13/78

SUPREME COURT OF VICTORIA

COMMISSIONER FOR CORPORATE AFFAIRS v GREEN (sub nom WALDRON v GREEN)

McInerney J

13, 14 October 1977; 16 February 1978

[1978] VicRp 48; [1978] VR 505; [1978] ACLC 29,728 (¶40-381); 3 ACLR 289; [1971-1979] ASLC 85,337; (Noted 2 Crim LJ 236)

COMPANIES – ACQUIRING OF "INFORMATION"– AS "OFFICER OF CORPORATION" – "IMPROPER USE" OF INFORMATION – SUBMISSION OF NO CASE TO ANSWER – AWARD OF COSTS – WHETHER JUST AND REASONABLE: *COMPANIES ACT*, S124.

Green was charged with two breaches of s124(2) *Companies Act* in that being an officer of a corporation (Endeavour Oil Company N.L.) did make improper use of information acquired by him by virtue of his position to gain an advantage directly for Gwello Pty Ltd. It was common ground that Green was a director of Endeavour Oil at all relevant times. It was alleged that Green had obtained information at a Board meeting of that company that a call on shares was imminent. At Green's behest, Gwello P/L sold 4 parcels of its shares in Endeavour Oil (total 100,000 shares) at 14-15%. Some 11 days later, Endeavour Oil announced a 5% call, and the price of such shares on the Melbourne Stock Exchange forthwith fell to 11%. Gwello P/L, by avoiding both the loss and the call, had hence obtained an advantage. Green, as a director of and major shareholder in Gwello P/L., had hence indirectly gained an advantage.

The share sales were admitted. Green established that he had not sold his own shares in Endeavour Oil, and that Gwello still held 80,000 shares in Endeavour after the call. Evidence from the secretary of Endeavour Oil indicated that prior to the sales, although not on the agenda there was some discussion about a call but there was no resolution by the Board other than to defer the matter — there was evidence that the resolution to make or call was passed by the Board subsequent to the transactions. The secretary had taken steps preparatory to a call purely as a possibility. Green's record of interview stated that mention of a call could have been made at the earlier meeting but was deferred — that he was not aware that a call was imminent — that he recommended Gwello sell its shares in Endeavour (as they were not providing income) to reduce an overdraft incurred by Gwello in share purchases in another company.

A submission of no case to answer was upheld at the close of the prosecution case; and on the dismissal $3,000 costs were awarded against the informants. Upon review—

HELD:

1. It is settled law that the role of a presiding judicial officer when deciding a 'no case' submission is altogether different from the role which the officer has to discharge at the end of the case. In a criminal case, at the end of all the evidence it is for the tribunal of fact to say whether on that evidence, or so much of that evidence as it accepts it is satisfied beyond reasonable doubt of the guilt of the accused. The question at that stage is whether on the evidence the accused ought to be convicted. But on a 'no case' submission, that is, when at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the accused ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law.

***May v O'Sullivan* [1955] HCA 38; 92 CLR 654 at p658; (1955) ALR 671 at p674; [1955] ALR 671, and**

***Downward v Babington* [1975] VicRp 85; (1975) VR 872 at p875; (1975) 31 LGRA 314 per Gowans J, referred to.**

2. Looking at the evidence as a whole, the evidence at the close of the prosecution case did not establish, on a balance of probabilities, that the respondent made use of the information as to the probability – or even possibility – of a call in order to decide to sell Gwello Pty Ltd's shares in Endeavour Oil N.L. The inference that the respondent did thus use that information is of no more than equal degree of probability with the inference that he did not. Consequently, the prosecution failed to make out a case and the Magistrate rightly acceded to the 'no case' submission.

3. In relation to the Magistrate's award of costs, this case was neither so complex nor so difficult

as to make the costs of briefing of senior counsel a recoverable expenditure. The evidence was in a relatively small compass, as also was the argument on appeal which lasted less than two days. There does not appear to be anything about the case – either as to the facts or the law – which a competent and experienced junior could not have handled. The briefing of senior counsel as opposed to a competent and experienced junior counsel in this case was not reasonable – still less that it was reasonable to throw the added burden of the costs consequential on the briefing of senior counsel on the informant.

4. Accordingly, the order nisi succeeded in relation to the order for costs and such order was set aside and referred to the Taxing Master to certify what costs had been reasonably incurred.

McINERNEY J: *[After quoting s124(2) of the* Companies Act*, His Honour continued]* ... Mr Hedigan analysed this sub-section into eight ingredients taking them in the order in which the words appear in the sub-section. I think it is more convenient if the section is treated as requiring proof of the following facts taking them in chronological order:

1. That the respondent was at the relevant time an officer of the corporation.
2. That the respondent acquired the relevant information.
3. That he acquired that information by virtue of his position as officer of the corporation.
4. That he made improper use of that information.
5. That he made that improper use in order to gain directly or indirectly an advantage.
6. That such advantage was either for himself or for some other person.
7. (Alternatively to (5)) that he made that improper use to cause detriment to the corporation.

The first of those matters was not in dispute in the present case, so I pass to the second matter to be proved by the prosecution namely, that the respondent acquired the relevant information.

Mr Hedigan strenuously contended that the evidence did not show that the defendant had acquired 'information'. 'Information' meant, he argued, 'factual knowledge of a concrete kind, not rumour, possibility or speculative suggestion nor information of a kind that is preliminary or uncertain. The information must entail some degree of specificity.' In support of these propositions he cited *Green v Charter House Group of Canada* (1973) 35 DLR (3rd) 161 and *Ryan v Triguboff* (1976) 1 1 NSWLR 588. It is to be observed that in each of the two cases cited the relevant statute — in the Canadian case s113 of the *Securities Act* 1966 (Ontario), c142 — was expressed to impose liability on an insider who made use of 'specific confidential information' for his own benefit. Vamp J held that information which was preliminary and uncertain was not specific confidential information. Similarly in *Ryan v Triguboff* (*supra*) the relevant New South Wales section used the words 'specific information' see at p596, para (d) of the report and p597, paras (c) to (d).

I am reluctant to import into s124(2) a word which is not there. Our section does not require that the information be 'specific'. In many cases a hint may suggest information or may enable an inference to be drawn as to information. Information about impending stock movements or Share movements may often be veiled. Discussion concerning such a movement may often take the form of 'mooting' but not deciding a matter. I am of the view that it was open to the magistrate to find, as he did find, that the respondent gained information at the Board meeting on 16th January 1975, the information being that the board of Directors had under consideration or had given consideration to the question of whether to make a five cent call on shares, and that the Board had decided not to make a decision on that matter for the time being. It is not to the point that a person familiar with and making a study of the movements of oil and mining shares might have deduced that a call would have to be made in the near future: the fact is that, after the meeting of 16th January 1975, the respondent had advance knowledge not only that it was likely, objectively speaking, that such a call would have to be considered but, in addition, he knew then what the outsiders did not know, namely, that the Board had actually discussed the matter although it had decided to defer a decision for the time being.

The third ingredient is that the respondent must have acquired the information by virtue of his position as an officer of the corporation. It was clearly open to the magistrate to find this ingredient on the evidence before him. I am unable to accept Mr Hedigan's submission that there was no evidence to indicate that the respondent acquired information from his directorial position, as against what every one in the public domain knew. There is the plainest of evidence that he was present at the Meeting of the Board of Directors at which there was discussion on the

question whether a call should be made. Whether or not he gained additional information from outside sources as, for instance, by the reports of marketeers and people studying movement of shares is not to the point. What the section is concerned with is the question whether an officer of a corporation has acquired information by virtue of his position. If he does, it is nothing to the point that that information is supplemented by information acquired as a matter of common knowledge or by reference to outside sources.

The fourth ingredient is that the respondent should have made use of that information. That may be coupled with the fifth ingredient that use so made must have been an improper use. It was in relation to this ingredient that the learned magistrate ruled that there was no case to answer. The contention of the applicant informant is that such improper use was to be inferred from the fact that the respondent had been instrumental in causing Gwello Pty Ltd to effect the sales of shares referred to in particulars of paragraphs 3,4,5 and 6 of the particulars to each information. Those sales were clearly subsequent to the date on which the respondent acquired the information alleged by the prosecution: the question was whether they were made because of or having regard to that information.

There was no direct evidence, by way of admission by the respondent, that the sales were decided on in the light of the information gained at that meeting. The prosecution case was that a casual connection was to be inferred as a matter of circumstantial evidence. It becomes necessary, therefore, to examine the role of the magistrate when deciding a no case submission.

It is settled law that the role of a presiding judicial officer at this stage is altogether different from the role which he has to discharge at the end of the case. In a criminal case, at the end of all the evidence it is for the tribunal of fact to say whether on that evidence, or so much of that evidence as it accepts it is satisfied beyond reasonable doubt of the guilt of the accused. The question at that stage is whether on the evidence the accused ought to be convicted. But on a 'no case' submission, that is, when at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the accused ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. See *May v O'Sullivan* [1955] HCA 38; 92 CLR 654 at p658; (1955) ALR 671 at p674, and *Downward v Babington* [1975] VicRp 85; (1975) VR 872 at p875; (1975) 31 LGRA 314 per Gowans J.

The phrase in the passage quoted above 'whether on the evidence as it stands he could lawfully be convicted' is not to be understood as meaning whether on the evidence as it stands the tribunal of fact could be satisfied beyond reasonable doubt as to his guilt. The question is whether 'the prosecution has adduced evidence sufficient to support proof of the issue' — see *May v O'Sullivan* (*supra*) (CLR at p658; ALR at p674) and at this stage the standard of proof applied as not proof beyond reasonable doubt but proof on the balance of probabilities: see *Wilson v Buttery* (1926) SASR 150 at p154, where Napier J, delivering the judgment of the Full Court said:

> "At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence but this; do they establish a substantial balance of probability in favour of the inference which the prosecution seeks to draw?'

See also *Wendo v R* [1963] HCA 19; (1963) 109 CLR 559 at p572, [1964] ALR 292 at p300; 37 ALJR 77.

Perhaps the word 'substantial' ought to be excised from the passage in the judgment of Napier J just quoted. As the High Court said in *May v O'Sullivan* (*supra*) (CLR at p659):

> 'A magistrate who has decided that there is a "case to answer" may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made "a *prima facie* case" but it does not follow that in the absence of a "satisfactory answer" the defendant should be convicted.'

The reason is, of course, that the standard of proof to be established at the end of the case is quite different.

There being, in the present case no direct evidence that the sales were induced by the

information acquired, the prosecution was forced to rely on inference or circumstantial evidence. As Lord Wright said in *Caswell v Powell Duffryn Associated Collieries Ltd* (1940) AC 152 at p169; [1939] 3 All ER 722; 55 TLR 1004:

> 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

Some light is thrown on the connection between the event to be proved and the event from which the inference is to be drawn by the passage in the judgment of Dixon J in *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367 at p375; (1936) ALR 261 at p264 although His Honour was there speaking of the degree of proof required at the end of the case rather than on a 'no case' submission. At all events, he said:

> 'If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person, the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability for the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which from constituent parts or ingredients of the transaction itself, or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations, are in general not matters which it is lawful to take into account and evidence disclosing them, if not otherwise relevant, is rigidly excluded. But the class of acts and occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also exists.'

Reference may also be made to what was said by the High Court in *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 at p358; (1952) ALR 308 at p311 where the majority Judges, citing from an unreported judgment in *Bradshaw v McEwan* (1951), unreported) said:

> 'Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture; see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674. But if circumstances are proved in which is it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture, or surmise: cf. per Lord Loreburn, *ibid.* at p678.'

Mr Hedigan rightly pointed out that the question on a 'no case' submission is not really whether there is any evidence on which a jury or a tribunal of fact could find the matter to be proved but whether there is any evidence which ought reasonably to satisfy the tribunal that the fact sought to be proved is established. See per Willes J in *Ryder v Wombwell* (1868) LR 4 Ex Ch 32 at p39. Mr Hedigan suggested that such material as indicated that information had been acquired by the respondent at the Board meeting on 16th January had been discredited in cross-examination of Rogerson. I do not take that view. I think it was for the magistrate to determine whether on the whole of Rogerson's evidence — and Rogerson was not shown to have lied in any respect — there was any evidence on which he could draw the inference that the sales had taken place as a result of the information having been acquired.

And in determining whether there was any evidence, the test suggested by Dr Glanville Williams has to be applied, namely, accepting any evidence which tends in the desired direction

and disbelieving any evidence which tends in the contrary direction. See the *Criminal Law The General Part* (1st. Edn.) p695 para 225 citing Lord Blackburn in *Metropolitan Railway Co v Jackson* (1877) 3 AC 193 at p207. Williams' formulation must, however, be read in the light of what was said by Maule J in *Jewell v Parr* 13 CB 916, so that the evidence tending in the desired direction must be such that ought reasonably to satisfy the jury (or other tribunal of fact) that the fact sought to be proved is established.

There is no direct evidence that the sales of shares by Gwello Pty Ltd took place as a result of the respondent's having acquired information that a call had been under consideration by the Directors. The question is whether from the fact that the sales took place after the respondent had acquired that information it was open to the magistrate to conclude or infer that the sales took place as a result of the respondent having acquired that information, or (to put the matter more precisely in terms of the section), whether the respondent made use of that information in deciding to sell the shares. The argument for the prosecution may be said to involve the proposition '*post hoc propter hoc*' – a proposition which Scrutton LJ, in *Clan Line Steamers Ltd v Board of Trade (The Clan Matheson)*) (1929) 2 KB 557 at p569 stigmatised as 'an old fallacy' and as 'generally wrong'. Something more, then, must be established than the mere sequence, in point of time, of the gaining of the information and of the sale. The mere occurrence of the two events in sequence one to another does not establish causation. In the absence of other evidence, the inference of causation is at best an inference of equal degree of probability with the inference that the two events are not causally connected. Such other evidence as there is concerning the sale is equivocal. The circumstance that Gwello Pty Ltd had a 'liquidity problem' and was anxious to realize on non-income producing shares in order to reduce its debt on overdraft with the bank and the consequential liability for interest thereon would support a conclusion that the decision to sell was reached independently of the acquisition of information that a call was imminent. It could equally be argued, however, that such information coupled with an understanding of the probable effect of a call on the market value of shares might have affected a decision as to the time of Gwello Pty Ltd's sales, and to that extent have constituted one of the factors inducing the decision to sell. The circumstances as to Gwello Pty Ltd's liquidity problems might, however, be more relevant to the question whether, on the assumption that the evidence otherwise established that the respondent made use of the information acquired by him as to the probability of a call, such use was improper. The same observation may likewise be made as to the relevance of the circumstance that Gwello Pty Ltd elected to retain 80,000 of its original holding of 180,000 shares. Looking at the evidence as a whole, I do not think that the evidence at the close of the prosecution case established, on a balance of probabilities, that the respondent made use of the information as to the probability – or even possibility – of a call in order to decide to sell Gwello Pty Ltd's shares in Endeavour Oil N.L.

The inference that the respondent did thus use that information is, in my view, of no more than equal degree of probability with the inference that he did not. Consequently, in my view, the prosecution failed to make out a case and the magistrate rightly acceded to the 'no case' submission.

I should add that in reaching this conclusion I have considered what inferences were open on the facts both exclusive of and inclusive of the explanation given by the respondent in his Record of Interview. Mr Gaffy contended that the learned magistrate was guilty of a failure 'to direct himself properly or at all, on the law relating to the drawing of proper inferences of fact from otherwise established facts'. (Ground 6 of the Order Nisi). Mr Gaffy seized on certain expressions in the learned magistrate's ruling in support of that argument. I am not to be taken as assenting to the view that those expressions bore the meanings suggested by Mr Gaffy because even if they did, the 'no case' submission would have to be upheld on the totality of the evidence.

In the result, it becomes unnecessary for me to determine the matter raised by Ground 5 of the Order Nisi, namely, that the magistrate should have found that the respondent did make improper use of the information acquired by him when he sold the shares of Gwello Pty Ltd, at the time when and in the circumstances in which the respondent did so and the reasons for which he said he did so.

Some interesting problems of statutory considerations arise in relation to that ground, e.g. as to the words 'advantage' and 'detriment' used in s124(2), and whether on the facts of this

case it could be said that Gwello Pty Ltd gained an 'advantage' in selling the shares before the call was made. It is better to leave such matters to be resolved when a resolution thereof becomes strictly necessary.

It becomes now necessary to consider the attack made in Grounds 10 and 11 of the Order Nisi on the magistrate's order as to costs. A magistrate who dismisses an information is empowered to order the informant to pay to the defendant such costs as the court thinks just and reasonable. See *Magistrates (Summary Proceedings) Act* 1975 (Act 8731) s97(b) – formerly s105(2) of the *Justices Act* 1958.

The hearing before the magistrate occupied two clays – 28th and 29th March 1977. The evidence was completed on the first day – the transcript thereof runs to 52 pages. Mr Hedigan's submission of 'No Case' was, in substance, completed on that day, (pp53-69, although he added some observations on the next day pp70-2). Mr Gaffy's submission (pp72-98) was completed in well under two hours and after an adjournment of apparently some substantial period of time the learned magistrate gave his decision dismissing the information. He was then asked to award costs on the basis of the retention of senior counsel in the matter. He was told that counsel had spent some three days in preparation for the case in addition to the two days of the hearing. He was told that the costs of counsel in respect of the preparation and hearing would exceed $5,000 and he was asked to make an order for costs of 'something in the region of $7,500'.

Counsel's brief on the hearing was not handed to the magistrate to enable him to see the fee marked thereon, but Mr Gaffy of counsel for the prosecution did not challenge Mr Hedigan's statements as to the fees of counsel for the defence. In those circumstances it was open to the magistrate and proper for him to act on the assertions made by counsel for the defence concerning costs: see *Bailey v Wallace* [1970] VicRp 15; (1970) VR 109 at p114, citing *Kellett v Buchanan* (1935) SASR 144. The magistrate was told that in *Byrne v Baker* [1964] VicRp 57; (1964) VR 443 the defendant's costs had after reference to the Taxing Master – see (*supra*) at p467 – been allowed at $3,000 (in fact, at $3,702.90 – see (1970) VR at p113.). He was told that in another prosecution in about 1975, Mr Froude SM had allowed costs in an amount of $9,000.

In *Bailey v Wallace* [1970] VicRp 15; (1970) VR 109 a challenge to an award of $530 failed. Before me, reference has been made to the judgment of Starke J in *Day v Hunter* [1964] VicRp 109; [1964] VR 845. I have read His Honour's reasons for judgment, as well as what was said by the High Court in *Stanley v Phillips* [1966] HCA 24; (1966) 115 CLR 470; (1967) ALR 197; 40 ALJR 34. The latter case proceeded in relation to the terms of O.65 R.27(29) and (47) which are in terms different to those of s97(b) of the *Magistrates (Summary Proceedings) Act* 1975.

A review of the exercise of the magistrate's discretion as to costs is to be approached in the light of the well-established principles stated (or restated) by Kitto J in *Australian Coal and State Employees Federation v Commonwealth* (1953) 94 CLR 627 at p647. It becomes necessary to consider 'What amount of costs could seem just and reasonable to a reasonable magistrate on the facts before him, taking into account only relevant considerations' – see *Bailey v Wallace* [1970] VicRp 15; (1970) VR 109 at p114. Some of the relevant considerations are set out at p112 lines 25-54 of that report. In *Stanley v Phillips* (*supra*) the provisions of Order 65 rule 27(29) were treated as involving the question whether the employment of two counsel was necessary or proper for the attainment of justice or for defending the rights of the plaintiff. Here the question whether the amount allowed is just and reasonable must involve the consideration first of the nature of the charges brought against the respondent, the consequences of a conviction – which in this case, over and above the normal consequences, would have involved a disqualification of the respondent from acting as a director without the leave of the Court – see *Companies Act* s122 – a matter of some importance to a man such as the respondent. It was also urged that the magistrate was entitled to take into account the fact that the case was to a large extent a case of first impression, involving the construction of a statutory provision of comparatively recent origin.

All of these were matters which it was open to the magistrate to consider. It was, I consider, open to him to decide that in awarding costs he would proceed on the footing that the case warranted the employment of counsel to represent the respondent, and that therefore it was just to allow the costs of brief to counsel, with (if appropriate) a refresher.

A separate question arises in relation to the employment of senior counsel and in relation to the 'preparation fees'. It has to be borne in mind that the question is not merely whether the costs incurred were reasonably incurred: the question for the magistrate was whether it was just and reasonable that such costs should be recovered from the other side. In relation to this matter, the magistrate had to consider (*inter alia*) the place of the tribunal in the hierarchy of courts – though this will seldom, if indeed ever, be a decisive matter (see *Stanley v Phillips* (*supra*) at p478) – but also the interest of the community in not discouraging the executive from bringing before the courts cases considered proper to be prosecuted.

In *Day v Hunter* (*supra*), Starke J interpreted the phrase 'just and reasonable' as meaning that all that a defendant is entitled to is the lowest expenditure which is consistent with his being able to present his defence so that a just result will be obtained. I doubt if the phrase 'lowest expenditure' is necessarily and in all cases the correct test, but what His Honour clearly had in mind was that the expenditure should not be extravagant or over-cautious. For while it was open to the respondent to take the view that his interests would best be protected if he retained senior counsel to represent him, it by no means follows that is reasonable to cast on his opponent, the informant, the burden of paying the extra costs consequential upon the employment of senior counsel. See on this point the observations of Barwick CJ in *Stanley v Phillips* (*supra*) (CLR at p478; ALR at p291).

Endorsing wholeheartedly, if I may respectfully say so, the observations of Menzies J in *Stanley v Phillips* (*supra*) (CLR at pp489-490; ALR at p209) as to he special place of the 'inner bar', I am nevertheless of the opinion that this case was neither so complex nor so difficult as to make the costs of briefing of senior counsel a recoverable expenditure. The evidence was in a relatively small compass, as also was the argument which before me lasted less than two days. There does not appear to me to be anything about the case – either as to the facts or the law – which a competent and experienced junior could not have handled. I am not myself persuaded that the briefing of senior counsel as opposed to a competent and experienced junior counsel in this case was reasonable – still less that it was reasonable to throw the added burden of the costs consequential on the briefing of senior counsel on the informant. The learned magistrate evidently took the contrary view on the first of those matters, but I cannot find any indication that the second matter was considered by him.

The same considerations apply in relation to the preparation fees. To have incurred fees of three days conferences was, I consider, an excess of caution, and ought to have been so regarded by the magistrate. Even accepting the fact that the respondent had to come prepared to present his own evidence in the event of the prosecution making a case, I am far from persuaded that it was necessary or reasonable to incur three days fees to counsel – presumably for conferences – to prepare the respondent's case. I think this was inordinately over-cautious expenditure on the part of the respondent and his advisors. I am loth to believe that the respondent's solicitors could not have obtained the necessary proofs of evidence and so on. At all events, I do not find it self-evident that these costs were reasonably incurred or that it is reasonable to throw the burden thereof on the applicant informant.

In the result I think that the Order Nisi succeeds in relation to the order for costs and that the order as to costs should be set aside and that it should be referred to the Taxing Master to certify what costs have been reasonably incurred by the respondent in relation to the two informations and what costs ought justly and reasonably to be awarded against the applicant informant. I will adjourn the proceedings *sine die* to enable the Taxing Master to furnish his certificate on these matters and when the matter comes before me again, I will allow to the respondent in lieu of the sum of $3,000 awarded in respect of each information, such sum as the Taxing Master certifies to be just and reasonable to be allowed. As to the costs of the proceedings before me each party has succeeded to some extent and I think the fairest thing is to make no order for costs. I will certify for counsel.

APPEARANCES: For the applicant/informant Waldron: Mr FG Gaffy, counsel. Leo LaFontaine, solicitor to the Commissioner of Corporate Affairs. For the defendant Green: Mr J Hedigan QC with Mr Mandie, counsel.
