**31/85**

**SUPREME COURT OF VICTORIA**

# *JAN LOUISE WADE (COMM'R FOR CORPORATE AFFAIRS) v INDUSTRIAL EQUITY LIMITED, RONALD ALFRED BRIERLEY and WILLIAM MARCUS LOEWENTHAL*

**Marks J (10 March 1983)**
**Murray J (16 August 1985)**

**COMPANIES – DIRECTORS – ACCOUNTING RECORDS – REQUIREMENT FOR WHERE COMPANY INCORPORATED IN VICTORIA INVOLVED IN INTERSTATE OPERATIONS – INSPECTION OF RECORDS BY CORPORATE AFFAIRS OFFICE - RECORDS NOT PRODUCED - WHETHER "OBSTRUCT OR HINDER" – WHETHER "WHILE EXERCISING A POWER" – COSTS – WHERE MAJORITY OF CHARGES DISMISSED – RELEVANT CONSIDERATIONS IN EXERCISE OF DISCRETION: *COMPANIES ACT* 1961, SS7(6), 7(9), 7(10), 161A(4), 161A(8), 161A(10); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S97.**

IEL, a company incorporated in Victoria had its registered office located in Melbourne and its Head office in Sydney. In 1980, two officers from the Corporate Affairs office served notices on IEL requiring production of certain accounting records for inspection. The records were not produced and all further attempts to inspect them proved fruitless. As a result, IEL, B. and L. were charged (Group A informations) with a breach of s7(10) of the *Companies Act* 1961 ('Act') in that they obstructed or hindered the officers "while exercising a power" in ascertaining whether the provisions of the Act were being complied with. They were further charged (Group B informations) with breaches of s161A(8) of the Act in that they failed to make its accounting records available for inspection. Finally, they were charged (Group C informations) with failing to keep certain records as required by s161A(4) of the Act. After hearing evidence led on behalf of the Commissioner, the Magistrate held that each defendant had a case to answer. Upon order nisi to review before Marks J—

**HELD: Order absolute in respect of Group A informations; Order discharged in respect of Groups B and C informations.**
**(1) The words "while exercising" in s7(10) of the Act referred to a time after the Commissioner commenced to exercise the power to inspect the books.**
***Rice v Connolly*** **[1966] 2 QB 414; [1966] 3 WLR 17; [1966] 2 All ER 649;**
***Sykes v DPP*** **[1962] AC 528; [1961] 3 WLR 371; [1961] 3 All ER 33; and**
***Willmott v Atack*** **[1977] 1 QB 498; [1976] 3 WLR 753; [1976] 3 All ER 794, referred to.**

**(2) As the books were never produced, the exercise of the Commissioner's powers to inspect them for a specified purpose was never embarked upon and accordingly, there was no obstruction or hindrance.**

When the hearing of the charges comprising Groups B and C resumed before the Magistrate, the defendants elected not to give evidence but submitted that none of the charges had been proved beyond reasonable doubt. The Magistrate dismissed the charges comprising Group B, but found the charges comprising Group C proved and adjourned them upon the defendants' entering into recognizances to be of good behaviour. The net result was that the Commissioner had been successful in one Group of charges out of three or put another way, three informations out of 25. The Commissioner's counsel claimed costs. After hearing argument on both sides, the Magistrate decided to order that the sum of $6,500.10 costs to be paid by the defendants to the Commissioner. Upon order nisi to review before Murray J—

**HELD: Order nisi discharged in respect of the findings of guilt; Order nisi absolute in respect of the order for costs. Order that defendants pay the sum of $2000 costs to Commissioner.**
**(1) In the exercise of his discretion, it was not a proper consideration for the Magistrate to take into account that the Commissioner may have been more successful if further evidence had been adduced.**

**(2) In the circumstances, the fact that the Commissioner was acting in the course of a public duty and did not act unreasonably in laying the charges were not considerations carrying a great deal of weight.**

**(3) As the costs of the proceedings were greatly inflated by reason of the prosecution of charges which ultimately failed the Magistrate should have considered whether some alleviation or diminution in the quantum of costs should have flowed from the fact that the defendants were successful in a majority of the charges.**

Judgment delivered 10 March 1983 by Marks J.

**MARKS J:** *[After setting out the nature of the charges and the evidence said to support them, His Honour continued]:* ... **[5]** Eleven informations alleged offences against s7(1) of the Act. There were five against I.E.L., four against Loewenthal and two against Brierley. One information against I.E.L. concerned the fruitless visit to Sydney on November 24 1980 and another related to the Sydney appointment of December 3 1980 which was not kept on Loewenthal telling an officer of the Commissioner that the books would not be produced. Two informations against Loewenthal were based on those alleged circumstances whilst the informations against Brierley related purely to the events of April 1980 in Melbourne. These eleven informations are respectively the subject of orders to review numbered 8229, 8230, 8232, **[6]** 8233, 8243, 8244, 8245, 8246, 8246A, 8247 of 1982.

Mr Bennett QC who appeared for I.E.L. and Loewenthal and Brierley on his own account contended that no case was made out under s7(10) in the first place because "obstruct or hinder" required the prosecution to prove some positive act or conduct whereas it had only established that the applicants/defendants had done nothing at all. The prosecution in other words, it was said, could not rely simply on non-production of the books described in the notice. They relied on *Rice v Connolly* [1966] 2 QB 414; [1966] 2 All ER 649; [1966] 3 WLR 17 and the statement of Lord Denning in *Sykes v DPP* [1962] AC 528 at p562; [1961] 3 All ER 33; (1961) 3 WLR 371; 45 Cr App R 230. Mr Ryan QC for the Commissioner referred me to *Willmott v Atack* [1977] 1 QB 498 at p503; [1976] 3 All ER 794; [1976] 3 WLR 753. In my view, these cases are not authority for a transcending rule about the meaning of "obstruct" or "hinder" no matter what their statutory context. Each is a decision on its own facts in the light of the meaning to be given the words in their particular statutory setting. In the present case, the learned Stipendiary Magistrate was merely required to consider whether the conduct revealed by the evidence met the statutory criterion of "obstruct" or "hinder". He was not required, in my view to ask himself whether such conduct was passive or active, involved a positive act or was mere unresponsiveness. For one thing concepts of that kind are elusive and vague. A man standing on a footpath may be said to be guilty of a positive act of obstruction when lawfully asked by a police constable to move on. On the other hand it could be argued that the continuing to stand in the same place after the request he was doing no more than what up to that time he had been lawfully doing and was acting passively.

**[7]** In my view, the learned Stipendiary Magistrate was entitled to consider the evidence bearing on the conduct of the applicants and determine, as I have said, whether it was sufficient to raise a case to answer that it met the relevant criterion of s7(10). It may be that in some cases the criterion is not by conduct which in ordinary language might be described as passive (or other than positive) but the proper course is to have regard to the words of the statute.

Mr Bennett QC argued in the second place that it was an essential element of the offence that any "obstructing" or "hindering" must be shown to have taken place <u>while</u> the Commissioner or a person authorized by her was "exercising a power under ss(6)". He contended that non-production of the books, even if constituting obstruction or hindrance, preceded the exercise of any power under ss(6) and therefore could not be shown to have occurred "<u>while</u>" a power of inspection was being exercised under it.

Although there was no formal admission about it, argument of all parties proceeded on the assumption that the only conduct relied upon by the Commissioner was indeed the non-production of the books requested. The learned Stipendiary Magistrate appears to have rested his decision on that basis. It is unlikely that it could have been otherwise as the particulars in the informations only speak of non-production.

It is common ground that the word "while" in s7(10) has a temporal meaning. Mr Ryan QC for the Commissioner said he did not contend for a causal one. He argued that the Commissioner embarked on her exercise of **[8]** power under s7(6) when she made up her mind to inspect the books of I.E.L., or, if not at that time, when she served a notice to produce. So he argued that power under s7(6) was being exercised from that time on, continuously I gather, and that she was obstructed or hindered while exercising it by non-production. It was an argument along these lines which the learned Stipendiary Magistrate appears to have accepted. However, I do not think it can be sustained, particularly when strict regard is had to the words of the statute.

Section 7(10) provides that the Commissioner shall not be obstructed or hindered "<u>while</u>

exercising a power under ss(6)". The only power spelt out in ss(6) is to inspect certain books for a specified purpose. If that was the power relied upon by the Commissioner, clearly its exercise had not been embarked upon if the books were never produced. The words "while exercising" can only refer to a time after the Commissioner commenced to exercise the power, that is, to inspect. What is said to have occurred was, at its highest, prevention, or arguably, obstruction or hindrance "from" but not "while" exercising a power of inspection.

Of course conduct of that kind is clearly the subject of s7(9) as Mr Bennett pointed out. I think he is right in his contention that s7(9) is appropriate for what is here alleged namely the failure to meet a requirement to produce books and that s7(10) is the appropriate provision for interference with an inspection whilst it is taking place, that is, after it commences and before it concludes. **[9]** It may be accepted that s7(6) carries with it the incidental power to require production of the books and appoint a time and place for inspection. But, as Mr Ryan QC conceded, the evidence about non-production was not capable of constituting evidence of obstructing or hindering the Commissioner in the course of any exercise of that power.

If then, s7(10) requires, as I think it does, the identification of a power under s7(6), which was being hindered or obstructed 'while' being exercised, the evidence of which I am presently apprised, failed to do so. This conclusion may be less technical than appears at first sight. An essential element of the offence created by s7(10) is that the power to be protected relates to books required by or under the Act to be kept. To prove an offence against s7(10) the prosecution is obliged to prove that the books sought for the purpose of inspection are of that description.

This has relevance here. In her notices to produce the Commissioner merely sought production of books and records by a nomenclature of her own. This did not, in every case, necessarily refer, without evidence on the matter, to books required to be kept, or, if so, to be kept at the place appointed by her for inspection. If the evidence was deficient in demonstrating that the books sought were those referred to in s7(10) and s7(6) then, of course, no offence was proved because any obstruction of hindrance could not be shown to have relevance.

This point was taken before me by Mr Bennett QC and Mr Brierley himself. It may not have been taken in the court below. The learned Stipendiary Magistrate did not **[10]** refer to it. If the matter is remitted to him he may well have to consider whether the evidence was indeed sufficient to establish in relation to each information that the books designated in the notices were ones which were required to he kept "by or under the Act". It is to be borne in mind that generally speaking accounting records and the like are not identified in the Act by the nomenclature employed in the notices.

Mr Bennett QC maintained that the evidence in support of one of the informations showed that the refusal to produce was at a place other than that designated in the relevant notices. He submitted that in the circumstances there was no case to answer. In my view, this fact alone would not necessarily dictate that result. A great deal depends on the whole of the evidence and whether on it the learned Stipendiary Magistrate was satisfied that the statutory criterion was met. There may have been evidence, for example, as counsel has told me there was, that the officers of the Commissioner went to the different address because they were told by a representative of I.E.L. the books would be produced there. However, my decision on the earlier submissions makes this aspect no longer of consequence.

Mr Bennett QC also argued in relation to this group of informations that those which related to non-production of the books in New South Wales could not succeed because s7(10) could not reach an offence which in effect was committed outside the jurisdiction. This was referred to in argument as the "territorial point" and was raised before the learned Stipendiary Magistrate who in **[11]** effect ruled against it. In view of what I have already said it is unnecessary to concern myself at length with it. The principle is that a statute will be interpreted to apply only to acts committed within the jurisdiction unless its provisions show a legislative intent otherwise. I will deal later in more detail with the territorial reach of relevant provisions of the Act.

Here, if the conduct relied on by the Commissioner occurred while she was indeed exercising a power under s7(6) outside Victoria s7(10) could only be accorded sensible operation if the legislature is taken to have intended to reach that conduct. It is fanciful, in my opinion, to

consider that the legislature intended to oblige a Victorian company to permit inspection of its books outside Victoria but not to make it an offence to hinder or obstruct such an inspection. It would be necessary to argue further, as Mr Bennett did, that s7(6) does not itself permit inspection of books which are required to be kept under the Act but may be kept outside Victoria. It is not necessary to go into that here. It is involved in the discussion in respect of the Group B informations.

In summary, therefore, I conclude in relation to the submissions on these Group A informations as follows:-

> 1. Evidence going to establish that I.E.L. did not produce the books specified in a notice to produce of the Commissioner and that Loewenthal or Brierley played a role, whether active or passive, in the prevention of their **[12]** production, was not sufficient, without more, to establish offences by I.E.L., Loewenthal or Brierley against s7(10) of the Act.
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> 2. It was an essential element of the proof by the Commissioner of an offence against s7(10) that the books specified in a notice, non-compliance with which was said to constitute that offence, were books which were required to be kept by or under the Act. Insofar as any book so specified is not described in identical terms by or under the Act the Commissioner was obliged to adduce evidence that she referred in her notice to a book which was so required to be kept.
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> 3. Evidence that the Commissioner or her authorised officer did not seek production of a book or books specified in a notice at the place appointed by it but at another place did not in itself necessarily mean there was no case to answer.
> *[His Honour then considered the remaining charges].*

Judgment delivered 16 August 1985 by Murray J.

**MURRAY J:** *[After setting out the history of the proceedings, His Honour continued]:* ... **[9]** I turn now to the attack on the magistrate's order in relation to costs. This matter was debated at considerable length by counsel and both Mr Graham for the applicants and Mr McCurdy for the respondent urged the magistrate to make an order for costs in their favour. Mr McCurdy handed up to the magistrate a list of the costs which were claimed by the **[10]** respondent these costs including counsel's fees, both in respect of court hearings and numerous conferences, witnesses' fees, and the attendance of his instructing solicitor at the various hearings. Mr McCurdy made no claim in respect of senior counsel's fees. In the discussion in relation to the items in this list the magistrate reduced some of the amounts claimed but the reductions were on the basis of allowing the claim but not the amount – in other words the magistrate was acting as a taxing master. The total amount claimed by Mr McCurdy was some $7,610 and the amount the magistrate allowed was $6,500.10. I think that sum may be treated as being a full amount of the respondent's costs of the whole proceeding after taxation upon a party and party basis.

Section 97 *Magistrates (Summary Proceedings) Act* 1975 is as follows:-

> "97. The power of a Magistrates' Court to award costs and the award of costs by a Magistrates' Court shall be subject to the following provisions:-
> (a) Where the Court makes a conviction or order in favour of an informant or complainant, the Court may order the defendant to pay to the informant or complainant such costs as the Court thinks just and reasonable;
>
> (b) Where the Court dismisses the information or complaint, or makes an order in favour of the defendant the Court may order the informant or the complainant to pay to the defendant such costs as the Court thinks just and reasonable: ..."

The question is whether the magistrate erred in the exercise of his discretion in coming to the conclusion (as presumably he must have) that it was just and reasonable to order the applicants to pay $6,500.10 costs to the respondent and to refuse to order the respondent to pay any costs to the **[11]** applicant. As I have previously mentioned the litigation commenced with the issue of some twenty-five informations against one or other of the three applicants. In the end twenty-two of these informations stood dismissed.

I have carefully read and re-read the transcript of the discussion between counsel and the magistrate on the question of costs. In the course of this discussion the magistrate did make

mention of a number of factors which appeared to play a part in the exercise of his discretion. He first grouped the twenty-five informations into three groups of which the three informations in respect of which he found the case proved he classed as one group. From this he said that it appeared that the respondent had been successful in one out of the three categories of charges. He further said that the respondent had not acted unreasonably in laying the charges and was carrying out her duty as a public officer. Thirdly, he said that if the respondent had been able to lead some further evidence she might have succeeded in obtaining convictions on another of the groups of informations. Finally, he said that it was therefore not correct to say that the respondent had been unsuccessful and at the end of the day she had succeeded in proving three of the informations. It does not appear to me that the fact that had the respondent been able to lead further evidence she might have succeeded in another of the groups of informations is a proper consideration nor having regard to the authorities do I think that the fact that she was acting in the course of a public duty and did not act unreasonably in laying the charges is a consideration which in the circumstances of the present case should carry a great **[12]** deal of weight. While it is true to say that the respondent had not been unsuccessful that statement seems to me to understate the real position. The respondent may have been successful in relation to three informations but she was unsuccessful in relation to twenty-two.

Another point made by the magistrate was that the offences in respect of the three informations upon which the respondent succeeded were continuing offences which continued throughout the dates referred to in the other informations. This presumably is because the evidence showed that at no relevant stage did the applicant company keep accounting records in Victoria. But this again does not in my opinion make the fact that three informations were proved any greater or for that matter any less. I notice that when orders nisi to review were disposed of by Marks J by reason of the fact that the applicants succeeded in respect of some charges and failed in respect of the others, His Honour took the view that no order for costs should be made. He did not take the view that because the applicants had succeeded in respect of some charges they were the successful parties and were entitled to their costs nor for that matter that because the respondent had succeeded in respect of some of the charges she was the successful party and was entitled to her costs. In the present case it seems clear beyond doubt that some of the evidence in the Magistrates' Court related to charges which were dismissed and a great deal of time was spent in submissions to the magistrate in respect of those charges. The costs of the proceedings were therefore quite obviously greatly inflated by reason of the **[13]** prosecution of charges which ultimately failed. The magistrate however took the view that the respondent was ultimately the successful party and as such was entitled to her costs. With every respect to the careful way in which the magistrate considered the matter and discussed it with counsel it appears to me that at an early stage he dismissed from his mind the question of whether some alleviation of the position should flow from the fact that the applicants were successful in relation to either two out of three groups of charges or twenty-two out of twenty-five charges whichever way one likes to express it.

With respect it appears to me that this aspect of the matter seems to have passed out of consideration in the discussion in relation to the quantum of costs on the list handed up by Mr McCurdy and in some way it seems to have been almost assumed by the magistrate that by reason of the fact that the respondent obtained some convictions she became the successful party and was entitled to a general order for her costs.

With great respect to the magistrate I cannot help but come to the conclusion that his discretion miscarried and that his order for costs must be set aside. As I mentioned at the outset this litigation has gone on for a great deal of time and has cost a great deal of money all of which I would have thought could have been much better spent. I therefore do not propose to add to the costs already spent by referring the question of costs back to the magistrate to make a further order. Giving full weight to the relevant considerations to which the magistrate attached weight and giving weight also to the fact that on twenty-two **[14]** of the informations the applicants were successful and giving further some weight to the nature of the proceedings and to the facts as disclosed by the evidence I think an appropriate order in all the circumstances would be that the applicants pay to the respondent the sum of $2,000 by way of costs.

In the result orders nisi Nos. 22, 23 and 24 will be made absolute and order nisi No. 25 will be discharged. The order made by the magistrate for costs for the payment of $6,500.10 by

the applicants to the respondent will he set aside and in lieu thereof I order that the applicants pay to the respondent the sum of $2,000 costs. Consistent with the principles which I have discussed I consider that the applicants have been only partially successful in these proceedings and I propose therefore to make an order for costs in their favour upon a reduced basis and again to avoid further costs being expended in taxation I order that the respondent pay the applicants the sum of $500 costs in respect of orders Nos. 22, 23 and 24 and I make no order for costs in relation to order No. 25.

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