ADJOURNMENTS

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1. General principles relating to adjournments

In determining whether an adjournment should be granted, the court is not confined to applying the general traditional view that regard is only to be had to the interests of the litigants in the particular case, but should also take into account the effect of an adjournment on court resources; the competing claims of litigants in other cases awaiting hearing in the particular list; the working of the listing system of the particular court or list; and the importance in the proper working of that system of adherence to dates fixed for hearing.

(i) In relation to **criminal proceedings**, s331 of the *Criminal Procedure Act* 2009 provides that a court may adjourn the hearing of a criminal proceeding before the court (a) to any time and place; and (b) for any purpose; and (c) on any terms as to costs or otherwise that it considers appropriate.

(ii) In relation to **civil proceedings**, the Court's power must be exercised in accordance with the overarching purpose of s7 of the *Civil Procedure Act* 2010 ('CPA') and the rules of court in relation to civil proceedings, of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. Section 8 of the CPA provides that a court must seek to give effect to this overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers are part of the court's implied jurisdiction or statutory jurisdiction or arise from or are derived from the common law or any procedural rules or practices of the court.

(a) In *Sali v SPC Limited & Anor* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841, the High Court considered the decision of the Court of Appeal in *Maxwell's* case [1928] 1 KB 645; [1927] All ER 335. At CLR page 843 it said:

> "In *Maxwell v Keun* the English Court of Appeal held that although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions. Moreover, the judgment of Atkin LJ in *Maxwell* has also been taken to establish a further proposition, an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action.
>
> However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become. In determining whether to grant an adjournment the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties.
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> As Deane J pointed out in *Squire v Rogers* [1979] FCA 48; (1979) 39 FLR 106; (1979) 27 ALR 330 this may require knowledge of the working of the listing system of the particular court or judge and the importance and the proper working of that system of adherence to dates fixed for hearing. What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources."

(b) The appeal with which the Court of Appeal was concerned in *Maxwell v Keun* arose out of an order refusing the plaintiff an adjournment of the hearing of his libel action. The ground of the application was that if the action was heard on the date fixed for the trial, the plaintiff, who was serving with his regiment in India, would be unable to be present, and that his claim could not be established in his absence. Lawrence LJ [at 659] said:

> "Further it is plain that if he is not present at the trial his case must fail, in other words, he will not have had an opportunity of having his case properly tried and thus of obtaining justice. I will assume for this purpose that his advisers committed an error of judgment in applying for the postponement of the trial at the time when they did, and that they ought to have applied some weeks earlier. I cannot myself think that the penalty for that error of judgment is that the plaintiff should not have his case properly tried. I have heard no word said on behalf of the defendants that they will in any way be prejudiced by the case being postponed until next term, and there is no evidence whatever that they will be prejudicially affected by such a postponement. It seems to me that, in those circumstances, it would be denying justice to the plaintiff if his case were allowed to remain in the list of cases to be heard this term."

(c) In *State of Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 at 154; (1996) 141 ALR 353; (1997) 71 ALJR 294 at 154 Dawson, Gaudron and McHugh JJ said:

> "Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

However, the High Court held in *Aon Risk Services Australia v Australian National University* [2009] HCA 27; (2009) 239 CLR 175; (2009) 258 ALR 14; (2009) 83 ALJR 951 that the statement from *JL Holdings* set out above is not authoritative and is not to be followed. French CJ at [6] said:

> "[6] It appears that a factor in the decision of the primary judge and of the Court of Appeal was the decision of this Court in *JL Holdings* [1997] HCA 1; (1997) 189 CLR 146; (1996) 141 ALR 353; (1997) 71 ALJR 294. That case arose out of an entirely different factual setting. However, to the extent that statements about the exercise of the discretion to amend pleadings in that case suggest that case management considerations and questions of proper use of court resources are to be discounted or given little weight, it should not be regarded as authoritative."

Gummow, Hayne, Crennan, Kiefel and Bell JJ at [111] said as follows:

> "[111] An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
>
> [112] A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.
>
> [113] In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings."

and Heydon J at [133] said:

> [133] In relation to *Queensland v JL Holdings Pty Ltd*, it is sufficient to hold that, at least in jurisdictions having rules similar to rr21 and 502 (of the *Court Procedures Rules* (ACT) 2006), that case has ceased to be of authority. It is necessary to apply the Rules without any preconceptions derived from what was said in that case. There is a common opinion – it is far from universal, but it is common – within the judiciary and the legal profession that *Queensland v JL Holdings Pty Ltd*, whether it has been correctly understood or not, has had a damaging influence on the conduct of litigation. One judge who held that opinion was Bryson J in *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* [2000] NSWSC 753 at [15]. In a passage which merits preservation from the oblivion of unreported judgments, he pointed out one undesirable consequence of the way *Queensland v JL Holdings Pty Ltd* has been understood:
>
> > "In view of the state of the law governing allowance of amendments, amendment applications brought forward before the trial began were treated with uncomplaining supine liberality, notwithstanding that they sometimes showed that problems had been addressed years after they should have been. I do not think that the law requires the discretion to allow amendments to be exercised in entire innocence of understanding the obvious impact of forbearance and liberality on the behaviour of litigants, who have diminished incentive to do their thinking in due time and to tell the court and their opponents their full and true positions. When forbearance and liberality are extended to a delinquent the burden of inconvenience and lost opportunities for preparation tends to fall heavily and without adequate repair on parties who have not been delinquent. A

> relative disadvantage is imposed on those who proceed methodically and in due time; their interest in procedural justice should claim at least as much consideration as the interests of the applicant for a late amendment who does not have to look far for the creator of his difficulty. It is even conceivable that a litigant might deliberately pursue a course which will impose disadvantage on an opponent who has to reconsider his ground and change course in the midst of a contest."

2. Criminal Proceedings:

(a) Section 331 of the *Criminal Procedure Act* 2009 provides that a court may adjourn the hearing of a criminal proceeding before the court (a) to any time and place; and (b) for any purpose; and (c) on any terms as to costs or otherwise that it considers appropriate.

In the context of a **criminal proceeding**, factors that might favour the granting of an application for an adjournment include:

(a) the reasons for the adjournment;
(b) the timeliness of the application and the length of the adjournment sought;
(c) where the reason for the application is a legal issue which is scheduled for adjudication in the future, the prospects of that issue being resolved in a manner favourable to the applicant;
(d) whether the applicant would suffer prejudice if an adjournment were refused and whether that prejudice could be mitigated by the court making a particular order;
(e) whether refusal of an adjournment would be contrary to the rules of natural justice or undermine a fair trial; and
(f) the interests of justice.

In the same context, factors that might count against the granting of an application for an adjournment include:

(a) whether parties other than the applicant would suffer prejudice if an adjournment were granted and whether that prejudice could be mitigated by the court making a particular order;
(b) whether an adjournment would undermine or frustrate the objects of any applicable legislation;
(c) whether the circumstances giving rise to the need for an adjournment were self-induced or involved any misconduct by the applicant;
(d) the desirability of resolving criminal proceedings expeditiously and avoiding any fragmentation;
(e) the need for finality in litigation; and
(f) the interests of justice.

Per Kyrou J in *Marwah v Magistrates' Court of Victoria & Anor* [2013] VSC 278; MC 21/2013, 29 May 2013.

Kyrou J:

> "An application to the Magistrates' Court for an adjournment of a hearing engages that Court's discretionary power to grant or refuse the application. Where an application for an adjournment relies on an argument that the substantive proceeding falls outside the jurisdiction of the Court and that the jurisdictional issue is scheduled to be heard at a future time, one of the factors that the magistrate hearing the application must consider is the prospects of success of the jurisdictional challenge. Although the magistrate would not be in a position to form a concluded view about the prospects — and indeed could not properly do so because that issue is to be specifically determined in the future — the magistrate would need to form a 'rough and ready' assessment of this matter.
>
> Courts are regularly required to form 'rough and ready' assessments of the prospects of success of an application or a proceeding to be heard in the future. Examples include an application for leave to commence a proceeding out of time, an application for a stay of a judgment pending the hearing of an appeal, and an application for leave to appeal."

Per Kyrou J in *Marwah v Magistrates' Court of Victoria & Anor* [2013] VSC 278; MC21/2013, 29 May 2013.

(b) The inherent jurisdiction given to a court to regulate its own proceedings and to be able to grant adjournments given to ensure that justice is done in the procedures of the court, that the hearing is conducted in such a fashion as to do no injustice to any party appearing before the court, and that nobody is in any way hurt by the nature of the proceedings. It is an improper use

of the inherent power to adjourn proceedings simply to save a defendant from the consequences of proof of his guilt of an offence. Per Gillard J in *Pittaway v Bassett* [1973] VicSC 144; MC 22/1973, 24 July 1973.

(c) As a matter of general principle it is clear that a Magistrates' Court has a discretion to adjourn proceedings before that court. It is also clear that that discretion must be exercised judicially. The relevant criteria will vary with the circumstances of the case before the court. Per Gobbo J in *Tucker v Clisby Pty Ltd t/as Astra Billiards & Ors* [1983] VicSC 372; MC 54/1983, 9 December 1983.

(d) Adjournment of case to prepare defence

The defendant's counsel sought an adjournment on three grounds, one which concerned the unavailability of certain information which if obtained could be material to the presentation of the defence. The prosecutor opposed the application, but did not claim that the informant would be prejudiced if the adjournment were granted, the refusal of the application for the adjournment denied the defendant an opportunity to present evidence material to his defence and precluded counsel from obtaining sufficient instructions to present properly the defence, there was a real risk of an injustice to the defendant. Per Kaye J in *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234; MC 41/1986, 16 October 1986.

Kaye J said it is essential to the fair trial of an action that all parties are able to present their case as fully as necessary and within the limits of the law. Refusal to grant an adjournment for this purpose could constitute an injustice.

(e) Application where four previous adjournments

Where a person charged with an offence of wilfully trespassing and refusing to leave had had four previous adjournments (the last being of 16 weeks' duration in order to obtain witnesses), no error was shown in the magistrate's refusal to grant the accused a further adjournment. The magistrate was clearly satisfied that proceedings had been adjourned from 4 May at the defendant's request to enable him to assemble his witnesses. It was apparent that the defendant knew perfectly well that the information was to be heard on 24 August and the magistrate was perfectly entitled to treat the application which was then made as being without merit. Per Gray J in *Setka v Gottliebsen* [1989] VicSC 266; MC 52/1989, 9 June 1989.

(f) Adjournment for hearing of test case

(i) It is open to a Magistrate to adjourn proceedings where he/she is satisfied on material before him/her that a point that might be properly described as a "test case" point is about to be resolved which will obviate it having to be argued and decided and which may obviate a lengthy hearing. It may even be that in certain circumstances the Magistrate would be entitled to adjourn proceedings to await the decision of a superior court even where no lengthy hearing of the matter was involved before the Magistrate. It will depend on the circumstances of each case. Per Gobbo J in *Tucker v Clisby Pty Ltd t/as Astra Billiards & Ors* [1983] VicSC 372; MC 54/1983, 9 September 1983.

(ii) Unless there are circumstances that warrant deferring a matter for a limited period to enable particular assistance to be given and unless there are cogent grounds so far as the disposition of business in, and the convenience of the court, generally, the court should proceed to dispose of the matters before it. *R v The Public Service Board of State of Victoria* [1948] VicLawRp 53; (1948) VLR 310; [1948] 2 ALR 405, applied.

(iii) Where an adjournment was of an indeterminate nature, that it was not clear when the "test case" was due to be heard, that it was not clear whether the issue raised was likely to be the subject of the "test case", and that the issue raised was bound to fall for decision in the hearing of the informations, there was an element of speculation about whether resolution of the "test case" would be of any assistance, and accordingly the magistrate's discretion miscarried. Per Gobbo J in *Tucker v Clisby Pty Ltd t/as Astra Billiards & Ors* [1983] VicSC 372; MC 54/1983, 9 September 1983.

(iv) Where the Full Court of the Supreme Court of Victoria stood adjourned after argument on an appeal from a decision of a single Judge of the Supreme Court in relation to the provisions of s30(2) of the *Magistrates' Court Act* 1989, it was open to a Magistrate to grant an application for an adjournment in order to await the outcome of the decision of the Full Court. That the Magistrate

should have simply adjourned the proceeding before him in order to avoid such unnecessary waste of time and money was a perfectly proper exercise of judicial discretion. Per JD Phillips J in *Terry v Banks* [1992] VicSC 526; MC 43/1992, 28 October 1992.

(ga) Adjournment where notice not served on Police Informant or Police Prosecutor

Per O'Bryan J:

> "The course taken at the hearing was unusual, in that one might have expected the informant to have sought an adjournment of the drink/driving charges when the Court was advised that the maker of the certificate was required by the defence to be called as a witness. The affidavit in support of the order nisi failed to make clear whether the Court was advised by the defence, before the hearing began, that the defendant required the maker of the certificate to be called as a witness. Had the defence done so, one would suppose that the informant would have stated that he did not receive notice in writing of the defence requirement. The proper and most reasonable course then would have been to adjourn the hearing to a later date. Why this course was not adopted is not dealt with in the affidavit."

Per O'Bryan J in *Roberts v Beet* [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51; MC 53/1987, 11 November 1987.

(gb) Adjournment where notice not served on Police Informant or Police Prosecutor

Per Eames J:

> "96. In my view, the way in which the evidence had been produced in this case was unfair to the appellant [Police informant]. No notice having been given under s58(2) [of the *Road Safety Act* 1986], nor any warning having been given as to the allegation which it was intended to make, it must have been known to the respondent [defendant] and his legal advisers that the person who it was to be claimed had proffered the advice to the respondent not to have a blood test would not be present to answer that allegation. (The leading of this evidence may not have amounted to a breach of the rule in *Browne v Dunn* (1893) 6 R 67 (itself a rule as to fairness, see *R v Schneidas (No.2)* (1981) 4 A Crim R 101; [1973] 2 NSWLR 713), but a similar unfairness arises here as was the focus of that rule.)
>
> The absence of the operator was a forensic advantage which operated unfairly against the prosecution. In my opinion, the request of the prosecutor for an adjournment so as to call the operator to give evidence about the alleged advice should have been acceded to by the magistrate. (The primary consideration relevant to the question whether an adjournment should be granted was the interests of justice as between the parties: see *Bulstrode v Trimble* [1970] VicRp 104; (1970) VR 840, at 845, per Newton J).
>
> In my opinion, the question whether there had been any relevant unfairness to justify the exercise of the general unfairness discretion could not be answered in the absence of a response from the operator as to the allegation. The magistrate ought to have known whether the allegations were admitted by Senior Constable Steele, and, if so, whether he believed the truth of what he said, and whether, objectively, there was any truth as to what he asserted.
>
> Because of the conclusion I have reached as to the availability of the *Bunning v Cross* discretion it is unnecessary for me to further consider the application of the general unfairness discretion."

Per Eames J in *DPP v Moore* [2003] VSCA 90; [2003] 6 VR 430; (2003) 39 MVR 323; MC 20/2003, 29 July 2003.

(h) Adjournment of hearing for one hour

Approximately six weeks after a charge against the defendant had been listed in the Mention Court (but 16 days before the date of the trial) certain documents, which the defendant claimed were relevant to the preparation of his case, were taken from his possession. When the charge came on for hearing, the defendant sought an adjournment pending the return of the documents. The Magistrate granted an adjournment of one hour and then the defendant refused to plead to the case and said that he would take no part as there had been a denial of natural justice. He attended the hearing, which began an hour or so later, but he took no part despite being repeatedly invited by the Magistrate to do so. At the end of the hearing, he was convicted and fined.

HELD: Natural justice required that a person shall have a reasonable opportunity to obtain names of relevant witnesses, to prepare his case generally and to present it fully. But, in view of the time which had elapsed, it was open to the Magistrate to conclude in the circumstances that the defendant had had a reasonable opportunity to prepare and present his case. The defendant did not state or suggest any suitable period or, indeed, any period of adjournment of the case, so that it was open to the Magistrate not unreasonably to conclude that he was faced with an

application for a completely indefinite period of adjournment until such time, if ever, as the alleged "documentation" was delivered by the Curator to the Union and thence to the defendant. In this case, it was open to the Magistrate not unreasonably to consider that here was a case where neither 45 days, nor any finite period, was likely to see the recovery of the allegedly seized documents. It was at least open to the Magistrate not unreasonably to consider that the nature of the case was such – that is to say, that the elements of the offence were such – that 16 days was a period calculated to enable a defendant-in-person to prepare his case, to decide what questions to ask and either remember who the witnesses were or at least complete all available and appropriate enquiries to find out.

Per Fullagar J:

> "It is, I think, important to observe that natural justice requires only that a person shall have a reasonable opportunity to obtain the names of relevant witnesses and to prepare his case generally and it was, in my opinion, open to the Magistrate upon all the admissible evidence in the present case to conclude that the applicant had had that opportunity. That is, indeed, what the Magistrate did conclude. What the law says and what, with respect, I have no doubt that His Honour intended by these words to convey, is that each party shall have the opportunity to present his case fully; if he is given that opportunity, the rest is up to him. Indeed, the second proposition put to me by the applicant in his argument was the quotation from *R v Jones* [1971] VicRp 7; (1971) VR 72, at p76 that –
>
> > "It is a basal consideration of justice that an accused person must be given a reasonable opportunity to prepare and to present his defence."
>
> In *Sullivan v Department of Transport* (1978) 20 ALR 323; (1978) 1 ALD 383, Deane J, in the Full Court of the Federal Court, said:
>
> > "It is important to remember that the relevant duty of the tribunal is to ensure that a party is given a reasonable opportunity to prepare his case. Neither the Act nor the common law imposes upon the tribunal the duty of ensuring that a party takes the best advantage of the opportunity to which he is entitled."
>
> The proper conclusion in the present case was that it was fairly open to the Magistrate, on the facts before him, to conclude that the defendant had had a reasonable opportunity to prepare his case and, in particular, a reasonable opportunity to prepare it since the date of the seizure of the documents."

Per Fullagar J in *Young v Verschuur* [1988] VicSC 460; MC 02/1989, 6 September 1988.

(i) Adjournment where pre-sentence report sought

Pursuant to s4(1)(c) of the *Bail Act* 1977, where a case is adjourned for the purposes of obtaining a pre-sentence report, the accused is entitled to be granted bail unless the court is satisfied that the release of the accused would not be desirable in the public interest. Where an accused pleaded guilty to a charge of indecently assaulting a 4-year-old girl, no error was shown in the court's refusing bail pending completion of a pre-sentence report having regard to the unclear reasons for the commission of the offence and the possibility of public disquiet in the relevant neighbourhood. Per JH Phillips J in *R v Durose* [1991] VicRp 13; [1991] 1 VR 176; MC 15/1990; 16 February 1990.

(j) Adjournment in drink/driving case to allow analytical chemist to attend court

The defendant L. was charged with drink/driving offences pursuant to s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). The matters came on for mention in April and adjourned for a contested hearing in the following August. In the meantime, L. underwent a profile test conducted by an analytical chemist. Three days before the hearing date, the chemist indicated (without giving reasons) that he was unavailable to attend on the date fixed for hearing. Accordingly, on the return date, L.'s legal practitioner sought an adjournment of the charges which was refused and L. was convicted of the charge under s49(1)(f) of the Act; the other charge being struck out. Upon order nisi to review—

HELD: Order nisi discharged.

1. Having regard to the deeming provisions of s58(2) of the Act which provide conclusive proof as to the breath analysing instrument's being in proper working order and properly operated at the relevant time together with the fact that the instrument operator had not been required to attend the court, the evidence proposed to be given by the analytical chemist could have had no effect upon the result of the case. Accordingly, no prejudice was suffered by L. as a result of the refusal of the request for an adjournment.

2. In view of the provisions of s49(6) of the Act, the lapse of time between the mention date and the date of hearing and the fact that no reason was advanced to explain the chemist's absence, the learned magistrate was not in error in asking whether the evidence of the absent witness was arguably admissible.

Humphrey v Wills [1989] VicRp 42; (1989) VR 439, distinguished.

Per Fullagar J:

> "I find it sufficient to decide this case upon the ground that the applicant has not shown that he has suffered any prejudice whatsoever by the refusal of the adjournment, having regard to the conclusiveness worked by s58(2) of the Act, as a consequence of the failure of the applicant to give the written notice referred to in the sub-section. However, I am not to be taken as finding that the Magistrate exceeded his discretionary power in refusing the adjournment, quite apart from the effect now of s58(2). I was referred by Dr Thomson to the decision of Kaye J in *Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, and I should say that the headnote appears adequately to summarize what His Honour actually decided. Dr Thomson however relied heavily on the *obiter dicta* of His Honour appearing at p443 of the report, lines 20-42. These observations of Kaye J must, in my opinion, be considered in the light of the case before him, and His Honour was careful to distinguish that case, where the application was made during the course of the trial and at the end of the prosecution case, from cases like the present where the application for adjournment is made before the trial commences. Compare *R v Jones* [1971] VicRp 7; [1971] VR 72 at p78, to which Kaye J expressly referred. In such cases, as was said by Lush J in another case cited by Kaye J "each case of this kind must depend on its own facts".
>
> In the present case, having regard to s49(6) and to the fact that the Magistrate knew that the absent witness was an analytical chemist, and to the fact that the trial had been fixed on 24th April for 9th August, and to the fact that no reason whatever was given for the absence of the witness, I think the Magistrate was justified in asking for some indication at least that the proposed evidence was arguably admissible.
>
> It has been in the past, I think, a not uncommon practice for persons charged with these offences to attempt to put off the evil day for as long as possible, first by seeking adjournments of the trial and later, in the event of a conviction, by orders to review coupled with a stay, and the Magistrate had a wide discretion of exercise, and it was proper for him to consider the convenience of the court and the ordering of its busy affairs, and I am not satisfied in the circumstances of the present case that he erred in the exercise of that discretion. I emphasise again, however, that each case of this kind must depend on its circumstances.

Per Fullagar J in *Leishman v O'Connor* [1991] VicSC 3; (1991) 13 MVR 499; MC 13/1991, 17 January 1991.

(k) Witness on holidays and unavailable to attend Court

When the adjourned hearing resumed in the Magistrates' Court, M.'s counsel sought a further adjournment on the ground that a witness (who had been present on the first day of hearing) was unavailable on holidays. The magistrate refused to grant the adjournment stating that there had been ample time to subpoena the witness and that a further adjournment would lead to difficulty in recalling the evidence already given. As to the *voir dire*, M.'s counsel called no further evidence, the prosecutor gave evidence as to service of the documents on the first day of hearing and the Magistrate refused to rule on the *voir dire* stating that it was not necessary because, in his view, service had been properly effected.

Per McDonald J:

> "In deciding whether to grant an application for an adjournment, a magistrate must carefully weigh the interests of the accused, the Crown, witnesses and generally the administration of justice. In view of the fact that:
> (i) the absent witness could give evidence as to an ingredient of the offence;
> (ii) the application was made for *bona fide* reasons;
> (iii) the evidence already given was of a straightforward nature and could be recalled without difficulty;
> (iv) there was no inconvenience to the prosecution witnesses; and
> (v) the prosecution took advantage of the first adjournment period to effect service,
> the magistrate, in refusing the application for an adjournment failed to allow M. to present his case fully thereby resulting in a denial of natural justice.
>
> In *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701, Wilson J (with whose judgment Gibbs CJ, Murphy and Aickin JJ agreed) said at pp548-9 –
>
> "The decision whether to grant or refuse an adjournment lies in the discretion of the trial judge,

> and it is indeed seldom that an appellate court will feel justified in reviewing such a decision. In *Maxwell v Keun* [1928] 1 KB 645 at 653; [1927] All ER 335 Atkin LJ stated the terms which have won general acceptance 'I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so'. See also *Hayes v Hayes (No.1)* [1934] 1 St R Qd 219; *Myers v Myers* [1969] WAR 19; *Walker v Walker* [1967] 1 All ER 412; [1967] 1 WLR 327".

In *Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, Kaye J reviewed the relevant decisions on the return of an Order Nisi to review the decision of a Magistrate, one ground of which review related to his refusal to grant an adjournment. In that case the Magistrate on application for adjournment being made in order to call defence evidence had asked the defence counsel whether he intended to call the applicant as a witness. When counsel replied that he did not, the Magistrate then stated that there was no basis for the adjournment. Kaye J at p445 stated –

> "In the present case, the exercise of the magistrate's discretion refusing the application for an adjournment was founded upon an irrelevant consideration, namely that the applicant did not intend to give evidence. As a result the applicant was denied a fair trial according to law. The right of an accused person to call evidence in his defence is not conditional upon the magistrate, before hearing a proposed witness, forming his own view of the merits or otherwise of the evidence. Before a person charged with an offence can be properly convicted he must be afforded the opportunity to call in his defence such witness or witnesses as he or his counsel deem to be appropriate. Precluding him from doing so constitutes a denial of natural justice of the defendant".

In the result that the Magistrate refused the application he either gave no or insufficient consideration to the importance of permitting a party to present his case fully as an essential element of ensuring a fair trial. In the circumstances of this case that consideration far outweighed any inconvenience that may flow from the granting of an adjournment. In the result, the exercise by the Magistrate of his discretion miscarried. Counsel for the respondent submitted that if it was found that the discretion had miscarried, then he did not contend that in the circumstances of this case it did not result in a denial of natural justice to the Applicant.

By refusing the application for adjournment and precluding the Applicant from being able to call the proposed witness it did constitute a denial of natural justice to the Applicant."

Per McDonald J in *Mooney v Edwards* [1990] VicSC 255; (1990) 11 MVR 333; MC 47/1990, 8 June 1990.

(l) Omission in charge; application for adjournment to serve notice on police informant

1. Where a police informant's address was omitted from the charge and summons, this defect did not vitiate the document.

2. Where an accused had 3-4 months in which to serve a notice pursuant to s58(2) of the *Road Safety Act* 1986, there was sufficient time for the notice to be sent to the informant care of the Chief Commissioner of Police. Accordingly, the Magistrate was not in error in refusing an application for an adjournment in order to serve the notice on the informant.

Per Harper J:

> "The Appellant complains that the Magistrate's discretion miscarried when he refused the Appellant's application for adjournment. That application was based upon the assertion that an adjournment was necessary to enable the Appellant to serve upon the informant a notice pursuant to s58(2) of the *Road Safety Act* 1986. But the charge and summons were served on the Appellant in August 1994; the information was not heard until 13 January 1995. A notice under s58(2) must be served on the informant not less than 28 days before the hearing or within any shorter period ordered by the court. The notice in this case could therefore have been served upon the informant at any time between August 1994 and 14 December 1994. There could be no suggestion that that time was insufficient. All the Appellant needed to do was forward the notice to the informant care of the Chief Commissioner at the Chief Commissioner's address. There is no suggestion that such service would have been insufficient. In any event, I hold that it would have been sufficient, at least in the absence of any other address shown on the charge and summons."

Per Harper J in *Brady v Colley* [1995] VicSC 327; MC 20/1995, 30 June 1995.

(m) Prosecution's main witness not in good health; application for adjournment

The prosecution's main witness was unable to attend court because she had undergone emergency

surgery two days before the date of hearing of charges arising from a road rage incident. It was said that the witness was groggy and apparently under the influence of medication. The defendant was notified of a pending application for an adjournment and in the event the adjournment was not granted, given notice that an application would be made to rely upon the witness' statement pursuant to s65 of the *Evidence Act* 2008 (Vic) ('Act').

When the matter came on for hearing, the application for adjournment was made and refused by the magistrate on the ground that the prejudice to the defendant was far outweighed by any prejudice to the public interest. In relation to the application to admit the witness' statement under s65 of the Act, the magistrate in refusing the application said that the notice of the application was deficient in relation to the time of service and the detail contained within it. Also, the magistrate stated that the application for admission was an abuse of process. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrates' Court for hearing and determination.
1. There may be many circumstances when refusing an adjournment will be justified in the exercise of a discretion even though the practical effect of a refusal to adjourn the hearing will result in the dismissal of a proceeding. However an application for an adjournment which is likely to have that effect should not be refused without considering that consequence and taking it into account as a factor to be weighed against others. In this case the only evidence against the defendant was of the one single witness who was not able to give oral testimony because of unexpected surgery only a few days before. The matters put against the adjournment might all have been accommodated by a relatively short adjournment although the Magistrate did not explore or explain whether or not that was possible. The inability of the witness to give oral evidence might conceivably not have been fatal to the outcome of the case if the written statement she had made had been admitted in evidence by her under s65 of the Act, however the Magistrate did not consider whether the effect of ruling against the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges. The refusal of the adjournment would have had, and did have, the effect of denying the informant the opportunity to present his case (unless the written statement of the witness had been admitted in evidence). The Magistrate did not weigh that consequence against the factors tending against an adjournment. An adjournment, all things being equal, may more readily be refused where a hearing may still be conducted meaningfully upon evidence. It may even be refused in some cases where the effect of a refusal may lead inevitably to a party not being able to present a case, but it should not be refused without taking that into account. The Magistrate ought to have considered whether the consequences of the refusal of the adjournment were warranted by those matters put to her as bearing against the adjournment.

2. In relation to the admissibility of the statement pursuant to s65 of the Act, the Magistrate failed to consider whether a condition of s65 was satisfied namely, that the witness was "not available to give evidence about an asserted fact".

3. The Magistrate was in error in concluding that the notice had not been served within a reasonable time or had not given sufficient detail of the matters required to be provided by the Act. What constitutes reasonable notice is something which must depend upon all of the circumstances of the case. In this case notice of an intention to rely upon the written statement was given to the defendant's legal representatives promptly as soon as the unavailability of the witness became known. Section 67(3) provides that the notice must state "the particular provisions" of the division "on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence". In this case the written notice formally served on 24 February 2010, but reliance upon which was conceded to have been conveyed on 23 February 2010, identified s65 as the section upon which reliance was placed and, on page 2 of the notice, there was express statement of an intention to rely upon s65(2)(a) or (b) or (c) or (d), s65(3)(a) or (b) or 65(8)(a) or (b). Some of these provisions may not have sustained the application but there was asserted the provisions on which reliance was placed. The Magistrate's conclusions to the contrary were not sustainable.

Per Pagone J:

> "The Magistrate was referred to *Brimbank Automotive Pty Ltd v Murphy* [2009] VSC 26; 01/2009; where Kaye J said:
>
> > [12] The guiding principle for the exercise of the discretion is that a court should not refuse an application for an adjournment, where to do so would cause injustice to the party making the

application, unless the grant of the adjournment would occasion irreparable prejudice to the other side, such prejudice not being capable of being remedied by an appropriate order as to costs or otherwise. Thus, in *Walker v Walker* [1967] 1 All ER 412; [1967] 1 WLR 327 at 330, Simon P stated:

> "... Where the refusal of an adjournment would result in a serious injustice to the party requesting the adjournment, the adjournment should only be refused if that is the only way that justice can be done to the other party ... ."

[13] In determining whether to grant an adjournment, a court is entitled to take into account, as a relevant circumstance, the exigencies of case management. However, that consideration should not be permitted to prevail over the rights of the parties before the court, and in particular it should not predominate over the right of a particular party to be able to present its case properly to the court. The exercise by the court of its discretion in such a case is not the occasion to punish a party, or its practitioners, for oversight, mistake or tardiness. Rather, the overriding requirement is that the court must do justice between the parties. The point was stated in authoritative terms in the joint judgment of Dawson J, Gaudron J and McHugh J in *The State of Queensland & Anor v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146; (1996) 141 ALR 353; (1997) 71 ALJR 294, as follows:

> "In our view the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

"The inability of Ms Venner to give oral evidence might conceivably not have been fatal to the outcome of the case if the written statement she had made had been admitted in evidence by her under s65 of the *Evidence Act* 2008 (Vic), however the learned Magistrate did not consider whether the effect of ruling against the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges. The refusal of the adjournment would have had, and did have, the effect of denying the informant the opportunity to present his case (unless the written statement of Ms Venner had been admitted in evidence). The learned Magistrate did not weigh that consequence against the factors tending against an adjournment. An adjournment, all things being equal, may more readily be refused where a hearing may still be conducted meaningfully upon evidence. It may even be refused in some cases where the effect of a refusal may lead inevitably to a party not being able to present a case, but it should not be refused without taking that into account. The learned Magistrate ought to have considered whether the consequences of the refusal of the adjournment were warranted by those matters put to her as bearing against the adjournment."

Per Pagone J in *DPP v Easwaralingam & Anor* [2010] VSC 437; MC 47/10, 1 October 2010.

On appeal:

HELD: In relation to the order granting *certiorari* in respect of the adjournment application, leave to appeal granted. In relation to the admissibility of the witness' statement, appeal dismissed. Remitted to the Magistrates' Court for further hearing.

1. By reason of s10 of the *Administrative Law Act* 1978, in Victoria the 'record' includes a court's reasons, whether the application for judicial review is brought under the *Administrative Law Act* or under Order 56. The transcript of proceedings may be incorporated into the record by reference.

2. In the present case, the reasons were transcribed. The applicant accepted that other matters in the transcript could be considered to the extent that reference to them was necessary to enable understanding of the Magistrate's reasons. Beyond those matters, only the charges, the oral application for the adjournment, and the oral decision of the Magistrate could be taken into account. What could not be taken into account was the content of the witness' statement that detailed the circumstances of the offence, including the circumstance that only she and the applicant were present at the scene, or the notes taken by the informant.

3. The trial Judge (Pagone J) considered material which was well beyond the ambit of the record, however defined. Indeed, the error he made – of considering material not before the Magistrate on the adjournment application – would still have been an error had the challenge to the refusal to adjourn

been brought by way of an appeal (if an appeal had been available). However, because the proceeding was an application for *certiorari*, this should have alerted the trial Judge to the need to be particularly careful in identifying precisely to what material reference could be made in determining whether the Magistrate had committed an error of law. This he failed to do.

4. The trial Judge (Pagone J) found that the Magistrate was in error in reaching the conclusion that the application for the admission of the statement was an abuse of process. Amongst the errors committed by the Magistrate was the erroneous conclusion that what was meant by 'not available' was not defined in the legislation when it is so defined, in the 'Dictionary' section at the back of the *Evidence Act*. It is defined in a manner that includes where 'the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability'. The trial Judge found that the Magistrate failed to consider whether that condition was satisfied, and her failure to do so contributed to her conclusions about abuse. Had she been alert to the relevant definition she may have considered that a policy objective of s65 was to provide for evidence to be adduced in the circumstances before her, if the statutory pre-conditions were satisfied on the facts. It was necessary for the statutory definition of a person's availability, upon which s65 depends, to have been considered before determining whether or not reliance on s65 in the circumstances of the case was an abuse. The failure of the Magistrate to consider the statutory definition of 'not available', and the consequent failure to determine whether that definition was satisfied in the circumstances of the case, was an error of law.

Per Tate JA (Buchanan JA agreeing):

> "I consider that it was open for the trial Judge to find on the material before the Magistrate on the adjournment application that Ms Venner was unable to give oral evidence on the scheduled day of the hearing because of unexpected surgery a few days before, given the sworn evidence of the informant, his evidence being referred to in general terms in the Magistrate's reasons, to the effect that, on the day on which the contested hearing was due to be heard, Ms Venner was extremely groggy."

Per Tate JA in *Easwaralingam v DPP & Anor* [2010] VSCA 353; (2010) 208 A Crim R 122; MC 52/2010, 20 December 2010.

(n) Adjournment to allow Chief Commissioner to appear

A sub-poena addressed to the Chief Commissioner of Police sought that certain documents be produced to the court. The police prosecutor who appeared on behalf of the informant indicated that some documents would be produced but opposed the production of other documents sought. The defendant's counsel submitted that the prosecutor had no standing with respect to challenging any aspect of the sub-poena and had no instructions to challenge the sub-poena. After hearing submissions in the matter the magistrate stated that the Chief Commissioner of Police should be given the opportunity to appear to present submissions and on his own motion adjourned the proceedings. Upon an originating motion to quash—

HELD: Application refused. The absence of an application to adjourn the return of the sub-poena did not prevent the magistrate adjourning the proceedings. The magistrate had power under s128 of the *Magistrates' Court Act* 1989 to adjourn the sub-poena on his own motion. Having information before him that the person sub-poenaed opposed the sub-poena, the magistrate could not ignore that information. It would have been a denial of natural justice to press on and order the police prosecutor to produce the documents without giving the Chief Commissioner of Police an opportunity to be represented. The decision of the magistrate to adjourn was a practical and prudent solution which was likely to minimise the wastage of the court's time and the parties and it also protected the positions of the relevant parties and avoided any prejudice.

The absence of an application to adjourn did not prevent the Magistrate adjourning the proceedings. He had power under s128 of the *Magistrates' Court Act* 1989 to adjourn the subpoena on his own motion.

Counsel relied on *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121, 127. The circumstances of that case are not relevant. The principle for which it is cited, that an adjournment should be granted on material considerations only, does not require authority to support it.
Per Smith J in *Cheremnov v Magistrates' Court & Ors* [2002] VSC 364; MC 24/2002, 30 August 2002.

(o) Defendant with no previous Court experience wanted to plead not guilty and have charges adjourned

Some time prior to the hearing of charges against Onus ('O'), O's solicitor wrote to the Magistrates'

Court seeking an adjournment of the charges for further mention. When the matters came on for hearing, O. appeared without a legal representative. O. was given an extra charge of criminal damage by the prosecutor. After discussion with the magistrate, the matter was stood down and O. consulted a court lawyer. Upon resumption, O. told the magistrate that she consented to the charges being heard in the Koori Court Division of the court. The case proceeded and subsequently O. was released on an undertaking without conviction with the condition she pay the sum of $1791.35 compensation by way of instalments. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted for re-hearing.
1. There are two fundamental requirements of the rules of natural justice. First, an accused person must have a reasonable opportunity to know the case against him/her, and to make answer to that case. Secondly, an accused is entitled to have the charges heard free of actual or apprehended bias on the part of the presiding magistrate. In the present case the appellant relied on the proposition that the magistrate conducted himself in a manner which gave rise to an appearance of bias.

2. In this case the magistrate did not expressly refuse to grant an adjournment. Rather, after the defendant requested an adjournment, the magistrate discussed the matter with her, and then stood the matter down to enable the defendant to consider whether she wished to plead not guilty, in which case the matter would need to be adjourned. However, the fact remained that the defendant had initially clearly signified that she wished to plead not guilty, and that she considered that she was not guilty of the three assault charges. She had only just been served with the charge of intentionally causing damage to property under s197(1) of the *Crimes Act*. She was an 18 year old Aboriginal girl with no prior convictions and no previous court experience. She had sought the advice of a solicitor, who wished to make further enquiries before advising his client as to the course which she should adopt. At the time of coming to court the defendant did not have a copy of the police brief. In those circumstances it was clear that the defendant did not have an opportunity to properly consider the charges brought against her, and to seek proper advice as to what course she should take in respect of them. She was within her rights in seeking the adjournment; under s39 of the *Magistrates' Court Act* 1989, the court was required to adjourn the matter if requested by the defendant, if the court was satisfied that the defendant had not had a reasonable opportunity to obtain legal advice.

3. In the circumstances it behoved the magistrate to adjourn the proceeding to a further date in order to enable the defendant to obtain legal advice and, if she so desired, to properly prepare a defence to the charges which had been brought against her. The conduct of the proceedings before the magistrate was productive of an injustice to the defendant, by being deprived of the opportunity to seek and obtain legal advice, and, if she so desired, to contest the charges which had been brought against her. Accordingly, there was a breach of the rules of natural justice based on the failure of the magistrate to accede to the defendant's application for an adjournment, and based on the magistrate's proceeding to take a plea from the defendant on the five charges, and to hear and determine the submissions in respect of the question of penalty.

Per Kaye J:

> "Thus the *Magistrates' Court Act* does not contain any express requirement for the actual service of a charge. It is sufficient the charge be brought to the notice of the accused person. Further, the authorities suggest that statutory provisions such as s34 of the Act, which require the service of a summons more than a prescribed time before its return, do not exclude the operation of the principle that, however a person has been brought before a court, that person is liable to answer any charge or information then and there brought against him; see *R v Hughes* (1879) 4 QBD 614 especially at 626-7; *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; [1970] VR 625 at 638. Of course the operation of that principle is subject to the right of the accused person to ask for and obtain an adjournment if the accused is taken by surprise; see for example *McManamy v Fleming* [1889] VicLawRp 67; (1889) 15 VLR 337.
>
> The magistrate then referred to the letter which he had received from the appellant's solicitor. That letter is important because, not only did it seek an adjournment, but also it stated that the appellant's solicitor was in the process of obtaining a copy of the police brief of evidence with a view to advising the appellant. In addition, the appellant had only just been served with the charge under s197(1) of the *Crimes Act*. She could not have sought and obtained even preliminary advice from her solicitor relating to that charge. Thus, as matters stood, when the case was first called before the magistrate, the appellant had strong grounds on which to apply for an adjournment.

> It is well established that the decision, whether to accede to or to refuse an application for an adjournment, is an exercise of a judicial discretion. Appellate courts rarely interfere with a trial judge's exercise of that discretion. However, where the result of a refusal of an adjournment might be to prevent a party from presenting his or her case as fully as necessary and within the limits of the law, then an appellate court will interfere with a trial judge's exercise of his discretion. Such an intervention by an appellate court occurs where it is necessary to prevent an injustice to one or other of the parties caused by the failure of the lower court to grant the adjournment; see *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503 at 506; (1986) 24 A Crim R 234; *Maxwell v Keun* [1928] 1 KB 645 at 653; [1927] All ER 335; *Walker v Walker* [1967] 1 All ER 412; [1967] 1 WLR 327 at 330; *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701 at 703; *State of Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 at 155; (1997) 141 ALR 353; 71 ALJR 294.
>
> The appellant had not had the opportunity to obtain informed advice from the solicitor whom she had chosen to consult. Under s39 of the *Magistrates' Court Act*, and at common law, the appellant had a right to seek and obtain an adjournment in order that she might have the benefit of that advice.
>
> I am mindful of the admonition in the authorities that the courts are very slow to interfere with the discretion of a judge or magistrate on the issue as to whether to allow an adjournment. Nevertheless, in my view, the conduct of the proceedings before the magistrate was productive of an injustice to the appellant, by being deprived of the opportunity to seek and obtain legal advice, and, if she so desired, to contest the charges which had been brought against her. I therefore consider that there was a breach of the rules of natural justice based on the failure of the magistrate to accede to the appellant's application for an adjournment, and based on his Worship's proceeding to take a plea from the appellant on the five charges, and to hear and determine the submissions in respect of the question of penalty.
>
> I have therefore concluded that the appeals in this matter should be allowed on the basis that the appellant was denied natural justice by reason of the fact that the magistrate did not adjourn the contest mention hearing when requested to do so. In reading the transcript I have no doubt that the magistrate was attempting to adopt a pragmatic approach to the proceedings, and that he was doing so conscientiously in what he considered to be the best interests of the appellant. I have no doubt that the magistrate genuinely considered that, on the material before him, the appellant would not be well served by contesting the charges, and that it was in her interest to plead guilty and to receive the statutory credit to which she was entitled for doing so. It is of course desirable that an element of pragmatism be retained in Magistrates' Court proceedings. In a busy court it is not easy to preserve a balance between the desire to be practical and the need to observe the requirements of natural justice. However, on the facts of this case I have come to the conclusion that there was a breach of the rules of natural justice in the manner I have just described."

Per Kaye J in *Onus v Sealey* [2004] VSC 396; (2004) 149 A Crim R 227; MC 32/2004, 14 October 2004.

(p) Adjournment to obtain counsel of choice

The accused, who had been committed for trial for serious offences, sought an adjournment of his trial to a date to be fixed at least for six months on the ground that a particular member of Counsel would be available by that date. The statute *Charter of Human Rights and Responsibilities Act* 2006 ('Charter') was enacted with commencement in part on 1 January 2007 and the balance to commence on 1 January 2008. One of the provisions of the Charter dealing with the Courts does not apply until 1 January 2008.

HELD: Application refused.

1. The Charter distinguishes between criminal and civil proceedings and hearings or trials as demonstrated in section 24(1) and has elected in s49(2) to declare that the Charter does not affect <u>any</u> legal proceedings commenced before the commencement of Part 2 on 1 January 2008. Accordingly, the Charter has no relevance to the application for an adjournment made on behalf of the accused as a result of the proceedings in relation to this matter having commenced prior to the introduction, proclamation or commencement of the Charter and more particularly Part 2.

2. *Obiter.*

(a) A Judge or magistrate is not acting in "an administrative capacity" when he or she is hearing an application for adjournment of a trial which has already been listed by the listings section of the Court, for the purposes of the Charter, and does not fall within the definition of "Public Authority" contained therein. Members of the listing section of the Supreme Court and other Courts may well be acting in an administrative capacity when listing trials. But it is clear that

the decision to fix a trial date, or to adjourn a trial date already fixed, is discretionary and that in determining those matters a court must act judicially and balance a number of factors including, but not limited to, matters such as the availability of counsel, the availability of witnesses and the proper availability and allocation of court time.

(b) The intention of Parliament is for the Courts to become actively involved in the interpretation of the Charter and human rights after 1 January 2008. The rights as declared, at the least in s25, would be rights that the Court would be bound to take into account in ensuring that a fair trial was conducted pursuant to section 24.

(c) Whilst the Court can and will do all they can to accommodate counsel of choice for accused persons, it cannot be that they are entitled to select a counsel who will not be available for a lengthy period and thereby compel the court to adjourn matters that are capable of being heard. In considering all relevant matters together with the desirability of the accused being represented, not only for himself, but in relation to the problems that it will create for the Crown and the court in providing the necessary assistance that must be provided to the accused and the relationship that it is said Counsel enjoys with accused and the confidence that he has in Counsel, on balance, it is not in the interests of justice to adjourn this trial for a period of at least six months, on the expectation that the accused may brief particular Counsel to conduct his trial.

Per King J:

> "I have considered all of those matters together with the desirability of Williams being represented, not only for himself, but in relation to the problems that it will create for the crown and the court in providing the necessary assistance that must be provided to Williams. I have considered the relationship that it is said Mr Faris enjoys with Williams and the confidence that he has in Mr Faris, but on balance, I do not accept that it is in the interests of justice to adjourn this trial for a period of at least six months, on the expectation that Williams may brief Mr Faris to conduct his trial.
> Whilst the Court can and will do all they can to accommodate counsel of choice for accused persons, it cannot be that they are entitled to select a counsel who will not be available for a lengthy period and thereby compel the court to adjourn matters that are capable of being heard. This matter has been the subject of decisions in other countries and I will refer only to one, that of the Canadian decision of *R v McCallen* 43 OR (3d) 56; 131 CCC (3d) 518; 1999 CanLII 3685 (ON C.A.) paras 45-47, a decision of the Ontario Court of Appeal which stated:
>
> > "Many of the same factors come into play in decisions whether to adjourn a trial date in order to permit an accused's counsel of choice to be available. The emphasis is on the reasonableness of the delay involved in accommodating the accused's choice; if the counsel of choice is not available within a reasonable time, then the rights of the accused must give way to other considerations and the accused will be required, if he or she chooses to be represented, to retain another counsel who is available within a reasonable period of time; see *R v Lai*; *Barette v R* and *R v Smith*."
>
> 46. In determining what is a reasonable period of time, the court will balance many factors including the reason counsel is not available sooner, the previous involvement of the particular counsel in the case, the public interest in having criminal cases disposed of in an expeditious manner, the age and history of the case, the availability of judicial resources and the best use of courtroom facilities, the availability of the complainant the witnesses, the availability and use of Crown counsel and law enforcement officers and the potential impact of the scheduling decision on the rights of an accused under s11(b) of the Charter guaranteeing a trial within a reasonable period of time.
>
> 47. There is no formula that can be rigidly applied in balancing these different factors and what is reasonable in one case may not be reasonable in another. Rigid rules defeat the very nature of the discretionary decision that is required. However, guidelines are helpful because they bring a measure of predictability to scheduling decisions that will assist the various participants in the process. It is the trial courts that are in the best position to assess and balance the circumstances and resources that are available in a particular region and to develop guidelines that make the most sense for that region."

Per King J in *R v Williams* [2007] VSC 2; MC 11/2007, 15 January 2007.

(q) Application for adjournment to obtain Counsel; application for adjournment because matter being referred to the Supreme Court for an order

Per Nathan J:

> "The authorities establish that a person accused of serious criminal offences is entitled to be represented by competent counsel. That does not mean a particular counsel, although circumstances

may arise, when to retain counsel other than the individual of particular choice might create injustice. The charges in the present case did not reveal a fact-situation or complexities of any novelty. Nor were there any special circumstances or an area of legal expertise which warranted retaining counsel and him alone. The magistrate had a statutory duty to proceed with the hearing of the case and the obligation lay with the defendant's solicitor to retain counsel who would not be personally embarrassed by appearing before the assigned magistrate. In those circumstances the fair-minded and informed observer knowing that the magistrate had previously made findings adverse to counsel and knowing the nature of those offences, would not consider that the magistrate would betray his oath and make findings adverse to, or exercise a discretion against, any person in a subsequent case for whom that counsel appeared.

The Originating Motion itself is not a court order; it is merely the document which institutes the proceeding by which an order might be obtained. No order of the Supreme Court prohibiting the magistrate from continuing the case was ever taken out. Notification from the Bar table that some sort of process is either afoot or underway should not, *ipso facto*, oblige a magistrate to cease adjudication. Much will depend upon the strength of the assertions from the Bar table that an order in the nature of prohibition has been sought and is likely to be made. Any magistrate is entitled to presume that jurisdiction inures until it is suspended by a Supreme Court order. By continuing to hear the case, the magistrate did not exceed his jurisdiction nor did he display bias to the defendant or his counsel.

No special circumstances attach to this case, nor is there an area of legal expertise which would warrant retaining Mr Perkins and him alone. The charges are anything but novel. I glean from the witness statements that the method of detection through a police informer were anything but novel. The police brief delivered to Mr Kuek in response to his request for particulars does not reveal a fact situation or complexities of any novelty. Accordingly it cannot be suggested that Mr Perkins' retainer was so essential to the plaintiff's defence that any other counsel would not do. To the contrary the Victorian Bar is well serviced by many junior criminal barristers and many who have great familiarity with the Act.

The matter was set down in March. It had gone through the contested mention process and three days of the court's time set aside to dispose of it. Mr Kuek knew the court's calendar had been fixed in order to dispatch his applications. In my view he either knew or should have known of Mr Perkins' possible embarrassment because he was the instructing solicitor in Mr Perkins' personal defence, or the fact that Mr Perkins was unlikely to continue to appear if the magistrate insisted upon proceeding. He appears to have taken no steps to meet this contingency.

Mr Perkins withdrew on 7 June and fresh counsel was briefed later that afternoon. Upon the case being called upon the next morning, the 8 June the magistrate granted a further adjournment until the morning of 9 June. In my view an adjournment for a day-and-a-half in a case of this kind, is quite sufficient, especially when the solicitor was on notice of the time assigned by the court specifically to hear this case. I am aware of *Queensland v JL Holdings Ltd* [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294 which stands for the proposition that the interests of justice prevail over the convenience of the court.

A conference with Mr Pham would have been desirable if not required, but there were two evenings in which this could have been done and many hours of ordinary office working time in which it could have been accomplished. In my view the interests of justice were in no way compromised by requiring this case to proceed after an adjournment period of almost two days.

It would appear that at about ten past ten the criminal co-ordinator at Dandenong did receive a fax copy of the Originating Motion but that is all that it is a step, albeit an essential one in initiating process. The Originating Motion itself is not a court order. It is merely the document which institutes the proceeding by which an order might be obtained. No order of the Supreme Court actually prohibiting the magistrate from continuing to hear the process has ever been taken out. All the magistrate had before him was verbal notice that something in the nature of that process had probably been issued and which might, during the course of the morning, be served upon him. Nothing to that effect occurred. It follows from these observations that by continuing to hear the case despite being told from the Bar table that something in the nature of prohibition had been filed, the magistrate was not exceeding his jurisdiction. Nothing had been served upon him and counsel was not able to produce or assure him that an order in the nature of prohibition had been obtained.

I do not consider that the mere issuing of a Notice of Motion has the effect of suspending a magistrate's jurisdiction. Suspension of that jurisdiction comes into effect the moment an order for review is obtained. That is at the instant the judge pronounces the order. Up until that time, the magistrate's jurisdiction has not been impugned and continues to be exercisable. In fact the legal responsibility of the magistrate to proceed would seem to be impelling. The situation might conceivably be different if the magistrate were told that a motion for an order to review was currently before a judge. But in

> this case that was not the situation. I consider the mere issuing and filing of a Notice of Motion is not enough to signal the suspension of the jurisdiction of a magistrate.
>
> In this case no court order was ever obtained, the magistrate was merely told that a Notice of Motion had been issued and ultimately a copy of that notice was delivered to his court although not to him. Therefore his jurisdiction to hear the case was never suspended or foreshortened in any way. Any magistrate is entitled to presume that jurisdiction inures until it is suspended by a Supreme Court order."

Per Nathan J in *Pham v Taylor & Anor* [2000] VSC 53; MC 17/2000, 1 March 2000.

(r) Application for an adjournment to obtain legal representation

The accused was charged with 25 indictable offences. Committal proceedings took place and the accused requested an adjournment because he was not legally represented but the application was refused by the Magistrate and the proceedings continued. The Magistrate failed to carry out certain procedural statutory requirements and committed the accused to stand trial. Upon appeal—

HELD: Appeal allowed. The committal order was null and void.

1. In relation to the application for an adjournment of the committal proceedings, the onus was on the accused to justify the adjournment. The Magistrate had a discretion whether to grant an adjournment and had to consider whether the accused had received a reasonable opportunity to present his case.

2. The accused had represented himself on many occasions, including before the Magistrates' Court, the County Court, the Practice Court and the Court of Appeal and the matter had been on foot for nearly two years. The accused came to court determined to press his application that the charges be heard and determined summarily and to seek to review any decision that refused that application and he was able to argue that application without legal assistance.

3. Accordingly, the accused was not denied natural justice or denied a fair hearing or any of the rights conferred by ss24 or 25 of the *Charter of Human Rights and Responsibilities Act* by the Magistrate's refusal of an adjournment.

Per Ginnane J in *Strangio v The Magistrates' Court of Victoria & Anor* [2013] VSC 496; MC 40/2013, 23 September 2013.

(s) Costs awarded to informant on adjournment of criminal proceedings

At the contest mention hearing, the defendant indicated that alibi evidence would be called. However, notice of alibi was not given to the prosecutor until the day before the hearing. When the matter came on for hearing, the prosecutor sought an adjournment to enable investigation of the alibi and for the defendant to pay the costs of the prosecutor and informant thrown away by reason of their attendance at the court for the hearing. The magistrate granted the adjournment and ordered the defendant to pay the sum of $232 costs for the prosecutor and $116 for the informant. These costs were said to be the normal rate recoverable by the Victoria Police in civil proceedings. On appeal—

HELD: Appeal allowed. Order for costs quashed.

1. A magistrate has power to award costs in a criminal proceeding and in exercising that discretion the magistrate has an unfettered discretion save that the discretion must be exercised judicially.

Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287; MC 43A/1990;

Norton v Morphett [1995] VicSC 590; [1995] VSC 211; (1995) 83 A Crim R 90; MC 15/1995, referred to.

2. In the present case, the magistrate erred in the exercise of his discretion in that he overlooked—

- that there had been no breach by the defendant of the alibi procedure; and
- that the prosecutor and informant had not incurred any expense by reason of the adjournment against which they were entitled to be indemnified.

3. It is inappropriate in a criminal proceeding to award costs to the prosecutor or the informant on the basis of what may be recovered by them if called as a witness in a civil proceeding.

Per Beach J:

> "In my view it is quite inappropriate in a criminal proceeding to award costs to the prosecutor or the informant on the basis of what may be recovered by them if they are called as witnesses in a civil proceeding. In my opinion the magistrate erred in the exercise of his discretion so far as the order for costs was concerned and that order should be quashed. It was argued by counsel for the defendant that in the circumstances of this case an order in respect of the costs of the adjournment should have been made in favour of the defendant. I do not accept that proposition. If a defendant does leave it to the last moment to serve his notice of alibi, for whatever reason, then it becomes almost inevitable an adjournment will be sought by the prosecution and granted, unless, of course, the defendant can satisfy the court that to adjourn the hearing would prejudice the proper presentation of the defence. In such a situation there is no proper basis for making an order for costs in favour of the defendant."

Per Beach J in *Fitzgerald v Golden & Anor* [1995] VicSC 676; MC 06/1996, 5 December 1995.

(t) Adjournment of charges to a date to be fixed

Per Smith J:

> "The next matter raised concerns the magistrate's decision at the conclusion of the proceedings to adjourn the informations charging unlawful assault and recklessly causing injury (Final order 3, ground 6). A magistrate has an inherent power or an implied power to adjourn proceedings to a date to be fixed (*Paroukas & Anor v Katsaris* [1987] VicRp 4; [1987] VR 39). The power is a discretionary power and has not been fettered. It must be exercised judicially and therefore must be exercised in accordance "with legal principle and upon relevant and not irrelevant considerations" (Herring CJ in *Lee v Saint* [1958] VicRp 25; [1958] VR 126 at 129; [1958] ALR 545, cited by McGarvie J in *Paroukas v Katsaris*, above).
>
> I note Herring CJ's comment that an indefinite adjournment may in some circumstances amount to a refusal to exercise jurisdiction and thus may be exercised in error. In the present case it seems that his Worship was motivated by a concern that he did not know what Mr Willis intended to do in respect of any appeal. It seems reasonable to infer from that that his Worship was concerned that if there was an appeal and the appeal was successful, there was likely to be a re-hearing in which case the informant would wish to have the lesser charges heard. Mr Willis had already taken the position that the striking out of such informations in similar circumstances had the effect of dismissal. His Worship may well have been conscious of the doubts in the law resulting from *Bishop v Cody* [1939] VicLawRp 37; [1939] VLR 246; [1939] ALR 315 about the power to withdraw and a magistrate's power to strike out an information at that point.
>
> While it seems to me that it was undesirable in the circumstances that existed in this case to adjourn the criminal proceedings indefinitely and that to strike them out was the preferable solution, it cannot be said that it was not open to his Worship to exercise his discretion in the way he did. To do so did not place the defendant in any real jeopardy. Pending the outcome of the appeal, the prosecution would not be able to proceed with the other charges. If the appeal was not successful, the prosecution again would not be able to proceed with the other charges and in that situation the defendant could, if he wished, have the proceedings brought on and dealt with. Thus it seems to me that the magistrate cannot be shown to have erred in adjourning the unlawful assault charge and the charge of recklessly causing injury.

Per Smith J in *Willis v Magistrates' Court of Victoria & Buck* [1996] VicSC 576; [1996] 89 A Crim R 273; MC 09/1997, 2 December 1996.

(u) Taxation charges: Adjournment to prepare case and present defence fully and adequately

(i) Relevant considerations when considering applications for adjournment are that Courts have a responsibility to ensure, so far as possible and subject to overriding considerations of justice, that the limited resources which are committed to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice; that the plaintiff is entitled to have his claim adjudicated upon and enforced without unnecessary delay; and that there is a possibility that a defendant who is justly liable in respect of a claim may endeavour to postpone his obligations. Per King CJ and Cox J in *Dawson (t/as Goodvibes Yachts) v DCT* [1984] 56 ALR 367; [1984] 84 ATC 4752; (1984) 71 FLR 364; MC 05/1985 (South Australia), 28 September 1984.

(ii) In *Squire v Rogers* [1979] FCA 48; (1979) 39 FLR 106 at 113; (1979) 27 ALR 330 at 337, Deane J, with which the other members of the court agreed, stated:

> "The question whether an application for adjournment of a matter should be granted or refused is a matter within the discretion of the trial judge to be resolved according to the overall requirements of justice in the particular circumstances (*Conroy v Conroy* [1917] NSWStRp 44; [1917] 17 SR (NSW) 680 at 682). Its resolution may involve the assessment of competing claims by litigants in other

cases awaiting hearing in the list of the particular judge or the particular court and may require knowledge of the working of the listing system of the particular court or judge and the importance in the proper working of that system of adherence to dates fixed for hearing.

A court of appeal will not, as a general rule, interfere with the decision of a judge of first instance on that question unless it is satisfied that the exercise of his discretion has miscarried in the sense that it had been affected by wrongful application of principle or misunderstanding or erroneous assessment of the factual material before him". The District Court, like the other courts of the State, is subject to great pressure from the volume of cases to be tried. The judges of that court, like the judges and magistrates of the other courts, have a responsibility to ensure, so far as possible and subject to overriding considerations of justice, that the limited resources which the State commits to the administration of justice are not wasted by failure of parties to adhere to trial dates of which they have had proper notice. Moreover, the Deputy Commissioner of Taxation, like other plaintiffs, is entitled to have his claim adjudicated upon and enforced without unnecessary delay.

Judges must also bear in mind the possibility that a defendant who is justly liable in respect of a claim may endeavour to postpone his obligation. There is no evidence that that is the motive of the present appellant, but it is right that judges should be alert, as a general consideration when considering applications for an adjournment or postponement of trial, to the risk of persons endeavouring to manipulate the legal process as the means of escaping or deferring their just obligations. These were all relevant considerations for the trial judge.

There is no reason to suppose that he overlooked the countervailing consideration that the appellant was unable to obtain his solicitors' file and obtain other representation by reason of lack of funds. It must be said, however, that this consideration was considerably weakened by a number of factors. No attempt was made, so far as we were told, to provide details of the appellant's financial position, nor of the factors which enabled him to borrow money on the eve of trial but not before. Nor was any detail vouchsafed of whatever efforts might have been made to overcome the problem in the light of the approaching trial. It is not known whether the possibility of legal aid was investigated and with what result.

(v) Apprehended change in Legislation
Per Dean J:

"How reluctant a superior court is to interfere with the discretion of an inferior tribunal as to adjournment is shown by *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union* [1949] HCA 51; (1949) 80 CLR 164; [1949] ALR 605. Sometimes adjournments have been made pending the decision of another case and, in general, this is legitimate enough: *Re Yates' Settlement Trusts* [1954] 1 All ER 619; [1954] 1 WLR 564. At the same time, an indefinite adjournment may amount to a denial of justice, and a refusal by the tribunal to perform its duty to hear and determine matters before it. See *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32; [1940] 4 All ER 212; *Robertson v Cilia* [1956] 3 All ER 651; [1956] 1 WLR 1502.

The question is whether in the present case the adjournment was dictated by relevant considerations or whether, on the other hand, the discretion was exercised for extraneous reasons. I think it was the duty of the court, when the applications came on for hearing, to deal with them in accordance with the law as it then stood. In *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty* Ltd [1935] HCA 75; (1935) 54 CLR 230, at p253; 42 ALR 6, at p14, Starke J, said: "Courts of law can only act on the state of the law as it is, and have no right to, and cannot, speculate upon alterations in the law that may be made in the future".

This was said in the course of a dissenting judgment, but none of the other members of the Court expressed any contrary view, and I think what his Honour said was correct. It would be a cause of injustice if courts could adjourn cases because they had some real or imagined belief that the law might be amended. On 2 June the court believed that a Bill then before Parliament which gave the court power to dispense with strict compliance with formalities would soon be enacted. We know now that it was for some days uncertain whether the Bill would pass the Legislative Council. It has now been passed, and came into operation on 11 July 1960. I think the court was in error in granting the adjournment indefinitely for the reason assigned."

Per Dean J in *R v Whiteway; ex parte Stephenson* [1961] VicRp 26; [1961] VR 168, 30 September 1960.

3. Civil Proceedings:

(i) In relation to **civil proceedings**, the Court's power must be exercised in accordance with the overarching purpose of s7 of the *Civil Procedure Act* 2010 ('CPA') and the rules of court in relation

to civil proceedings, of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. Section 8 of the CPA provides that a court must seek to give effect to this overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers are part of the court's implied jurisdiction or statutory jurisdiction or arise from or are derived from the common law or any procedural rules or practices of the court.

(ii) Section 128 of the *Magistrates' Court Act* 1989 provides that the Court may, on the application of a party to a proceeding other than a criminal proceeding or without any such application, adjourn the hearing of the proceeding to such times and places; and for such purposes; and on such terms as to costs or otherwise as it considers necessary or just in the circumstances. If the Court has adjourned the hearing of a proceeding to a particular time, it may order that the hearing be held or resumed before that time. However, the Court may only make such an order with the consent of all the parties or on the application of a party who has given reasonable notice of the application to the other party or parties.

(iii) Rule 46.06 of the *Magistrates' Court General Civil Procedure Rules* 2010 provides that the Court may adjourn the hearing of an application on such terms as it thinks fit.

(a) Defendant's principal witness overseas for two months

When determining an application for an adjournment, the relevant consideration is not a conclusion about the strength or existence of a defence but whether a fair opportunity has been given to a party to avail itself of the services of the court to determine the validity or strength of the case which that party wishes put before the court.

Where, in civil proceedings, a defendant's principal witness was overseas on the first return date but planned to return some 2 months later, a magistrate was in error in refusing an application for an adjournment on the ground that the defendant did not have a defence to the claim.

Per Marks J:

> "The substance of the error alleged was that the Magistrate refused an adjournment for which application was made on behalf of the plaintiff by its legal representatives. Notice had been given to the defendant, who was the complainant in the court below, some two days or so before the hearing, but the application was opposed. The basis of the application was that the principal witness for the plaintiff, a person named Zev Eizik, who was obviously the *alter ego* of the plaintiff, was overseas and, by virtue of his being a member of the Israeli army, was not free to leave that country until he had completed his service. It was anticipated that he would be back in Australia by the end of June, which was only some two months or so away.
>
> The magistrate said that pursuant to the first affidavit sworn by Efron, Zev Eizik had completed military duty in the Israeli army. However, he was satisfied that this was due to an error of interpretation by Efron and the matter had been cleared up by the second affidavit. He stated, however, that he was not satisfied that the defendant did have a defence and, accordingly, he refused the application for an adjournment.
>
> It was common ground that the application was made to the Magistrate on the first return date. It was also clear that the Magistrate was obliged to consider the factors which weighed in favour of and against the adjournment. The Magistrate was not entitled to conclude on the material before him that the plaintiff had no defence or that there was some burden on the plaintiff to establish that he had a defence which either would or was likely to succeed.
>
> Our system of justice entitles a person to have his or her rights determined after a full hearing of the case which he or she, or in the case of a company, it, wishes to present. The Magistrate was informed by the legal representatives of the plaintiff that because of the absence overseas of Mr Eizik, they were not fully instructed as to all the circumstances which would go to support the defence which was outlined. There can be little doubt that the Magistrate did not hear the evidence which the plaintiff wished to present by way of defence to the claim and, accordingly, it was not open to the Magistrate to conclude that there was no defence.
>
> The relevant consideration, however, was not the conclusion about the strength or existence of the defence, but whether a fair opportunity has been given to a party to avail itself of the services of the court to determine the validity or strength of the case which that party wishes to put before the court.
>
> The Magistrate did have open to him many alternatives to ensure that no countervailing injustice was done to the defendant. The Magistrate could have granted an adjournment on terms; for example,

> terms as to the fixing of a hearing date which would give the plaintiff and its witnesses a fair opportunity to be present, terms as to the payment of costs, and, if necessary, the payment of any other expense to which the defendant might be said to have been put by reason of an adjournment. It was not necessary, of course, that the Magistrate grant successive adjournments to meet any application which the plaintiff might make; it was only necessary to deal with the application in such a way as to avoid injustice to the plaintiff."

Per Marks J in *Zev Eizik Corporation Pty Ltd v Pro-Image Productions (Vic) Pty Ltd* [1990] VicSC 448; MC 52/1990, 26 September 1990.

(b) Application by plaintiff to adjourn proceedings

Where, in a civil proceeding, a plaintiff was well aware of the defendant's defence, interlocutory steps had been completed and sufficient notice given by the defendant of an intention to call expert evidence, a magistrate was not in error in refusing the plaintiff's application for an adjournment to further prepare its case.

The proceeding came on for hearing on 18 March 1992. Thus the notice of intention to rely on expert evidence that the defendant had given the plaintiff was given within the time prescribed by the rules of the Magistrates' Court. Upon the matter being called on for hearing, counsel for the plaintiff applied for an adjournment of the hearing, alleging that the defendant had not made sufficient discovery and asserting that it was necessary to have the defendant medically examined in order that the plaintiff might present its case properly.

The Magistrate refused that adjournment and stated that the plaintiff had complied with the discovery and the filing of a statement of expert evidence, and that no prejudice arose to the plaintiff.

Per Hayne J:

> "The principles which govern the judicial discretion to adjourn a case and the attitude of appellate or supervisory Courts to the review of an exercise are to be found conveniently in two decisions of Kaye J, in *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234, and *Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, as well also as the unreported decision of Fullagar J given on 24 January 1991 in *Bullmore v Zurich Australian Life Insurance Ltd* [1991] VicSC 12. It is clear, I think, from those decisions, that the question whether to accede to or refuse an application for adjournment of a hearing is a matter within the discretion of the Magistrate to whom the trial of the proceeding is committed. Equally, it is clear that an appellate Court will rarely interfere with a trial judge's exercise of discretion upon such an application. [See *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701 at 703, per Wilson J; *Maxwell v Keun* (1928) 1 KB 645 at 653 per Atkin LJ; [1927] All ER 335.].
>
> It is clear, however, that if the result of refusal to grant an adjournment may be to prevent the party seeking it, from presenting his case or defence in circumstances where that result could constitute an injustice an appellate Court may interfere with the trial judge's discretion. I leave to one side whether some different and narrower test should be applied when the proceeding is by way of judicial review, for it seems to me that on judicial review no wider test could be applied were appeal open.
>
> It was open to the Magistrate to conclude firstly that sufficient discovery had been made by the defendant, secondly that due and sufficient notice had been given by the defendant of its intention to call expert evidence (for after all notice had been given within the time prescribed by the rules for that purpose) and that in circumstances where it had been apparent for well nigh 12 months that the issue of the medical condition of the defendant at the time of the accident was a live one, that in those circumstances the plaintiff should not be entitled to adjournment and that the proceeding should go on.
>
> Refusing the adjournment would not, and in my view did not, prevent the party seeking adjournment from presenting his case or defence. The position that the plaintiff found itself in, if it was embarrassed in the conduct of the trial, was a position that it found itself in, not by reason of the refusal to grant an adjournment, but by reason of its own conduct."

Per Hayne J in *City of Warragul v Kavalee* MC 48/1992, 26 November 1992.

(c) Defence witness ill

Where an application for an adjournment of a civil proceeding was made on the ground that a witness whose evidence was said to be critical to the defendant's case was ill, a magistrate was not in error in refusing the application but reserving the right for a further application to be made if it became clear that the witness' evidence was relevant to the case.

Per Beach J:

> "On 11 August 1993 the solicitors for Paper-Corp informed the solicitors for GTH that a director of Paper-Corp who was to be called to give evidence on Paper-Corp's behalf, Mr Peter C. Gregory, was ill, that Mr Gregory resided in Perth and that as a consequence of his illness he would not be able to attend the hearing on 16 August, and in that situation Paper-Corp intended to seek an adjournment of the proceeding. The solicitor for GTH informed the solicitor for Paper-Corp that his client would not consent to any application for adjournment and that the application which would be made to the magistrate on 16 August would be opposed.
>
> The magistrate said:
>
> > "I have been told that Mr Gregory's evidence is critical to the dispute. I refuse the application for the adjournment and if evidence given during the proceeding makes Mr Gregory's evidence critical to the defendant's case, an application for an adjournment will be entertained at that stage."
>
> In other words, the magistrate before whom the complaint first came was not making a final determination in relation to the application for adjournment. All he was saying was, when the matter is heard, and one presumes he realised it would be heard by some other magistrate at the Melbourne Magistrates' Court that day, if the evidence makes it clear that Gregory is a relevant witness, then renew your application for an adjournment at that stage. But instead of adopting that course, the solicitor for Paper-Corp and its director chose to simply leave the court, thereby allowing GTH's proceeding to be heard undefended.
>
> The originating motion was brought before the court by reason of Paper-Corp's failure to follow what would have been the most sensible approach to have been adopted in the matter before the Magistrates' Court on the 16th of August, namely, as all of GTH's witnesses were present at the court, and as one of the directors of Paper-Corp was present before the court, to allow the proceeding to be heard reserving, as it were, to Paper-Corp its right to make an application to the Magistrate hearing the proceeding for an adjournment once it became clear that Gregory's evidence was relevant to the case. There was no doubt that if, during the hearing before the magistrate, it had become apparent that Gregory's evidence was relevant to the case, the magistrate would have then adjourned the case part heard to enable Gregory to be called. That course was not pursued by Paper-Corp and as a consequence it subjected GTH to the expense and inconvenience of defending the originating motion. In that situation it was appropriate that Paper-Corp pay GTH's costs on a solicitor/client basis."

Per Beach J in *Paper-Corp Pty Ltd v GTH Engineering Pty Ltd & Anor* [1994] VicSC 21; MC 12/1994, 3 February 1994.

(d) Application for adjournment because defendant on medication; medical report ambiguous

Where, in civil proceedings, an application for an adjournment was refused and subsequently, a second application was made to another magistrate based on identical material to that presented to the first magistrate, the second magistrate had jurisdiction to entertain the further application but should have refused it as an abuse of process.

Per Smith J:

> "The application (to the first magistrate) was made by the Hos on the basis that Mrs Ho was not in a position to give creditable evidence due to the fact that she had been on medication. Reliance was placed upon an affidavit sworn by their solicitor and a medical report obtained from a medical practitioner.
>
> The magistrate was not confined in his determination of the question of fact to the report and the solicitor's evidence of the doctor's opinions. Such evidence was to be considered in the context of other evidence. The difficulty facing the Hos was that the report did not contain a statement by the doctor that Mrs Ho was at that time unable to give credible evidence. In ordinary circumstances and in the absence of other evidence, a magistrate might well have been prepared to give them the benefit of the doubt rather than cause the incurring of further costs but there were circumstances that raised doubts about the *bona fides* of the application. There was evidence before his Worship that the question of whether the drug treatment was affecting Mrs Ho's ability to give evidence was brought to her attention during the Supreme Court hearing which occurred several months earlier. There was also evidence that the Hos had appeared on the first hearing date in June 1994 and had apparently been prepared to proceed at that time notwithstanding that Mrs Ho was still taking the medication which had allegedly affected her ability to give evidence. It also appeared that she did not take any action to have the problem addressed until the week prior to the adjourned hearing on 1 September 1994.
>
> Having regard to those circumstances the ambiguities in the report took on a significance they might not otherwise have had. It cannot be said, therefore, that it was not reasonably open to the magistrate

to find as he did that he was not satisfied that Mrs Ho could not give credible evidence. That being so no error of law can be demonstrated in his decision.

The application before (the second magistrate) mounted, however, was an abuse of process because it sought effectively to challenge the first decision and sought a re-hearing when none was provided for by the courts procedures and it was based on the identical material that had been relied on previously.

Whether that was required or not, the situation was that the magistrate was asked to exercise a discretion in favour of Mr and Mrs Ho in circumstances where, not long before, when asked if they sought an adjournment on the grounds that they wished to appeal the earlier decision, counsel had indicated that they did not seek an adjournment on that ground. Mr and Mrs Ho were not in court. They had already applied that day for an adjournment based on material which the previous magistrate had found insufficient and had not sought to augment that material.

It was within the magistrate's discretion to decline to give leave to bring the second application on 1 September 1994 and, further, to refuse it in the absence of direct evidence that Mr and Mrs Ho did in fact wish to appeal, he having been told that they did not seek an adjournment on that basis only a short time earlier. Counsel did not seek an opportunity to make an application on further material and accordingly Mr and Mrs Ho cannot, in my view, now complain."

Per Smith J in *Ho & Anor v BMW Australia Finance Ltd* [1995] VicSC 193; MC 04/1995, 3 May 1995.

(e) Hearing date fixed three months in advance

Where a magistrate took into account the effect of an adjournment on the parties and the court; that the defendant could pursue an indemnity claim at a later date; that the hearing date had been fixed three months earlier; and that the defendant had engaged in delaying tactics in failing to join third parties and take interlocutory steps until the date of the hearing, the magistrate was not in error in refusing the defendant's application for an adjournment.

Per O'Bryan J:

"In *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202, the High Court said, in a joint judgment:

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

Error of the kind described in *House* must be demonstrated by the plaintiff. Nevertheless, although an appellate court will be slow to interfere with the discretion of a trial Judge (Magistrate) to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to the other party. In *Sali v SPC Ltd* [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841 at 843, the High Court qualified the above proposition in the following passage from the joint judgment of Brennan, Deane and McHugh JJ:

"In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties." (843-44)

I have reached the conclusion that the learned Magistrate's exercise of discretion has not been shown to have miscarried. He had regard to all relevant matters and took into account the effect of an adjournment on both the claimant and the defendant. Relevantly, the learned Magistrate concluded that the proposed third party claim for indemnity could be brought by Stratton after the claim was determined.

The circumstance that the indemnity claim may have to be commenced in the County Court because the indemnity claim will exceed the jurisdiction of the Magistrates' Court did not require the Magistrate to accede to the application to adjourn the hearing. The interlocutory steps that Stratton's counsel indicated to the Magistrate Stratton desired to pursue were unnecessary and likely to produce considerable delay in the hearing of the claim."

Above all else the learned Magistrate was entitled to conclude that Mail Management was entitled to have its claim heard on the day fixed by the Court three months earlier and that Stratton had

> engaged in delaying tactics in failing to join third parties, obtain discovery or seek an adjournment until the day of hearing. No doubt the learned Magistrate also had regard to the state of the civil list in the Court and the inconvenience caused by an adjournment. Bearing in mind, however, that the claim against Baillie had to be adjourned, this was not a compelling reason for the application to be granted."

Per O'Bryan J in *Stratton v Mail Management Pty Ltd* [1996] VicSC 287; MC 24/1996, 20 June 1996.

(f) One Party said to be overseas or interstate

Some time well prior to the return date, parties to a claim and counterclaim were notified of the date of hearing. J. told his legal practitioner that the date of hearing would have to be adjourned because J. had important business overseas. When the matter came on for hearing, counsel appeared for J. and requested that the matter be adjourned. No explanation was given to the magistrate as to the nature of the business which required J. to be overseas on that day or why it was so urgent that he be there. No affidavit or any evidence in support of the application was filed with the court. B. opposed the application. In refusing the application, the magistrate said that there was not sufficient detail as to why the absent party had to leave the jurisdiction. The magistrate then heard the matter, made an order in B's favour and dismissed J's counterclaim. On appeal—

HELD: Appeal dismissed. It is entirely within the discretion of a magistrate whether or not to grant an application for an adjournment of proceedings before the court. In this case, there was no evidence whatsoever to support J's application. In particular, there was no material as to the nature of J's business overseas that day, why it was necessary for J. to be overseas that day, why it was so urgent that J. had to be overseas that day and when he would be returning to Victoria. It was incumbent upon the person making the application to place before the court appropriate material in support of the application. Accordingly, it could not be said in the circumstances that in refusing J's application for an adjournment J. was denied natural justice.

Per Beach J:

> "But perhaps of more significance is the fact that no explanation was given to the Magistrate as to the nature of the business which required the presence of the appellant overseas that day, or why it was so urgent that he be there. The appellant had been informed of the date of hearing well prior to 26 July and had had ample opportunity to put that material before the court had he been minded to. In that situation, as the Magistrate made clear in the brief reasons he gave for refusing the application, the Magistrate was completely in the dark in the matter.
>
> The fact of course is that the appellant was not overseas but was simply interstate. Where an application for an adjournment is opposed, as it was in this case, I think it is incumbent upon the person making the application to place before the court appropriate material in support of the application.
>
> If appropriate material is placed before a court, and nevertheless the court refuses the application, it may well be successfully contended that there has been a denial of natural justice so far as the applicant is concerned. But, in my opinion, such a contention cannot be made when no such material is placed before the court."

Per Beach J in *Jacobson v Biggs* [1999] VSC 476; MC 29/1999, 17 November 1999.

(g) Decision quashed. Magistrate to rehear evidence

M. claimed a sum from W. for unpaid wages during a period of alleged employment in 1993. On the hearing, M. was successful and an order made on the claim together with interest and costs. Subsequently, an appeal from this decision to a judge of the Supreme Court was successful and the matter was remitted to the Magistrates' Court for further hearing. In the reasons for decision, His Honour referred to a potential witness who had sworn an affidavit to the effect that she gave perjured evidence in support of M's claim before the magistrate. In ordering that W. could relitigate the original claim, His Honour contemplated that, as a matter of probability, the outcome of the rehearing might depend on whether the witness gave evidence and in that event, what that evidence was. When the rehearing came on before the magistrate, the witness did not attend. Without any evidence being given, M. applied for the reinstatement of the original order. W. sought an adjournment so that the witness could be sub-poenaed to attend court. The magistrate refused the application for an adjournment and reinstated the original order with costs. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for further hearing. The magistrate misunderstood

the nature of the order made by the judge of the Supreme Court. His Honour ordered that the original order be quashed and the matter be remitted to the Magistrates' Court for hearing and determination according to law. Upon the plain terms of the order it was not open to the magistrate not to conduct a hearing because a particular potential witness was not available.

Per Ashley J:

> "When Myles' solicitor learned, on 28 September 1999, that Ms Hutchings would not be giving evidence, the solicitor applied for the reinstatement of the order made in June 1994. The Magistrate granted the application. Before doing so, her Worship refused an application made by Wilson's counsel for an adjournment so that Ms Hutchings, who was then living in Queensland, could be got to court.
>
> I have not the slightest doubt that the appeal must succeed. It seems to me crystal clear that the learned Magistrate misunderstood the nature of the order made by Harper J. His Honour ordered that the original order of the Magistrates' Court be quashed and that the matter be remitted to the Magistrates' Court for hearing and determination according to law. Upon the plain terms of the order, it was not open to the Magistrate not to conduct a hearing because a particular potential witness was not available."

Per Ashley J in *Wilson v Myles* [2000] VSC 158; MC 20/2000, 19 April 2000.

(h) Illness of party

The matters that were referred to in the medical reports indicated a serious state of affairs as to the health of the defendant.

Per Hansen J:

> "It has been said time and time again, that whether an adjournment will be granted at the request of a party depends on the justice of the situation in the particular circumstances and it has been said for a long time now, and it was referred to by the High Court in *State of Queensland v JL Holdings* [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294, that normally an adjournment will be granted if any prejudice to the opposite party can be cured by an award of costs or some other appropriate term. Regrettably, in this case, the Magistrate never came appropriately to consider that proposition.
>
> Here the application for an adjournment was opposed. Perhaps because the applicant for the adjournment was not represented by a lawyer, the application was not made on the basis that the applicant may have to pay the costs of the adjournment or bear some other term that might ameliorate the postponement of the case. No party has an ongoing right to the adjournment of a proceeding and this was the fourth fixture, an application for the adjournment of which might ordinarily therefore have been approached with some trepidation as to its success. For some reason, as I read the transcript, counsel appearing for Coadys did not come to the point of suggesting terms, whether costs or otherwise, as the price of an adjournment. It is not that he was under any obligation to do so.
>
> However, it might have been suggested that the matter had gone so far that an appropriate term, apart from costs, was that subject to further order or agreement of the parties Maryvell put some money aside, whether in whole or part of the claim and whether in court or otherwise. Perhaps as a result of that or the approach of Mr Velissaris, the Magistrate, so far as the transcript is concerned, did not consider whether any prejudice to Coadys might satisfactorily be catered for by an order for costs or otherwise. Having formed the view as to the unsatisfactoriness of the materials in support of the application, the matter stopped there. As to the reasons which the Magistrate expressed, I would say this further. The matters that were referred to in the medical reports indicated a serious state of affairs as to the health of Mr Velissaris. That was apparent on the face of the documents. There was an opinion of Dr Cochrane, apart from the other matters, as to Mr Velissaris undertaking a court case.
>
> It is difficult in the light of the pressures operating in a busy court and without the benefit of considered submissions from an independent lawyer, to deal with such materials, but there was clearly an expressed view by Dr Cochrane and references to angioplasty and cardiac disease. The course that might have been taken in relation to such materials was to adjourn the proceeding for a short time, perhaps a week, perhaps more, perhaps something else, whatever the Magistrate thought in light of the circumstances, for the purpose of and if necessarily requiring evidence to be given to the court in order to produce an appropriate level of satisfaction in the court one way or the other. In that way, the court is not merely speculating as to the correctness or otherwise of a medical practitioner's report and opinion and is generally proceeding on far safer ground.
>
> The Magistrate's statement that the materials were so vague as to what may or may not happen in the future that he could never have any confidence that it would ever be a matter that would

be heard, seems to me to go quite beyond the materials. It reflected an element of frustration. The question was not whether the case would ever be heard. The Magistrate was not required to make a prognostication of such a type, and he was not in a position to do so. It was a question of how the application was to be appropriately dealt with in light of the materials before the Court, not whether it might ever be heard at all.

It seems to me, not without some hesitation and having given the matter considerable thought, that the case falls on the line that the Magistrate did fail to give appropriate consideration to the application and in a way that may properly be described as denying procedural fairness."

Per Hansen J in *Maryvell Investments Pty Ltd v Coadys & Anor* [2004] VSC 59; MC 15/2004, 6 February 2004.

(i) Venue. Adjournment to another court

Per Nathan J:

"(1) Notwithstanding the definition of "proper venue" in s3 of the *Magistrates' Court Act* 1989, O29.01 of the *Civil Procedure Rules* opens up venue selection in civil proceedings to the initiating party. The court may transfer the proceeding to another venue if the defendant objects but subject to the convenience of the parties.

(2) In view of the history of the proceeding, particularly the previous decisions in interlocutory matters and the fact that the defendant had not objected to the plaintiff's choice of venue, when the matter came on for hearing the proper and appropriate venue had become Melbourne. Accordingly, the magistrate was in error in transferring the proceeding to another venue.

Accordingly, it was at all times possible for the plaintiff to have selected a venue other than Frankston and to have proceeded on that basis. It did so. The defendant did not object. The magistrate did not have regard to the convenience of the parties *a fortiori* the court itself which had selected the hearing day. The magistrate apparently thought, under sub-rule (4), that the requirement to proceed at the proper venue was one which gave him discretion to direct the case to that site. If he did, he was acting administratively and not judicially. The power of the magistrate to uplift or direct the proceedings away from the one selected by the parties (I use the term in the plural, because I am satisfied that the defendant had chosen the court at Melbourne just as much as had the plaintiff) is a power which must be governed by the circumstances of the case. It should not be exercised administratively in a Sovietesque manner. Even if the magistrate had made the order judicially the same principle applies. However in this case he acted, not to resolve a dispute between the parties but out of administrative rectitude. The magistrate seems to have assumed that he had power only to direct the matter to the proper court, under the terms of the rule; that is simply incorrect and a far too restricted meaning of the words in sub-section (4). He could have directed it anywhere.

Discretion must be exercised judicially in the context of the entire case. The antecedent history of the case must be taken into account and should not have been ignored. A highly relevant and pertinent factor was not taken into account by the magistrate here. His discretion, or exercise of it, falls clearly into the class of being exercised in innocence of a relevant and pertinent fact, in this case, the antecedent history."

Per Nathan J in *Champion Compressors Ltd v Andreko Nominees Pty Ltd* [1994] VicSC 10; MC 15/1994, 18 March 1994.

(j) Application to join third party refused

Per Cavanough J:

"Mr Harris complained that the magistrate gave undue weight to principles of case management as compared with the loss that would be suffered by his clients by the refusal of the adjournment and the making of an order against them in the proceeding. I do not agree with that characterisation of the magistrate's approach.

It is true that he gave some weight to considerations of case management. But he was fully entitled to do so, having regard to the authorities, including *Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146; (1997) 141 ALR 353; 71 ALJR 294, *Sali v SPC* [1993] HCA 47; (1993) 67 ALJR 841; 116 ALR 625 and other cases. The decision of Fullagar J in *Adams v Wendt* [1993] VicSC 77, Supreme Court of Victoria, 26 February 1993, BC9300638, which is briefly reported at (1993) 30 ALD 877, His Honour referred to what Deane J, sitting as a judge of the Full Federal Court, had said in *Sullivan v Department of Transport* (1978) 20 ALR 323; (1978) 1 ALD 383 at 403 (emphasis in the original), namely:

"The failure of a tribunal to adjourn a matter may conceivably constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment. In this regard however it is important to remember that the

> relevant duty of the tribunal is to ensure that a party is given a reasonable *opportunity* to present his case. Neither the Act nor the common law imposes upon the tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled."

Per Cavanough J in *Williams v Beveridge* [2008] VSC 342; MC 40/2008, 21 August 2008.

(k) Adjournment of claim for criminal injuries compensation

1. The Crimes Compensation Tribunal does not have a wide discretion to adjourn a claim until the applicant has commenced civil proceedings against the person involved. The tribunal's power to adjourn is fettered by s10 of the *Criminal Injuries Compensation Act* 1983.

2. Accordingly, the Tribunal was in error in adjourning an application for an award indefinitely so as to compel an applicant who was unwilling and/or unable to commence a civil proceeding.

Per O'Bryan J:

> "I consider that the learned Magistrate meant that he had a wide discretion to adjourn the claim until the applicant commenced a civil proceeding and her allegation of rape was determined in a civil court. This view of the power to adjourn is wrong and fails to recognise that the Tribunal's power to adjourn an application is fettered by s10 of the Act. The discretion to adjourn must be exercised within the term of s10. It follows that the learned Magistrate acted upon an erroneous construction of s10(b) and this Court may correct the learned Magistrate's exercise of discretion."

Per O'Bryan J in *Hall v Crimes Compensation Tribunal & Ors* [1995] VicSC 630; 9 VAR 279; MC 19/1995.

(l) Change of forum; Adjournment *sine die*

(1) In dealing with an application for a change of forum, a mere balance of inconvenience is not enough. The change of forum is to be ordered only if the balance of relevant considerations relied on by the parties indicates that real injustice would otherwise result to the party seeking the change.

(2) The magistrate had power to adjourn the hearing of the complaint to a date to be fixed on the basis that another Court was a more convenient forum. Having regard to the reasons given by the magistrate, it could not be said that he erred in the exercise of his discretion.

Per McGarvie J:

> "The decisions establish that a mere balance of convenience is not enough; a change of forum is to be ordered only if the balance of relevant considerations relied on by the parties indicates that real injustice would otherwise result to the party seeking the change. That discretion is not to be treated as being fettered or as having conditions prescribed for its exercise by earlier judicial decisions.
>
> In practice, situations do occasionally arise where in the interests of justice it may be desirable that the hearing of a claim before a Magistrates' Court be adjourned to enable the claim or some issue in it to be decided by another court. This may occur where the claim or issue is to be decided by a higher court. Eg *Patey v Patey* [1923] VicLawRp 64; (1923) VLR 521; *Ex parte Jospe; Re Radovsky* (1957) 74 WN (NSW) 156. It may occur where the claim or issue to be decided by the court of another State or of a Territory or a federal court, of equal or higher status. It would be absurd if the Magistrates' Court at Wodonga could not adjourn indefinitely a complaint before it, when it was satisfied that the rights of the parties upon the claim were nearing determination after an extensive hearing before the Local Court across the border at Albury.
>
> In my opinion s76 has exclusive application to all adjournments to be made on the basis that another Magistrates' Court in Victoria is a more convenient forum. I do not, however, regard the Act as carrying the implication that the provision in s76 deprives a magistrate of power to adjourn a complaint because another court other than a Victorian Magistrates' Court will provide a more convenient forum.
>
> The fact that courts were inferior courts has not deprived them of inherent power to adjourn proceedings. *Lee v Saint* [1973] VicRp 83; [1973] VR 833 and *Howard v Pacholli* [1972] VicSC 259; [1973] VicRp 83; [1973] VR 833 and also *R v Cox* [1960] VicRp 102; (1960) VR 665 and *Ex parte Morrison, Re Finley* (1957) 74 WN (NSW) 402. I consider that the power of a Magistrates' Court to adjourn without appointing any time is to be construed in the context of modern times."

Per McGarvie J in *Paroukas & Anor v Katsaris* [1987] VicRp 4; [1987] VR 39; MC 45/1986, 5 June 1986.

Patrick Street LL B, Dip Crim
24 March 2014