03/01; [2000] VSCA 198

SUPREME COURT OF VICTORIA — COURT OF APPEAL

THE MAGISTRATES' COURT of VICTORIA at HEIDELBERG v ROBINSON & ANOR

Brooking, Charles and Buchanan, JJ A

27 September, 24 October 2000 — [2001] 2 VR 233; (2000) 117 A Crim R 155

COSTS – AGAINST MAGISTRATES' COURT – GUIDELINES FOR EXERCISE OF DISCRETION TO AWARD COSTS – NOTION OF SERIOUS MISCONDUCT OR SERIOUS IMPROPRIETY TO UNDERLIE AN AWARD OF COSTS – MAGISTRATE GUILTY OF FLAGRANT VIOLATION OF A PRINCIPLE OF NATURAL JUSTICE AND DISREGARD FOR ELEMENTARY PRINCIPLES – WHETHER APPROPRIATE TO AWARD COSTS AGAINST MAGISTRATES' COURT.

1. The notion of serious misconduct or serious impropriety may be said to underlie the award of costs against inferior courts provided that it is understood that there may be misconduct or impropriety notwithstanding the absence of any knowing departure from elementary principles. A magistrate may be said to be guilty of serious misconduct or serious impropriety if he or she fails to observe some fundamental principle of justice notwithstanding that the magistrate was ignorant of that principle. Some principles are so fundamental that it may be regarded as misconduct or impropriety in the necessary sense for a magistrate not to observe them notwithstanding that the magistrate is unaware of them.

2. Where a magistrate threatened to imprison a young offender to compel payment of a sum of compensation and later threatened to use the contempt power to silence a legal practitioner who was attempting to make a proper submission, it was open to conclude that it was a flagrant instance of disregard for the elementary principles which every court should obey or a flagrant violation of a principle of natural justice. The case was one of serious misconduct of such a nature as to justify an award of costs against the Magistrates' Court.

BROOKING JA:

1. In the small hours of 21 December 1997, a few days before his eighteenth birthday, Leigh Robinson was walking along Waterdale Road, Heidelberg West with a friend. They spent their time smashing the windows of ten factories and two parked cars, by hitting them and by throwing rocks. They managed to do $9,470 worth of damage. The companion was arrested at the scene by two bystanders. Robinson himself made his escape, but was identified to the police by his companion. And so the day of reckoning came on 7 September 1998, when he appeared before the Magistrates' Court at Heidelberg and pleaded guilty to twelve charges of intentionally damaging property. He had gone there with his mother and sought the help of the Legal Aid duty solicitor. The magistrate who heard the case was Mr Maher. The police prosecutor told him the circumstances of the offences and said that compensation orders for $9,470 were sought under s86(1) of the *Sentencing Act* 1991. He mentioned that the defendant had no prior convictions.

2. The duty solicitor then made a plea, saying that Robinson had been drunk and had been angry because of a row with his girlfriend. He handed up to the magistrate a two-page "resumé" dealing with his client's background, which the magistrate read. What then happened is best recounted by citing a long passage from Robinson's uncontradicted affidavit:

> "The Magistrate then said that he wanted me to pay the $9,470-00 in damages. He went on to say that it was tax payer's money that I was costing the community by doing these things and he told the Duty Lawyer that I must pay-up or go in. My Solicitor then asked for time to pay and the Magistrate asked him how much time did I need. The matter was then adjourned shortly while the Solicitor and I went out and I advised the Solicitor that I did not know how I was going to get the money, but I would simply have to try and pay it. The Duty Solicitor said that he would go in and ask for 12 months and would that be enough time. I agreed that I would attempt to pay it off in that period of time. We then went back into Court and the Duty Solicitor asked for 12 months, however, the Magistrate declined saying `No way'. The Duty Solicitor then said what about 6 months and the Magistrate replied `Stop wasting my time. He either gets a loan or gets his mother to get one or he goes

in for 2 months. No question about it'. The Duty Solicitor then asked whether it would be possible for a non-conviction penalty to be imposed and the Magistrate replied, 'No way, he will definitely be convicted, I'll give him 2 months to come up with the money, if he doesn't, he definitely goes in'. I then left Court after the matter was adjourned to 5 November 1998. ... [O]n the 5 November 1998, I again appeared at the Heidelberg Magistrates' Court with my Solicitor Mr C Metcalfe who is now representing me in relation to this matter. The matter was called and the Magistrate was reminded about the matter and he indicated that he recalled this case and he enquired as to what the position was and whether I had paid the money. The Police Prosecutor, Sergeant Tony Ryan, then indicated to the Magistrate that his brief was quoted to the effect that the Defendant was to make arrangements before 5 November 1998 to repay the damages or else he would be sentenced to gaol. The Magistrate indicated that he recalled this matter and that I was to pay the money or go in. He then asked my Solicitor, Mr Metcalfe, what the position was. Mr Metcalfe told His Worship that I had paid 3 of the factories for damages, being the factories which had not claimed money from their insurers. He then indicated that my mother had contacted all the other factories and had obtained details about their insurance companies and that I would need time to make arrangements to pay off these insurance companies and that I was willing to pay, but my wages are less than $200-00 per week. He went on to indicate that my mother is on a part pension with 2 other children to provide for and it makes it impossible to pay the money as required by His Worship. His Worship responded 'I told him, if he didn't come up with the money, I will put him in'. Mr Metcalfe again told His Worship that I was willing to pay the money, but I was unable to pay straight away and that I needed time to pay. His Worship replied saying that 'He didn't care, its his problem, he committed the crime, he can do the time'. He said that he told me on the last occasion that I either paid the money or go in, it was as simple as that. He said 'What's it to be' to Mr Metcalfe who then replied that that was not reasonable and Mr Metcalfe asked His Worship to disqualify himself from the case. In response to Mr Metcalfe's Application to His Worship to disqualify himself, His Worship immediately said to Mr Metcalfe 'How dare you make that Application, don't insult my intelligence'. He told Mr Metcalfe that he was being disrespectful to the Court in making the Application and if he persisted with the Application, he would deal with him, Mr Metcalfe, 'Right here and now'. He told Mr Metcalfe that he was not present on the previous hearing of the matter in September and that he didn't know what he was talking about. His Worship said that he knew what he said on the previous occasion and that was that he either paid the damages or go in. Mr Metcalfe told His Worship that he was not being disrespectful to the Court and that he was simply putting his client's instructions to the Court. His Worship then responded by saying that he would again deal with Mr Metcalfe for contempt if he persisted with that Application and that if his client's instructions were to persist with that Application, then he would put him in custody today. He then asked Mr Metcalfe what I was intending to do and Mr Metcalfe indicated to him that I would pay for the damages as I am able to, but I was not able to pay it in one lump sum. His Worship indicated that he would not make a Restitution or Compensation Order as that would not be paid and that 'He either pays it or goes to gaol'. He then indicated that he would adjourn the matter for 2 months to enable me to pay and then indicated that he would not be here in January and the matter would have to be adjourned to February 1999. A date in February was then obtained and the matter has been adjourned to the 8 February 1999."

3. On 22 December 1998 Robinson filed an originating motion, naming as defendants the police constable who was the informant and the Magistrates' Court of Victoria at Heidelberg, and seeking to prohibit the particular magistrate from proceeding with the hearing of the charges. The matter came before Gillard J on 10 February 1999, when the plaintiff and the informant were both represented by counsel, counsel for the informant telling the Court that her client did not contest the proceeding. The Magistrates' Court was not represented by counsel, although a solicitor attended on its behalf when judgment was given, saying that he wished to make submissions only in relation to costs. On 10 February Gillard J gave judgment, determining that Mr Maher should be prohibited from hearing the charges laid against the plaintiff and that they should be heard by another magistrate. The correctness of his Honour's decision in this regard is not and never has been challenged. Gillard J reserved the question of costs and on 16 February heard argument on that question, the plaintiff and both defendants each being represented by counsel. His Honour reserved his decision and, on 11 March 1999, in carefully considered reasons, determined that the second-named defendant – the Magistrates' Court – should pay the plaintiff's costs; he ordered payment accordingly. On 9 April 1999 this Court granted the Magistrates' Court leave to appeal from the order for costs, and it is this appeal which is now before us. All three parties have appeared on the hearing of the appeal, but Mr McArdle, while assisting the Court on certain points, put no argument either in support of or opposition to the appeal. He desired to be heard only in the event that the appeal succeeded and the Court was minded to make an order for costs against his client, the constable, in respect either of the proceedings below or of the appeal.

4. Where proceedings are taken to challenge some decision of an inferior court and that court, instead of appearing only as a submitting party, chooses to participate in the proceedings by attempting to support its own decision and its opposition is unsuccessful, so that the decision is overturned, the inferior court's participation in the proceedings by way of attempting to support its own decision may lead to an award of costs against it. But in the present case the Magistrates' Court did not appear before Gillard J and seek to resist an order in the nature of prohibition, and the order for costs made by Gillard J was based, not on anything done in the proceedings in his court, but simply on what had occurred in the lower court. Accordingly we are in no way concerned with, and what I say hereafter ignores, the principle that an inferior court's attempt on appeal or review to uphold its own decision may lead to an award of costs against it. It is the events of 7 September and 5 November 1998 in the court at Heidelberg with which we are concerned.

5. It has long been accepted that only very rarely will an order for costs against justices or a magistrates' court be appropriate. In 1883 Stawell CJ, sitting in the Full Court, observed, "Costs are not given against justices, save under very exceptional circumstances": *R v Dixon; ex parte Richardson*[1]. More recently it has been said in England that it is "the rarest thing" for the Divisional Court to give costs against justices: *R v Willesden Justices; Ex parte Utley*[2]. And in New South Wales it has been observed in the Court of Appeal that it would be "a very rare case" in which the power to award costs against a stipendiary magistrate was exercised: *Ex parte Corbishley; Re Locke*[3].

6. In the last 150 years the question when such an award will be made has received a good deal of attention in New South Wales, beginning with *Re Starr* in 1859.[4] There is in that State a considerable body of authority – decisions of single judges, the Full Court and the Court of Appeal – attempting to explain in what circumstances an inferior court should be mulcted in costs. While expressions recur and while one decision does not purport to depart from another, there is a degree of diversity of expression to be found.[5] Sometimes the Court makes it clear that the categories given by it are not exhaustive[6].

7. "Perverse" is a word often found in the cases in New South Wales. The word is used to suggest something more than error, or manifest error, and conveys some such notion as obstinacy or persistence in error: *Cummins v Mackenzie*[7]. So in the early case of *R v Smith* Stephen J said of the magistrate, "I take it for granted that with this section before him couched in terms as plain as words could be, he refused to follow it."[8] In *Ex parte Vincent* the Full Court of New South Wales, faced with what it regarded as "an extraordinary and astounding blunder", was not prepared to say that the magistrate had behaved perversely.[9] The idea seems to be that a magistrate is not to be ordered to pay costs for acting on an erroneous view of the law, even though it is very plain that that view was wrong, unless the magistrate has really chosen to ignore the law[10]. Owen J once said:

> "It is clear to my mind that the magistrate has not attempted to apply his mind to the facts or the law of the case. He obviously had come into Court with his mind made up, and without allowing the solicitor for the husband to be heard, said: 'I have made up my mind, I won't listen to you'. Is that justice? ... It is contrary to natural justice ... . Where a magistrate has made an honest mistake in attempting to carry out his duties the Court does not punish him by awarding costs against him. But in this case I am satisfied that the magistrate disregarded his judicial position, and his conduct ... is such as to justify the Court in awarding costs against him": *Ex parte Taylor; Re Butler* at 83-84.

I think it may be said that where a magistrate acts "perversely", in the sense in which the cases use that word, he is disregarding his judicial position, as Owen J put it. So in *Cummins v Mackenzie* Sheppard J said of the magistrate that perversity was not established: "He did not intend ... to be obstinate or stubborn in relation to the discharge of his duties. In other words he intended to do, and thought he was doing, justice according to law".[11] The same notion had been expressed much earlier by Williams J: "The council, it appeared, had acted *bona fide*": *Ex parte Alexander*[12].

8. The word "misconduct" often appears in the decisions in New South Wales. Sometimes it is used in a narrow sense, as by Hutley JA in *Sankey v Whitlam* ("where the magistrate is guilty of serious misconduct, corruption, gross ignorance or has been perverse")[13]. In this formulation, corruption, gross ignorance and perversity are not regarded as varieties of "serious misconduct", unless the comma which appears after that expression is intended to make that which follows

epexegetical. But in the case cited by Hutley JA, *Ex parte Blume; Re Osborn*, the Full Court, as it seems to me, used the words "a clear case of serious misconduct" at 339 in a generic sense, as covering all kinds of behaviour which justified an award of costs against the magistrate. The immediately following references to perversity, corruption and gross ignorance are, I think, made by way of mentioning varieties of misconduct. "A clear case of serious misconduct", mentioned at 339, is "misconduct of such a nature as to justify an award of costs against him" (340). The view that "misconduct" was used in an all-embracing sense is supported by what was said at 340-1:

> "The appeal against this part of the order [the part dealing with costs] was because of the imputation of serious misconduct which such an order necessarily involves."

9. In first mentioning serious misconduct, the Court in *Ex parte Blume* cited *Ex parte Cox*. Cohen J there cited *Ex parte Tranter* as "a case where it was laid down that costs should not be given against Justices except in a clear case of misconduct". *Ex parte Tranter* was a decision of the Full Court in which Faucett J said, "I do not think we should give costs against the Justices, unless it is a clear case of misconduct."[14] I think it may be said that the notion of misconduct does underlie the exercise of the power to award costs against inferior courts. In *R v Goodall*[15] Cockburn CJ observed during the argument: "This Court does in some cases inflict costs on justices when they have been guilty of some gross impropriety in the exercise of their summary jurisdiction." "Gross impropriety" and "serious misconduct" express the same notion. In 1884 Higinbotham J said, "The general rule that the costs of a *mandamus* go to the successful party, is subject to the exception that when a judicial officer is required by *mandamus* to do an act he shall not be fixed with the costs unless he has been guilty of improper conduct ...": *R v Bailes; Ex parte Pickup*[16]. This remark was treated by Williams J in 1886 as requiring "some misconduct" before an order for costs could be made: *Ex parte Alexander*[17]. In more recent times, it has been laid down in England that the Divisional Court will award costs against justices only if they have acted "improperly". In words which have often since been cited, Lord Parker CJ said in 1960:

> "So far as costs against the justices are concerned, it has been the practice not to grant costs against justices or tribunals merely because they have made a mistake in law, but only if they have acted improperly, that is to say, perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance."[18]

I see no distinction between the English test (a flagrant instance of improper conduct) and that propounded in New South Wales (a clear case of serious misconduct).

10. There is a notable similarity between one expression used by Lord Parker CJ (flagrant disregard for the elementary principles which every court ought to obey) and the words used by the Full Court of New South Wales in *Re Starr* (a flagrant violation of the maxim *audi alteram partem*) and by Cohen J in *Ex parte Cox* in reliance upon *Starr's case* (a flagrant violation of a principle of justice). In my view, the notion of serious misconduct or serious impropriety may be said to underlie the award of costs against inferior courts provided that it is understood that there may be misconduct or impropriety notwithstanding the absence of any *knowing* departure from elementary principles. By this I mean that the person or persons constituting the court may be said to be guilty of serious misconduct or serious impropriety if they failed to observe some fundamental principle of justice notwithstanding that they were ignorant of that principle. Some principles are so fundamental that it may be regarded as misconduct or impropriety in the necessary sense for an inferior court not to observe them notwithstanding that the court is unaware of them.

There is, I think, here to be drawn a distinction between rules of substantive law and the fundamental rules of natural justice. The superior court may be prepared to regard even "an astounding blunder" in a matter of substantive law as not exhibiting "gross ignorance" in a necessary sense and, in the absence of "perversity", may decline to make an order for costs against the inferior court, although a stage might be reached at which the rule of substantive law that had, albeit through ignorance, not been applied was so fundamental as to require the case to be viewed as one of misconduct or impropriety and so as making an award of costs appropriate. But when one is concerned, not with some "ordinary" rule of substantive law, but with the fundamental principles concerning procedural fairness or natural justice, the inferior court may[19] be held not to be excused by its own ignorance. In considering the suggestion of "gross ignorance", and what is to be excused, one cannot overlook the fact that the lay and honorary justice has given

way to the legally qualified professional magistrate. But in saying this I do not wish to suggest that a mere blunder should attract an award of costs: the approach should still be benign, or reasonably so, where a bona fide mistake has been made.

11. In recent years there has been some reference in Victoria to the New South Wales authorities. Marks J, in *Edwards v Hutchins*[20] said that they supported the proposition that an order for costs would not ordinarily be made against a magistrate in the absence of perverse or shameful conduct, and that he believed that "the so-called rule of law in New South Wales"[21] accorded with the practice in Victoria. In *Munro v West*[22] Smith J derived from them the test of whether there was a clear case of serious misconduct. Chernov J, in *Charter Homes Pty Ltd v Housing Guarantee Fund Ltd*[23] used a number of the expressions to be derived from the decisions in New South Wales, as did Charles JA, speaking for the Court, in *Psychologists' Registration Board of Victoria v Herald & Weekly Times Ltd*[24].

12. I have no doubt that the present case was one of serious misconduct in the sense of misconduct of such a nature as to justify an award of costs against the Magistrates' Court. More specifically, I have no doubt that it was a flagrant instance of disregard for the elementary principles which every court ought to obey (using the English formulation) or a flagrant violation of a principle of natural justice, using the formulation originating in New South Wales. One could, with slight modifications, apply the words of Owen J in *Ex parte Taylor; Re Butler* set out above to the facts of the present case. Let us now look at what the magistrate did in this case. He was certainly entitled to take the view that the making of the compensation order sought would by no means dispose of the matter of compensation for sentencing purposes. He was certainly entitled to take the view that the making of an order is one thing and that payment pursuant to it is another. He was entitled to have regard to the losses that others had suffered in determining upon an appropriate sentence and was entitled to have regard to whether the offender had reduced or extinguished the loss by making payments.

The making of such payments could also have been put forward as suggesting remorse or rehabilitation. If the magistrate had, when the matter first came before him, said to the duty solicitor that, as matters stood, notwithstanding that the defendant was a first offender, and especially having regard to the value of the property damaged, the offences seemed to require some kind of custodial sentence and asked whether any compensation had been paid and whether there was any positive proposal to pay it, probably no problem would have arisen. But the magistrate did not do this. He made it clear that a custodial sentence (in the form of a term of imprisonment, not youth training centre detention) would be imposed unless the defendant paid the $9,470. Having been told that the defendant could not pay that sum unless given a long time to pay, the magistrate made it clear that a prison sentence of two months would be passed unless he or his mother got a loan and so paid the full amount within the next two months. This was thoroughly unsatisfactory, but the greater vice is in what took place two months later, when the case came on again. The magistrate had been brusque and offensive in what he said on 7 September, but his conduct on 5 November was far worse.

During the initial discussion (if such it can be called) on 5 November the magistrate continued in his rude and abrupt way. He was then met with an application that he disqualify himself – an application properly made, both as regards its foundation and the manner in which it was put forward. The solicitor, Mr Metcalfe, in very trying circumstances, behaved courteously in trying to make his application. It was perfectly proper for him to ask the magistrate to disqualify himself, the intended basis of the application no doubt being – at least in part – that the magistrate had prejudged the matter by making up his mind irrevocably at too early a stage, without listening to argument and possible evidence. The magistrate behaved like a bully and, worst of all, threatened the solicitor with instant committal for contempt of court if he persisted in his application.

What Martin J once called the immensity of the power to commit[25] makes the abuse of that power in the present case deplorable. It cannot be said to be mitigated by any stress that the magistrate was under or any justifiable irritation. The magistrate was continuing to behave as he had behaved up till then, although now his behaviour became worse. He refused to hear a party, and moreover in a criminal proceeding, and did so by using his contempt power as an instrument of oppression. Adapting the words of Wallace P in *Ex parte Corbishley; Re Locke*[26], it

may be said that "there was a denial of natural justice in the proceedings before this magistrate, and it is discouraging to learn that justice has been administered in this way by a modern Victorian court".

13. The history of the power to award costs has received a good deal of attention in recent years.[27] The matter of costs is now governed by s24 of the *Supreme Court Act* 1986. The parties have, in my view rightly, not suggested that what is said in the older cases has its significance for present purposes affected by the terms of the provision[28] which authorised an award of costs. Section 24(1) of the *Supreme Court Act* places the costs of all matters in the Court in the discretion of the Court, with full power to determine by whom and to what extent they are to be paid. A settled practice has developed of not awarding costs against an inferior court merely because that court has made a mistake. The practice has been to require a clear case of serious misconduct — misconduct of such a nature as to justify an award of costs. Categories of such misconduct have come to be recognised. They are not exhaustive. What the courts have done is lay down principles or guidelines for the exercise of the discretion: *Aiden Shipping Co Ltd v Interbulk Ltd*[29]*; Symphony Group Plc v Hodgson*[30]; *Norbis v Norbis*[31]; *Latoudis v Casey*[32]; *El Deeb v Magistrates Court of South Australia*[33].

14. Gillard J recognised that this was the approach to be taken to the decisions dealing with the award of costs against justices and magistrates. Even if we would ourselves have exercised the discretion in a different way, that would not itself be enough to entitle us to substitute our own view for his. But I do not for a moment think that I would have exercised the discretion differently: the case was an eminently proper one for an award of costs notwithstanding the caution with which such applications should be approached.

15. Little was said before us in support of the contention that the order for costs was incompetent by reason of s14 of the *Magistrates' Court Act* 1989:

> "A magistrate has, in the performance of his or her duties as a magistrate, the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge."

16. Gillard J observed that s14 puts magistrates in the same position as judges in the sense that no action may be brought against them for acts done in the performance of their duties as magistrates: *Rajski v Powell*[34]; *Gallo v Dawson*[35]. Burbury J said of a similar provision, "clearly the section is only concerned to give ... the same protection and immunity as a judge of the Supreme Court has from being sued in relation to the exercise of his judicial functions".[36] The immunity has been held not to be confined to immunity from suit but to extend to immunity from disclosing any aspect of the decision-making process.[37] There are similar provisions in other current Victorian Acts, including the *Children and Young Persons Act* 1989, s14, the *Local Government Act* 1989, s210, the *Victorian Civil and Administrative Tribunal Act* 1998, s143(1) and the *Evidence Act* 1958, s21A. Equivalent provisions will be found in other jurisdictions, for example, the *Magistrates Court Act* 1987 (TAS), s10A, the *Magistrates Act* (NT), s19A and the *Magistrates Court Act* 1991 (SA), s44(1). A specimen drawn from Commonwealth legislation is the *Administrative Appeals Tribunal Act* 1975, s60(1).

17. In my opinion, the section now in question has nothing to do with the awarding of costs against magistrates. True it is that in *Santamaria v Secretary to Department of Human Services*[38], when costs were sought against the Victorian Civil and Administrative Tribunal as successor to the Administrative Appeals Tribunal, counsel referred to s57(1) of the *Administrative Appeals Tribunal Act* 1984 and s143(1) of the *Victorian Civil and Administrative Tribunal Act* 1998. But Balmford J seems to have based her refusal of an order for costs on the exercise of a discretion, not on the existence of a statutory immunity. Apart from what happened in *Santamaria*, I am not aware of any case in which it has been suggested that provisions of the kind now in question are applicable where an application for costs is made against an inferior court or tribunal whose decision has been assailed. For example, there was no suggestion in *El Deeb v Magistrates Court of South Australia* that s44(1) of the *Magistrates Court Act* 1991 (SA) stood in the way of an award of costs. It is noteworthy that in *Psychologists' Registration Board of Victoria v Herald & Weekly Times Ltd* the Court of Appeal, having twice adverted to the fact that s30(3) of the Board's Act made s21A of the *Evidence Act* 1958 applicable, went on to treat the making of an award of costs against the Board as a matter of discretion and to refer to the decisions laying down guidelines

for the exercise of the discretion. Nowhere did the Court suggest that s21A sheltered the Board from an order for costs.

18. It is perhaps worth mentioning that, before the order to review procedure was introduced by the *Justices of the Peace Act* 1887 (No. 953), there were in Victoria two statutory modes of reviewing decisions of courts of petty sessions or justices – orders to prohibit (known as statutory prohibition) and orders to quash. There was in addition an appeal to the Supreme Court by way of case stated. Statutory prohibition was provided for by s6 and the appeal by case stated was provided for by s11 of an Act of 1862 (No. 159). By s19 of that Act:

> "No justice who by virtue of this Act shall be prohibited from proceeding or from further proceeding as hereinbefore mentioned or whose determination shall be appealed from shall be liable to any costs in respect or by reason of such prohibition or appeal."

19. The three corresponding sections of the *Justices of the Peace Statute* 1865 are ss136, 150 and 158. When the *Justices of the Peace Act* 1887 (No. 953) replaced the order to prohibit, the order to quash and the case stated procedure by the order to review, it provided, by s160, that no justice should be liable to any costs in respect or by reason of any decision, judgment or order of the Court upon any order to review or appeal.[39] A provision in substantially the same terms as s160 appeared in successive *Justices Acts*. We last see it as s101 of the *Magistrates' Court Act* 1971 as amended by Act No. 8427 of 1973. No similar section appears in the *Magistrates' Court Act* 1989.

20. The appeal must fail.

CHARLES JA:

21. Having had the advantage of reading the reasons for judgment prepared by Brooking JA, I agree that this appeal must fail and, subject to the addition to the following comments, for the reasons given by his Honour.

22. Paragraphs 4 and 5 of the affidavit of the respondent dated 22 December 1998 set out what occurred in the Magistrates' Court at Heidelberg on 7 September and 5 November 1998. No answering affidavit was filed, nor was it suggested in argument before us that this version was in any way inaccurate, or unfair to the magistrate. On 7 September, at a time when the duty solicitor's plea on behalf of the respondent had plainly not concluded, the magistrate intervened to say that he wanted the respondent to pay $9,470 in damages. He repeated this demand a number of times, accompanying the demand on at least three occasions with the threat that the defendant would go to gaol for two months if he did not pay that sum within two months. When the duty solicitor's request for 12 months to pay was rejected out of hand, and a request was made for six months, the magistrate replied, "Stop wasting my time. He either gets a loan or gets his mother to get one or he goes in for two months. No question about it."

23. These events would, in my view, by themselves have been sufficient to require the magistrate to disqualify himself as having shown an appearance of bias and having failed to hear the respondent's case before arriving at a concluded view. I should add that the magistrate's demand that in the alternative the respondent's mother should get a loan also seems to me to have been quite improper. Then, on 5 November, when the case resumed, the respondent was represented by a new solicitor, Mr Metcalfe. The magistrate was informed that the respondent had paid part of the compensation demanded, but that he earned less than $200 per week and his mother was on a part-pension with two other children to provide for. Notwithstanding these matters, on no less than four occasions the magistrate repeated his assertion that the respondent was to pay the money or go to gaol. When Mr Metcalfe submitted that the magistrate's demand was unreasonable and asked him to disqualify himself, the magistrate twice threatened to deal with Mr Metcalfe for contempt.

24. I have no doubt that the Magistrates' Court at Heidelberg is overworked and that it is necessary for matters to be dealt with succinctly and expeditiously. The magistrate was, no doubt, concerned not to waste time, as shown by his response to the duty solicitor on 7 September on the first occasion when the duty solicitor asked for 12 months' time to pay. But as Lord Salmon said, speaking for the Privy Council, in *Maharaj v Attorney-General for Trinidad and Tobago*[40] –

> "Their Lordships recognize how important it is not to waste judicial time. But if this can be avoided only by finding against a party without giving him a fair chance of being heard, then such a price for saving judicial time is far too high."

Borrowing from what Lord Salmon also said on the same page, I doubt whether the respondent left court either on 7 September or 5 November without feeling he had received something less than justice. On the unchallenged evidence the magistrate's behaviour throughout was overbearing, indeed bullying, and I doubt whether at any stage it could be said to have represented the "impersonal authority of law"[41].

25. A threat to deal with an advocate for contempt is a very serious matter. It is a "drastic and most unusual course"[42]. Courts must proceed very carefully before they make an order to commit to prison; *Re B (JA) (An Infant)*[43]. Furthermore it is particularly important that the power not be misused to prevent an advocate in good faith making proper submissions to a court. As Mason, Murphy, Wilson, Brennan and Dawson, JJ. said in *Lewis v Judge Ogden*[44] –

> "The freedom and the responsibility which counsel has to present his client's case are so important to the administration of justice, that a court should be slow to hold that remarks made during the course of counsel's address to the jury amount to a wilful insult to the judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client."

These observations, although made in relation to counsel's address to the jury, are in my view at least equally relevant to the situation when an advocate is making legal submissions to a judge or magistrate.

26. There can be no question that counsel must be able in appropriate circumstances to make a submission that a magistrate should be disqualified on the ground of apparent bias without the making of that submission being treated as contempt; see *Magistrates' Court v Murphy*[45]. The fact that a tribunal is annoyed or insulted by the fact that such an allegation has been made cannot convert the making of such a submission into contempt of court. Such a submission might become contemptuous if made in a sufficiently insulting or disrespectful manner[46], or if made for an improper purpose[47] (e.g. not for any genuine concern of bias, but to prevent the case being dealt with by a particular judge or magistrate, or to obtain an adjournment). But there was not the slightest suggestion in the evidence or submissions that Mr Metcalfe was disrespectful to the magistrate, and his application that the magistrate disqualify himself was, on the material before us, at the least made with full justification.

27. In the present case the magistrate in my view failed to observe the principles of natural justice both on 7 September and 5 November, and, when the solicitor made a proper application that the magistrate disqualify himself, seriously abused his position by threatening to commit the solicitor for contempt of court. I entirely agree with Brooking JA that one could apply the words of Owen J in *Ex parte Taylor; Re Butler*[48], to the facts of the present case, and that the evidence showed serious misconduct on the part of the magistrate, of such a nature as to justify an award of costs against the Magistrates' Court.

BUCHANAN JA:

28. I agree that the appeal should be dismissed for the reasons stated by Brooking and Charles, JJ A. In my opinion the magistrate's treatment of Robinson and his solicitor could properly be described as serious misconduct or serious impropriety, for it constituted a flagrant breach of elementary principles of justice. The threat of gaol to compel payment of compensation was bad enough. The misuse of the contempt power to silence a solicitor attempting to make a proper submission was even worse. Accordingly I am of the view that the order for costs made by Gillard J was appropriate.

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[1] [1883] VicLawRp 39; (1883) 9 VLR (L) 2 at 4; 4 ALT 146.
[2] [1948] 1 KB 397 at 400; [1947] 2 All ER 838.
[3] [1970] 2 NSWR 547; (1970) 19 LGRA 268; 91 WN (NSW) 217; (1967) 67 SR (NSW) 396 at 403 per Holmes JA.
[4] The newspaper report of this case is reproduced in a note in (1896) 12 WN (NSW) 172. Other decisions include *Ex parte Tranter* (1867) 7 SCRNSW 213; *R. v Smith* (1894) 10 WN (NSW) 171; *Ex parte Cox* (1896) 12 WN (NSW) 172; *Ex parte Vincent* (1900) 16 WN (NSW) 215; *Ex parte Taylor* (1924) 41 WN (NSW) 81; *Ex parte Blume; Re Osborn* (1958) 58 SR (NSW) 334; (1958) 75 WN (NSW) 411; *Ex parte Corbishley; Re Locke*

(1967) 67 SR (NSW) 396; *Willesee v Willesee* [1974] 2 NSWLR 275; *Sankey v Whitlam* (1977) 29 FLR 346; (1977) 21 ALR 457; [1977] 1 NSWLR 333; *Carr v Werry* [1979] 1 NSWLR 144; *Cummins v Mackenzie* [1979] 2 NSWLR 803.

[5] "Corruption or gross ignorance": *Starr*; "a clear case of misconduct": *Ex parte Tranter* per Faucett J. at 214; "a flagrant violation of a principle of justice ... or ... a clearly defined case of misconduct ... or ... something ... done in flat disregard of an act of Parliament, or a decision of the Supreme Court": *Ex parte Cox*; "a clear case of serious misconduct": *Ex parte Blume; Re Osborn;* "perverse or guilty of corruption or gross ignorance": *Willesee v Willesee* at 284; "where the magistrate is guilty of serious misconduct, corruption, gross ignorance or has been perverse": *Sankey v Whitlam* per Hutley JA at 363; *Carr v Werry* at 147. This very diversity suggests guidelines rather than rules of law.

[6] For example, *Cummins v Mackenzie* at 810 per Sheppard J ("*inter alia*, where the magistrate has been guilty of gross ignorance or has been perverse").

[7] at 810 per Sheppard J.

[8] at 172.

[9] The approach in *Ex parte Vincent* has been endorsed by the Full Court of Western Australia: *City of Subiaco v Minister for Planning and Heritage* (unreported, 19 February 1997).

[10] Compare *El Deeb v Magistrates Court of South Australia* [1999] SASC 113; (1999) 72 SASR 596 at 598 and *Ex parte Britt* (1879) 14 WN (NSW) 7.

[11] at 810.

[12] (1886) 8 ALT 43.

[13] Another example is *El Deeb v Magistrates Court of South Australia* (1999) 72 SASR 596 at 598 ("something like misconduct, corruption or perversity").

[14] at 214.

[15] [1874] LR 9 QB 557 at 559.

[16] (1884) 6 ALT 29 at 30.

[17] (1886) 8 ALT 43.

[18] *R v Liverpool of Justices; Ex parte Roberts* [1960] 1 WLR 585 at 586-7; [1960] 2 All ER 384; (1960) 124 JP 336. See, too, *R v Newcastle-under-Lyme Justices; Ex parte Massey* [1994] 1 WLR 1684; *R v York City Justices; Ex parte Farmery* (1988) 153 JP 257; *City of Subiaco v Minister for Planning and Heritage* (unreported, Full Court of Western Australia, 19 February 1997).

[19] I say "may" because each case requires an exercise of discretion in the light of the particular circumstances.

[20] Unreported, 31 October 1990.

[21] This phrase is probably intended to reflect the distinction between binding rules of law and principles or guidelines informing the exercise of a discretion. See [13].

[22] Unreported, 7 March 1997.

[23] Unreported, 10 June 1997 at 4.

[24] [2000] VSCA 118 at [11]; 16 VAR 208.

[25] *Morriss v Withers* [1954] VicLawRp 15; [1954] VLR 100 at 104; [1954] ALR 233; compare *Lloyd v Biggin* [1962] VicRp 80; [1962] VR 593.

[26] at 398.

[27] See, for example, *Burns Philp & Co Ltd v Bhagat* [1993] VicRp 13; [1993] 1 VR 203; *Knight v FP Special Assets Ltd* [1992] HCA 28; (1992) 174 CLR 178; (1992) 107 FLR 362; 104 ALR 317; [1992] ATPR 41-184; 6 ACSR 269; 10 ACLC 1; (1992) 16 AAR 276; (1992) 63 A Crim R 383; 66 ALJR 171; (1992) 29 ALD 57; *Wright, Danci & Currie* (1994) 77 A Crim R 67; *Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246; (2000) 115 A Crim R 528.

[28] For example, in *Ex parte Alexander* (1886) 8 ALT 43 it was s252 of the *Common Law Procedure Statute* 1865:

"In all cases of application for any writ of mandamus whatsoever the costs of such application whether the writ shall be granted or refused, and also the costs of the writ if the same shall be issued and obeyed, shall be in the discretion of the court; and the court is hereby authorized to order and direct by whom and to whom the same shall be paid."

[29] [1986] AC 965 at 975; [1986] 2 All ER 409; [1986] 2 Lloyds Rep 117; [1986] 2 WLR 1051 per Lord Goff.

[30] [1994] QB 179 at 192; [1993] 4 All ER 143; [1993] 3 WLR 830 per Balcombe LJ.

[31] [1986] HCA 17; (1986) 161 CLR 513; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819.

[32] [1990] HCA 59; (1990) 170 CLR 534 at 541-2 per Mason CJ, 544 per Brennan J, 558-9 per Dawson J and 562 per Toohey J; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.

[33] [1999] SASC 113; (1999) 72 SASR 596 at 599. See too footnotes 5 and 21 above.

[34] (1987) 11 NSWLR 522.

[35] (1988) 63 ALJR 121; (1988) 82 ALR 401.

[36] *R v Town and Country Planning Commissioner* [1970] Tas SR 154 at 162; (1970) 24 LGRA 108.

[37] *Herijanto v Refugee Review Tribunal* [2000] HCA 16; (2000) 170 ALR 379; (2000) 74 ALJR 698; (2000) 21 Leg Rep 33.

[38] [1998] VSC 122.

[39] Why s160 referred to appeals is not presently clear to me.

[40] [1977] 1 All ER 411 at 413.

[41] Cf. *Offutt v United States* 348 US. 11 (1954) per Frankfurter J at 17; 99 L Ed 11; 75 SCt 11.

[42] *Maharaj* per Lord Salmon at 415.
[43] [1965] Ch 1112, per Cross J at 1117-18.
[44] [1984] HCA 28; (1984) 153 CLR 682 at 689; 53 ALR 53; 58 ALJR 342.
[45] [1997] 2 VR 186 at 209; (1996) 89 A Crim R 403.
[46] *Ex parte Bellanto; Re Prior* (1962) 63 SR (NSW) 190 at 196; 80 WN (NSW) 616; [1963] NSWR 1556; *Magistrates' Court v Murphy* at 209.
[47] Cf. *R v Shumiatcher* (1967) 64 DLR (2d) 24 at 32.
[48] (1924) 41 WN (NSW) 81 at 83.

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