SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2021 0075

PAUL REDMOND MULLETT — Applicant

v

CHRISTINE NIXON & ORS (according to the attached Schedule) — Respondents

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JUDGES:	FERGUSON CJ, BEACH and McLEISH JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	8 August 2022
DATE OF JUDGMENT:	23 August 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 174
JUDGMENT APPEALED FROM:	*Mullett v Nixon* [2016] VSC 512 (T Forrest J) *Mullett v Nixon* [2015] VSC 727 (J Forrest J)

TORTS – Misfeasance in public office – Malicious prosecution – Application for extension of time within which to seek leave to appeal – Application for leave to adduce fresh evidence – Whether suspension of applicant from Police Force done maliciously – Whether respondents acted maliciously in initiating and maintaining criminal proceedings against applicant – Whether respondents failed to discover and disclose critical documents – Whether new evidence, if available at trial, gives rise to possibility of opposite result – Applicant's proposed ground of appeal not made out – Futile to grant extension of time – Application for extension of time refused.

PRACTICE AND PROCEDURE – Discovery – Obligations of discovery – Relevant documents – Critical documents – Claims that respondents breached discovery, disclosure and production obligations not made out – *Supreme Court (General Civil Procedure) Rules 2015,* r 29.01.1(3) – *Civil Procedure Act 2010*, s 26(1).

EVIDENCE – Fresh evidence – Proceeding dismissed at trial – Whether evidence sought to be relied upon gives rise to possibility of opposite result – No breach of discovery obligations – Evidence not giving rise to possibility of opposite result – Applicant not granted leave to adduce fresh evidence – *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 applied.

Counsel

Applicant:	Ms G L Schoff QC with Mr E H R Kelly
First, Second and Third Respondents:	Mr R Knowles QC with Mr D P McCredden
Fourth and Fifth Respondents:	Dr I R L Freckelton QC with Mr S G Frauenfelder

Solicitors

Applicant:	Stephens Lawyers & Consultants
First, Second and Third Respondents:	Victorian Government Solicitor's Office
Fourth and Fifth Respondents:	Corrs Chambers Westgarth

FERGUSON CJ
BEACH JA
McLEISH JA:

1 Paul Mullett ('the applicant') was a senior sergeant of the Victorian police force and the Secretary of the Police Association. In November 2007, the then Chief Commissioner, Christine Nixon ('the first respondent') suspended the applicant, with pay, from duty as a Victorian police officer ('the first suspension'). In July 2008, a superintendent of Victoria Police, Wayne Taylor ('the third respondent') laid five charges against the applicant: one charge of attempting to pervert the course of justice; two charges of perjury; and two alternative charges of wilfully making a statement known to be false or misleading in a material particular.[1] Prior to filing the charges, a deputy commissioner of Victoria Police, Kieran Walshe ('the second respondent') reviewed the brief and authorised the charges. On the same day that the charges were laid, the applicant was suspended without pay ('the second suspension').

2 In May 2009, the applicant was discharged on the attempt to pervert the course of justice charge, but committed to stand trial on the two perjury charges. In June 2009, the Director of Public Prosecutions took over the prosecution and entered a *nolle prosequi* in relation to the two perjury charges. The two alternative summary charges were withdrawn in the Magistrates' Court.

3 In March 2013, the applicant commenced a proceeding in the Trial Division claiming damages from the first, second and third respondents. In relation to the first suspension, the applicant alleged the tort of misfeasance in public office against the first respondent. In relation to the laying of the criminal charges and prosecution of them, the applicant alleged malicious prosecution against all three respondents, and misfeasance in public office against the first and second respondents. In relation to the second suspension, the applicant alleged misfeasance in public office against the second respondent.

4 The trial of the applicant's proceeding was heard by T Forrest J (as his Honour then was) over 14 days in May 2016. On 26 October 2016, in accordance with reasons delivered on 31 August 2016,[2] his Honour dismissed the applicant's proceeding.

5 The applicant now seeks an extension of time within which to seek leave to appeal, and to appeal against the trial judge's orders made on 26 October 2016 and also against an earlier order for costs made against him by J Forrest J on 4 April 2016 in relation to an unsuccessful application the applicant made in 2015 for further discovery.[3] The applicant also seeks leave to rely upon evidence which he contends is fresh evidence in support of his applications for an extension of time, leave to appeal and appeal. The respondents to each of these applications are the original defendants in the proceeding below (the first, second and third respondents) and two additional parties: the State of Victoria ('the fourth respondent') and the Chief Commissioner of Victoria Police ('the fifth respondent').

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[1] Contrary to s 86K(1)(c) of the *Police Regulation Act 1958*.
[2] *Mullett v Nixon* [2016] VSC 512 ('Trial Reasons').
[3] *Mullett v Nixon* [2015] VSC 727 ('Discovery Reasons').

6 The applicant's proposed ground of appeal is that, since the trial, fresh evidence that 'should have been discovered, disclosed and produced at trial' has been found, which, if produced at trial, 'would have significantly altered the conduct of the proceeding, such that an opposite outcome would have been reasonably clear, alternatively, a real possibility'. In his proposed ground of appeal, the applicant contends that 'the failure to make proper discovery, disclosure and production of [this] evidence remains unexplained, was deliberate or reckless, and/or amounted to malpractice or misconduct', and that the conduct of the respondents and/or their representatives occasioned a miscarriage of justice. Amongst other orders sought by the applicant, he seeks an order remitting his proceeding for a retrial and an order that he be granted leave to file a fresh statement of claim.

7 The first, second and third respondents oppose the application for an extension of time within which to seek leave to appeal, the application to adduce fresh evidence and the application for leave to appeal. The fourth and fifth respondents do not oppose the extension of time being granted, but oppose the application to adduce fresh evidence and the application for leave to appeal.

Relevant background

8 In late 2005, the Victoria Police email system was used to circulate criticism of the then president of the Police Association, Janet Mitchell. The emails were published under the pseudonym 'Kit Walker'. The Ethical Standards Division ('ESD'), under the command of Assistant Commissioner Luke Cornelius, commenced an investigation into the emails and their authorship. In February 2007, Mr Peter Lalor (then a serving officer with the rank of detective sergeant) was identified as the author of one of the Kit Walker emails.

9 On 13 February 2007, Operation Briars was established by Superintendent Rod Wilson to investigate whether there was any and if so what police involvement in the shooting murder of Shane Chartres-Abbott.

10 On 2 May 2007, an agreement (to which the applicant was a party) was made between the Police Association and ESD that the Kit Walker investigation would cease and that Mr Lalor would not be interviewed about the Kit Walker emails, pending consideration of a report by an independent reviewer of ESD's conduct in relation to that investigation.

11 On 30 May 2007, the Director of the Office of Police Integrity ('the OPI'), on his own motion, determined to conduct an investigation under s 86NA of the *Police Regulation Act*. The investigation (known as 'Operation Diana') concerned, among other things, the alleged unauthorised dissemination of confidential information and sensitive police operational information by former Assistant Commissioner Noel Ashby, Stephen Linnell (the first respondent's then media advisor) and the applicant. The investigation related to a number of matters, including Operation Briars.

12 On 24 September 2007, the Director of the OPI purported to delegate investigatory powers in relation to Operation Diana to Murray Wilcox QC under s 102F(1) of the *Police Regulation Act*. Private and public hearings followed. It was alleged that

Mr Ashby, Mr Linnell and the applicant were each involved in leaking sensitive operational information. The applicant gave private evidence in October 2007, and public evidence on 14 and 15 November 2007. Mr Cornelius, at the first respondent's behest, attended each day of the public hearings. He gave evidence at trial that, after hearing evidence given by the applicant in the public hearings, he formed the view that the applicant had committed criminal offences, including offences under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Police Regulation Act.*

13 The first respondent met with her advisors on 14 and 15 November 2007, the second of which meetings was attended by Peter Hanks QC for the purpose of advising whether the suspension power in s 79(1) of the *Police Regulation Act* could be used. Following those meetings, the first respondent, purportedly acting pursuant to s 79(1) of that Act, suspended the applicant from the Force with pay (the first suspension), on the basis that she had (as required by s 79(1)) a reasonable belief that the applicant had committed an offence punishable by imprisonment.

14 In February 2008, the OPI published the results of Operation Diana and reported them to Parliament. The OPI recommended that consideration be given to instituting a number of criminal charges against Mr Ashby, Mr Linnell and the applicant.

15 In mid-2008, the OPI formed the view that it did not have the power to prosecute the various alleged offences that it had identified. As a result, Victoria Police were asked to lay the relevant charges. The first respondent and the head of ESD (Mr Cornelius) agreed that Victoria Police would take on this role. The third respondent agreed to act as the 'nominal informant'. The third respondent drew up charge sheets alleging the five criminal charges against the applicant to which we have already referred. The second respondent reviewed the brief and authorised the charges.

16 Relevantly, the charge of attempting to pervert the course of justice concerned the allegation that the applicant had attempted to have disclosed to Mr Lalor (who was then a target of Operation Briars) the existence or possible existence of a telephone interception warrant covering Mr Lalor's telephone service, by requesting one Brian Rix to warn Mr Lalor to be careful what he said to people. In summary, the conduct alleged against the applicant was as follows:

(a) On 15 August 2007, Mr Linnell warned Mr Ashby that his conversations with the applicant might be being recorded. Mr Linnell showed Mr Ashby a media strategy document revealing Mr Lalor as a target of Operation Briars;

(b) later that day, Mr Ashby warned the applicant that he had learnt that a conversation between the applicant and Mr Lalor had been intercepted;

(c) on 16 August 2007, the applicant told Mr Rix to contact Mr Lalor and tell him to be careful who he spoke to;

(d) that same day, Mr Rix and Mr Lalor spoke on the telephone three times and met once in person;

(e) immediately after his meeting with Mr Rix, Mr Lalor telephoned David Waters, another suspect in the Operation Briars investigation. A transcript of that telephone conversation records that Mr Lalor said 'yeah [sic], put your head down and keep a low profile'.

17 As the trial judge observed,[4] this charge required that the prosecution prove that the applicant knew Mr Lalor was a suspect in the Operation Briars investigation and that the applicant caused Mr Rix to warn Mr Lalor that his telephone was bugged or that Mr Lalor was suspected of criminal conduct.

18 In his evidence at the OPI public hearings, the applicant had maintained that any warning he may have caused to be given to Mr Lalor related to the Kit Walker investigation, and not to Operation Briars. As we have already said, the Kit Walker investigation concerned the inappropriate use of the internal Victoria Police email system in late 2005 to disseminate material critical of the then president of the Police Association, Ms Mitchell. As the trial judge also observed, the charge of perverting the course of justice also required that this 'Kit Walker' explanation be excluded.[5]

19 The perjury charges and the two alternative summary charges related to two statements made by the applicant at the private OPI hearings conducted on 19 October 2007: the first statement being that the applicant could not recall asking Mr Ashby to obtain the disciplinary file in respect of proceedings against a Jennifer McDonald; and the second being that the applicant could not recall discussing a disciplinary hearing in respect of Ms McDonald with Mr Ashby, except to query whether Mr Ashby was the hearing officer for that disciplinary hearing.

20 On 29 July 2008, the third respondent filed the charges in the Melbourne Magistrates' Court, and the applicant was served with a copy of them. Section 79(2) of the *Police Regulation Act* was thus engaged, and the applicant was suspended on that day without pay (the second suspension). The second suspension was authorised by the second respondent.

21 On 19 May 2009, the applicant was committed for trial on two counts of perjury, but discharged on the count of attempting to pervert the course of justice. On 25 June 2009, as we have already observed, a *nolle prosequi* was entered in respect of the perjury charges. The two alternative summary charges were withdrawn.

22 In 2010, in subsequent proceedings against Mr Ashby, Mr Wilcox's delegation to conduct the OPI hearings in relation to Operation Diana was found to be invalid.

The trial judge's reasons

23 Because one of the issues in this proceeding concerns what effect (if any) the production at trial of the evidence that the applicant asserts is fresh and should have been produced at trial would (or might) have had, it is necessary for us to examine the trial judge's reasons in some detail.

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4 Trial Reasons, [105].

5 Ibid [107].

24 The trial judge commenced his reasons with a brief description of the background to the proceeding. The judge noted that the applicant sought to establish the torts of misfeasance in public office and malicious prosecution by circumstantial reasoning, the applicant's submission being that the circumstances of the case gave rise to an inference that the first respondent's 'true purpose in causing him to be suspended and charged' was her wish for him to be gone from his position at the Police Association.[6] The judge noted that the respondents rejected the applicant's hypothesis, and that each of them gave direct evidence about their actions and objects. The judge described the applicant and the three respondents as 'reasonably impressive witnesses' who, with a few exceptions, were not seriously challenged in relation to their reliability or credibility.[7]

Elements of the torts

25 The trial judge identified the elements of the tort of misfeasance in public office as follows:

> (i) an invalid or unauthorised act;
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> (ii) done maliciously;
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> (iii) by a public officer;
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> (iv) in the purported discharge of his or her public duties;
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> (v) which causes loss or harm to the plaintiff.[8]

26 In relation to malicious prosecution, the judge identified the elements of the tort as follows:

> (i) [criminal proceedings] were initiated, instigated or continued against the plaintiff by the defendant;
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> (ii) the proceedings were terminated in the plaintiff's favour;
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> (iii) the defendant, in initiating or maintaining the proceedings, acted maliciously;
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> (iv) the defendant acted without reasonable or probable cause, [and to establish this element], the plaintiff must prove a negative proposition, being *either* that the defendant prosecutor did not 'honestly believe' the case that was instituted and maintained (subjective aspect), *or* that the defendant prosecutor had no sufficient basis for such an honest belief (objective aspect), or both;
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> (v) the plaintiff suffered damage.[9]

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6 Trial Reasons, [11].
7 Ibid.
8 Ibid [15], [46].
9 Ibid [17].

27 The judge said that the allegations of misfeasance in public office against the first and second respondents were 'grave', and that he therefore had to be satisfied of proof of the malice element of that tort to the *Briginshaw*[10] standard, as codified by s 140 of the *Evidence Act 2008*.[11] His Honour came to the same conclusion with respect to the third and fourth elements of the tort of malicious prosecution, saying that these elements also had to be proved to that standard.[12]

The souring of relations between the applicant and the first respondent

28 The trial judge summarised the relationship and various dealings between the applicant and the first respondent between the time when the first respondent was appointed Chief Commissioner of Police (April 2001) and February 2007.[13] The judge observed that from October 2006, the first respondent refused to deal personally with the applicant; and that relations had become 'so bad' that both had 'signed an agreement not to publicly criticise each other'.[14] The judge observed, however, that this agreement appeared to have had little effect on the applicant.[15]

Narrative of events

29 The judge described the setting up of Operation Diana, saying that from June 2007 until 14 September 2007, the existence of this investigation was not known to Victoria Police.[16] The judge then set out the relevant chronology of events relating to the first suspension as follows:

> (a) 14 and 17 September 2007: The Director of OPI (George Brouwer) and the Director of Operations (Graham Ashton) told Ms Nixon [the first respondent] and A/C Cornelius about Operation Diana. They were told that Operation Diana was investigating leaks of operational information about a current OPI/Victoria Police investigation into suspected police involvement in a murder (Operation Briars). Telephone intercepts suggested that Mr Ashby, Stephen Linnell … and Mr Mullett [the applicant] were involved in the leaks. The OPI was planning to continue the investigation and sought the assistance of A/C Cornelius and D/C Overland to test whether leaks were being processed in the manner they suspected.
>
> (b) Ms Nixon directed A/C Cornelius to monitor the OPI investigation. Ms Nixon stated in evidence that she was shocked at both the nature of the allegations and the fact that they involved two senior members of Victoria Police. She authorised A/C Cornelius and D/C Overland to participate in the investigation.
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> (c) A 'sting' operation was set in motion whereby misinformation was

10 *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*').
11 Trial Reasons, [22].
12 Ibid [23].
13 Ibid [24]–[38].
14 Ibid [38].
15 Ibid.
16 Ibid [40].

passed on by Victoria Police (through either A/C Cornelius or D/C Overland) to Mr Linnell. The information was then followed through a series of telephone intercepts.

(d) On 24 September 2007, the Director of the OPI purportedly delegated certain investigatory powers to Mr Murray Wilcox QC under s 102F(1) of the PR Act [*Police Regulation Act*]. ...

(e) In September and October 2007, Mr Wilcox QC carried out confidential examinations of Messrs Linnell, Ashby and Mullett. In early October A/C Cornelius was interviewed by the OPI at their offices. He was interviewed with a view to him becoming a witness. He was subsequently provided with a draft affidavit, which he understood would be included in the brief of evidence 'against the Diana principals'.

(f) Commencing on 7 November 2007, the OPI conducted a series of public examinations. Mr Linnell gave evidence on 7 November 2007, Mr Ashby on 9 November 2007 and Mr Mullett on 14 and 15 November 2007.

(g) A/C Cornelius attended the OPI on each day of the public hearings at Ms Nixon's behest. He viewed the evidence on a television monitor in the Director's office. A/C Cornelius created a running log on his laptop computer in which he set out relevant evidence as it was given. Throughout each day of the public hearings he would email the running log to Ms Nixon. Ms Nixon gave evidence that she read the running log and also the transcripts of the public hearings as they were published by the OPI daily. She would also be briefed at the end of each hearing day by A/C Cornelius. She was not challenged on this evidence.

(h) Messrs Linnell and Ashby resigned from their employment shortly after their public evidence concluded.

(i) A/C Cornelius said that after hearing Mr Mullett's public evidence he formed the view that Mr Mullett had committed criminal offences including offences under the *Telecommunication (Interception and Access) Act 1979* ('TI Act') and the PR Act. He said that he formed the view that this provided sufficient grounds to suspend Mr Mullett from Victoria Police.

(j) On 14 November 2007, at the conclusion of Mr Mullett's first day of public hearing evidence, a meeting was held between Ms Nixon, A/C Cornelius, Ms Kirsty McIntyre of the VGSO, D/C Overland and perhaps Mr Stephen Lee of the VGSO. The focus of the discussion was on whether there was sufficient evidence to support the 'reasonable belief necessary for the suspension of Mr Mullett'. It was agreed that urgent advice should be sought from Mr Peter Hanks QC. Ms McIntyre prepared a Brief to Advise that was delivered to Mr Hanks on the evening of 14 November 2007. Mr Hanks was requested to examine the public OPI hearing transcripts, particularly that of Mr Mullett, and advise whether he has 'given evidence that would empower the Chief Commissioner of Police to take action against him under the *Police Regulation Act 1958* (Vic) …' and to 'advise the Chief Commissioner

in conference, on the options available to the Chief Commission(er) under the Act and avenues for Senior Sergeant Mullett to appeal'.

(k) On 15 November an early morning conference was held at Mr Hanks' chambers. Amongst others, present were Mr Hanks, Ms Nixon, A/C Cornelius, D/C Overland, Inspector Richard Koo from the Discipline Advisory Unit ('DAU") of Victoria Police and Ms Kirsty McIntyre. Mr Mullett's evidence was discussed. The mood was sombre. The plaintiff [the applicant] contends that I ought reject Ms Nixon's account of what occurred at this meeting. For present purposes I shall set out the effect of that evidence. I shall return to the plaintiff's alternative contention later in these reasons.

(l) Mr Hanks advised that, in his view, the evidence given by Mr Mullett was sufficient to give rise to a reasonable belief that Mr Mullett had committed a criminal offence. Mr Hanks advised the suspension power contained in s 79(1) of the PR Act could be used. Mr Hanks identified offences under both the TI Act and the PR Act. According to the evidence of Ms Nixon, Ms McIntyre, Mr Koo and A/C Cornelius, no one in the room disagreed with Mr Hanks.

(m) A decision was made in this meeting to prepare suspension documentation for Mr Mullett under s 79(1) of the PR Act. Ms Nixon stated her decision to suspend Mr Mullett was 'interim' at this juncture as he was still in evidence and she wished to see how the evidence unfolded before reaching a concluded view.

(n) A further issue was discussed in the meeting concerning who should exercise the suspension power and sign the suspension notice. Section 79(1) of the PR Act conferred the suspension power [on] Ms Nixon. Ms Nixon gave evidence that she would normally delegate that power to A/C Cornelius. She said that the problem with such a delegation in this instance was that A/C Cornelius' prior 'involvement in this matter' meant that it 'would not be appropriate for him to sign the notice'. For the same reason it was not appropriate, Ms Nixon said, for D/C Overland to sign the notice. Ms Nixon could not recall whether Mr Walshe was available or whether other senior members were considered but for various reasons eliminated. She said she believed it was 'proper' for her to take responsibility for the suspension.

(o) There was discussion in the meeting about whether there would be a perception of bias if Ms Nixon personally suspended Mr Mullett. Mr Koo expressed reservations about Ms Nixon personally exercising the s 79(1) power.

(p) There was also discussion in the meeting about the review processes available to Mr Mullett. No decision was reached as to who may conduct the review but there was discussion about appointing an independent external person to conduct any review. Ms Nixon said in evidence that she recalled Mr Koo raising the possibility that, if Mr Mullett felt aggrieved by the decision, he would be able to challenge it in the Supreme Court. Mr Mullett's role at TPA [the Police Association] and the impact of the suspension was also the subject of discussion. Part of

this discussion concerned the effect of s 86(7) of the PR Act, which meant that once Mr Mullett was suspended he could not enter police premises unless directed or permitted to do so. Ms Nixon determined that the mechanism for obtaining a direction of this sort ought come from the Chief Commissioner's office rather than the individual police premises that he was seeking to enter on any particular occasion.

(q) The suspension notice was drawn up by Mr Koo. Ms Nixon signed the notice later on 15 November suspending Mr Mullett with pay under s 79(1) of the PR Act. It was served on Mr Mullett at 3.55 pm on 15 November and was immediately effective. An error in the date nominated for the notice to take effect meant that a replacement notice was issued on 16 November. Neither notice gave particulars of the offences alleged. They recited merely: '… you are reasonably believed to have committed … an offence punishable by imprisonment'. A/C Cornelius stated that this was the general practice. He further stated that a s 79(1) suspension was preliminary and the ultimate charges a member may face might be quite different to those originally believed to have been committed when the s 79(1) power is activated. A/C Cornelius was not challenged on this characterisation of the general practice around s 79(1) suspensions.

(r) Both suspension notices carried a review mechanism inviting Mr Mullett to show cause as to why his 'status within the Force should be altered', and to supply any material or evidence that he may rely upon to challenge the suspension, deliverable to A/C ESD (A/C Cornelius).[17]

30 The judge then set out the chronology of events surrounding the charging and prosecuting of the applicant and the second suspension as follows:

(a) On 29 November 2007 Mr O P Holdenson QC received a letter from Mr Wilcox. The letter set out items that had been identified in the OPI investigation that were said to place his client, Mr Mullett, at risk of adverse findings. The items were listed as follows.

Item 1

At the closed hearing on 19 October 2007, Mr Mullett either gave false evidence or misled or attempted to mislead the Director in relation to seven identified matters.

Item 2

Mr Mullett disclosed to Mr Lalor (a police officer) the existence or possible existence of a telephone interception warrant covering Mr Lalor's telephone and thereby inferentially disclosing the fact that Mr Lalor was suspected of having committed a serious crime. Particulars of the evidence relied upon were supplied.

Item 3

Mr Mullett failed to comply with the confidentiality requirements of an

[17] Ibid [40] (footnotes omitted).

OPI investigation imposed upon him by the PR Act by (a) disclosing to Mr Ashby that Mr Lalor had attended at an OPI hearing, and (b) by aiding and abetting Mr Ashby's disclosure of information about Mr Linnell's attendance at an OPI hearing.

(b) On 25 January 2008 Mr Wilcox delivered his report ('the Wilcox Report') to the Director of the OPI. Relevantly it recommended that the Victorian Office of Public Prosecutions ('OPP') consider instituting the following criminal proceedings against Mr Mullett:

(1) Wilfully making a false or misleading statement pursuant to s 86K of the PR Act or for perjury, in respect of three specified answers given at the private hearing on 19 October 2007;

(2) Attempting to pervert the course of justice by disclosing to Mr Lalor the existence or possible existence of a telephone interception warrant covering Mr Lalor's telephone; and

(3) Counselling or procuring the commission by Mr Ashby of an offence under s 102G(1) of the PR Act.

(c) The OPI reported to Parliament on 7 February 2008. Part Two of the OPI report incorporated the Wilcox Report.

(d) The OPI sought advice from Mr Jeremy Rapke QC, the Director of Public Prosecutions. On 23 April 2008 Mr Rapke QC advised as follows:

(1) There was evidence to justify a prosecution for perjury or alternatively under s 86K(1)(c) of the PR Act in relation to Mr Mullett's evidence at the private hearing that he could not recall asking Mr Ashby to get hold of the Jennifer McDonald hearing files so that Mr Ashby could be the hearing officer.

(2) Mr Rapke QC did not recommend prosecuting Mr Mullett for perjury or under s 86K of the PR Act in respect of the other six false evidence matters referred to in the OPI report.

(3) There was evidence to justify a charge of attempting to pervert the course of justice. This was said to relate to Mr Mullett telling Mr Lalor of the existence or possible existence of a telephone interception warrant covering Mr Lalor's telephone. The Director added the cautionary rider that this charge relied on inferences, inferential reasoning and 'could not be described as strong'.

(4) The evidence did not support a charge of counselling and/or procuring the commission of an offence by Mr Ashby.

At this stage (April 2008) it was still envisaged that the OPI would be the prosecuting authority.

(e) In evidence, A/C Cornelius stated that in about mid-2008 he was advised that the OPI had formed the view that it did not have the power to

prosecute the offences that it had investigated. He briefed Ms Nixon. Ms Nixon spoke to Mr Rapke QC. Mr Rapke QC told Ms Nixon that he had been involved in the formulation of charges against various individuals investigated by Operation Diana, but that the OPI could not lay the charges. Ms Nixon said that up until hearing of this issue, it was her understanding that the OPI would institute any charges.

(f) Superintendent Wayne Taylor [the third respondent] was recommended by A/C Cornelius to be the Victoria Police informant. A/C Cornelius said that he recommended Mr Taylor because Mr Taylor was a Superintendent within the ESD who had no previous involvement in the matters the subject of the OPI inquiry. Mr Taylor, in evidence, said that he understood that he was to be the 'nominal informant'. He said that part of this task was to independently assess the evidence collected by the OPI to determine to his satisfaction that there was a reasonable prospect of conviction on each of the charges that were proposed. The charges proposed were not just against Mr Mullett but also against Mr Ashby and Mr Linnell. Of the circa 53 charges he was to review, 5 related to Mr Mullett. Two of these five charges were alternative charges.

(g) Mr Taylor said that his role was confined to satisfying himself that the charges were appropriate and, if so, laying them. The investigation was not his concern.

(h) Mr Taylor attended the offices of the OPI. He met with OPI lawyers and investigators, including Ms Sharon Kerrison. He stated in evidence that he considered the evidence and elements of each proposed charge for Mr Mullett, Mr Ashby and Mr Linnell. The meeting took an hour and forty minutes. He reviewed about 53 charges in total. He made diary notes. He was shown transcripts and statements. He said that he could not remember who had formulated the charges, nor could he remember seeing the Rapke QC advice letter. He stated that he sat at a table with the OPI staff and asked them to produce the evidence they relied upon to substantiate the charges he was considering. I shall scrutinize the various criticisms of Mr Taylor made by the Plaintiff in the analysis section of these reasons.

(j) A/C Cornelius determined that, given his involvement in the investigation, it would be inappropriate for him to consider whether to 'authorise the brief'. Ordinarily, an ESD investigator's recommendation that charges be laid would be reviewed by the A/C ESD. D/C Kieran Walshe [the second respondent] was selected by Ms Nixon and A/C Cornelius to consider whether to authorise the prosecution.

(k) Mr Taylor concluded that there was a reasonable prospect of conviction against Mr Mullett, and referred the brief to Mr Walshe for authorisation. Mr Taylor had reached similar conclusions against Messrs Linnell and Ashby and their briefs were referred as well. Mr Taylor said he signed the relevant charge sheets either during or following the OPI meeting of 15 July 2008.

(l) The briefs were delivered to Mr Walshe 'around 15 July'. He was unsure

whether he saw the Rapke QC advice during this review process. Mr Walshe said that over the next several days he spent considerable time reviewing the material in the briefs. He estimated in the range of 25 – 30 hours. He formed the view that there was a reasonable prospect of securing a conviction in relation to each of the charges against Mr Ashby, Mr Linnell and Mr Mullett. In cross-examination Mr Walshe accepted that for significant periods, at about this time, he was in regional Victoria; he accepted that during these periods he would not have worked at reviewing the briefs. I shall scrutinise this aspect more closely in the analysis section of these reasons.

(m) Mr Walshe signed the Mullett charge sheets on 25 July 2008. On 29 July 2008 the Mullett charges were filed by Mr Taylor at the Melbourne Magistrates' Court. A copy of the charges was served on Mr Mullett.

(n) The Director of Public Prosecutions took over the prosecution as soon as the charges were filed.

(o) Mr Mullett was suspended without pay pursuant to s 79(2) of the PR Act on 29 July 2008 [the second suspension]; that is the day on which he was charged … .

(p) Mr Mullett remained contracted to TPA until 18 March 2009.

(q) On 11 May 2009 Mr Mullett's committal hearing was commenced in respect to the three indictable charges:

a) perjury,

b) perjury, and

c) attempting to pervert the course of justice.

Magistrate Couzens discharged Mr Mullett on the 'attempt to pervert' charge but committed him for trial on the two perjury charges.

(r) On 25 June 2009 the Director of Public Prosecutions entered a *nolle prosequi* in this Court in relation to the two perjury charges. The summary alternatives (charges 3 and 5) were withdrawn in the Magistrates' Court.[18]

Trial judge's analysis

31 The trial judge commenced his analysis by examining what he said was the proposition that underpinned the applicant's claims against the first three respondents, being that they acted for an ulterior purpose — namely to rid the first respondent of 'an implacable political foe'.[19] The judge said that he was 'comfortably satisfied' that by 2007, the relationship between the applicant and the first respondent was 'toxic', and that the first respondent had a 'healthy motive' for wishing that the applicant be removed from his

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18 Ibid [40] (footnotes omitted).
19 Ibid [41].

role as Secretary of the Police Association.[20] His Honour observed that this did not mean that the first respondent in fact acted for that collateral purpose. He noted the applicant's contention that he should use this motive, along with other circumstantial evidence, to conclude that the real purpose behind the two suspensions and the prosecution of the applicant was for the first respondent to rid herself of an 'uncompromising adversary'.[21] The judge noted that, in response, the first, second and third respondents submitted that he ought to accept their direct evidence that their actions were 'lawful, appropriate, and entirely uninfected by any hidden purpose'.[22]

32 Turning to the first suspension, the judge noted the applicant's submission that the first suspension was invalid or unauthorised because: first, the first respondent 'did not and could not have any reasonable belief that [the applicant] had committed any offence punishable by imprisonment'; and secondly, the first respondent had not commenced an investigation into the matter and thus did not comply with s 79(1) of the *Police Regulation Act* so as to enliven the suspension power.[23]

33 We interpolate that in this Court, the applicant submitted that the first suspension was invalid, not because of the lack of some statutorily required investigation process; but rather because, not having conducted any investigation, the first respondent could not have had the reasonable belief required by s 79(1) of the *Police Regulation Act*.

34 On the question of the first respondent's reasonable belief, the judge examined the evidence given at trial by the first respondent and Mr Cornelius.[24] As to the first respondent's evidence, the judge said that she struck him as a 'conscientious witness, anxious to provide complete answers, and careful when her memory failed her (which [was] only to be expected nearly nine years after the relevant events took place)'.[25] The judge then dealt sequentially with the factors which the applicant submitted 'in combination circumstantially demonstrate that [the first respondent] could not reasonably have held the requisite belief to suspend him pursuant to s 79(1)'.[26] In relation to those submissions, his Honour concluded:

> When these circumstantial factors are considered together and against the background of the pre-existing acrimonious Mullett/Nixon relationship, in my view, they are entirely insufficient to displace the evidence of Ms Nixon on this aspect. As I have explained, I considered her evidence cogent and reliable and I am satisfied of its truth. The plaintiff has failed to prove that Ms Nixon 'did not and could not have had' the necessary reasonable belief.[27]

35 The judge rejected the submission that the first suspension was invalid or unauthorised because an investigation required by s 79(1) had not been commenced. His Honour said that the evidence established that there was a pre-existing OPI investigation (Operation

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20 Ibid [44].
21 Ibid [45].
22 Ibid.
23 Ibid [47].
24 Ibid [49]–[50].
25 Ibid [51].
26 Ibid [52].
27 Ibid [53].

Diana); the first respondent had asked Mr Cornelius to undertake an investigative role to assist that investigation; Mr Cornelius and Mr Overland both assisted in the OPI 'sting' operation; and Mr Cornelius monitored developments in the OPI investigation and reported them back to the first respondent.[28]

36 The judge thus concluded that the applicant had not made out the first element of his cause of action of misfeasance in public office against the first respondent in relation to the first suspension.[29] While that finding was sufficient to dispose of that cause of action, out of an abundance of caution, the judge went on to consider whether the first suspension was actuated by malice. After further discussing and analysing the evidence, the judge concluded that the first respondent's exercise of the suspension power was not carried out with an intention to injure the applicant, and that the applicant had failed to prove malice.[30]

37 The judge then turned to the charging and prosecution of the applicant and the second suspension. He summarised the substance of the evidence of the first, second and third respondents and the evidence of Mr Cornelius on these topics.[31] The judge described Mr Cornelius as an impressive witness who provided substantial support for the accounts of the first, second and third respondents.[32]

38 The judge concluded that there was no evidence (direct or indirect) that the first respondent played any role in the criminal proceedings taken against the applicant.[33] The applicant's claims of misfeasance in public office and malicious prosecution against the first respondent in relation to those proceedings thus failed.[34]

39 Next, the judge dealt with the claim against the third respondent for malicious prosecution. The judge described the live elements of that tort which had to be proved by the applicant as being:

> (a) that in initiating and/or maintaining the criminal prosecution Mr Taylor acted maliciously;
>
> (b) that Mr Taylor acted without reasonable and probable cause; and
>
> (c) that Mr Mullett suffered either reputational, personal and/or actual economic damage arising from the malicious prosecution.[35]

40 The judge rejected the applicant's claim that the third respondent acted maliciously, saying that matters relied upon by the applicant '[did] not get close to demonstrating an improper, illegitimate or oblique purpose'.[36] The judge said that he considered the third

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28 Ibid [58].
29 Ibid [60].
30 Ibid [69].
31 Ibid [73]–[76].
32 Ibid [77].
33 Ibid [80].
34 Ibid [82], [83].
35 Ibid [84].
36 Ibid [88].

respondent to be an impressive witness, and he did not accept that the third respondent had acted maliciously.[37] While the judge's finding on malice was sufficient to defeat the applicant's claim against the third respondent, the judge went on to consider whether the third respondent did not honestly believe that charges were warranted (the subjective limb of the reasonable and probable cause element) and whether the third respondent had a sufficient basis for charging the applicant (the objective limb of the reasonable or probable cause element of the cause of action). The judge concluded that the applicant had failed to make out either the subjective limb or the objective limb of this element of the cause of action.[38] In rejecting the applicant's contention that there was no objective reasonable and probable cause for the institution of the attempting to pervert the course of justice charge, the judge said:

> In my view, it would have been open for a reasonable informant to conclude:
>
> (a) that Mr Mullett engaged in conduct that had the tendency to pervert the course of justice when, possessed with knowledge of Operation Briars (including that Mr Lalor was a suspect) he caused Mr Rix to warn Mr Lalor that his phone was 'off'; and
>
> (b) that this conduct was carried out with the intention of interfering with the course of the 'Operation Briars' investigation including possible future judicial proceedings.
>
> This conclusion necessarily requires that the alternative innocent 'Kit Walker' explanation be discarded. A reasonable police informant could discard this alternative hypothesis because:
>
> (a) Mr Mullett was party to an agreement in May 2007 brokered between TPA and ESD (together with Ms Nixon) that the Victoria Police 'Kit Walker' investigation would cease and that no attempt would be made to interview Mr Lalor until an independent review was conducted; and
>
> (b) There was never any complaint by Mr Mullett that the Victoria Police Kit Walker investigation had recommenced.[39]

41 The judge then turned to the causes of action alleged against the second respondent. With respect to the second suspension, the judge said that s 79(2) of the *Police Regulation Act* only required that charges punishable by imprisonment be laid. His Honour then said that this legislative precondition was met when the charges were laid on 29 June 2009. It followed that the second suspension was not an invalid or unauthorised act.[40] Similarly, the judge concluded that the applicant had failed to demonstrate that the second respondent's authorisation of the charges against him was an invalid or unauthorised exercise of power.[41]

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37 Ibid [92].
38 Ibid [97], [126].
39 Ibid [111]–[112].
40 Ibid [137]–[139].
41 Ibid [141].

42 The judge noted that the same facts were relied upon by the applicant to prove malice in respect of the misfeasance in public office and malicious prosecution claims. Ultimately, the judge rejected the applicant's case on malice against the second respondent.[42] In the course of doing so, the judge said that he considered the second respondent to be a careful and conscientious witness who was unshaken in cross-examination.[43]

43 The judge's conclusions on the issue of malice were sufficient to dispose of the applicant's causes of action alleged against the second respondent. Nevertheless, his Honour went on to consider the reasonable and probable cause element of the malicious prosecution claim, and concluded that there was reasonable and probable cause to instigate the prosecution against the applicant.[44]

44 Finally, the judge concluded his reasons for dismissing the applicant's claims as follows:

> Mr Mullett has failed to prove a valid cause of action against any of the defendants. He has failed to establish that his prosecution was groundless and unjustified, and he has failed to establish any misuse or abuse of power by a holder of public office. I have found that Ms Nixon had a sound motive for wanting Mr Mullett removed from his position at TPA — he was a fierce adversary. The existence of this motive, however, simply does not prove that it actuated Mr Mullett's subsequent suspensions and prosecution. I am positively satisfied that it did not.[45]

The applicant's case in this Court

45 In support of his applications in this Court, the applicant relied upon four affidavits sworn by him,[46] and an affidavit sworn by Mr Koo.[47] In essence, the applicant deposed to first becoming aware in February 2019 of the involvement of Nicola Gobbo in Operation Briars. The applicant said that he became suspicious that Ms Gobbo had been involved in investigations involving him, and that this may have 'contaminated' proceedings in which he had been involved. He deposed that, of particular concern to him was 'the non-disclosure of evidence by Victoria Police or the OPI in respect of the role of Ms Gobbo in Operation Briars and, potentially, Operation Diana'.

46 The applicant's affidavits in this Court set out the steps the applicant took to obtain additional documents relating to his matter. In summary, while the applicant obtained various documents during the course of the Royal Commission into the Management of Police Informants, it was not until the Royal Commission published its final report on 30 November 2020 that he obtained the majority of the documents he now seeks to rely upon as containing fresh evidence.

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42 Ibid [142]–[144], [148]–[152].
43 Ibid [149].
44 Ibid [151(e)], [153]–[157].
45 Ibid [160].
46 Sworn on 1 April 2021, 7 July 2021, 20 February 2022 and 29 March 2022.
47 Sworn on 28 June 2021.

47 The applicant's case in this Court is that the Trial Division was led into error, in ruling against him, as a consequence of the wrongful conduct of the respondents during the discovery application heard in 2015 and the trial, by their failure to discover, disclose and produce evidence that was material to the key issues in dispute. The applicant contends that this evidence would have significantly assisted, alternatively altered, the applicant's case at first instance. The applicant asserts that the respondents (all five of them), their servants, agents, legal practitioners and representatives, engaged in wrongful conduct that was contrary to obligations and duties they owed to the Court.

48 In relation to the first, second and third respondents, the applicant contends that they failed to comply with their discovery and/or disclosure obligations under r 29.01.1 of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules'), and s 26 of the *Civil Procedure Act 2010*.

49 In relation to the fourth and fifth respondents, the applicant contends that they were parties and participants in the proceeding below who also had obligations under r 29.01.1 of the Rules and s 26 of the *Civil Procedure Act* — with which (like the first, second and third respondents) they too failed to comply. Additional criticism was made of them in relation to their failure to comply with their obligations under O 42A of the Rules, 'as a subpoena addressee'.[48]

50 In relation to the representatives of the respondents, the applicant asserted that legal practitioners acting on behalf of the respondents employed by the VGSO and Victoria Police (including the Legal Services and Civil Litigation Units):

- failed to avoid conflicts of interest between the first to third respondents and the fourth and fifth respondents;
- facilitated breaches of the respondents' discovery, disclosure and production obligations; and
- failed to disclose to the Court 'that Victoria Police was a party to the proceeding and controlling the litigation process'.

51 At the risk of repetition, the applicant's proposed ground of appeal is that the fresh evidence he has discovered should have been produced by the respondents prior to trial, and that their failure to do so amounted to malpractice or misconduct, and has occasioned a miscarriage of justice requiring the trial judge's decision to be set aside and a new trial ordered.

The fresh evidence

52 The fresh evidence upon which the applicant seeks to rely was identified in a 12-page document headed 'Consolidated Table of Fresh Evidence' dated 29 March 2022 ('the fresh evidence table'). The first 59 documents and categories of documents in the fresh

48 During the course of the proceeding below, the VGSO, who were the solicitors acting for the first, second and third respondents, issued a number of subpoenas seeking documents for the purpose of discovering such documents to the applicant. Two of these subpoenas (issued on 21 May and 12 October 2015) were issued to the fifth respondent.

evidence table existed at the time of trial. The balance of the documents came into existence after the trial judge dismissed the applicant's proceeding.

53 Self-evidently, there could be no valid complaint about any of the respondents failing to discover, disclose or produce documents that post-date judgment. Nevertheless, the applicant seeks to rely on these documents as fresh evidence for the purpose of showing that the documents identified in the first 59 entries of the table of fresh evidence existed and should have been disclosed by the respondents prior to trial. Additionally, some of the post-trial documents are relied upon by the applicant to support an alleged motive that the respondents (and, in particular, the fifth respondent) might have had to prevent the disclosure of documents which were in truth discoverable. The motive suggested by the applicant was that some of the documents refer to the activities of Ms Gobbo, a matter which the fifth respondent was actively seeking to suppress at the time of trial in *AB v CD*[49] and related proceedings.[50]

54 Relevantly for the purpose of the applicant's proposed ground of appeal, the fresh evidence documents comprise:

- evidence received by the Royal Commission said to be relevant (but not produced during the course of the trial, despite extensive efforts having been made by the applicant to obtain all relevant documents from the first to third respondents) ('the additional evidence documents');
- evidence in the first to third respondents' bill of costs, served on the applicant on 13 May 2020 ('the bill of costs'); and
- costs assignment deeds executed individually by the first to third respondents in late 2016 and early 2017, which were provided to the applicant in March 2017 ('the assignment deeds').

55 During the course of the hearing, in relation to the additional evidence documents, we were taken to briefing papers for Operation Briars, minutes of management committee meetings of Operation Briars, Briars Taskforce updates, handwritten and typed annotations on those documents and source management logs relating to Ms Gobbo. These were said to be the critical documents which the respondents failed to discover, disclose or produce at trial ('the purportedly critical documents').

56 Relying upon evidence given by Sir Ken Jones at the Royal Commission, the applicant contended that the Operation Briars documents in the additional evidence documents were discoverable because Operation Briars was closely linked to Operation Diana. As the applicant put it in a table attached to his further written case:[51]

> Any investigatory division said to exist between Operation Briars and Operation Diana was a fiction, there being comprehensive management and operational overlap.

57 The applicant also contended that the Operation Briars documents in the new evidence documents were, on their face (and without the need to prove any link between

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49 [2017] VSC 350.

50 See further, *AB v CD* [2017] VSCA 338; *AB v CD* [2019] VSCA 28.

51 Table 1 attached to the applicant's further amended written case dated 29 March 2022.

Operation Briars and Operation Diana), critical documents which should have been discovered, disclosed and produced by the respondents prior to trial.

58 The applicant relied on the bill of costs and the assignment deeds (documents produced after the conclusion of the trial) for a different purpose. These were relied upon to show what was said to be the involvement of the fourth and fifth respondents in the defence of the applicant's proceeding. Specifically, the applicant contended that these documents showed that 'Victoria Police was exercising influence over the conduct of the proceeding and the named defendant' by, amongst other things, funding the litigation and instructing the VGSO with respect to pleadings, discovery, disclosure, subpoenas, correspondence with the applicant's solicitors and the briefing of counsel, a mediator and experts. The applicant submitted that, as a result of engaging in this activity, the fourth and fifth respondents were required to discover, disclose and produce relevant documents (including the purportedly critical documents) to the applicant pursuant to r 29.01.1 of the Rules and s 26 of the *Civil Procedure Act*.

Discovery obligations under the Rules

59 Prior to trial, each of the first to third respondents filed and served affidavits of documents pursuant to an order made that the parties give discovery of documents. The scope of their discovery was governed by r 29.01.1, which relevantly provided that:

> [T]he documents required to be discovered are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given –
>
> (a) documents on which the party relies;
>
> (b) documents that adversely affect the party's own case;
>
> (c) documents that adversely affect another party's case;
>
> (d) documents that support another party's case.[52]

60 In support of his contention that the fourth and fifth respondents were also required to give discovery pursuant to r 29.01.1, the applicant relied upon the definition of the word 'party' in s 3 of the *Supreme Court Act 1986*, which relevantly provided:

> **party** includes every person served with notice of or attending any proceeding whether named on the record or not;[53]

The obligation to disclose documents imposed by the Civil Procedure Act

61 The obligation imposed by the provisions of the *Civil Procedure Act* to disclose the existence of documents is contained in s 26 of that Act. Section 26 provides:

> **26 Overarching obligation to disclose existence of documents**

52 See r 29.01.1(3) of the Rules.

53 The word 'proceeding' is defined in s 3 of the *Supreme Court Act* to mean 'any matter in the Court other than a criminal proceeding'.

(1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—

(a) of which the person is aware; and

(b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.

(2) Disclosure under subsection (1) must occur at—

(a) the earliest reasonable time after the person becomes aware of the existence of the document; or

(b) such other time as a court may direct.

(3) Subsection (1) does not apply to any document which is protected from disclosure—

(a) on the grounds of privilege which has not been expressly or impliedly waived; or

(b) under any Act (including any Commonwealth Act) or other law.

(4) The overarching obligation imposed by this section—

(a) is an ongoing obligation for the duration of the civil proceeding; and

(b) does not limit or affect a party's obligations in relation to discovery.

62 The overarching obligations imposed by the *Civil Procedure Act* are set out in ss 16–26 of the Act. They include overarching obligations to act honestly[54] and not to engage in conduct which is misleading or deceptive, or likely to mislead or deceive.[55] Section 10(1) of the Act provides that the overarching obligations apply to:

(a) any person who is a party;[56]

(b) any legal practitioner or other representative acting for or on behalf of a party;

(c) any law practice acting for or on behalf of a party;

(d) any person who provides financial assistance or other assistance to any

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[54] *Civil Procedure Act*, s 17.

[55] *Civil Procedure Act*, s 21.

[56] The word 'party' is defined in s 3 of the *Civil Procedure Act* to mean 'party to a civil proceeding'. The expression 'civil proceeding' is also defined in s 3. It is defined to mean 'any proceeding in a court other than a criminal proceeding ['criminal proceeding' being another defined term in the Act] or quasi-criminal proceeding'. For present purposes, it is not necessary for us to set out the definition of 'criminal proceeding' in s 3 of the Act.

> party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—
>
> (i) an insurer;
>
> (ii) a provider of funding or financial support, including any litigation funder.

63 The applicant contends that the bill of costs and the assignment deeds show that the fourth and fifth respondents, as parties to whom the overarching obligations apply, were required, but failed to, disclose the existence of the purportedly critical documents.

Fresh evidence: principles to be applied

64 Generally speaking, in order for an unsuccessful party at trial to succeed on appeal in setting aside the primary judgment on the basis of fresh evidence, the unsuccessful party needs to establish that it is reasonably clear that if the evidence had been available at trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary.[57] As was said in *Quade*, however, the application of that general rule does not serve the demands of justice in the individual case or the public interest in the administration of justice generally in a case where the unavailability of the evidence at trial resulted from a significant failure by the successful party to comply with an order for the discovery of relevant documents in his or her possession or under his or her control.[58]

65 *Quade* concerned a case where the successful party had 'seriously failed in the performance of its own obligations, and [had] thereby created the difficulty'.[59] The High Court said:

> It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court's assessment of what will best serve the interests of justice, 'either particularly in relation to the parties or generally in relation to the administration of justice'. In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors,

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57 *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435, 444 (per Dixon CJ); *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 142 (per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) ('*Quade*'); *Eastman v The Queen* (2000) 203 CLR 1, 114 [350]; *Clone Pty Ltd v Players Pty Ltd* (2018) 264 CLR 165, 190 [49] (per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) ('*Clone*'). See further, *Giles v Jeffrey* [2016] VSCA 314, [207] ('*Giles*'); *Pateras v State of Victoria* [2017] VSCA 31, [64]–[65] ('*Pateras*').

58 *Quade* (1991) 178 CLR 134, 142.

59 Ibid 143.

> including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party, any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. While it is not necessary that the appellate court be persuaded in such a case that it is 'almost certain' or 'reasonably clear' that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.[60]

The relevance of the purportedly critical documents

66 The applicant contends that the purportedly critical documents are relevant to three issues, which he variously identifies and defines as 'the leak explanation', 'the Kit Walker explanation', and the 'investigation defence'. We will deal with the applicant's contentions in relation to each of these issues in turn.

The leak explanation

67 The applicant submitted that a critical issue for determination at trial was whether the information which the first three respondents had regarding the allegation that, in mid-August 2007, the applicant had leaked information to Mr Lalor about Operation Briars, provided a reasonable basis for suspending, charging and prosecuting the applicant. The applicant submitted that such a determination required consideration of any exculpatory evidence, including evidence that others may have leaked information about Operation Briars to Mr Lalor. The applicant's case was that other sources of potential (if not actual) leaks included other police, Ms Gobbo and a journalist.

68 The applicant identified the parts of the purportedly critical documents showing the existence of (or at least possibility of) leaks from people other than the applicant as being contained in:

- source management logs relating to Ms Gobbo of 4, 6, 8, 13 and 14 September 2007;
- the Briars Taskforce update of 22 June 2007;
- the minutes of the board of management meeting of Taskforce Briars of 22 June 2007;
- the Briars Taskforce update of 2 July 2007; and
- handwritten annotations of Mr Cornelius on the Briars Taskforce update of 30 July 2007, together with a typed version of those handwritten annotations.

The Kit Walker explanation

69 The applicant has always denied leaking information about Operation Briars. In the course of his evidence before Mr Wilcox he maintained that denial and provided an

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60 Ibid 142–3. See also *Clone* (2018) 264 CLR 165, 190–1 [50].

alternative innocent explanation that any warning he may have caused to be given to Mr Lalor related to the Kit Walker investigation — not Operation Briars. In his evidence before Mr Wilcox, the applicant maintained that the interception of Mr Lalor's phone was attributable to a recommencement of the Kit Walker investigation.

70 The applicant submitted that a number of the purportedly critical documents show that the Kit Walker investigation continued from March to July 2007, and was ongoing from 2 July 2007 within Operation Briars. The documents relied upon by the applicant included:

- Mr Wilson's briefing paper to Taskforce Briars Operation Management Group dated 15 March 2007 (including Mr Cornelius's handwritten annotation to that document);
- the minutes of the Operation Briars management committee meeting of 15 March 2007;
- Operation Briars management committee meeting minutes of 26 March 2007, 10 April 2007, 1 May 2007, 7 May 2007, 12 June 2007, 22 June 2007, 23 July 2007 and 30 July 2007; and
- Briars Taskforce updates dated 15 May 2007, 22 June 2007, 2 July 2007 and 30 July 2007.

The investigation defence

71 Section 79(1) of the *Police Regulation Act* relevantly provided:

> If the Chief Commissioner reasonably believes a member of the Force to have committed an offence punishable by imprisonment the Chief Commissioner may cause an investigation into the matter under the criminal law to be commenced and may, at any time during that investigation –
>
> …
>
> (c) suspend the member from the Force with pay.

72 In his statement of claim, the plaintiff pleaded:

> At no relevant time prior to [the first suspension] … [did the first respondent] cause or institute any investigation to be commenced into the alleged misconduct forming the basis for the said suspension either pursuant to s 79(1) or alternatively s 71 of the *Police Regulation Act* in order to inform herself properly of the true facts of the alleged misconduct.

73 In response to this assertion, the first respondent pleaded in her defence that she caused an investigation to be commenced into whether the applicant had committed an offence punishable by imprisonment by giving an oral direction to Mr Cornelius on or about 17 September 2007. It is this pleading which the applicant alleges constitutes the investigation defence. The applicant then contends that, because there was a 'comprehensive management and operational overlap' between Operation Briars and Operation Diana, the various Operation Briars Taskforce documents to which we have

already referred were discoverable and disclosable by the respondents and should have been produced to the applicant by the respondents prior to trial.

The extension of time application

74 The applicant's application for an extension of time within which to seek leave to appeal is opposed by the first, second and third respondents, but not opposed by the fourth and fifth respondents. The first, second and third respondents oppose the application for an extension of time on two bases: first, the applicant has not provided an adequate explanation for the delay in filing his proposed application for leave to appeal; and secondly, the proposed application for leave to appeal does not have any real prospect of success.

75 In our view the applicant has provided an adequate explanation for the delay in filing his proposed application for leave to appeal. It is plain that the applicant has invested a significant amount of effort in attempting to obtain documents which he believes are relevant and which were not discovered or disclosed to him until a number of years after judgment was given against him. We accept that the applicant made reasonable and appropriate efforts to obtain the purportedly critical documents, and that he was not in a position to determine whether or not he should seek leave to appeal out of time until sometime after 30 November 2020 (by which date he had been provided with all of the purportedly critical documents).

76 In his first affidavit,[61] the applicant deposed to, and exhibited, correspondence between his solicitors and the VGSO foreshadowing his proposed application for an extension of time within which to seek leave to appeal. In February 2021, the VGSO requested the applicant provide copies of a draft application for leave to appeal and draft written case. In March 2021, the applicant provided draft appeal documents and said that he was willing to participate in discussions to resolve the matter. A week later, the VGSO advised that they had instructions to accept service of appeal documents on behalf of the first three respondents. In April 2021, the applicant commenced the current proceedings against all five respondents.

77 The applicant having explained the delay in the filing of his appeal documents, the remaining issue on the extension of time application is the merits of the applicant's proposed appeal. Plainly, if the application for leave to appeal has no merit then it would be futile to grant the applicant the extension of time which he seeks. Thus, we turn to the merits of the applications seeking leave to adduce fresh evidence and leave to appeal.

Leave to adduce fresh evidence and leave to appeal

78 The applicant's applications seeking leave to adduce fresh evidence and leave to appeal are interrelated. We accept that the purportedly critical documents were not available to the applicant at trial, and that this was not caused by any lack of reasonable diligence on his part.[62] Thus, the central issues in these applications then become: (1) whether

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61 Sworn 1 April 2021.

62 See *Giles* [2016] VSCA 314, [207(a)]; *Pateras* [2017] VSCA 31, [64].

any (or all) of the purportedly critical documents were discoverable and/or required to be produced by one or some of the respondents prior to trial; and (2) whether it can be concluded that there is (at least) a real possibility that their production and use by the applicant at trial would have led to an opposite result.[63]

79 For the reasons which follow, both of these questions must be answered unfavourably to the applicant.

80 For present purposes, it can be accepted that the fifth respondent provided financial assistance to the first, second and third respondents in the defence of the applicant's proceeding at first instance. It is less clear that the fourth respondent provided any such assistance. That said, the extent to which the overarching obligations might be held to apply to the fourth and fifth respondents on the basis that they provided financial or other assistance is only 'insofar as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding'.[64] Notwithstanding the contents of the deeds of assignment and the bill of costs, it is entirely unclear to what extent (if any) either of the fourth or fifth respondents exercised any of the influence referred to in s 10(1)(d) of the *Civil Procedure Act*.

81 Having made these observations, and again for present purposes, we are prepared to accept that the fourth and fifth respondents were parties to whom the overarching obligations under the *Civil Procedure Act* applied, and that they were thus required to disclose documents that were or had been in their possession, custody or control, which they considered, or ought reasonably to have considered, were critical to the resolution of the applicant's proceeding.[65]

82 The next issue that arises is the extent of the obligation to disclose documents under s 26 of the *Civil Procedure Act*. In the explanatory memorandum relating to s 26 it is stated:

> The term 'critical documents' is intended to capture a class of documents considerably narrower than those required to be discovered, but is broader than the concept of 'decisive' documents. The test is meant to capture those documents that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case. The purpose of the early disclosure is to allow persons in dispute and their lawyers to have sufficient information upon which to have meaningful settlement discussions with the other side.

83 Section 26 of the *Civil Procedure Act* falls to be construed in accordance with well-known principles of statutory construction. Specifically, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*, the High Court said:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and

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63 See *Quade* (1991) 178 CLR 134, 142–3.

64 See s 10(1)(d) of the *Civil Procedure Act*.

65 See s 26 of the *Civil Procedure Act*.

> extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[66]

84 In *Yunghanns v Colquhoun-Denvers*,[67] Daly AsJ accepted a submission that the test for determining whether a document was a critical document within the meaning of s 26 of the *Civil Procedure Act* was as follows:

> [A] critical document is a document which a party would reasonably be expected to have relied upon as forming the basis of a party's claim when commencing the case, as well as documents that the party knows will adversely affect the case.[68]

85 With respect, we would construe s 26(1) differently. The sub-section is to be interpreted in the context of the whole of the *Civil Procedure Act* and in accordance with its purposes. The overarching purpose is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[69] The overarching obligations under that Act are directed to fulfilling that purpose, focussing not only on determination of civil disputes at trial but also on earlier resolution through appropriate dispute resolution. For example, s 22 mandates the use of reasonable endeavours to resolve a dispute by agreement between the parties in dispute.[70]

86 Against that legislative backdrop, appropriate content has to be given to the words 'critical to the resolution of the dispute' in s 26(1). That language is in contrast to the language in r 29.01.1(3). The Rule uses different concepts as well as different language – concepts of reliance and whether the document affects or supports a party's case. The Rule is broader in scope. Not every document which might support or adversely affect a party's case to a slight degree on any issue, no matter the significance or otherwise of the issue, will necessarily be 'critical to the resolution of the dispute'. To this extent, in our view the critical documents which are required to be disclosed under s 26 of the *Civil Procedure Act* are likely to be a subset of those required to be discovered by a party under r 29.01.1(3) of the Rules (those discoverable documents being documents that are relied upon or which affect or support a party's case). The 'critical' documents are those which are crucial to each party's case and which, on this basis, if produced to the opposite party, are the most likely to lead to resolution of the dispute either by early settlement or at trial.

87 In applying that test, a person to whom the section applies should consider whether a reasonable opposing party and their legal representatives would want to see the document at an early stage of the proceeding in order to:

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66 (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

67 [2021] VSC 243 ('*Yunghanns*').

68 Ibid [158].

69 Section 7(1) and see also s 1(c).

70 See also, for example, s 16 (paramount duty in relation to appropriate dispute resolution), s 19 (overarching obligation to only take steps to resolve or determine dispute), s 23 (overarching obligation to narrow the issues in dispute).

(a) make an assessment of whether to compromise the dispute or not; or

(b) avoid surprise at trial.

Naturally, determination of what documents are critical will be a value judgment which needs to be made in the particular circumstances of each case at the time the issue arises. As we have said, this will need to be determined having regard to the language of s 26(1) and the purposes of the *Civil Procedure Act.*

88 The first, second and third respondents have sworn affidavits in this Court which, with one possible exception in relation to the second respondent, tell against any conclusion that there was any breach of discovery obligations by them at or prior to trial.[71] Certainly, there is nothing in the material relied upon in this Court which would lead us to conclude that any of the first to third respondents engaged in misconduct or wilfully failed to comply with discovery obligations. Additionally, we reject the applicant's submission that there was any misconduct on the part of the first, second or third respondents in not revealing the fact that they were receiving assistance from the fourth and/or fifth respondents, or not revealing that the fourth and/or fifth respondents had some involvement in the litigation. Similarly, we are not persuaded that there was any misconduct on the part of the fourth and/or fifth respondents as alleged by the applicant.

89 Moreover, we see no reason to disagree with the conclusion of J Forrest J that, on the whole of the material, it appears that the VGSO, during the course of the proceeding at first instance, went out of its way on behalf of each of the first, second and third respondents to endeavour to provide adequate discovery.[72] Additionally, we see no basis for the applicant's criticism of the fourth and fifth respondents in relation to their responses to the subpoenas issued prior to trial by the VGSO on behalf of the first, second and third respondents.[73] In any event, the documents in issue are the same, whatever obligation to produce them is relied on, and the applicant's case is not advanced by the reliance upon the subpoenas.

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71 The possible exception in relation to the second respondent is identified by him in his affidavit sworn in this Court on 29 October 2021 in the following terms:

> I have read and reviewed each of the Briars Taskforce documents in the Review Table [a table containing the fresh evidence the applicant now seeks to rely upon]. I have no independent recollection of reading or reviewing those documents prior to reviewing them for the purpose of preparing this affidavit. However, I have been shown by my solicitors an affidavit sworn by me on 8 May 2009, and as a result of the contents of that affidavit, I believe that it is possible, although not certain, that I examined some or all of the Briars Taskforce documents in May 2009.

72 Discovery Reasons, [31].

73 For completeness, we note that in the applicant's further amended application for leave to appeal, the applicant made complaint about the fourth and fifth respondents' responses to subpoenas addressed to them, but in his further amended written case the subpoena complaint was made only in respect of the responses to subpoenas by 'the Chief Commissioner of Police and Victoria Police'. In any event, the only subpoenas specifically identified by the parties in argument in this Court were subpoenas issued by the VGSO to the fifth respondent, IBAC and the DPP (see further the affidavit of Rose Joy Singleton sworn 23 November 2015).

90 Further, we are unable to see any basis upon which it should be concluded that the fourth and/or fifth respondents were required to give discovery prior to trial in accordance with r 29.01.1 of the Rules. No such order was sought against either the fourth or fifth respondents at or prior to trial; and notwithstanding the width of the definition of 'party' in s 3 of the *Supreme Court Act*, we are unable to construe O 29 of the Rules as imposing any obligation on the fourth and/or fifth respondents in the circumstances of this case.[74]

91 Having examined each of the purportedly critical documents, we are not persuaded that any of the respondents considered, or ought to have reasonably considered, that any of them were critical to the resolution of the applicant's proceeding. It follows that so far as the applicant's contentions are founded upon s 26 of the *Civil Procedure Act*, those claims must be rejected. The question of whether any of the purportedly critical documents were documents that adversely affected the case of any of the respondents or supported the applicant's case, and were thus discoverable under r 29.01.1, is more arguable. Having examined those documents, however, we are not positively persuaded that any of them were required to be discovered, disclosed and produced as asserted by the applicant. In our view, the issue is, at best, debatable.

92 The first point to be made is that the purportedly critical documents have no relevance to the first suspension (notwithstanding the applicant's assertion that there was some 'investigation defence'). The first suspension was founded upon the first respondent's belief that the applicant had committed offences (punishable by imprisonment) under the *Telecommunications (Interception and Access) Act* and the *Police Regulation Act* — not the offence of attempting to pervert the course of justice, with which he was subsequently charged in July 2008, and to which the purportedly critical documents were said to relate. More particularly, as was observed by Mr Wilcox,[75] by the end of the applicant's evidence given during the course of the hearings before Mr Wilcox, the applicant 'was freely admitting that he warned Mr Lalor that Mr Lalor's phone might be 'off''. It was the applicant's acceptance of these basal facts which gave rise to the first respondent's belief that the applicant had committed offences punishable by imprisonment under the *Telecommunications (Interception and Access) Act* and the *Police Regulation Act*. The Kit Walker explanation was not a defence to these charges, and thus was not required to be considered by the first respondent at the time of the first suspension.

93 The second point to be made is that none of the critical documents have any relevance to the malicious prosecution cause of action so far as it concerned the perjury charges. At best, the purportedly critical documents could only have relevance in relation to the attempting to pervert the course of justice charge.

94 In relation to the applicant's reliance upon the purportedly critical documents as showing that other people had (or may have) leaked information about Operation Briars, we are unable to see how that fact advanced the applicant's case, or was adverse to any of the first, second or third respondent's cases, in any material way. The fact that others may have been leaking information about Operation Briars says nothing about whether

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[74] For a discussion of the meaning of 'party' in s 3 of the *Supreme Court Act*, see *Financial Wisdom Ltd v Newman* (2005) 12 VR 79, 96–8 [43]–[46].

[75] See the Office of Police Integrity Report entitled, 'Exposing Corruption Within Senior Levels of Victoria Police', dated 25 January 2008, 157 [90] ('OPI Report').

there was a reasonable and proper basis for believing that the applicant was leaking such information. At best, it might suggest that Mr Lalor already knew the information the applicant was alleged to have procured Mr Rix to pass onto him. That does not, however, gainsay the prosecution case that Mr Lalor immediately warned Mr Waters to 'keep a low profile'.

95 In relation to the applicant's Kit Walker explanation (ie that any warning he gave Mr Lalor that his phone might be 'off' related to the Kit Walker investigation, not Operation Briars), the best that can be said of the purportedly critical documents is that there are references to the Kit Walker investigation in them showing that that investigation was the subject of discussion from time to time by the Operation Briars Taskforce. There is, however, nothing in the documents that undermines in any material way any of the first, second or third respondent's basis for rejecting the Kit Walker explanation and concluding that there were reasonable grounds for charging and prosecuting the applicant with attempting to pervert the course of justice.

96 Moreover, as the trial judge observed, a reasonable police informant could discard the Kit Walker explanation because of the agreement (to which the applicant was a party) made in May 2007 that the Kit Walker investigation would cease pending an independent review.[76] To use the words of Mr Wilcox in the OPI report, when he rejected the Kit Walker explanation:

> If Mr Mullett had really believed the 'Kit Walker' investigation had been recommenced … he would have 'kicked down the door' of the Chief Commissioner's office. Probably, he would have done much more.[77]

97 At trial, the applicant failed to establish the first two elements of his misfeasance in public office causes of action (an invalid or unauthorised act, done maliciously) or the third and fourth elements of his malicious prosecution cause of action (malice in the initiation or maintenance of the criminal charges, without reasonable or probable cause). In fact, the trial judge was positively satisfied to the contrary, that the first and second suspensions were not invalid or unauthorised and were not done maliciously; that none of the respondents acted maliciously in the initiation or maintenance of the criminal proceedings against the applicant; and that the second and third respondents, who were responsible for the initiation and instigation of the criminal charges, had reasonable and probable cause for instigating and continuing them.[78]

98 If the applicant were required to establish that the tendering of the purportedly critical documents would likely have led to an opposite result at trial then his claim would undoubtedly fail. Even if we accepted that there had been some breach of discovery obligations by one or more of the respondents (which we do not), having examined the trial judge's reasons in detail, we are unable to conclude that there is any realistic possibility that if the purportedly critical documents had been tendered and relied upon at trial, an opposite result may have been achieved.[79] The trial judge plainly accepted

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76 Trial Reasons [112].

77 OPI Report, 158 [93].

78 Remembering that the trial judge was positively satisfied that the first respondent did not, directly or indirectly, institute the criminal proceedings taken against the applicant: Trial Reasons [83].

79 See *Quade* (1991) 178 CLR 134, 143.

the respondents as honest and reliable witnesses. Having done so, that was realistically the end of the applicant's case and the judge could not have done otherwise than dismiss the proceeding. We do not see anything in the purportedly critical documents which might give rise to the possibility that, if they had been available at trial and deployed in cross-examination of the respondents, the applicant may have succeeded against one or some of the respondents.

99 Finally, we should mention for completeness the affidavit of Mr Koo filed in this Court in support of the applicant's applications for leave to adduce fresh evidence and leave to appeal.[80] In summary, Mr Koo deposed to being provided with copies of the purportedly critical documents; that he was not aware of these documents as at 15 November 2007; and that had he been aware of the documents he would have given evidence at trial that he had serious concerns about the OPI hearing evidence being sufficient for the first respondent to form a reasonable belief that the applicant had committed a criminal offence, 'given the existence of evidence of other sources of leaking in relation to Operation Briars'. Putting to one side admissibility issues concerning Mr Koo's opinion, it is plain from his affidavit that the opinion he expresses is premised incorrectly on the proposition that the first suspension was founded on the first respondent's belief that the applicant had committed the offence of attempting to pervert the course of justice — rather than the offences under the *Telecommunications (Interception and Access) Act* and the *Police Regulation Act* to which we have already referred. In any event, nothing in Mr Koo's affidavit relied upon in this Court suggests that the evidence he would now wish to give would have any real prospect of leading to an opposite result from that achieved at trial.

100 It follows from what we have said above that the applicant's applications for leave to adduce fresh evidence and leave to appeal must be refused.

Conclusion

101 Having concluded that the applicant's applications for leave to adduce fresh evidence and leave to appeal must be refused, it would be futile to grant him the extension of time he seeks within which to seek leave to appeal. Accordingly, the applicant's application for an extension of time within which to seek leave to appeal will be refused.

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[80] See [45] above.

SCHEDULE OF PARTIES

PAUL REDMOND MULLETT	Applicant
and	
CHRISTINE NIXON	First Respondent
KIERAN WALSHE	Second Respondent
WAYNE TAYLOR	Third Respondent
THE STATE OF VICTORIA	Fourth Respondent
CHIEF COMMISSIONER OF VICTORIA POLICE	Fifth Respondent