09/13; [2013] VSC 101

SUPREME COURT OF VICTORIA

WADDINGTON v MAGISTRATES' COURT of VICTORIA and KHA

Lansdowne AsJ

24 October 2012; 13 March 2013

PRACTICE AND PROCEDURE – REVIEW SOUGHT OF REFUSAL OF MAGISTRATE TO ALLOW A PERSON APPOINTED PURSUANT TO POWER OF ATTORNEY TO APPEAR FOR A PARTY IN THE MAGISTRATES' COURT – JURISDICTION OF ASSOCIATE JUDGE TO HEAR AN APPLICATION FOR SUMMARY DISMISSAL OR STAY OF THE ORDER BELOW IN RESPECT OF AN APPLICATION FOR JUDICIAL REVIEW – ATTORNEY APPOINTED BY A PARTY BY POWER OF ATTORNEY NOT "EMPOWERED BY LAW TO APPEAR FOR THE PARTY" – NO REAL PROSPECT OF SUCCESS – SUMMARY DISMISSAL GRANTED – ORDER FOR COSTS FOR THE WHOLE DAY – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S100; *INSTRUMENTS ACT* 1958, S107; *CIVIL PROCEDURE ACT* 2010, SS63 AND 64 – *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005. ORDER 56.

Section 100(6) of the *Magistrates' Court Act* 1989 provides:
"A party to a civil proceeding (including an arbitration) may appear—
(a) personally; or

(b) by legal practitioner or other person empowered by law to appear for the party; or

(c) in the case of a cause of action for a debt or a liquidated demand, by a person in the exclusive employment of the party who is authorised in writing to appear for the party."

W. instituted a civil proceeding against K. and another. The Magistrate declined to permit W. to be represented by a person on the basis that the person was not legally qualified. W. submitted that the person was empowered by law to appear for him because W. had given him a power of attorney to that effect. Upon application for an originating motion—

HELD: Proceeding dismissed.
1. An Associate Judge has clear power to hear and determine a summary judgment application in respect of an application pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005. This jurisdiction is conferred by r77.01(2)(iiia) of the Rules which confers power on an Associate Judge to hear and determine any application under the *Civil Procedure Act* 2010.

2. The conferral of power by r77.01 is subject to the exceptions contained within r77.02, but the power to grant summary judgment is not within any such exception. In particular, such an order is an interlocutory order, not an order at trial, notwithstanding that it brings the proceeding to an end, and so does not fall within that exception to the powers of an Associate Judge.

3. The words "empowered by law" in s100(6)(b) of the *Magistrates' Court Act* must be interpreted in the light of the usual power of a court to control its own proceedings. If they were to be read as contended for by W. (the plaintiff), a party in proceedings would be at liberty to appoint any person, whatever the skills, qualifications or abilities of that person, to represent that party. That is, how the party was to be represented would be entirely within the control of the party, not the court. This would be inconsistent with the necessary control over its own proceedings that any court must have. A solicitor or barrister admitted to practise is subject to the overriding control of the Supreme Court and the relevant licensing bodies and is required to have appropriate training and personal qualities so as to afford confidence in that person's ability to appear in court. It is for this reason that, traditionally, courts hear only from parties themselves or legal representatives for a party.

4. The reference to "law" in the phrase in s100(6)(b) "empowered by law" must mean statute law or case law of general application, and accordingly "empowered by law" means empowered by such law of general application to represent a party, rather than by act of a particular party in accordance with law. Accordingly, there is no real issue to be tried as to whether a person appointed by a power of attorney, notwithstanding that the power of attorney is pursuant to the *Instruments Act*, falls within s100(6)(b).

5. Section 107 of the *Instruments Act* does not advance W.'s argument. It merely provides that

the attorney has authority to do on behalf of the donor anything which the donor "lawfully" can do by an attorney. Thus, there is a degree of circularity in reliance on this definition. W. would first need to establish that he can lawfully be represented in court proceedings by an attorney, which would require some other specific provision for the attorney to be entitled to represent the plaintiff before the Magistrates' Court. Section 107 refers to a body of other law as to what an attorney may do, without specifying those powers. An argument that s107 created the necessary empowerment for the purpose of s100(6)(b) had no real prospect of success.

6. In relation to the submission that the Magistrate displayed actual bias or a perception of bias, actual bias requires evidence of same. Perception of bias is not the subjective perception of the party, but must be established on the basis of what a reasonable person in that party's position would perceive. On a reading of the whole of the transcript it showed at most that the magistrate was abrupt. But there was no real prospect of success in W.'s contention that the transcript showed either any actual bias or that objectively, that is to a reasonable person, the magistrate appeared biased against the plaintiff. On the contrary, the magistrate immediately permitted Mr McDonald to be a McKenzie friend for the plaintiff, on the plaintiff's request, and also immediately moved on the plaintiff's application for adjournment.

7. In relation the Magistrate's order for allowing costs for the whole day, the matter was listed before the Magistrate for hearing, which would ordinarily require the practitioner to have allocated the full day to the matter, even if in the event it did not take that long. Similarly, the award of costs on the adjournment, as opposed to reserving such costs or ordering that they be in the proceeding, would generally not amount to any error of principle. Indeed, adjournments are commonly granted only on the basis that the party seeking the adjournment pay the costs thrown away. The fact that the costs were ordered in a sum above scale, if that was the case, may in some circumstances suggest an error of principle, if the reason for doing so were not set out. W. did not set out the facts on the basis of which he asserted the costs were wholly solicitors' costs and above scale. The solicitor for the second defendant said that the costs awarded included travel costs for the second defendant and so the amount may have been explicable on that basis.

8. W.'s claim had no real prospects of success within s63, and there was no reason pursuant to s64 by reason of which it should nevertheless have proceeded to trial. Accordingly, the proceeding was dismissed.

LANSDOWNE AsJ:

Introduction

1. The matter before me is an oral application by the second defendant for summary dismissal of the originating motion filed by the plaintiff on 28 September 2012. The application was heard before me on 24 October 2012. The plaintiff was not on notice of the application, although he indicated he was ready to proceed on that day, and with a view to affording him a further opportunity to file material but limiting the costs of the parties I made directions on 24 October 2012 for any further affidavit and submission from the plaintiff and any affidavit in reply and further submission in reply by the second defendant. The plaintiff duly filed a further affidavit on 7 November 2012 and the second defendant filed an affidavit in reply on 19 November 2012. I have taken that further material into account.

2. The plaintiff by his originating motion seeks relief under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 ('the Rules") in the nature of *certiorari* and mandamus in respect of an order made by the magistrate at Dandenong on 3 August 2012 in civil proceedings instituted by Mr Waddington against Mr Kha and Nathan Massie. According to the summary Mr Waddington gave the magistrate, by the proceedings he sought damages for goods destroyed at a rooming house owned by Mr Kha while he, the plaintiff, was incarcerated. The magistrate declined to permit Mr Waddington to be represented by a Mr McDonald, on the basis that Mr McDonald was not legally qualified. The magistrate did permit the plaintiff to use Mr McDonald as a McKenzie friend. On the application of Mr Waddington to enable him to obtain representation, the magistrate adjourned the proceedings, which had been listed for defended hearing on that date, to a later date, and made an order for costs fixed in the sum of $1,800 being the costs sought by the solicitor for Mr Kha. The magistrate fixed the sum on the basis of the request by that legal representative, Mr Cook, without enquiry as to how it was made out.

3. Relief is sought in the originating motion in respect of these orders on the basis that refusal to allow the plaintiff to be represented by his "elected representative" constitutes a denial of natural justice or procedural fairness; that the magistrate was biased; and that the costs order was unfair, inappropriate and the amount awarded exorbitant and above scale.

4. The proceedings first came before me for directions on 12 October 2012. There was no appearance for the defendants. It became apparent that the plaintiff had not served the second defendant personally, and I adjourned the proceedings to enable that to occur or to make any application for substituted service. On the adjourned date, 24 October 2012, the second defendant entered an appearance and made by affidavit an application for summary dismissal of the originating motion, which application, on enquiry, was founded on s 63 of the *Civil Procedure Act* 2010 ("the CPA").

5. The plaintiff had also made application for an interlocutory injunction, returnable on 24 October 2012, by which he sought an order to restrain the Magistrates' Court from conducting the final hearing in the proceedings on 2 November 2012, the adjourned date, and a stay on the costs order. The basis of the application was that it was unlikely that the originating motion would be heard before that date.

6. There is no specific provision in Order 56 for an Associate Judge to grant a stay in respect of a lower court order the subject of proceedings under Order 56 (compared, for example, with specific provision in relation to appeals on a question of law from the Magistrates' Court and appeals from the Victorian Civil and Administrative Tribunal.) Nor is there any specific provision in Order 56 itself for an Associate Judge to summarily dismiss a proceeding under that Order, again by comparison with other sorts of judicial review or appeal. An Associate Judge does not have the jurisdiction to hear an injunction, without referral from a Judge. The Practice Court Judge referred both matters to me for hearing and determination; the application for summary dismissal for the avoidance of doubt, and the injunction as a matter of necessity.

7. In the event, the plaintiff and the second defendant agreed to take all necessary steps to adjourn the Magistrates' Court proceedings from 2 November 2012 and I dismissed the injunction proceeding accordingly. These reasons concern the second defendant's application for summary dismissal and the plaintiff's application for stay of the costs order.

Jurisdiction

8. On reflection, I consider that an Associate Judge has clear power to hear and determine a summary judgment application in respect of an application pursuant to Order 56. This jurisdiction is conferred by r77.01(2)(iiia) of the Rules which confers power on an Associate Judge to hear and determine any application under the CPA.

9. Section 63 of the CPA provides:

> (1) Subject to s64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or party of the claim, defence or counterclaim, as the case requires, has no real prospect of success.
>
> (2) A court may give summary judgment in any civil proceeding under subs (1) –
> (a) on the application of a plaintiff in a civil proceeding;
> (b) on the application of a defendant in a civil proceeding;
> (c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

10. Section 64 of that Act provides as follows:

> Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—
> (a) it is not in the interests of justice to do so; or
>
> (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

11. "Civil proceeding" is defined to mean "any proceeding in a court other than a criminal proceeding or quasi-criminal proceeding" in the CPA and none of the exceptions in the Act to its application apply to proceedings under Order 56.

12. The conferral of power by r77.01 is subject to the exceptions contained within r77.02, but the power to grant summary judgment is not within any such exception. In particular, such an

order is an interlocutory order[1], not an order at trial, notwithstanding that it brings the proceeding to an end, and so does not fall within that exception[2] to the powers of an Associate Judge.

13. I consider that the plaintiff's claim has no real prospects of success within s63, and there is no reason pursuant to s64 by reason of which it should nevertheless proceed to trial. Accordingly, I will dismiss the proceeding.

14. As the proceeding is to be dismissed, it is not necessary to further consider the plaintiff's application for stay of the costs order. I do, however, consider that, where it is appropriate, an Associate Judge has power to order a stay of an order that is subject to an application under Order 56, notwithstanding the absence of explicit reference to such a power in the Rules, because the power is an exercise of the inherent jurisdiction of the Court.[3]

Issues

15. The plaintiff says that he was entitled to be represented by Mr McDonald by virtue of s 100(6)(b) of the *Magistrates' Court Act* 1989. Sub-section 100(6) provides as follows:

> Section 100(6) A party to a civil proceeding (including an arbitration) may appear—
> (a) personally; or
>
> (b) by legal practitioner or other person empowered by law to appear for the party; or
>
> (c) in the case of a cause of action for a debt or a liquidated demand, by a person in the exclusive employment of the party who is authorised in writing to appear for the party.

16. The plaintiff says that Mr McDonald was "empowered by law" to appear for him because he, the plaintiff, had given Mr McDonald a power of attorney to that effect.

17. The plaintiff relies on s107 of the *Instruments Act* 1958 to support his argument. The relevant portions of that provision provide as follows:

> 107(1) A general power of attorney in or to the effect of the form set out in Schedule 12 shall operate to confer—
> (a) on the attorney under the power; or
>
> (b) if there is more than one attorney, on the attorneys acting jointly or acting jointly or severally, as the case may be—
> authority to do on behalf of the donor anything (other than delegate his powers under the power of attorney) which he can lawfully do by an attorney.

Sub-sections (2) and (3) are not relevant.

18. In relation to the bias question, the plaintiff says that the transcript reveals the magistrate's bias and that he, and other persons present in the Court, perceived the magistrate to be biased.

19. In relation to the costs order, the plaintiff says that the relief he seeks in the originating motion is consequential, rather than an independent source of complaint. He is not seeking that the costs order be quashed, but says that costs should have been reserved because he was in fact ready to proceed on that day had his representation been permitted.

20. The second defendant's case is that there was no error in the magistrate limiting representation to a legally qualified representative or the plaintiff himself. In relation to the complaint of bias, the solicitor for the second defendant says that the magistrate had heard no evidence, may not in fact sit on the final hearing in any event, and, if he is allocated the hearing, the plaintiff can make an application to him on that day that he recuse himself for the perception of bias.

21. In relation to the costs order, and generally, the solicitor for the second defendant says that the plaintiff's participation in the hearing before me showed that he was competent to represent himself and he had had sufficient notice prior to the first hearing date in the Magistrates' Court to be prepared for the contested hearing. He says that the established rule is that parties are entitled to be represented only by themselves or a legally qualified person.

22. In reply to the plaintiff's submissions, the second defendant says that reliance on the power of attorney and the Instruments Act is misconceived as a power of attorney cannot amount to being "empowered by law" as required by s100 of the *Magistrates' Court Act*. He also relies on the fact that the plaintiff sought, before the magistrate, an adjournment to obtain legal representation.

Discussion: Availability of relief sought

23. Breach of natural justice, whether by failure to afford procedural fairness or by perception of bias, can be a ground for quashing a decision of an inferior tribunal and so a basis for the relief of *certiorari*.[4]

24. The costs order that is the subject of the third complaint in the originating motion and the proposed relief of mandamus, was, however, the exercise of a discretionary power by the magistrate. The writ of mandamus is available to require the performance of a duty of a public character in accordance with law, but does not require the performance of that duty in any particular manner. To the extent the relief sought seeks that the discretionary power the magistrate had in relation to costs should have been exercised differently, mandamus is not available.

Summary judgment

25. Under s63 of the CPA summary judgment may be given if a claim has no real prospect of success. In a number of decisions trial judges of this Court have expressed the view that the test for summary judgment under the CPA is different to, and requires a lower threshold than, that required under the Rules.[5]

26. Recently the Court of Appeal in *Karam v Palmone Shoes Pty Ltd*[6] held that the change in terms was not intended to establish a new or different test, and that the power to exercise summary judgment is still to be exercised sparingly and it should only be granted if it is clear that there is no real question to be tried.[7] In that case it was clear there was no real question to be tried, and so it was not necessary to distinguish between the two tests. For the avoidance of doubt, however, I will determine this application under the old standard, being that summary judgment will only be given if it is clear that there is no real question to be tried.

27. I will also separately consider the discretion vested in the Court to refuse summary judgment, even if the claim has no real prospect of success, by s64 of the CPA.

Representation via a power of attorney

28. The plaintiff in his affidavit sworn 7 November 2012 submits that the construction of s100 must mean that "other person empowered by law to appear for the party" in paragraph (b) must be someone other than a legal practitioner retained by the party or an employee of the party, as referred to in (c). I agree. He then says that it was obviously prudent for the authors of the *Magistrates' Court Act* to allow for some other persons, undefined in the Act, but authorised by law to appear for a party. This may be so. What does not follow, however, is his next proposition, that this category includes persons authorised to act for a party by a power of attorney.

29. In my view, the words "empowered by law" in s100(6)(b) of the *Magistrates' Court Act* must be interpreted in the light of the usual power of a court to control its own proceedings. If they were to be read as contended for by the plaintiff, a party in proceedings would be at liberty to appoint any person, whatever the skills, qualifications or abilities of that person, to represent that party. That is, how the party was to be represented would be entirely within the control of the party, not the court. This would be inconsistent with the necessary control over its own proceedings that any court must have. A solicitor or barrister admitted to practise is subject to the overriding control of the Supreme Court and the relevant licensing bodies and is required to have appropriate training and personal qualities so as to afford confidence in that person's ability to appear in court. It is for this reason that, traditionally, courts hear only from parties themselves or legal representatives for a party.

30. This usual practice is reflected in various rules made by the Magistrates' Court[8] such as 1.18 (any act required or permitted to be done by a party may be done by that party's Australian lawyer); 4.03 (names, addresses and representation of parties) and Order 20 (change of Australian lawyer). These provisions reflect the usual practice that parties are represented only by themselves, or Australian lawyers.

31. In particular types of cases or jurisdictions, there may be persons other than a legal practitioner who can sufficiently represent a party. For straightforward cases in the Magistrates' Court this is recognised by s100(6)(c) which permits employees of a party in the case of debt or liquidated demand to appear if authorised in writing. I consider, however, that the reference to "law" in the phrase in s100(6)(b) "empowered by law" must mean statute law or case law of general application, and accordingly "empowered by law" means empowered by such law of general application to represent a party, rather than by act of a particular party in accordance with law. In my view, there is no real issue to be tried as to whether a person appointed by a power of attorney, notwithstanding that the power of attorney is pursuant to the *Instruments Act*, falls within s100(6)(b).

32. Section 107 of the *Instruments Act* does not advance the plaintiff's case. It merely provides that the attorney has authority to do on behalf of the donor anything which the donor "lawfully" can do by an attorney. Thus, there is a degree of circularity in reliance on this definition. The plaintiff would first need to establish that he can lawfully be represented in court proceedings by an attorney, which for the reasons I have given would require some other specific provision for the attorney to be entitled to represent the plaintiff before the Magistrates' Court. Section 107 refers to a body of other law as to what an attorney may do, without specifying those powers. I do not consider an argument that s107 creates the necessary empowerment for the purpose of s100(6)(b) has any real prospect of success.

33. In his affidavit of 7 November 2012, the plaintiff further amplified his submission that an attorney authorised by him is a person "empowered by law" to represent him in the Magistrates' Court in the following ways. First, he relies on historical usage of the term "attorney" as the antecedent to the term "solicitor", and what he claims to be historical precedent for a party being able to choose a representative for court proceedings other than a legal representative. I do not consider this assists. The Magistrates' Court is created by statute. Accordingly, I read s106(6) of the *Magistrates' Court Act* as a code i.e. historical precedent is relevant only if it establishes that the chosen representative is a person "empowered by law". The plaintiff does not refer to any case authority, or any legislation other than United Kingdom legislation, in support of his proposition of historical usage, and in the absence of such authority or Victorian statute, I do not consider that the argument has any real prospect of success for the reasons given earlier.

34. Next, the plaintiff relies on Victorian authority *Cornall v Nagle*,[9] a decision of JD Phillips J of the Court, in support of his proposition that an attorney can represent him in court. The portion he has extracted contains the comment, itself extracted from another case cited, *Re Hall*: "A man has a perfect right to appear personally; it is not necessary that he should go personally to the courts".[10]

35. I consider reliance on *Cornall v Nagle*, and the extract from *Re Hall* there cited, to be misconceived. Those cases concern disciplinary action against a person not qualified to act as a legal practitioner who was said to be doing so. Accordingly, the focus of those cases was on whether or not certain conduct constituted acting as a legal practitioner, not whether or not a person may retain someone other than a legal practitioner to represent him or her in court.

36. *Cornall v Nagle* was a prosecution of the defendant for contempt for disobeying an order restraining him from practising as a solicitor. One of the alleged contraventions was said to be actions he had undertaken for a Mr and Mrs Beale. The defendant had been appointed their attorney by power of attorney. In that capacity he wrote letters on their behalf and filed court documents in the Magistrates' Court. He also sought to appear on their behalf at a Magistrates' Court hearing pursuant to the power of attorney and on the basis that he was in the exclusive employment of the Beales, a basis for appearance permitted by s106(6)(c) of the *Magistrates' Court Act*. That basis was not available here due to the nature of the proceedings. The magistrate refused Mr Nagle the right to appear for the Beales.

37. The judge in the contempt proceedings held that the writing of letters and lodging of court documents could have been undertaken by any person sufficiently authorised by the Beales (it would seem, including by power of attorney), and so did not constitute acting as a solicitor. He held that the drawing of court documents, however, was acting as a solicitor and found Mr Nagle in contempt of the restraining order in that respect. The judge did not consider it established

beyond reasonable doubt that the defendant was guilty of contempt, i.e. had sought to act as a solicitor, in attempting to appear for the Beales at the hearing. He considered there was some doubt because the appearance was said to have been sought not as a lawyer but on the basis of the power of attorney or employment.

38. It is not entirely clear from his affidavit or attached submissions what the plaintiff seeks to establish by reliance on *Cornall v Nagle*. If it is that, in his submission, the case establishes that a person appointed pursuant to a power of attorney is entitled to appear in the Magistrates Court pursuant to s106(6)(b), the case does not in my view establish that. I have had regard to the portions from the case he extracts to seek to understand his submission. The extract from *Re Hall*, which I set out in part above, continues "If he can do the work by a messenger, he may do so; he is not to be deprived of a messenger because he chooses to defend himself instead of relying upon the advice and assistance of a solicitor." Thus the conduct there permitted was as messenger, not as advocate. The conclusion of the whole portion from *Cornall v Nagle* extracted by the plaintiff refers to Mr Nagle's "status as agent or attorney" for the Beales as explaining the part he played, but not protecting him from the prohibitions against acting as a solicitor. This is not an endorsement of a person appointed as attorney having a right of appearance.

39. Further, the absence of a finding that seeking to appear constituted acting as a solicitor is not the same as finding that an attorney pursuant to power of attorney is entitled to appear. There was no challenge before the trial judge in *Cornall v Nagle* to the refusal of the magistrate to allow Mr Nagle to appear, and so the question as to whether or not a power of attorney may be sufficient for that purpose was simply not determined in that case. In fact, there are indications, in the discussion of the drawing of court documents, that the Court accepted without question that it is only a party or a solicitor for a party who may, pursuant to the then *Rules of the Magistrates Court*[11] (to the same effect as the current rules to which I have referred above), take a step in litigation in that Court.[12] In that respect, the case supports the conclusions I have reached, not the reverse.

40. The plaintiff next refers, in his affidavit sworn 7 November 2012, to *Spina v Permanent Custodians Ltd*[13], a single judge decision of the New South Wales Supreme Court. Again, reliance on this case is fundamentally misconceived. The case concerned the powers of an attorney to enter into a contract, not to appear in court. The plaintiff relies on a portion of the judgment at which the trial judge, Hammerschlag J says (citations omitted):

> As a general rule whatever a person has power lawfully to do can be done by him, her or it through an agent. There are exceptions including where a statute prevents it and where the power concerned is purely personal and therefore not capable of delegation: *Halsbury's Laws of England*, 5th ed, vol 1.[14]

41. That statement does not support the proposition that an attorney can appear in the Magistrates' Court because a party can lawfully do so for the simple reason that it contains its own qualifications—the relevant exception being here where a statute prevents it. Section 100 sets out exhaustively the categories of agents who may lawfully appear for a party, and they are a legal practitioner, an agent in the exclusive employment of the party in certain categories of cases if authorised in writing, and a person "empowered by law to appear for the party" (emphasis added), not so empowered by the party himself.

42. The plaintiff then refers to information on the Department of Justice website that provides that an agent appointed by a general power of attorney is thereby empowered to make financial or legal decisions for the donor of the power. He submits that appearance in court is simply a series of legal decisions. "Legal decisions" in the context of this general information are probably intended to be understood as entry into contracts and the like. Even if the phrase could extend to the commencement of proceedings and the making of forensic decisions within them, where the plaintiff's submission fails is that putting submissions and running a case before a court, while informed by such "legal decisions", is not the same as the decisions themselves. The difference is that the court controls, subject to statute, its own procedure. A party may choose to allow another person to make the legal decisions that inform the appearance, but cannot require a court to allow the person so empowered to appear, if that right is not otherwise conferred by law.

43. Accordingly, having considered and rejected all of the plaintiff's submissions, I do not

consider that the plaintiff has any real prospect of success or that there is any real question to be tried in relation to complaint 1 in his originating motion.

Bias

44. Bias may be established either as actual bias or perception of bias. It is not entirely clear on which limb the plaintiff relies, and so I will consider both. The plaintiff refers to particular portions of the transcript in support of his contention, asserting that the magistrate cut him off or did not allow reasonable discussion.

45. Actual bias requires evidence of same. Perception of bias is not the subjective perception of the party, but must be established on the basis of what a reasonable person in that party's position would perceive. I have read the whole of the transcript, including the portions on which the plaintiff relies. On my view, that reading shows at most that the magistrate was abrupt. There is no real prospect of success in my view, in the plaintiff's contention that the transcript shows either any actual bias or that objectively, that is to a reasonable person, the magistrate appeared biased against the plaintiff. On the contrary, the magistrate immediately permitted Mr McDonald to be a McKenzie friend for the plaintiff, on the plaintiff's request, and also immediately moved on the plaintiff's application for adjournment.

46. The plaintiff asserts that the fact that the magistrate allowed a full day's costs thrown away for a short appearance and a sum in excess of scale without enquiry also show bias. I do not consider there is any real prospect of success in this contention. As set out below, a foundation for the costs orders can be found in the circumstances of the adjournment, and are not explicable only by bias.

47. I do not consider that the plaintiff has any real prospect of success in relation to complaint 2 in his originating motion.

Order for costs

48. An order for costs is discretionary. Section 131 of the *Magistrates' Court Act* provides that:

> 131(1) The costs of, an incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.

49. To obtain any relief by way of appeal or review of an exercise of a discretion, the plaintiff would need to show an error in the exercise of that discretion by way of applying the wrong principle, taking into account an irrelevant consideration or failing to take into account a relevant consideration or similar. I do not consider that that there is any real prospect that the plaintiff will be able to show that here.

50. In relation to costs for the whole day being allowed, the matter was listed before the magistrate for hearing, which would ordinarily require the practitioner to have allocated the full day to the matter, even if in the event it did not take that long. Similarly, the award of costs on the adjournment, as opposed to reserving such costs or ordering that they be in the proceeding, would generally not amount to any error of principle. Indeed, adjournments are commonly granted only on the basis that the party seeking the adjournment pay the costs thrown away. The fact that the costs were ordered in a sum above scale, if that was the case, may in some circumstances suggest an error of principle, if the reason for doing so were not set out. The plaintiff has not, however, set out the facts on the basis of which he asserts the costs were wholly solicitors' costs and above scale. The solicitor for the second defendant says the costs awarded included travel costs for the second defendant and so the amount may be explicable on that basis[15].

51. On balance, I do not consider that the plaintiff has any real prospect of success in challenge to the costs order or that there is any real question to be tried in relation to it.

Section 64

52. For the reasons set out above, I do not consider that there is any real prospect of success i.e. any real question to be tried in relation to the originating motion. Further, I do not consider that there is any reason why in the interests of justice the matter should nevertheless proceed to trial. The proceeding is for supervisory review of a lower court, and not a factual inquiry where on

occasion a court may consider that the proceeding should continue to trial due to the nature of the allegations or the possibility of further factual material becoming evident in pretrial preparation.

53. The plaintiff contends that the case contains elements of significant public interest and for that reason should proceed to trial. I do not consider any broader public interest in whether or not a person appointed attorney has a right of appearance in the Magistrates' Court justifies this case proceeding further.

Conclusion and costs

54. For these reasons I will grant summary judgment.

55. At the conclusion of oral argument on 24 October 2012 the second defendant made an application for costs and for costs to be fixed. The plaintiff indicated he opposed the application. Mr Cook in his affidavit in reply again sought costs if he is successful, without further detail.

56. In the interests of limiting further costs for the parties, I will deal with the costs application in these reasons, but with a right in the parties to seek to re-open the issue at oral hearing if he or they so choose. If of course a party does so, and is unsuccessful, then that party will in all probability also have to bear the costs of that further hearing.

57. Costs are in the discretion of the Court, but usually follow the event. Here the second defendant has been successful. I consider that it follows that, subject to anything the plaintiff may wish to put to me, the plaintiff should pay the second defendant's costs. I will award costs at the usual party/party rate, again subject to anything to be put to me further. I will not fix the costs because I do not consider I have sufficient information to do so and the Costs Court is far better placed to tax costs.

58. I add one further comment. The plaintiff has taken objection to the second defendant being heard in relation to the plaintiff's complaints against the magistrate, except in relation to costs. That objection is misconceived. Although the proceeding is a supervisory one, by way of judicial review of the magistrate, the Rules require the other party to the proceedings below to be joined, and that party then has a right to be heard on all issues, because of the direct impact on his or her interests and because the analysis of legal issues is facilitated by a contradictor. It is the court below, i.e. the body the subject of the review, that traditionally does not seek to be heard on an application for judicial review, not the other party.

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[1] *Karam v Palmone Shoes Pty Ltd* [2012] VSCA 97 at [19]- [22], which itself arose from the summary dismissal of an application under O56 by an Associate Judge.
[2] R77.02(1)(a).
[3] R77.01(1) confers the inherent jurisdiction of the Court on an Associate Judge. In *New South Wales Bar Association v Stevens* [2003] NSWCA 95 at [83]- [84]; (2003) 52 ATR 602 the Court held that the power to grant a stay of a decision the subject of an application for judicial review fell within the inherent power of the Supreme Court, there of New South Wales.
[4] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 and 175; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[5] *Wheelahan and Anor v City of Casey and Ors (No.3)* [2011] VSC 15 at [8] (Osborn J as he then was); *Matthews v SPI Electricity Pty Ltd* and *SPI Electricity Pty Ltd v Utility Services Corporation Limited and Ors (Ruling No.2)* [2011] VSC 168 at [18] to [22] (J.Forrest J); *Ottedin Investments Pty Ltd v Portbury Developments Co. Pty Ltd and anor* [2011] VSC 222 at [8] to [18] ("*Ottedin*") (Dixon J); *JBS Southern Australia Pty Ltd and anor v Westcity Group Holdings Pty Ltd and ors* (2011] VSC 476 at [39] to [50] (Croft J); *Dattner v Wharton* [2011] VSC 610 at [43] (Habersberger J); *Samfa Pty Ltd v Hilane Pty Ltd and Ors* [2011] VSC 644 at [9]- [10] (Davies J).
[6] [2012] VSCA 97.
[7] Ibid, at [28].
[8] *Magistrates' Court General Civil Procedure Rules* 2010.
[9] [1995] VicRp 50; [1995] 2 VR 188.
[10] *Re Hall; Ex parte the Incorporated Law Society* (1893) 69 LT 385 per Cave J, cited ibid, at 221E.
[11] *Magistrates' Court General Civil Procedure Rules* 1989.
[12] *Cornall v Nagle*, op cit, at 219 at ll 23-39.
[13] [2008] NSWSC 561; 13 BPR 98,316.
[14] Ibid, at [101].
[15] Affidavit of Bryan Cook sworn 19 November 2012 at [11].

APPEARANCES: The plaintiff Waddington appeared in person. For the second defendant Kha: Mr B Cook, solicitor. Cook & Associates, solicitors.