check an accused's story and obtain evidence to refute it before the trial.[15]

Failure to infer prejudice

[18] Turning to the first contention, it is not correct that the primary judge imposed any such requirement. He commented on the absence of evidence from the appellant

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8 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [3].

9 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [21]–[22].

10 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [23].

11 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [31].

12 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [34].

13 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [39].

14 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [26]–[28] and [41].

15 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [35].

which required him to speculate, to a degree, as to the extent to which the appellant and the fifth respondent might be prejudiced if they chose to give evidence and put questions to ASIC's witnesses in the proceedings. In considering the potential prejudice to the appellant and the fifth respondent, his Honour concluded that the advantage which would be lost in relation to the elements of the New Zealand offences on which the appellant and the fifth respondent had the onus of proof, namely, that the prosecution would have advance notice and additional time to prepare, was "tactical".[16] He observed that the position may be different in respect of the elements of "misleading and (in the case of omissions) materiality"[17] in the New Zealand offences. He found it difficult, however, to conclude from the evidence before him that there was much evidence which the appellant and the fifth respondent could give which would bear upon those issues. His Honour does not appear to be using the word "tactical" in a pejorative way. Nor did he suggest that the loss of a "tactical advantage"[18] could not be prejudicial to the interests of the appellant and the fifth respondent.

[19] The primary judge, although commenting on the paucity of evidence on the point, was prepared to infer that there were substantial areas of factual overlap between the present proceedings and the New Zealand proceedings.[19] His Honour, however, was not prepared to infer that the evidence of the appellant and the fifth respondent would tend to incriminate them under s 58 of *Securities Act* 1978 (NZ) (the NZ Act). That, he concluded, would depend on their evidence, whatever it happened to be.[20] His Honour was not satisfied that the appellant and the fifth respondent demonstrated that there was a real risk of their being placed in the dilemma they feared: the necessity to decide whether to give evidence or cross-examine witnesses in such a way as to reveal their instructions in the present proceedings. His Honour said in that regard:[21]

> "Even if one assumes in their favour that they will indeed be placed in that dilemma, it has not been demonstrated that they will suffer significant disadvantage in the present proceedings by maintaining their claim of privilege. Whatever injustice they might suffer is in my judgment outweighed by the injustice which a stay would cause to the other defendants and the detriment to the public interest which would result."

Mere tactical advantage

[20] As for the contention that the primary judge categorised the appellant's prejudice as nothing more than the loss of a "mere tactical advantage",[22] the above discussion shows that the primary judge was alive to ways by which the appellant and the fifth

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16 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [39].

17 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [39].

18 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [39].

19 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [20].

20 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [37].

21 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [41].

22 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [39].

respondent may suffer prejudice. Plainly, the primary judge considered the possibility that the appellant may, by cross-examination and by going into evidence, if that choice were to be taken, suffer a material disadvantage in the New Zealand proceedings. As the fourth respondent pointed out, however, the continuation of the Queensland proceedings need not necessarily disadvantage the appellant. He would have the opportunity to cross-examine ASIC's witnesses, many of whom are likely to be material witnesses in the New Zealand proceedings.

Section 1317N of the Act

[21] Contrary to the appellant's contentions, the primary judge's findings in respect of s 1317N of the Act are unexceptional. The primary judge rightly held that the elements of the New Zealand offence are quite different from "the conduct alleged to constitute the contravention"[23] in the proceedings.[24] Moreover, s 1317N is not applicable to foreign criminal proceedings.[25]

Reconsideration of Gould

[22] It was submitted that if the principles articulated in *Gould* precluded the exercise of a discretion to grant a stay in favour of the appellant, the relevant principles should be reconsidered in the manner identified in *Re AWB Ltd (No 1)*.[26] In that case Robson J referred to doubt expressed about the correctness of *Gould*, particularly since *Reid v Howard.*[27] The passage in the reasons of Robson J on which the appellant inferentially placed particular reliance was:[28]

> "For the purposes of this case, I assume I am bound to follow the *McMahon v Gould* line of authorities. Nevertheless, I wish to add my voice to those at first instance suggesting that an appellate court may wish to reconsider *McMahon v Gould*. In particular, an appellate court may consider that the right of silence should not only be recognised, but protected by the courts by preventing a defendant from being effectively compelled to waive his right of silence and thereby help those who seek to prove an offence by requiring him to defend civil actions relating to the same or similar conduct the subject of existing or potential criminal proceedings before those civil proceedings are completed. Compelling the defendant to defend civil proceedings, particularly those which impose a penalty, may assist the Crown in its prosecution by putting the Crown onto a train of inquiry or enable it to adjust its case to meet the anticipated defence in advance. It might be thought that such a circumstance denies the defendant his or her basic common law right to have the Crown establish its case against him or her without any assistance from the defendant." (citations omitted.)

[23] Even if it were to be accepted that additional weight or emphasis should be afforded to maintaining the relevant privileges consistently with the principles articulated in *Reid*, it was not submitted that any such approach would result in an unconditional

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23 *Corporations Act* 2001 (Cth), s 1317N(1)(b).

24 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [29].

25 See the definition of "offence" in s 9 of the Act and s 1317N.

26 (2008) 21 VR 252.

27 (1995) 184 CLR 1.

28 *Re AWB (No 1)* (2008) 21 VR 252 at 277.

right to the stay of civil proceedings, the continuation of which might have the practical result of forcing a defendant in the civil proceedings to take steps which would waive the defendant's right of silence and thus disadvantage the defendant in criminal proceedings being prosecuted in a different jurisdiction. Moreover, as may be seen from the foregoing discussion, the primary judge did not merely apply the guidelines stated in *Gould* and his alleged error in not applying the *Gould* principles reformulated in accordance with *Re AWB Ltd (No 1)* was not identified.

The competing interests and considerations

[24] The appellant's argument did not attempt to identify the extent to which the evidence in the proceedings might coincide with or bear upon the evidence in the New Zealand proceedings. The primary judge accepted that there were "substantial areas of factual overlap between the present proceedings and the New Zealand proceedings".[29] The appellant relied on that finding, which was uncontested, to advance the proposition, in effect, that his privileges against self-incrimination and exposure to a civil penalty were so fundamental that they outweighed competing considerations. I am unable to accept the appellant's argument in this regard.

[25] Once it is accepted, as it must be, that the appellant has no absolute right to a stay of the proceedings in the circumstances under consideration and that the rights and interests of ASIC, the other respondents and also the public interest must be taken into account, it becomes apparent that the considerations in favour of staying the proceedings are outweighed by the considerations against.

[26] The fourth respondent's employment was concluded as a result of the allegations made against him by ASIC in the proceedings. He has always worked in the financial services industry and, except for a specific project of about three months duration, he has been unable to secure re-employment. He has no expectation of obtaining a suitable position in the financial services industry until the proceedings are finalised. As was submitted on his behalf, the "prejudice resulting from allegations involving dishonesty and want of probity remaining outstanding for a lengthy period of time can be readily inferred".[30] The strain litigation imposes on litigants is a factor to be taken into account in the exercise of a discretion which bears on the expedition or delay of the litigation.[31]

[27] The fourth respondent and his family have suffered and continue to suffer stress as a result of the proceedings. The fourth respondent has spent "[a]n enormous amount of time and effort" in preparing for trial. He is anxious to have the proceedings concluded. He is concerned about the duplication and waste which would ensue were a stay to be granted. He is concerned also that the staying of the proceedings might give rise to a risk that the sum insured under the policy of insurance relied on by him and the other natural person respondents will become depleted or exhausted before the conclusion of the proceedings. The primary judge found, in effect, that this concern was justified.[32]

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29 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [20].

30 For observations concerning the prejudice that can be expected to flow from unresolved allegations which reflect adversely on a person's competence or probity and which bear upon his or her employability, see *Bishopsgate Insurance Australia Ltd (In liq) v Deloitte Haskins & Sells* [1999] 3 VR 863 at 887.

31 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220.

32 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [28].

[28] The sixth respondent is in the same general position as the fourth respondent. Serious allegations of dishonesty have been made against her. She is anxious to have them resolved. She voiced concern about the unfairness that may result from the erosion of witnesses' memories over time.

[29] The primary judge was rightly concerned that there had already been considerable delay and that further delay "will inevitably degrade memories".[33] He found that further delay would be prejudicial to a fair trial.

[30] Counsel for the appellant submitted that the delay which would result from a stay should not prevent a fair trial as most of ASIC's witnesses had provided affidavits, there were statements containing the anticipated evidence of the other persons ASIC intended to call to give evidence and much of the evidence was documentary. These are valid points but, as the primary judge remarked, "the defences are opaque"[34] and the respondents have not provided affidavits dealing with the merits of ASIC's claims. Forty seven prospective witnesses have been required for cross-examination. It is impossible to conclude that there will not be cross-examination of many of those witnesses or of the witnesses called by individual respondents. Nor is it possible to form any view as to the extent to which the oral evidence may explain, qualify or otherwise impinge on the documentary evidence.

[31] In *Brisbane South Regional Health Authority v Taylor*,[35] McHugh J discussed, in terms which are relevant here, the way in which delays in litigation are capable of causing deterioration in the quality of evidence, the loss of evidence or the diminution in awareness of the evidentiary significance of a known fact or circumstance.

[32] It is obvious that deferring the trial of the proceedings for possibly three or more years will disrupt the time consuming task of securing the attendance at the trial in Brisbane of some 47 witnesses, many of whom reside interstate. Some reside abroad. Fresh arrangements will need to be made. Witnesses' private affairs will be disrupted and it is by no means inconceivable that some will be unable to attend a deferred trial due to illness, incapacity or death. Generally, the adjournment of the trial for a lengthy period will result in the waste of much of the pre-trial preparatory work and the costs incurred in relation to it.

[33] The public interest is engaged. Civil penalty and disqualification proceedings embody both punitive and protective purposes.[36] As the primary judge pointed out, the purpose of the proceedings is to enforce the law and there is a strong public interest in the resolution of claims such as those under consideration in a timely way. The events the subject of the proceedings occurred some six years ago. Failure to conclude the proceedings without further delay would tend to erode public confidence in the administration of justice.

[34] It follows from the foregoing that even if the appellant had succeeded in showing appellable error on the part of the primary judge, the above considerations would have led this Court to exercise its discretion against the grant of a stay.

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33 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [31].

34 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [4].

35 (1996) 186 CLR 541 at 551.

36 *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129 at 144 [30]–[38].

[35] **GOTTERSON JA:** I agree with the separate reasons of Muir JA and of Applegarth J.

[36] **APPLEGARTH J:** I have had the advantage of reading the reasons of Muir JA with which I agree.

[37] The primary judge did not err in failing to infer prejudice. He concluded that if the appellant chose to put questions to ASIC witnesses in the present proceeding and to give evidence, then the New Zealand prosecution would have more time to prepare than it would if it heard the questions and evidence for the first time during the trial in New Zealand.[37] The primary judge concluded that an advantage would be lost. He thereby inferred prejudice. Given the state of the evidence before him, the primary judge was not in a position to say that the appellant's evidence "would" tend to incriminate him. It was not obvious that it would have that tendency.[38]

[38] The primary judge did not treat the loss of the advantage as nothing more than the loss of a tactical advantage. Instead, his Honour recognised "the fundamental nature of the privilege against self-incrimination" and that it "demeans it to refer to it as a mere tactical advantage".[39]

[39] There was no elevation of case management principles above the appellant's fundamental common law right. The primary judge was assisted by the guidelines stated in *McMahon v Gould*[40] and appreciated that later authorities refined those guidelines by affirming that it is legitimate for a party in the appellant's position to deprive the prosecution of an early opportunity to check his story and obtain evidence to refute it. The primary judge did not engage in a case management exercise. His concern was with the interests of justice. The principles stated in *McMahon v Gould* and later authorities identified the court's task as balancing competing interests and deciding whether the interests of justice warranted a stay.

[40] There was no error in not finding that s 1317N of the Act evidenced a legislative intent that criminal proceedings arising out of the same factual matrix be heard ahead of civil penalty proceedings. As Muir JA states, s 1317N is not applicable to foreign criminal proceedings.

[41] The errors alleged by the appellant are not established. The discretion to refuse the application was correctly exercised by concluding that whatever injustice the applicants for the stay might suffer was "outweighed by the injustice which a stay would cause to the other defendants and the detriment to the public interest which would result".[41]

[42] The only other matter which I wish to address is the presence or absence of compulsion in the appellant's choosing to cross-examine ASIC witnesses and give evidence in the ASIC proceeding. ASIC submitted to the primary judge that it was

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37 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [39].

38 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [37].

39 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [34].

40 (1982) 7 ACLR 202.

41 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [41].

not a relevant consideration that the so-called "right to silence" was lost because a defendant in civil proceedings retains the power to decide what evidence to adduce and what response to make to allegations.[42] The primary judge did not accept that submission, and stated that it overlooked the fundamental question of whether it was in the interests of justice that the proceeding be stayed, and that account must be taken of the damage the applicants may suffer "if they choose not to give evidence or put their instructions to ASIC witnesses".[43]

[43] Upon the hearing of the appeal counsel for the fourth respondent put a similar argument to that originally advanced by ASIC about the absence of compulsion. Reference was made to the privilege against self-incrimination having its foundation in protection against *compulsory* incrimination. The conduct of the ASIC proceeding was said to not abrogate the privilege against self-incrimination: it simply meant that the appellant had choices to make about propounding a positive case and giving evidence.

[44] The appellant correctly characterised the present circumstances as a form of practical compulsion. The appellant is faced with the choice of not putting a positive case to ASIC's witnesses and not giving evidence. The consequences of doing so might be very damaging: the ASIC proceeding might be lost by him, civil penalties imposed and other orders made against the appellant at great cost to him and his reputation. Faced with such practical consequences he may be "effectively compelled to waive his right of silence and thereby help those who seek to prove an offence"[44] in existing criminal proceedings.

[45] The practical and effective compulsion to give evidence and to put a case to witnesses, and thereby lose the tactical advantage that is protected by the privilege against self-incrimination, should be recognised as a form of compulsion. It is one thing to say that the appellant is free to make such forensic decisions as he sees fit in the ASIC proceeding. The reality is another thing.[45] His choice is a forced one in the circumstances.

[46] The primary judge correctly took account of the risk that if the ASIC proceeding was not stayed the case for the appellant may be damaged if he chooses not to give evidence or put his case to ASIC witnesses. If, instead, he chooses to put his story to those witnesses and give evidence then he would lose an advantage which the privilege against self-incrimination preserves. He would give prosecuting authorities in New Zealand an early opportunity to check his story and obtain evidence to refute it.

[47] The fundamental nature of the privilege against self-incrimination and the factors that favoured the granting of a stay were weighed by the primary judge. They were clearly outweighed by the injustice which a stay would cause to other defendants and to ASIC, and by the public interest in securing a fair trial of the ASIC proceeding. Muir JA has explained how further delay would be prejudicial to a fair trial.

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42 ASIC cited *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 5)* [2013] FCA 369 at [20] to the primary judge in this regard.

43 *Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313 at [34].

44 *Re AWB Ltd (No 1)* (2008) 21 VR 252 at 277 [58].

45 *Australian Securities and Investments Commission v Craigside Company Ltd* (2013) 93 ACSR 176 at 185 [22]; [2013] FCA 201.

[48] So far as the other defendants are concerned, there is substantial prejudice to them in having public allegations about their probity and competence unresolved. That heavy burden is increased when the resolution is deferred for an uncertain period of years.[46] The primary judge was entitled to "weigh in the balance the strain the litigation imposes on litigants … and the legitimate expectation that the trial will determine the issues one way or the other".[47]

[49] To effectively adjourn the trial of the proceeding for an uncertain number of years by granting a stay pending the conclusion of the hearing of the New Zealand charges would jeopardise the fair trial of the ASIC proceeding. It would impose an unjust burden and personal strain on defendants who are entitled to have the allegations made against them by ASIC resolved one way or the other without unnecessary delay. The appellant was prepared to bear any adverse consequences to him of having the ASIC proceeding delayed. But this does not lighten the burden upon the other defendants of having serious allegations against them unresolved for years.

[50] The injustice to the defendants and the other factors considered by the primary judge and explained by Muir JA outweighed the injustice to the appellant of being forced to forgo a tactical advantage which is protected by the privilege against self-incrimination.

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46 *Bishopgate Insurance Australia Ltd (In liq) v Deloitte Haskins & Sells* [1999] 3 VR 863 at 887 [60]; applied in *Australian Securities and Investments Commission v Lindberg; Re AWB Limited (No 2*) [2009] VSC 70 at [28]–[30] and *Spitfire Nominees Pty Ltd v Thompson & Hall* [1999] VSC 12 at [44].

47 *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214 [100]–[101].