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Federal Court of Australia

Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020 (30 August 2023)

Last Updated: 5 September 2023

FEDERAL COURT OF AUSTRALIA

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

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet on the Court's website. This summary is also available there.

In December 2018, a judge of the then Federal **Circuit Court** of Australia, who was hearing a matrimonial cause involving the applicant in this matter, ordered that the applicant be imprisoned for twelve months, purportedly for contempt of court. The applicant spent seven days in police custody and prison before the order which had resulted in his imprisonment was stayed pending an appeal. The Full Court of the then Family Court of Australia subsequently set the judge's order aside on the basis that the judge had erred in several fundamental respects. The Full Court concluded that to permit the order to stand would be an "affront to justice".

In this proceeding, the applicant claimed that, by ordering him to be imprisoned in the way he did, the judge committed the torts of false imprisonment and collateral abuse of process. He also claimed that the Commonwealth and the State of Queensland were vicariously liable for his false imprisonment on the basis that their security, police and prison officers, acting on the basis of the judge's order and a related warrant, caused him to be imprisoned. The applicant sought compensation from the judge, the Commonwealth and Queensland for the loss and damage he suffered as a result of his imprisonment.

The judge, the Commonwealth and Queensland each defended the applicant's claim on a number of bases. They each claimed that the applicant's imprisonment was lawfully justified because the judge's order was valid until set aside. The judge also claimed that he was protected from any liability to the applicant by the judicial immunity afforded to him at common law in his capacity as a judge. For their part, the Commonwealth and Queensland claimed that their officers had available to them a common law defence, the effect of which was that their actions in imprisoning the applicant were justified because they were acting on the basis of a judicial order or warrant which appeared valid on its face. Queensland also relied on a statutory defence.

The case brought by the applicant raised a number of complex issues of fact and law.

First, the question whether the judge's order was valid until set aside raised issues concerning the source and nature of the Circuit Court's power to punish for contempt and the legal nature and enforceability of orders made in the exercise of that power.

Second, the question whether the judge was protected by judicial immunity raised complex issues concerning the nature and scope of the immunity afforded at common law to judges of inferior courts such as the Circuit Court. It should be noted that the expression "inferior court" is not a statement of

derision, but a legal expression which distinguishes such courts from courts which are higher in the judicial hierarchy.

Unfortunately, the common law concerning the scope of the immunity afforded to inferior court judges was not entirely settled or satisfactory. To resolve the question whether the judge's conduct in this case fell within the scope of that immunity it was necessary to closely consider a long line of cases stretching back hundreds of years to a time when in England it was said that superior court judges on occasion had to correct inferior court judges with "strokes of the rodde, or spur". Needless to say, that rationale for the distinction between inferior and superior court judges in this context is no longer considered applicable, though issues remain concerning the precise circumstances in which an inferior court judge may lose the protection of judicial immunity. It should also be noted in this context that, unlike most inferior court judges in the states and territories of Australia, Circuit Court judges were not afforded any statutory immunity which equated their position to that of a superior court judge.

Third, the defence advanced by the Commonwealth and Queensland similarly raised difficult issues concerning whether there was, at common law, a justification defence available to police and prison officers who executed orders and warrants issued by inferior court judges which, while regular on their face, turned out to be invalid and of no legal effect. The common law in that regard was again far from settled or satisfactory. To resolve those issues it was again necessary to closely consider almost four centuries of case law, not all of it pellucid.

The uncertainties in the common law in that regard largely ceased to be a problem in England over two hundred years ago because police and prison officers were afforded statutory protection from liability when they executed invalid inferior court orders and warrants. Similar statutory protections have applied at various times in some Australian states and territories. There is no Commonwealth statute which provides any protection to state or territory police and prison officers who execute warrants issued by a federal court such as the Circuit Court.

Queensland contended that one of its statutes operated to protect the Queensland police and prison officers who imprisoned the applicant in this case. The question whether that was so raised difficult questions of construction, in particular whether the provision in question could apply to warrants issued by a federal court simply because it happened to be physically sitting in Queensland at the time the order and warrant in question were issued.

Fourth, in the event that the applicant succeeded in establishing that the judge, the Commonwealth and Queensland were liable, the applicant's case in respect of damages also raised complex questions. In particular, the applicant claimed damages running into the millions of dollars for financial loss allegedly suffered by him as a result of a loss of earning capacity. The loss of earning capacity was said to be the result of a post-traumatic stress disorder which resulted from his prison experience. As the evidence at trial unfolded, however, real issues arose as to the extent of any financial loss arising from any loss of earning capacity suffered by the applicant. There were also medical issues concerning the applicant's prognosis and the extent of the impairment which resulted from his psychological injury.

For the reasons set out in considerable detail in the Court's reasons for judgment, the liability issues have mostly been resolved in the applicant's favour. While the Court found that the applicant had not made out his case of collateral abuse of process against the judge, the Court found that the applicant had made out his case of false imprisonment against each of the judge, the Commonwealth and Queensland. The Court's reasons for so concluding may be shortly summarised as follows.

First, the order which resulted in the applicant's imprisonment was infected by a number of serious and fundamental errors on the part of the judge. The individual and cumulative effect of those errors

was that the order was invalid and of no legal effect from the outset. The order and related warrant therefore provided no lawful justification for the applicant's imprisonment. The fact that the order was purportedly made in the exercise of the Circuit Court's power to punish for contempt did not alter the fact that the order, having been made by an inferior court, was invalid and of no effect from the outset.

Second, the judge was not protected by the immunity afforded to inferior court judges at common law. The protection afforded to inferior court judges at common law may be lost where it is found that the judge acted without or in excess of jurisdiction. In this case, while the judge may have had jurisdiction to hear the matrimonial cause involving the applicant, the judge acted without or in excess of jurisdiction when he imprisoned the applicant, purportedly for contempt arising from his failure to comply with certain disclosure orders. That was because, in summary, he imprisoned the applicant without first finding that the applicant had in fact failed to comply with the disclosure orders in question and was therefore in contempt, and without finding any of the facts he was required to find before imprisoning the applicant for any such contempt. As explained in detail in the reasons for judgment, the judge was also guilty of a gross and obvious irregularity of procedure and denied the applicant any modicum of procedural fairness or natural justice. The denial of procedural fairness was anything but narrow or technical. It was fundamental.

Third, as for the liability of the Commonwealth and Queensland, while the common law remains somewhat uncertain, ultimately the Court was not satisfied that the defence upon which the Commonwealth and Queensland relied was sufficiently recognised or accepted in the relevant authorities, or that the Commonwealth and Queensland were able to avail themselves of any such common law defence in the circumstances of this case. While at common law it is accepted that some court officers, such as sheriffs, may be able to justify their otherwise tortious actions arising from the execution of an order or warrant on the basis that they are subject to a duty of obedience to the court which made the order or warrant, that defence does not apply to police and prison officers who are not officers of the court.

Fourth, as for Queensland's purported statutory defence, the statutory provision relied on by Queensland, properly construed, does not extend or apply to protect officers who execute an order or warrant made by a federal court in the exercise of federal jurisdiction, as was the case here. That is so even though the court may have been physically or geographically sitting in Queensland at the time.

Finally, as for damages, while that Court has assessed that a not insubstantial award of damages should be made in the applicant's favour, that award is well below the award sought by the applicant. The Court was not satisfied on the evidence that the financial loss suffered by the applicant as a result of his loss of earning capacity was anywhere near the substantial amount claimed by the applicant. Nor was the Court satisfied that the substantial awards of general, aggravated and exemplary damages ultimately sought by the applicant were warranted.

In the end result, the Court has concluded that the applicant is entitled to an award of damages, assessed under various heads of damage, totalling $309,450.

JUSTICE MICHAEL WIGNEY

30 August 2023

Sydney

FEDERAL COURT OF AUSTRALIA

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

File number: ACD 57 of 2020

Judgment of: WIGNEY J

Date of judgment: 30 August 2023

Catchwords:

TORTS – false imprisonment – where applicant imprisoned for contemp in matrimonial proceeding in Federal Circuit Court of Australia for purported non-compliance with disclosure orders – where judge's contempt declaration and imprisonment orders were set aside for invalidity – consideration of whether imprisonment order was valid until s aside and provided lawful justification for imprisonment – consideration o whether the judge exercised superior court powers to punish for contem which meant orders remained valid until set aside – found that judge's orders, being of an inferior court and vitiated by jurisdictional error, were void ab initio and of no legal effect – found that no lawful justification for imprisonment

TORTS – collateral abuse of process – whether the judge had an improper purpose or motive to coerce settlement of matrimonial proceeding – found it was not established that the judge's purpose in making the contempt declaration and imprisonment order was other tha to punish for non-compliance with court order – found that it was not established that the judge's predominant purpose was "improper" – four that tort not made out

TORTS – judicial immunity – whether common law judicial immunity protected inferior court judge from liability for tort of false imprisonment - consideration of scope of common law judicial immunity afforded to inferior court judges – consideration of circumstances where inferior cou judges may lose that immunity – consideration of whether common law distinction between immunity of superior and inferior court judges remai in place – where judge made orders for which there was no proper foundation in law and was guilty of a gross irregularity of procedure and denial of procedural fairness – found that the judge lost the protection of judicial immunity afforded to inferior court judges because he acted without or in excess of jurisdiction

TORTS – justification defence – whether security, police and prison officers protected from liability in tort by common law justification defenc

when acting pursuant to an order or warrant made by an inferior court judge which was void ab initio but appeared regular on its face when executed – held that no such defence available at common law in respe of orders or warrants issued by inferior court judges – found that defenc is only available to officers of the court or "ministerial officers" who are bound by a duty to the court to obey a warrant issued by the court whicl appeared regular on its face

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

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

DAMAGES – claim for general damages for personal injury – where applicant suffered post-traumatic stress disorder as a result of false imprisonment – award of damages assessed pursuant to *Civil Liability A 2003* (Qld) and *Civil Liability Regulation 2014* (Qld) which require consideration of impairment caused by psychiatric injury – consideration of expert evidence regarding impairment – consideration of material nor disclosures by applicant regarding pre-existing conditions – found that award of general damages for a moderate mental disorder was warrant

DAMAGES – claim for damages for loss of earning capacity – consideration of principles applicable to compensation for loss of earnin capacity – found that some diminuation to earning capacity resulted fror psychiatric injury – found that no substantial financial loss established bu

that psychiatric injury may cause future financial loss – found that mode award of damages for loss of earning capacity warranted

Legislation:

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

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Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Broome v Cassell & Co Ltd [1972] UKHL 3; [1972] AC 1027; 1 All ER 80
Bulsey v The State of Queensland [2015] QCA 187
Butler v Simmonds Crowley & Galvin [2000] 2 Qd R 252; [1999] QCA 47
Butt v Newman [1819] EngR 293; (1819) 171 ER 850
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Corbett v The King (1932) 47 CLR 317; [1932] HCA 36
Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayma
Ltd [2013] UKPC 17; [2014] AC 366; [2013] 4 All ER 8
DAI v DAA (2005) 191 FLR 360; [2005] FamCA 88
Davis v Capper [1829] EngR 725; (1829) 10 B & C 28; 109 ER 362
Day v The Queen (1984) 153 CLR 475; [1984] HCA 3
Demer v Cook (1903) 88 LT 629; 20 Cox CC
Director of Public Prosecutions (NSW) v Kmetyk (2018) 85 MVR 25; [2018] NSWCA 156
Dr Drury's Case [1572] EngR 109; (1610) 8 Co Rep 141; 77 ER 688
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Jones v Chapman [1845] EngR 775; (1845) 14 M & W 124; 153 ER 416
Kable v New South Wales (2012) 268 FLR 1; [2012] NSWCA 243
Keighly v Bell [1866] EngR 9; (1866) 4 F & F 763; 176 ER 781
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Morrell v Martin [1841] EngR 1144; (1841) 3 Man & G 581; 133 ER 1273
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New South Wales v Williamson (2012) 248 CLR 417; [2012] HCA 57
Nicholas v Walker and Carter (1634) Cro Car 394; 79 ER 944
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R v JAA [2019] 3 Qd R 242; [2018] QCA 365
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Re Colina; Ex parte Torney (1999) 200 CLR 386; [1999] HCA 57
Re East; Ex parte Nguyen (1998) 196 CLR 354; [1998] HCA 73
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William Lambard, *Larmbard's Eirenarcha* (1614) Cap 4 370

Division:	General Division
Registry:	Australian Capital Territory
National Practice Area:	Administrative and Constitutional Law and Human Rights

Number of paragraphs:	852
Date of hearing:	6 to 15 December 2021, 24 May 2022
Counsel for the applicant:	Mr P Herzfeld SC with Mr D Reynolds
Solicitor for the applicant:	Ken Cush & Associates
Counsel for the first respondent:	Mr J Kirk SC with Ms P Bindon
Solicitor for the first respondent:	King & Wood Mallesons
Counsel for the second respondent:	Mr T Howe QC with Mr D Hume
Solicitor for the second respondent:	Australian Government Solicitor
Counsel for the third respondent:	Mr J Horton QC with Mr D Favell
Solicitor for the third respondent:	Crown Law

ORDERS

ACD 57 of 20

BETWEEN:	**MR STRADFORD**
	Applicant
AND:	**JUDGE SALVATORE PAUL VASTA**
	First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

STATE OF QUEENSLAND

Third Respondent

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **30 AUGUST 2023**

THE COURT ORDERS THAT:

1. Until further order, the applicant in this proceeding be given, for the purposes of this proceeding, the pseudonym Mr Stradford and the applicant's former wife be given the pseudonym Mrs Stradford.
2. Judgment be entered in favour of the applicant against the first, second and third respondents jointly and severally for personal injury and loss of earning capacity in the amount of $59,450.
3. Judgment be entered in favour of the applicant against the first and second respondents jointly for general and aggravated damages for false imprisonment and deprivation of liberty in the amount of $35,000 plus interest under s 51A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) from 6 December 2018 to the date of judgment at the pre-judgment rates specified in the Interest on Judgments Practice Note (GPN-INT).
4. Judgment be entered in favour of the applicant against the first and third respondents jointly for general and aggravated damages for false imprisonment and deprivation of liberty in the amount of $165,000 plus interest under s 51A of the FCA Act from 6 December 2018 to the date of judgment at the pre-judgment rates specified in the Interest on Judgments Practice Note (GPN-INT).
5. Judgment be entered in favour of the applicant against the first respondent for exemplary damages for false imprisonment and deprivation of liberty in the amount of $50,000.
6. The parties are to confer with a view to reaching agreement in respect of the appropriate order as to costs and in the event that no agreement is reached within two weeks from the date of judgment, the parties are to arrange to have the matter relisted for the purposes of hearing further submissions in respect of costs.

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

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REASONS FOR JUDGMENT

WIGNEY J

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

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

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

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

5. There could be no real dispute that the Judge made a number of fundamental and egregious errors in the purported exercise of his power to punish Mr Stradford for contempt. He sentenced Mr Stradford to imprisonment for contempt without first finding that Mr Stradford had in fact failed to comply with the orders in question. He erroneously believed that another judge had made that finding, though exactly how he could sensibly have arrived at that position in the circumstances somewhat beggars belief. He also failed to follow any of the procedures that he was required to follow when dealing with contempt allegations and otherwise failed to afford Mr Stradford any procedural fairness. He effectively pre-judged the outcome. Imprisonment was a fait accompli.

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

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

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

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

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

11. The second issue, which relates to the tort of false imprisonment, is whether the imprisonment order made by the Judge remained valid until set aside by the FamCA Full Court. If the order remained valid until set aside, it provided lawful justification for Mr Stradford's imprisonment. If, however, the order was invalid from the outset because it was infected by jurisdictional error, it provided no lawful justification.

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

on an excursion through a long line of cases, stretching back hundreds of years, which deal with the circumstances in which an inferior court judge may lose the protection of judicial immunity.

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

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

15. The fifth issue concerns whether Queensland has available to it a statutory defence based on s 249 of the ***Criminal Code*** *Act 1899* (Qld). The issue is, in essence, whether that provision, properly construed, can apply to a warrant issued by a federal court, in this case the Circuit Court, simply because that court was sitting in Queensland when the warrant was issued and the warrant was therefore to be enforced in Queensland by officers located in Queensland.

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

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

FACTS RELEVANT TO LIABILITY

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

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

20. Following a number of earlier interlocutory hearings, on 19 June 2018 the matter was listed before Judge Spelleken for directions. Mr Stradford appeared unrepresented and Mrs Stradford did not appear. Judge Spelleken listed the matter for final hearing at 9.45 am on 10 August 2018 and made various procedural orders, including orders that each party file a case outline setting out a minute of the orders sought, a chronology, a list of affidavits

to be relied on and a statement setting out the evidence applicable to the principles in ss 79(4) and 75(2) of the Family Law Act.

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

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

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

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

> [MR STRADFORD]: From my – from my enquiries with UBET, because I couldn't find it on my transaction statement, that's what they had told me.
>
> HIS HONOUR: Rubbish.
>
> [MR STRADFORD]: So - - -
>
> HIS HONOUR: Rubbish.
>
> [MR STRADFORD]: Okay.
>
> HIS HONOUR: Rubbish – rubbish. Do not accept that for one second, one iota of a second.
>
> [MR STRADFORD]: Okay.
>
> HIS HONOUR: That is absolute rubbish. So do you understand what - - -
>
> [MR STRADFORD]: I just – a letter from the court would have helped.
>
> HIS HONOUR: Do not ever talk over the top of me.
>
> [MR STRADFORD]: Sorry.
>
> HIS HONOUR: I have told you, I will put you in jail in contempt of this court if you talk over the top of me. Do you understand? I am not happy at all with you, but I am happy for you to think about this, because your disclosure at this point has been absolutely abysmal. And if it is that I order this and you do not disclose your superannuation, your current bank accounts, all the accounts that you say have now been closed, and when

> they were closed and what the balance was when they were closed – all of those matters need to be given to [Mrs Stradford] by a certain time, and I would think it would be within two months. And if that isn't given to her – **if it is that she comes here, and she complains that she has asked for things and you have not given them to her, bring your toothbrush.** Okay. So you have a think about it.
>
> (Emphasis added)

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

1. If on the adjourned date the Court is of the opinion that the Applicant has not made full and frank disclosure in accordance with today's orders, he is to be dealt with for contempt of those orders.
2. If a contempt hearing has to take place before [the Judge], it will be heard 10.00am 5 December 2018.

100. If the Court is satisfied that [there] has been full and frank disclosure by the Applicant husband, the matter be set down for a final hearing, allocating one (1) day.

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

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

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

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

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

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

> HIS HONOUR: All right. You're [Mr Stradford] and you're [Mrs Stradford]. All right. Okay. So when we were last together on 10 August, we had quite a talk about what the assets were that the two of you had. And I made a number of orders that needed to occur. And that has gone back into what Judge Turner has. But with regard to the matter that went back before her on 26 November, **I noted that if on the adjourned date the court, that is Judge Turner, was of the opinion that you, [Mr Stradford], had not made full and frank disclosure in accordance with the others, that you were to be dealt**

> **with for contempt of those orders,** and that that would take place before me. So that's that. So the matter can't go anywhere at this point in time, **because Judge Turner has determined that you are in contempt of the orders** that I made on 10 August. So that's where we are, it seems. So what do you want to say about that?
>
> (Emphasis added)

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

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

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

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

> HIS HONOUR: So that's that. So, okay, well, it just means that **we will have to go ahead with the contempt hearing**. I've got something on at 11, so I will come back at quarter at 12. Okay. And we will sort this out. All right. **So I hope you brought your toothbrush**, [Mr Stradford].
>
> [MRS STRADFORD]: Sorry. No.
>
> HIS HONOUR: What's - - -
>
> [MRS STRADFORD]: Sorry, I said I don't want him to go to - - -
>
> HIS HONOUR: I don't care
>
> [MRS STRADFORD]: Okay.
>
> HIS HONOUR: This is - - -
>
> [MRS STRADFORD]: It's your decision.
>
> HIS HONOUR: This is my order.
>
> [MRS STRADFORD]: Okay

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

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

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

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

> As I have stated both in the preamble to these remarks and in the course of the submissions that have been made in this Court, the gravamen of this contempt is that this matter that was supposed to be ready to proceed cannot proceed. The gravamen is that the wife is not cognisant of the true financial position of the Applicant, so that she can mount a meaningful case before this Court for a just and equitable property adjustment.
>
> I am of the view that these matters were matters where the Applicant, if he truly wanted, could have made proper disclosure. I am of the view that the Applicant was able to get those items and the Applicant was able to simply tell the wife exactly what sort of amount of money he was getting, how he was getting it, how it was being used or funnelled through different companies, what that meant for him "in the hand" and where that money has been dissipated.
>
> He has chosen not to. There can be no other inference available other than this is deliberate conduct so that the wife is kept in the dark and cannot make a proper, just and equitable submission to this Court as to what the property adjustment should be. It would leave the Court, as it was at 10 August 2018, looking at a negative property pool

so that the Applicant husband did not have to in any way account for what it is that he has been doing with money that he has come into possession of, especially from the years 2014 to the present.

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

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

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

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

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

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

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

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

WARRANT OF COMMITMENT

Family Law Act 1975

To: The Marshal

All Officers of the Australian Federal Police

All Officers of the State and Territory police forces

The Commissioner of Queensland Corrective Services

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

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

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

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

(Emphasis in original)

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

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

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

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

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

45. For reasons that will become apparent, it is relevant to note that the Queensland Police Service had received a telephone call requesting the attendance of police officers at the Circuit Court at 11.43 am on 6 December 2018. That was before the Judge recommenced the hearing during which he purportedly dealt with Mr Stradford for contempt.

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

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

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

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

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

> On 6 December 2018, I made an order that Mr Stradford was in contempt of orders that I had previously made on 10 August 2018.
>
> Specifically, I found him in contempt of order 3(a), (h), (j), (k), (l), (m), (n) and (o) of those orders. I had actually not found him in contempt of orders 3(k) or 3(l), but had found him in contempt of the others.
>
> My reason for doing so was that I had been given a list with markings from Her Honour, Judge Turner. My reasons for having made the orders on 10 August 2018 were to tell the Applicant husband that he needed to make this disclosure properly, especially since there had been previous orders for him to do so.
>
> My notation was that the matter would go back to a duty judge; but if the duty judge was of the opinion that the Applicant has not made full and frank disclosure in accordance with today's orders, that he was to be dealt with for contempt of those orders.
>
> That was to allow that Court to then deal with the contempt, or, if the Court so chose, they could send the matter back to me and I would deal with the matter as a contempt of my orders. My very clear memory is that I had told the Applicant that he would be looking at two years' imprisonment if I found that he was in contempt of my orders.
>
> What has been shown to me is that I could very well have been in error in assuming that Her Honour had actually found, by the markings that she had given to me, that the Applicant was prima facie in contempt of my orders.
>
> Whilst I had read the affidavit of the Applicant that he had filed on 2 November 2018, the only matters that I had really gone through in any depth were the G Group accounts and the tax returns; that is, making a finding that the G Group accounts and the online gambling accounts had not been properly disclosed. I had been given the documents that the Applicant had disclosed and they were totally insufficient for the purposes of affording the wife knowledge of the financial circumstances of the husband.

> The husband had claimed that he had disclosed his tax returns but the fact was that he had not disclosed his tax returns; he had only disclosed his tax assessments and not his actual returns.
>
> Those were the matters that I specifically highlighted as they were the matters that I felt were most illustrative of the contempt shown by the Applicant husband. I did not feel the need to explore any other aspect further because I had, in effect, proceeded upon the basis that Her Honour had already made a finding of contempt.
>
> It seems, on the material, that this could well have been an incorrect assumption. If that was an incorrect assumption, then it is an error by me not to have actually gone through with each and every item on that list and made a ruling as to whether the Applicant father was in contempt of my orders.
>
> To do that I would have had to have the Applicant sworn to give evidence and cross-examined upon the material. I could have then used that actual sworn evidence to decide whether the contempt had actually occurred. But I proceeded straight to a "sentencing" proceeding because I was of the view that the issue of whether the Applicant husband was in contempt had already been decided.
>
> It seems to me if that is also the conclusion that is reached by a Court of Appeal (and I think that it would be), then that Court would really have no hesitation in allowing the appeal and remitting the matter back to me.
>
> I have looked at the declaration that I made on 6 December 2018 and, after discussion with counsel, have come to the conclusion that I am *functus officio* with regard to that declaration. I do not have the power to stay that declaration, even though I am of the view that it should be stayed.
>
> However, I can stay the orders that I had made, especially the one that the Applicant be sentenced to a period of imprisonment of 12 months, but to be released after serving five months. It seems to me that the basis upon which I made that order is almost certainly incorrect. Therefore, it would be totally unjust not to grant the relief that has been sought by the Applicant husband today.
>
> So, I will allow the oral application for a stay of order 1 sentencing the Applicant to imprisonment. That order is stayed pending the outcome of the appeal of that order and declaration.

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

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

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

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

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

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

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

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

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

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

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

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

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

62. Fourth, the Judge in effect performed the roles of prosecutor, witness and judge and failed to follow the procedure mandated in r 19.02 of the *Federal Circuit Court Rules 2001* (Cth) (**FCC Rules**) for dealing with allegations of contempt other than contempt in the face or hearing of the court: *Stradford* at [22]-[27]. There was "no feature of this case which warranted, in the broader interests of justice, any departure from the fundamental principles of justice reflected in r 19.02": *Stradford* at [28]. The Judge did not "employ, by way of procedure, anything remotely resembling the procedures specified in r 19.02 for the purposes of the hearing" on 6 December 2018: *Stradford* at [37].

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

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

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

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

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

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

ERRORS ALLEGEDLY MADE BY THE JUDGE

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

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

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

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

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

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

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

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

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

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

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

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

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

79. The Commonwealth's reliance on paragraph 20 of the contempt judgment is misplaced. In that paragraph, the Judge stated that "it seems to me that given everything that has been said, *and especially the fact that Judge Turner has already found that there is a contempt*, that the Applicant is in contempt for the non-compliance with orders of mine" (emphasis added). Read in context and in light of what the Judge said during the hearing, in the balance of the contempt judgment and in the stay judgment, it is quite clear that his Honour made no independent finding that Mr Stradford had failed to comply with the orders. The Judge's reference to "everything that has been said" appears to be a reference to what Mr Stradford had said during the hearing, which his Honour characterised as amounting to an attempt to "give some excuses for his failure": CJ at [15].

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

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

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

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

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

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

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

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

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

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

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

89. Section 17 of the FCC Act provided as follows:

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

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

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

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

93. Perhaps most significantly, since the 1989 amendments to the Family Law Act, the FamCA Full Court has held that Pt XIIIB of the Family Law Act is a "complete code for dealing with contempts": ***DAI*** *v DAA* (2005) 191 FLR 360; [2005] FamCA 88 at [47], [67]; see also ***Rutherford*** *v Marshal of Family Court of Australia* (1999) 152 FLR 299; [1999] FamCA 1299; *In the Marriage of* ***Schwarzkopff*** [1992] FamCA 30; (1992) 106 FLR 274. It may be true, as the Judge submitted, that each of those cases dealt primarily with the question whether the sentencing principles in the *Crimes Act 1914* (Cth) applied when imposing sanctions for contempt under the Family Law Act. It is, however, nevertheless clear from the reasoning in each of the cases that the FamCA Full Court conluded that

the contempt powers under the Family Law Act were exhaustively dealt with in Pt XIIIB. There was certainly no suggestion in any of the judgments that s 35 of the Family Law Act provided a separate and distinct power to punish for contempt that was not constrained by or subject to Pt XIIIB. In particular, there was no suggestion that a contempt involving contravention of an order could be punished pursuant to s 35 of the Family Law Act, even if there was no allegation or finding that the contravention of the order involved a flagrant challenge to the authority of the court as required by s 112AP(1) of the Family Law Act.

94. I should follow judgments of the FamCA Full Court, an intermediate appellate court, unless persuaded that they are plainly wrong. That is all the more so given that jurisdiction under the Family Law Act is a specialist jurisdiction and the Family Court is a specialist court in respect of that jurisdiction. I am not persuaded that the FamCA Full Court was wrong in concluding that, properly construed in the context of the Family Law Act as a whole, Pt XIIIB constitutes a code for dealing with contempts arising in the context of jurisdiction under the Family Law Act. I should, in those circumstances, follow *DAI*, *Rutherford* and *Schwarzkopff* rather than the dicta in *Skouvakis* and *Moll v Butler*.

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

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

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

98. It is also important to emphasise in this context that s 17(2) of the FCC Act expressly provides that s 17(1) "has effect subject to any other Act". Plainly the Family Law Act is an "other Act". It is therefore clear that when the Circuit Court exercises jurisdiction under the Family Law Act, its power to punish for contempt pursuant to s 17(1) of the FCC Act gives way to, or is subject to, the exhaustive provisions in Pt XIIIA and Pt XIIIB of the Family Law Act. The result is that, while s 17(1) may provide the Circuit Court with a general power to punish for contempt, when that court exercises jurisdiction under the Family Law Act it must exercise that power pursuant to, or in

accordance with, Pt XIIIB of the Family Law Act. If the alleged contempt relates to non-compliance with a court order, unless the court finds that the non-compliance constituted a flagrant challenge to the court's authority, the court must deal with the non-compliance in accordance with Pt XIIIA of the Family Law Act. It should also be noted in this context that the reliance by both the Judge and the Commonwealth on the well-known principle in *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 was misconceived. That is because the combined effect of s 17(2) of the FCC Act and Pt XIIIB of the Family Law Act is to impose an express, not implied, limitation on the Circuit Court's power to punish for contempt.

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

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

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

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

103. Mr Stradford's claim that the Judge lacked power to make the imprisonment order because he was required to, but did not, apply the provisions of either Pt XIIIA or Pt XIIIB of the Family Law Act is accordingly upheld. The Judge was not empowered to punish Mr Stradford for contempt unless or until he found that his alleged non-compliance with the disclosure orders contstiuted a "flagrant challenge to the authority of the court". That was effectively a mandatory statutory precondition to the Judge's power to imprison Mr Stradford for contempt. His Honour made no such finding.

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

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

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

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

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

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

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

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

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

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

113. Second, it is at best doubtful that r 1.06 could operate to permit a judge of the Circuit Court to dispense with compliance with a rule such as r 19.02, which imposes fundamental requirements or obligations on the court to ensure that it exercises its jurisdiction in a way which is procedurally fair. The proper construction of general dispensation rules such as r 1.06 of the FCC Rules is that they "enable the court in a proper case to relieve a party of an obligation to comply with particular provisions of the Rules, for instance, as to time or the filing of pleadings and suchlike": *Survival & Industrial Equipment (Newcastle) Pty Ltd v Owners of the Vessel "Alley Cat"* [1992] FCA 242; (1992) 36 FCR 129 at 138; [1992] FCA 319; *Harrington v Lowe* (1996) 190 CLR 311 at 321; [1996] HCA 8. General dispensation rules like r 1.06 of the FCC Rules should not be construed in such a way as to permit the court to unilaterally dispense with obligations imposed on it, particularly those plainly designed to ensure procedural fairness.

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

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

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

Alleged error 4: denial of procedural fairness

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

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

Alleged error 5: pre-judgment

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

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

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

122. As discussed earlier in these reasons, when the matter came back before the Judge on 6 December 2018, the Judge inexplicably stated, at the very commencement of the hearing, that Judge Turner had determined that Mr Stradford was in contempt. It is almost impossible to conceive how the Judge had arrived at that conclusion. Judge Turner had made no such order and had not delivered any judgment. The basis for the conclusion appeared to be that "Judge Turner wouldn't have sent it to me [the Judge] without making a determination that you [Mr Stradford] had actually failed to do that".

123. The Judge then went through some of the categories of documents in the disclosure orders and sought Mr Stradford's response as to whether he had provided those documents. Mr Stradford responded to the Judge's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

135. I am, of course, mindful that an allegation that a judge had predetermined a matter is a particularly serious allegation, particularly where the outcome was a sentence of imprisonment. An allegation of pre-judgment, which amounts to an allegation of actual bias, is "about as serious an allegation as any that could be made against a judicial officer" because it "involves a finding of judicial impropriety and probably of judicial misconduct": *Spirits International BV v Federal Treasury (FKP) Sojuzplodoimport* [2013] FCAFC 106 at [13]. I take the seriousness of the allegation into account in determining whether the inference of pre-judgment is available and should be drawn: cf ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 and s 140(2)(c) of the ***Evidence Act*** *1995* (Cth). I am nevertheless satisfied that the inference can and should be drawn.

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

Alleged error 6: improper purpose

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

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

139. As has already been noted, at the very commencement of the hearing on 6 December 2018, the Judge told the parties that Judge Turner had found that Mr Stradford was in contempt and had made it plain that he did not

believe that Mr Stradford had fully complied with the disclosure orders. It was in that context that the Judge asked Mrs Stradford what she really wanted. Mrs Stradford indicated that what she really wanted was a property settlement. The following exchange then occurred:

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

> **minutes and then I will let you talk to Mr Stradford. And it will be only for five minutes. Then you can come back and you can tell me what you want to do. If it is that there's not going to be a resolution, I'm going to proceed with the contempt hearing**. It's as simple as that. Okay. Thank you. Okay. All right.
>
> [MRS STRADFORD]: Thank you, your Honour.
>
> (Emphasis added)

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

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

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

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

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

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

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

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

147. While it was undoubtedly inappropriate for the Judge to conduct the proceeding in the way he did, I am ultimately not satisfied, to the requisite standard, that his predominant or actuating purpose in pursuing or prosecuting the contempt allegation against Mr Stradford was to exert pressure upon the parties to settle the proceeding, or force Mr Stradford to capitulate. The Judge appears to have believed that Judge Turner had already found that Mr Stradford was in contempt and to have already formed the view that the appropriate penalty for that contempt was imprisonment. He obviously knew that Mr Stradford did not want to go to gaol. He also knew that Mrs Stradford did not want Mr Stradford to go to gaol and had also formed the view that that would also not be in Mrs Stradford's best interests. He appears, in those circumstances, to have sent the parties outside for further discussions in the misguided belief that it was somehow in their best interests to do so, despite the obvious pressure that placed upon them. While the effect of the Judge's actions was to exert pressure upon the parties to settle, I am not persuaded that that was his predominant purpose for acting as he did. That is all the more so given the absence of any apparent advantage that the Judge may have derived from forcing the parties to settle, other than perhaps ridding the Judge of a case that he would otherwise have been required to hear and determine on its merits.

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

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

THE TORTS ALLEGEDLY COMMITTED BY THE JUDGE

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

False imprisonment

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

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

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

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

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

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

155. Any person who actively promotes and causes the complainant to be imprisoned may be liable: *Myer Stores Ltd v Soo* [1991] VicRp 97; [1991] 2 VR 597 at 616. That person may be held liable even if other people who were involved in the imprisonment, including those who actually effected the imprisonment, are immune or have a defence: *Ruddock v Taylor* at [151]-[153].

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

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

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

Collateral abuse of process

159. The tort of collateral abuse of process is committed where the defendant employs a process of the court for some purpose other than the attainment of the principal claim for relief in an action. As Issacs J put it in *Varawa v Howard Smith Co Ltd* [1911] HCA 46; (1911) 13 CLR 35 at 91; [1911] HCA 46: "[i]f the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process". Lord Sumption described the essence of the tort as follows in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] AC 366 at [149]; [2013] UKPC 17; [2013] 4 All ER 8:

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

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

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

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

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

164. Mr Stradford's case against the Judge for collateral abuse of process was that the Judge initiated the contempt proceeding against him and threatened to prosecute that proceeding through to completion as a means

of putting pressure on Mr Stradford to capitulate in his litigation with Mrs Stradford. The overt acts were alleged to be the threats made by the Judge during the purported hearing of the contempt allegation.

LIABILITY OF THE JUDGE FOR COLLATERAL ABUSE OF PROCESS

165. I propose to first deal with Mr Stradford's case for the tort of collateral abuse of process. That is because it can be dealt with fairly shortly.
166. I am not satisfied that the Judge committed the tort of collateral abuse of process. That is so for a number of reasons.
167. First, I am mindful that the allegation that the Judge instigated or maintained the contempt proceeding against Mr Stradford for the improper purpose of forcing Mr and Mrs Stradford to settle their family law proceeding, or forcing Mr Stradford to capitulate in that litigation, is an extremely serious allegation. I must take the seriousness of the allegation into account in determining whether the inference of improper purpose is available and should be drawn: *Briginshaw*; s 140(2)(c) of the Evidence Act.
168. Second, it is not entirely clear that the Judge instigated, or saw himself as the instigator of, the contempt proceeding against Mr Stradford. Rather, as discussed earlier, he proceeded under the mistaken belief that Judge Turner had already found that Mr Stradford had failed to comply with the court's orders and was therefore in contempt. Implausible as it may seem, he appears to have proceeded on the basis that, while Judge Turner had made the contempt finding, it was a matter for him to proceed to sentence Mr Stradford for that contempt.
169. Third, while it may be accepted that the Judge pursued or maintained the contempt proceeding against Mr Stradford in that regard, and to that extent can be regarded as the moving party, I am not satisfied to the requisite standard that the Judge's predominant purpose in pursuing the contempt allegation was a purpose other than that for which contempt proceedings of the sort in question are properly pursued. That purpose was to punish Mr Stradford for his non-compliance with the court's orders and thereby vindicate the court's authority. I would infer that the Judge believed that Mr Stradford had been found to be in contempt and that it was appropriate to proceed to deal with him for that contempt.
170. Fourth, it is true that in the course of the contempt proceeding the Judge indicated to the parties that if they settled the proceeding he would effectively forgive or overlook the contempt, but that if they did not settle Mr Stradford would be going to gaol. He told the parties to engage in settlement discussions with that in mind. That was entirely inappropriate and bordering on improper. I am not, however, satisfied to the requisite standard that the Judge's inappropriate statements and conduct in that regard were motivated or actuated by any improper purpose. Rather, for the reasons given earlier in the context of the allegation that the Judge acted for an improper purpose, the Judge appears to have acted in the pragmatic but nonetheless misguided belief that it was somehow in the parties' best interests to try to settle the proceeding and thereby avoid the spectre of Mr Stradford going to gaol. While it is difficult to imagine that the Judge was entirely oblivious to the pressure that his action put the parties under, I am not persuaded that his predominant purpose was to force the parties to settle the proceeding, or force Mr Stradford to capitulate.

THE LIABILITY OF THE JUDGE FOR FALSE IMPRISONMENT

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

Lawful justification

173. Both the Judge and the Commonwealth contended that there was lawful justification for Mr Stradford's detention. They obviously did not dispute that the FamCA Full Court in *Stradford* set aside both the declaration and

order of the Judge pursuant to which he had been imprisoned. They also conceded that the declaration and order were invalid and vitiated by jurisdictional error. That concession was properly made.

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

175. The thrust of the Judge's and the Commonwealth's contention that the Judge's imprisonment order and warrant nonetheless provided lawful justification for the imprisonment of Mr Stradford was that the order and warrant were valid until set aside by the FamCA Full Court. They submitted that the source of the Circuit Court's power to punish for contempt carried with it the power to make orders which were valid until set aside. The Constitution was said to be the source of the Circuit Court's power to punish for contempt, because the power to punish for contempt was said to be a feature of courts established under Ch III of the Constitution and the Circuit Court was a Ch III court. They also appeared to rely on the fact that s 17 of the FCC Act provided that the Circuit Court's powers to punish for contempt were the same as the powers that the High Court has to punish for contempt. It followed, in their submission, that when the Circuit Court exercises its jurisdiction under s 17, it exercises the jurisdiction of a superior court, or exercises its jurisdiction in effect as a superior court, or in the capacity of a superior court. It followed, so the Judge and the Commonwealth submitted, that contempt orders made by the Circuit Court are valid until set aside, which is the position that would apply in the case of a superior court.

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

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

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

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

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

179. Similarly, in *Director of Public Prosecutions (NSW) v* ***Kmetyk*** (2018) 85 MVR 25; [2018] NSWCA 156, Leeming JA (with whom Meagher JA and Sackville AJA agreed) held that orders made by the District Court of New

South Wales were vitiated by jurisdictional error and, because the District Court was an inferior court, those orders were "nullities" (at [43]). Justice Leeming cited ***Pelechowski*** *v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; [1999] HCA 19 in support of that conclusion.

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

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

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

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

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

183. That passage from *Mayas* was subsequently cited by McHugh J in *Pelechowski* in support of the proposition that "[a] long line of cases establishes that an order made by an inferior court, such as the District Court, will be null and void if that court did not have *jurisdiction* to make the order" (emphasis added). The passage from *Mayas* upon which the Judge and the Commonwealth rely has been understood and applied as drawing a distinction between cases where the order made by the inferior court was made within jurisdiction, and those where the error was infected by jurisdictional error: see, for example, *Ho v Loneragan* [2013] WASCA 20 at [32]- [35]; *Firth v Director of Public Prosecutions (NSW)* [2018] NSWCA 78 at [19]- [20]. As noted earlier, in *Kmetyk*, Leeming JA cited *Pelechowski* (and therefore, in effect, *Mayas*) in support of the conclusion that orders made by an inferior court which were vitiated by jurisdictional error were nullities. It follows that the Judge's and the Commonwealth's reliance on *Mayas* was misplaced.

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

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