

IN THE MAGISTRATES COURT OF VICTORIA  
AT HEIDELBERG

[DIVISION OF COURT]

Case No. B11682667

KAREN STUART

Informant

v

BELINDA CLARKSON

Defendant

MAGISTRATE: Magistrate M Smith

WHERE HELD: HEIDELBERG

DATE OF HEARING:

DATE OF DECISION:

CASE MAY BE CITED AS: Stuart v. Clarkson

REASONS FOR DECISION

Catchwords:

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

For the Defendant

HIS HONOUR:

- 1 The defendant is charged with two offences pursuant to s.79 of the Local Government Act 1989, the particularly relevant sections of which are as follows:

**77B Direct interest**

- (1) A person has a direct interest in a matter if there is a reasonable likelihood that the benefits, obligations, opportunities or circumstances of the person would be directly altered if the matter is decided in a particular way."

**79 Disclosure of conflict of interest**

- (1) If a Councillor or member of a special committee has a conflict of interest in a matter which is to be considered or discussed at a meeting of the Council or the special committee, the Councillor or member must, if he or she is attending the meeting disclose the conflict of interest in accordance with subsection (2).
- (6) While the matter is being considered or any vote is taken in relation to the matter, the Councillor or member of a special committee must -
- (a) leave the room and notify the Mayor or the Chairperson of the special committee that he or she is doing so; and
  - (b) remain outside the room and any gallery or other area in view or hearing of the room.

- 2 The conduct of the defendant which is complained of has been fully particularised in the charges and refers to what took place at a meeting of the Nillumbik Shire Council held on 21 December 2010. I would indicate at this stage, that the pleadings and particulars alleging in the alternative, an "Indirect interest" as appear in the charges 2 and 3 are withdrawn. Charge 1 is withdrawn.

- 3 There are very few factual matters in dispute within the narrative of relevant facts. With reference to Charge 2 as it appears in the amended charge sheet, the particulars 2.1 up to and including 2.8, are not in dispute, and in respect of Charge 3 as it now appears particulars 3.1 through to and including 3.8 are, likewise not in dispute. In particular the defendant does not dispute that she

attended the assembly of councillors on 8 December 2010 and did not declare a conflict of interest or act in accordance with the provisions of the Act relevant to a conflict of interest. The defendant further does not deny that at a meeting held on 14 December 2010 to elect a Mayor of the Shire, she both attended and did not cast a vote.

- 4 The position of the defendant is that firstly she did not have an "interest" as defined in s.77B; secondly that if prima facie, the circumstances brought her within the operation of that provision, then she could avail herself of the provisions of s.79C (specifically 79C(1)(b), (f) and (j))

**79C Certain situations where Councillor taken to not have a conflict of interest.**

- (1) A Councillor is taken to not have a conflict of interest for the purposes of this Division if the matter only relates to -
- (b) the election of the Mayor under section 71 or the appointment of an acting Mayor under section 73(3);
  - (f) an application to a Councillor Conduct Panel or VCAT under Division 1B;
  - (j) the conduct of a Councillor with respect to -
    - (i) an internal dispute that involves the Councillor;
    - (ii) an allegation of misconduct or serious misconduct (as defined in section 81A) by the Councillor

- 5 Thirdly, as a determination as to the existence of a conflict of interest is a determination as to a matter of fact, she had an honest and reasonable belief in the truth of facts and matters which would render her conduct innocent. A defence with reference to what is generally referred to as the principle in Proudman -v- Dayman.

- 6 Turning first to Charge 2 and proceeding through the recital in the particulars to the gravamen of the offence at particular 2.9:

"You had a direct interest in agenda Item 16.036/10 of the ordinary meeting of Council pursuant to s.77B of the Act because there was a

reasonable likelihood that your benefits, obligations, opportunities or circumstances would be directly altered by a decision whether to declare the matters discussed in the assembly of Councillors on 8 December 2010 confidential information pursuant to ss.77 and 89(2) of the Act."

- 7 The minutes record that a motion was put and carried at the meeting of the Council is as follows:

Date	Item	Grounds under s(89)2
8 December 2010	Consideration of the implications of Cr Clarkson's referral of Code of Conduct allegations to VCAT (briefing)	(h)

Motion

Cr Peter Perkins  
Cr Michael Young

**That the above items constitute confidential information under section 89(2) of the Local Government Act 1989.**

**CARRIED**

Cr Clarkson called for a division:  
For: Crs King, Brock, Chapple, Coleman, Perkins and Young  
Against: Cr Clarkson

8 As indicated the defendant does not deny that she did not declare an interest and that she did in fact take part in the debate and evidently the vote on the motion.

9 The "information" which was the subject of the agenda item and motion before the Council referred to what took place at the assembly of councillors on 8 December 2010. There is no dispute that the subject matter of what did in fact take place on 8 December 2010 was as set out in the heading, "Item" in the agenda.

10 The position of the prosecution, is that the matter before the Council on this motion does not attract the provisions of s.79C(1)(f) in that it was not a matter that, "only relates" to the subject matter of that sub section. The prosecution says that the matter is simply as to whether or not such information concerning that subject be treated by the Council as confidential pursuant to s.89(2) of the Act and does not go to the subject of the information per se.

11 The first matter for consideration is whether the defendant had a direct interest in this matter in accordance with the definition in s.77B. The options available on the motion before the Council were either that the information would be declared confidential or that it would not.

12 77B is obviously drafted in very wide terms, however, having heard the evidence of Ms Clarkson, and having considered the submissions of the prosecution, it is difficult to see how the, "Benefits, obligations, opportunities or circumstances" of the defendant would be, "directly altered" if the matter was decided either way. Ms Clarkson stated that her reason for her participation was a desire to have as much information in the public domain as possible, this particular concept or interest is not something in my opinion within the ambit of 77B

13 The second issue is whether or not the subject matter of the agenda item and subsequent motion, "only relates" to an application to a Councillor Conduct Panel or VCAT under Division 1B. The prosecution's position is that it does not, "only relate" for the reason that as indicated the motion calls for a decision as to the status of the information and not the nature of the subject matter of that information.

14 I accept the prosecution's submission that the inclusion of the word, "only" in s.79C(1) is designed to confine situations in the categories enumerated within s.79C. On the other hand, "Relates to" means a matter having some relationship to another, having reference to another or having factual, or

logical nexus with another.

15 In my opinion to draw the distinction as urged by the prosecution while not to be described as being merely semantic, is artificial, in my opinion the relevant subject matter can properly be described as relating only to the VCAT application.

16 I find that there is insufficient evidence to establish that the defendant had a direct interest in the subject matter of the agenda item concerned in Charge 2 and that even if this is not the case the defendant may avail herself of the exclusion, in s.79C(1)(f). That being so, Charge 2 will be dismissed.

17 Turning to Charge 3, again the particulars in the form of a recital of the relevant facts are not contentious; the gravamen of the offence is expressed in particular 3.9:

"You had a direct interest in agenda item 16.041/10 of the ordinary meeting of Council pursuant to s.77B of the Act because there was a reasonable likelihood that your benefits, obligations, opportunities or circumstances would be directly altered, if particular decisions made by Council in relation to sub-paragraph A the Council's conduct or strategy regarding the proceeding and/or sub paragraph B the actions, if any, Council would take as a consequence of your conduct at the assembly of Councillors on 8 December 2010 and a special meeting of Council held on 14 December 2010."

18 It is unnecessary to set out in full the agenda item 16.041/10 , Items 1, 2 and 3 do no more than set out the non-contentious background or history. Item 4 seeks that the Council confirm that the representative for the VCAT hearing involving the Council and the defendant be Mayor Helen Colman. Items 5 and 6 deal with matters relevant to how the Council will proceed in respect of the application now before VCAT.

I will set out hereunder Items 7 and 8. These items were added to the Council agenda after the initial circulation of the agenda containing Items 1 through to 6. Councillor Clarkson did not attend the pre meeting session which was held a few days prior to 21 December and her evidence, which I accept, was that

she was unaware of the amended agenda and any attendant motion based upon the additional items prior to the meeting itself.

Indeed she was not aware of them at all until they were raised toward the end of the meeting. The evidence of Councillor Clarkson was that she had very limited time to study and determine her response to what to her were additional items and to determine her response to them.

There was discussion and submissions from counsel as to whether the addition of Items 7 and 8 and any motion put to Council on the basis of those items, were properly in accordance with the relevant local laws, and could properly be regarded as being bona fide amendments to Item 16.041/10.

19 It is clear that the obligation on a Councillor to disclose conflicts of interest is an ongoing one and the fact that the defendant did not have an opportunity to declare any such interest in respect of Items 7 and 8 at the commencement of the meeting would not of course excuse her obligation to declare such interest if she felt it to be required at the time when she became aware of them. Also, while the issue as to whether or not Items 7 and 8 can properly be seen as amendments to, or distinct matters in addition to Items 1-6 is certainly arguable, a determination of this point would not materially affect any issue that I have to determine.

20 Items 7 and 8 are as follows:

"7. That in respect of the recent potential conflict of interest matter at the December 8 Assembly of Councillors, Council

a) Note that Cr Clarkson was provided verbal legal advice that she had a potential conflict or interest in the matter under consideration 'consideration of the implications of Cr Clarkson's referral of Code of Conduct allegations to VCAT at the Special Council Briefing on 8 December 2010.'

- b) Note that all Councillors have been provided with written confirmation of the legal advice provided in a) above.
  - c) Note that Cr Clarkson failed to heed the legal advice provided in a) above.
  - d) Refer Cr Clarkson's decision to participate in the Special Council Briefing (Assembly of Councillors) on 8 December 2010 after receiving legal advice that she potentially had a conflict of interest to the Local Government Victoria inspectorate.
8. In reference to the Special Council meeting held on 14 December 2010 Council:
- a) Formally record its concern that Cr Clarkson abstained from voting at the Special Council meeting on 14 December 2010 as this is a breach of the Local Government Act 1989 (S76BA and S90) and brings into disrepute the reputation and governance processes of Nillumbik Shire Council.
  - b) Note that whilst the Local Government Act 1989 clearly indicates that unless otherwise prohibited (by the Act), each Councillor at a meeting of Council must vote, there appears to be no penalty for breach of S90 of the Act (failure to vote).
  - c) This matter be referred to Local Government Victoria for consideration and advice back to Council.
  - d) That in response to any enquiries from the public or media in relation to Cr Clarkson's failure to vote during the election of the Mayor, that Council issue a statement detailing parts 8 a), b) and c) of this resolution.

21 With reference to whether matters "only relate", it is appropriate to consider Items 1-6 in agenda 16.041/10 in distinction to Items 7 and 8. Proper analysis does not depend upon whether a number of items are listed within a single "matter" for determination of Council, some of which items may raise the question of a conflict of interest and some of which may not.

If a motion before Council has a number of items all of which prima face might raise a position of conflict, but where one of the items within that motion might fall within s.79C it would be strange if a councillor concerned was unable to vote and to participate in debate upon that particular item attracting the exclusion simply because it was contained within a single motion containing matters which did not.

22 Looking therefore at the matters appearing within agenda Item 16.041/10. Items 1, 2 and 3 relate uncontentious matters of fact. Whether or not the Council chose to adopt those items as part of a motion or did not, it is very difficult to see now there was a reasonable likelihood that the benefits, opportunities obligations or circumstances of the defendant would be directly altered, or indeed altered in any way whatsoever. Items 4, 5 and 6 refer to the VCAT hearing, specifically, as to who shall represent Council at the hearing and what the Council's position might be in respect of legal representation for the Council. Assuming Items 4, 5 and 6 move beyond the significance or implications of Items 1, 2 and 3, it is difficult to see how they do not relate to an application to VCAT under Division 1B. It is not contested by the prosecution that, "Application" refers to and means both an application in the sense of a decision to initiate an application and to an application in progress at any stage of its proceeding.

23 That leaves Items 7 and 8 on the agenda as amended. The position of the prosecution in respect to Item 7 is that Item 7 does not and relate to a VCAT application but rather as to what appropriate steps should be taken concerning of the conduct of the defendant at the assembly of councillors on

8 December 2010.

In other words, the prosecution's position is that on 21 December 2010 the defendant had a conflict of interest in respect of a matter raising the question of her conflict of interest on a previous occasion. The position of the prosecution is that Item 7(d) furthermore, relates to a proposal to refer the matter of the defendant's conduct on 8 December 2010 to the local Government Victoria Inspectorate; in other words, it was not then a matter which fell within 79(c)(f).

24 Item 8 refers to what occurred on 14 December 2010 at a meeting of the Council to elect a Mayor. Item 8(a) seeks that the Council, "Formerly record" its concern that the defendant abstained from voting. Item 8(b) states the applicable provision of the Local Government Act being s.90. Item 8(c) seeks that the matter be referred to Local Government Victoria for, "Consideration and advice back to Council".

25 Section 90(1)(b) of the Local Government Act provides as follows:

"Unless otherwise prohibited by this Act, a councillor or member of the special committee present must vote".

26 No sanction is provided for the failure to vote either by way of criminal penalty or civil penalty. A breach of s.90 does not attract the provisions of s.29 of the Local Government Act which deals with the disqualification of councillors. The code of conduct adopted by the Council makes no reference to s.90. The code of conduct however, the adoption of which is a statutory requirement under s.79 of the Local Government Act, is required to include general councillor conduct principles pursuant to s.76BA. Sub section 5 of s.76BA provides as follows:

"(A Councillor must) Act lawfully and in accordance with the trust placed in him or her as an elected representative".

27 It is not I think a stretch of proper interpretation to construe the expression,

"Act lawfully" as including an obligation to comply with the relevant provisions of the Local Government Act, specifically those directly related to the issue of how on any particular occasion or in any circumstance a councillor must act. Section 90 of the Local Government Act is clearly one of those sections.

28 It is also appropriate to set out the wording of Item 8(a) of the agenda:

**"Formally record its concern that Councillor Clarkson abstain from voting at the special Council meeting on 14 December as this is a breach of the Local Government Act 1989 (s.76BA and s.90) and brings into disrepute the reputation and governance process of Nillumbik Shire Council."**

29 In my opinion Item 8 relates to and indeed for present purposes, only relates to an allegation of misconduct as defined in s.81A being:

"Conduct by a councillor that is in breach of the councillor code of conduct".

30 The defence has submitted that Item 8 fell within exception 79(c)(b) in that the vote on that day concerned an election for Mayor. In my opinion this submission cannot be sustained. This exception or exclusions here relevant, can, perhaps somewhat surprisingly, be elucidated by the relevant second reading speech:

"The new provisions contained some clear exemptions that are necessary for the practical operation of the Council, such as the ability of councillors to vote on certain matters affecting themselves such as the election of the Mayor, councillor, appointments, councillor allowances and applications for councillor conduct panels."

31 Insofar as it was thought open that voting for oneself to become Mayor involved a consideration of conflict of interest, this appears to have been the concern of the legislature at the time; 79(c)(b) does not create an exculpation of a breach of s.90.

32 Returning to Item 7 of the agenda a critical item is Item 7(d):

"Refer Councillor Clarkson's decision to participate in a special Council briefing (assembly of councillors) on 8 December 2010 after receiving legal advice that she potentially had a conflict of interest, to the local Government Victoria inspectorate."

33 Not only can this particular item be said to, "Relate" to a VCAT application insofar as that application was the very matter on foot and under discussion on 8 December 2010, but also the issue of acting in a situation where there is a conflict of interest, is plainly a matter fairly and squarely covered in the Code of Conduct. Item 7 in my opinion clearly relates to the conduct of a Councillor with respect to an allegation of misconduct.

34 In summary, my view of Items 7 and 8 is that disregarding statements of history, preamble and opinion, the gravamen of the agenda items and attendant motion clearly relates for all practical and effective purposes only to a VCAT application or to misconduct of Councillor Clarkson.

35 What might be described as to the underlying philosophy of the insertion of s.79C can again perhaps be illustrated by a reference to the relevant second reading speech.

"The Act lists a number of matters where councillors are not considered to have conflicts of interest. The bill adds an additional matter to this list, in regard to a councillor conduct matter that relates to an internal dispute involving the councillor or an allegation of misconduct or serious misconduct by the councillor. **This amendment protects a councillor's right to defend their own actions in a Council or committee meeting that is considering their conduct as a councillor.**"

36 I find for the reasons set out above, that the particular matters alleged in respect of these charges do not sufficiently establish a direct interest as that term appears in the Act or if they do they fall within the applicable exclusions in s.79C of the Act.

37 I should as a matter of completeness, address the issue as to whether a defence of honest and reasonable mistake of fact can be raised to these charges; a "Proudman -v- Dayman" defence (1941) 67CLR536. There is no dispute that the offences as charged are offences of strict liability, no element of mens rea need be proven.

38 The prosecution points in particular to certain provisions of the Local

Government Act as demonstrating that the legislature did not intend to allow such a defence to these particular charges. The prosecution points in particular to the provision of s.77A(1):

"A relevant person has a conflict of interest in respect of a matter if the relevant person has a direct interest or indirect interest in the matter"

Section 77A(6) provides as follows:

A relevant person does not have a conflict of interest in a matter if the relevant person

- (a) does not know the circumstances that give rise to the conflict of interest; and;
- (b) would not reasonably be expected to know the circumstances that give rise to the conflict of interest."

39 The prosecution's first submission is that s.77B which deals with the definition of direct interest does not have in terms any qualification as provided in s77A(6). The obvious response is that given the position ~~of~~ of 77A(1) and 77(A)(6) there would be no necessity for it to do so.

40 Prosecution also points to the provisions of s.80A(3).

"If a councillor attending an assembly of councillors knows, or would reasonably be expected to know, that a matter being considered by the assembly is a matter that, were the matter to be considered and decided by Council the councillor would have to disclose a conflict of interest under s.79, the councillor must at the time set out in sub-s.(4) disclose to the assembly that he or she has a conflict of interest and leave the assembly whilst the matter is being considered by the assembly."

41 This provision, that is to say s.80A(3) is somewhat curiously worded. In essence it requires a councillor act as if the matter were before Council in the ordinary course of a meeting in order to make a decision as to whether they were in a position of conflict, but which allows effectively for the existence of reasonable apprehension of facts.

42 These particular provisions do not in my opinion assist the prosecution, or indeed, particularly assist the court.

43 It is trite that a mistake of law does not afford a defence. The primary issue is whether a defendant's honest and reasonable mistake or misapprehension was as to a matter of fact or as to a matter of law, or indeed as to a matter of mixed fact and law. The availability of the defence, and the principles and indeed history relevant to it was dealt with and analysed in detail in Ostrowski -v- Palmer 218CLR 493.

44 In citing a previous decision of the High Court, the court stated:

"The distinction which our law makes for its purposes between law and fact, between questions of law and questions of fact, between mistakes of law and mistakes of fact, is thus by no means as easy as might have first been expected. That it is not absolute is illustrated by the many cases said to turn on a mixed question of law and fact. Then there is the choice between two propositions - on the one hand that of Dixon J in this court in Thomas -v- The King, that 'a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law' - on the other hand the rule that when the facts are ascertained it is a question of law whether a thing or place answers a particular description in the statute."

45 The essential issue before the High Court in Ostrowski was stated succinctly by Callinan and Heydon JJ

"The respondent is a professional fisherman. He was induced to fish in forbidden waters by the provision to him of inaccurate or incomplete materials by an official of the State Government department responsible for administering fisheries. The question in the appeal is whether his mistaken belief was as to a state of things or as to a matter of law."

46 In the case of the perhaps unfortunate Mr Palmer the conclusion of the court was clear that a mistaken belief that an activity is lawful or authorised will be a mistaken belief as to a matter of law rather than as to a matter of fact.

47 Given that Ostrowski dealt with particular statutory provisions and defences, it might be inappropriate to force a comparison with the present case. So far however as the statements of law and principle are concerned, they clearly apply. It appears to be the better view of the law at present, that a mistake as to a matter of mixed fact and law should properly be regarded as a mistake as to a matter of law.

48 The Court in Ostrowski reiterated the law applying to offences of strict liability where an intention to commit the offence is not one of the elements of that offence.

"Once the person proves in relation to a strict liability offence that the defendant knew the facts that constitute the actus reus of the offence, that is, all the facts constituting the ingredients necessary to make the act criminal, the defendant cannot escape criminal responsibility by contending that he or she did not understand the legal consequences of those facts."

49 The task therefore is to properly characterise those matters of belief which the defendant contends allow the defence to be raised.

50 The position of the defendant is that her belief went to the factual nature of the items and matters before the Council. Her belief was that all of those items related either to a VCAT application or to allegations concerning misconduct on her part whether referable specifically to misconduct as defined in the Act or misconduct construed from a failure to observe the applicable Code of Conduct. The defendant's position is that her belief as to the proper description or characterisation of these items was as to matters of fact and that were she correct as to the nature of these items her subsequent conduct would not be criminal. Either because no direct interest was disclosed, or because of the operation of s.79C.

51 The situation in this case obviously concerns an unusual consideration of the notion of "conflict of interest".

52 A trite example of conflict of interest might be where a councillor has a financial or beneficial interest in a corporate entity which is endeavouring to obtain a contract from the council. Plainly such a situation would give rise to a direct conflict of interest. If the councillor concerned held an honest and reasonable belief that all of her interests and any interests of those whose interest she might be reasonably expected to advance, had been properly and fully disposed of prior to the matter coming before the Council it would

appear to be a somewhat harsh conclusion, if the councillor concerned could not raise a defence, either upon an honest and reasonable mistake as to fact, or pursuant to s77A(6).

53 I am drawn back to the quotation from the second reading speech which concluded with the words that:

"The amendment protects a councillor's right to defend their own actions in a Council or committee meeting that is considering their conduct as a councillor".

54 In my opinion, the apprehensions of the defendant in respect of the agenda items before the relevant meeting of the Council were apprehensions as to matters of fact. The issue therefore is whether the defendant's apprehension and belief as to this factual state of affairs was honestly and reasonably held.

55 Evidence was received in the form of evidence from councillors and from the chief executive officer; there were also tendered a number of emails between the defendant and the chief executive officer relevant to this issue. In addition of course, the court heard the evidence of the defendant herself. Without descending to detailed description of that evidence, I am satisfied that the defendant's belief was honestly held.

56 I find furthermore that the fact that at the assembly of councillors, legal opinion was offered that it was, "Arguable" that the defendant had in fact a conflict of interest and the, I venture to say uneducated opinion, of the chief executive officer that in fact she had such a conflict, did not displace the reasonableness of the defendant's belief. The defendant considered her position, considered the factual matters that were to be put before the Council and reflected upon the relevant parts of the statute concerning her obligations which would arise in the face of a factual situation of conflict.

57 Having considered the relevant provisions of the Act, and the relevant case law, I am of the opinion that a defence of honest and reasonable mistake as to fact is available for a person in the position of the defendant. I also find in all

the circumstances of this case it is a defence upon which the defendant might rely.

58 For this, and the reasons set out above concerning the other grounds of defence, the charges will be dismissed.

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