Magistrates' Court
Victoria

MAGISTRATES CASES 2008 Part 5

16/08; [2008] VSC 46

SUPREME COURT OF VICTORIA

DPP v FODERO

Bell J

14, 26 February 2008

PRACTICE AND PROCEDURE - SUMMARY OFFENCE - CHARGE-SHEET SIGNED AND SUMMONS ISSUED BY POLICE OFFICER - REQUIREMENT THAT A TRUE COPY OF THE SUMMONS TO BE SERVED ON DEFENDANT - SUCH COPY SERVED BEFORE COPY OF SUMMONS FILED WITH APPROPRIATE REGISTRAR OF THE COURT - FINDING BY MAGISTRATE THAT OFFICER REQUIRED TO SERVE A TRUE COPY OF THE SUMMONS ISSUED AND FILED - WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT*, SS30(1), 30(2)(a), 34(1)(b)(i).

Where a police officer signs a charge-sheet and issues a summons, the officer does not have to serve on the defendant a true copy of the summons that has been filed with the appropriate registrar of the court. There is nothing in ss30-34 of the *Magistrates' Court Act* 1989 ('Act') which specifies that the summons to be served on the defendant has to be a true copy of the one filed with the appropriate registrar. Accordingly, a magistrate was in error striking out a charge on the basis that a true copy had not been served on the defendant as required by the Act.

BELL J:

1. Paul Fodero was charged with exceeding the speed limit while driving a motor vehicle contrary to rule 20 of the *Road Rules – Victoria*. The charge was heard in the Magistrates' Court of Victoria at Heidelberg. On 13 April 2007 a magistrate struck the charge out on the basis that a true copy of the summons had not been served on Mr Fodero as required by s34(1)(b)(i) of the *Magistrates' Court Act* 1989.

2. The Director of Public Prosecutions, on behalf of the police informant who brought the charge against Mr Fodero, now seeks judicial review of the decision of the magistrate. He contends her Honour erred in law on the face of the record by making the decision that she did.

3. The matter in issue is one aspect of the proper procedure to be followed by police officers when charging people with summary offences. Three things are clear but one thing is disputed. It is clear, one, that the police have the statutory authority to sign a charge-sheet and issue a summons (which are in the one single-page document); two, that the charge and summons must be filed with the appropriate registrar of the court within a specified time; and three, that the informant must serve a true copy of the summons on the person charged with the offence. What is disputed is whether the true copy of the summons to be so served can be a true copy of the summons as issued, or must be a true copy of the summons issued and filed.

4. Although this is purely a question of procedure, it has practical and legal importance. At present, the practice of the police is based on the understanding that the informant may serve the summons issued, but not necessarily the summons issued and filed. This is very convenient,

because it means they do not have to wait until they have filed the issued summons before serving it. If that is not correct, the practice of the police will have to change. So much the better, submits Mr Fodero, because the defendant should be served with a properly filed summons. That, in his submission, is what the legislation requires.

5. The legislation is the *Magistrates' Court Act*. The service requirement is stipulated in s34(1)(b)(i). It relevantly provides that every summons to answer a charge "must be served on the defendant by…delivering a true copy of the summons to the defendant personally…" Under s36(1), that can be done by post, as it was in the present case.

6. What the informant served on Mr Fodero by post was a copy of a charge-sheet signed and summons issued that had been properly completed in all respects, except for the filing details. That was because it was posted before it was filed. So the charge and summons gave proper particulars of the person bringing the charge, his signature, the details of the alleged offence, the legislation under which the charge was brought, the time and date at which the charge would be heard at the specified court, and the details of the issuing of the summons. But as the charge and summons had not yet been filed, the place for writing in the details of the filing was left blank.

7. The *Magistrates' Court Act* does not anywhere state what "a true copy of the summons" is for the purposes of s34(1)(b)(i). Nothing in any of the rules or regulations that have been made under that Act assists in this regard. The question I have to answer, which is a question of law, is what, on their proper interpretation, do those words mean? The answer to that question will determine whether the magistrate was correct in law in deciding that the informant did not follow the proper procedure in the present case.

8. The basis of the magistrate's decision was that, in her Honour's view, the informant was required, by s34(1)(b)(i), to serve on the defendant a true copy of the summons that had been filed with the appropriate registrar of the court. She accepted the submission made by the defence that the question was covered by the decision of this Court in *Nitz v Evans*.[1] The magistrate rejected the submission of the prosecution that the decision did not apply because it dealt with different circumstances.

9. *Nitz v Evans* was a case in which the summons had been purportedly issued by a registrar of the Magistrates' Court of Victoria. The registrar did so according to another procedure that was available for the issuing of summonses in 1993. That procedure was described by Hayne J:

> A criminal proceeding may be commenced in the Magistrates' Court by filing a charge with the appropriate registrar (*Magistrates' Court Act* 1989 (Vic), s26(1)(a)) and on filing the charge an application may be made to the appropriate registrar for the issue of a summons to answer the charge: s28(1)(a). The registrar is bound to issue a summons to answer the charge if he is satisfied that the charge discloses an offence known to the law: s28(4)(a). The registrar issues the summons by signing it or stamping it with a facsimile signature stamp: *Magistrates' Court General Regulations* 1990 (Vic) reg 302.[2]

10. The problem in *Nitz v Evans* was that the copy summons served on the defendant "did not indicate that it had been signed by the registrar and did not indicate that the registrar's title had been noted on the document."[3] That, held Hayne J, was fatal, because s34(1)(b)(i) (the same provision at issue in the present case) required a true copy of the summons to be delivered personally to the defendant. As held by his Honour –

> when s34 requires the service of a true copy of the summons it requires service of a true copy of the summons that has been issued. It follows in my view that s34 requires the service of a copy which will show to the defendant that fact of issue. Thus it requires service of a copy which will show that it has been signed by the issuing authority and what was served in this case did not.[4]

11. When *Nitz v Evans* was decided, a police officer who was a prescribed person could, under s30(1) of the *Magistrates' Court Act*, sign a charge and issue a summons to a person to answer the charge. The same is the case now, although s30(1) has been amended in ways that are presently immaterial. Section 30(2) required at that time, as it does now, the informant to file the charge and summons with the appropriate registrar within seven days after signing the charge-sheet.

12. In the present case, unlike in *Nitz v Evans*, the charge-sheet and summons had been properly signed and issued by the informant, exercising his powers under s30(1)(a) of the

Magistrates' Court Act to do so as a member of the police force. The summons so issued was served on Mr Fodero, as required by s34(1)(b)(i), and the charge so signed and that summons was filed within seven days, as required by s30(2)(a). So, submits the Director, the present case is to be distinguished from *Nitz v Evans*. I accept that submission, but that is not the end of the matter. *Nitz v Evans* shows how seriously the court takes these statutory procedural requirements. If I was to be satisfied that the requirements were breached by the informant, I think I would uphold the decision of the magistrate to strike out the summons, by analogy with the decision in *Nitz v Evans*.

13. It was submitted by Mr Fodero that, as a copy summons without the proper issuing details is not a true copy of a summons for the purpose of the service requirement in s34(1)(b)(i), so also a copy summons without the proper filing details is not a true copy of a summons for that purpose. In support of that submission, Mr Fodero contended ss30-34 of the *Magistrates' Court Act* specified four procedural steps that had to be carried out, in this order: (1) signing the charge-sheet under s30(1); (2) issuing the summons under s30(1); (3) filing the charge and summons under s30(2)(a); and (4) serving a true copy of the summons as filed under s34(1)(b)(i) (or alternatively in the way specified in s34(1)(b)(ii), which is not material in the present case).

14. Those submissions have some force. Filing the summons in court is an important procedural step. That it is important is clear from the legislation, both from s30(2)(a), which requires the charge and summons to be filed within seven days after signing the charge-sheet, and from s30(3) which, if the charge and summons are not filed within that specified time, requires the court to strike out the charge and, possibly, to award costs against the informant. The requirement to file being an important procedural step, submits Mr Fodero, the defendant is entitled to know it has been done. Properly interpreted, he submits, s34(1)(b)(i) ensures the defendant gets that knowledge, for it requires service of a true copy of the summons both issued under s30(1) and filed under s30(2)(a). If that means police officers must delay service of a summons until after the charge and summons has been filed with the appropriate registrar of the court, so be it.

15. I reject Mr Fodero's submissions as regards the proper interpretation of s34(1)(b)(i) of the *Magistrates' Court Act*. I think he is trying to read something into that provision which is not there and which is inconsistent with the scheme of ss30-34. Section 34(1)(b)(i) does not say the summons to be served on the defendant has to be a true copy of the one filed with the appropriate registrar. It should not be interpreted to produce that result.

16. The scheme of the provisions is that s30(1) allows the informant to sign a charge-sheet and issue a summons. Section 30(2)(a) gives the informant seven days, and no longer, to file it. Section 34(1)(b)(i) requires a true copy of the summons to be served which, under *Nitz v Evans*, has to be a true copy of the one issued. But it does not have to be a true copy of the one filed. Read as a whole, I think the provisions were intended to allow the police to adopt a four-step procedure, in this order: (1) signing the charge-sheet under s30(1); (2) issuing the summons under s30(1); (3) serving a true copy of the summons as issued under s34(1)(b)(i) (or in the alternative way); and (4) filing the signed charge and issued summons under s30(2)(a). Under the procedure, serving a signed charge and issued summons as filed under s30(2)(a) is fully compliant with s34(1)(b)(i), but it is not necessary to achieve compliance.

17. The scheme does have a safeguard. As we have seen, if the magistrate sees that a charge and summons has not been filed within the seven days specified in s30(2)(a), it must be struck out under s30(3). Williams J examined that safeguard in *Director of Public Prosecutions (Vic) v Magistrates' Court (Vic) and Another*.[5] Her Honour decided the criminal proceeding was commenced in the Magistrates' Court by the informant signing the charge and issuing the summons pursuant to s30(1). Under provisions applicable since 1994, and so applicable at the time of the present case, the proceeding continues to be valid despite the informant's non-compliance with the timely filing requirement in s30(2)(a), but it is liable to be struck out under s30(3).[6] That does not arise in the present case. The charge and summons was filed within time. But, with respect, I agree with Williams J's approach of interpreting the provisions as a scheme that centres on the capacity of police (among others) to commence summary criminal proceedings, subject to the safeguard. Any defendant who is concerned the informant may not have not filed the charge and summons within the seven days stipulated in s30(2)(a), and the legal representative of any such person, is perfectly entitled to inspect the court file to see if it has been done. The legislation strikes a balance between the interests of the police in being able to sign charges and serve summonses

"on the spot", which is an efficient use of resources, and the interest of defendants in being able to see that the proper procedures have been followed, which is their right. The safeguard is the way the legislation achieves that balance. That, I believe, is the answer to Mr Fodero's submissions in this regard.

18. In *CIC Insurance Ltd v Bankstown Football Club Ltd*[7], the High Court laid down the approach to be adopted when engaged in the task of statutory interpretation, especially in cases where it is necessary to identify the object and purpose of the legislation. This is the now classic principle that Brennan CJ, Dawson, Toohey and Gummow JJ expounded:

> Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means ..., one may discern the statute was intended to remedy.[8]

19. In the present case, there are parliamentary materials available which show unequivocally what the object and purpose of the procedures introduced by the *Magistrates' Court Act* 1989 were.

20. When the Bill for the *Magistrates' Court Act* 1987 was introduced into the Victorian Parliament in that year, and in the next year when the Bill for the *Magistrates' Court Act* 1988 was introduced, both the second reading speech and the explanatory memorandum said something about how ss30 and 34, as regards the police issuing, serving and filing a charge and summons, were intended to operate. This is what was said in the second reading speech for the 1987 Bill: The new on-the-spot summons permits police to issue a summons in relation to offences at the time of their original contact with the defendant. It is not necessary for the police to go before a justice to have the summons issued, nor to wait until a later date to have it served. This change will lead to considerable economies in the use of police resources.[9] Here are the comments in the explanatory memorandum for the 1988 Bill, which are equally illuminating:

> Clause 30 provides that in relation to prescribed summary offences a prescribed informant may at the time of the signing of the charge sheet issue a summons to answer the charge. The charge and original summons must then be filed with the registrar within 7 days.[10]

21. The 1988 Bill lay in abeyance in that year, but was reintroduced as the Bill for the *Magistrates' Court Act* 1989 after the change of government that occurred at that time. Section 30 as proposed in 1988 Bill was in the same form when the Bill was reintroduced in 1989. The explanatory memorandum for the 1989 Bill, as regards s30, was identical to the explanatory memorandum for the 1988 Bill. In the second reading speech for the 1989 Bill, this was said:

> A number of new provisions affecting criminal proceedings were outlined when the original Bill was introduced. These include procedures for the issue of on-the-spot summonses for certain summary offences.[11]

22. It is clear from these parliamentary materials that the procedures introduced by ss30-34 of the *Magistrates' Court Act* 1989 were intended to allow police to sign a charge-sheet and issue a summons then serve the summons on the defendant "on-the-spot". It would be inconsistent with that intention to interpret s34(1)(b)(i) in the manner for which Mr Fodero contends. The police would have to file the charge and summons and then serve it, which would delay things, for the police would have to attend to the filing and then obtain a copy of the document so filed for service on the defendant. The police could not just sign the charge-sheet and issue the summons, then serve the summons (remember, the charge and summons are in the one document) "on-the-spot," and then file it within the seven day period specified in s30(2)(a). That, in my view, is exactly what the provisions of ss30-34 were intended to allow the police to do. That, in my view, is what the provisions, properly interpreted, actually achieve.

23. The purpose and scheme of these provisions was examined and taken into account by the Appeal Division of this Court in *Director of Public Prosecutions v His Honour Judge Fricke*.[12] In that case Fullagar, Tadgell and JD Phillips JJ dealt with the question whether, under s30(2)(a), the person issuing the summons personally had to file it with the appropriate registrar, in the sense of going physically to the registry. Their Honours rejected that contention. In doing so, they gave

this explanation of the procedures introduced in 1989:

> As explained by counsel in the course of the appeal to this court, the procedure laid down by s30 is new. We were told that many summary offences have been prescribed for the purpose of the section and that all police officers of more than two years' experience are prescribed persons. The new procedure empowers those police officers (among others) to perform a function that previously was performed by justices. There is no longer any need for the informant to make application to another person for the issue of a summons. That procedure is perpetuated, although modified, in s28(1) but under s30(1) the informant may himself issue a summons at the time of signing the charge sheet. Both charge sheet and summons may then be handed to the defendant at the time of the initial contact – and hence, no doubt, the appellation in the Second Reading speech of 'on the spot' summonses.[13]

Their Honours went on to reject the submission that s30(2)(a) required physical attendance by the informant who had signed the charge and issued the summons:

> We see no reason to read into s39(2) any such safeguard for the informant. Nor is it apparent how such a system might work where, in the ordinary case, the defendant will have been served with the document containing the charge sheet and the summons at the time of first contact with the informant. That, we were told, was the whole point of s30...[14]

The explanation of these procedures by Fullagar, Tadgell and JD Phillips JJ, for example that the "charge sheet and summons may then be handed to the defendant at the time of the initial contact", both reflects my own view (with respect) of the proper interpretation of s34(1)(b)(i) and, I feel bound to say, presents an insuperable obstacle to acceptance of Mr Fodero's submissions.

24. So it is that the Director's application for judicial review of the decision of the magistrate to strike out the summons must be granted. The order of the magistrate dated 13 April 2007 striking out the summons with costs will be quashed and the summons remitted back to the Magistrates' Court of Victoria, however constituted, to be heard according to law.

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[1] (1993) 19 MVR 55.
[2] Ibid 56.
[3] Ibid.
[4] Ibid 58.
[5] [2006] VSC 257; (2006) 162 A Crim R 564, 572.
[6] Ibid 572-73.
[7] [1997] HCA 2; (1997) 187 CLR 384.
[8] Ibid 408 (footnotes omitted).
[9] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 1987, 1434 (Frank Wilkes, Minister for Housing).
[10] Victoria, explanatory memorandum for the Bill for the *Magistrates' Court Act* 1988, 2.
[11] Victoria, *Parliamentary Debates*, 31 March 1988, 1160 (Andrew McCutcheon, Attorney-General).
[12] [1993] 1 VR 369.
[13] Ibid 371.
[14] Ibid 373.

APPEARANCES: For the plaintiff DPP: Mr C Ryan SC, counsel. Office of Public Prosecutions. For the first defendant Fodero: Dr I Freckleton SC with Mr J Lavery, counsel. Tony Danos solicitors.

17/08; [2008] VSC 47

SUPREME COURT OF VICTORIA

COSTA v PARKS; SHEPHERD v PARKS

Habersberger J — 29 November 2007; 27 February 2008

PRACTICE AND PROCEDURE - COSTS ON DISMISSAL OF CHARGES - TWO DEFENDANTS - SOME CHARGES DISMISSED IN RELATION TO ONE DEFENDANT - ALL CHARGES DISMISSED IN RESPECT OF OTHER DEFENDANT - APPLICATION BY EACH DEFENDANT FOR COSTS - WHETHER DEFENDANTS WERE "SUCCESSFUL" - APPLICATION REFUSED IN RESPECT OF ONE DEFENDANT - FINDING BY

MAGISTRATE THAT A LOT OF TIME WAS TAKEN UP IN RELATION TO A JURISDICTIONAL QUESTION - FURTHER FINDING THAT THE NATURE OF THE EVIDENCE AND THAT THE PROSECUTION WITNESSES WERE CREDIBLE - APPLICATION GRANTED IN PART IN RELATION TO SECOND DEFENDANT - WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S131.

1. Where a court dismisses an information or complaint, the court may order that the informant pay to the defendant such costs as the court thinks just and reasonable. The question is whether the defendant can be regarded as being a "successful defendant".

***Latoudis v Casey* (1990) 170 CLR 534, applied.**

2. Where a defendant (Costa) pleaded guilty to two charges and was found guilty of one charge and not guilty of eight charges, it was open to the magistrate to conclude that the defendant Costa was not a "wholly successful" defendant. Whilst the magistrate took into account irrelevant considerations namely, the nature of the evidence led against Costa and that the prosecution witnesses were credible, the magistrate was not in error in refusing Costa's application for costs, particularly in view of the fact that the jurisdictional question had unreasonably prolonged the hearing.

3. Where a defendant (Shepherd) at the same hearing was wholly successful, it was open to the magistrate to order that the informant pay Shepherd's costs of representation for one day of the 7-day hearing plus the solicitor's preparation costs. The magistrate was not in error in finding that the costs should be reduced on account of the excessive time spent on the jurisdictional issue and the "joint nature" of the charges.

HABERSBERGER J:

1. In each of these proceedings, by a notice of appeal filed on 17 March 2006, the appellant has appealed to this Court, pursuant to s92(1) of the *Magistrates' Court Act* 1989, on a question of law from a final order in a criminal proceeding made on 20 February 2006 in the Magistrates' Court at Mildura. The affidavits filed by Samuel Peter Costa and Barry Keith Shepherd in support of their respective appeals disclosed that the joint hearing in the Magistrates' Court of the charges against each of them had lasted for seven days, between 6 and 14 February 2006, with judgment being delivered on 20 February 2006. In each proceeding, the question or questions of law stated in the notice of appeal raised the issue of whether the learned Magistrate had erred in the making of the order in respect of costs at the conclusion of the proceeding.

2. In the case of Mr Costa, the final order was that, in case number T01134532, five charges contrary to the *Fisheries Act* 1995 and three charges contrary to the *Fisheries Regulations* 1998 were dismissed and, in case number T01862131, three charges contrary to the *Fisheries Act* 1995 were found proven (he having pleaded guilty to two of them) in respect of which an aggregate fine of $900 was imposed without conviction. (On the second day of the hearing, 7 February 2006, prosecuting counsel had applied, in case number T01134532, to have six charges against Mr Costa under the Marine Act 1998 withdrawn and, on that day, the Magistrate had ordered that they be struck out.) The 14 charges in case number T01134532 related to alleged acts by Mr Costa on the Murray River at or near Boundary Bend on 15, 16 and 18 February 2005. A threshold question was whether the alleged acts took place in Victorian waters. The two charges in case number T01862131 to which Mr Costa pleaded guilty related to alleged conduct by Mr Costa in Victoria between 1 February and 22 March 2005. The third charge alleged unlawful possession of commercial fishing equipment by Mr Costa in Victoria on 22 March 2005.

3. The learned Magistrate refused the application made on behalf of Mr Costa that the informant, Mr Parks, pay his costs of the proceeding. Her reasons were expressed as follows:

> Mr Costa, as you're aware there is an application that the informant pay your costs of these proceedings. I'm not going to exercise my discretion to make that order. In relation to the matters that are before me, there are clearly a number of charges, certainly in relation to the charges where you were jointly charged with Mr Shepherd. You were successful in defending those matters. But in relation to the substance of the matters, it certainly is the case that there was direct evidence by the prosecution and, as I've found, the prosecution were unable to discharge the onus of proof, because I certainly formed a view that all of the witnesses that I heard were credible.
>
> But ... it was certainly proper for the court to be making those findings of credibility and those assessments. Whilst it might have persuaded me in other circumstances where such credibility issues were ultimately not discharged, it might have otherwise resulted in a costs order. It's certainly the case that much of the proceeding is taken up in relation to an issue in which you were unsuccessful, that being the jurisdictional question.
>
> Probably thirdly, and most importantly, you were facing three other charges, one of which you fought,

> and whilst not the whole of the proceedings were taken up with that matter, you were unsuccessful in relation to defending that matter. Whilst there are no hard and fast rules in relation to these matters, taking all matters into account, I'm not satisfied in the overall circumstances of this case that I ought to exercise my discretion to award costs in your favour as a result of these proceedings. So that application is refused.[1]

4. In the case of Mr Shepherd, the final order was that, in case number T01135274, five charges contrary to the *Fisheries Act* 1995 and three charges contrary to the *Fisheries Regulations* 1998 were dismissed. These eight charges were similar to the eight charges against Mr Costa, in case number T01134532. (Four charges against Mr Shepherd under the Marine Act 1998, in case number T01135274, were also struck out at the request of the prosecutor on the second day of the hearing.)

5. The learned Magistrate ordered that the informant, Mr Parks, pay the costs of Mr Shepherd limited to the costs of representation for one day in the hearing, together with the solicitor's preparation costs. Orders were also made relating to the quantification of the costs and fixing a stay on payment of the costs. The learned Magistrate's reasons for this costs order were as follows:

> In relation to you, Mr Shepherd, of course you were only facing the charges where you were jointly charged with Mr Costa, and you were wholly successful in relation to those proceedings. Whilst, of course, you were heavily involved in these matters, you took a somewhat lesser role in terms of the overall operation that was involved. In the circumstances it is my view that I ought to exercise my discretion that costs be awarded in your favour, at least in relation to part of the proceedings, given that you were wholly successful in relation to these proceedings.
>
> Now, of course, there was much duplication in relation to these matters and I expressed it rather colloquially before that it was approached on the basis of one in, all in, as it probably needed to be on the facts, given the joint nature of the charges against you. And of course it was the case that Mr O'Haire was representing both you and Mr Costa, and whilst he of course appeared for you separately it was the case that having regard to all of the matters that were traversed, it seems to me that what's appropriate in the circumstances is that – and what I do order is that the informant pay your costs for one day of the hearing, including solicitor's preparation costs in relation to that matter.[2]

6. Neither the initial evidentiary material in support of each appeal nor the framing of the original questions of law said to be raised in each appeal was satisfactory. The first problem largely resulted from the poor quality of the recording of that evidence. Eventually, after a number of orders were made by Masters of this Court, further affidavits were filed exhibiting the transcript of the whole of the evidence of one prosecution witness, Gary Hodges, a fisheries officer, on 6 and 7 February 2006, and the transcript of all of the hearing on 8 February 2006, which included part of the evidence in chief and all of the cross-examination of another fisheries office, David Trickey, the transcript of part of the evidence in chief of Eian Macrae, a senior fisheries officer, and all of the evidence in chief and part of the cross-examination, by senior counsel for Mr Costa, of John Pitt, a surveyor. However, another four witnesses were called by the prosecution. Further, both appellants gave evidence in their defence and were cross-examined, and Mr Costa called one witness. There was no transcript of any of this evidence.

7. Part of the evidence which was not contained in the exhibited transcript was summarised in the affidavit of Brian Vance O'Haire sworn on 17 September 2007 and filed in each proceeding. Mr O'Haire was the solicitor for each appellant. He had instructed counsel on behalf of Mr Costa, and had appeared on behalf of Mr Shepherd, at the hearing in the Magistrates' Court. However, very little was said in his affidavit about the evidence of the fisheries officers, David Trickey, Eian Macrae, David Cattlin, John Cooper and Andrew Driscoll, or the surveyor, John Pitt. The respondent also filed an affidavit in each proceeding exhibiting the transcript of the hearing on 20 February 2006. This contained the reasons for judgment given in respect of the prosecution of both Mr Costa and Mr Shepherd, the argument on costs and the rulings on costs. Although this transcript was satisfactory, deficiencies remained in the material before the Court concerning the course of evidence at the actual hearing of the charges against the appellants.

8. The second of the above problems was dealt with by each of the appellants filing an amended notice of appeal on 1 June 2006. In the case of Mr Costa, the questions of law in the amended notice of appeal were as follows:

1. Did the learned Magistrate err when she declined to order costs in favour of the Defendant?
2. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that she had made no adverse findings with respect to the credibility of the witnesses called for the prosecution?
3. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that there was direct evidence against the Defendant?
4. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that the Defendant was successful in Proceeding No. T01134532 as a consequence of the prosecution failing to prove its case to the criminal standard of proof?
5. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that the prosecution had been successful in satisfying the Court that the charges in Proceeding No. T01134532 occurred in Victoria and were within the jurisdiction of the Court?
6. Did the learned Magistrate err in the exercise of her discretion when declining to order costs in favour of the defendant, by taking into account that the prosecution had been successful in proving charge No. 3 in Proceeding No. T01862131?

9. In the case of Mr Shepherd the questions of law in the amended notice of appeal were as follows:

1. Did the learned Magistrate err in the exercise of her discretion in ordering the Informant to pay to the Defendant, the Defendant's costs limited to the costs of representation for 1 hearing day, including solicitor's preparation costs for defending the matter?
2. Did the learned Magistrate err in the exercise of her discretion when she found that there was duplication in the presentation of the defence of the case for the Defendant with that of his alleged co-offender, Samuel Peter Costa, such as to justify the limiting of an order for costs in favour of the Defendant?

10. Section 131 of the *Magistrates' Court Act* 1989 relevantly provides as follows:

(1) The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.

...

(2A) In exercising its discretion under subsection (1) in a proceeding, the Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the Court is satisfied resulted in prolonging the proceeding.

General Principles

11. In *Latoudis v Casey*,[3] the High Court considered the application of s97 of the *Magistrates (Summary Proceedings) Act* 1975, which was the predecessor of s131 of the *Magistrates' Court Act* 1989. Section 97 provided as follows:

(a) Where the Court makes a conviction or order in favour of an informant or complainant, the Court may order the defendant to pay to the informant or complainant such costs as the Court thinks just and reasonable;
(b) Where the Court dismisses the information or complaint, or makes an order in favour of the defendant the Court may order the informant or the complainant to pay to the defendant such costs as the Court thinks just and reasonable.

12. Mr Latoudis was charged with theft of a motor car, receiving stolen goods (being car accessories) and unlawful possession of the same goods. The first charge was dismissed when the prosecution led no evidence. The second was dismissed after a no case submission. The third was dismissed at the close of the defendant's case. The Magistrate refused the defendant's application for costs on the ground that the informant had acted reasonably in instituting the proceedings and that the defendant had caused suspicion to fall on him by failing to seek ownership of the goods when he acquired them. By a majority the High Court held that the Magistrate's exercise of discretion had miscarried, and that the successful defendant was entitled to his costs.

13. Mason CJ stated that:

[I]n ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting

> the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor. I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs.[4]

14. The second member of the majority, Toohey J described the principle as follows:

> If a prosecution has failed, it would ordinarily be just and reasonable to award the defendant costs, because the defendant has incurred expense, perhaps very considerable expense, in defending the charge. ...
> It is unnecessary to speak in terms of a presumption; it is enough to say that ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket.
> Now, in a particular case there may be good reasons connected with the prosecution such that it would not be unjust or unreasonable that the successful defendant should bear his or her own costs or, at any rate, a proportion of them. To return to the examples given earlier in this judgment, if a defendant has been given the opportunity of explaining his or her version of events before a charge is laid and refuses the opportunity, and it later appears that an explanation could have avoided a prosecution, it may well be just and reasonable to refuse costs .... This has nothing to do with the right to silence in criminal matters. A defendant or prospective defendant is entitled to refuse an explanation to the police. But if an explanation is refused, the successful defendant can hardly complain if the court refuses an award of costs, when an explanation might have avoided the prosecution. Again, if the manner in which the defence of a prosecution is conducted unreasonably prolongs the proceedings, for instance by unnecessary cross-examination, neither justice nor reasonableness demands that the successful defendant be indemnified, at any rate as to the entirety of the costs incurred. These illustrations are in no way exhaustive but what they point up is that a refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her.[5]

15. Very similar language was used by the third member of the majority, McHugh J. He said:

> [A] successful defendant in summary proceedings has a reasonable expectation of obtaining an order for the payment of his or her costs because it is just and reasonable that the informant should reimburse him or her for liability for costs which have been incurred in defending the prosecution. Consequently, a magistrate ought not to exercise his or her discretion against a successful defendant on grounds unconnected with the charge or the conduct of the litigation. ... Speaking generally, before a court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informant to establish that the defendant unreasonably induced the informant to think that a charge could be successfully brought against the defendant or that the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings.[6]

16. It can be seen from the quoted passages that s131(2A) has given legislative effect to one of the circumstances which the majority considered might give rise to the conclusion that "it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs".[7]

17. Each of the majority judges in Latoudis talked in terms of "a successful defendant". Mr Latoudis was regarded as a successful defendant because all of the charges against him were dismissed but, in other more complicated circumstances, whether or not the defendant should be regarded as "successful" will not be so clear.

18. In *Hung Phi Do v Bowers*,[8] the appellant appealed against an order refusing his application that the informant pay the costs of a hearing at which a charge against him of driving under the influence of intoxicating liquor was dismissed and a charge of refusing to undergo a preliminary breath test was withdrawn. This hearing resulted from the informant's refusal at a mention hearing to accept a plea of guilty to the charges of driving a motor car carelessly and driving a motor car in an unsafe condition if the other two charges were withdrawn. O'Bryan J dismissed the appeal. In his judgment, his Honour discussed the situation where a defendant was found not guilty of the most serious charge and guilty of the lesser charge arising out of the same transaction. It was his Honour's view that:

> In such circumstances a defendant would not be awarded costs as a "successful defendant" under the general rule.[9]

His Honour further ruled that the Magistrate was entitled to refuse to award costs, because he "may have found that the appellant was not 'a successful defendant'." His Honour continued:

> That he [the appellant] was successful in relation to the contested charge does not mean that he was "a successful defendant" for at the end of the day he was found guilty of two charges and substantial penalties were imposed by the Court. In these circumstances I consider the learned Magistrate was entitled to refuse to award costs.[10]

19. I do not accept the submission by Mr Trood, of counsel, who appeared for both appellants, that the decision of Olsson J of the Supreme Court of South Australia in *Saleeba v Beck*[11] is contrary to the reasoning of O'Bryan J in *Do*. In the South Australian case, the appellant was charged with two driving offences arising out of the same set of factual circumstances. He was convicted on one charge but not the other. The learned Magistrate rejected the application for costs on the ground that the relevant legislation only gave the Court the power to make an order for costs against the prosecution where the whole of the complaint was dismissed. Olsson J held that the proper construction of the section in question did not require that limitation. He said that when the section:

> speaks of the dismissal of a complaint it is speaking in the sense of the dismissal of a complaint as to a specific charge averred in it, rather than of the original initiatory process as to its entirety.[12]

His Honour therefore concluded that the learned Magistrate had fallen into error "as to the basis upon which the section ought to be applied." Accordingly, his Honour referred the matter back so that the exercise of discretion could be "considered afresh."[13] That is, Olsson J did not conclude that the appellant must receive his costs as a "successful defendant".

20. Appealing against the exercise of the broad judicial discretion given by s131(1) of the *Magistrates' Court Act* 1989 is no easy matter. In *Australian Coal and Shale Employees Federation v The Commonwealth*,[14] Kitto J said that:

> ... the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

21. In *Kenyon v Driessen*,[15] Ashley J, after referring to the above passage, stated as follows:

> It is true that an exercise of discretion is not to be treated by an appeal court asking itself whether it would have exercised the discretion in the same or a different way to the way in which it was exercised in fact. On the other hand, the appeal court, before it interferes with an exercise of discretion, must be satisfied that the decision was clearly wrong. In my opinion the correct approach is that in considering that question an appeal court is not constrained to hold that an exercise of discretion was wrong only by reason that weight was given to some irrelevant consideration, or by reason only of complaint that insufficient weight was given to some relevant consideration. It may be, despite such matters, that the decision was very evidently supportable by pertinent grounds relied upon by the decision-maker.

22. Similar statements have been made by other judges of this Court. In *Kymar Nominees Pty Ltd v Sinclair*,[16] Cavanough J said that:

> ... it is not for this Court to re-exercise a magistrate's discretion. Rather, the question is whether it was *open* to the magistrate, on the material before him, to determine that the case fell within an exception to the general principle. Or in other words, as Batt J observed in *Alexander v Renney*,[17] the appellant "must really say that it was not open to the Magistrate to find that the circumstances were not ordinary".

23. Finally, before turning to consider the arguments in each appeal, I note my respectful agreement with the following passage from the judgment of Ashley J in *Kenyon*:[18]

> *Latoudis* provides a basis upon which costs applications by defendants should be considered. But it does not deny to a Magistrate the power and the obligation to exercise the statutory discretion as to costs, having regard to the particular circumstances of the case before the court. It could not be said that *Latoudis* did or claimed to exhaust the circumstances in which costs would not be awarded to a defendant to criminal proceedings...

Mr Costa's Appeal

24. The main ground of Mr Costa's appeal was that, despite having found that he was "successful" in relation to the charges in case number T01134532, the learned Magistrate nevertheless declined to order the informant to pay Mr Costa's costs of defending such charges. Mr Trood submitted that the learned Magistrate's reasons for refusing to make an order for costs in favour of Mr Costa disclosed that she had fallen into error by taking into account irrelevant factors. Her first reason referred to the fact that "there was direct evidence by the prosecution" (the issue raised by question 3) as well as the fact that she had found that "the prosecution were unable to discharge the onus of proof" (the issue raised by question 4) because she had "formed a view that all of the witnesses... were credible" (the issue raised by question 2).

25. I agree with counsel's submission that the nature of the evidence led against Mr Costa, whether it be direct evidence or circumstantial evidence, was an irrelevant matter. I also agree with the submission that it was not a relevant consideration that the learned Magistrate found the prosecution witnesses credible even though she did not find the charges proven beyond reasonable doubt. This was a criminal prosecution and if the charges were not proved to the criminal standard then the defendant was entitled to have them dismissed. The consequences that flow from these conclusions are considered below.

26. Mr Dennis, of counsel, who appeared on behalf of the respondent, submitted that the reference to the credibility of the prosecution witnesses was relevant because considerable time had been taken up during the hearing with an unsuccessful attack on their credibility. Counsel referred to the learned Magistrate's statement during the argument on costs that it was:

> put to a lot of the witnesses that there was some sort of vendetta and I didn't find any evidence of that.[19]

In my opinion, it would be reading too much into this passing comment during argument to conclude that the learned Magistrate had decided that so much time had been spent on challenging the credibility of the prosecution witnesses, in particular by putting to them that they were part of a vendetta against Mr Costa, that this was a reason for refusing to order costs in Mr Costa's favour. I therefore reject the respondent's submission that the credibility of the prosecution witnesses was relevant to the question of costs.

27. Mr Trood submitted that the learned Magistrate's second reason for refusing the application for costs was also based on an irrelevant consideration, namely, that "much of the proceeding [was] ... taken up in relation to an issue in which [Mr Costa was] ... unsuccessful, that being the jurisdictional question" (the issue raised by question 5). He argued that this was not a finding by the learned Magistrate that this was an unreasonable act by the defence which resulted in the proceeding being prolonged, within the meaning of s131(2A) of the *Magistrates' Court Act* 1989. Rather, he submitted, it was simply being described as an issue in respect of which Mr Costa had been unsuccessful. Mr Trood pointed out that the issue of jurisdiction having been raised by the defendants, the prosecution was required to satisfy the Court on the balance of probabilities that the relevant part of the Murray River was within Victoria.[20]

28. I do not accept the submission that the learned Magistrate may not have been purporting to take into account the type of matter referred to in s131(2A). True it is that the learned Magistrate did not expressly state this to be the case, but it seems to me from her repeated reference during both the argument and the ruling about costs to the fact that "a lot of time was taken up in relation to the jurisdictional question",[21] that she was of the view that this issue had unreasonably prolonged the hearing. Alternatively, I consider that, at the very least, the learned Magistrate considered that, in the exercise of her discretion, Mr Costa should not be awarded all of his costs because of the

length of time that was spent on this issue. Clearly, this is a matter connected with the conduct of the litigation. In my opinion, therefore, no error has been shown in the learned Magistrate's approach to this aspect of her ruling.

29. Moreover, Mr Dennis submitted that, in the absence of a transcript of all of the evidence, alternatively an affidavit summarising in sufficient detail all of the evidence, it was not possible to determine what happened in many important respects during the hearing and therefore not possible to conclude that the learned Magistrate had erred in taking the time spent on the jurisdictional error into account in deciding whether or not to award Mr Costa costs. I agree with this submission, particularly because part of the missing transcript or summary of evidence was the balance of the cross-examination of the surveyor, Mr Pitt. It is therefore impossible to know whether this cross-examination was, or was expressed by the learned Magistrate to be, inordinately long. It is also not possible to assess whether senior counsel's estimate, during the argument on costs, that one-tenth of the time was spent on the jurisdictional issue,[22] was accurate.

30. In any event, I consider that the appellant's submission in respect of question 5 is contrary to the final position on the jurisdictional issue adopted by his counsel during the argument before the learned Magistrate. Initially, senior counsel for Mr Costa submitted that it was not relevant for her Honour to take into account the time taken in unsuccessfully raising the jurisdictional issue.[23] Alternatively, he submitted that there should be an apportionment on the basis of the time spent on the unsuccessful issue.[24] But, as Mr Dennis submitted, senior counsel then changed the submission when he said:

> I shall retreat and say this that, yes, an amount of time was spent on the jurisdictional matter, not nearly as much time as spent on the other matters, in our submission, and we would ask not for a full order of costs but we should be entitled, in our submission to a large proportion of them.[25]

Later, senior counsel said:

> So what I would submit is that Your Honour should make an order in favour of the defendants that reflects any matters that you believe should be reflected in the amounts, whether it be three-quarters, or a half, or nine-tenths, or whatever, and costs.[26]

31. In these circumstances, I consider that the appellant cannot now argue that the learned Magistrate erred, in the exercise of her discretion, "by taking into account that the prosecution had been successful in satisfying the Court that the charges in Proceeding No T01134532 occurred in Victoria and were within the jurisdiction of the Court".

32. Finally, Mr Trood submitted that the learned Magistrate's third reason for refusing the application for costs disclosed that, again, she had taken into account an irrelevant factor, namely, that Mr Costa had been "unsuccessful in relation to defending" the third charge in case number T01862131. Counsel submitted that, whilst the hearing of the charges which were the subject of pleas of not guilty took place at the same time, each was the hearing of a separate case against Mr Costa and that, as such, each information required separate consideration and was the subject of a separate verdict. He pointed out that each information contained separate and discrete allegations, and that they were not alternatives to one another. Mr Trood further submitted that the two sets of charges were separate proceedings, separate in date and in the nature of the allegations.

33. So much may be accepted. However, I see no error in the way in which the learned Magistrate exercised her broad discretion under s131(1) in dealing with all of the charges together when considering the question of costs. In my opinion, it was open to the learned Magistrate to conclude, therefore, that Mr Costa, unlike Mr Shepherd, was not a "wholly successful" defendant. It would have been artificial in the extreme and would have unnecessarily complicated matters to have treated the two cases or sets of charges separately – making a costs order in favour of Mr Costa in respect of the charges in case number T01134532 and a costs order against him in respect of the charges in case number T01862131. Far simpler to deal in one order with the costs of the whole hearing, taking into account the outcome of all of the charges. Therefore, the situation was that Mr Costa had pleaded guilty to two charges, had been found guilty of one charge and not guilty of eight charges (or 14, if one includes the *Marine Act* prosecutions which were withdrawn at an early stage). Mr Trood pointed out that during the argument on costs her Honour had

characterised the result as being that Mr Costa "won on the main bit". Nevertheless, even looking at the situation "primarily from the perspective"[27] of Mr Costa, it was, in my opinion, open to the learned Magistrate to conclude that overall Mr Costa was not a "successful defendant". I consider that this would be in accordance with the approach taken by O'Bryan J in *Do*, notwithstanding the tenuous evidentiary link between the two sets of charges which clearly did not arise out of the same transaction and which had been laid at different times.

34. I reject Mr Trood's submission that, because the prosecution never asked for costs in respect of the charges against Mr Costa which were found proven, the learned Magistrate could not have performed any setting off of what might otherwise have been two costs orders in reaching her decision. It seems to me to be clear that right from the outset of the argument on costs, everyone proceeded on the basis that the costs of the hearing would be dealt with as a whole. In those circumstances, when so many charges had been dismissed, costs were never going to be awarded to the prosecution. Nevertheless, prosecuting counsel did refer in his submissions to the learned Magistrate that "running through the case" there had been "a successful outcome"[28] in terms of the prosecution of Mr Costa on one of the three charges in the second set of charges. I agree with Mr Dennis' submission that the prosecution would have expected that this partial success would have been taken into account by the learned Magistrate in deciding the application for costs.

35. Whilst another judicial officer may have reached a different result in terms of this setting off or apportioning of costs exercise, no error has been shown, in my opinion, in the conclusion reached by the learned Magistrate about Mr Costa not being a "wholly successful" defendant. It cannot be said that the refusal to order that all or part of Mr Costa's costs be paid by the informant was not open to the learned Magistrate in the particular circumstances of his case. This being so, in my opinion it does not assist the appellant that I have concluded that the learned Magistrate did take into account certain irrelevant factors. As I have said, her conclusion was undoubtedly open to her based on other grounds. Further, it should not be overlooked that the learned Magistrate described her third ground for refusing the application for costs as probably the most important.

36. Mr Costa's appeal against the learned Magistrate's order in respect of costs must, therefore, be dismissed.

Mr Shepherd's Appeal

37. The main ground of Mr Shepherd's appeal was that, despite having found that he was "wholly successful" in relation to all of the charges he was facing, the learned Magistrate nevertheless limited the amount of the costs the informant was ordered to pay to Mr Shepherd. Mr Trood set out what, he submitted, appeared to be the learned Magistrate's reasons for the costs order which she made. The first matter he referred to was the learned Magistrate's statement that Mr Shepherd had taken "a somewhat lesser role in the operation". Counsel submitted that the appellant's role was an irrelevant matter to have taken into account.

38. I do not agree that this statement played any part in the learned Magistrate's decision on costs. It was simply a comment by her about the allegations against Mr Shepherd. Further, the learned Magistrate then went on to indicate that she would be awarding at least some costs in Mr Shepherd's favour because he had been "wholly successful". In any event, if the learned Magistrate did take Mr Shepherd's "somewhat lesser role" into account in making her costs order, in my opinion, this can only have worked in Mr Shepherd's favour.

39. The second matter Mr Trood referred to was the learned Magistrate's rather cryptic comment that it was a case of "one in, all in". Counsel submitted that as there was no suggestion that the separate representation of Mr Shepherd in the jointly conducted hearing was inappropriate, this was not a proper reason to reduce the award of costs to this appellant. This is the issue raised by the second question of law in Mr Shepherd's amended notice of appeal, which talks of a finding by the learned Magistrate that "there was duplication in the presentation of the defence" of Mr Shepherd with that of Mr Costa.

40. I consider that both this question and the supporting submission are based on a misunderstanding of the learned Magistrate's rather unclear reasons for not awarding Mr Shepherd all of his costs. The comment about "one in, all in" was made in response to Mr O'Haire's submission that from Mr Shepherd's point of view "not a great deal of time, if any, was spent in relation to the

jurisdictional issue." In my opinion, the learned Magistrate did not reduce the costs awarded to Mr Shepherd because she considered he should not have been separately represented. Rather, what she was saying was that because of "the joint nature" of the charges against Mr Shepherd and Mr Costa and because, apparently to quite a large extent, Mr O'Haire relied on the cross-examination and submissions of senior counsel for Mr Costa, there was "much duplication in relation to these matters". Further, the learned Magistrate referred to the fact that Mr O'Haire performed the joint role of instructing solicitor for Mr Costa and counsel for Mr Shepherd. Therefore, she concluded that similar conclusions should, where appropriate, be drawn about Mr Shepherd's claim for costs as were drawn in respect of Mr Costa. The most obvious example of this and the basis for the comment, was Mr O'Haire's reliance on Mr Costa's counsel's work in respect of the jurisdictional issue. When this was put to Mr O'Haire by her Honour during the argument, his response was that it was a "fair comment". Thus, the learned Magistrate reduced the costs awarded to Mr Shepherd on account of the excessive time spent on the jurisdictional issue.

41. I do not accept Mr Trood's submission that approaching it in this way was unfair to Mr Shepherd. In my opinion, it was open to the learned Magistrate to conclude that this was not a case where one defendant was defending the charges in an entirely different way to the other defendant, On the contrary, Mr Shepherd was content to rely on the cross-examination and submissions of senior counsel for Mr Costa, and to obtain any benefit resulting from that work. In those circumstances, where the learned Magistrate has concluded in respect of Mr Costa's application for costs that too much time was spent by Mr Costa's lawyers on the jurisdictional issue, it was certainly open to her, in my opinion, to reach the same conclusion in respect of Mr Shepherd's application for costs.

42. Whilst another judicial officer may have reached a different result in terms of the reduction in the amount of costs awarded to Mr Shepherd, in my opinion no error has been shown, nor could it be shown on the material before this Court, in the conclusion reached by the learned Magistrate. It was certainly open to her in the particular circumstances of Mr Shepherd's case.

43. The third matter Mr Trood relied on was the learned Magistrate's reference to "having regard to all of the matters that were traversed". He submitted that this was not just a reference by the learned Magistrate to the fact that the prosecution had satisfied the Court on the jurisdictional issue (which has been already dealt with), but also to the learned Magistrate's earlier findings in respect of charges that "there was direct evidence by the prosecution", and that "the prosecution were unable to discharge the onus of proof" because she had "formed a view that all of the witnesses ... were credible". I agree that the learned Magistrate should be taken to be referring back to those findings. As stated above with respect to Mr Costa's appeal, I accept the submission that the findings about the nature of the evidence and the credibility of the witnesses were not relevant to the question of costs. Nevertheless, as I have concluded that the limited order for costs in favour of Mr Shepherd was open to the learned Magistrate, it does not assist Mr Shepherd that those irrelevant factors were taken into account.

44. It follows that Mr Shepherd's appeal against the learned Magistrate's order in respect of costs must also be dismissed.

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[1] T 36-37.
[2] T 37-38.
[3] [1990] HCA 59; (1990) 170 CLR 534.
[4] [1990] HCA 59; (1990) 170 CLR 534 at 544.
[5] [1990] HCA 59; (1990) 170 CLR 534 at 565-566.
[6] [1990] HCA 59; (1990) 170 CLR 534 at 569.
[7] [1990] HCA 59; (1990) 170 CLR 534 at 544 per Mason CJ.
[8] (Unreported, Supreme Court of Victoria, O'Bryan J, 10 October 1996).
[9] Ibid, p5.
[10] Ibid.
[11] (1991) 54 A Crim R 114.
[12] (1991) 54 A Crim R 114 at 117.
[13] (1991) 54 A Crim R 114 at 118.
[14] [1953] HCA 25; (1953) 94 CLR 621 at 627.
[15] (Unreported, Supreme Court of Victoria, Ashley J, 6 October 1994) p6.
[16] [2006] VSC 488.
[17] (Unreported, Supreme Court of Victoria, Batt J, 21 August 1995) p3.

[18] (Unreported, Supreme Court of Victoria, Ashley J, 6 October 1994) p4.
[19] T 24.
[20] *Thompson v The Queen* [1989] HCA 30; (1989) 169 CLR 1.
[21] T 21.
[22] T 23.
[23] T 21.
[24] T 21-22.
[25] T 22-23
[26] T 30.
[27] *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534 at 542 per Mason CJ.
[28] T 26.

APPEARANCES: For the appellants Costa and Shepherd: Mr AD Trood, counsel. Brian O'Haire, solicitors. For the respondent Parks: Mr BM Dennis, counsel. Victorian Government Solicitor.

18/08; [2008] VSC 55

SUPREME COURT OF VICTORIA

TSAPEPAS v RHINO STRATEGIC COMMUNICATIONS

Coghlan J

5 February, 3 March 2008

CIVIL PROCEEDINGS - MONIES ADVANCED TO CORPORATE ENTITIES IN TWO AMOUNTS - MONIES NOT REPAID - CLAIM FOR REPAYMENT OF MONIES - PART PAYMENT MADE - WHETHER MONIES WERE LOANS OR GIFTS - FINDING BY MAGISTRATE THAT THE TWO ADVANCES WERE LOANS - ACCORDINGLY THE CLAIMS FOR REPAYMENT WERE NOT STATUTE BARRED - TREATMENT OF THE REPAYMENT - WHETHER IN REDUCTION OF THE OLDEST DEBT - APPLICABILITY OF *CLAYTON'S CASE* - NOT APPLICABLE AS ONGOING OR RUNNING ACCOUNT NOT INVOLVED - FINDING BY MAGISTRATE THAT AS BOTH DEBTS WERE SOUGHT TO BE PAID BY ONE DEMAND, PAYMENT RELATED TO BOTH DEBTS - WHETHER MAGISTRATE IN ERROR: *LIMITATION OF ACTIONS ACT* 1958 S26(6).

1. Where a magistrate found that two sums of money advanced to a party were loans and payment in part was made, the magistrate was not in error in finding that because both debts were sought to be recovered by one demand the payment was against both debts and accordingly, the claim was not statute barred.

2. The principle in *Clayton's Case* (*Devayne v Noble*) (1816) 1 Mer 572 is that where there is an ongoing or running account with a number of debts and a number of payments over time, any amount paid should be applied to the oldest of the debts. In the present case, *Clayton's Case* did not apply because the circumstances did not involve an ongoing or running account.

COGHLAN J:

1. This is an appeal from a decision of the Magistrates' Court of Victoria by which the appellant was found liable to repay two loans to the respondent company. Orders for interest and costs were also made.

2. The appeal is brought pursuant to s109 of the *Magistrates' Court Act* on the basis of an error of law. The ground of appeal is:

> "1. That a deemed repayment of the debt by operation of law cannot constitute payment under s26(6) of the *Limitation of Actions Act* 1958 (Vic)".

Factual background

3. The respondent had advanced (to use a neutral word) the sums of $50,000 and $10,000 to the appellant. The $50,000 had been paid on 8 December 1998 and the $10,000 on 9 August 2001. The payments were made to corporate entities operated by the appellant. The appellant had nominated the entities to which payment was to be made.

4. The nature of the transactions was in dispute between the parties. The respondent (through its principal shareholder, Mr George Tomeski) gave evidence that the two advances were loans. The appellant, on the other hand, asserted that the advances were gifts and that he was not under

any legal obligation to make repayment. Alternatively, he said that the advances were to corporate entities which were now in liquidation.

5. A separate consideration arose in relation to the $50,000 advance.

6. It was common ground that the proceedings to recover the $50,000 were issued outside the six year limitation period, unless there was some basis for the operation of s26(6) of the *Limitation of Actions Act* 1958 (Vic) ("the Act").

7. It was also common ground that on or about 7 November 2003, the appellant drew a cheque on the account of the Telephony Group Pty Ltd ("Group") in the sum of $5,000 payable to George Tomeski. The cheque was delivered to Mr Tomeski's place of business. The appellant said that he made the payment as an "ex gratia" payment because he believed that Mr Tomeski was in financial trouble. He also asserted that he had been threatened by "partners" of the respondent.

8. The respondent took action in the Magistrates' Court to recover both amounts. He particularised the matter as two distinct loans and treated the $5,000 as having been applied to reduction of the $50,000 loan.

Findings

9. The learned Magistrate found that the two advances were in fact loans. He found that the $50,000 was a loan payable on demand and that the $10,000 was a loan repayable 14 days after it was given (9 August 2001).

10. His Honour found that the loans were made personally to the appellant. He further found that since the two payments had been made by cheque drawn on the account of Rhino Strategic Communications ACN 081352785 (a company operated by Mr Tomeski), the debts were owed to the company.

11. It followed that his Honour found that the $5,000 paid in November 2003 was a repayment of the loans.

12. Since his Honour had found the nature of the transactions were loans, the question arose as to whether or not recovery of the $50,000 was statute barred.

13. The question which next arose was whether s24(3) of the Act would operate. The relevant parts of that sub-section are:

> "s24(3) Where—
> (a) any right of action has accrued to recover any debt or other liquidated pecuniary claim ...; and
> (b) the person liable or accountable thereafter acknowledges the claim or makes any payment in respect thereof—
> the right shall be deemed to have accrued on and not before the date of acknowledgment or the last payment".

14. The learned Magistrate rejected the evidence of the appellant on both issues of relevance, i.e., that the advances were not loans and the payment was an *ex gratia* payment.

15. It follows that the payment of $5,000 must be a payment with respect to the loans. There are two loans and the question arises as to whether or not the payment can be applied to any loan in particular.

16. It was argued on behalf of the respondent below that the payment of the cheque of $5,000 constituted an "acknowledgment of the debt" within the sub-section. His Honour rejected that argument principally on the basis that the "acknowledgment" could not be said to be "in writing and signed by the person making the acknowledgment" (see s25(1) of the Act).

17. In rejecting the appellant's evidence, his Honour necessarily found that the appellant was making payment with respect to the amount or amounts found by his Honour to be owing.

18. The argument advanced by the appellant was in three parts.

19. First, it is submitted that the payment was made by the Group and was not a part payment for the purposes of 24, 25 and 26(6) of the Act. There is an immediate difficulty with that argument. His Honour found (Exhibit "IGH-2" to affidavit of Ian George Hone of 23 January 2007, p273):

> "The only remaining question, though, is whether this payment made by Mr Tsapepas, or for that matter any other defendant, can acknowledge the debt or make a payment of a debt. On any view, the Group was not a debtor of either the firstnamed plaintiff or Rhino.
> I am troubled by this, but in the circumstances of this entire case, I am satisfied to find that the real position here is that Mr Tsapepas was paying this money, he just chose to take it and borrow it from the Group, and instead of writing out a number of cheques, he wrote out a Group cheque".

20. In the circumstances, on the unchallenged finding of his Honour, the payment was made by the appellant, using a Group cheque for the purpose.

21. In those circumstances, s26(6) of the Act has no operation. His Honour found that the liability was personal and the payment was personal. *Cheethams v Remington* [1999] VSC 150; [1999] 3 VR 258 is not relevant to any issue which needs to be decided here.

22. In one sense that conclusion would seem to dispose of the ground of appeal as expressed. Two other matters were urged on appeal and the ground of appeal may be just wide enough to encompass them.

23. Second, it was argued that if payment had been made, it was not possible to say that the payment related to the $50,000 debt which would otherwise be statute barred.

24. Third, or as part of the preceding argument, that the learned Magistrate had erred in his application of the principle in *Clayton's Case* (*Devayne v Noble*) (1816) 1 Mer 572; see also *Airservices Australia v Ferrier* [1995] HCA 57; (1996) 185 CLR 483).

25. It is convenient to deal with those arguments together. The learned Magistrate did purport to dispose of the case by the application of *Clayton's Case* (*supra*). He applied the principle that where an amount is paid against a number of debts, then the amount received should be applied to the oldest of them. The difficulty about the application of *Clayton's Case* is that the principle in that case arose in circumstances of an ongoing or running account (at p572). That is not the position in this case. These were two distinct loans and the proceedings in the Magistrates' Court dealt with each of them, although within the one summons, separately. (See also *Re Footman Bower and Co Ltd* [1961] 2 All ER 161, 164H).

26. There was no challenge to the proposition that the creditor may apply any amount received from the debtor in circumstances such as these to either loan. (See *Re Footman Bower and Co Ltd supra*). That would not, however, bind the debtor in a way which would treat the payment as a payment for the purposes of s23(4).

27. The question which is important is, what did the debtor intend? Unless it can be shown that he was intending to pay a particular debt, then the mere fact that the creditor applied it in a particular way will not prevail. (See *Re Footman Bower and Co Ltd* (*supra*) 164E).

28. In this case, what was intended? The learned Magistrate found that the principle in *Clayton's Case* would operate to deem the payment a payment in reduction of the $50,000 debt.

29. I assume *Clayton's Case* fell to be considered because there was little doubt that the demands being made were demands for the whole amount and in that sense the respondent had treated the two original transactions as having merged into one debt. In my view, the principle in *Clayton's Case* arose because the Court, in that case, had to deal with the concept of a number of debts and a number of payments over a period of time.

30. I am satisfied that the appellant's submission that the principle in *Clayton's Case* could not operate in this case is correct.

31. It was further submitted that although it was good law that the creditor could apply the payment to whatever debt he wished, that did not bind the debtor. It did not bind the debtor

for the purposes of making a particular payment a payment within the meaning of s23(4) of the Act.

32. The evidence was clear that the respondent had applied the $5,000 in reduction of the $50,000. The respondent had pleaded his case seeking to recover $45,000 on the first loan and $10,000 on the second.

33. It was conceded by the appellant that he could not resist a judgment in the sum of $10,000 after the Magistrate found that the amount was a loan.

34. In addition to what he said about the operation of *Clayton's Case*, the Magistrate made an alternative finding. It is of benefit to set out the whole of the relevant passage:

> "What is argued here, and in an argument which I accept, leaving aside perhaps one other obstacle, is that the cases which suggest that you cannot appropriate payments against a statute barred debt in order to revive or start the time again, do not apply where the payment is made before the statute runs its course.
>
> In such a case where the parties do not themselves appropriate the payment, the law will do so for them, and the law will appropriate the payment to the oldest debt.
>
> For that to happen is not to create a clash or tension with the *Statute of Limitations* because the Statute has nothing to say at that point of time. The Statute is not operating at that point of time to bar any debt at that point of time. At that point of time both debts can be sued for and the Statute is not available as a defence.
>
> So that a combination of those two propositions, namely a payment which is not tagged to be the payment of one of a number of debts means that – and the principle of *Clayton's case* that I have just referred to means that the payment then is appropriated to the earliest debt. Alternatively, it is a payment against both debts, in my opinion. Because both debts are asked and sought to be paid by the one demand".

35. The oral reasons were somewhat excursive. I am satisfied that the Magistrate looked at the matter in the alternative. He established the order of the payment by applying the principle in Clayton's Case. That is, he deemed the payment to be a payment against the earlier, now statute barred debt, of $50,000. Since the payment was made before the expiration of the limitation period, it was a payment for the purposes of s24(3) and s26(6) of the Act.

36. As I have already said, I find that the principle in *Clayton's Case* could not be applied in this case because this was not a case of a running account.

37. His Honour did find an alternative basis for judgment for the plaintiff (respondent). He said:

> "Alternatively, it is payment against both debts, in my opinion, because both debts are asked and sought to be paid by one demand".

38. It was argued on behalf of the appellant that that was not a true alternative basis for his judgment, but merely an alternative way of expressing what had been done by the respondent in applying the debt. It did not, as the argument ran, provide an acknowledgment of the debt in the general sense or, in particular, the whole debt.

39. I am not convinced by that argument. The juxtaposition being dealt with by His Honour was a clear one. If the principle in *Clayton's Case* applied, then the payment was to be applied to the earlier debt. In the alternative, his Honour then found the payment related to both debts. Some of the reasoning of His Honour when dealing with the operation of *Clayton's Case* was equally appropriate to the alternative.

40. At the time of the payment, neither of the debts were statute barred. In that sense it could not have mattered to the appellant in any legal sense which debt with respect to which he was paying the amount. The appellant gave evidence that neither of the advances to him were loans. He was therefore under no obligation to pay. He made the payment as an *ex gratia* payment. He did not assert that the payment was in relation to one amount rather than the other amount. If he did not regard the advances as loans, even if they were loans as a matter of law, then there was no basis on which he would have made any distinction between the advances or intended that the payment be with respect to one and not the other.

41. The Magistrate found that the advances were loans. The payment, therefore, was a payment off the loans. The amount which the respondent sought to recover was the total amount as his Honour observed "because both debts are asked and sought to be paid by the one demand".

42. The alternative finding was open on the evidence and was strongly supported by the circumstances. It was entirely logical. I am satisfied that the alternative finding by the Magistrate supports the judgment in favour of the respondent.

43. It follows I would dismiss the appeal. The respondent argued before me that the matter which gave rise to the ground of appeal had not been argued in the Magistrates' Court. In particular, Mr Harrison, who appeared for the respondent, submitted that it had not been put to the Magistrate that *Clayton's Case* was not of application in the present case.

44. In a purely technical sense, that may have been so, but when the submissions below are looked at as a whole, I am not satisfied that the matter was not raised. Since I have dealt with the appeal in the way that I have, it is not necessary for me to express a concluded view on the matter.

45. The appeal is dismissed.

APPEARANCES: For the appellant Tsapepas: Mr L Watts, counsel. Ian G Hone, solicitors. For the respondent Rhino Strategic Communications: Mr DC Harrison, counsel. Anderson Rice Lawyers.

19/08; [2008] VSC 56

SUPREME COURT OF VICTORIA

INTERNATIONAL FLAVOURS & FRAGRANCES v HOFF

Byrne J

21, 22 February, 7 March 2008

CIVIL PROCEEDINGS - EMPLOYER AND EMPLOYEE - EMPLOYEE'S EMPLOYMENT TERMINATED BY COMPANY - TERM IN CONTRACT OF EMPLOYMENT THAT EMPLOYEE WOULD RECEIVE CERTAIN ENTITLEMENTS IN THE EVENT OF TERMINATION FOR REDUNDANCY - CLAIM BY EMPLOYEE FOR ENTITLEMENT - WHETHER EMPLOYEE DISMISSED FOR REDUNDANCY - LEGAL TEST FOR DETERMINING REDUNDANCY - FINDING BY MAGISTRATE THAT EMPLOYEE DISMISSED FOR REDUNDANCY - WHETHER MAGISTRATE IN ERROR.

1. Redundancy occurs where the employer no longer wishes the job performed by the employee to be performed by anyone. In the present case, the employee had to prove on the balance of probabilities that the disappearance of her job was the reason for the termination of her employment. What is required is an analysis of each of the two jobs in terms of the overall duties and responsibilities which it comprises and its place in the structure of the enterprise. It is only where the disparity between the two is such that the job of the dismissed employee can be said no longer to exist that the circumstances for redundancy can arise.

2. Where a magistrate found that there was evidence to infer that the reasons for the employee's dismissal was that her functions and responsibilities had been incorporated into a different and expanded job for which she was considered unsuitable and which was given to another employee, it was open to the magistrate to conclude that the employee had been terminated for redundancy.

BYRNE J:

1. The respondent, Sandra Bridgette Hoff, was employed by the appellant, International Flavours & Fragrances (Australia) Pty Ltd ("IFF"), from 4 January 1988 until 11 January 2006 when her employment was terminated by IFF. At the time of termination she held the position of purchasing manager of materials for the IFF factory at Dandenong. The business of IFF at Dandenong was the manufacture of flavours and seasoning for the food industry.

2. It was a term of her contract of employment that, in the event that her employment was

terminated for redundancy, Ms Hoff would receive certain entitlements which, in her case, were $100,000. At the time of termination, IFF took the position that her employment was not terminated for redundancy and that she had no entitlement. She disagreed with this and commenced a proceeding in the Magistrates' Court in March 2006 seeking $100,000 and interest.

3. On 21 February 2007, following a two day hearing, Ms AJ Chambers M published her reasons for concluding that Ms Hoff's claim should succeed. An order was duly made on 14 March 2007 that IFF pay to her $100,000 plus $11,490.40 interest, and costs which were agreed at $30,000. By notice of appeal dated 27 April 2007, IFF appeals against the Magistrates' Court orders.

4 The questions of law raised in the notice of appeal, as amended, may be summarised as follows:

1. Did the Magistrate fail to identify the correct legal test for determining redundancy?
2. Did the Magistrate fail to apply these tests?
3. Did the Magistrate effectively reverse the ultimate onus of proof by imposing it on IFF?
4. Was the conclusion that the determination of employment was for redundancy open on the evidence?

5. I shall address each of these questions in turn, but not in the order presented. The grounds of appeal number 16 and range over six pages. I will not set them out.

QUESTION 1 - THE CORRECT LEGAL TEST

6. The reasons for decision of the Magistrate were detailed. In four paragraphs[1] her Honour comprehensively sets out the legal features of redundancy at common law. She accepted, as did the parties, that the terms of the contract of employment imported this common law concept so that it was to the leading cases discussing this concept that she turned.[2] She concluded that redundancy occurs where the employer no longer wishes the job performed by the employee to be performed by anyone. Cases such as *Jones v Department of Energy and Minerals*[3] and *Foster's Group Ltd v Wing*[4] show that, since a job is a collection of duties and responsibilities performed by an employee, it may be that, where these duties and responsibilities are dispersed to other employees, there is a redundancy for the employee notwithstanding that the employer continues to have the benefit of those services which had previously been performed by the employee as part of his or her job. It is sufficient that the duties and responsibilities of the employee which constitute his or her job have been changed or reorganised so that, for practical purposes, the original job no longer exists.[5] Her Honour correctly identified these as the principles relevant to this case.

7. Her Honour also concluded that the entitlement of Ms Hoff depended upon her proving that her employment was terminated for redundancy. This means that she must establish that the disappearance of her job was the reason for the termination of her employment.[6] In this case, IFF contended that the termination was for a number of matters which were collectively called performance issues. These issues were, in summary, issues as to the efficient performance of her duties and also as to her attitude towards other employees in the company.

8. The principal criticism offered on behalf of IFF was that her Honour made no mention in her reasons of *Foster's case*, which, it was said, was a decision on similar facts. This is, of course, not a valid criticism unless it be shown that her Honour misstated the legal principles which she applied.

9. I am satisfied that her Honour correctly identified the legal principles which underlie the concept of termination for redundancy. The first question of law must be answered in the negative.

QUESTION 3 - THE ONUS OF PROOF.

10. The Magistrate stated, correctly in my view, that the plaintiff before the Court bore the onus of establishing her case on the balance of probabilities. If, at the end of the day, Ms Hoff failed to persuade the Magistrate to that standard that she was terminated for redundancy, then she should fail.

11. IFF, as I have mentioned, joined issue upon the question that, if there were redundancy, this

was not the reason for termination. It did so by advancing another reason, namely, performance issues concerning Ms Hoff. Accordingly, the Magistrate considered this contention and the evidence offered in support of and against it. An examination of the transcript[7] shows that this contention occupied a large part of the hearing. Her Honour was not, in the end, persuaded that there was any substance in this contention of IFF. Her Honour did not, by so doing, impose any ultimate burden on IFF as to the reason for termination. It was just that there were two competing reasons offered and she found on the balance of probabilities that the reason offered by Ms Hoff was established.

12. Accordingly, the third question of law should be answered in the negative.

QUESTIONS 2 AND 4 - THE APPLICATION OF THE REDUNDANCY TEST

13. The uncontradicted evidence showed that in November 2005, some two months before the termination of Ms Hoff's employment, IFF interviewed one Matthew Ellis for the position of planning manager. By letter dated 19 December 2005 he was offered that position but the letter of offer does not describe his duties or responsibilities other than identifying his position by its title. Mr Ellis commenced work with IFF in that position in the first week of February 2006, some three weeks after Ms Hoff was terminated.

14. It was Ms Hoff's case that her job was not performed by anyone after her departure on 11 January 2006. IFF contended that Mr Ellis assumed her duties and responsibilities and certain others when he commenced in February.

15. It should be noted that these matters, namely, what work was Mr Ellis employed to perform in November 2005 and what work he did in fact perform when he commenced in February 2006, were matters of which Ms Hoff had no direct knowledge. She was not involved in his employment; indeed, the evidence of the IFF witnesses was to the effect that she was not told of this because he was to take her place in the factory. She had no knowledge of what he did in February 2006 for she was then no longer employed by IFF. She was, of course, able to give evidence of her own responsibilities and duties but, for those of Mr Ellis, she depended upon others. She called no other witness in the Magistrates' Court. The witnesses called by IFF were Jennifer Louise Marlow, the IFF human resources manager, and Morris Clayton Mahaley, at the time the IFF operations manager at Dandenong. Not called were Matthew Rouse, the country manager, and Mr Ellis himself. Ms Hoff's line manager was Peter Smith who reported to Mr Mahaley who, in turn, reported to Mr Rouse. The evidence showed that it was Mr Rouse whose responsibility it was ultimately to make the decision to terminate Ms Hoff.

16. In the circumstances, counsel for Ms Hoff argued that the Magistrate should draw a *Jones v Dunkel* inference against IFF for its failure to call Mr Rouse and Mr Ellis. The Magistrate accepted this submission and applied the rule, correctly in my view, without using the failure to call these witnesses to fill gaps in the proofs of Ms Hoff.

17. Having reviewed the evidence and made certain findings as to factual matters, her Honour at paragraph 48 of her reasons set out the conclusion which formed the basis for her finding as to whether the contract of employment was terminated for redundancy. Her findings were in these terms:

> 48. On 19 December, 2005 Mr Ellis and IFF entered into a contract of employment, with Mr Ellis being offered employment as Planning Manager, reporting to the Supply Chain Manager. His position was changed to Planning and Purchasing Manager in August, 2006. His duties included manufacturing duties as well as the purchasing duties performed by [Ms Hoff]. I find that whilst the purchasing duties of [Ms Hoff] continued to be performed by Mr Ellis, they were in fact incorporated into an expanded role that was given to Mr Ellis, one including manufacturing duties. As was conceded by Ms Marlow, it made good business sense to amalgamate the dual roles in this way.

18. On behalf of IFF, it was submitted that the findings of fact made in this paragraph and their application to the law were erroneous. By way of explanation, it should be noted that the evidence showed that after he commenced employment the duties and responsibilities of Mr Ellis changed. In evidence was an IFF document entitled Job Description for him dated August 2006. The evidence was that his earlier job descriptions existed but that they had been discarded when the August 2006 document came into existence. In this document Mr Ellis' job title is planning and purchasing manager. His key responsibilities are given as follows:

- Consistently achieve customer service level of 96% minimum
- Achieve predetermined inventory targets as measured by days of inventory and % of obsolete and slow moving stock
- Deliver cost saving initiatives for purchased items
- Monitor purchase orders to ensure that raw material levels are adequate to meet production requirements
- Implement demand management strategies to achieve customer service of 96% minimum
- Monitor production schedules to ensure that finished goods levels are adequate and timely to meet customer orders
- Ensure integrity of the department processes and procedures

None of these appears to be that of purchasing manager of materials for use in the manufacturing process. It may be that the customer referred to in dot points 1, 5 and 6 was the manufacturing department of IFF. On a reading of this document, the Magistrate was entitled to conclude that, by August 2006, the job of Mr Ellis was far removed from that which Ms Hoff had performed prior to her dismissal.

19. In terms of the management hierarchy, Mr Ellis is shown in the August 2006 document as reporting to one Lloyd Majoros, the supply chain manager, and that he had, in turn as subordinates, a demand manager, five production planners/buyers, and a shop floor controller.

20. Another document in evidence was an organisational chart of the IFF supply chain dated 25 September 2006. This shows that Mr Ellis was one of three managers reporting to Mr Majoros. His position is described as planning manager. Six, or perhaps seven employees report to him: three supply coordinators, a purchasing coordinator, a demand manager, and a senior planner. Reporting to the senior planner is a person whose position is described as shop floor controller. The evidence of Ms Hoff was that, of these persons, she did not have reporting to her the senior planner or the demand manager. Mr Mahaley, who moved from Dandenong in August 2006, said that, in a number of respects, this chart did not reflect the organisational structure in place when Mr Ellis joined the organisation.

21. What was put on behalf of Ms Hoff to the Magistrates' Court was that Mr Ellis' responsibilities in a large part concerned the planning of material purchases and supply to the factory, a role which she never had. Her purchasing work was performed by him or by persons under his control, but this was not a major part of the job he was employed to perform.

22. I have mentioned that both of these documents bear dates some seven or eight months after Ms Hoff's termination in January 2006 and, to that extent, may not truly reflect the position in January and February of that year.

23. Mr Mahaley said that, when she was terminated, her responsibilities were that of vendor management, supply management and a leader of the purchasing team. All of these three functions have passed to Mr Ellis. I interrupt myself to observe that his key responsibilities in the August 2006 document do not appear to bear this out. Mr Mahaley said that when Mr Ellis was first employed his first task was to clear the gaps in the purchasing department and to evaluate the skills and capacities of those in that department. He said that in April 2006, following the resignation of an employee, Joanne Luke, Mr Ellis' role was enlarged to take in the day-to-day responsibilities of purchasing and planning as well as demand planning.

24. Ms Marlow, too, said that Ms Hoff's responsibilities were solely directed to the roles of supply and purchasing of materials for use in the manufacturing processes and that these passed to Mr Ellis upon his appointment. She said, also, that, when he was engaged, "we did discuss with him about the demand position, that we would be looking at demand reporting into that area". And when asked whether there was good reason to combine the roles of demand planning and purchasing, the witness said "it was what Ms Hoff had to do anyway". This role of planning and demand reporting, which essentially concerned the relationship of the material supply and the demands of the manufacturing activities at the factory, was referred to in the context at the hearing as manufacturing duties. Ms Hoff said that her duties did not include manufacturing duties.

25. In the light of this, the Magistrate in the passage which I have quoted above[8] summarised the factual position as she saw it as being that, when he commenced employment in February 2006, Mr Ellis continued to perform Ms Hoff's purchase duties but that by August they had been

incorporated in an expanded role which included the manufacturing duties. These findings were open on the evidence and I find no error of law in this. There may be some uncertainty as to when the duties were enlarged, but nothing turns on this. Question four must be answered in the affirmative.

26. I come now to the nub of this aspect of the appeal. It is said on behalf of IFF that such a finding must inevitably lead to the conclusion that Ms Hoff's job continued after her dismissal for this is what Mr Ellis was doing. Accordingly, her employment was not terminated for redundancy.

27. In response, it was put that, upon a proper analysis, what the Magistrate found was that Ms Hoff's position was abolished. Her functions were rolled up into a new and different position which she was not offered, presumably because she was not seen as suitably qualified. It was submitted that there was evidence to support such a factual conclusion. I was referred to the following findings of the Magistrate:

- The title of Mr Ellis' position was that of planning manager, as an indication that his principal activity was that of planner
- The only competing reason for termination offered by IFF, the professional issues, was rejected
- The reason given to Ms Hoff by Mr Mahaley and Ms Marlow for her termination at the dismissal meeting on 11 January:

  I find that [Ms Hoff] was told by Mr Mahaley that due to a restructure of the company her role was no longer required, the company was moving in a different direction, a different skills set was needed and that her employment was being terminated.[9]
- The Magistrate, upon a vital issue in the case, rejected the evidence of Mr Mahaley and Ms Marlow as to what was said at the meeting on 11 January. Her Honour was entitled to treat this as a credit issue when assessing their assertions in evidence as to the circumstances and reasons for the dismissal.

28. I remind myself that the conclusion is largely one of fact. It is not my role to revisit questions of fact which lie in the province of the trial judge. I am to determine whether there was evidence before the Magistrate which would support the inference of fact which she drew that the reason for Ms Hoff's dismissal was that her functions and responsibilities had been incorporated into a different and expanded job for which she was considered unsuitable and which was that given to Mr Ellis.

29. The question of law is whether these facts amount to redundancy. It is clear from the judgment of the Court of Appeal in *Foster's case* that where the circumstances are that the work previously performed by the suggested redundant employee continues to be performed by another job-holder after that employee is terminated, the answer to the question whether the job of the dismissed employee has been abolished must be one of comparing the job of the dismissed employee with that of the other job-holder. It is not a matter of the labels given by management to the two jobs, although this may be a factor. It is not sufficient to say that the job has not been abolished simply because the duties and responsibilities continue to be performed by another employee. If this were the case the job of purchasing manager could never be abolished; it would seem always to be necessary for a manufacturer like IFF to have someone manage the purchase of its raw materials. What is required is that there be an analysis of each of the two jobs in terms of the overall duties and responsibilities which it comprises and its place in the structure of the enterprise. It is only where the disparity between the two is such that the job of the dismissed employee can be said no longer to exist that the circumstances of dismissal for redundancy can arise.

30. It is clear from her Reasons that the Magistrate addressed this question and reached the conclusion that the totality of the responsibilities and duties which Mr Ellis was engaged to assume and perform were so different from those previously assumed and performed by Ms Hoff that it may be said that his was a new job requiring different skills so that her role was no longer required. I find no appellable error in this conclusion. The second question must be answered in the negative.

31. It follows from this that the appeal must be dismissed.

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[1] Paragraphs [12]-[15].

[2] *R v Industrial Commission of South Australia*; *ex parte Adelaide Milk Supply Co-Operative Ltd* (1977) 16

SASR 6, *Jones v Department of Energy and Minerals* (1995) 60 IR 304 (Fed Ct) and *Dibb v Commissioner of Taxation* [2004] FCAFC 126; (2004) 136 FCR 388.
[3] (1995) 60 IR 304.
[4] (2005) 148 IR 224 (Vic Court of Appeal).
[5] *Foster's Group Ltd v Wing* (2005) 148 IR 224 (Vic Court of Appeal) at [36].
[6] *Dibb v Commissioner of Taxation* [2004] FCAFC 126; (2004) 136 FCR 388 at 404 [43]- [44].
[7] The transcript for the first day of the hearing in the Magistrates' Court comprises only notes taken of the evidence; not a full transcript.
[8] See para [17] above.
[9] Magistrate's Reasons para [41].

APPEARANCES: For the appellant International Flavours & Fragrances: Mr TJ Ginnane SC and Mr J Forbes, counsel. Freehills, solicitors. For the respondent Hoff: Mr NJD Green QC and Mr MR Champion (21 February 2008), counsel. Mr AJ McDonald (Sol) (22 February 2008). McDonald Murholme, solicitors.

20/08; [2008] VSC 75

SUPREME COURT OF VICTORIA

REID v TABBITT & ANOR

Coghlan J — 11, 14 March 2008

PRACTICE AND PROCEDURE - APPLICATION FOR A PERSON TO UNDERGO A COMPULSORY PROCEDURE - VATE TAPE AND TRANSCRIPT NOT AVAILABLE AT TIME OF HEARING APPLICATION - NATURAL JUSTICE - WHETHER PERSON DENIED NATURAL JUSTICE - TEST TO BE APPLIED BY MAGISTRATE WHEN DEALING WITH APPLICATION - APPLICATION GRANTED FOR TAKING OF SWAB - WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S464T.

1. When a magistrate is determining an application for an order that a person undergo a compulsory procedure, the test to be applied is that the magistrate must be satisfied on the balance of probabilities that there are reasonable grounds to believe that the person has committed the offence. The test does not involve the magistrate reaching any degree of satisfaction as to the commission of the offence.

2. Where a VATE tape was not made available to the magistrate in determining an application for an order directing a person to undergo a compulsory procedure because the tape had not been transcribed and the tape did not provide any exculpatory material, the person was not denied natural justice by the magistrate not viewing the tape.

COGHLAN J:

1. By Originating Motion dated 18 October 2007, the plaintiff seeks an order quashing an order made by Broughton M on 20 September 2007 in the Ballarat Magistrates' Court that, pursuant to S464T of the *Crimes Act* 1958 (Vic) ("the Act"), the plaintiff provide a forensic sample to the defendant.

2. The plaintiff seeks a further order that Broughton M be, "directed to redetermine the application subsequent to full disclosure having been made by the first defendant and according to proper principles of law".

3. The grounds of the application set out in the Originating Motion are:

> "1. The 1st defendant did not provide full disclosure of available material to the Court upon the hearing of the application pursuant to s464T, *Crimes Act*, (Vic) on September 20, 2007 in that the VATE tape of the victim was not produced to the Court.
> 2. 2. The Honourable Magistrate fell into error in ruling that s464T(3)(b) should not be interpreted as meaning that the Court must find the respondent to the application guilty on the balance of probabilities of the offence in respect of which the application was made."

4. The events which led to this Motion began on Saturday 17 August 2007 when K.T. (born 25 March 1992) attended an 18th birthday party. K.T. later claimed that she had been attacked and digitally penetrated without her consent. As a result of the police investigation, the plaintiff was charged with the offences of rape and sexual penetration of a female under the age of 16. K.T. was medically examined. Various samples containing mixed DNA were recovered from her and her clothing.

5. It was in that context that the application was made to the Ballarat Magistrates' Court.

6. The application was for the provision of a sample by "buccal swab".

7. The taking of the "buccal swab" was a forensic procedure under s464T of the Act. That section provides for a Magistrate to make "an order directing a person to undergo the compulsory procedure" s464T(1) of the Act). Such an order may be made on the application of a member of the police force. It is founded on the plaintiff refusing to undergo the procedure, the plaintiff being a relevant suspect and that the member of the police force believing on reasonable grounds that the person has committed the offence s464T(1)(a), (c) and (d) of the Act).

8. Section 464T(2) sets out the form of application. No issue arises under that section in this case.

9. Section 464T(3) provides as follows:

> "(3) The Court may make an order directing a person to undergo a compulsory procedure if the Court is satisfied on the balance of probabilities that—
> (a) the person is a relevant suspect; and
> (b) there are reasonable grounds to believe that the person has committed the offence in respect of which the application is made; and ...
> (h) in all the circumstances, the making of the order is justified. ...
> (5) A relevant suspect in respect of whom an application is made—
> (a) is not a party to the application; and
> (b) may not call or cross-examine any witnesses; and
> (c) may not address the Court, other than in respect of any matter referred to in subsection (3)(a) to (h).
> (6) In exercising the right of address under subsection (5)(c), a relevant suspect may be represented by a legal practitioner."

10. The plaintiff was present at the time of making the application and was represented by Mr Stephen Howe of counsel who made submissions on his behalf. In such applications the role to be played by counsel is somewhat restricted because of the provisions of s464T(5) set out above. Mr Howe made detailed submissions relating to the matters in paragraph (a) to (h) but made two additional submissions. He submitted that exculpatory material available to the defendant (applicant) before the Magistrate had not been put before her. It would follow that the plaintiff (respondent) had been denied natural justice. (See *O'Sullivan v Freeman* [2003] VSC 45). To support his argument, Mr Howe quoted various pieces of material to the Magistrate from the Bar table. He was not permitted to lead evidence, but made submissions.

11. Much of the material went to establishing the proposition that relevant material had not been put before the Magistrate. It was submitted that the material was exculpatory and therefore went either to the question of natural justice or to the proposition that the Magistrate could not be satisfied that there were reasonable grounds to believe that the person had committed the offence in respect of which the application was made (s464T(3)(b)).

12. How the submissions fitted in with s464T(5), I am by no means sure. In any event, the material which was referred to by Mr Howe was tendered by Ms Maxwell, the solicitor who appeared on behalf of the applicant.

13. There was one "document" which remained untendered. That was either the VATE tape of the interview with the complainant or a transcript of it. (See generally s37B Evidence Act 1958 (Vic)).

14. However, tendered to the Magistrate was a document titled "Video Taped Interview Log".

15. The following passages appear in that document.

> "This guy with dark hood pulled down to his nose jumped on me and stuck his fingers in me, while lying on the couch".
> And later Constable White asked:
> "What was the male wearing?---Black jumper. Jeans, lip pieced (sic)".
> "Describe piecing (sic) in lip?---A bar that went straight thru and a ball on either end".

16. At no other place in the "log" is any mention made of piercing.

17. It has emerged that the so-called exculpatory material was material which was served on the plaintiff together with the affidavit in support of the application.

18. In any event, the solicitor for the defendant (applicant) below tendered all of the material which was referred to and counsel for the plaintiff (respondent) was permitted to make detailed submissions on it.

19. Once the material was supplied to the Magistrate, the procedural fairness argument before her was somewhat arid. She heard detailed submissions on the material. The main argument advanced was that the complainant had only described one piercing of the lip of the alleged offender. It was submitted that he had two piercings; one in the lip and one between the lip and the chin. Mr Howe made submissions based upon the statements of Mark Keyte, Rebecca Kensington, Sergeant Karl Curnan, Dr Jill Ramsey, Constable Tibbett (with reference to a recorded conversation with the plaintiff), A.T. (the mother of the complainant) and Constable White. Recent photographs of the plaintiff and his jacket were also tendered. In one sense that material enabled her to look at the question of whether she had been provided with adequate material, but it also allowed her to deal with the case more fully.

20. The general thrust of the submissions was that there was sufficient doubt about the reliability of the identification evidence both relating to the question of "piercings" and the colour of the jacket for her Honour to refuse the order.

21. Toward the end of submissions being made on behalf of the plaintiff, the following exchange occurred (pp23/24 of transcript exhibited to the affidavit of Raylene Maxwell of 13 February 2008 ("the transcript")):

> "MR HOWE: Simply that it has been described variously. To be fair, Your Honour, the victim herself describes the jacket as dark once, and that once is the first time she described it in the VATE log. Now, whether she describes it that way on the VATE tape, I have no idea. I think Your Honour should really see the tape to be fully informed of the matter. I haven't seen it. But that's my view. Whether she says it on the tape, I don't know. But there's once where it is referred to as dark, but then later on in that same interview she reverts to black. So it is always described as black, consistently as black, from the first moment she tells anyone about it, except for once in the VATE log where she says dark. But, as I say, it then reverts to black subsequently, Is the VATE tape obtainable? Is it close by?
> HER HONOUR: I'm certainly not going to call for the VATE tape if it is not readily available.
> MR HOWE: I will take that no further then, Your Honour. That's my submission.
> HER HONOUR: It is not in court at the moment?
> MS MAXWELL: No, Your Honour. It's being transcribed at the present.
> MR HOWE: For the moment that's all I have to say before you read the material, Your Honour."

22. No application was made by counsel with respect to the VATE tape.

23. Counsel for the plaintiff had commenced his submission with an argument that the words of s464T(3)(b) should be interpreted as meaning that the Magistrate needed to be satisfied on the balance of probabilities that the plaintiff was "guilty of the offence".

24. Counsel advanced no authority for the proposition. The argument was repeated before me and it appears to involve the proposition that because the paragraph requires, "reasonable grounds to believe that the person has committed the offence", a tribunal could not be satisfied as to the existence of reasonable grounds unless satisfied on the balance of probabilities that the person had committed the offence.

25. The Magistrate gave careful and cogent reasons for her decision which are set out at p28ff of "the transcript".

26. It is fair to say that her Honour dealt with all the factual matters which had been put to her by counsel for the plaintiff. By necessary implication she rejected the construction of s464T(3)(b) suggested by counsel. She dealt with all the matters suggested by counsel to be exculpatory. She also must be taken to have rejected the argument relating to procedural fairness advanced to her. As I have already noted, once the Magistrate had all of the material, that argument was not really sustainable. She concluded:

> "I have certainly traversed a number of the issues which question has been raised about the

prosecution case, but if I could put it now the other way. I have considered certainly all of the material that I identified and it is the case that, in my view, having considered all of that evidence, that there are reasonable grounds to believe that the respondent has committed the offence with respect to which the application is made and the application will be granted."

27. She made an order that the plaintiff, "attend at the Ballarat Police Station for the provision of a buccal swab on or before 22 October 2007 unless an order to review is filed in the Supreme Court before that date".

28. The first ground before me was:

"1. The 1st defendant did not provide full disclosure of available material to the Court upon the hearing of the application pursuant to s464T, *Crimes Act* (Vic) on September 20, 2007 in that the VATE tape of the victim was not produced to the Court".

29. There is no evidence before me that the tape was available at the time of the hearing below. The evidence was to the contrary. It is not clear to me that such a tape would be admissible on an application of this kind s37B *Evidence Act* 1958 (Vic)). The tape was not produced before me. I had one advantage over her Honour. I had before me a transcript of the VATE tape. Counsel for the plaintiff who, as I understand it, has not seen the VATE tape, did not urge me to view the tape.

30. Lack of procedural fairness would be a basis for quashing the order made by the Magistrate (see *O'Sullivan v Freeman*).

31. It seems to me that the first ground could only be made out if there was something in the VATE tape itself which would have affected the Magistrate's attitude to the application in a way which was favourable to the plaintiff.

32. The Magistrate had before her the log of the VATE tape. She proceeded on the basis that the complainant had said in the tape that there was one "piercing". I have read the transcript of the tape and compared it with the log which was tendered. (See part of LR1 Exhibited to the affidavit of Jeremy William Harper of 12 December 2007, Video Taped Interview Log).

33. In her reasons, Broughton M very carefully dealt with the questions of both the piercing and the jacket or jumper worn by the suspect (transcript pp.33-36). She made reference to the VATE tape. She said:

"Dealing with the videotaped interview log, I note that the VATE tape itself was not in court. I didn't call for it. It's not been seen by the respondent. But certainly it's the case that the VATE log refers to the complainant giving a description. Certainly there's a spelling error, but it is clear that it means 'lip pierced'. Then the complainant appears to have been asked 'Describe piercing in lip'. 'A bar that went straight through and a ball on either end'."

34. The transcript of the VATE tape contains the following passages:

"Q19: Okay. 'Take advantage', how – how do you mean 'take advantage'?
A: Well, I was probably earlier with some boys that night and they must have seen me and thought that, you know, it was okay for them to come up and kiss me or touch me. And when I was in a caravan ... the annexe, they came in and one of them – first of all they came in with me when me and my friend – me and my friend, Tim, were in there and jumped on top of us and that. And he told them to go away 'cos I wanted to sleep. And then after that, I – Tim had left the room said he'll be back in a minute, then they came in again and were just laughing and saying stuff like 'Get into her. She's easy. She looks easy. She was doing it all night'. And after that I was lying on the couch and one of them jumped on top of me, I think he had his hood put in front of his face and, yeah, I was trying to push him away and he, sort of, stuck his fingers in me.
Q20: Stuck his fingers in where?
A: In my vagina.
Q21: In your vagina?
(NODS HEAD)
Q22: Where did this happen?
A: At my friend, Chris Sharp's house. This was his 18th birthday.
Q23: Was Chris in the room?
A: No.
Q24: So were you on the couch when this happened?
A: Yeah. I was lying down.
Q25: Down on the couch. And where were your clothes?

> A: My clothes were on my body, except my undies were, sort of, pulled down to here by one of the guys.
> Q26: What were you wearing that night?
> A: A dress and a cardigan.
> Q26A: Now, you said a male came in and got on top of you.
> A: Yep.
> Q27: Tell me more about him.
> A: I can't really remember much of him. I ... he had a black jumper and jeans and I remember he had his lip pierced. That's all I remember.
> Q28: Can you describe the piercing in his lip?
> A: It sort of had a bar that went straight through and a ball on the end and a ball on the top."

35. The only real difference between the transcript and the log is that the jumper is called a "dark hood" in the log but has colour or shade ascribed to it in the VATE transcript.

36. I am unable to see how the playing of the tape or the reading of the transcript could have made any difference to the decision reached by the Magistrate. Counsel for the plaintiff was unable to give me any particular reason as to why his client's position would have been advanced by the playing of the tape, except to say it would have provided the complete context in which the expression "piercing" was used.

37. It is important to note that at no time in her reasons for decision did the Magistrate proceed on any basis other than that the complainant had referred to piercing in the singular.

38. I am satisfied that the plaintiff was not denied natural justice by the Magistrate not viewing the VATE tape. Counsel did not ask for the Magistrate to view the tape. I accept that he may have felt somewhat constrained by the provisions of s464T(1) and (5) and by what the Magistrate said about it.

39. If there was some reason to believe that the VATE tape provided additional and, in particular, exculpatory material, then the position may well be different. That is not this case.

40. As to the second ground of appeal, I am satisfied that the test to be applied is that the Magistrate must be satisfied on the balance of probabilities that there are reasonable grounds to believe that the person has committed the offence.

41. Those are the plain words of the sub-section and sub-paragraph. The test does not involve the Magistrate reaching any degree of satisfaction as to the commission of the offence. Magistrates would be constrained almost to the point of impossibility if that were the test.

42. I listed the matter on 14 March 2008 intending to deliver judgment. I raised with counsel the fact that I had not seen the VATE tape. I enquired of counsel as to whether or not counsel thought that it was necessary to do so. Mr Howe, who appeared on behalf of the plaintiff, submitted that the only question was whether there was some nuance on the question of "piercing" which might be derived from viewing the tape. He was anxious not to delay the matter, particularly on the issue of costs. I gave him the opportunity to seek instructions. He was unable to contact his client but did not seek to have the matter adjourned to do so or so that I might look at the VATE tape. Given the narrowness of the issue as I see it, which is, is there anything on the VATE tape (taking the transcript of it to be accurate) which might have led Her Honour to a different conclusion; Mr Howe's view that not much might be gained from the actual viewing of the tape is correct. I can only reiterate that all the matters going to the possible identification of the defendant were very carefully dealt with by Her Honour.

43. The order of the Court is that the proceedings commenced by Originating Motion are dismissed.

APPEARANCES: For the plaintiff Reid: Mr S Howe, counsel. Jeremy Harper & Associates, solicitors. For the firstnamed defendant Tabbitt: Mr T Gyorffy, counsel. Office of Public Prosecutions.

21/08; [2008] VSC 102

SUPREME COURT OF VICTORIA

WITHERS v GIROTTO & ORS

Kaye J

19 March 2008

SENTENCING - COMMUNITY-BASED ORDER MADE WITH CERTAIN CONDITIONS - CONDITION TO UNDERGO FORENSIC CARE AND PSYCHIATRIC ASSESSMENT - TO ABSTAIN FROM ILLEGAL DRUGS AND UNDERGO DRUG TESTS - FURTHER CONDITION THAT IF ANY ILLEGAL DRUG DETECTED IN OFFENDER TO "RESULT IN IMMEDIATE BREACH ACTION" - WHETHER SUCH CONDITIONS ARE *ULTRA VIRES* THE *SENTENCING ACT* 1991 - CBO MADE FOR AN OFFENCE NOT PUNISHABLE BY A FINE OF MORE THAN FIVE PENALTY UNITS - WHETHER MAGISTRATE IN ERROR: *SENTENCING ACT* 1991, SS36(1), 38, 47(1).

1. S38(1) of the *Sentencing Act* 1991 ('Act') specifically reserves for the determination of the Regional Manager as to when appropriate testing and assessment should take place and by whom they are to be undertaken. In relation to testing for drugs, the Act reserves to the Regional Manager the discretion and administrative decision as to when and with what frequency that testing is to occur. Also, a court does not have power to dictate to those responsible for prosecuting breaches of community-based orders if and when they should proceed to do so.

2. Where a court attached conditions to a community-based order which were contrary to the provisions of the Act, the conditions were invalid and liable to be deleted from the order.

3. S36(1) of the Act provides that an offence which is not punishable by a fine of not more than five penalty units cannot be the subject of a community-based order. Accordingly, a magistrate was in error in making a community-based order in respect of a charge under the *Road Safety (Vehicles) Regulations* 1999 which did not render the offender liable to a fine of more than five penalty units.

KAYE J:

1. In this matter the appellant came before the Heidelberg Magistrates' Court on 26 November 2007 in respect of ten charges brought against her. Those charges were comprised in four separate police briefs in respect of which there were four informants. The appellant was convicted on all ten charges and was sentenced by the Magistrate to a community based order with particular conditions attached to it. The appellant has brought this appeal in respect of some of the conditions which were so imposed. It is common ground between the appellant and the respondent that the conditions complained of are invalid, and that accordingly an order should be made by this Court amending the orders made by the Magistrates' Court by deleting the offending conditions from the community based order.

2. Having heard short submissions from Mr P Matthews, who appears on behalf of the appellant, and from Mr A Castle, the solicitor for the respondent in each matter, I am persuaded that the conditions so imposed were *ultra vires* the *Sentencing Act* 1991 and should not have been imposed in the community based order. I shall turn briefly to the conditions which are the subject of the appeal.

3. The community based order contained five of the program conditions which are referred to in s38 of the Act, and specified that the appellant perform unpaid community work of 100 hours over 12 months. In addition, the order contained further conditions under the title, "Other conditions and alternative concurrent/cumulative directions". It is those conditions which are the subject of this appeal.

4. The first additional condition was expressed thus: "Undergo forensic care psychiatric assessment to be required by core to occur within six weeks of this date". In my view, that condition was beyond the power of the Court. Section 38(1)(d) of the *Sentencing Act* 1991 provides for program conditions of a community based order to include, where appropriate, a condition that the offender undergo assessment and treatment for alcohol or drug addiction or submit to medical, psychological or psychiatric assessment and treatment "as directed by the Regional Manager".

5. That section has specifically reserved for the discretion and administrative direction of the Regional Manager, the determination both of when the appropriate testing and assessment are to take place, and by whom they are to be undertaken. The express provision for those two matters within s38(1)(d) excludes the power of the Court to direct when, and by whom, the psychiatric assessment is to occur. Thus, the condition, containing each of those two matters, was invalid and *ultra vires* the Act. It should be deleted from the community based order.

6. The second additional condition, which is the subject of this appeal, is expressed thus: "Abstain from all illegal drugs and undergo drug tests to be required by core at least once per month and any illegal drug test detected as from 26/12/2007 is to result in immediate breach action".

7. There are two complaints made by the appellant in respect of that condition. In my view both complaints are valid. First, in my opinion the magistrate did not have power to specify the frequency with which testing for illegal drugs was to take place. The program condition under s38(1)(e) specifically provides that the offender is to submit to testing for alcohol or drug use "as directed by the Regional Manager". That provision expressly reserves to the Regional Manager the discretion and administrative decision as to when, and with what frequency, that testing is to occur. By doing so, it excludes the power of the Court to direct when, and with what frequency, the testing is to occur. For that reason, in my view the additional condition is invalid, because it did specify that tests were to take place at least once per month.

8. The second criticism by the appellant, and supported by the respondent, of that second condition relates to the last part of it, namely, that any illegal drug test detected is "to result in immediate breach action". That provision clearly impinges on the discretion of the prosecuting authority, under s47(1), to determine whether any breach of the community based order ought to be the subject of proceedings against the appellant. In my view, the Court does not have power to dictate to those responsible for prosecuting breaches of community based orders if and when they should proceed to do so. That is a matter which is properly reserved for the discretion of the prosecuting authority. For those reasons, I consider that the last part of the second condition, to which I have referred, is *ultra vires* and thus invalid. Accordingly, I will make orders in each of the matters deleting the two conditions to which I have just referred.

9. In addition, the eighth charge against the appellant was brought under Regulation 703(7) of the *Road Safety (Vehicles) Regulations* 1999, for removing a defective label from a motor vehicle. It is common ground, and I accept, that such an offence may not be the subject of a community based order, because conviction for it does not render the offender liable to a fine of more than five penalty units, which is a prerequisite for the imposition of a community based order as specified by s36(1)(a) of the *Sentencing Act*. Accordingly, the Court did not have power to impose a community based order in respect of Charge 8. Insofar as it did so, the order of the Court will be set aside, and that charge will be remitted to the Heidelberg Court for rehearing.

10. Finally, I should observe that the last condition contained in the community based order is expressed as follows, "If Cognitive Skills Program is successfully completed, 51 hours is to be deducted from work hours under this order." At one stage it was considered whether that condition should be the subject of this appeal, but it is not the subject of the appeal which has come before me today and was not the subject of any argument before me. I therefore specifically decline to express any view as to whether a community based order could contain such a condition. That question may arise in later proceedings, and therefore it is inappropriate that I express any view on it at this stage.

11. For the reasons I have just stated, I shall therefore make orders to the effect discussed with counsel and in the form of the draft orders which have been provided to me.

APPEARANCES: For the appellant Withers: Mr PJ Matthews, counsel. Victoria Legal Aid. For the respondents: Mr A Castle, counsel. Office of Public Prosecutions.

22/08; [2008] VSC 78

SUPREME COURT OF VICTORIA

BROTT v KERSTING & ANOR

Curtain J — 26 & 27 February, 19 March 2008

CIVIL PROCEEDINGS - COSTS - MOTOR VEHICLE COLLISION - SOLICITORS ISSUED PROCEEDINGS IN THE DRIVER'S NAME - DRIVER NOT THE OWNER OF THE MOTOR VEHICLE - CLAIM DISMISSED - MAGISTRATE NOT SATISFIED THAT DRIVER HAD SUFFERED LOSS - COSTS SOUGHT AGAINST THE THE SOLICITOR PERSONALLY - COSTS APPLICATION LASTED THREE DAYS - PARTIES HAD OPPORTUNITY TO BE HEARD AND FILE WRITTEN SUBMISSIONS - FINDING BY MAGISTRATE THAT COSTS WERE INCURRED WITHOUT REASONABLE CAUSE AND IMPROPERLY - ORDER THAT THE SOLICITOR PERSONALLY PAY THE COSTS - WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS131, 132(3).

Where upon the dismissal of a complaint (after a hearing over three days) an application was made that the complainant's solicitor pay the costs personally and the solicitor was given (over a period of four days) to make oral submissions and file written submissions, and the magistrate found that the defendant's costs were incurred without reasonable cause and improperly, the solicitor was not denied natural justice on the basis that he was denied a reasonable opportunity to be heard. Accordingly, it was open to the magistrate to order that the solicitor pay the costs personally.

CURTAIN J:

1. Stephen Parker drove into a car being driven by Eugene Kersting. Mr Kersting took the car to Collision Repair Centre to be repaired. Mr Kersting was not the owner of the car. Mr Kersting was told he would not have to pay for the repairs to the car. He signed a document, which was a purported arrangement whereby another company, Elite Claims Management Pty Ltd, was authorised to recover and retain moneys from the other party involved in the collision. The repairs were carried out. There was apparently a dispute as to the payment for the repairs with Mr Parker or his insurance company. The debt owed to Collision Repairs was subsequently factored to NRC Recovery[1].

2. The firm, Issac Brott & Co, issued proceedings in Mr Kersting's name against Mr Parker. Negligence was not in dispute, but quantum and liability was. The plaintiff's claim was dismissed because the Magistrate was not satisfied that the plaintiff had suffered loss as a result of Mr Parker's negligence.

3. Normally costs would follow the event, but counsel for Mr Parker sought an order for costs against Issac Brott & Co and/or Issac Brott. After a hearing, which lasted four days, the Magistrate ordered the plaintiff to pay the defendants' costs and Mr Issac Brott was ordered to pay to Mr Kersting the sum that he had been ordered to pay to Mr Parker. The Magistrate, in making the order, was exercising the discretion conferred by s131 of the *Magistrates' Court Act* and governed by s132 of the Act. The Magistrate gave detailed reasons for her decision and had recourse to written submissions submitted by counsel for Mr Brott and Mr Parker. Mr Kersting, who was unrepresented at the costs application, also submitted written submissions.

4. Issac Brott & Co issued an originating motion seeking certain orders in the nature of *Certiorari* and Mandamus pursuant to Order 56 of the Supreme Court Rules, in particular, that Order 2 of the costs order made against him by Magistrate Patrick on 12 July 2006 be quashed, alleging an error of law on the face of the record constituted by her Honour's reasons for her decision and instituted an appeal pursuant to s109 of the *Magistrates' Court Act*. The appeal has been stayed pending determination of this matter by order of Senior Master Mahoney on 26 November 2006. Mr Levine, counsel who appeared in this court on behalf of the applicant, sought that the two matters be effectively heard together as the issues are, in essence, the same. Mr Levine also sought to amend the Notice of Motion by adding paragraph (k) and the appeal (by amending paragraphs 11 and 22). Mr Levine also sought leave to amend the name of the plaintiff as the proceedings had been brought in the name of Issac Brott & Co when the order for costs had been made against Issac Brott personally. The applications were not opposed and leave was granted to amend accordingly.

5. The applicant's complaint is essentially that Mr Brott was denied natural justice, in particular that:

(a) he was denied a reasonable opportunity to be heard;
(b) there was a failure to provide any or proper particulars in respect of the application for costs;
(c) the Magistrate had no evidence upon which she could reasonably have based her decision[2]; and
(d) the Magistrate relied upon written submissions and the accompanying letter which was forwarded to the Magistrate by Mr Kersting but which was not served on either Mr Brott or Mr Parker's legal representative.

6. The matter has a protracted and disjointed history. The substantive matter came on for hearing on 21, 22 and 23 February 2005. At that time, Mr Parker, the defendant, was represented by Mr Ravida of counsel and Mr Kersting was represented by Mr Scriva of counsel, who was briefed by Issac Brott & Co. At the conclusion of the evidence and after hearing submissions, her Honour dismissed the plaintiff's claim. An application for costs was foreshadowed and subsequently commenced on 23 March 2005. At that time, Mr Kersting was unrepresented as Mr Scriva had withdrawn, citing potential conflict of interest. Mr Brott was personally represented by counsel, Mr McDermott, and Mr Ravida again appeared on behalf of Mr Parker. Mr Ravida sought an order "that costs ought to be paid by the solicitor for the plaintiff and not the unsuccessful plaintiff, and that those costs ought to be awarded on a solicitor/client basis" or, alternatively, if unsuccessful in that application, "costs against the unsuccessful plaintiff as costs follow the event".[3]

7. In support of that submission Mr Ravida contended that the proceedings were not brought on the instructions and authority of the named plaintiff but were brought on behalf of the repairer, the recovery agent and/or the factorer, and that Issac Brott & Co were aware of this and were acting therefore on behalf of other named parties.[4] Counsel contended in particular that such a conflict or potential conflict between the interests of other parties and the plaintiff amounted to misconduct within the terms of s132 of the *Magistrates' Court Act*.

8. Submissions were made by both counsel and, indeed, Mr Kersting[5] who, it appears, passionately and succinctly put his case that he should not have to pay costs. Counsel for Mr Brott, Mr McDermott, raised the issue of legal professional privilege, and this matter was then raised by her Honour with Mr Kersting. It appears her Honour explained the privilege to him, and Mr Kersting said he understood it, but it appears her Honour perhaps doubted his assurance and she determined to proceed and to be mindful of any difficulties. Mr McDermott called Ms Fergus, the solicitor who had the care and control of the file, to give evidence about two letters on the file which were sought to be tendered in evidence on the cost application and Mr Brott was called to give evidence on the same point. It was during his cross-examination that Mr Kersting expressed his dissatisfaction with the course the proceedings were taking and stated that he -

> "liked everything to be out in the open now because everything has gone the wrong way. ... I am ready to sit there now and state everything because it's just becoming a joke really, all this".[6]

9. Mr Kersting then articulated particular matters which the Magistrate regarded as potentially serious allegations and adjourned the proceedings to enable Mr Kersting to get further advice.

10. No application was made by counsel for Mr Brott on that day for any further particularisation of the costs application being made against him.

11. The matter came back on before her Honour on 14 December 2005. At this time, Mr Brott was now represented by Mr Levine. Mr Ravida again appeared on behalf of Mr Parker and Mr Kersting was once again unrepresented. Mr Levine made three applications:

1 That the Magistrate disqualify herself due to a reasonable apprehension of bias;
2. that the authority of Issac Brott & Co was *res judicata* and could not be heard in a costs application; and
3. that the costs application was an abuse of process.

12. These three applications were supported by extensive written submissions[7]. The applications and the submissions were considered and dismissed, and counsel for Mr Brott then sought a further adjournment of the costs application to require the defendant to file and serve written particulars of the basis of the costs application. Her Honour held that basis of the costs application had been adequately particularised in Mr Ravida's submissions on 23 February and his opening on 24 March, and that no particulars had been sought in the intervening period. The matter then proceeded with Mr Brott resuming the witness box and being cross-examined

by Mr Ravida.[8] In that cross-examination, Mr Brott said Mr Murdaca (who was a consultant to Collision Repair Centre and Elite Pty Ltd[9]) gave him instructions to issue proceedings, that he did not speak to Mr Kersting until an advanced stage in the proceedings and that he did not tell Mr Kersting that he acted for Mr Murdaca to cover the cost of repairs and, when asked if he had advised Mr Kersting prior to the commencement of proceedings that he would have a cost liability if unsuccessful, Mr Brott said that he had told Mr Murdaca. Mr Brott said he told Mr Kersting that he acted for both Collision Repair Centre and the factorer, but that he did not advise Mr Kersting of the conflict of interest between the factorer and Mr Kersting because he did not think there was one. He was asked further questions about the content of conversations between he and Mr Kersting, such questions which, *prima facie*, appear to be in breach of legal professional privilege, and it appears that no objection was taken either by Mr Brott, his counsel or Mr Kersting to those questions being answered; nor was there any intervention by the Magistrate.

13. At the end of that day's hearing, Mr Levine renewed his application for written particulars; that application was dismissed. The next day, two further questions were asked of Mr Brott in cross-examination and nothing was pursued in re-examination. Mr Murdaca, Mr Scriva and Mr Kersting then gave evidence in the ensuing two days, at the conclusion of which her Honour then set a timetable for the filing of written submissions and replies by all parties.[10]

14. Her Honour delivered her judgment in respect of the costs application on 12 July 2006. On that date, Mr Brott appeared on behalf of Issac Brott & Co, Ms Ritchie appeared on behalf of Mr Parker and Mr Kersting yet again appeared in person.

15. As stated previously, her Honour gave detailed reasons for coming to the view that the costs of the defendant in this matter were incurred without reasonable cause and improperly; they were that Issac Brott or his employee or employees -

> (a) instituted proceedings at the instigation of, and in the interests of a person or persons other than his client, Mr Kersting;
> (b) failed to take proper or adequate instructions from Mr Kersting;
> (c) failed to advise Mr Kersting of the consequences of bringing proceedings in his name, given that he was not the legal owner of the vehicle;
> (d) failed to properly advise Mr Kersting as to his liability for the cost of repairs;
> (e) placed pressure on Mr Kersting to sign documents and participate in the proceedings when Mr Kersting indicated that he did not wish to do so without advising him as to his options;
> (f) acted in the interests of other persons or entities whose interests were in conflict with Mr Kersting's interests; and
> (g) failed to properly advise Mr Kersting of the cost consequences to him of the liquidation of the company on which Mr Brott and his employers knew Mr Kersting was relying as provided the cost indemnity.

16. It was this conduct her Honour found that caused the proceedings to be instituted and prosecuted which would otherwise not have been instituted or continued to the hearing stage with Mr Kersting as plaintiff and in this way the defendant was placed in the position of incurring costs in defending that claim.

17. Her Honour, in her reasons for her decision, stated that it had been made clear throughout the proceedings that the authority to act would be raised in the costs issue and held that the costs proceedings was part of the same substantive proceedings. Her Honour came to the view that sufficient notice of particulars had been given and her Honour was satisfied that Issac Brott & Co and Mr Brott were given adequate notice of the costs application against them and the basis for it. In her Honour's view, the nature of the allegations were clearly raised throughout the proceedings and at the commencement of the costs application. Her Honour noted that once the application had been outlined by counsel for Mr Parker, no further particulars were sought by counsel for Mr Brott. Her Honour held that Mr Brott had "ample opportunity to seek further clarification if that had been required".

18. The hearing in respect of liability took three days and in respect of the costs application, four days. In these circumstances, when the proceedings are taken as a whole, when all the parties made written submissions, including a reply on behalf of Issac Brott & Co in respect of the costs application, it is clear that the issues were sufficiently well ventilated and apparent to the parties.

19. It is not disputed that neither party received Mr Kersting's written submissions, nor were they given an opportunity to respond to them. Those submissions cannot now be produced to the Court, as a search of the Court file has failed to produce them and Mr Kersting took no part in these proceedings. The content of the submissions and the extent to which her Honour relied upon them nonetheless may be gleaned from her Honour's reasons. Her Honour referred to the submissions as part of the narrative and remarked as follows:

> "His submissions consistently with the evidence he had given and the position he had taken throughout the proceedings are that he did not engage Issac Brott & Co 'to work' on his behalf. He says that he attended Court because Mr Scriva rang him on the morning of the hearing to 'threaten' him that he must attend Court or that he would be liable 'for all money and expenses'. He attaches a copy of a letter sent to him by Issac Brott & Co after the hearing of the costs application containing an offer by Mr Murdaca to inspect the vehicle and make good any defect in repairs. The letter also alleges that Mr Kersting had obtained a financial advantage by deception".

20. Her Honour, however, did not accept Mr Kersting's position that Mr Brott was not acting for him as she was satisfied that by his subsequent conduct Mr Kersting had adopted and ratified the actions purported to be taken on his behalf. This finding was adverse to Mr Kersting and favourable to Mr Brott. So, not only did her Honour not rely upon the submissions of Mr Kersting, her decision on this point was inconsistent with the position adopted by him. Further, the letter referred to in her Honour's remarks as being attached to the submissions had emanated from the office of Issac Brott & Co, so it could not be that they are not familiar with its contents.

21. The failure to afford the parties the opportunity to respond to written submissions, indeed to be made aware of the content of those submissions, may well amount to a procedural unfairness but the content of the obligation to accord procedural fairness depends upon the circumstances of the case[11] and that an objective test should be applied to determine whether a fair hearing had been given.[12] However, her Honour stated that Mr Kersting's submissions were consistent with his evidence, of which clearly the parties were aware. Her Honour, it appears, relied upon the submissions to a limited degree only. They appear to form part of the narrative of her judgment, as distinct from her rationale for it and, indeed, to the extent that she rejected the contention that Mr Brott was not acting for Mr Kersting, found contrary to the tenor of Mr Kersting's evidence, which finding, if not favourable to Mr Brott, was certainly adverse to Mr Kersting. In these circumstances it cannot be said that the failure to provide an opportunity for the parties to respond to Mr Kersting's submissions amounts to a denial of natural justice.

22. Mr Levine, counsel for Mr Brott in these present proceedings, submitted that there was no evidence upon which her Honour could conclude that there had been improper conduct or negligence on behalf of Mr Brott in issuing the initial proceedings. It is apparent, however, that her Honour did not make a finding that Mr Brott had been negligent. The evidence is overwhelming that Mr Kersting was not the registered owner of the car; if Mr Brott or his employees had in fact taken instructions from Mr Kersting and had asked the one fundamental question, which clearly was not asked, the proceedings would never have been issued in Mr Kersting's name. It was for this reason that her Honour held that the costs of the defendant were incurred without reasonable cause and improperly. Indeed, it appears that Mr Brott argued agency and bailment in an effort to overcome this basic deficiency, and in that way Mr Parker was called upon to answer a case that should never have been brought. True it is that Mr Brott does not owe a duty of care to Mr Parker, after all, Mr Parker is not his client, but the Magistrate has complete discretion to award costs under the provisions of s132 of the *Magistrates' Court Act*; provided, pursuant to sub-s(3), that the practitioner has had a reasonable opportunity to be heard. The section does not require written particulars, the issue of ownership of the car was clearly apparent, the issue of authority to sue was thoroughly canvassed in the evidence of Mr Murdaca, Mr Brott and Mr Kersting and, indeed, was crucial to the question of the recoverability of the cost of the repairs to the car and essential to the bringing of a successful action against Mr Parker. In my view, the findings of her Honour were well open on the evidence before her.

23. Her Honour drew counsel's attention to the ambit of the issue of costs during the course of the hearing[13], stating:

> "The question really is whether there is any basis on which costs should be awarded against Issac Brott & Co and whether there is any basis for not continuing in the ordinary course of events of awarding (an order) against Issac Brott & Co and Mr Kersting or Issac Brott & Co and not Mr Kersting, or Mr Kersting and not Issac Brott & Co or, I suppose theoretically, against nobody. That seems unlikely in the circumstances".

24. It is apparent then that all possibilities contemplated by an order under s131 and s132 of the *Magistrates' Court Act* were being raised as possibilities by the Magistrate in those proceedings and thus it cannot be said that her Honour, counsel, or the parties were not aware of the orders open to her Honour in the exercise of her discretion.

25. In these circumstances, where her Honour exercised her discretion in making an order pursuant to s132(1)(b) in ordering Issac Brott Solicitor to pay the costs of which Mr Kersting was ordered to pay, it cannot be said to amount to a denial of natural justice.

26. Mr Levine also submitted that Mr Brott had been prevented, by operation of legal professional privilege, from mounting his own case and from cross-examining Mr Kersting. As stated previously, it appears that legal professional privilege was waived by Mr Kersting, for he was extensively cross-examined on matters which would otherwise attract the privilege. Mr Kersting was advised of his right to claim the privilege and her Honour was alert to it and mindful of it. The cross-examination of Mr Kersting by counsel representing Mr Brott was conducted with vigour, to say the least. Although Mr Brott may well have considered himself constrained by legal professional privilege whilst he was in the witness box, it cannot be said on a fair reading of the transcript that his position was compromised by constrained cross-examination of Mr Kersting.

27. Matters of client and solicitor communications were raised by Mr Levine, such as letters of demand, as well as evidence given as to the manner in which Mr Kersting had engaged Mr Brott, and his understanding of Mr Brott's interest in representing Mr Murdaca. These were answered by Mr Kersting, who essentially stated he had nothing to lose and so was prepared to be completely honest. In any event, even without intruding into matters the subject of legal professional privilege, the submission is not sustainable in light of the fundamental deficiency in the case, and that is that Mr Kersting was not the owner of the car.

28. For these reasons, I am satisfied that Mr Brott has not suffered a denial of natural justice. Mr Brott had reasonable opportunity to be heard in respect of the matters raised going to the heart of the costs issue, that is, ownership of the car; the written submissions by Mr Kersting did not form the basis for the judgment against Mr Brott, instead her Honour's decision was based on findings of fact made by her Honour, having heard the evidence over a hearing which in total encompassed seven days. Her Honour's reliance on the matters the subject of the submissions was minimal, the submissions were consistent with the evidence of Mr Kersting, privilege was effectively waived and cross-examination unfettered throughout the hearing, and finally the Magistrate made clear the scope and ambit of her discretion to make orders in any manner pursuant to s131 of the *Magistrates' Court Act* and was cognisant of the requirements of s132(3) of that Act, which her Honour regarded as having been met and complied with. Accordingly, for the above reasons, I have come to the view that her Honour's exercise of her discretion does not constitute an error of law and I would dismiss the appeal and the originating motion.

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[1] Her Honour Magistrate Patrick's reasons p216.
[2] See p1 of the transcript.
[3] Transcript CB p276.
[4] CB p277.
[5] CB pp303-4.
[6] CB p333.
[7] CB pp351 and 355.
[8] (Recourse is had to Stephen Donely's affidavit dated 2 February 2007 as the proceedings of this day were not transcribed.)
[9] At a later date Mr Murdaca became a director of Collision Repair Centre. Transcript p57.
[10] CB transcript pp501-2.
[11] *Kioa v West* (1985) 195 CLR 550 at 584.
[12] *R v Wise* (2000) 2 VR at 287.
[13] CB p398 and transcript p42.

APPEARANCES: For the plaintiff Brott: Mr M Levine, counsel. Isaac Brott & Co, solicitors. The firstnamed defendant appeared in person. For the secondnamed defendant: Mr Carmody, counsel. Ligeti Partners, solicitors.

23/08; [2008] VSC 125

SUPREME COURT OF VICTORIA

MARIJANCEVIC v RIDSDALE

Williams J

17, 18, 23 April 2008

EVIDENCE - ADMISSIBILITY OF CERTIFICATE FROM THE ROADS CORPORATION - CERTIFICATE STATING THAT DRIVER'S LICENCE SUSPENDED FROM A CERTAIN DATE - CERTIFICATE EMAILED TO INFORMANT UPON REQUEST - CERTIFICATE NOT SIGNED BY AUTHORISED PERSON - WHETHER CERTIFICATE ADMISSIBLE IN EVIDENCE - BEST EVIDENCE RULE - WHETHER CERTIFICATE AN ORIGINAL DOCUMENT - WHETHER MAGISTRATE IN ERROR IN RELYING UPON CERTIFICATE AS PROOF OF ITS CONTENTS: *ROAD SAFETY ACT* 1986, S84; *EVIDENCE ACT* 1958 S55A.

1. There is nothing in s84 of the *Road Safety Act* 1986 ('Act') which requires that a certificate issued as proof of the status of a driver's licence needs to be signed or stamped.

2. Primary evidence of the contents of a document is the original. Section 84 of the Act should be construed as permitting evidence of the contents of Roads Corporation's records to be given in the form of a printed document, notwithstanding that the document is printed for the first time after being transmitted by email to the person by whom it is obtained. In so far as the "best evidence" rule survives, given the purpose for which the certificate was admissible under s84 of the Act, it was properly to be regarded as an original document.

3. Accordingly, a magistrate was not in error in relying upon an emailed certificate from the Roads Corporation as proof of its contents and finding that the defendant drove a motor vehicle whilst his authorisation to drive was suspended.

WILLIAMS J:

1. By a notice of appeal filed on 20 December 2006 Mr Marijancevic appeals the whole of the judgment given and orders made by the Magistrates' Court at Sunshine on 26 November 2006. On that day, the learned magistrate concluded that Mr Marijancevic had committed a breach of s30(1) of the *Road Safety Act* 1986 on 6 February 2005 by driving whilst his authorisation was suspended. He ordered that Mr Marijancevic be disqualified from driving for a period of three months and imposed a fine of $500. Mr Marijancevic appeals against the whole of the judgment given and the orders made.

2. The respondent in the appeal is the Informant in relation to the subject charge.

The Magistrates' Court hearing

3. Mr Marijancevic's defence to the charge in the Magistrates' Court was one of honest and reasonable mistaken belief that his licence was not suspended on 6 February 2005, the date upon which he was apprehended driving. The transcript of proceedings in the Magistrates' Court was tendered in evidence in the appeal.

4. The Informant gave unchallenged evidence in the Magistrates' Court to the effect that he and his corroborator, Senior Constable Riddle, intercepted Mr Marijancevic on 6 February 2005 and issued him with a penalty notice for speeding.

5. The prosecution sought to tender through the Informant a certificate stating that Mr Marijancevic's licence had been suspended for three months from 15 December 2004 ("the certificate"). The certificate was purportedly issued by Mr Peter Donelly as a person authorised under s84 of the *Road Safety Act* 1986.

6. Section 84(1) was in the following terms:

> **84. General evidentiary provisions**
>
> 1. A certificate containing the prescribed particulars purporting to be issued by the [Roads Corporation] ... or an authorised person certifying as to each matter which appears in or can be calculated from the records kept by the [Roads Corporation] ... or a delegate of the [Roads Corporation] ... is admissible

in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters stated in the certificate.

7. The certificate was relevantly in the following terms:

State of Victoria
***Road Safety Act* 1986**
***Road Safety (General) Regulations* 1999**
Certificate Under Section 84
MATTERS WHICH APPEAR IN OR CAN BE CALCULATED FROM THE RECORDS KEPT BY THE ROADS CORPORATION
I CERTIFY THAT ON **6 February 2005**
Mr Joseph Marijancevic
OF **47 Spring St HASTINGS VIC 3915**
DATE OF BIRTH **5 February 1950**
was the holder of a Victorian Motor Vehicle Driver Licence, which was suspended under Section 25(3) of the Road Safety Act 1986 (Demerit Points)
Suspended Licence Number: [blacked out]
Date of Expiry if Suspended Licence: **9 January 2005**
Start Date of Suspension: **15 December 2004**
End Date of Suspension: **14 March 2005**
Peter Donelly
Manager
Records Services Division Victoria Police
An authorised person for the purposes of s84 of the *Road Safety Act* 1986 ...
Dated: 20 May 2005

8. Mr Marijancevic objected to the tender, submitting that the certificate appeared to him to be a photostat copy. The prosecutor then informed the court that the document was an original, having been emailed to the Informant and printed out in hard copy by him in accordance with a practice of many years standing. Mr Marijancevic did not seek to contradict or object to the prosecutor's statement or challenge the Informant under cross-examination as to its veracity.

9. The Informant gave evidence as to the circumstances in which he had obtained the certificate in re-examination. He stated that Mr Marijancevic had lodged an objection to the penalty notice. The Informant had then (about three weeks after 6 February 2005) made enquiries which revealed that Mr Marijancevic's licence had been suspended on 6 February 2005 and that he had then been disqualified from driving for three months.

10. The Informant's corroborator, Senior Constable Riddle, gave evidence that on 6 February 2005 he had recognised Mr Marijancevic as a driver he had intercepted on 26 December 2004 for an offence of driving through a red light. He told the court that his enquiries on 26 December 2004 had indicated that Mr Marijancevic's licence had been suspended and that he had been disqualified from driving for three months from 15 December 2004. Senior Constable Riddle stated that he had informed Mr Marijancevic about the disqualification which Mr Marijancevic had denied.

11. Mr Marijancevic cross-examined Mr Riddle without challenging his evidence about the results of his enquiries as to the status of his licence or that Senior Constable Riddle had told him about the suspension. Rather, he put it to the corroborator that he had said to him on 26 December 2004 that his "record keeping system was wrong". Mr Riddle responded that he could not recall that exchange.

12. Mr Marijancevic himself gave evidence. He said that he had told Mr Riddle on 26 December 2004 that the records were wrong. He stated that he subsequently had made enquiries he characterised as "unsuccessful" (without elaboration) and that he had subsequently received a licence renewal notice. He said that he had stopped driving after having been pulled over on 26 December 2004 but that he had gone to a post office on 29 December 2004 and had paid the fee for the renewal of his licence.

13. Mr Marijancevic said that he had subsequently made an FOI request which had produced several documents which he claimed not to have received earlier. The first was a VicRoads letter dated 11 January 2005 stating that he could not renew his licence until the suspension period was over and enclosing a cheque refunding the amount paid on 29 December 2004. The second

was a letter to the effect that the cheque had not been cashed and enclosing another. His evidence was that he had received neither. The VicRoads' letters had been addressed to 47 Spring Street Hastings which was one of two addresses he had given to VicRoads. Mr Marijancevic said that he still went to the 47 Spring Street address and did receive mail there. He also conceded that it was the address to which his licence renewal notice had been sent and the place at which he had also been served with the summons in relation to the charge which had brought him to the Magistrates' Court. He said that he had been living at that address when served with the summons.

14. In a short final submission, Mr Marijancevic claimed to have had an honest and reasonable belief that he was licensed at the time of the alleged offence.

15. In his reasons, the learned Magistrate referred to the contents of the certificate and the evidence of the corroborator to the effect that he had checked on 26 December 2004 and had found that Mr Marijancevic's licence had been suspended for three months from 15 December 2005 and had informed him of that fact. His Honour referred to a VicRoads' letter advising Mr Marijancevic of the suspension and noted his denial that he had received what the Magistrate characterised as a "number of crucial documents". He went on to state:

> The essential thing here is ... that on Boxing Day when you were pulled up for driving through the red light, and Senior Constable Riddle did a check and found you were off the road .. were disqualified. ... that is the time you should have stopped driving, but you continued to drive because you say you tendered ... your licence fee on the 29th. .. in my opinion, you had been given notice of your inability to drive and the defence of honest and reasonable mistake in those circumstances is not open to you. I find the charge proven.

The grounds of appeal

16. Mr Marijancevic has abandoned grounds 1 and 4 in the Notice of Appeal and persists with grounds 2 and 3 which challenge the admission by the magistrate of the certificate.

17. The remaining grounds in the Notice of Appeal are stated as follows:

> 2. The learned Magistrate erred by accepting into evidence against defence objection a facsimile or emailed document that does not bear the original signature and purports to be a certified extract pursuant to s84 of the *Road Safety Act* 1986 as proof of that document's contents.
> 3. The learned Magistrate erred in failing to apply the "best evidence rule" when judging whether or not a facsimile or emailed document that does not bear the original signature and purports to be a certified extract pursuant to s84 of the *Road Safety Act* 1986 is admissible evidence.

18. Mr Marijancevic thus challenges an interlocutory ruling, as opposed to a final order of the Magistrate. Section 92 of the *Magistrates' Court Act* 1989 only allows for appeals in relation to a final order.

19. Nevertheless, it would appear from the learned Magistrate's statement of reasons for his decision that he relied upon the admitted document as part of the evidence as to the suspension of Mr Marijancevic's licence which was an element of the charged offence.[1] In those circumstances, it is common ground that the Court should consider an additional ground of appeal expressed in this way:

> The learned magistrate erred by accepting into evidence a document purporting to be issued under s84 of the *Road Safety Act* 1986 and using that document as part of the evidence in finding the charge proven.

I consider it just and convenient to allow the addition of the further question for consideratio n[2].

20. Mr Marijancevic appears unrepresented before the Court but he has acknowledged that he has had access to legal advice. He sought and was afforded time during the hearing to obtain legal advice as to the suggested restatement of the grounds of appeal.

Submissions

21. Mr Marijancevic challenges the characterisation of the tendered document as a "certificate" under s84 of the *Road Safety Act* 1986. He argues that:

> (1) section 84(1) of the *Road Safety Act* 1986 refers to a certificate which is signed by or stamped with a necessary signature of the "authorised person" certifying as to its contents; and
> (2) as the document was a photocopy of an original, s55A of the *Evidence Act* 1958 required that it be certified as a copy.

22. Mr Marijancevic refers to the Court of Criminal Appeal's decision in Joseph Marijancevic.[3]

There it was held that a document recording prior convictions and required to be signed in order to be admissible under s395(4) of the *Crimes Act* 1958 was admissible if signed or impressed with a facsimile signature by means of a stamp.[4]

23. Mr Marijancevic also cites the *Oxford Dictionary* definition of "certificate" in support of his contention that such a document must bear a signature or stamp. More generally, he refers to the best evidence rule in so far as the document was a copy, as opposed to an original certificate. He cites the criminal nature of the proceeding brought against him and says that he was unrepresented and should have been "given some leeway" by the Magistrate.

24. Counsel for the Informant responds that there is nothing in the s84 of the *Road Safety Act* 1986 requiring that the document issued as proof of the status of Mr Marijancevic's licence needed to be signed or stamped.

25. As far as the challenge based upon s55A of the *Evidence Act* 1958 is concerned, he contends that the section is inapplicable because the document admitted into evidence was not tendered as a copy document. It was tendered as an original certificate. It had been emailed to the Informant as a consequence of his enquiry of VicRoads as to Mr Marijancevic's licence status.[5] (The prosecutor informed the Magistrate that the certificate was a printout of an emailed document transmitted that way in accordance with what was then a longstanding practice. Mr Marijancevic did not take issue with the truth of that statement or the Magistrate's receipt of that information.)

26. Counsel for the Informant contends that the document produced was an original which satisfied the vestiges of the best evidence rule and argues that it meets the description of a document admissible under s84.

27. Counsel also argues that it is, in any event, open to the respondent in an appeal under s92 of the *Magistrates' Court Act* 1989 to support the verdict on any other basis open in the court below. He argues that Mr Marijancevic made an implied admission that his licence was suspended by taking the defence of reasonable and honest mistake as to the status of his licence when he was caught driving. He also refers to the evidence from each of the Informant and the corroborator that they ascertained that fact as a result of making the appropriate enquiries.

Conclusions

28. I say at the outset that the learned Magistrate appears from the transcript to have assisted Mr Marijancevic in the presentation of his case as a litigant in person.

29. I agree with counsel for the Informant that the certificate was admissible and, under s84 *Road Safety Act* 1986, in the absence of evidence to the contrary, constituted proof of the contents of VicRoads' records of the suspension of Mr Marijancevic's licence.

30. I am not persuaded to the contrary by Mr Marijancevic's reference to the Court of Criminal Appeal's decision in Joseph Marijancevic.[6] The important difference between the subject statutory provisions in that case and s84 of the *Road Safety Act* 1986 lies in the fact that s84 does not require the certificate purporting to be issued by Mr Donelly as an authorised person to bear his signature. Nor does the *Oxford Dictionary* reference provide a basis for a contrary view.

31. Primary evidence of the contents of a document is the original. Section 84 of the *Road Safety Act* should be construed as permitting evidence of the contents of VicRoads' records to be given in the form of a printed document, notwithstanding that the document is printed for the first time after being transmitted by email to the person by whom it is obtained. In so far as the "best evidence" rule survives[7], given the purpose for which the certificate was admissible under s84 of the *Road Safety Act*, it was, in my opinion, properly to be regarded as an original document.

32. Section 84(1) of the *Road Safety Act* 1986 provides the statutory means for adducing evidence as to the contents of VicRoads' records. The certificate fell within the description of "a certificate purporting to have been issued by an authorised person" who was certifying as to the relevant contents of VicRoads' records. The learned Magistrate did not err in so far as he relied upon the certificate as proof of its contents.

33. Mr Marijancevic's challenge to the admissibility of the certificate and its use by the learned

Magistrate should fail.

34. The appeal should be dismissed.

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[1] Magistrates' Court hearing transcript, T43 ll 26-9.
[2] See: *DPP v Hinch*, 5 August 1994, Unreported decision of Mandie J; BC 9400955.
[3] (1991) 54 A Crim R 431.
[4] (1991) 54 A Crim R 431 at 450 per Crockett, Southwell and Ashley JJ.
[5] Magistrates' Court hearing transcript, T24 ll 14-9.
[6] (1991) 54 A Crim R 431.
[7] See: JD Heydon, *Cross on Evidence* 1996 at [39005].

APPEARANCES: The appellant Marijancevic appeared in person. For the respondent Ridsdale: Mr AD Halse, counsel. Office of Public Prosecutions.

"QUOTEWORTHY"

1. 27. The sentencing of an offender is seldom, if ever, an easy task. It was certainly not in this case. Obviously if the criminal justice system is to function effectively and fairly and not itself to be productive of injustice, the sentencing of offenders should never be permitted to become a mechanical process that pays little regard to the complexities of human behaviours, capacities, circumstances and motivations or fails to recognize that sentencing is directed to the attainment of a variety of social objectives not all of which can be seen to be compatible in a given situation. It is inherent, in the very nature of this task, that sentences effect balances between the sometimes competing values and objectives of the criminal law and inevitable that there will be occasions upon which the members of an appellate court would have arrived at a different conclusion. The authorities make clear that the mere existence of such a different view does not justify appellate intervention. That can only occur where error is manifest. Per Vincent JA in *DPP (Vic) v Green*, VSC (CA) 6 March 2008.

2. 3. … I have researched the matter and can find no instance in the history of the Court in which a jury trial has been heard to completion in Melbourne and then the plea and sentence remitted to the regional city of origin. I think the principles of regularity and of unity of proceedings require that the balance of these proceedings remain in Melbourne. Accordingly I so direct.

4. Unfortunately something else needs be said. Yesterday in submissions, senior counsel for the accused stated "I don't fancy walking into court and being spat on" (T.2210). That was an irresponsible statement and should not have been made. I have no doubt – none whatsoever – that if held in Mildura the proceedings would be conducted in a proper and orderly way. The many grieving and afflicted families involved in this case have conducted themselves with the most admirable dignity throughout. The city of Mildura is a fine city with fine citizens. Counsel's comment should not have been made. Per Cummins J in *DPP v Towle* (Ruling no 11) [2008] VSC 64 (13 March 2008).

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Edited by: **Patrick Street LL B, Dip Crim**
C/o Magistrates' Court, GPO Box 882G, Melbourne Vic. 3001

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