FEDERAL COURT OF AUSTRALIA

Hastwell v Kott Gunning (No 5) [2020] FCA 621

|  |  |
| --- | --- |
| File number: | NSD 714 of 2017 |
|  |  |
| Judge: | **JACKSON J** |
|  |  |
| Date of judgment: | 11 May 2020 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** - stay of proceedings - refusal to attend medical examination - applicant's right to personal liberty - respondent's right to adduce evidence in its defence - request for applicant to attend medical examination reasonably required for the just resolution of the case - stay granted |
|  |  |
| Legislation: | *Australian Human Rights Commission Act 1986* (Cth) ss 3, 10A, 46P*Disability Discrimination Act 1992* (Cth) s 3*Evidence Act 1995* (Cth) ss 75, 76, 79, 81, 102, 108C*Federal Court of Australia Act 1976* (Cth) ss 23, 37M*Safety, Rehabilitation and Compensation Act 1988* (Cth) s 57*Sex Discrimination Act 1984* (Cth) s 3*Federal Court Rules 2011* (Cth)*Rules of the Supreme Court 1971* (WA) O 28, r 1*Uniform Civil Procedure Rules 2005* (NSW) r 23.4 |
|  |  |
| Cases cited: | *Alder v Khoo* [2010] QCA 360*Brookfield v Davey Products Pty Ltd* [2001] FCA 104*Dupas v The Queen* [2012] VSCA 328; (2012) 40 VR 182*Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67; [1969] 2 All ER 127*Electric Light & Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554*Ewin v Vergara (No 3)* [2013] FCA 1311*Furesh (as administrator of Intestate Estate of Slipcevich) v Schor* [2013] WASCA 231; (2013) 45 WAR 546*Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374*Gray v Hopcroft* [2000] QCA 144*Hastwell v Kott Gunning (No 3)* [2019] FCA 1641*Hill v Hughes* [2019] FCCA 1267*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612*Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council* [2009] NSWCA 59; (2009) 230 FLR 336*Lambert v Mainland Market Deliveries Ltd* [1977] 1 WLR 825*Lane v Willis* [1972] 1 WLR 326*McKinnon v Commonwealth of Australia* [1998] FCA 1095*McKinnon v Commonwealth of Australia* [1999] FCA 505*McKinnon v Commonwealth of Australia* [1999] FCA 717*Nursing and Midwifery Board of Australia v HSK* [2019] QCA 144*Perera v GetSwift Limited* [2018] FCAFC 202; (2018) 263 FCR 92*R (Y) v Croydon London Borough Council* [2016] 1 WLR 2895*Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; (2014) 223 FCR 334*Ruddock v Vadarlis* [2001] FCA 1329; (2001) 110 FCR 491*S v S* [[1972] AC 24](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1972+AC+24)*Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218*Starr v National Coal Board* [1977] 1 WLR 63*Waters v Public Transport Corporation* (1991) 173 CLR 349 |
|  |  |
| Date of hearing: | 19 December 2019 |
|  |  |
| Registry: | Western Australia |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Employment & Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 83 |
|  |  |
| Counsel for the Applicant: | The applicant appeared in person |
|  |  |
| Counsel for the Respondent: | Mr JB Blackburn SC |
|  |  |
| Solicitor for the Respondent: | HLS Legal |

ORDERS

|  |  |
| --- | --- |
|  | NSD 714 of 2017 |
|   |
| BETWEEN: | HAYDYN GARY HASTWELLApplicant |
| AND: | KOTT GUNNINGRespondent |

|  |  |
| --- | --- |
| JUDGE: | JACKSON J |
| DATE OF ORDER: | 11 MAY 2020 |

THE COURT ORDERS THAT:

1. On and from 8 June 2020 this paragraph takes effect so that the proceeding is permanently stayed.
2. If paragraph 1 of these orders takes effect the applicant must pay the respondent's costs of and incidental to the proceeding, including any reserved costs, to be assessed if not agreed.
3. At any time before 2 June 2020 each party has liberty to apply on 72 hours' written notice in relation to paragraphs 1 and 2 of these orders.
4. The applicant must in any event pay:
	1. the respondent's costs of and incidental to the interlocutory application dated 1 October 2019, to be assessed if not agreed; and
	2. the respondent's costs of and incidental to the applicant's application to set aside a subpoena dated 29 November 2019.

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

REASONS FOR JUDGMENT

JACKSON J:

1. The respondent, Kott Gunning, seek a permanent stay of these proceedings on the basis that the applicant, Mr Hastwell, has refused to submit himself to an examination by a consultant psychiatrist whom they have nominated.

## The issues said to mean that examination by a psychiatrist is necessary

1. I gave a general description of the issues in the proceedings in *Hastwell v Kott Gunning (No 3)* [2019] FCA 1641. I will not repeat the description here. It is, however, necessary to describe in more detail how certain issues as to loss or damage arise, both on the pleadings and on the evidence, in order to see one of the ways in which Kott Gunning say the requirement for examination by a psychiatrist arises.
2. Mr Hastwell seeks damages for unlawful bullying, harassment and discrimination, which he alleges took place while he was employed by Kott Gunning. His loss and damage is pleaded to include:

(a) Offence, humiliation, anxiety and depression;

(b) Loss of income and other benefits as an employee of Kott Gunning;

(c) Loss of opportunity forpromotion [sic] and advancement at Kott Gunning;

…

(e) Termination of employment …

1. Mr Hastwell has also raised an issue about his mental health in the statement of claim by alleging that he suffers from anxiety, which he says is a disability, and alleging that Kott Gunning discriminated against him on the basis of that disability. But Kott Gunning did not rely on that issue for the purposes of the stay application so I will not address it further.
2. In the defence, Kott Gunning admit that Mr Hastwell's employment with them was terminated with consequent loss of income and other benefits, but otherwise do not admit that he has suffered loss or damage. They deny that he suffered any loss by reason of the employment being terminated in circumstances where, they claim, he did not intend to return to work at Kott Gunning after a period of absence, and the employment relationship between the parties had broken down and was not capable of being restored. Kott Gunning also plead that in any event Mr Hastwell has not suffered loss or damage because of any wrongdoing by the firm, or for which the firm is liable.
3. The parties have filed affidavits containing evidence they propose to adduce at trial. Mr Hastwell's affidavit sworn on 9 August 2018 says that he has been unemployed save for a part time job as a phlebotomist between February 2016 and May 2018. He refers to his employment history at another law firm in June 2013, and his job interview with Kott Gunning in July 2013, in terms which acknowledge that at those times he suffered from anxiety.
4. Mr Hastwell also deposes to what he calls 'the systemic nature of the bullying and harassment by Kott Gunning and its staff over the course of my employment there' which he says led to him being certified by a doctor as unfit for employment due to depression and anxiety from 19 December 2014 onwards. That is the period of absence which ended with the termination of his employment around late March or April 2015 (the precise date is in dispute). There is evidence of earlier periods in October 2014 and December 2014 during which he was certified unfit for work and, while the evidence is not entirely clear, this may have been because of depression or anxiety. One of the certificates is based on work-related stress.
5. The affidavit contains evidence that after raising concerns with management at the firm in May 2014, Mr Hastwell consulted his general practitioner who prescribed anti‑depressant medication. This was 'with a view to it helping me cope better at work and making me less anxious'.
6. Mr Hastwell has also annexed to his affidavit a number of medical certificates citing stress and depression which extend from the beginning of 2015 into 2016. Mr Hastwell's affidavit describes these as being due to 'work related anxiety and depression'. He does not feel he could ever work in Perth as a lawyer again, although he does not explicitly ascribe that to anxiety or depression.
7. Kott Gunning have also put into evidence for the purposes of the stay application medical records from Mr Hastwell's general practitioner which suggest that in June 2013, before he commenced employment with Kott Gunning, he suffered from 'generalised anxiety disorder'. The doctor's notes also say 'longstanding (5 years)' and 'keen for psychology input'. It would appear the doctor referred him to a psychologist or other specialist.
8. Finally, Mr Hastwell has filed an affidavit of Dr Claire Hollo, an occupational physician. It annexes a report by Dr Hollo dated 3 April 2019 which is based, among other things, on what is said to be a medical examination of Mr Hastwell which seems to have taken place on 26 February 2019. The report commences by giving Mr Hastwell's account of his history, which includes counselling in June 2014, consultations with a psychiatrist in September 2014 and visits to a psychologist from November 2014 through to 2015. The psychiatrist prescribed further medication.
9. Dr Hollo's report gives a diagnosis of anxiety and depression, with the anxiety tending to predominate. It indicates that she was asked whether there was a causal relationship between any diagnosed condition and Kott Gunning's treatment of Mr Hastwell. She does not give any such opinion in terms, but she does refer to 'a temporal correlation between Mr Hastwell's increased intensity of anxiety and the persistence of adverse commentary' made to him by Kott Gunning staff and 'a correlation between the nature of the exposure and Mr Hastwell's increasing level of anxiety'. She opines that 'Mr Hastwell's anxiety was aggravated and exacerbated by the behaviour and omissions of the staff at Kott Gunning Lawyers. The heightened level of anxiety was later compounded by [a] severe level of depression'. It says that '[t]he behaviour also had the secondary effect of creating avoidance behaviour on the part of Mr Hastwell that had a flow‑on effect to social isolation even to the extent of having to move interstate'. This a reference to Mr Hastwell's move from Perth to Sydney in 2018 (he has since moved back).
10. The report says Mr Hastwell will require further treatment with a psychiatrist and a psychologist, including medication. According to Dr Hollo this will be indefinite and the 'treatment for the work‑related aggravation is ongoing'. It also expresses an opinion as to his fitness for work on a number of different scenarios. Its tenor is that in future, he will be fit for work, including work as a solicitor, although recalling events he finds painful for the purposes of this litigation 'would interfere with his ability to work in a pressured job as a lawyer in a legal firm'. The report concludes with a statement of Mr Hastwell's prognosis, which Dr Hollo considered is excellent provided he continues treatment and abstains from alcohol.
11. On the basis of this material, it is clear that the state of Mr Hastwell's mental health, before, during and after his employment with Kott Gunning, will be an issue at trial. While it is only referred to briefly in the pleadings as they currently stand, it appears from the other evidence I have described, in particular Dr Hollo's report, that the issue will be a significant aspect of his damages claim. It is open on the state of the evidence and the pleadings for Kott Gunning to put a case that any anxiety or depression was pre-existing, and they say they do intend to put such a case. That will raise the additional question of whether, if those conditions were pre‑existing, they were exacerbated by Mr Hastwell's experiences at Kott Gunning.
12. In oral submissions, Mr Hastwell summarised the issues succinctly in the following way: 'Is Haydyn depressed as a result of his treatment by Kott Gunning? Is Haydyn anxious as a result of his treatment by Kott Gunning? Yes, he had a pre-existing anxiety. Is that anxiety being exacerbated, etcetera, by Kott Gunning?'. He accepted that these were relevant issues in the proceedings, including in relation to his capacity to work and economic loss. But he did not accept that it was necessary for Kott Gunning to adduce its own psychiatric evidence about them.
13. Kott Gunning's submissions indicate that they want Mr Hastwell to be medically examined so that they can respond to his medical evidence. They said they need to adduce their own expert medical evidence as to the nature, extent, cause and prognosis of any medical condition from which he suffers. That they have this intention is evidenced by an affidavit sworn on 1 October 2019 by Thomas Darbyshire, a partner at Kott Gunning.
14. The proceedings do not authorise Kott Gunning to conduct a wide ranging inquiry into *any* medical condition, but in truth I do not believe that is what Kott Gunning propose. Their subsequent, more detailed submissions show that they want to adduce evidence about his alleged anxiety and depression. They say that because there is evidence of a pre‑existing psychiatric or psychological issue, there will need to be a medical assessment to differentiate (if possible) between symptoms caused by that issue and symptoms caused by their alleged unlawful conduct. That is part of the broader issue of whether Mr Hastwell's present psychiatric state and any incapacity to earn income was caused by conduct in which Kott Gunning engaged, or conduct of its staff for which it may be liable.
15. Kott Gunning also say they need Mr Hastwell to be examined to determine his capacity to work from the time his employment with them ceased. They say it will also be relevant to mitigation of loss. I accept that Kott Gunning have these intentions also, although the question of whether Mr Hastwell was incapacitated for work (which would support his damages claim) and the question of whether he should have mitigated his loss by finding work (which could reduce the value of his claim) may well resolve to the same issues: could he, or could he not, work, and if so in what capacity and when? Also, given Dr Hollo's prognosis for Mr Hastwell and her views about his capacity for work in the future, the issue of future capacity for work may not prove to be prominent.

## Dr Parmegiani's report

1. I have said that the above is one of the ways in which Kott Gunning say the requirement for examination by a psychiatrist arises. There is one other way, which relates to material that I described in broad terms in *Hastwell v Kott Gunning (No 3)*, being particulars of claim in a proceeding Mr Hastwell commenced in the Supreme Court of New South Wales. These refer to a report of a psychiatrist, Dr Parmegiani, who appears to have examined Mr Hastwell in 2016 for the purposes of his claim against Kott Gunning. As I said in the earlier reasons, Dr Parmegiani appears to have reached conclusions about Mr Hastwell's psychiatric condition which, if correct, would potentially undermine the credibility of the claims that Mr Hastwell makes in these proceedings.
2. Mr Hastwell is claiming legal professional privilege over the report, so Kott Gunning have not seen it. But they say, on the basis of what the particulars reveal about its contents, that they also wish to have Mr Hastwell medically examined for the purpose of adducing evidence which may reflect adversely on the credibility of his claims in these proceedings. Again, I accept on the basis of Mr Darbyshire's affidavit and Kott Gunning's submissions that they do wish to have Mr Hastwell examined for that purpose as well.
3. A psychiatric opinion on the credibility of Mr Hastwell's evidence could be admissible under s 108C of the *Evidence Act 1995* (Cth). That is an exception to the rule in s 102 that credibility evidence about a witness is not admissible. Section 108C(1) provides:

The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:

(a) the person has specialised knowledge based on the person's training, study or experience; and

(b) the evidence is evidence of an opinion of the person that:

(i) is wholly or substantially based on that knowledge; and

(ii) could substantially affect the assessment of the credibility of a witness; and

(c) the court gives leave to adduce the evidence.

1. In *Dupas v The Queen* [2012] VSCA 328; (2012) 40 VR 182 at [271] the Court of Appeal of Victoria explained the purpose of the provision as follows:

The exception as enacted is thus directed to expert testimony of substantial probative value, relevant to the assessment of the reliability of a witness to facts in issue. It deals with the capacity of a witness to give credible evidence, having regard to some behavioural or other factor which may have affected that witness's capacity to give accurate evidence. The exception permits expert evidence to be called as to behavioural factors - environmental, cognitive or otherwise - which would assist the court's understanding of the capacity of a witness to give credible evidence.

1. Mr Hastwell objected strongly to any reliance on Dr Parmegiani's report. He submitted that the report was not in evidence, and the things Kott Gunning said about it were drawn from a pleading in a separate proceeding which refers only to extracts from the report and do not represent it fairly in its totality. He also submitted that 'a medico-legal doctor can't seek to determine the facts of a case'. He criticised Dr Parmegiani for assuming the facts and inferring a psychiatric condition from the assumed facts. Mr Hastwell said that whether his (Mr Hastwell's) evidence is to be accepted can only be determined by the judge.
2. Kott Gunning accept that the evidence they have adduced about Dr Parmegiani's report is not admissible to establish the truth of any of the opinions apparently expressed in the report. That concession was inevitable. Neither Kott Gunning nor the court have the report; all that has been put into evidence are particulars of claim in the Supreme Court of New South Wales which contain excerpts from the report. If the report was to be relied on as evidence of the truth of its contents, it would need to be read as a whole and it is possible that doing so would put a different complexion on the excerpts.
3. But that is not the purpose for which Kott Gunning have adduced the evidence of the contents of the report. The purpose is a more limited one; it is to show that Kott Gunning have a proper basis to seek to obtain psychiatric evidence going to Mr Hastwell's credibility. That any applicant would be sensitive about the possibility of evidence of this kind being adduced is understandable. If a respondent were to require an applicant to submit to psychiatric examination based on nothing more than speculation or conjecture that the applicant's evidence might be affected by a psychiatric condition, that could well be judged not to be a reasonable request which engages the power to order a stay.
4. The purpose of adducing evidence about Dr Parmegiani's opinions is no more than to dispel that concern. It establishes that Kott Gunning's position is not based on mere conjecture; a person apparently qualified to reach the opinion has apparently expressed it. The court does not have to reach a view on whether the views Dr Parmegiani has apparently expressed are correct or might be understood differently in their full context in order to find that they provide a reasonable basis for the line of inquiry Kott Gunning wish to take. So Kott Gunning are not relying on the evidence as to Dr Parmegiani's opinion in order to prove the truth of the opinion. It is the holding of the opinion (right or wrong) by a person apparently qualified to express it that is the fact proven. This use of the evidence does not infringe the opinion rule in s 76 of the *Evidence Act*, and so does not require proof of the matters required to establish the exception for expert opinion in s 79.
5. There is a question about whether that evidence, contained as it is in a document filed by Mr Hastwell, is admissible as evidence of an admission: see *Evidence Act* s 81. But it is not necessary to resolve that question; to the extent that the evidence would otherwise be objectionable as hearsay, it is admissible in the present interlocutory application because Kott Gunning has adduced evidence as to its source: s 75.
6. I am therefore satisfied that the evidence establishes that Kott Gunning have a reasonable basis for its wish to have a psychiatrist nominated by it examine Mr Hastwell in order to determine whether the doctor may be able to provide admissible evidence going to Mr Hastwell's credibility. It is not necessary to consider Mr Hastwell's other criticisms of Dr Parmegiani's report. If he submits to an examination by an expert psychiatrist, Dr Parmegiani's report may not go into evidence at all (even if privilege over it has been waived).

## Mr Hastwell's refusal to submit to a medical examination

1. Mr Darbyshire's affidavit together with an affidavit sworn by Mr Hastwell on 13 November 2019 give the procedural history that has led to the present application. It is not necessary to describe it in detail. The question of Mr Hastwell being examined by a psychiatrist nominated by Kott Gunning was raised at a case management hearing on 15 February 2019. On 8 April 2019 orders of the court provided for Mr Hastwell to file and serve any medical expert evidence on which he intended to rely and then for Kott Gunning to notify him within 14 days of service of that evidence if it required him to attend any medical examinations by a practitioner or practitioners nominated by them. Mr Hastwell served Dr Hollo's affidavit annexing her report on 24 July 2019. On the same day Kott Gunning wrote to Mr Hastwell saying that, pursuant to the orders, it required him to be examined by Dr Tony Mander, Consultant Psychiatrist, on any one of five dates in September 2019.
2. The reason it is not necessary to go into more detail is that Mr Hastwell has made it plain throughout that he will not submit himself to examination by Dr Mander or by any psychiatrist nominated by Kott Gunning. I will consider below Mr Hastwell's objections, as they were framed by the time of the hearing of the interlocutory application. But in broad terms, Mr Hastwell has indicated that he considers the examination to be an invasion of his rights, to which he will not agree.
3. The only other aspect of the procedural history that needs to be noted is that at the case management hearing on 15 February 2019, Bromwich J told Mr Hastwell that if he refused to be examined by a doctor nominated by Kott Gunning, he may not be able to adduce his own medical evidence. At another case management hearing on 5 April 2019 his Honour told Mr Hastwell that it was also possible if he maintained his opposition that he would not be permitted to continue with his case at all.

## Principles

1. Mr Hastwell relied heavily on what he submitted was an invasion of his fundamental rights if he were compelled to submit to a psychiatric examination. The common law accepts that a person has rights of control and self-determination in respect of his or her body which can only be altered with the consent of the person concerned: *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 309‑310 (McHugh J). Consistently with that, a direction requiring an interference with the liberty of an individual litigant has generally been viewed as requiring specific statutory authority. So, for example, in *S v S* [[1972] AC 24](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1972+AC+24) a majority of the House of Lords held that the High Court of England and Wales does not have an inherent jurisdiction to order a person of full age and capacity to undergo a blood test against their will. Similarly, it has been held that the Supreme Court of Western Australia does not have an inherent power to compel a person to undergo DNA testing: *Furesh (as administrator of Intestate Estate of Slipcevich) v Schor* [2013] WASCA 231; (2013) 45 WAR 546. In some jurisdictions, rules of court authorise the court to order a party to submit to a medical examination: for example O 28 r 1 of the *Rules of the Supreme Court 1971* (WA); and *Uniform Civil Procedure Rules 2005* (NSW) r 23.4. The *Federal Court Rules 2011* (Cth) contain no provision of that kind.
2. I note at this point that since the examination proposed here is a psychiatric examination, it may be that it will not involve any physical touching of Mr Hastwell. Fundamental legal prohibitions on assault and trespass to the person therefore may not be relevant. However there was no evidence about what the examination would involve, and neither party relied on the particular character of the examination here. Even if the examination does not involve physical touching, it will inevitably involve some encroachment on Mr Hastwell's privacy. I will proceed on the basis that the principles pertaining to a psychiatric examination are the same as for any medical examination.
3. Although the Federal Court does not have power to order a compulsory medical examination, there is a distinction between such an order and an order that an action be stayed unless an applicant submits to examination by a medical practitioner nominated by the respondent: see *Kurnell Passenger & Transport Service Pty Ltd v Randwick City Council* [2009] NSWCA 59; (2009) 230 FLR 336 at [79] (Basten JA); *Furesh v Schor* at [72] (Murphy JA); and *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374 at [127] (Collier J). In *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67 at 72‑73 Widgery LJ (agreeing with Lord Denning MR and Davies LJ) observed:

I can see the objections that would be raised if it were sought to give the court power to make a direct order for medical examination with, presumably, power to commit the plaintiff for contempt if he refused. But none of those objections, to my mind, arise where it is sought to give the plaintiff a right to elect between not going on with his action, or submitting himself to medical examination, especially where his refusal to be examined is based on no reason and will result in the defendants being unable to prepare their defence, and will thus result in the court being unable to do justice towards the defendants.

1. Nevertheless, it must be recognised that the practical effect of such an order may be to compel the applicant to submit to a medical examination, because the consequence of not doing so is that the action is stayed. It is, as Sachs LJ said in *Lane v Willis* [1972] 1 WLR 326 at 333, a 'somewhat strong course'. In *Starr v National Coal Board* [1977] 1 WLR 63, Scarman LJ said (at 68) that 'a stay, if granted, either shuts out the plaintiff from the seat of justice or compels him against his will to submit to a medical examination and, of course, that is an invasion of his personal liberty'.
2. Be that as it may, it has long been recognised that the courts have power to make such stay orders in appropriate cases, even in the absence of specific statutory authority. This is an instance of the court's 'ample jurisdiction to order a stay whenever it is just and reasonable to do so': *Edmeades* at 71 (Lord Denning MR, Davies and Widgery LJJ agreeing).
3. It may be preferable to avoid using the terminology of 'inherent' jurisdiction when discussing the powers of a court established by statute such as the Federal Court: see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618 (Wilson and Dawson JJ). But the point of substance is that the court has a general power to control its own proceedings, which extends to ordering either a permanent or temporary stay as the occasion demands. In *Perera v GetSwift Limited* [2018] FCAFC 202; (2018) 263 FCR 92 at [121]‑[126] a Full Court (Middleton, Murphy and Beach JJ) identified the court's power to stay competing class actions as resting in the court's express and implied power to manage the cases before it. Their Honours found statutory authority to stay proceedings in the power in s 23 of the *Federal Court of Australia Act 1976* (Cth) to make such orders as the court thinks appropriate, as well as in the overarching purpose of the civil practice and procedure provisions, found in s 37M(1), to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. The Full Court also referred at [125] to the court's general power to control its own proceedings, which 'extends to ordering either a permanent or temporary stay as the occasion demands'. At [126] the Full Court said, 'These powers are not constrained by any necessity to fit them into a specific category such as "abuse of process"'.
4. These powers permit the Federal Court, in an appropriate case, to stay a proceeding because an applicant is refusing to submit to a medical examination. Quite apart from s 37M of the *Federal Court Act*, it can scarcely be doubted that a superior court has power to control its own proceedings so as to ensure a just determination of a proceeding before it. In *Alder v Khoo* [2010] QCA 360 at [29], Chesterman JA (Muir and White JJA agreeing) described a stay ordered until the appellant submitted to the taking of a blood sample as 'the usual, orthodox order in the circumstances'. In this court, Hill J in *McKinnon v Commonwealth of Australia* [1999] FCA 505 ordered a stay because of an applicant's refusal to be medically examined. In an earlier ex tempore judgment (*McKinnon v Commonwealth of Australia* [1998] FCA 1095) his Honour considered it to be clear enough law that the court would grant a stay of proceedings 'if it was demonstrated that a reasonable request had been made that the applicant attend a medical examination, but that request had not been complied with in circumstances where clearly the case of the Respondents could be materially affected by the failure to attend the examination'. In neither judgment did his Honour examine the source of the power. But in *McKinnon v Commonwealth of Australia* [1999] FCA 717 at [6] the Full Court affirmed the orders he made.
5. The importance of ensuring a just determination of a cause is the basis of such a stay. That was made explicit in *Starr v National Coal Board*. The facts were somewhat different to the present case, in that Mr Starr had agreed in principle to a medical examination, just not by the doctor whom the defendants had nominated. After examining the course of authority in the Court of Appeal, Scarman LJ said (at 70):

So what is the principle of the matter to be gleaned from those cases? In my judgment the court can order a stay if, in the words of Lord Denning MR in *Edmeades'* case, the conduct of the plaintiff in refusing a reasonable request for medical examination is such as to prevent the just determination of the cause. I think that those words contain the principle of the matter. We are, of course, in the realm of discretion. It is a matter for the discretion of the judge, exercised judicially on the facts of the case, whether or not a stay should be ordered. For myself, I find talk about 'onus of proof' in such a case inappropriate. There is, I think, clearly a general rule that he who seeks a stay of an action must satisfy the court that justice requires the imposition of a stay.

1. The Court of Appeal did not overlook the importance of a litigant's right to personal liberty. But that was not the only right involved. Scarman LJ went on (at 70‑71, citations omitted):

In the exercise of the discretion in this class of case, where a plaintiff has refused a medical examination, I think the court does have to recognise … that in the balance there are, amongst many other factors, two fundamental rights which are cherished by the common law and to which attention has to be directed by the court. First … there is the plaintiff's right to personal liberty. But on the other side there is an equally fundamental right - the defendant's right to defend himself in the litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the witnesses that he will call. It is particularly important that a defendant should be able to choose his own expert witnesses, if the case be one in which expert testimony is significant.

Geoffrey Lane LJ made similar observations at 75, as did Cairns LJ at 77. The decisive factor is that of the interests of justice; of the just determination of the cause: Scarman LJ at 71C.

## Mr Hastwell's objections to the proposed examination

1. As I have said, Mr Hastwell relied heavily on what he submitted were his fundamental rights. He referred to principles concerning assault to the person that are discussed in *Marion's Case* (cited above) as well as habeas corpus, which he submitted is so fundamental to the system of governance in Australia that Parliament will not infringe it except in very specific circumstances, otherwise the interference will be unconstitutional.
2. *Habeas corpus* is not strictly relevant here. It is a prerogative writ that provides a remedy directed to the relief of a person's detention without lawful authority: see *Ruddock v Vadarlis* [2001] FCA 1329; (2001) 110 FCR 491 at [71] (Black CJ, dissenting but not on this point). While it is not necessary to show actual detention and complete loss of freedom to found the issue of *habeas corpus*, custody and control are the required elements. There is no suggestion that Mr Hastwell will be in anybody's custody and control here.
3. As for the broader argument about human rights, in *McKinnon v Commonwealth of Australia* [1999] FCA 717 at [6] Branson J (Finn and Emmett JJ agreeing) described as 'entirely without merit' a contention that the requirement for the applicant to attend reasonably required medical examinations was an infringement of his 'substantive right to civil liberty'. But, as I have indicated, this does not mean that the law concerning orders of the kind sought here disregards the importance of that right. There is, however, another right involved. The question can be framed in a different way: should a respondent be exposed to the possibility of a compulsory order of the court requiring it to provide remedies to an applicant without giving that respondent the opportunity to defend itself on the basis of such relevant and admissible evidence as it chooses to advance?
4. Mr Hastwell submitted that there 'must be some legal instrument which can be relied upon by the court to infringe' an individual's right to personal liberty. He relied on *Nursing and Midwifery Board of Australia v HSK* [2019] QCA 144 at [34], and cited a number of examples of specific statutory authorisations of that kind. But the court, if it makes the order, is exercising the control over its own procedures that is necessary to ensure that Mr Hastwell's application is resolved justly and according to law. It needs no specific statutory authority to do that.
5. One of the authorities on which Mr Hastwell relies in order to submit that specific provision is necessary for interference with the liberty of an individual litigant is the speech of Lord MacDermott in *S v S*, in particular at 46‑47. But in that passage his Lordship, citing *Edmeades*, said that the jurisdiction Kott Gunning now invoke 'cannot … be questioned'. His Lordship went on to say that this 'ancillary jurisdiction' gave the court power to order a person to submit to a blood test. In *Furesh v Schor* at [31] Newnes JA described this last extension of his Lordship's reasoning as a minority opinion that was not a correct statement of the law. I respectfully agree, but that does not cast doubt on the well‑established jurisdiction of the court to order a stay where that is necessary to ensure a fair trial.
6. Mr Hastwell submitted that the order sought would be an infringement of a person's personal liberty and 'also their right to be heard' and so was contrary to the purpose and intent of the *Australian Human Rights Commission Act 1986* (Cth). But he did not point to any provisions of that Act which expressly or by implication prohibit the court from staying its own proceeding if an applicant does not submit to a medical examination. The long title of the Act is 'An Act to establish the Australian Human Rights Commission, to make provision in relation to human rights and in relation to equal opportunity in employment, and for related purposes'. So it may be accepted that the Act has a general purpose of promoting the recognition of human rights in Australia: see also s 10A. Human rights are defined broadly: see the definition in s 3(1) as modified by s 3(4). However the Act does not give statutory force to any right to personal liberty. It creates and confers functions on the Australian Human Rights Commission and other bodies. It authorises individuals to make complaints to the Commission, but only on the basis of unlawful discrimination, being discrimination made unlawful by other legislation: see s 46P(1) and the definition of 'unlawful discrimination' in s 3(1). It is not possible to discern any intention in the Act to limit the powers of superior courts to control their own proceedings in the way that is contemplated in the orders proposed here.
7. Mr Hastwell relied on the principle that the particular provisions of an Act must be read in the light of its statutory purpose, and this is particularly significant in the case of legislation which protects or enforces human rights: see *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359. But unless particular provisions needing to be construed are identified, that principle has no application. The only specific provisions Mr Hastwell identified here were s 3 of the *Sex Discrimination Act 1984* (Cth) and s 3 of the *Disability Discrimination Act 1992* (Cth), each of which says that an object of the Act is to eliminate, as far as possible, discrimination of the kind that is proscribed by the Act. But those are broad statements from which it is not possible to discern any intention to modify the Federal Court's powers and procedures. And the submission begs the question of whether Kott Gunning have, in fact, engaged in discrimination of those kinds.
8. Mr Hastwell also submitted that there is no power under the *Australian Human Rights Commission Act* or the *Sex Discrimination Act* or the *Disability Discrimination Act* which 'gives the Federal Court or a party to litigation the power to *compel* me to be medically examined'. As has been explained the court, much less Kott Gunning, will not be compelling Mr Hastwell to be medically examined in the strict sense implied by the italics in the quote, which are Mr Hastwell's. Mr Hastwell goes on to refer to legislation which authorises bodies administering certain personal injury schemes, such as Comcare, to 'request' that a claimant undergo a medical examination, and which imposes the sanction of suspension of the claim if the claimant does not comply with the request: see e.g. *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 57. It is not clear the point Mr Hastwell is making here, as the legislation generally speaks in terms of requiring, not requesting a medical examination, and it is doubtful that specific authority is necessary to make a mere request.
9. Mr Hastwell may be drawing a contrast between the specific powers and sanctions conferred by that kind of legislation, and the lack of such specific provision in the legislation governing the Federal Court. If so, the contrast does not support his case. That Parliament has seen fit to confer specific powers on statutory authorities that are arms of the executive says nothing about the court's inherent or implied power to ensure the just determination of its own proceedings.
10. Mr Hastwell submitted that if Parliament had intended that persons who make claims under that kind of legislation should be medically examined, it would have said so. But there is no need for those statutes to confer that power on the court. If the order sought by Kott Gunning is made, the court will be exercising a power which is a necessary incident of its duty to pursue the just determination of Mr Hastwell's application.
11. In the present case, the *Australian Human Rights Commission Act* has conferred jurisdiction on this court, the court having pre‑existed the conferral of that jurisdiction. In the absence of any contrary intention appearing, 'it is to the court as such that the matter is referred exercising its known authority according to the rules of procedure by which it is governed and subject to the incidents by which it is affected': *Electric Light & Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554 at 559. So (ibid at 560):

it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality.

The lack of any mention of medical examination in the specific legislation concerned here therefore does not support Mr Hastwell's argument; it has the opposite effect.

1. Mr Hastwell submitted that it was logical for provisions for compulsory examination to be found in worker's compensation legislation, which is a strict liability scheme and where typically all costs will be met by an insurer. But it does not follow that an order of the kind sought cannot be made in matters where none of those characteristics are found. There is no obvious reason why it should make a difference that the *Sexual Discrimination Act* and *Disability Discrimination Act* are not strict liability. The question is whether there is an issue in the proceedings where medical evidence is needed. As for the lack of any insurer here, Mr Hastwell did not raise any matter concerning the cost to him of attending the proposed examination as a basis for his objections. He did submit that claims under the human rights and discrimination legislation 'do not afford the same financial benefits as do insurance scheme related personal injury claims' and pointed to expenditure he has made on the litigation in circumstances where he has not been in full time employment since he left Kott Gunning. But that is beside the point; Mr Hastwell is pursuing a claim against Kott Gunning, and funds he has spent doing so give no basis to object to Kott Gunning collecting its own evidence. Subject to the effect of any costs orders, Kott Gunning will pay for his examination by Dr Mander or any other psychiatrist.
2. According to a further submission by Mr Hastwell, for him to 'have to undergo a medical examination by the very people who have been responsible for the bullying, harassment and discrimination would be unjust and damaging'. That, he said, would 'not seek to prevent human rights abuses but encourage them'. But once again, that begs the question. Mr Hastwell is alleging that Kott Gunning engaged in bullying, harassment and discrimination against him, but is yet to prove his case. And the fundamental common law right of a defendant to defend itself in litigation applies in any litigation, whether the case involves a private law or a public law claim: *R (Y) v Croydon London Borough Council* [2016] 1 WLR 2895 at 2901‑2902.
3. Mr Hastwell submitted that effectively barring a claimant from pursuing a bona fide human rights claim would be contrary to the intent and purpose of human rights legislation, but for reasons already explained, in the absence of an express or clearly implied legislative intention to exclude the court's discretion to order a stay, the legislation will not be read so as to exclude the power to make an order of the kind sought here. Mr Hastwell submitted that it would be 'fundamentally unjust for this matter not to go to trial and granting a stay would discourage people from bringing legitimate claims for discrimination'. But it would be fundamentally unjust for the matter to go to trial without giving the respondent the ability to adduce evidence on a matter relevant to its defence. It is no answer to say that the need for an applicant prove his case, and the court's obligation to give a respondent a reasonable opportunity to disprove the case, might discourage applicants in future.
4. Mr Hastwell also relied on the contrast between the rules of court of other jurisdictions, some of which, as I have said, make specific provision for medical examination of parties, and the *Federal Court Rules*, which do not. But no inference can be drawn about the legislative intention of the Commonwealth Parliament (or the judges of this court as the relevant rule making body), based on the way that other jurisdictions have handled the matter. That is especially so since the power on which Kott Gunning rely was well‑established by the time the present rules were introduced in 2011. In truth, the rules would have needed to exclude the power in order to find a legislative intention that the power not exist.
5. Mr Hastwell nevertheless described it as 'accepted practice' for the courts to allow medical evidence procured solely by the applicant in applications under the *Australian Human Rights Commission Act*. But the three cases he cited in support of that (*Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; (2014) 223 FCR 334; *Ewin v Vergara (No 3)* [2013] FCA 1311; and *Hill v Hughes* [2019] FCCA 1267) do not establish any practice. They are merely examples of cases where, for reasons not apparent on the face of the judgments, respondents did not adduce their own expert medical evidence to respond to medical evidence from applicants.

## Whether a stay should be ordered here

1. For those reasons, I do not accept any of what might be described as the objections of principle that Mr Hastwell has raised. The court has discretion to stay the proceeding in an appropriate case.
2. How should the discretion be exercised here? Senior counsel for Kott Gunning placed considerable emphasis on a statement by Geoffrey Lane LJ in *Starr v National Coal Board* (at 75H) that '[f]ew problems arise if the plaintiff flatly declines to be examined by anybody'. I am satisfied that this is indeed what Mr Hastwell is doing here, but I do not think his Lordship was enunciating any general principle. Each case depends on its own facts (*Starr v National Coal Board* at 76B) and his Lordship's comment must be understood in the context of the sentence that followed: 'The real difficulty is when, as here, the defendants put forward the name of an experienced and well-qualified doctor who on the face of it appears to be unobjectionable but to whom the plaintiff and his advisers nevertheless object'. And that in turn needs to be understood by reference to the objections that were raised to the neurologist who the defendant wanted to examine the plaintiff. Those objections were on the basis, delicately put by Scarman LJ (at 72D), that:

... there was no suggestion of lack of competence or of lack of honesty or of professional honour, but there were indications in earlier reports in other cases, which were produced for our examination, which would appear to suggest that this doctor was not always successful in making a full, complete, and not misleading report.

So understood, Geoffrey Lane LJ's comments were directed to the particular situation of the less than full blooded objections to the doctor in that case. I therefore do not consider that Mr Hastwell's flat refusal to be examined ends the matter.

1. Mr Hastwell submitted that there was no need for Kott Gunning to adduce their own evidence on his psychiatric condition, as his witness, Dr Hollo had already answered the necessary questions. He said that if Kott Gunning wished to, they were free to cross‑examine her, and seek to undermine her evidence that way, or they could seek to 'discredit' her evidence in its submissions. But these arguments reflect a misunderstanding of the adversarial system of justice of which this court is a part. The obligation to afford a respondent a fair trial is not fully discharged by permitting the respondent to challenge evidence adduced by the applicant in submissions, or in cross‑examination. It is fundamental to a fair trial that all parties have a reasonable opportunity to adduce their own admissible evidence relevant to the matters in issue. As Widgery LJ explained in *Edmeades* at 73:

If, in fact, the defendant is deprived of medical advice on some aspect of the case and the only evidence on that aspect is that given by the plaintiff's doctors, I see no way by which the balance can be adjusted. If the trial judge thinks that the plaintiff's doctors are credible, it seems to me that he would then have to follow their evidence and a great injustice to the defendant might arise. The test, I agree, is whether in the circumstances of the particular case it is reasonable that a stay should be ordered so that justice shall be done between the parties.

1. Mr Hastwell submitted that 'the respondent must merely disprove the facts that I say gave rise to the anxiety and depression and therefore unlike personal injury claims medical evidence is irrelevant to the defence'. That seems to be a submission that it would be fair to confine Kott Gunning to disproving the alleged acts of bullying, harassment, and discrimination, so that they could not adduce evidence on the question of loss or damage. That proposition only needs to be stated for it to be apparent that it is wrong, and for the reasons given above I reject it.
2. Mr Hastwell submitted that Kott Gunning were free to seek privilege to be waived over Dr Parmegiani's report at trial. It did not appear that this was a waiver of privilege on his part, or an offer to do so. But even if privilege was waived, that would just give Kott Gunning one piece of evidence which may or may not be admissible and the scope of which is uncertain (because Dr Parmegiani's report is unseen). That is no basis to say that Kott Gunning need not adduce further psychiatric evidence of their own.
3. Mr Hastwell objected to being examined by Dr Mander, on the basis that he 'may be conflicted given the respondent's dominance in the medico‑legal field in Perth'. But that objection was purely speculative. No evidence was advanced that Kott Gunning had that dominant position, let alone that it would cause Dr Mander to give any opinion other than an impartial one, consistent with his ethical duties as a psychiatrist and his duties to the court as an expert witness.
4. In *Starr v National Coal Board*, Scarman LJ held (at 72E) in relation to the concerns expressed about the doctor there:

I certainly do not think that it is incumbent upon a plaintiff, in this situation, to have to prove to the satisfaction of the court that the doctor had erred in the past in the way suggested, or was likely to make in this case the sort of mistake or error that he might appear to have made earlier. All that has to be proved is that the plaintiff and his advisers were entertaining reasonable apprehension that that might be so, and that those apprehensions, if realised, might make a just determination of the cause more difficult than it would be if another doctor conducted the examination.

1. Here, there was nothing before the court capable of establishing that Mr Hastwell's apprehensions were reasonable. No evidence was put before me of Dr Mander's experience and particular qualifications, but Mr Hastwell did not take issue with the description of him in Kott Gunning's letter of 24 July 2019 as a consultant psychiatrist. Justice requires that a defendant (or plaintiff) have the ability and right to choose a medical witness in whose in whose forensic ability and expertise it has confidence: *Gray v Hopcroft* [2000] QCA 144 at [15] (Ambrose J, Thomas JA and Helman J agreeing). I do not accept Mr Hastwell's stated objections to Dr Mander in particular.
2. Mr Hastwell suggested that any psychiatrist in Perth would be unacceptable for the same reasons that Dr Mander was. For the same reasons I do not accept that, either. In the course of oral submissions Mr Hastwell was not even willing to accept the (hypothetical) suggestion that the court could appoint its own expert psychiatrist.
3. Mr Hastwell also submitted that because Dr Hollo was not from Perth, and does not know Kott Gunning, her 'report would be the best medical evidence to rely on, even if the respondent did get a report from Dr Mander'. But whether that is so is, of course, is a matter for the court to decide after hearing all the relevant evidence, including cross-examination of Dr Hollo and the respondent's expert witness, and making an assessment of their respective independence and impartiality and the quality of the evidence they give.
4. Another objection Mr Hastwell raised was that Kott Gunning have not agreed to the exact nature of their proposed instructions to Dr Mander, including what material would be included in those instructions. But it is not usually necessary for a respondent to run its questions to an expert witness by the applicant or the court in advance. It is conceivable that particular questions could be so intrusive or unnecessary that an intention to ask them affords a reasonable basis for objection. But there is no reason to think that Kott Gunning intend to ask such questions here. From the evidence and the description of the issues they have given, it may be inferred they intend to ask, in broad terms, what psychiatric conditions if any Mr Hastwell has and how severe they are, what caused them, whether his alleged experiences with Kott Gunning caused or exacerbated them, and the effect of the conditions on his capacity to work, past and future. In any event, I do not accept that Mr Hastwell objects because he does not know the questions that Dr Mander will be asked. It is plain he is not prepared to be examined by Dr Mander in any event.
5. Mr Hastwell submitted that a stay should be refused because Kott Gunning have adduced no medical evidence that an examination by its chosen psychiatrist is necessary. He relied on *Starr v National Coal Board* as authority for that, but that case does not stand for any requirement that an applicant for a stay must support it by medical evidence. The closest it gets to the subject is where (at 71E) Scarman LJ says:

I have already indicated that I do not regard this as a question of onus of proof. There is, in my judgment, a duty upon each party in such a situation to provide the court with the necessary material known to him, so that the court, fully informed, can exercise its discretion properly. However, I would add this comment: that at the end of the day it must be for him who seeks the stay to show that, in the discretion of the court, it should be imposed.

In my view Kott Gunning have provided the necessary material. It consists of the pleadings, Mr Hastwell's own evidence about his anxiety, Dr Hollo's report, and what is known about Dr Parmegiani's report.

1. There is a passage in *Lane v Willis* [1972] 1 WLR 326 which could be taken to support Mr Hastwell's argument. At 334 Sachs LJ said (emphasis added):

When the matter came before the master and the judge in chambers, it is manifest that *in those circumstances* the onus lay heavily upon the defendant to show that such a further examination was needed. But he produced nothing in the way of medical evidence to show why another doctor or expert was required. He did nothing but produce correspondence.

For my part, I am by no means prepared to say that either the master or Talbot J was wrong on the material laid before them. Now, however, we have had further discussion of the case, the fact that some medical evidence should have been put before the master or the judge - and preferably, to my mind, the reports of Dr Carroll - has been ventilated, and it has become plain that in future cases *of this particular type (if these should ever recur)* such medical evidence should be produced: no room should be left for a plaintiff to wonder whether the application is really due to the reports of a defendant's medical expert being favourable to the plaintiff.

1. Sachs LJ's comments must, however, be understood in the context of the circumstances to which his Lordship was referring in the first paragraph. They were circumstances where the defendant had delayed in requiring the plaintiff to be examined by a psychiatrist, after the plaintiff had already submitted to two examinations by another doctor nominated by the defendant. And the defendants had in correspondence given no reason why the plaintiff 'should be further disturbed' (see 334D). As the last lines of the quote show, there was cause for concern over whether the real reason for the requirement for another examination was that the first doctor's opinion was not favourable to the defendant (see also at Roskill LJ at 335G). Hence Sachs LJ's comments were confined to 'future cases of this particular type (if these should ever recur)'. In any event, the Court of Appeal did not require such evidence and made the order on the basis of statements from the bar table (see 334G).
2. I do not consider that *Lane v Willis* is authority for the proposition that a party seeking a stay for refusal to submit to a medical examination can only succeed if it adduces medical evidence that the examination is necessary. It must appear from the reasons advanced by the applicant for a stay, and from the nature of the issues in the proceeding, that it will be unjust if the trial proceeds, in circumstances where a party wishing to adduce evidence on an issue has not been able to do so. If so, then the power to order a stay will arise. There is no need in every case for those reasons to be supported by expert evidence.
3. I am persuaded on the particular facts of this case that it is appropriate to order a stay. In large part the reasons are apparent from the discussion above. Mr Hastwell's psychiatric condition, and the causes of that condition, are central to the remedies he seeks. He has accepted as much. Once that is accepted, it is clear that the trial will not be a fair one if Mr Hastwell is able to adduce medical evidence about those issues, and Kott Gunning are not.
4. In addition, what is known about Dr Parmegiani's report gives Kott Gunning a proper basis to seek psychiatric evidence which may go to Mr Hastwell's credibility. It is necessary for there to be a fair trial for Kott Gunning to have the opportunity to seek to adduce expert evidence that is truly probative, in the sense that it could substantially affect the court's assessment of Mr Hastwell's credibility. The discretion of the court under s 108C(1)(c) to withhold leave to adduce such evidence ensures that the opportunity cannot be abused.
5. Finally, there is nothing unreasonable about Kott Gunning's choice of Dr Mander, or the arrangements for the examination which they have proposed.

## The form of the order

1. There are three questions about the form of the order which need to be addressed.
2. The first, recognising that a comprehensive stay is a 'somewhat strong course', is whether justice can be achieved by taking the lesser course of staying the proceeding only in so far as it concerns the alleged anxiety and depression, and preventing Mr Hastwell from adducing medical or psychiatric evidence, including the report of Dr Hollo, unless he consents to being examined by a practitioner nominated by Kott Gunning. Kott Gunning's interlocutory application raised a similar order as an alternative to the comprehensive stay which it primarily seeks, although it did not pursue that alternative at the hearing.
3. In any event I will not make an alternative order of that kind. That is for three reasons. The first reason is that it will not remove the question of Mr Hastwell's psychiatric condition as an issue raised on the pleadings. The second reason, which is related to the first, is that it would require the parties and the court to proceed with a kind of truncated trial on the other issues only. There would be an air of artificiality, to say the least, about a trial which avoids the question of what consequences the acts of Kott Gunning and their staff had for Mr Hastwell's mental health, if those acts are established. It would not be possible to determine how those acts affected his earning capacity. The court would be determining only some of the true issues in the case, and on the basis of limited evidence. The resulting remedies, if awarded, would lack the practical usefulness of an award of damages. The whole process would be manifestly unsatisfactory.
4. The third reason I have rejected the possibility of, in effect, a stay of part of the action, arises from the report of Dr Parmegiani. Kott Gunning wish to have Mr Hastwell medically examined so that it can adduce evidence as to whether his psychiatric condition affects his ability to give credible evidence. That potentially affects the whole of Mr Hastwell's application. Determination of the many factual issues as to whether the alleged unlawful conduct occurred will depend to a large extent on Mr Hastwell's evidence. That is another reason why it would not be appropriate to make orders which merely prevent Mr Hastwell from adducing his own medical evidence.
5. The second question about the form of the order was raised by a submission on behalf of Kott Gunning that the stay should be a permanent stay. Senior counsel expanded on that by saying that it would be unfair to grant a stay which only applies unless and until Mr Hastwell agrees to attend a medical examination. He has been emphatic that he will not consent to the examination. A temporary stay 'would leave the matter in limbo' and leave it open to Mr Hastwell to seek to revive the matter without notice years in the future. It was submitted that would be unfair to Kott Gunning, which is comprised of a small number of equity partners, as well as to the large number of witnesses who may need to be called. Also, the longer the matter is unresolved, the more the memories of the large number of witnesses will fade.
6. I accept that these consequences would be left open by any temporary or conditional stay of the sort that Kott Gunning oppose. I also accept that they are consequences which should be avoided. I am satisfied that it would not be appropriate to stay the proceeding pending any particular development indicating that Mr Hastwell has relented in his opposition to being examined by a psychiatrist. I will therefore not make the proposed stay temporary or conditional. It may be that it is a moot question whether the stay is properly described as a permanent stay: see *Brookfield v Davey Products Pty Ltd* [2001] FCA 104 at [27] Mansfield J. However that terminology is commonly used, and in my view is an appropriate recognition of the principle that it is desirable that litigation, once apparently finished, ought not lightly be reopened: see *Lambert v Mainland Market Deliveries Ltd* [1977] 1 WLR 825 at 833.
7. The third question about the form of the order arises because the minute of proposed orders which Kott Gunning submitted contemplates that the stay will take effect unless Mr Hastwell consents to a medical examination within 14 days and subsequently cooperates. That would have the effect of a self‑executing order in circumstances where there would be ample room for disagreement about whether the conditions for it to execute have been fulfilled. In my view it is appropriate, instead, simply to order that the proceeding be stayed after the lapse of a period of time which permits Mr Hastwell to consider his position and, if he chooses, to agree to a medical examination. Express liberty to apply before that time expires should be given. Then, if Mr Hastwell does take steps to indicate that he will submit to the examination, he may apply with suitable evidence, for the stay order to be vacated, or for the time before it takes effect to be extended, or such other order as is appropriate in the circumstances. While it is often undesirable for the court to undertake the level of supervision that may entail, in my view that is preferable to an order which operates inflexibly in the absence of 'cooperation', a word which is unavoidably indeterminate. Given the potentially serious consequences for Mr Hastwell, the period before the stay takes effect will be 28 days.

## Costs

1. Kott Gunning sought their costs of the application for a stay and of the proceeding as a whole. Mr Hastwell accepted that if Kott Gunning were successful they would be entitled to their costs in both of those respects. The result of the orders I will make are that, if the 28 days expires without the orders being varied or vacated, Mr Hastwell will have been substantially unsuccessful in the proceeding as a whole. So it is an appropriate exercise of the court's discretion to make the costs orders that Kott Gunning seek.
2. Kott Gunning also sought the costs of an application for the issue of a subpoena which Mr Hastwell made and then discontinued. Once again, he did not oppose that order, and it will be made.

|  |
| --- |
| I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson. |

Associate:

Dated: 11 May 2020