

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

NORTH J

No. VID 74 of 2014

THE MARITIME UNION OF AUSTRALIA and ANOTHER

and

DP WORLD MELBOURNE LIMITED

MELBOURNE

10.33 AM, FRIDAY, 4 APRIL 2014

MR S. MOORE appears for the applicants

MR M.D. WYLES SC appears with MR R. O'NEILL for the respondent

MR R. GILLIES QC appears with MR B. JELLIS for Mr J. Wheelahan and Mr R. Dalton

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HIS HONOUR: Yes, Mr Moore.

MR S. MOORE: Your Honour, I appear for the Maritime Union of Australia and Mr Johnston.

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HIS HONOUR: Yes. Thank you.

MR M.D. WYLES SC: And if your Honour please, I appear with MR O'NEILL for DP World Melbourne Limited.

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HIS HONOUR: Yes. Thank you, Mr Wyles.

MR R. GILLIES QC: May it please your Honour, I appear with my learned friend, MR JELLIS, on behalf of Messrs Wheelahan and Dalton.

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HIS HONOUR: Yes. Thank you, Mr Gillies. Well, I think perhaps the first thing, Mr Moore, is your application to reopen; is it not?

MR MOORE: Yes, your Honour. Thank you. Does your Honour have – can I hand up to your Honour a brief outline of argument – submissions on this point that I have provided to my friends?

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MR WYLES: Can I indicate to your Honour that I've indicated to my learned friend we neither consent nor oppose the application to reopen.

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HIS HONOUR: Thank you.

MR WYLES: We will deal with the substance.

MR MOORE: Your Honour, the relevant moving document is an amended interlocutory application which was filed with the court yesterday and, by that application, the applicants seek to reopen their case in opposition to the respondent's application to discharge order 1 of the orders made on 18 February, in particular to have read in opposition to that application an affidavit of Mr Kevin Bracken who is the state secretary of the MUA, and his affidavit is annexed to an affidavit – to a supplementary affidavit by my instructor, Mr Daniel Victory.

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HIS HONOUR: Yes.

MR MOORE: I won't deal with, in light of Mr Wyles – the position indicated by DP World – I just note, for your Honour's attention, the relevant principles going to reopening which I've summarised in very short form in paragraphs 3 to 6.

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HIS HONOUR: Well, I don't think there's any issue about that. I mean - - -

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MR MOORE: No.

5 HIS HONOUR: - - - I clearly have power and whether I do or not is a matter of discretion and whether it's appropriate in the circumstances – but fundamentally, Mr Moore, I've had a look at the affidavit and the matters in it would not persuade me to change the view that I've arrived at, so I can't see that there's any point – I mean, the fact that the Union complied with the orders by explaining to the workplace what I had said is no more than I would expect. There was just a gap in the evidence - - -

MR MOORE: Indeed.

10 HIS HONOUR: - - - but there was a more fundamental gap and that was that where I had made it so completely plain that the reinstatement order hung by a thread – that when these incidents arose, nothing on the evidence was done by this organisation or this applicant who have so much at their heart the need to prevent intimidation and harassment that the impetus for discharging the orders seemed to me to be greater
15 than if such evidence had been there, and so, you see, the scenario that I could have imagined was that the Union gets told that there had been an outbreak of misconduct of exactly the sort that I had said could not occur if the order was to contend with – and nothing is done at all on the evidence until I raise it in court and then – yesterday, I think it was – the Union scurries down and updates the members.

20 Well, that's not the sort of conscientious response that I had envisaged when making the order. I mean, had something like this come up, I've got no doubt that there were means in the workplace to discover who was responsible for doing it, or at least attempts could be made, and I mean it seemed to me that it would have been within
25 the contemplation of the approach I had taken, for instance, that the Union call a meeting of the workforce and say, "We were told that this reinstatement order hangs on a thread. What has happened is a real danger to that order." Now, you've got to work out – those – the people that did it have got to work out whether they want Mr Johnston to stay there or they want to come forward and explain to the court or to us
30 or to somebody or to DP World why this has happened, and that's what I would have expected, but stunning silence till I raise it in the court and then you come up with this – what I do frankly say is really not a response that was called for, given the background of the case.

35 MR MOORE: Well, your Honour, I acknowledge what you're saying. There is no evidence – I can't put anything before you as to the Union that it took actions of the type that your Honour refers to since 11 March. That didn't happen. There's no evidence that that did happen. That is so.

40 HIS HONOUR: And that's very dangerous to your position, I think.

MR MOORE: Well, your Honour, I understand what your Honour says about that, but your Honour ought – if I might say so, with respect – bear in mind a couple of things there: (1) this is not – this is the DP World worksite; the Union does not have
45 free access and egress - - -

HIS HONOUR: But do you think, Mr Moore, that if you had gone to DP World and said, "Look, we got this order. We know that we only just got it by a whisker. We are concerned to hold it and what we want to do is call a meeting to try and find out who did it or" – I don't know. I mean, look, I know union officials well enough from
5 my experience at the bar to know that they have ways of finding out things in a workplace which may not require a meeting but, you know, a conscientious response in that situation was, as soon as that material hit the fan, that they get down there and work out how they're going to respond, but there's just stunning silence which leaves me to think that, you know, it's just a continuation of the same silly war that led to
10 the problem.

MR MOORE: Well, your Honour, that stunning silence – with the benefit of hindsight – I can see is mistaken but, your Honour, that doesn't mean that the Union was not conducting itself in good faith and in a manner which it felt was appropriate.
15 Now, what has occurred in the last couple of days is that the Victorian branch secretary has gone down there and laid down the law to the members in no uncertain terms. Now, your - - -

HIS HONOUR: Not really. That's – it's just a formulaic – it's good for an affidavit but it doesn't – it's not – Mr Moore, I know how union officials work. I mean, I
20 dealt with them for many, many, many years and particularly this union for whom I acted. They are a very tight knit organisation and I am prepared to draw upon judicial notice that they could have done very much more than what's revealed in this affidavit.

25 MR MOORE: Well, that might - - -

HIS HONOUR: Anyway, the bottom line is, Mr Moore, at the moment, unless you've got some wisdom to impart, I would not allow the case to be reopened
30 because it would be futile in the sense that this evidence wouldn't change the result.

MR MOORE: Well, your Honour, I don't have anything further I can add beyond what's in the outline and the issues that are set out there, your Honour.

35 HIS HONOUR: All right. Well, thank you. Now, whilst you're on your feet, I think I've got a better finetuned version of the estimate for the trial from the other side but not from you.

40 MR MOORE: Yes.

HIS HONOUR: Do you have a better guess?

45 MR MOORE: Well, I think on the previous occasion – on Tuesday – I gave, I think, a – quite a detailed estimate, your Honour, of seven to 10 days and I identified the names of all the witnesses we thought would be called save for two.

HIS HONOUR: Well, yes. But you said, I think – if I remember correctly – that there would be 17 in all - - -

MR MOORE: Yes.

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HIS HONOUR: - - - including the respondents'; but now the respondents have listed their proposed witnesses, what does that do to your 17 and to your estimate?

MR MOORE: Your Honour, I will need to revisit that. I'm sorry. I don't – I haven't done that adjustment in light of the respondents' communications but I could - - -

HIS HONOUR: Well, whilst I hear from the others, you might do that.

MR MOORE: I will do that, your Honour.

HIS HONOUR: Yes. Very good.

MR WYLES: And do I take it that your Honour wishes to now move to deal with the question of an expedited trial date?

HIS HONOUR: Well, that has really been dealt with. I think it's common ground and where we had got to on the last occasion was that it was common ground that I had got the estimates from both sides. Your estimate has now been tightened up a bit.

MR WYLES: Five to six days, your Honour.

HIS HONOUR: Yes. And the witnesses that you intend to call have been specified.

MR WYLES: Yes.

HIS HONOUR: The only remaining thing, I think, was that there were some draft directions which were essentially agreed, except for some timing issues - - -

MR WYLES: Yes.

HIS HONOUR: - - - and for one matter which I raised and that was that the agreed form provided for outlines of evidence to be provided by all parties on the same day and it seemed to me likely to be more productive if they were done in a staggered way, so what I've done now is I now have a trial date for you - - -

MR WYLES: Thank you, your Honour.

HIS HONOUR: - - - and I have readjusted the timing in view of that so you will hear in due course. I doubt that there's anything further you need to say about that.

MR WYLES: Thank you.

HIS HONOUR: All right. Well, I propose to give judgment on the application before I hear the remaining issue which I foreshadowed on the last occasion.

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JUDGMENT DELIVERED

10 HIS HONOUR: I think before formulating the precise terms of the orders I will deal with the remaining matter, which is the matter I raised in relation to the conduct of the legal representatives of the respondent on the last occasion. Now, Mr Gillies, that's your area I think.

15 MR GILLIES: Yes, your Honour. Would you hear me now?

HIS HONOUR: Yes. Certainly.

20 MR GILLIES: Your Honour, we appear pursuant to your Honour's invitation to explain, and we would hope to resolve an area of difficulty that obviously exists in your Honour's mind. We take your Honour's comments with the utmost seriousness and my clients are very, very upset that the criticisms have been made, but welcome the opportunity of being able to address your Honour. Not in an apologetic manner; we are confident we can put argument to your Honour that would cause your Honour to review your Honour's approach hitherto.

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HIS HONOUR: It might be a rather large task, Mr Gillies, but you can try.

30 MR GILLIES: Well, we won't resile from it, your Honour. We understand that your Honour was very cross. Your Honour would understand that my clients are very cross, but this has to be - - -

35 HIS HONOUR: Rather than cross, Mr Gillies, I perceive that a line of professional integrity has been crossed. It was – cross is the wrong take on the situation. I sought to explain that my response concerned a question of professional conduct and integrity.

40 MR GILLIES: Yes. I understood that, your Honour, and your Honour did advert to the possibility later on of being misguided, and - - -

HIS HONOUR: Well, I'm certainly happy to hear an explanation.

MR GILLIES: Yes.

45 HIS HONOUR: But whether it calls for an apology or not is a matter of I think potentially high contention.

MR GILLIES: Yes. Well, we don't resile from the task, your Honour, because our firm approach is that we are very pleased to be able to take your Honour to your Honour's various criticisms and to respond to them, but in an explanatory manner, not an apologetic manner because we say that there has been no breach of ethics or any diminution of the propriety which one would expect of this court.

HIS HONOUR: Well, I certainly differ from that view as things presently stand, Mr Gillies.

MR GILLIES: Well, the - - -

HIS HONOUR: I think it's right to distinguish two different areas. The area about which I am concerned particular to here is the reason why the leave to appeal application was proceeded with rather than returning to me. That I regard as a matter of significant discourtesy, and that is the point on which I am concerned to hear. Now, the way the appeal was run, and I made some comments about that, I freely acknowledge that that's a matter for Middleton J and how he dealt with it, and the observations I made there were passing observations. They are not the ones about which I am concerned.

I mean I have a view about the way the application was argued, but I freely accept that that is a matter that is dealt with in the context of the appeal by the judge hearing - sorry, the lead application by the judge who is hearing the lead application. What I would like to know is why the proceeding to leave to appeal without returning to me in the circumstances of the case did not represent a gross discourtesy, just so that I make quite clear what my position is, and you might say, well, what's a judge bothering about courtesy about? And that's where I say that is an issue of professional conduct and integrity because this system of ours will not work unless there is trust and respect between the bench and the bar, and it's at that point which I regard the conduct of counsel and solicitors for DP in taking the action that they did as being discourteous in the extreme.

No one could have made it clearer, and you've perhaps seen it again today, how that the decision to reinstate Mr Johnston was a line ball one, that it was one made after serious consideration of Ms Coombe and Ms Bowker's position where I invited them to address the court - no one else did - and I heard from them directly, and it was made patently clear that if the basis upon which the order was made ceased any longer to exist, then come back, I think I said, in a flash.

MR GILLIES: Yes.

HIS HONOUR: Now, if counsel then go off and seek leave to appeal when they have in their hands the evidence about the basis of the - the very same basis that has now led to the discharge of the order, I regard that as just discourteous in the extreme.

MR GILLIES: Yes.

HIS HONOUR: What is it saying about the court, Mr Gillies?

MR GILLIES: Well, we've read your Honour's words in that regard, and your Honour's - - -

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HIS HONOUR: Well, if that doesn't call, Mr Gillies, for an apology then I don't know what does.

MR GILLIES: All right. Well, I will ask your Honour to hear the argument. Your Honour has set the task before me.

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HIS HONOUR: Well, you might want me to stand the matter down to talk to your clients having now heard directly the approach that I am taking to it, because you can try, but frankly you have a big job to persuade me that the circumstances do not call for some form, however you like to express it – but to try and retain the position that what was done was completely, professionally acceptable – you might be able to do it, but I'm presently not liking your changes, and I might as well make that clear because I don't want to minimise your task.

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MR GILLIES: No. And we don't want your Honour pre-judging the situation either by the same token.

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HIS HONOUR: Of course, and that's why I'm saying that I'm very happy to listen to you, but it's not use you being misled - - -

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MR GILLIES: I understand that, your Honour, but - - -

HIS HONOUR: - - - into thinking that the task is going to be an easy one.

MR GILLIES: Yes. Well, we welcome the challenge, your Honour, but we would have a disquiet if your Honour had a closed mind before I uttered a syllable.

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HIS HONOUR: Mr Gillies, I've just told you that I'm happy to hear what you say.

MR GILLIES: Yes. Well, we want your Honour to do more than hear it; we want your Honour to note it and evaluate what I say.

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HIS HONOUR: Then I will.

MR GILLIES: May it please your Honour. Your Honour has invited me to speak to my clients; there is no point in me doing that, my instructions are clear. My advice to my client is clear.

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HIS HONOUR: Well, you weren't here, and very much depends upon having been here, and maybe that's the problem at least Mr Wheelahan had because, you know, it is in the highest regard difficult to accept that anyone who observed the difficulty and, I hope, seriousness with which I approached that task then took the course that

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they did. Anyone who was there will have observed that this was a very difficult judgment call - - -

5 MR GILLIES: Yes.

HIS HONOUR: - - - and it was wide open to come back the next day or the next day or the next day.

10 MR GILLIES: Yes. We understand that, your Honour.

HIS HONOUR: Yes.

15 MR GILLIES: And we understand that that is your Honour's principal concern. But of course your Honour made other remarks during the course of the judgment. I want to go to those to put them to one side, because I deduce from what your Honour is saying that the real nub of your Honour's concern is referable to the application to seek leave to appeal.

20 HIS HONOUR: And that was made plain the other day.

MR GILLIES: Yes. May it please your Honour. There are also some criticisms that your Honour made which inferentially your Honour will not persist with relating to the use during the appeal of remarks made by your Honour during argument.

25 HIS HONOUR: Absolutely so.

MR GILLIES: And the - - -

30 HIS HONOUR: I mean if you want to make a fight about that, we can - - -

MR GILLIES: No. I don't want to make - - -

35 HIS HONOUR: - - - because I still - I hold the view that it was quite a wrong thing to do.

MR GILLIES: Yes.

HIS HONOUR: But that is for Middleton J.

40 MR GILLIES: But that is our argument, you see.

HIS HONOUR: Well, I accept that argument.

45 MR GILLIES: All right. But I nevertheless - the fact is allegations have been made which have not been withdrawn, and it's very important to our case that the common ground be taken care of before we get to the area where there might be an exchange of cannon fire. And I want to take your Honour to those parts of the transcript of

your Honour's judgment that deal with your Honour's then concern concerning remarks during judgment not being part of the judgment, and your Honour distinguishing reasons given in judgment from utterances from your Honour as your Honour teased out the issue.

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HIS HONOUR: Exchanges with counsel?

MR GILLIES: Yes. And we take, if your Honour has - - -

10 HIS HONOUR: What's the point of this?

MR GILLIES: Your Honour, there are allegations that your Honour has made of impropriety that we need to have withdrawn concerning - - -

15 HIS HONOUR: I won't be withdrawing them, Mr Gillies.

MR GILLIES: Well - - -

20 HIS HONOUR: I mean it's the view I have that that is the - is an illegitimate way of arguing an appeal, and I mean there are authorities in the court that say that.

MR GILLIES: All right, well, there are authorities that say the opposite, your Honour - - -

25 HIS HONOUR: Are there?

MR GILLIES: - - - and I will take your Honour to those. I'm conscious of the fact that your Honour is not making this today's argument and I am, but we can't let injurious observations reputationally to stand.

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HIS HONOUR: I think you might be best to focus on the ones that currently trouble me, Mr Gillies.

35 MR GILLIES: Well, I with respect won't do that, your Honour, because serious allegations have been made and I want to identify those and have your Honour indicate that they are not the subject matter of today's proceeding.

HIS HONOUR: Well, you're not here to get indications from me, Mr Gillies.

40 MR GILLIES: May it please, your Honour. Well, I will proceed to take your Honour to what I intended to do and if your Honour wishes those to be debated we will certainly do it. At transcript page 6 - does your Honour have the transcript of the hearing of 1 April?

45 HIS HONOUR: I think I can have access to it.

MR GILLIES: It's page 6 of the transcript. It would be helpful if that could be printed for your Honour's information, because in respect of the other limb of the disputation I want to refer to the transcript in some detail.

5 HIS HONOUR: Yes. I will have it now.

MR GILLIES: Thank you.

10 MR WYLES: Your Honour, we can provide it. There is a hard copy if it assists, your Honour.

HIS HONOUR: Thank you.

15 MR GILLIES: I will take your Honour to page 6 of the transcript of argument. Your Honour will see at line 11 your Honour says to Mr O'Neill:

20 *What is it that you mean, because I understand the way it was argued on appeal it was remarks in exchange with counsel upon which you relied; it is, I ought to say if it was the case, a technique of appellate advocacy which is unavailable and of which I take a very dim view.*

Does your Honour have that passage?

25 HIS HONOUR: Yes.

MR GILLIES: And your Honour then elaborated to explain how your Honour's exchanges with counsel were designed to clarify issues as they arise, and of course that is completely unexceptional. Then your Honour proceeded to say:

30 *It is quite improper to query where a matter of ethical infringement for the appellant advocates to resort to exchanges with the bench, save in the event of an allegation of bias, which was not made, and I direct these comments to you, although you are not the particular appellate advocate on the special leave application. I'm not sure that you're in court at all, but it's concerning, I must say, to read it, particularly against the background, where you have properly described it. I made it completely clear that the applicant's employment hung by a thread.*

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40 And on the previous page, page 5, your Honour, Mr O'Neill took you to a passage of your Honour's judgment, it was in their submissions. And whether it's called the sword of Damocles argument or quick as a flash, we all understand exactly what your Honour meant, that if there was a problem, that your Honour was available to rehear the matter on the basis of that fresh material. Then your Honour proceeded at line 31:

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I mean, quite apart from my personal irritation about the course you've taken, which I think is really an absurdity, frankly I understand the counsel for the applicant in the proceeding wasn't called upon.

5 That's where your Honour merges on to the first point that your Honour has identified. Your Honour, on the same page, refers to the conduct of advertising to remarks made by the judge during the appellant argument as being:

Improper, an ethical infringement and impermissible.

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Now, we say, your Honour, that those remarks are inappropriate. It's not simply a case of us taking exception to the adjectives used, your Honour. We say that as a matter of law, counsel is entitled to advert, if it's relevant, to comments made by the trial judge during the course of the appeal. And we say it's not simply a matter of asserting to your Honour that in our practice – in our experience in practice that is so. We are able to take your Honour to authority on the subject, the most recent authority being *Cruse v Multiplex* and others. Your Honour may well know it, we will hand up a copy, because I want to take your Honour to a specific passage in the majority judgment.

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Cruse, your Honour will recall, is an industrial law case, which went on appeal, where it was heard by Gray, Goldberg and Jessup JJ. In relation to this point about the permissibility of advertising to the trial judge's comments and remarks during the course of argument at trial, his Honour, Gray J, though that was impermissible. He adverted to a number of authorities to the contrary. But in paragraphs 4 to 10 of Gray J's judgment, he expresses the view held by your Honour that it was impermissible to advert to exchanges between trial judge and counsel. Goldberg and Jessup JJ disagreed with Gray J in that regard, your Honour. And if we could now take your Honour to paragraphs 62 and 63 of the majority judgment. Your Honour will see that the judges are there saying that:

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We have had the opportunity to read the reasons for judgment of Gray J in draft form. Having regard to the manner in which the appeal was conducted, it was not necessary to address the issues raised by Gray J in paragraphs 4 to 10. The fact that we have not done so should not be taken as our agreement with the observations of Gray J in those paragraphs.

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HIS HONOUR: Well, that's not a disagreement.

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MR GILLIES: Well, it is. And with the greatest of respect - - -

HIS HONOUR: I'm sorry.

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MR GILLIES: It is, with the greatest of - - -

HIS HONOUR: "It should not be taken as agreement."

MR GILLIES: Yes. Well, we say that that - - -

HIS HONOUR: It's just that it hasn't been considered by them, as I read it.

5 MR GILLIES: Well, we would say not, your Honour. And the next paragraph is:

10 *In particular, when a ground of appeal is that a trial judge's exercise of discretion has miscarried, consistently with the principles in House v The King, counsel for the appellant should not be inhibited from submitting that observations and statements made by the judge in the course of the trial have had a bearing on the judge's exercise of discretion, if counsel has formed the view that there is a basis for such a submission. The conduct of a trial by a judge and the statements made by the judge in the course of the trial may be relevant to a ground of appeal, even though such conduct and statements are*
15 *not referred to in the judge's reasons for judgment.*

So we say, your Honour, that Goldberg and Jessup JJ make it very clear that they are disagreeing with Gray Js decision on that point. And it follows from that, your Honour, we say that your Honour's inclination to regard what was done on appeal,
20 by reference to the quick as a flash offer enshrined within the transcript, was something that they were entitled to do and was not unlawful. What they did was perfectly legitimate and notwithstanding that, they've had to endure the criticism, in particular, transcript 6 and 9, where your Honour has described it as:

25 *Improper, an ethical infringement and impermissible.*

HIS HONOUR: Where on 9? You mean on page 9.

MR GILLIES: Yes, T9 of the – line 25, where your Honour commenced:
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I think you misunderstand, Mr O'Neill, what I said in the transcript –
etcetera.

35 *It's perfectly appropriate for you to quote to me today. That is not my point. My point is, in seeking to impugn my judgment, counsel put it to Middleton J that there were things said by me in discourse with counsel which reflected error. That is impermissible, because I speak through my judgment. But when you're coming back to me now seeking to have the order discharged it's, of course, appropriate for you to say, "Well, this is what you said then." I mean, you know, we live in a land, Mr O'Neill, of rationality. And that is why I regard your predecessors and your solicitors and your client's conduct as discourteous, because I made it plain what course I was intending to take and despite that, it was somehow thought a good idea to seek leave to appeal.*
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In that paragraph, your Honour is enshrining your two criticisms: firstly, the decision to appeal, but also the use of the discourse between your Honour and

5 counsel as part of the theatrical – I’m sorry, part of the presentation of the appeal. So we say that in those four areas that I’ve taken your Honour to, your Honour has criticised counsel and solicitors for not only doing something improper, but doing something illegal when the law perfectly justifies what they did. And we say it’s an excess that your Honour has used linguistically to be criticising them for a breach of ethics for doing something which was entirely permissible.

10 And we say that it’s not enough for your Honour simply to say to me to confine the argument today to the decision to appeal and leave this wound unattended. We say that having regard to Cruse’s case and the cases prior to it, we don’t need to do it historically, but if we did, there’s a train of authority which justifies it. Gray J adverted to it but nevertheless expressed a contrary view. But where we have a Full Court decision as well as the train of precedent authority justifying it, we say that it’s a gratuitous wound that has been sustained by counsel and the solicitor, for your Honour to say that you took a dim view of what they were doing, that it was improper, an ethical infringement and impermissible. And we say that - - -

20 HIS HONOUR: Well, Mr Gillies, I mean, the problem about this is that valuable though it is for you to deflect attention away from what I regard as the main issue, the problem is that – and this is why, I think, we agree that this is a matter for Middleton J and what I say in passing is, in a sense, neither here nor there, because it doesn’t determine anything, but the position is not even on the majority judgment in Cruse as clear as you make out, because for this unusual course – and it is an unusual course, as you know from appellant advocacy that you’ve engaged in yourself – it’s confined into a very narrow area, as they explain, so that counsel has to form a view that in the particular instance what was said has a bearing.

30 Now, what was completely undeniable in the circumstances of this case was that it was made clear beyond any shadow of a doubt that you could come back at any time and upset this order. And yet it was against that background, I say, wrong to go beyond what the judgment said, because in the course of discussion with counsel I tried to work out what the right thing to do was. In the end, I said in the judgment, “Come back.” Now, in those circumstances, for counsel to conscientiously form the view that what I said in discussion with them was relevant to the appeal, was wrong.

35 MR GILLIES: Well, we say it was not. Your Honour says it’s wrong; we say it is not.

40 HIS HONOUR: All you’ve done – you’ve pointed to the principle. I say the next step is to apply that principle in the circumstances. And the problem about this whole form of argument is that we are descending into what was, really, Middleton Js area. And, I mean - - -

45 MR GILLIES: We would certainly agree with that.

HIS HONOUR: - - - I say what I say, it was my – it is my interpretation of what’s right and wrong in appellant advocacy. We can debate that all afternoon. I accept

the principle, but did it apply in this case, I say it was unsustainable in the circumstances; you say it wasn't. That's not – I mean, that's a disagreement – you know, every time counsel's arguments are rejected by a judge you can't say, "Well, there is a need for some sort of acceptance of the fact."

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MR GILLIES: No. We're not complaining about dissent. We're complaining about your Honour taking the next step of saying that that's an ethical breach. God help us if every time I put an irrelevant argument, I'm dealt with by a judge on a basis of an impropriety. It doesn't work that way.

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HIS HONOUR: But, I mean, I can hold the view that it was an argument that was unavailable by application of the principle even in the majority judgment.

MR GILLIES: Well, we say that's wrong.

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HIS HONOUR: That's the view that I hold. And that's, if you like, what was being expressed.

MR GILLIES: Well, it's quite a different matter to have a different construction on a judgment on the one hand, from taking the next step of saying, "If you disagree with me, you're acting improperly. You're committing an ethical infringement."

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HIS HONOUR: Well, in circumstances, Mr Gillies, where the situation was so blindingly obvious.

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MR GILLIES: That's a different issue.

HIS HONOUR: I say – no, it is the application of the principle. You see, unfortunately you weren't there. You didn't observe the struggle – and judges have these struggles, to get to the right conclusion. And what we require of the bar is an understanding that when that struggle comes to an end, it's accepted as having been done conscientiously.

30

MR GILLIES: Yes. That's a leave to - - -

35

HIS HONOUR: And what I say is by arguing the special leave all together and by putting on that special leave application remarks made between counsel prior to coming to the final hanging by a thread, that was wrong.

40

MR GILLIES: But we say it was not.

HIS HONOUR: Yes. Well, I say it is.

MR GILLIES: And we say it was entirely inappropriate for your Honour to take the step of saying that's an ethical breach.

45

HIS HONOUR: Well, we remain, I'm afraid, at odds about that.

MR GILLIES: I beg your pardon, your Honour.

HIS HONOUR: We remain at odds about that.

5 MR GILLIES: All right. Well, we would urge that your Honour should, having regard to what we have now put to you on the law – and your Honour’s casted mind as to what was, really, the responsibility of Middleton J and not yourself, that your Honour should - - -

10 HIS HONOUR: Well, I said that on the day.

MR GILLIES: Yes. Well, your Honour should withdraw the adjectives that I’ve referred to.

15 HIS HONOUR: Which adjectives do you want - - -

MR GILLIES: The fact that you took a dim view, the allegation of impropriety - - -

20 HIS HONOUR: Well, you tell me precisely what you want me to remove or say should not be in the transcript.

MR GILLIES: Very well, your Honour. In relation to – if we go to transcript 6.

25 HIS HONOUR: Yes.

MR GILLIES: Your Honour will see, in line 14:

A technique of appellate advocacy which is unavailable and of which I take a very dim view.

30 We say that should be excised.

HIS HONOUR: Well, I can explain it a little more, if you like.

35 MR GILLIES: No. We say it should be excised.

HIS HONOUR: All right.

40 MR GILLIES: We say the sentence commencing at line 17, “It is quite improper and query whether a matter of ethical infringement”, we say that that entire sentence should be excised. And on transcript 9 line 27 the sentence commencing:

45 My point is in seeking to impugn my judgment counsel put it to Middleton J that there were things said by me in discourse with counsel which reflected error. , “It is quite improper and query whether a matter of ethical infringement”, we say that that entire sentence should be excised. And on transcript 9 line 27 the sentence commencing:

My point is in seeking to impugn my judgment counsel put it to Middleton J that there were things said by me in discourse with counsel which reflected error. That is impermissible because I speak through my judgment.

5 Etcetera. So we say that that entire sentence should come out in addition to the sentence:

I mean, you know, we live in a land, Mr O'Neill, of rationality. That is why I regard your predecessors and your client's conduct as discourteous.

10

Etcetera. No, I'm sorry, that deals with the first objection.

HIS HONOUR: Yes. That's the other point.

15 MR GILLIES: Yes. I will be asking that that be removed; that's a different head of argument. I think those are the ones. There is a general complaint which your Honour makes of transcript 44 and 45. I will postpone my application on that till I deal with what I will call the special – or the leave to appeal point, your Honour, but we are much aggrieved at a number of paragraphs appearing at transcript 44 and 45,
20 but for present purposes as far as, if I can call this head of argument the “judicial remarks” head of argument, we say that those criticisms of counsel and solicitors should be withdrawn by your Honour.

HIS HONOUR: Yes.

25

MR GILLIES: Is it convenient we now move to the other limb of complaint which is the one your Honour is more persistent about today, namely the decision to seek leave to appeal? Your Honour might note the following transcript references to your Honour's criticisms. There are approximately under this head – there are 15
30 references which your Honour makes to the failure to come back to your Honour, if I could so call it. We don't regard it as a failure, but that's the language that your Honour would endorse; perhaps I should put it neutrally, the decision not to return to your Honour.

35 The first reference is at transcript 5, your Honour. At line 31 my learned friend Mr O'Neill extracted the relevant paragraph, the “come back here as quick as a flash” offer of your Honour, and it proved to be quite prophetic as it turned out with graffiti reappearing, or appearing subsequent to the order. As Mr O'Neill was developing his argument, your Honour responded to that quotation at line 40, “Precisely. So
40 why didn't you come back to me?” And I think that encapsulates your Honour's express concern that your Honour wonders why, if in fact there was this mechanism by the cross-reference of your Honour's order to that offer for the parties to return, why an appeal was engaged in, and your Honour makes it quite clear that that is your Honour's concern. Then Mr O'Neill developed his argument on the following page, and your Honour at transcript 6 referred to the leave application as being “silly”.
45 Your Honour referred to it at line 32 as being this, “an absurdity”. Your Honour says at line 31:

5 *I mean, quite apart from my personal irritation about the course you've taken, the course being leave to appeal, which I think is really an absurdity, frankly I understand that counsel for the applicant in the proceeding wasn't called on by Middleton J. I mean it's just nonsensical and extremely undermining to the administration of justice that silly special leave applications are brought just because it happens that DP World is cross with my decision.*

And your Honour observed correctly that litigants often go away cross:

10 *Everyone is entitled to make an application for leave to appeal if there are grounds, but where I've said plainly come back as quick as a flash and you will be heard if there is a problem then I can see no justification for the steps that your client has taken, unless, as I say, it reflects upon the material that you had about the circumstances. And that is what concerns me today, because why –*
15 *why go on this unreasonable and silly course if you had grounds?*

Then we say as we pass, your Honour, that your Honour's observation that the applicant wasn't called upon by Middleton J in the appeal proceeding – we say that that is from our viewpoint a judicial slight, because the fact of the matter is we've all had the experience in appeals which we thought were bona fide - - -

HIS HONOUR: Leaves to appeal.

25 MR GILLIES: Of leave to appeal, yes. Leave to appeal a fortiori but saying we don't call upon your opponents.

HIS HONOUR: Leave to appeal from a discretionary decision - - -

30 MR GILLIES: Yes.

HIS HONOUR: - - - made in an interlocutory matter.

MR GILLIES: Exactly.

35 HIS HONOUR: Yes.

MR GILLIES: Yes.

40 HIS HONOUR: A judicial slight?

MR GILLIES: But where our opponent is not called upon, because, your Honour, your Honour observes – fortifies your Honour's criticism - - -

HIS HONOUR: Yes.

45 MR GILLIES: - - - that Middleton J didn't call on my learned friend Mr Wheelahan and - - -

HIS HONOUR: What is wrong with that, Mr Gillies?

5 MR GILLIES: Because it's of no probative value. It's underpinning your Honour's criticism. It doesn't advance your Honour's argument that it was silly or nonsensical; it means nothing, particularly in a situation where written submissions were seen.

HIS HONOUR: I'm not with you, Mr Gillies. Well, it means something, surely.

10 MR GILLIES: No - - -

HIS HONOUR: I mean I've sat in a court for many, many years, and to me it means something.

15 MR GILLIES: Well, we say it doesn't, your Honour.

HIS HONOUR: I don't know what courts you sit in, but - - -

20 MR GILLIES: We say it doesn't, your Honour. We say it's almost a malevolent sideswipe as your Honour through. It means nothing to the decision to appeal - - -

HIS HONOUR: It's a fact.

25 MR GILLIES: - - - that they weren't called upon, in a situation where there is obviously a written outline filed by the opponent. It happens all the time, and as I say, if that was a - - -

HIS HONOUR: So Mr Gillies, you say it happens all the time; I, sitting where I sit, have to say to you it happens unusually.

30 MR GILLIES: All right.

HIS HONOUR: That's my experience and that is the basis upon which I said what I said. It happens unusually - - -

35 MR GILLIES: It being - - -

40 HIS HONOUR: - - - because litigants, whether there are written submissions or not, are not called upon, it is - you know, we can quibble about occurrences, but you know, as a criticism, I think you've got better points than that.

45 MR GILLIES: All right. Well, we mention it, though, because we say that without being paranoid that it's indicative of a sort of a malevolence on your Honour's part toward my client.

HIS HONOUR: No. Mr Gillies, I have to stop you there. You seem not have absorbed the circumstances in which I made that decision. You know, I said, Mr Gillies, come back if you got a problem - - -

5 MR GILLIES: Yes. I understand that.

HIS HONOUR: - - - I'm putting him back not at all sure whether this is going to work.

10 MR GILLIES: Yes.

HIS HONOUR: You see, let's just not go into a stratospheric sort of unreality. You know, I was there, they were there, and I was saying this is a hard decision, I will put him back, but I've heard from the ladies and I don't want them to be disadvantaged; therefore come back.

15

MR GILLIES: We're very acceptable of that, your Honour, and we understand that your Honour - - -

20 HIS HONOUR: Well, you don't really – you don't - - -

MR GILLIES: Well, I do.

HIS HONOUR: You don't really accept in it of your characterisation of what happened before Middleton J, because if you were there and if you had understood the dynamic of what happened there, then to see DP World running off to get leave to appeal when they had the very same material that supports the decision now made. - - -

30 MR GILLIES: There is an argument about that, your Honour, but yes.

HIS HONOUR: - - - then - - -

MR GILLIES: There is an argument about that which your Honour was taken to by Mr O'Neill at the time. I want your Honour to understand this - - -

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HIS HONOUR: So I just – at the moment I'm struggling to get the reality of the submission you're making, because - - -

40 MR GILLIES: All right. Well - - -

HIS HONOUR: - - - it's avoiding completely engaging with what actually happened and how line ball that decision was.

45 MR GILLIES: I understand that.

HIS HONOUR: And that's why if you really absorbed that, Mr Gillies, then you would appreciate why I said and say that it was a – at least most discourteous thing to do.

5 MR GILLIES: All right. Well, we will always disagree on that particular point, your Honour, but what I won't disagree on is that your Honour has gone to great pains to fashion a judgment with indications that was tailor-made, in your Honour's view, to the particular predicament that the parties found themselves in. We don't quibble with that one iota. We don't quibble with the fact that it was a difficult, line-
10 ball decision. We accept that your Honour showed some ingenuity in having this safety valve by making your Honour available should there be any further trouble. Your Honour was doing your Honour's best to please all parties with this result.

HIS HONOUR: Precisely.

15 MR GILLIES: I understand that. Our objection is that your Honour, if not offended, is hurt by the fact of the appeal having regard to the trouble your Honour went to to please the parties in this case.

20 HIS HONOUR: No. It's got nothing to do with my hurt. Offended, yes, but more precisely it's my concern about the relationship between the bar and the court.

MR GILLIES: Yes.

25 HIS HONOUR: Because our court has prided itself on respectfulness and courtesy running both ways.

MR GILLIES: Yes. We acknowledge that.

30 HIS HONOUR: And our system needs it, and we know by our experience of working in other jurisdictions and perhaps with contacts internationally that this is a precious thing, and that is why I'm making such a point of it because I've always been proud that in Victoria there is a respectfulness running both ways between the profession and the court, and this, Mr Gillies, I'm sorry, but in the way I approach
35 making this decision, I regard what was done as below the standard on which we normally operate. Now, it has taken me a little while perhaps to engage with you enough to explain where my motivation is coming from, and I do urge that you, having heard what has motivated me, consult with your clients about the approach you wish to take. There are a number of ways that this can be dealt with. I mean the
40 last thing I really want to do is to name names in a judgment and explain the need for courtesy and why I say this case demonstrates that it didn't occur. I'm not writing a textbook about professional ethics. I don't want to upset counsel or solicitors more than is necessary to draw attention to my strongly-held view, as you can see, about the circumstances of this incident.

45 MR GILLIES: Yes. I understand that, your Honour.

HIS HONOUR: Now, I'm happy for you to continue. I'm prepared to clarify the position in relation to the point about appellate advocacy. I maintain the view that in the circumstances the course adopted was not available, but I also accept that that is an arguable position based on Cruz and others, but on the question of courtesy so far
5 I'm not persuaded that you as an advocate have really grasped what circumstances on the day have caused me to react in the way I have.

MR GILLIES: I understand, your Honour. I'm not – I don't feel disadvantaged. It's not like a credibility case where I've not been there while someone has been
10 giving evidence. I'm prepared to accept that your Honour has bent over backwards to please the parties at the trial level, but we say that is irrelevant when it comes to a decision to appeal. If it becomes an ethical breach for counsel to recommend an appeal, notwithstanding that the judge has been earnest, diligent and - - -

15 HIS HONOUR: But that's getting off onto a different point.

MR GILLIES: But it's not really, your Honour.

HIS HONOUR: I'm talking about the courtesy point.
20

MR GILLIES: The real point is, the real point is the extent to which a trial judge can be critical of legal practitioners who appeal against his decision. That's the point.

25 HIS HONOUR: Well, it's the point in circumstances where there was an alternative course at the time against the background of a line ball decision - - -

MR GILLIES: Yes, we understand that.

30 HIS HONOUR: - - - made tortuously.

MR GILLIES: I accept all of that, your Honour, and - - -

HIS HONOUR: Well, if that's not discourteous, then what is?
35

MR GILLIES: But it's not discourteous because lots of judges – the majority of judges who are appealed against have tried very hard to get it right.

40 HIS HONOUR: But they don't say come back to me if you have this problem because I can anticipate that this is a difficult circumstance. That's the critical difference.

45 MR GILLIES: I know but they're aggrieved at your Honour's decision to reinstate ab initio. They have got a right to appeal against that.

HIS HONOUR: Yes, but the – it was a decision qualified in a most obvious way. Yes, you're back today but if what you say is going to happen, which none of us can know because it hasn't happened, but if that's going to happen, just come back.

5 MR GILLIES: But the - - -

HIS HONOUR: Then it happened and they came back.

MR GILLIES: I understand - - -

10

HIS HONOUR: And then they still went on with their application for leave.

MR GILLIES: I understand your Honour's logic.

15 HIS HONOUR: I mean, that's just - - -

MR GILLIES: And I have studied your Honour's judgment and the reasons for it, the argument – I know all that and I accept what your Honour says.

20 HIS HONOUR: But you don't know - - -

MR GILLIES: But - - -

25 HIS HONOUR: What you don't know is the dynamics of the day, which I hope I'm imparting to some extent to you now.

MR GILLIES: I can see it.

HIS HONOUR: And which is what is critical.

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MR GILLIES: Yes.

35 HIS HONOUR: It's that background which – you know, I mean, discourtesy is something that comes from the whole environment at the time and it cannot be wrenched away by classifying it into a proposition that this is just – you know, proposition, is it discourteous to seek leave to appeal from a judgment of the judge? Of course it's not. I mean, you know, I would – I haven't been sitting here for 20 years if that was going to be the problem.

40 MR GILLIES: I understand all that, your Honour.

HIS HONOUR: But this is way, way, way, way outside those parameters.

MR GILLIES: Well, we say it's not. Perhaps I could go on.

45

HIS HONOUR: All right.

MR GILLIES: I want to take your Honour to the evidence and then I want to deal with the submissions. I'm happy to deal with submissions as – on the run but I have got a greater anxiety to indicate the areas of complaint, your Honour's complaints which are also complaints, so at least there's unanimity about that. I have taken your Honour to the reference to Middleton J not being aware of the entirety of the circumstances. It's, again, at transcript 6. Transcript 6 at the bottom of the page – in fact, I will conjoin that. Middleton J, at lines 46 – 146:

Middleton J wasn't aware of the entirety of the circumstances.

10

Does your Honour have that?

HIS HONOUR: Yes.

15

MR GILLIES: Again, we take exception to that, your Honour. If that observation is meant to convey that those in charge of the case were holding relevant material back from Middleton J, then we would take exception to that. If it's a statement of the obvious, that he's not aware of the entirety of the circumstances, like me, then that would not be exceptional. But as we read it, particularly when cross-referred to other observations, if your Honour is suggesting by that that counsel for the employer were withholding relevant information on the appeal, then we would take exception.

20

HIS HONOUR: No, no, that's not what's being said.

25

MR GILLIES: Well - - -

HIS HONOUR: What I was doing is saying exactly what I have just been saying to you, that it's one thing to read on paper, you know, you can come back at the drop of a hat. It's another thing to read that on the paper. If you had been in the court when all this discourse had happened and I had called upon Ms Coombe and Ms Bowker to address me - - -

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MR GILLIES: Yes.

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HIS HONOUR: - - - so that I could see what their concerns were.

MR GILLIES: Your Honour - - -

HIS HONOUR: That's why – you know, can you imagine why that's not a little frustrating?

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MR GILLIES: I can understand that, your Honour, but again it comes back - - -

HIS HONOUR: Well, it's a shame your clients can't because - - -

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MR GILLIES: They understand that part of it, your Honour. What they don't understand is why they are being criticised for appealing. Why they have to accept a

finding that the man should be reinstated. Their case was lost. They wanted to appeal. Your Honour accuses them of impropriety by the fact of the appeal. They know your Honour tried hard, they know your Honour bent over backwards, they know that your Honour called the women along to - - -

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HIS HONOUR: And they knew that I said come back as quick as a flash.

MR GILLIES: Of course they did. Of course they did. That was mentioned in the appeal. That wasn't – that was – there's an incongruity in this whole matter, your Honour, because they have emphasised a matter which might have lost them the appeal. It might be that Middleton J adverted to that fact in deciding the appeal, or thought it, but the fact of the matter is your Honour proceeded to say, not only that Middleton J wasn't aware of the entirety of the circumstances but in the next breadth, at line 46, your Honour said:

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But if it were in my power to order that your client pay the costs of the special leave application, I would do so.

HIS HONOUR: Then I would and I still would and I would be dismayed if DP World were called upon to pay the costs – I mean, the legal costs of their own lawyers for that application.

20

MR GILLIES: Well, we - - -

25 HIS HONOUR: For the same reason.

MR GILLIES: Well, we say, your Honour, that that observation and your Honour's retort demonstrates a ferocity which we say is not part of our instructions here. My instructions are to try and resolve this. We're very cognisant of the fact, from a rational and logical viewpoint, that people have to co-exist. We know that your Honour is probably the most senior industrial Lord judge on this bench bar perhaps one but the – indeed, from a practice viewpoint, when you combine your Honour's practice at the bar to your experience on the bench and who knows how many cases your Honour has argued or sat on. My clients appear in this court. The odds are they will appear - - -

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HIS HONOUR: Well, this won't affect any of that. I mean, you know, these things come and go but there is a point to be made about this case.

40 MR GILLIES: Yes, I understand that.

HIS HONOUR: And I do have strong feelings about it.

MR GILLIES: But there's an anxiety that we have though, your Honour, to resolve this because your Honour - - -

45

HIS HONOUR: Well, the approach you're taking - - -

MR GILLIES: Your Honour and my clients need to peacefully cohabit on this particular planet.

HIS HONOUR: Exactly. Exactly.

5

MR GILLIES: My learned - - -

HIS HONOUR: And if I decide another case about reinstatement in the same way, with the same, you know, delicate line drawing, which often happens, and I'm accorded this response - - -

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MR GILLIES: That, again, is your Honour taking offence at the fact of appeal and we say that - - -

15 HIS HONOUR: Exactly.

MR GILLIES: Yes.

HIS HONOUR: In circumstances where I have said come back if circumstances change.

20

MR GILLIES: Yes, I understand that, your Honour. Understand that. My clients returned their brief for fear that my submissions might inflame the situation to the detriment of their client.

25

HIS HONOUR: I'm sorry?

MR GILLIES: That my submissions might inflame the situation to the detriment of their client. They have got this anxiety that their client be protected from any backlash from the dispute between your Honour and them. Your Honour says they're acting improperly, they say they are not. From a client's viewpoint, that becomes a source of concern. We have got to fix this, your Honour, because we can't have it persisting that your Honour has got - - -

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HIS HONOUR: We have got to fix it because it has to be fixed. We don't have to fix it because - no one is going to be prejudiced - I mean, your client is not going to be prejudiced by it. Your client has so far had a win.

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MR GILLIES: Yes.

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HIS HONOUR: But - - -

MR WYLES: Different clients, your Honour. I'm here for the client.

45 HIS HONOUR: Yes.

MR WYLES: Mr Gillies is here for - - -

MR GILLIES: I'm -- yes - - -

HIS HONOUR: You're talking about DP World, are you not?

5 MR WYLES: No.

MR GILLIES: I'm talking about my clients. I'm talking about the two barristers
- - -

10 HIS HONOUR: I see.

MR GILLIES: - - - who have returned their brief.

HIS HONOUR: I see.

15

MR GILLIES: Thus, Mr Wyles now appears. And no doubt because of his great talent, immediately has a win, a proper win.

HIS HONOUR: But he wasn't called upon.

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MR WYLES: Thank you. I needed that.

HIS HONOUR: Am I allowed to observe that he wasn't called upon?

25 MR GILLIES: No.

HIS HONOUR: Actually, that - - -

30 MR GILLIES: That means my learned friend is in great trouble on that rationale, your Honour.

MR WYLES: I must come to this court more often.

35 HIS HONOUR: I suppose that disproves my point that people are not often called upon.

MR GILLIES: It does and it's - - -

HIS HONOUR: Unless their arguments are completely hopeless.

40

MR GILLIES: Mr Laws is now shifting around in his seat. So that's the situation, your Honour. This is a very serious thing. We're not just treating this as encapsulating this particular case. It goes far beyond it. It goes into the profession if your Honour - - -

45

HIS HONOUR: Well, that's my concern.

MR GILLIES: And if your Honour is going to - - -

HIS HONOUR: That this – it’s this – this trod over the line of courtesy and - - -

5 MR GILLIES: Yes, well, let me go on with our – the joint areas of complaint. Your Honour’s complaint about my clients becomes our complaint about your Honour.

HIS HONOUR: Yes.

10 MR GILLIES: So it’s an area of common ground in terms of isolation of issues.

HIS HONOUR: Yes.

MR GILLIES: The transcript 7, the line 1, your Honour refers to:

15

...outrageous conduct in the circumstances.

This is in connection with the leave application and your Honour referred to the “quick as a flash” situation which, obviously and for good reason, is your Honour’s preoccupation at this time. Then line 16, your Honour said:

20

This nonsense, it reflects badly on counsel, it reflects badly on your instructors, it reflects badly on your client.

25 HIS HONOUR: Yes.

MR GILLIES: Then, transcript 7, your Honour put this to Mr O’Neill:

30

Well, if you had faith in the material, why, in the name of creation, didn’t you come back to me and put it?

Your Honour is clearly there saying, well, why go down the appellate avenue when, on the North J model, there was a solution; coming back. We say two things to that, your Honour. Number one, they had lost the case and they were entitled to appeal for that reason, if they thought they had a good ground to appeal, notwithstanding the safety valve. But secondly - - -

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HIS HONOUR: They had a right. No one is contesting the right.

40 MR GILLIES: No.

HIS HONOUR: What I’m putting is courtesy.

MR GILLIES: But we say it’s not discourteous to exercise a right.

45

HIS HONOUR: Okay.

MR GILLIES: A right - - -

HIS HONOUR: Well, that's where we're way apart.

5 MR GILLIES: All right. Well, we will need to work on that.

HIS HONOUR: There must be circumstances where to exercise the right is discourteous.

10 MR GILLIES: All right.

HIS HONOUR: That has now narrowed down our area of disagreement.

MR GILLIES: Yes. It does indeed.

15

HIS HONOUR: Maybe we should refer ourselves to mediation.

MR GILLIES: Well, that's true. We would need a good mediator.

20 MR WYLES: I will do it.

MR GILLIES: A good, neutral mediator, Mr Wyles. He would be decisive, we know that. And also this problem about coming back with material presumes that at the time when the decision was made to appeal, the material was there when it wasn't. Your Honour counters - - -

25

HIS HONOUR: Well, that's - - -

MR GILLIES: I know what your Honour is going to say because your Honour did counter Mr O'Neill and say, well, why you abandon the appeal once material was there. But we say - - -

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HIS HONOUR: Yes. I mean, I was talking about at the time when the appeal was heard.

35

MR GILLIES: Yes.

HIS HONOUR: By the time the appeal – sorry, the application for leave was heard

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MR GILLIES: Yes.

HIS HONOUR: - - - the material was in. This was an argument I had with Mr O'Neill the other day.

45

MR GILLIES: Yes. That's right. And the – your Honour's response was obviously a reasonable one but what we say is reasonable is we were entitled to appeal. If we're aggrieved by the decision in a case which we had lost, we're entitled to appeal.

5 HIS HONOUR: Well, I mean, there's no contest about that.

MR GILLIES: All right. Then, the next troubled, or troublesome observation is at transcript 9. Your Honour said at line 5 - - -

10 HIS HONOUR: What about on 7, around line 40, it's the same thing again, isn't it?

MR WYLES: Yes.

MR GILLIES: Yes. Yes, that's the – yes, that's so, your Honour.

15

HIS HONOUR: You have told me you have used the words Damocles and that's why I said to you - - -

20 MR GILLIES: Yes. Yes, there has been various – whether it's quick as a flash, whether it's the noose or whether it's the sword of Damocles, we all know exactly what your Honour meant. Line 5 on page 9, your Honour, transcript 9. As Mr O'Neill did his best to satisfy your Honour, your Honour said:

25 *Well, it's very convenient that those involved are not here today because at the very minimum, Mr O'Neill, the very minimum, I take the conduct of your client, your solicitors and counsel, at the least, as highly discourteous.*

30 And again, we take exception to the reference to them being discourteous but also to the note that it's very convenient that they're not here, as though they're sort of skulking in a back alleyway, your Honour, and not coming to face the music.

HIS HONOUR: Well, it is – it's a fact, isn't it.

35 MR GILLIES: But convenient – no, convenient is a pejorative expression though, your Honour. It's really stating the reverse. The fact is your Honour is there saying, as we would construe it, well, they're deliberately not here. That's the only way we can attribute meaning to that expression, your Honour.

HIS HONOUR: Well - - -

40

MR GILLIES: Unless it's just irony.

45 HIS HONOUR: Well, there is a bit of that in it, I have to say, and, again, viewed through my eyes, that's again not surprising because if you do view the circumstances as I do, that this was – that it was an unreasonable and discourteous course to take where I had left the invitation to come back if circumstances changed

- - -

MR GILLIES: Yes.

HIS HONOUR: - - - then I suppose that is an expression of the fact that those who –
well, in part, at least, Mr Dalton who was there on the first occasion didn't have to
5 respond to what had happened on that day.

MR GILLIES: But that presumes that Mr Dalton is hiding under rock.

HIS HONOUR: Not really. It just says he's not there.

10 MR GILLIES: He might not have been for a very obvious reason he was in another
case. It's not appropriate for your Honour to suggest that he absented himself.

HIS HONOUR: But I don't really say that do I?

15 MR GILLIES: Well, you say it's very convenient.

HIS HONOUR: I mean I just say it happens to be convenient that the people that
would really know are not here.

20 MR GILLIES: Inconvenient would be the correct expression if your Honour was
not engaging in criticism or at least irony.

HIS HONOUR: But I was. I mean, I was being critical so - - -

25 MR GILLIES: But no one was to predict that your Honour was going to be
unhappy.

HIS HONOUR: Well, I'm surprised that they didn't because that's why I say to me
30 with the experience that I've had of courts and barristers and the Victorian Bar this
was way out of line. This was just conduct that – I mean, I've not seen this type of
conduct so that's why the reaction was completely consistent.

MR GILLIES: All right. Well, I've taken your Honour to that. I want to go the
35 next and I mentioned the expression at transcript 9 of "highly discourteous" and then
– and then we have – yes, at line 32 and I've partially taken your Honour through
this:

40 *I mean, you know, we live in a land Mr O'Neill of rationality. That is why I
regard your predecessors and your solicitors and your client's conduct as
discourteous because I made it plain what course I was intending to take and
despite that it was somehow thought a good idea to seek leave to appeal.*

45 Now, again, your Honour, we regard that as a very pejorative expression and
unwarranted in a situation where there is a bona fide decision taken to appeal by a
party aggrieved by your Honour's decision notwithstanding your Honour's effort to
accommodate everyone, notwithstanding your Honour's pains to have a workable

situation they are still entitled to be unhappy. They are still entitled to appeal if they wish to exercise their legal right, and that's what we say about that. That's the 11th area that I've taken your Honour to under this leave application point. The next is at – the 12th is at transcript 10, line 20, your Honour refers to the discourtesy which your legal – sorry:

The discourtesy which your Honour legal team implied of shown to me in the circumstances.

10 Then, your Honour, at 25 says:

Well, an apology might take it further. That's all.

And then at line 37 your Honour said:

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Because I regard it as I said unreasonable and discourteous to have taken the approach you have in the light of what I have said.

And we complain about that as well. That's the 14th area. The 15th is at transcript 15, line 41:

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I've criticised the applicant for discourteous activities which are offensive because they're irrational. I mean a system does require everyone judges, barristers, solicitors, clients to act with a certain degree of decorum taking every valid point, of course, but there's a line, and I've always been proud that in Victoria the profession knows clearly that line is and the same rules apply to you as apply to Mr O'Neill.

25

Your Honour is here addressing Mr Moore:

30

So in the scheme of things I'm not sure where this little debate actually goes.

Now, those are 15 areas in which we want to take your Honour to under this leave to appeal subheading. We will take your Honour to a more general criticism which your Honour makes probably embodying the remarks criticism as well as the leave to appeal criticism. At page 44 of the transcript, your Honour. Perhaps, I could start at page – yes, page 44, line 42. We read this as a catch all criticism, your Honour:

35

I've made some observations about the professionalism of colleagues, yours, your instructors and counsel who appeared in relation to the leave to appeal. The matter is not going to rest with those observations being made but they need to reflect upon what steps they wish to take, if any, in relation to them. So as I'm presently minded I wish to tread carefully when criticising lawyers about their professional conduct, but I do take as I've indicated to you, a view – a view about what they did. They should have the opportunity to consider them and respond if they wish to do so, and I think the proper course would be for me to stand the matter over to give such of them as wish to the opportunity

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45

because at the moment my inclination is to reflect in the judgment the observations which I've made.

5 So, your Honour, we take exception to that comment because not only do we say it's wrong as far as the inference of – well, the allegation of professional misconduct is concerned. We say it's most inappropriate for your Honour to, as we read it, in an unveiled threat to say, "Well, unless you don't react in the way that I want you to react I will put this in the judgment for all to read".

10 HIS HONOUR: No, no, no. Mr Gillies, now, that's just nonsensical. That's just silly really.

MR GILLIES: Well, we - - -

15 HIS HONOUR: I mean what I'm saying is I have said things about certain lawyers. They're not here, and I've said they should be given a chance to explain - - -

MR GILLIES: Yes.

20 HIS HONOUR: - - - because at the moment the view that I have I would set out in a judgment because I – I agree with you that I can't simply say in transcript – make imputations against professional people without explaining what I mean, and that's – so I was saying, well, at the moment what I intend to do is explain the circumstances in the judgment, but I want to hear from them because they may persuade me that I've completely got the wrong idea about where the – where discourtesy starts or ends.

MR GILLIES: Very well.

30 HIS HONOUR: And that's what I was doing. I was saying, "Well, come along" and, you know, maybe, if you read the next few lines - - -

MR GILLIES: I will certainly do that.

35 HIS HONOUR:

I will do that as a last resort.

40 MR GILLIES: I will certainly do that. I will certainly read it but I want to debate this particular point at this stage, your Honour, because we have a real - - -

HIS HONOUR: Yes, there's no veiled threat. That was just a natural justice invitation. That was just saying "Let me tell you what I'm presently thinking. I might be wrong. Come along and tell me."

45

MR GILLIES: All right.

HIS HONOUR: And that's all and to try and jazzy that up in some other way, Mr Gillies, if you can, then it's certainly wasn't intended that way.

5 MR GILLIES: All right, your Honour. Our concern is that it was referred to today as well. We've got a concern that unless we give a satisfactory response to your Honour there's another sort of Damocles, namely, that your Honour will go public.

HIS HONOUR: No, but look, I have to. I mean - - -

10 MR GILLIES: All right. Well - - -

MR GILLIES: ^{H Honour} - - - I have criticised professional people. If that is - if I maintain a view that what they did was as I've said then I speak through judgments of the court. I can't just go around expressing views in transcript and allowing them to be sort of
15 unreasoned, unresponded to. You know, I mean, we do this all the time, Mr Gillies. You know we hear a case - - -

MR GILLIES: Yes.

20 HIS HONOUR: - - - we hear an argument, and then we hear the other side, and then we write a judgment and all I was - - -

MR GILLIES: But this is extraneous, your Honour.

25 HIS HONOUR: Sorry?

MR GILLIES: This is extraneous. This is irrelevant to your Honour's task of deciding this case.

30 HIS HONOUR: Well, except that, you know, we do have a strong proprietary interest in the way the administration of justice works.

MR GILLIES: May be so but any criticism that you make of the legal professional in this particular application, the one that your Honour has just given judgment on, is
35 a different creature. It's a different case to that which your Honour decided. I know it's the same parties and it's the same forum, but it's not within your Honour's judicial power to speak pejoratively about the conduct of people - - -

40 HIS HONOUR: Well, I'm not - - -

MR GILLIES: - - - in another case.

HIS HONOUR: I'm not speaking pejoratively, Mr Gillies. I'm expressing a view about the professional conduct in the course of the case.

45 MR GILLIES: Well, that's a pejorative thing. If your Honour is not persuaded by me - - -

5 HIS HONOUR: Well, the conduct might be – the conduct might warrant
condemnation but pejorative suggests without foundation and I have a – I started at
least with a view about the actions. I think it's the – it's a requirement of a judge if
faced with conduct beyond ordinary responsible professional practice to remark on it,
but then to – then to draw no conclusions without giving those people a chance to
explain which is what I've done, but if at the end of the day the matter – I mean the
matter has to be concluded somehow.

10 MR GILLIES: Yes.

HIS HONOUR: And all I'm saying there at page 40 – at transcript 45 is that how
else can I bring it to an end but by saying "Well, this was what I thought of the
events. This is what they said of the events, and this is the view I've finally come
to".

15 MR GILLIES: Yes. Let me continue with the view, your Honour, because I've
nearly ended that. I want to get to my real submissions, but on this particular point
we wish to develop the argument. Your Honour is ultra vires in - - -

20 HIS HONOUR: Well, what do you expect me to do about that? Nothing - - -

MR GILLIES: You've got no power though.

25 HIS HONOUR: - - - nothing more?

MR GILLIES: You've got no power, and we will come to it, but I want to continue
with this.

30 HIS HONOUR: Well, I mean I can adjourn the court and then the transcript stays as
the transcript is.

MR GILLIES: Your Honour has got no power to be judgmental about the conduct
of my clients and the solicitor in this case.

35 HIS HONOUR: I don't think I'm accepting that but – but - - -

MR GILLIES: All right. Well, look, I want to develop it but I want to - - -

40 HIS HONOUR: Yes.

MR GILLIES: - - - I really want to finish this review till I get to the submissions.
To read on, your Honour. Your Honour goes on to say at line 6:

45 *I will do that, that is, reflect in the judgment, and I will do that as a last resort
because it will involve imputation on people's professional ethics and morality,
if not their professional actions, I mean, the legality of their professional
actions or the – so for that purpose I think the best course is to stand the matter*

5 *over generally to allow that to happen then to indicate to me what they would wish to do, if anything. They can let the matter just go, of course. They can seek, I suppose, to address the issues and explain. They can if they accept what I say, and I may be quite misguided about the way I view the situation and I accept that as a possibility. I'm open to hear what they say and I do. I don't wish to unnecessarily reflect on professional people's integrity and professional activities. As you know my view presently is that the words need to be said about those things so if you just pardon me a minute.*

10 Your Honour, that concludes the review of the observations made by your Honour connectable to this issue of the leave to appeal application. During the course of that review I have addressed some arguments but I want to spend some time elaborating the argument on power. Jurisprudentially, your Honour, in deciding this case today is hearing a different case to the one which your Honour decided before and went on
15 appeal. The moment your Honour decided that case before and gave – made the order, reinstating the worker with the explanatory note and it went on appeal your Honour was functus officio on that point.

20 Thereafter, it was a matter for Middleton J to gauge the strength of the appeal. It was not your Honour. Your Honour had no right. Middleton J had a statutory function to decide the appeal. If he thought that it was of no merit, if he thought that it was vexatious, if he thought that it was rude having regard to your Honour's efforts to please everyone and your Honour's carefully fashioned judgment, if he thought that, that was his job not your Honour's. Your Honour is not the umpire of that dispute.
25 If Middleton J was critical of my clients and their instructor then they could deal with that but he was the only one empowered to do that, not you. Not you as the trial judge with a complaint about an appeal being lodged against his carefully thought out decision. It came back to your Honour on a fresh application.

30 HIS HONOUR: It remained with me in my docket.

MR GILLIES: It might be on your docket as a matter of court administration, but your Honour is being critical of not misconduct which was before your Honour today and the day before yesterday. Your Honour is being critical of what happened in
35 respect of the matter in which your Honour is functus officio, and in respect of which was the domain of the appeal justice. Your Honour could have been hearing any case today and the day before yesterday. Your Honour, it's just a coincidental platform that your Honour happened to have the same parties before your Honour on a different application.

40 HIS HONOUR: But in my docket.

MR GILLIES: Yes. In your docket, but hierarchically as a matter of jurisprudence that's a different case.

45 HIS HONOUR: I'm concerned with the management of the case.

MR GILLIES: You might well be concerned about the management of the case, but we are concerned about whether your Honour has the power to be critical.

HIS HONOUR: About how lawyers involved in a case that's in my docket behave?

5

MR GILLIES: Yes. Yes.

HIS HONOUR: Well - - -

10 MR GILLIES: Your Honour has no right at law to intrude into the appellate function. It's not your Honour's job. Your Honour is complaining about the exercise of an appellant right, not a misconduct in a hearing before your Honour.

15 HIS HONOUR: No. Well, that's one way of characterising it. But my complaint is about the conduct in relation to the reinstatement order which was interlocutory and qualified.

20 MR GILLIES: I understand all that, your Honour. But we emphasise that your Honour is intruding into the appellate process by even looking sideways at Mr Wheelahan and his learned junior and their instructors because your Honour has got no standing to do it. It would be different if he gave me the sack now and wanted to take over the conduct of the application and said something that your Honour regarded as discourteous. That would be different. But your Honour, as a matter of looking at this in a principled manner, has, we say, strayed to interfere with appellant rights and to virtually move alongside Middleton J in the appellant function.

25

HIS HONOUR: Well, maybe you'd like to seek leave to appeal against the remarks that I made.

30 MR GILLIES: No. We don't seek leave to appeal against that.

HIS HONOUR: I think that's what Mr Harmer tried to do in Ashby.

MR GILLIES: Is that so? Well - - -

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HIS HONOUR: Judge was fairly critical of Mr Harmer.

40 MR GILLIES: Well, there you are. That's not what we do. But we emphasise, and despite that slight excursion from what I'm saying, your Honour, that this is an exercise beyond your Honour's power. And it's a serious point because chapter 3 of the Constitution defines judicial power. Your Honour has got a constitutional obligation to properly exercise judicial power. And we say that your Honour, in seeking to criticise in a highly critical manner members of the profession and attack on reputation is as serious as it gets. And would be enough common ground. We say that your Honour is going beyond your constitutional power because your Honour, once there is an appeal, has got no right to be critical. It's not something that is happening in your Honour's patch. It - your Honour might be hurt and upset

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that your Honour's efforts to please everyone have not been recognised. And we understand that as a human characteristic.

HIS HONOUR: That's not the basis.

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MR GILLIES: All right. But what we do react to is a trial judge asserting any criticism at all in the public forum about practitioners who appeal against a decision. The short point is, your Honour has got no right to be heard on that once it leaves your Honour. Once an appeal notice is served, or a notice of application for leave to
10 appeal notice is served, your Honour has no juridical function at all on that particular matter. And your Honour, by being critical of the legal profession in this area, we say, is straying beyond power. Your Honour, is - - -

HIS HONOUR: Well, I could just refer the matter to the bar, I suppose, and the
15 Law Institute and let them investigate.

MR GILLIES: We would be quite happy if that be done.

HIS HONOUR: Would you like that to be done?

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MR GILLIES: Perfectly happy with that be done. Our preference is that your Honour withdraw the remarks. Our preference is that your Honour realise that, notwithstanding your Honour's efforts to produce a solution to the case, one side was not happy with that solution. And in this civilised community you don't jump up and
25 abuse the umpire. If you don't like it, you appeal. And that's what they did. So it's a very big legal point, your Honour. It's one that goes beyond management of the list or the docket. It goes to management of the court. And it's of enormous importance to the administration of the court if a judge were to be regarded as going beyond his constitutional power. And we don't want to go down that track. We
30 want to resolve this in a manner satisfactory to all sides. We won't apologise because we say we have done nothing wrong. Your Honour has been upset and that's a cause of regret.

HIS HONOUR: Mr Gillies, I can't let you keep saying that. That's not the point. I
35 say there has been a professional discourtesy. It doesn't matter whether I am upset or not. But in terms of what the proper conduct of barristers and solicitors in the situation that faced them was, I say what they did was professionally discourteous. And it's disruptive to the relationship between the bar and bench. And it's disruptive
40 in the management of this case. If you want a statutory basis for my jurisdiction I have the function under the Federal Court of Australia Act to manage the case and if counsel retained in the case act in a way which is discourteous beyond an acceptable limit in our professional understanding, I think it's my function to say so. I mean, if,
45 for instance, in the course of the hearing the other day a member of counsel had come into court and put his feet up on the bar table and started reading the newspaper, could I have done anything?

MR GILLIES: You could because your Honour runs your own court.

HIS HONOUR: But it's got nothing to do with the case.

MR GILLIES: No. But your Honour is running your own court. If someone walks in naked you are entitled to have them thrown out.

5

HIS HONOUR: Yes.

MR GILLIES: It doesn't matter - - -

10 HIS HONOUR: And when I'm managing a case in my docket if counsel have acted discourteously in respect of an order which I made - - -

MR GILLIES: Yes but their discourtesy is an exercise in our appellate right. That's the - - -

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HIS HONOUR: No. Their discourtesy was in the steps they took in relation to a judgment which I had made which gave the right to return. It was a discourtesy in relation to the ongoing management of the case given the rights under that order. Anyway, that's perhaps - - -

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MR GILLIES: Well, you know the response, your Honour.

HIS HONOUR: Yes.

25 MR GILLIES: The response is that they have got a right to appeal.

HIS HONOUR: But I ought to say that the resolution which you are proposing is that you have a withdrawal of what I have said. Now, you are not going to get that because I'm not so far convinced from what you have said that the discourtesy point has been answered. And as for the jurisdiction point, well, if you show me a case maybe but it seems contrary to all understanding that I have built up over about 35 years.

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MR GILLIES: All right. We put it this way, your Honour. Firstly, your Honour - - -

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HIS HONOUR: Is there a case that says something like this in these types of circumstances?

40 MR GILLIES: Not this precise. But the fact of the matter is, the Constitution is a legal document. It's a reasonable authority. And your Honour's juridical power involves deciding cases.

HIS HONOUR: Yes.

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MR GILLIES: And deciding cases - - -

HIS HONOUR: Dealing with professional people who appear in them.

MR GILLIES: Yes.

5 HIS HONOUR: And that's who these were – are.

MR GILLIES: But that is so, but not professional people - - -

HIS HONOUR: Anyway, I doubt that's your strongest point.

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MR GILLIES: Well, we ask it to be taken very seriously, your Honour, because

- - -

HIS HONOUR: I don't take it very seriously.

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MR GILLIES: Well, we urge your Honour to do so because we say that it's a logically unassailable point. And we say that it's a serious point that a trial judge gets annoyed and upset because someone appeals against his decision. We say that's the first point. The second point is that that judge exceeds power by acting against

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- - -

HIS HONOUR: Well, then you can get Mandamus.

MR GILLIES: We could.

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HIS HONOUR: You can get the High Court to - - -

MR GILLIES: We can do – we can do lots of things. Your Honour can write a florid judgment if your Honour wants to do that. Or you can get Mandamus if you want to do that. We can exchange cannon fire for months. But it's not the way to do it, your Honour.

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HIS HONOUR: It's not. But you're not giving me much of an option because I – I am not at the moment accepting your point about the discourtesy in the circumstances which were special.

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MR GILLIES: All right. Well, your Honour would need to explain in giving reasons how it is that a trial judge can justifiably criticise someone for seeking leave to appeal against a decision. Because that's what they've done.

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HIS HONOUR: Absolutely.

MR GILLIES: They have no put their feet on the bar table. They have not been abusive. It's not one of these cases where someone has been insolent to the judge.

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Their crime, in your Honour's view, is appealing before your Honour's decision.

HIS HONOUR: Before coming back to me.

MR GILLIES: There's no rule of law that requires that.

HIS HONOUR: No. I'm not talking about rule of law. I'm talking about courtesy. We're talking about relations between the bench and the bar.

5

MR GILLIES: I know - - -

HIS HONOUR: Anyway we have traversed this ground - - -

10 MR GILLIES: Look, there is no rule that someone comes back to a trial judge and says, "Look, your Honour, as a matter of courtesy, whilst you have done your best we are going to appeal". That's not done. And that would be a very precious situation - it would have to be - done. That's - you are saying, with all due respect, not a tenable position. The - if they formed their client's bests interests as served by
15 a notice of appeal their obligation is to appeal. And to run the risk of your Honour being upset. To run the risk of your Honour feeling unloved about the trouble that your Honour had gone to.

20 HIS HONOUR: Mr Gillies, you know, you keep trying to draw it back to that, as a personal issue of offence. It is not that. Can I ask you to stop referring to the matter in that way. I don't care a hang personally about whether you appeal or you don't appeal. I mean, you know, you sit on a court for many, many, many years. There are many appeals. If you got upset about appeals you would no longer be a judge.

25 MR GILLIES: Well, we say your Honour is upset.

HIS HONOUR: It's not a matter of personal upset. It's a matter of an assessment of professional conduct as I have observed it over many years and the extent to which this was a discourtesy. That's all.

30

MR GILLIES: Right.

35 HIS HONOUR: It's a timing question. Of course there's a right to appeal. Your clients had every right to seek leave to appeal. But where the circumstances had arisen and you were given a right to come back, that should have been what you did.

40 MR GILLIES: Well, they weren't - they didn't disclose that fact to Middleton J. And, in fact, your Honour criticised them for mentioning it. That's - we say that's an inconsistency, with the greatest of respect. But we don't wish to deviate from our main point which was that your Honour as a trial judge has no right to be critical of anyone who appeals against that decision. That the instant counsel is timorous about appealing for fear of annoying the judge, they let down their client. Their duty is to their client in this regard. If they think that there is a reasonable prospect of success on appeal, they are obliged to give that advice.

45

HIS HONOUR: Did they really?

MR GILLIES: They must have thought that, then your Honour - - -

HIS HONOUR: No. No.

5 MR GILLIES: - - - raising an eyebrow at that indicates a malevolence which we shouldn't have to contend with.

HIS HONOUR: I raised two eyebrows because given that this was an interlocutory discretionary decision where the sword of Damocles held over, it would have amazed me if leave to appeal would have been granted.
10

MR GILLIES: Well, it was not granted but that doesn't alter the fact. If they bona fide thought that they had a reasonable prospect of appeal they are obliged to tell their client that. And they are obliged to carry on with that. That is part of the independence of the bar. Your Honour would have done that countless times.
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HIS HONOUR: Of course. No one more so.

MR GILLIES: And run the risk of being unpopular with the judge before your client many times.
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HIS HONOUR: No one more so, Mr Gillies.

MR GILLIES: But we say that's what they're doing and they are being - - -
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HIS HONOUR: Well, I characterise it completely differently.

MR GILLIES: - - - chastised, to put it mildly, for that. And we say that it's very much a fall back situation. If your Honour is correct in being upset or feeling that a discourtesy has been done, that should not warrant your Honour taking the next step which is a gigantic one of accusing them of - just one moment - yes. Your Honour, coming back to this point, your Honour has no right to criticise anyone for appealing against your Honour's decision. In respect of whether your Honour had whether the applications for leave had reasonable grounds, again, that's not for your Honour to speculate about here.
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HIS HONOUR: No. But you're - you - - -

MR GILLIES: That's Middleton Js job.
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HIS HONOUR: You got that response because you said, in portraying these circumstances, that these were just fearless barristers who were advising their client of the right to seek leave to appeal in circumstances where they genuinely thought that there was a chance that they would succeed on it. And I raised both eyebrows, because it looks to me, for what it matters, as if it was so hopeless a case that if I were in Middleton Js position, I would have made DP World pay the costs of the application. It was hopeless.
45

MR GILLIES: Well, that's what – but your Honour is being the judge - - -

HIS HONOUR: It was hopeless for the very reason why I say it's - - -

5 MR GILLIES: But your Honour is being the judge of your own judgment.

HIS HONOUR: Yes. A very good position to be in.

MR GILLIES: But it is.

10

HIS HONOUR: But. No, I mean, look - - -

MR GILLIES: It's like a football supporter applauding the umpire for giving his team a free kick. We say that your Honour's example is a bad one, because the whole idea of appeal is to have some independent eyes looking at the problem.

15

HIS HONOUR: Yes. But you're trying – you elicited this response, Mr Gillies, because you are trying to paint a picture which, again – I mean, I've tried to bring you back to the real world of this case and these circumstances, which is what has got me going. And those circumstances where you are not talking about fearless advocates who are seeking to vindicate a sleight of hand wrong which they have endured and need to seek leave to appeal.

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MR GILLIES: No, I'm not.

25

HIS HONOUR: Of course I accept probably more than anybody at the bar that there is a right to take difficult appeals and to challenge the judiciary and to challenge decisions. I mean, the practice at the bar was based on that in those years, you know. But that's not this case. This case is where, in a line ball, I say, "Look, I am really – I don't know which side of the line this falls on, so put him back, because he's going to suffer consequences if he doesn't, but any problem, come back to the court."

30

MR GILLIES: I understand that, your Honour.

35 HIS HONOUR: It's in those circumstances where then to go off and appeal is - - -

MR GILLIES: Well, if your Honour says "Go off", they're entitled to go off and appeal. That's their right.

40 HIS HONOUR: Yes. Well - - -

MR GILLIES: Go off doesn't mean go off and do something illegal. It means they exercise their statutory right of appeal.

45 HIS HONOUR: In a way that was discourteous.

MR GILLIES: But – not in a way. They served a notice. That’s what happens. It’s not serving a note with “Take that, Justice North” written across the front of it. They exercised their right in a proper manner. And your Honour, as the trial judge, as I say, by making these criticisms, is not only acting ultra vires, but is intruding into the appellatant function. That’s why we have a separate court of appeal to – or in this case, a statutory court of appeal. That’s why it is. And we say that your Honour’s conduct is completely erosive of the freedom of that right to appeal and entirely inappropriate that you be critical of legal advisors conscientiously advising their clients.

10 I’m not saying they’re heroic. An appeal on an interlocutory matter would not be the brightest jewel in Mr Wheelahan and Mr Dalton’s crown. But they’re entitled to have a client properly advised. They gave advice and they lost. You win them and you wear them. But they shouldn’t have to put up, in our respectful submission, with cutting criticism that goes straight to their reputations. It’s the worst thing that can be said about a barrister or a doctor or any other professional person. And we’ve got an anxiety that your Honour accept their bona fides, that never was there any slight intended. We’re unapologetic, because we simply say that we behaved appropriately. And it’s not reasonable that your Honour - - -

20 HIS HONOUR: What I think you have to contend with – where you’re resisting an apology, Mr Gillies, is what you have to contend with is the possibility that I remain of the view that this was a discourteous approach. And you might disagree with that. But at the moment you haven’t persuaded me that that view is wrong. And then the question becomes, “Well, that’s what he thinks, we’ve put our best shot. We think he’s wrong, but he’s not going to change his mind – or he hasn’t changed his mind, rather, at that point.” And so that’s where – I think that’s where we’re at at the moment. And that’s where some resolution needs to be plotted in relation to a way forward, because, you know, I mean, I will deal with all these arguments in a judgment. I don’t think that it would be responsible for me to do otherwise, unless you can tell me some other way out of it.

30 MR GILLIES: Well it’s not a case of a way of out it. It’s a case, as we say, of your Honour applying principle and that principle is your Honour, as a trial judge, has not got a right to criticise someone for appealing against a decision.

HIS HONOUR: Well, I don’t accept that.

40 MR GILLIES: All right.

HIS HONOUR: So you have to contend with the fact.

MR GILLIES: Right.

45 HIS HONOUR: I mean, I will sit down and examine these propositions and then determine them, if the need arises. But if you want my view at the moment, then I don’t see a basis for that.

MR GILLIES: And I want your Honour to carefully consider our arguments, of course. We're distressed by your Honour's initial reaction that we were facing a very difficult task. And we accept that your Honour says - - -

5 HIS HONOUR: Well, you were. I mean, it's no use me hiding - - -

MR GILLIES: All right.

HIS HONOUR: It's no use me disguising the task that you've got.

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MR GILLIES: No. Well, we are distressed by that, because, in our submission, our task should be simpler. We submit that our arguments are good arguments and are not capable of being answered by reference to your Honour's undoubted endeavour to please everyone and to provide a mechanism for disquiet, because there's no basis for saying "That's a discourtesy," when a legal right is being executed.

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HIS HONOUR: Well, I do contest that proposition in the circumstances of this case.

MR GILLIES: Yes. And even to talk in terms of discourtesy rather than illegality; discourtesy rather than extreme impropriety. Discourtesy is a really bad adjective to apply to a barrister. We depend on a courteous approach, a vigorous approach. And from the bench too.

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HIS HONOUR: Absolutely.

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MR GILLIES: There's a reciprocity of courtesy. And that's how it works. We accept that. And that's part of our concern, that there's a public assertion that a silk, his junior and a solicitor have – by executing an appellate right, have been discourteous. And that's a bad prior conviction for an advocate, for advocates that take themselves very seriously and propose to appear in this court. It's a bad starting point for them; it's a bad starting point for their clients. That's why they take it's so seriously. They're not just, by reflex, retaliating to your Honour criticising them.

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HIS HONOUR: Of course.

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MR GILLIES: We're all used to being criticised, that's part of the process. But being criticised is one thing, but being accused of an ethical impropriety is completely different. So that's why we say that your Honour, having – the air has been cleared and that your Honour, in that situation, should understand that whatever has happened, it has been in good faith. There has not been anything of a personal attack of slight or vendetta. And when viewed through that prism - - -

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HIS HONOUR: Well, how could I form that view? I mean, there's nothing at all on which to base that.

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MR GILLIES: But your Honour should presume it. You don't have to – it should be presumed in the absence of evidence to the contrary. It's not something - - -

HIS HONOUR: But the evidence to the contrary is the circumstances of the case.

MR GILLIES: But then we go back to what we've been arguing about for the last hour and a half.

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HIS HONOUR: Yes, we are.

MR GILLIES: And I don't want to be repetitive and neither does your Honour.

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HIS HONOUR: No.

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MR GILLIES: But we say we have a bona fide reaction to the very serious suggestions that your Honour has made. We accept your Honour's invitation to come back and we're grateful for that, because plainly it would have been most unfair for us not, as a matter of natural justice, to be heard. And your Honour was very conscious of that and lucidly expressed that fact in your Honour's statement of reasons the other day. However, having said that, it's of complete importance to us that any suggestion of impropriety, illegality, poor ethics, be removed. We would ask your Honour to be impressed by the serious reaction that they're taking to this.

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HIS HONOUR: Well, I am that.

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MR GILLIES: There's no disdain in your Honour's observations. There's no, "Well, what does it matter? Justice North can think what he likes." There's none of that.

HIS HONOUR: Exactly.

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MR GILLIES: There's none of that.

HIS HONOUR: And that is completely consistent with what I said earlier about the standards which have been observed by the Victorian bar throughout the years that I've been a lawyer in Victoria.

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MR GILLIES: Yes. Well, I would ask your Honour to draw on that well of information. And it's not only your Honour as a judge, it's your Honour as a barrister too. Your Honour has been heavily involved in the community of the bar, as well as the community of the bench. Your Honour knows how the wheels turn. Your Honour knows how someone can be regarded very poorly by just the suggestion of "He has to be watched" or "he's rude." It's enough.

HIS HONOUR: Exactly.

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MR GILLIES: And just as your Honour wouldn't wanted to have gone through your life at the bar as someone who has to be watched – it's the way it's put, isn't it, "You've got to keep your eye on him." That's why it's a very precious commodity. And even a slight attack – and we don't regard this as slight, because your Honour,

obviously, was very concerned to make the point your Honour has – we would ask your Honour to be impressed by our reaction to it.

HIS HONOUR: Well, I am that.

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MR GILLIES: It's a serious and conscientious rejoinder. We're not just here to be critical of your Honour. We're here defensively of our clients. And they're here engaging us to do that. And we're anxious to convey the great seriousness that they regard these allegations to be. That they're a matter that goes right to the bone of being a professional person, particularly coming from the most experienced judge in this area, in this court, from individuals who propose to practice in this court. We say it's very important that your Honour be very impressed by their serious and conscientious reaction to your Honour's concerns. And - - -

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15 HIS HONOUR: Well, all that, I absolutely do. I am impressed by that. But it leaves the problem about the events themselves.

MR GILLIES: Yes.

20 HIS HONOUR: Because I - - -

MR GILLIES: But your Honour might be satisfied by the seriousness and conscientiousness of the reaction - - -

25 HIS HONOUR: I am.

MR GILLIES: - - - that the matters your Honour has ventilated have had a purpose. Your Honour might think that. Your Honour might think that it has been a useful exercise to debate this in some detail. Not in a malevolent or insulting manner, but in a sensitive and relevant manner, as being a reasonable *raison d'être* for what your Honour expressed. Your Honour might see that as a reasonable approach in this situation. It's not a case of your Honour saying, "Look, I want an apology. I'm not going to do anything unless I get an apology." Your Honour is not a churlish man. Your Honour might think the ventilation of this problem and the fact that a lot of time and effort has gone into the response to it – a lot of blood, sweat and tears, I would ask your Honour to assume, from the viewpoint of those whose integrity is on the line, your Honour might well think it's the – sort of been the last thing they think about before they go to sleep and the first thing they think about when they wake up. Your Honour might think that's enough.

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HIS HONOUR: I'm very well aware and I hesitate long and hard – and if you look back through my record you will find that this type of intervention is extremely unusual. But that rather reflects the reaction to the circumstances. So all the things you've just said about the seriousness with which your clients have treated the matter are absolutely accepted. It leaves the issue, however, of my assessment remaining the same on the fundamental point about the action not to come back but rather to seek special leave, and I'm not presently minded to express a different view on that. I do,

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5 however, acknowledge that your clients have taken my comments very seriously and that is appropriate, and that is the sort of ethic of the Victorian Bar that I value enormously, but which I see the other conduct as having been inconsistent with. So I said it on the previous occasion: I know how valuable the integrity and reputation of barristers is, and I would tread very carefully before impugning it. But there are lines, and I think they have been crossed, so I'm not sure where one goes from here.

10 MR GILLIES: We invite your Honour to take into account in the balancing act what I've put – that is, about the judicial function – on the one hand this; on the other hand that. We say that your Honour should regard their reaction as being entirely appropriate in coming to court, engaging me to articulate their problems, and to engage your Honour so that I can persuade your Honour, if not of the incorrectness of what your Honour has done – and that's our principal point – but their reaction to it is completely honourable in protecting their integrity in a rational and reasoned matter, a non-adjectival manner, and we say that whilst what your Honour did was incorrect, and we don't resile from that – your Honour says it's correct – that's not a solution to the problem.

20 The solution to the problem is, do they deserve to be publicly named in a situation where we have a bona fide dispute between a barrister and a judge where the judge, because of his superior ammunition, the powers that are invested in your Honour, can inflict a lot of damage, and we say that your Honour should not do that.

25 HIS HONOUR: Well then, where to from here?

MR GILLIES: We say that your Honour should simply withdraw the criticisms.

30 HIS HONOUR: Well, they reflect my view, and that view is not changed. So that's a course that I'm not very attracted to follow.

MR GILLIES: It's not fair though, your Honour, because your Honour's view would stand, but our reaction would not. It would become a sort of a one sided publication.

35 HIS HONOUR: Well, it's clear from the transcript that you regard my view as incorrect. So what is concerning me is what you say about the superior firepower, and the fact that me, having said it, is damaging to your clients in a way that can't be properly responded to by simply referring to the transcript where you say, well, you disagree, and that's why - - -

40 MR GILLIES: People don't want to do that. That's not the – you know, when there's a natural disaster people start counting the bodies; they don't look for a good result.

45 HIS HONOUR: But we're in a position where you haven't persuaded me. Isn't the only course that I have got, regrettable though it might be, to reflect in a reasoned

decision why I've come to that view – as we always do, put your arguments, analyse them, and say, “Well, that’s not the view I have,” and then - - -

5 MR GILLIES: But, having done that, your Honour might be of the view that we’re right. Your Honour again - - -

HIS HONOUR: Well, possibly.

10 MR GILLIES: - - - predetermining that, as your Honour notionally writes the judgement, your Honour has already got a bottom line that we lose. That’s not acceptable.

HIS HONOUR: Well, at the moment that’s the view I have, so viewing it on that basis, we’re trying to find a way forward apart from - - -

15 MR GILLIES: Yes.

20 HIS HONOUR: - - - creating damage to your client’s reputation, which you say is unfair, and I’m seeking to explore the fact that there is, I think, some point in that observation that I can make a very damaging judgment which is very directly professionally harmful, in circumstances where it is, in a lot of ways, a side issue, and that does concern me and, as I said originally, I don’t want to do that. But I’m just at the moment puzzled about how otherwise to deal with the matter, given that at the moment you haven’t persuaded me that my view about discourtesy is wrong.

25 MR GILLIES: Yes. Well, I understand what your Honour is saying and, your Honour, we can’t prohibit your Honour from writing a judgment. We would caution your Honour about that, because our main point, or a main point is that your Honour is not empowered to do it.

30 HIS HONOUR: Yes.

MR GILLIES: I don’t want to have this debate in this - - -

35 HIS HONOUR: Mr Gillies, I see the time, and I think we’ve probably got to a point where I think you’ve put what you have to put. I would like to think about some way of resolving this other than the ordinary way of just writing a decision and analysing the arguments and coming up with some very interesting material about the ethics of barristers and where they start and where they stop. I’m sure that will be interesting reading for some, but we’ve got a practical issue, and so it might be useful to think about that over lunch, and mention the matter shortly at – it will have to be 2. Yes, because I have a case starting at 2.15 by videolink so we can’t - - -

45 MR GILLIES: No, that would suit our convenience to come back at 2.

HIS HONOUR: Yes. Very good. Well, I will - - -

MR WYLES: And if your Honour wishes to come back at – we don't have very much to say on behalf of our client I'm instructed, your Honour, but - - -

HIS HONOUR: The only thing I think left for you and Mr Moore - - -

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MR WYLES: Well, just on the issues that my learned friend has been adumbrating this morning, your Honour, we just wish to, on behalf of DP World and on behalf of our instructing solicitors, assure your Honour that absolutely no discourtesy was ever intended in the course which your Honour has come to view with, if I might say respectfully – there's always a looking forward and a looking back at these things, and we wish to assure your Honour that it was absolutely no intention that there be any discourtesy whatsoever.

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HIS HONOUR: Yes, thank you. Well, is it convenient for you to come back at 2

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MR WYLES: Certainly.

HIS HONOUR: - - - Mr Moore, with some orders which reflect the judgment that I gave this morning, and – well, you may not need to even come back if the two of you can talk about it, because what – Mr Gillies, if I can just interrupt you so we resolve this orders issue.

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MR GILLIES: No. I'm not saying any more before lunch, your Honour.

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HIS HONOUR: Yes. You will have to cater for the discharge of the reinstatement order, and I'm not sure what you want to do about the undertakings. Probably they don't any more apply, any of them or some of them. And then what I can give you is the information that the matter will be listed for trial on 23 June for two weeks before Jessup J, and so you can - - -

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MR WYLES: Prepare a timetable accordingly.

HIS HONOUR: - - - work out the timetable going backwards from that, and - - -

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MR WYLES: 23 June.

HIS HONOUR: 23 June.

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MR WYLES: 20?

HIS HONOUR: 23rd.

MR WYLES: Thank you, your Honour. Sorry.

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MR MOORE: Your Honour, if it's convenient, I think it would be practical from my perspective to liaise with my learned friends about an order.

HIS HONOUR: Yes. And just send one up.

MR MOORE: Is that convenient, your Honour?

5 HIS HONOUR: Yes.

MR WYLES: Certainly.

MR MOORE: Yes.

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HIS HONOUR: I don't think there - - -

MR WYLES: Perhaps that might even arrive in your Honour's chambers either later this afternoon or Monday.

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HIS HONOUR: Well, either would be fine. I don't think there are any other issues. If the order reflects the discharge of the reinstatement order - - -

MR MOORE: Yes.

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HIS HONOUR: - - - and the timetable, and the listing commencing on 23 June for two weeks.

25 MR MOORE: Yes. I think your Honour had asked me about the estimate of witness numbers. That was the other outstanding matter before.

HIS HONOUR: Yes.

30 MR MOORE: And the estimate of witnesses that the applicant proposes to call, there will be at least three witnesses, and perhaps four witnesses.

HIS HONOUR: And now, taking into account the number of witnesses that the - - -

35 MR MOORE: Six, the respondent had identified.

HIS HONOUR: - - - six, and how many for you? Four?

40 MR MOORE: Four. So I would have thought the reservation of two weeks is prudent and appropriate in the circumstances, your Honour.

HIS HONOUR: Yes. Well, I have said to Jessup J that I thought two weeks was the outside.

45 MR MOORE: Yes. I think that's so for this side of the table, your Honour.

HIS HONOUR: Yes. All right. Well then, I will just expect a form of order which is agreed by both sides.

MR WYLES: Thank you, your Honour.

MR MOORE: Yes, and may we be excused from - - -

5 HIS HONOUR: Yes.

MR MOORE: Thank you, your Honour.

MR WYLES: We may return, your Honour.

10 HIS HONOUR: Yes, certainly.

MR MOORE: Thank you.

15 HIS HONOUR: And, Mr Gillies, I will hear you further at 2 o'clock.

MR GILLIES: Thank you, your Honour.

HIS HONOUR: Yes. Thank you. Would you adjourn the court, please.
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ADJOURNED [12.49 pm]

25 **RESUMED** [2.02 pm]

HIS HONOUR: Mr Gillies, was there anything more you wished to say?

30 MR GILLIES: Just a few moments, your Honour – another five minutes. Without
being repetitive – I know that's completely unnecessary – we wish to reiterate that
we've got a fervent desire to have a cordial resolution of this situation. We do ask
your Honour to take into account the fact that my clients, like your Honour, are
highly reputable people and that, in humankind, it's possible for intelligent and very
35 reputable people to have different views on topics – definitionally, on the meaning of
"discourtesy". We accept that, definitionally, your Honour genuinely and sincerely
believes there has been a discourtesy. We would ask your Honour to accept, as a
threshold point, that my clients genuinely and sincerely believe it has not.

40 If decent, intelligent people genuinely disagree, there should be a solution and not a
solution whereby someone is punished reputationally, which is far worse than any
fine as your Honour would understand – far worse than a conviction. It's the worst
possible thing that could happen to a practitioner. In that situation, it's my respectful
submission that each side to this dilemma should have it within themselves to accept
45 the other's view and to part, whilst not satisfied – it's a difficult situation – but to
part friends in the sense that there should be no inhibition from my clients ever
appearing in front of your Honour.

HIS HONOUR: Of course not.

5 MR GILLIES: They dread the situation where they might think they've got to tell a client of a difference that they've had with your Honour of an etiquette nature. I want to be in a position to say to my clients that they don't have to do that as a matter of informed consent of a - - -

10 HIS HONOUR: Well, they don't have to do that. I mean, that's certainly not required.

MR GILLIES: No. But I would want to put myself in a - - -

15 HIS HONOUR: I accept everything that you've said up to date. I mean, Mr Wyles had a formula which seems very acceptable to me and I don't know – it took him about a minute to say. I don't know whether that's not the most prudent course to follow.

20 MR GILLIES: Inferentially, we're certainly content to say that no disrespect was intended - - -

HIS HONOUR: Well - - -

MR GILLIES: - - - and no offence was intended. That's - - -

25 HIS HONOUR: Well, that's - - -

MR GILLIES: I don't need instructions for that.

30 HIS HONOUR: Well, isn't that the core of it?

MR GILLIES: It is.

35 HIS HONOUR: And once you get to that, it seems to me everything else that you've said follows and then, of course, you can differ with my view. You didn't start that way. You said, "Your Honour is wrong. Your Honour needs to withdraw what you said," and now it's, "Well, I accept you have that view and I know it's genuinely held and I never doubted that the argument that you were putting was genuinely put and" – but that being the case, isn't that the end of the story?

40 MR GILLIES: We would hope so, your Honour. We've got a genuine fear that if it were to be taken further, it would not be good for my clients; it would not be good for the court. We don't want to go upstairs to the High Court and have some argument about whether something is ultra vires or not. It's the last thing we want to do, but if the disputing parties could separate on the basis that everyone has got a
45 genuinely held view – they're irreconcilable but they're - - -

5 HIS HONOUR: Well, I think that's where we got to this morning and then you were given the opportunity to seek to persuade me that I was wrong about how I viewed the circumstances and I'm not persuaded at the moment, at least, about that but as you say, that gets us to a position of saying, "Well, your clients think one thing. I think the other." The statements that I made were, if you like, descriptive so that they're not operative in the sense of having an effect on a judgment or orders or ongoing issue, so we're arguing about how we characterise the events of the past and I don't think we're going to bridge the gap about the view we each hold about that but - - -

10 MR GILLIES: No.

HIS HONOUR: But that's fine. Well, as long - I mean - - -

15 MR GILLIES: Yes. Well, that seems to be a common ground, your Honour.

20 HIS HONOUR: Well, except that the step - the step, I think, that stood in the way until after lunch was the position you took which was the requirement on your side, in effect, to have an acknowledgement that my view was wrong. Now you've shifted and that puts you, it seems to me, to the position that Mr Wyles expressed, which rather answers much of the discourtesy point. I mean, I continue to hold the view about the events but if the position is that this was done without any intention to be discourteous, well, that's really about as far as you can ever go because I'm not going to require you, as you sought to do to me, to change your mind and, you know, grovel and say, "Well, I got it all wrong."

25 MR GILLIES: No. We're not intending - - -

30 HIS HONOUR: I mean, I will not do that and your clients are obviously not going to do that either.

MR GILLIES: No. No.

35 HIS HONOUR: But it doesn't seem to me that that needs then to lead anywhere in particular.

40 MR GILLIES: No. It may have been triggered by your Honour's observation that we could advance contrary argument - to come along to advance contrary argument - or it may be attributable to me being an adversarial advocate - all these things rather than a conciliatory one. All these things are possible - - -

HIS HONOUR: They are.

45 MR GILLIES: - - - without making any admissions. However, the - we still have this problem with the transcript.

HIS HONOUR: Well, you've got this transcript too though.

MR GILLIES: Yes. We do. But we still have a fact – the senior and highly distinguished member of this judiciary has used expressions that I’ve taken your Honour to, and whilst your Honour has heard the contrary argument, the contrary argument is not as newsy as via the allegation.

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HIS HONOUR: Is not as “newsy”?

MR GILLIES: Yes. People retracted other people’s misfortune – not their explanation. It’s just a human nature thing and we’ve got this abiding worry, even as we will part friends, to have these observations - - -

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HIS HONOUR: Well, what – that can be addressed by a paragraph in the reasons which I gave this morning, which say something like this: that, arising out of the appeal, I have the view that the course of events involved discourtesy. I, in consequence of expressing that view, gave your clients an opportunity to explain. They sent you along that that was a responsible, reasonable and proper response in the circumstances; that you put a number of arguments – I think the only one I really need to specify is that that exercise of a right of – right to seek appeal is – cannot be categorised as discourteous conduct – something to the effect that courtesy is essential in the relationship between the bench and the bar. Neither side – or there was no ultimate resolution of that difference, however, your clients indicated that no discourtesy was intended and, on that basis, the matter need – nothing more need be said and if that - - -

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MR GILLIES: Well, I will need to get instructions on that, your Honour, because I’ve got a jurisprudential difficulty with it in the sense that your Honour would still be expressing a view – even if it was highly complementary to my clients – expressing a view in a judgment – a view which was not directed at any tryable issue in dispute.

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HIS HONOUR: Well, I can say that too. I can say you put the argument that I had no jurisdiction and I again differ with you on that. If you like - - -

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MR GILLIES: But I will need to get instructions because I’ve got a concern that, if I consent to the conciliatory approach that your Honour is suggesting, that I would be consenting at the same time to your Honour giving judgment on something which – because it is a judgment after all – on a matter which is not a tryable issue and that’s our – one of our complaints.

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HIS HONOUR: You know – I mean – it’s not at all uncommon in judgments to have observations where – and I mean – where you have an issue which is not perhaps – which is not necessary for a decision to be made but nonetheless, having heard the case, you think that it is something which the parties might benefit from. You know, somebody loses but you want to say they were an impressive witness and – I mean, there are very many circumstances - - -

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MR GILLIES: Yes.

HIS HONOUR: - - - and if you want the argument recorded that there was no jurisdiction and that I disagreed with that and that - - -

5 MR GILLIES: No. I don't. But I don't know that we want anything recorded and my submission would be your Honour, in detail, expressed your concerns about this whole matter and I would like to think that we, in detail, have responded to that.

HIS HONOUR: Yes.

10 MR GILLIES: Why wouldn't it be a more reasonable approach just not to have any of it transcribed, whether it be my counterallegations or explanations, depending on how you look at them, and - - -

15 HIS HONOUR: You mean to - what? Make today's argument confidential or something?

MR GILLIES: Yes. Or simply to withdraw the transcript. The transcript doesn't have to be public. Judges do that all the time when they're sensitive - - -

20 HIS HONOUR: It doesn't have to be?

MR GILLIES: Made public.

25 HIS HONOUR: Well, it's not made public, really. I mean, it's - - -

MR GILLIES: It's accessible though as a - - -

30 HIS HONOUR: It would be a very unusual course to keep it confidential. There would have to be - I mean, I suppose there's commercial confidentiality which you might say this was because you're protecting the reputations of your clients, but isn't it better for you to have your position stated because it has been vigorously put?

35 MR GILLIES: Your Honour, this becomes a tipping point in the hearing. I've got my own views but I really should share them with my clients.

HIS HONOUR:

MR GILLIES: I would seek a short moment to get instructions from my clients.

40 HIS HONOUR: Yes. All right. Well - - -

MR GILLIES: It shouldn't require long.

45 HIS HONOUR: I will stand the matter down for you to do that. Whilst it's stood down, we will have the video link to Perth, but I will allow that to be interrupted for a short moment when you come back.

MR GILLIES: Thank you, your Honour.

HIS HONOUR: Yes. Yes. Would you adjourn the court, please.

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ADJOURNED

[2.16 pm]

RESUMED

[2.30 pm]

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HIS HONOUR: Yes, Mr Gillies.

15 MR GILLIES: Your Honour, I'm optimistic that I have a proposal that will be attractive to your Honour. In terms of likely time, we don't require more than 10 minutes – five might do it.

20 HIS HONOUR: Yes. I'm a little reluctant to interrupt this matter. Is it inconvenient for you to return – this should be over by – what do you think, Mr Wright and Mr Clifford? How long is this going to take? An hour and a half at most?

MR WRIGHT: I'm hoping no more than an hour.

25 HIS HONOUR: Well, the written submissions are good.

MR WRIGHT: Yes.

HIS HONOUR: Is it possible to return, say, at 4?

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MR GILLIES: Yes, your Honour.

HIS HONOUR: I'm sorry to do that to you but - - -

35 MR GILLIES: No. We're happy to do that.

HIS HONOUR: Yes. Very good. Well, I will stand this matter over until 4 o'clock this evening.

40 MR GILLIES: Thank you, your Honour.

ADJOURNED

[2.31 pm]

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RESUMED

[4.08 pm]

HIS HONOUR: Yes, Mr Gillies.

MR GILLIES: Thank you, your Honour. Your Honour, we are confident that we're
in a position of conciliation to effect a mutually satisfactory resolution of the
5 problem that has beset us. Firstly, I want to talk about the issue of judgment. We
say that there should be no judgment referable to this for the very good reason, we
say, that any judgment concerning the conduct of counsel or even the resolution of
the situation is extramural, your Honour's job as a judge adjudicating upon issues
10 between parties. In other words, there's a disconnect between that and any triable
issue before your Honour. However, we say the transcript should tell the story. I
have express instructions that my clients do not want any part of the transcript
redacted, concealed, put in an envelope, amended or whatever.

We're happy that the situation has been adequately and fairly ventilated and anyone
15 who fairly reads that transcript will get a correct impression of the situation. So we
say let the transcript stand as a true record of your Honour's concerns and our
responses to it, so there's no problem in that regard. There's no secrecy, nothing to
be deleted, nothing to be concealed. Thirdly, we reiterate that none of the lawyers
meant any disrespect to the court, to your Honour or to the administration of justice.
20 There's a complete concordance of view in that regard. Fourthly, that we say that as
we understand the situation as distilled during argument, that your Honour has and
will always have an abiding and genuinely held view that what had transpired,
connectable to the appeal, was a discourtesy.

25 We accept that your Honour has that view. Your Honour accepts that we have a
contrary view definitionally. We say that the criticism of the lawyers moving from
your Honour should be confined to this concept of discourtesy without it being
adjusted upward to higher discourtesy or lowered to low discourtesy, but your
Honour will always regard this, notwithstanding advocacy from the bar table to the
30 contrary, that it was a discourtesy. We ask your Honour to accept fifthly, as your
Honour has already indicated, that there's a bona fide definitional difference of
opinion in relation to what constitutes discourtesy and what does not. That's the
parting of the ways but that's – it's not the gun fight at the O.K. Corral, that is, the
difference of opinion which well behaved and intelligent people looking at the
35 relevant issues and ignoring the irrelevant have come to.

It can happen on a Court of Appeal where you have a dissent. It can happen where a
trial judge thinks that a Court of Appeal has deal with the decision harshly. Bona
fide dissent. In relation to the issue of the reference on appeal to your Honour's
40 remarks to my learned friend, Mr Wheelahan, or my learned client, Mr Wheelahan,
we understand the situation is that no criticism is to be made in that regards, so that
your Honour does not regard that as a discourtesy. That your Honour's concern is in
relation to the notice of appeal and what your Honour has clearly indicated is your
Honour's cast of mind in that regard. But as we understand your Honour's reaction
45 to the application this morning, that your Honour simply wanted to hear argument on
the appellate point, not on the other point about the use of a comment made by your
Honour during the course of argument.

5 So that as we understand the situation, your Honour's view in relation to discourtesy is confined to the issue of a notice of appeal against the backdrop of your Honour having done your Honour's level best to please the parties with a judgment and a set of indications tailor made to the dispute inter parties. Your Honour, if your Honour
10 agrees with all of that and in particular, as part of number four which was the criticism of lawyers being confined to discourtesy in relation to the leave to appeal application, that that means what it says, that we're not now defending our clients from a possible allegation of lack of ethics disrupting the force of justice and the other matters that were touched upon as possible outcomes subject to us being heard.

15 As an example, any reference to courtesy your Honour would obviously stand by, but with the advancing of argument it references to offensiveness, irrationality, breaches of decorum, undermining the system of justice and not to be persisted with as far more pejorative possible allegations than discourtesy. So as we apprehended, your Honour is satisfied that whilst we have been unsuccessful in having your Honour depart from your Honour's firmly held view that there was a discourtesy, that your Honour is content to have that empathy accurately describes your Honour's concerns about what transpired in relation to the notice of appeal. That it was a - - -

20 HIS HONOUR: The application for leave to appeal.

MR GILLIES: Of course, of course.

HIS HONOUR: Yes.

25 MR GILLIES: Yes, accepting that correction. Now, if there's anything I've said in those six points that your Honour is unhappy with or that I've paraphrased too simplistically or which does not truly reflect your Honour's cast of mind, we would invite your Honour to say that. We've conferred long and conscientiously to come to
30 this conclusion but obviously, if we've got it wrong, we know your Honour will be the first to tell us and we would welcome that. I would thus invite your Honour to say whether what I've said accurately reflects your Honour's cast of mind and whether your Honour is prepared to dispose of this matter on that proposed basis.

35 HIS HONOUR: Yes. Well, thank you, Mr Gillies. I think the approach you've arrived at is a very constructive one. I think the - your summary reflects the stage at which argument had reached and a I think a resolution on the basis which your propose is appropriate, reasonable and I think, save for one matter, nothing more need be said. But one matter, I think, that needs to be addressed was a reference you
40 made to a concern your clients had about future appearances - - -

MR GILLIES: Yes.

45 HIS HONOUR: - - - and whether these events would cast a shadow. I think they should be assured that that is not the case for this reason, that nothing in the episode is taken personally. I hope that has been made clear, that this was not taken up as a question of my persona but rather, as a question of decorum in relation to the conduct

of court proceedings, and that being so then there's absolutely nothing on your client's side to fear that they will not be treated fairly and appropriately on other occasions.

5 MR GILLIES: Well, thank you very much for that indication, your Honour. We unreservedly accept what your Honour has said, of course. Our client's concern was what do they tell clients. I will be telling them to tell them nothing.

HIS HONOUR: Tell them nothing.

10

MR GILLIES: It's not an informed consent situation. You have differences with judges, as your Honour would have, at the bar and you've had differences with barristers as a judge. That's what happens. It's part of the - - -

15 HIS HONOUR: Yes.

MR GILLIES: - - - advocates landscape and I will unhesitatingly advise my clients they need not, even as an ultra precaution, indicate that they had a difference of opinion with your Honour on issues of courtesy and discourtesy.

20

HIS HONOUR: Yes. No, that's the case.

MR GILLIES: Thank you, your Honour.

25 HIS HONOUR: Yes. Well, and thank you, Mr Gillies, your intervention and particularly, the way in which the afternoon has progressed underscores the confidence I've had in the Victorian Bar and the way we go about things. It's a great strength that tucked down in the south eastern corner of Australia there is actually a highly developed sense of etiquette between the bench and the bar. And I think what
30 has happened today, although in the context of real robustness at various times, has been a reaffirmation of the strength of that relationship between the bench and the bar on a proper basis.

35 MR GILLIES: Yes. Thank you, your Honour. And I know that your Honour would always endorse robustness at the bar table as a medium of solving problems that confront your Honour.

HIS HONOUR: Yes, very good.

40 MR GILLIES: Thank you, your Honour.

HIS HONOUR: Thank you. Yes. Would you adjourn the court please.

45 **MATTER ADJOURNED at 4.19 pm INDEFINITELY**