

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Driscoll & Anor* [2016] QDC 339

PARTIES: **THE QUEEN**

v

SCOTT DRISCOLL
(first defendant)

and

EMMA DRISCOLL
(second defendant)

FILE NO/S: 2088/15

DIVISION: Criminal

PROCEEDING: Application

ORIGINATING
COURT: District Court, Brisbane

DELIVERED ON: 1 July 2016

DELIVERED AT: Brisbane

HEARING DATE: 27 and 28 June 2016

JUDGE: Smith DCJA

ORDER:

- 1. Application for further and better particulars is dismissed.**
- 2. Mr Driscoll's application to exclude the evidence of the filing of Mrs Driscoll's affidavit with the QIRC is dismissed.**
- 3. Mr Driscoll's application to sever counts from the indictment is dismissed.**
- 4. I order that Mrs Driscoll be tried separately from Mr Driscoll.**

CATCHWORDS: CRIMINAL LAW- INDICTMENT- Whether an order should be made for further and better particulars- whether a separate trial should be ordered as between counts- whether a separate trial should be ordered as between defendants

Criminal Code 1899 (Q) ss 567, 590AA, 597A, 597B

De Jesus v R (1986) 61 ALJR 1

John L Pty Ltd v Attorney-General (NSW) (1987) 163 CLR 508

Johnson v Miller (1937) 59 CLR 467

Kirk v Industrial Court (NSW) (2010) 239 CLR 531

R v Bargenquast & Holmes [2014] QSC 481
R v Cranston [1988] 1 Qd R 159
R v Crawford [1989] 2 Qd R 443
R v Davidson [2000] QCA 39
R v Demirok [1976] VR 244
R v Hasler; ex parte Attorney-General [1987] 1 Qd R 239
R v Middis unreported NSW Supreme Court, 27th of March
 1991
R v Swan [2013] QCA 217
R v Symss [2003] NSWCCA 77
Tripodi v R (1961) 104 CLR 1
Webb v R (1994) 181 CLR 41

COUNSEL:

Ms S. Farnden for the Crown

Ms K. Hillard for the defendant Scott Driscoll

Ms J. Sharpe for the defendant Emma Driscoll

SOLICITORS:

Office of the Director of Public Prosecutions for the Crown

Russo Lawyers for the defendant Scott Driscoll

Fisher Dore Lawyers for the defendant Emma Driscoll

Introduction

- [1] This is an application pursuant to s 590AA of the *Criminal Code (Q)* 1999 by Mr Driscoll for:
- (a) further and better particulars;
 - (b) severance of the counts on the indictment; and
 - (c) a separate trial from Mrs Driscoll.
- [2] Mrs Driscoll applies for a separate trial from Mr Driscoll pursuant to s590AA of the *Criminal Code (Q)* 1999.

Counts

- [3] The following counts are charged by indictment 2088 of 2015:
- Count 1, that on or about the 26th day of October 2012 at Redcliffe or elsewhere in the State of Queensland, Scott Driscoll dishonestly caused a detriment, namely a sum of money, to the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and the detriment caused was of a value of more than \$30,000.¹
 - Count 2, that on the 5th day of October 2012 at Redcliffe or elsewhere in the State of Queensland, Scott Driscoll, being an agent, corruptly solicited from Wesfarmers for the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) valuable consideration, namely a sum of money, as a reward for forbearing to favour Wesfarmers Ltd interests in relation to his principal's affairs.

¹ There is a difficulty with the pleading of the charge because no actual detriment has been pleaded. I wonder whether the more appropriate charge is dishonestly applying the funds (bank credit) to the use of the company with the funds alleged to be subject to a condition or direction.

- Count 3, that on the 5th day of October 2012 at Redcliffe or elsewhere in the State of Queensland, Scott Driscoll, being an agent, corruptly solicited from Woolworths Limited for the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) valuable consideration, namely a sum of money, as a reward for forbearing to favour Woolworths Limited interests in relation to his principal's affairs.
- Count 4, that on a date or dates unknown between the 11th day of December 2012 and the 4th day of May 2013 at Redcliffe or elsewhere in the State of Queensland, Scott Driscoll and Emma Driscoll, with intent to defraud, made a false entry or entries in a record, namely minutes of a meeting of the Executive Committee of the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) on the 20th day of July 2012.
- Count 5, that on a date or dates unknown between the 27th day of February 2013 and the 4th day of May 2013 at Redcliff or elsewhere in the State of Queensland, Scott Driscoll and Emma Driscoll, with intent to defraud, made a false entry or entries in a record, namely minutes of an extraordinary meeting of the Executive Committee of the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) on the 24th day of February 2013.

Background

- [4] The depositions have been marked and tendered as Exhibit 4.
- [5] On 21 April 2008, Mr Driscoll was appointed as CEO of the Queensland Retailers Trades and Shop Keepers Pty Ltd ("QRTSA").² The QRTSA was an association which assisted small businesses across the state, by providing advice and by appearing on behalf of small businesses before the Queensland Industrial Relations Commission ("QIRC"), in particular to contest applications made by businesses such as Coles and Woolworths to extend their trading hours. IGA owners made up a significant proportion of QRTSA members. Mr Driscoll became signatory on the association's accounts. Mrs Driscoll became a signatory also on 21 September 2009.
- [6] On 19 April 2010, Mr Driscoll was appointed as president of the executive committee of QRTSA. He created a company called Norsefire Pty Ltd and put forward a proposal to the executive committee that it would be cheaper to contract out to Norsefire rather than to pay employees directly.³ The contract with Norsefire commenced on 1 July 2010.
- [7] On 18 April 2011, an annual general meeting of the association was held. The Crown alleges this was the last actual meeting held by the executive committee.⁴ Despite the last meeting being on 18 April 2011, there are purported minutes of meetings held after this. The Crown case is that both Mr Driscoll and Mrs Driscoll were involved

² Statement of Ian Baldock dated 11 September 2012.

³ Statement of Ben Scott dated 31 July 2013.

⁴ A number of witnesses give evidence they were never at meetings contrary to that which is stated in the minutes and did not move or second motions and/or motions were never passed – see statements of Nicholas Withycombe dated 17 October 2013, John Edwards dated 23 August 2013, Bruce Mills dated 9 October 2013, Leesa Mills dated 4 November 2013, and Ben Scott dated 31 July 2013.

in the creation of these false minutes. There are also notes in the minutes claiming that motions were passed when they were not.

- [8] The QRTSA in 2010 moved out of the office in Kelvin Grove and started to work out of Mr Driscoll's campaign office in Redcliffe.⁵
- [9] In June 2012, Coles and Woolworths initiated a number of trading hours' cases. The QRTSA was to defend these. Advice was given to Metcash/IGA that it would cost \$150,000 to run the trading hours' cases.⁶ Metcash/IGA paid the \$110,000 to run the cases but this amount went directly to Norsefire. There is nothing in the Norsefire accounts which indicates that the money was used for the QRTSA cases (count 1).⁷
- [10] The only expense incurred appears to have been the industrial advocate's fee of around \$10,000.⁸ On 27 September 2012, the IGA indicated before renewing its membership with QRTSA that it required minutes of all meetings held and all financial statements.⁹ The QIRC also noted that necessary records have not been kept and that the Association was seeking advice to fix these invalidities.¹⁰
- [11] Mr Driscoll then instructed Mr Dorber, through Bruce Mills, to not oppose the trading hours' cases which was in direct conflict with the interests of QRSTA members.¹¹
- [12] Also Mr Driscoll approached executives at Coles¹² and Woolworths¹³ and said that if they paid between \$200,000 to \$300,000 in the case of Coles and \$200,000 in the case of Woolworths, QRTSA would stop opposing their applications. It may be seen then that the events involving Mr Dorber (count 1) and Coles and Woolworths (counts 2 and 3 respectively) are directly related.
- [13] Metcash/IGA withdrew its support from QRTSA on 26 October 2012.¹⁴
- [14] Falsified documents were filed with the QIRC, i.e. documents purporting to be minutes of meetings. Mrs Driscoll attached these to a sworn affidavit.
- [15] In summary, indictment 2088 of 2015 relates to the \$110,000 paid to Mr Driscoll's company to be used to conduct the trading hours' cases but it was not used for that purpose (count 1). The secret commission offences relate to the approaches to Coles and Woolworths to be paid money in return for adopting the alternative position on those cases (counts 2 and 3).
- [16] The false documents charges (counts 4 and 5) relate to the creation of documents purporting to be minutes of meetings for matters relevant to counts 1, 2 and 3 were alleged to have been discussed. The Crown case is that these meetings never took place and the documents are false.

⁵ Mr Driscoll was pre-selected to run for the seat of Redcliffe in 2010.

⁶ Statements of John Maclaren dated 26 August 2013 and Roslyn White dated 27 September 2013.

⁷ Statement of Nicole Farrell dated 10 December 2013.

⁸ See statements of Colin Dorber dated 28 August 2013 and Kenneth Hunt dated 14 January 2014.

⁹ Statement of Roslyn White dated 27 September 2013.

¹⁰ See statements of Gary Savill dated 3 December 2013 and Roslyn Thiele dated 29 November 2013.

¹¹ See statements of Bruce Mills dated 9 October 2013 and Colin Dorber dated 28 August 2013.

¹² Statement of Christopher Mara dated 13 August 2013.

¹³ Statement of Kate Blunden dated 4 September 2013.

¹⁴ Statement of Roslyn White dated 27 September 2013.

Crown case further analysis

- [17] In respect of Mr Driscoll, the Crown's position is that all of the evidence is admissible against him including evidence of the acts of Mrs Driscoll. Mrs Driscoll is charged with two of the five offences and it is accepted that some evidence is not admissible against her, in particular the approaches to Coles and Woolworths (counts 2 and 3). However, it is submitted that most of the evidence surrounding the background of QRTSA, how it operates, how it came undone, and the false documents is admissible against her.
- [18] The Crown cannot say which of the two defendants created the documents but there are emails between the two of them which demonstrate a clear contribution by both of them to the contents of the documents. A number of different copies of the documents were found in different locations including the defendants home, attached to Mrs Driscoll's affidavit and in a computer Mrs Driscoll's used at RCAMB.
- [19] Bruce Mills was an additional recipient to these emails and produced them. Copies are also located in the parliamentary server¹⁵ and on the parliamentary laptop issued to Mr Driscoll.¹⁶
- [20] The evidence of the \$110,000 being paid to Norsefire is relevant to explain why some minutes were false.
- [21] The Crown further submits that the evidence on count 2 and 3 is discrete and can be readily discerned for the remainder of the evidence to be led in the trial.
- [22] The Crown submission is that the two defendants are inextricably linked and, as such, they should be tried together.

Particulars

- [23] The Crown has particularised its case as follows¹⁷.

Count 1

- [24] With respect to count 1, it alleges:
- (a) \$110,000 was paid by Metcash (on behalf of Metcash and on behalf of IGA) to the QRTSA for the purpose of QRTSA defending trading hours' cases.
 - (b) A pecuniary detriment was caused as the full amount of the money obtained was not used for that purpose.
 - (c) The accused's dishonesty is derived by inference from all the circumstances including:
 - (i) The evidence as to a lack of work undertaken to progress the cases.
 - (ii) The lack of visibility of expenditure of the \$110,000 on the cases.
 - (iii) The fact that the money was transferred into the Norsefire Account.

¹⁵ Statement of Mr Neil Laurie dated 16 December 2013.

¹⁶ Evidence of CMC investigators.

¹⁷ Exhibit 7- Crown particulars.

- (iv) The fact that no financial records were produced of expenditure despite requests.
- (v) The fact that the money was not returned to Metcash when the IGA members withdrew their instructions from QRSTA.
- (vi) The fact that Mr Driscoll contacted the representatives from Coles and Woolworths contrary to the interests of QRTSA.
- (vii) The fact that Scott Driscoll proposed to change the position of QRTSA without the knowledge of its members prior to their withdrawal.
- (viii) The generation of a false record that purported to be minutes of a meeting on 20 July 2012.
- (ix) The generation of a false record purporting to be minutes dated 24 February 2013.

Count 2

- [25] With respect to count 2, it is alleged that Scott Driscoll was an agent for QRTSA and held himself out to be representing them. He corruptly solicited from Wesfarmers (Coles) \$200,000 to \$300,000 on behalf of QRTSA as a reward for forbearing to favour Coles' interests in relation to the trading hours' cases being defended by QRTSA.
- [26] His actions were corrupt in that he acted deliberately and contrary to duties incumbent on him by:
- (a) contacting the representative without the knowledge of members whose interests he purported to represent; and/or
 - (b) contacting the representative against the interests of the members who had not yet withdrawn instructions and membership to QRTSA.

Count 3

- [27] As to count 3, it is alleged Scott Driscoll was an agent for QRTSA as he held himself out to be their patron and rang at the request of the board. He corruptly solicited \$200,000 on behalf of QRTSA as a reward for forbearing to favour Woolworths Limited's interests in relation to the trading hours cases being defended by QRTSA.
- [28] His actions were corrupt in that he acted deliberately and contrary to duties incumbent on him by:
- (a) contacting the representative without the knowledge of members whose interests he purported to represent; and/or
 - (b) contacting the representative against the interests of the members who had not yet withdrawn instructions and membership to QRTSA.

Count 4

- [29] As to count 4, it is alleged that a false record was created which purported to be minutes of a meeting which took place on 20 July 2012.
- [30] The false record contained false entries as follows:
- (a) That a General Meeting of the Executive Committee of QRTSA took place on 20 July 2012 at 5.00pm at Level 1, Cominos Building, 133 Redcliffe Parade Redcliffe; and/or

- (b) The minutes purported to record the attendance at the meeting of a person/persons who were not there; and/or
 - (c) As it is alleged the meeting never took place and all of the entries are alleged to be false.
- [31] The false records and/or false entries were made with intent to defraud as they were created for the purpose of:
- (a) Disguising that Scott Driscoll had dishonestly caused a detriment of \$110,000 to QRTSA, which had been obtained by Norsefire, without authority (not alleged that Emma Driscoll had this intent¹⁸); and/or
 - (b) Satisfying the Queensland Industrial Relations Commission (QIRC) that QRTSA was functioning according to law and that invalidities had not taken place or corrected or to have invalidities forgiven.
- [32] It is alleged Scott Driscoll and Emma Driscoll were involved in the creation of this false record and/or made a false entry or entries in the record from 12 December 2012.
- [33] The false record was attached to an affidavit filed under the name of Emma Driscoll in QIRC dated 3 May 2013.
- [34] It is alleged that Scott Driscoll and Emma Driscoll were a principals or parties to the creation of these documents.

Count 5

- [35] As to count 5, it is alleged that a false record was created that purported to be minutes of a meeting that took place on 24 February 2013.
- [36] The false record contained a false entry or entries including the following:
- (a) That an Extraordinary Meeting of the Executive Committee of QRTSA took place on 24 February 2013 at 7.30pm at 2/249 Oxley Ave, Margate; and/or
 - (b) The minutes purported to record the attendance at the meeting of persons who were not there; and/or
 - (c) As it is alleged the meeting never took place and all entries contained on the Minutes are said to be false.
- [37] The false record/entries were made with intent to defraud as they were created for the purposes of:
- (a) Disguising that Scott Driscoll had dishonestly caused a detriment of \$110,000 to QRTSA, which had been obtained by his company Norsefire, without authority (for which the minutes of 20/7/12 were falsely created with intent to defraud and disguise which these minutes purported to confirm- not alleged Emma Driscoll had this intent¹⁹);
 - (b) Satisfying the QIRC that QRTSA was functioning according to law and that invalidities had not taken place or to have invalidities forgiven.
- [38] It is alleged Scott Driscoll and Emma Driscoll were involved in the creation of this false record and/or made a false entry or entries in the record from 28 February 2013.

¹⁸ My underlining.

¹⁹ My underlining.

- [39] The false record was attached to an affidavit under the name Emma Driscoll in the QIRC dated 3 May 2013.
- [40] It is alleged that Scott Driscoll and Emma Driscoll were principals or parties to the creation of this false record.

Particulars

- [41] Mr Driscoll has raised concern as to the particulars.
- [42] The purpose of particulars is to inform the court and an accused person of the identity of the offence alleged and providing the accused with the substance of the charge which he or she is called upon to meet. There must be sufficient particulars necessary for the accused to prepare his defence.²⁰
- [43] Also an accused person:

“...is entitled to be told not only of the legal nature of the offence which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge.”²¹

- [44] In my respectful opinion the particulars provided by the prosecution are sufficient for the defence to mount their defence in this case.

Evidential ruling

- [45] The Crown proposes to lead the fact that Mrs Driscoll filed an affidavit with the QIRC which enclosed the alleged false minutes through an appropriate QIRC witness. The Crown did not intend for the affidavit itself to be tendered. Mr Driscoll objects to the evidence as he says it is prejudicial to him bearing in mind it is said to be a false affidavit.
- [46] In my view, the evidence is admissible. For counts 4 and 5 part of the allegation against Mr Driscoll is that the minutes were falsified for the purpose of correcting the invalidities. In my view there is reasonable evidence of pre-concert in the emails.²²
- [47] In my view, the evidence goes in under the *Tripodi*²³ principle. It is common purpose evidence. I consider the evidence of high probative value not greatly outweighed by its prejudicial effect.²⁴

Submissions by the parties

Scott Driscoll

- [48] Scott Driscoll, in his submissions,²⁵ submits that counts 2 and 3 are properly joined, as are counts 4 and 5, but seeks an order that count 1 be tried separately; counts 2 and

²⁰ *John L Pty Ltd v Attorney-General* (NSW) (1987) 163 CLR 508 at 519 -520 per Mason CJ, Deane and Dawson JJ.

²¹ *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [14]; applying *Johnson v Miller* (1937) 59 CLR 467 at 489 per Dixon J.

²² Exhibit 6.

²³ *Tripodi v R* (1961) 104 CLR 1.

²⁴ *R v Hasler; ex parte Attorney-General* [1987] 1 Qd R 239.

²⁵ Exhibit 2.

3 be tried separately and counts 4 and 5 be tried separately from the other counts and he be tried separately from Emma Driscoll. It is submitted the evidence of counts 1, 2 and 3 is not cross-admissible and the dishonesty evidence led on count 1 is of no probative value on counts 2 and 3 and is highly prejudicial. It also is submitted there are different elements with respect to the particular charges.

[49] With respect to the separation of the trial from Emma Driscoll it is submitted that the co-accused here should be tried separately.

[50] In oral submissions Mr Driscoll:

- (a) Conceded that in light of the fact that the factual allegations surrounding counts 4 and 5 are relied on as particulars of dishonesty in count 1, those counts are joinable with count 1.
- (b) Submitted that count 2 and 3 are quite different counts to count 1 with different evidence.
- (c) Submitted that there is an unfairness in having the counts heard together as there were no trading hours cases being heard at the time of the alleged approaches to Coles and Woolworths.

Emma Driscoll

[51] Mrs Driscoll submits²⁶ that none of the facts relating to counts 2 and 3 relate to the charges against the applicant. Further and importantly, the charges in counts 4 and 5 are significantly different to counts 2 and 3. It is further submitted that Scott Driscoll is charged with much more serious offences of fraud and soliciting secret commissions. It is submitted that the evidence the Crown relies on to prove those charges is not admissible against the applicant except insofar as the Crown relies on the alleged creation of false minutes by Scott Driscoll as relevant to the fraud. Emma Driscoll is not said to be a party to the fraud or the secret commissions offences. Her criminality relates to the creation of a false record and, in particular, to deceive the QIRC with respect to so-called invalidity proceedings. It is submitted that there would be substantial prejudice to the applicant in being tried with her co-accused in these circumstances.

[52] In oral submissions Mrs Driscoll submitted:

- (a) There is much evidence admissible against Mr Driscoll which is not admissible against her. This largely relates to dealings Mr Driscoll had with a number of the witnesses.²⁷
- (b) A joint trial with her husband who is also charged with count 1, 2 and 3 would be very prejudicial.
- (c) Directions will be difficult because e.g. emails contained in Exhibit 6 are admissible only against her on counts 4 and 5 and not with respect to any fraud but are also admissible against her husband on count 1.

Respondent's submissions

[53] The Crown submits²⁸ that the counts on the indictment are properly joined under s 567(2) of the *Criminal Code*. It further submits that the starting point is that the co-accused should be jointly charged and the risk of prejudice for admitted inadmissible

²⁶ Exhibit 1.

²⁷ Exhibit 8 is an agreed schedule of the evidence inadmissible against Mrs Driscoll.

²⁸ Exhibit 3.

evidence can be obviated by careful directions to the jury. It is also a case where the defendants may try and blame each other for the offending. It is accepted (para 41) that there will be evidence not admissible against her in respect of specific transactions but this is only a small part of the evidence to be led.

- [54] In oral submissions the Crown:
- (a) Submits that the facts surrounding counts 2 and 3 form part of the particulars concerning count 1.
 - (b) Submits that in addition the evidence concerning count 1 is admissible on counts 2 and 3.
 - (c) Submits that the emails²⁹ show clear evidence of collusion between Mr and Mrs Driscoll.
 - (d) Submits that in a case where there may be “finger pointing” the accused should be tried together.
 - (e) Submits that the evidence can be disentangled such that directions may be given to the jury to remove any risk of prejudice arising from a joint trial.

Relevant law

- [55] Section 567(2) of the *Criminal Code* provides:
 “Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.”
- [56] To be founded on the same facts they must have a common factual origin. Further, even if charges are properly joined s 597A of the *Criminal Code* applies such that if the Court is of the opinion that an accused person may be prejudiced or embarrassed in his defence, then the Court may exercise a discretion to sever such charges. To be properly joined there must be a nexus or connection between the charges.³⁰
- [57] One issue to be considered, of course, is whether the evidence is cross-admissible as between counts.
- [58] With respect to the issue of joinder as between co-accused, s 568 (12) of the Code provides:
 “Any number of persons charged with committing different or separate offences arising substantially out of the same facts or out of closely related facts so that a substantial part of the facts is relevant to all the charges may be charged in the same indictment and tried together.”
- [59] Further s 597B provides:
 “When 2 or more persons are charged in the same indictment, whether with the same offence or with different offences, the court may, at any time during the trial, on the application of any of the accused persons, direct that the trial of the accused persons or any of them shall be had separately from the trial of the other or others of them, and for that

²⁹ Exhibit 6.

³⁰ *De Jesus v R* (1986) 61 ALJR 1 and *R v Cranston* [1988] 1 Qd R 159 at p 164.

purpose may, if a jury has been sworn, discharge the jury from giving a verdict as to any of the accused persons.”

- [60] There are strong reasons of principle and public policy as why joint offenders should be tried jointly.³¹ But even where there is a common *factum probans*³² or a substantial number of circumstances in respect of the charges joined under s 568(12) where the evidence admissible against each accused is impossible or difficult to disentangle and the evidence against one is highly prejudicial against the other, this may warrant an order for separate trials.³³
- [61] There are administrative factors pointing in the direction of joint trials but, more importantly, it is desirable to avoid inconsistent verdicts, particularly when each accused tries to cast blame on the others.³⁴
- [62] Justice Hunt in *R v Middis* (unreported NSW Supreme Court, 27th of March 1991)³⁵ stated:
 “Briefly, the relevant principles are that: (1) where the evidence against an applicant for a separate trial is significantly weaker than and different to that admissible against another or the other accused to be jointly tried with him, and (2) where the evidence against those other accused contains material highly prejudicial to the applicant although not admissible against him, and (3) where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material, a separate trial will usually be ordered in relation to the charges against the applicant. The applicant must show that positive injustice would be caused to him in a joint trial.”
- [63] I do note, though, in *R v Swan*³⁶ Jackson J noted that juries were obliged to follow a trial judge’s directions but, at paragraph 58, with reference to *Pham* stated:
 “... it would have been virtually impossible, as a matter of common sense, for the jury to disregard [the other defendant]’s interview in dealing with the case against the appellant, despite the emphatic directions that [the other defendant]’s alleged confession formed no part of the case against the appellant and should be disregarded so far as he was concerned.”

Disposition

- [64] It is my view that it is first necessary to determine what charges, if any, are joinable insofar as Scott Driscoll is concerned because this will be highly relevant in the determination on whether Emma Driscoll should be granted a separate trial.

Joinder of counts

- [65] In my view, the evidence of all of the counts is relevant to Scott Driscoll’s conduct. The QRTSA is a retail industry with members from the retail sector across

³¹ See *Webb v R* (1994) 181 CLR 41.

³² *R v Crawford* [1989] 2 Qd R 443.

³³ *R v Bargaquast & Holmes* [2004] QSC 481 and *R v Davidson* [2000] QCA 39.

³⁴ *R v Demirok* [1976] VR 244.

³⁵ Applied in *R v Symss* [2003] NSWCCA 77 at [69].

³⁶ [2013] QCA 217 at [58].

Queensland. One of its activities in 2012 was to represent IGA/Metcash in the trading hours cases. The trading hours cases arose because the National Retail Association representing clients including Coles and Woolworths, filed documents in Queensland with the Queensland Industrial Relations Commission to allow Coles and Woolworths to operate for longer or extended shopping hours in Queensland. IGA/Metcash customers as a State entity resisted the trading hours cases through QRTSA. IGA/Metcash provided \$110,000 on QRTSA to work on the trading hours cases.

- [66] A number of people worked on them but by mid-2012 Scott Driscoll became more involved in these cases. Three cases were listed for hearing before the QIRC on or about 28 September 2012 and an Industrial Advocate, Colin Dorber was engaged by QRTSA for about \$13,000 to appear. The matters were withdrawn by the NRA on the day of hearing without explanation.
- [67] The Crown case is that the \$110,000 was obtained for the purpose of the trading hours' cases; no work was done on them by the QRTSA; there is no explanation or financial records of the expenditures and there was an obligation to return the money. The Crown also alleges that the applicant contacted Coles and Woolworths contrary to the interests of IGA/Metcash on 5 October 2012 which is relevant of course to counts 2 and 3. Then, of course, the behaviour alleged in counts 4 and 5 is also relevant to the dishonesty alleged for count 1.
- [68] Turning to counts 2 and 3, the Coles and Woolworths staff generally state that Scott Driscoll contacted a representative from Coles and Woolworths and asked them if they would become members or pay a service fee to QRTSA and, if they did the QRTSA would take a different position on the THC cases in the future. The Crown's case is that the applicant solicited the benefit to disfavour IGA/Metcash's interests. After the alleged approaches occurred, about one week later, the three trading hours cases in the QIRC were withdrawn by the NRA.
- [69] In the circumstances, I am satisfied on the evidence that there is a common factual thread between counts 1, 2 and 3 and, in the circumstances, I am satisfied that counts 1, 2 and 3 are joinable as against Scott Driscoll.
- [70] I also consider that there is sufficient factual relevance to counts 4 and 5 insofar as count 1 is concerned such that they are also joinable against Scott Driscoll.
- [71] I do not consider Mr Driscoll would be prejudiced or embarrassed in his defence. Whilst it is true counts 2 and 3 contain different elements the jury will be appropriately directed on the elements to be considered for each count.

Joinder of accused

- [72] On the other hand, it seems to me that the defendant, Emma Driscoll, would be gravely prejudiced by being involved in a joint trial with Scott Driscoll, particularly bearing in mind she is not alleged to be a party or principal to counts 1, 2 and 3. She is not said to be involved in these alleged frauds or secret commission charges. I consider that there is a real risk that, despite direction, Emma Driscoll may be irreparably prejudiced by the hearing of this evidence on her trial.

- [73] Aside from this there is much evidence not admissible against her which is, on the other hand, admissible against Mr Driscoll³⁷. In my view, there is a real risk that despite direction Mrs Driscoll will be “roped” in with the evidence relating to the alleged dishonest and corrupt activities of her husband.
- [74] There is no great administrative difficulty concerning a second trial. If Mrs Driscoll is to be tried separately the evidence may be more focussed on the allegation relating to the association’s invalidities. Many of the witnesses to be called as to counts 1, 2 and 3 would be unnecessary.
- [75] In the circumstances, in the exercise of the discretion under s 597B, I order that Emma Driscoll be tried separately from Scott Driscoll.

Orders

- [76] For the reasons given my orders are as follows:
1. I dismiss the application for further and better particulars.
 2. I dismiss Mr Driscoll’s application to exclude evidence of the filing of the affidavit of Mrs Driscoll with the QIRC.
 3. I dismiss Mr Driscoll’s application for severance of counts on the indictment.
 4. I order that Mrs Driscoll be tried separately from Mr Driscoll.

³⁷ See exhibit 8- schedule of this evidence.