23/02; [2002] VSC 362

SUPREME COURT OF VICTORIA

HUNTER v MAGISTRATES' COURT and AULICH

Smith J

25, 26 July, 2, 5, 6, 30 August 2002

NATURAL JUSTICE – INTERVENTION ORDERS MADE – SUBSEQUENT PROCEEDINGS ALLEGING BREACHES OF INTERVENTION ORDERS – APPLICATIONS MADE FOR EXTENSION OF ORDERS – BEFORE HEARING ANY EVIDENCE MAGISTRATE STATED HE DID NOT PROPOSE TO GRANT PLAINTIFF'S APPLICATION – CONFERENCE WITH COUNSEL IN MAGISTRATE'S CHAMBERS – ORDER LATER MADE AGAINST PLAINTIFF WITHOUT CONSENT – WHETHER MAKING OF ORDER INVOLVED A DENIAL OF NATURAL JUSTICE – WHETHER STATEMENTS MADE BY MAGISTRATE PROVIDED A REASONABLE BASIS FOR APPREHENSION OF BIAS.

In 1997, intervention orders were made between H. and A. In 1998, the parties came before the same magistrate seeking extensions of the intervention orders. After hearing outlines of each party's case, the magistrate stated that he did not consider H.'s case constituted any breach of the order or provided any grounds for extension. The matters were stood down to enable counsel to confer with their clients and later, counsel discussed the matters with the magistrate in chambers. When the court reconvened, the magistrate made orders against H. without hearing any evidence and without H.'s consent. Upon an originating motion to quash—

HELD: Orders made by the magistrate quashed. Remitted for hearing and determination by another magistrate.

1. As H. did not consent to the orders being made and the requirements imposed, the making of the orders after the negotiations failed involved a denial of justice because there was no hearing accorded to H.

2. The statements made by the magistrate were made before any sworn evidence had been given. Also, the magistrate made an order against H. and imposed an additional constraint without H.'s consent. These actions of the magistrate provided evidence supporting pre-judgment and a finding of ostensible bias.

SMITH J:

The Proceeding

1. By originating motion originally filed on 15 September 1998, the plaintiff, Meredith Hunter (Whitelaw), seeks relief in the nature of certiorari in respect of decisions made by the first defendant on 17 July 1998:

> (a) to grant the application of the second defendant, Mr Aulich, to extend an intervention order made against the plaintiff on 27 June 1997, and
>
> (b) to refuse extension of an intervention order made against Mr Aulich on 27 June 1997, and the entry of the first defendant's orders giving effect to those decisions.

2. The plaintiff seeks orders quashing the decisions and orders made by the first defendant and directing that the matter be returned to the Magistrates' Court at Ringwood to be heard by that Court constituted by another Magistrate.

3. The matter has been argued by counsel for the plaintiff and the second defendant. The first defendant has followed the usual practice of electing not to participate in the proceeding.

4. The originating motion sets out the grounds upon which the orders are sought, they having been amended by leave of Ashley, J granted on 17 April 2000. The first ground alleges a denial of natural justice. The following are the particulars relied upon in support of that ground:

> "(a) The extension of the Intervention Order against the Plaintiff for a period of 10 years without the hearing of any evidence.
> (b) The refusal of an Intervention Order in favour of the Plaintiff without hearing any evidence.

(c) In relation to the decision of the First Defendant made on 17 July 1998 to grant the Second Defendant's application to extend the Intervention Order made against the Plaintiff on 27 June 1997, and the entry of the First Defendant's orders thereto:
(i) the decision was contrary to law being a decision:
(A) made in the absence of consent and unsupported by admissible evidence;
(B) the Second Defendant/Applicant having failed to discharge its legal and evidentiary burden so as to sustain:
a. the decision of the First Defendant to grant the Second Defendant's Application for extension of the intervention order against the Plaintiff;
b. the decision of the First Defendant to extend the Second Defendant's intervention order against the Plaintiff for a period of ten years;
c. the decision of the First Defendant to vary the prohibitions expressed in the Second Defendant's prior intervention order against the Plaintiff, of its own motion, and in the absence of application, by deleting a prohibition expressed in the prior order and by adding the words *and with the express approval of this court* as a condition to a prohibition appearing in the prior order.
(ii) The decision of the First Defendant to extend the effective period of the intervention order made against the Plaintiff for a period of ten years, and to vary the prohibitions expressed in the prior order was so unreasonable as to be contrary to law;
(iii) The decision of the First Defendant to permit the parties to negotiate their client's positions and the terms of possible orders which the Court might make on the then current applications, in chambers, compromised the proper conduct of the proceeding, and in permitting such conduct the First Defendant erred in law.
(iv) The issue by the Registrar of the Ringwood Magistrates' Court of a certified extract of order purporting to contain or effect an amendment or variation to orders previously certified by the court and made by the First Defendant, was *ultra vires* the Registrar and occurred in circumstances where the First Defendant was *functus officio*."

5. The grounds also allege ostensible or apprehended bias on the part of the Magistrate. The following are the particulars relied upon:

"**PARTICULARS**
The expressed opinion by the Magistrate that he well knew the case, he should not have granted an Intervention Order in favour of the Plaintiff originally and was not going to do so on her current application granting an Intervention Order in favour of the Secondnamed Defendant without considering properly or at all:
(a) The terms of Section 2 of the *Crimes (Family Violence) Act* as to whether the applicant Secondnamed Defendant had any standing to bring the application.

(b) The terms of Section 4 Subsections 1, 2 and 3 of the *Crimes (Family Violence) Act*.

(c) The terms of Section 16 of the *Crimes (Family Violence) Act*.

(d) The terms of Section 20 of the *Crimes (Family Violence) Act*."

6. Finally, it is alleged that the first defendant failed to comply with the procedure laid down in Part 3 of the *Crimes (Family Violence) Act* 1987 ("the Act") in that even if the orders of the Magistrate were made by consent, there was no sworn evidence taken by the Court upon the applications made by the plaintiff and second defendant, as there must have been.

7. The order made against Ms Hunter on 17 July 1998 was that she be prohibited from –

"approaching, telephoning or contacting the aggrieved family member, except in the company of a police officer or in accordance with an order of the Family Court; knowingly being at or within 200 metres of premises situated at 285 Prices Road, Gladysdale, 5 Closter Avenue, Nunawading, 335 Eacotts Road, Hoddles Creek, or any other premises where the aggrieved family member lives or works, except in the company of a police officer or in accordance with an order of the Family Court; denigrating, insulting or maligning the aggrieved family member or discussing any issues in dispute between them in any public place; damaging property owned/jointly owned by the aggrieved family member; approaching, contacting, telephoning or making any enquiry, complaint or allegation about the aggrieved family member to his employer, the Victoria Police, save and except a genuine and legitimate complaint of a criminal act of which the defendant is a victim, and with the express approval of this Court; causing another person to engage in conduct prohibited by this order; possessing, carrying or using any firearm or holding any firearm licence."

The order also stated that any party had liberty to apply in writing to the Court at any time to revoke, vary or extend the order. The order was stated to last until "1/7/2008".

Mr Aulich gave an undertaking not to approach Ms Hunter's residence except on police business.

History of Proceedings

8. On and prior to 17 January 1997, the plaintiff and the second defendant had issued proceedings seeking intervention orders against each other. On 17 January 1997, they appeared before Mr Smith, the same Magistrate who conducted the hearing on 17 July 1998. They agreed to submit to mutual consent orders while denying liability. His Worship decided not to make such orders but to have the parties give undertakings to the Court in terms of the orders each had sought. The undertakings were to last three years.

9. Issues subsequently arose between the parties, each alleging that the other had breached the undertakings.

10. On 27 June 1997 the plaintiff and the second defendant obtained intervention orders against each other (Exhibits A and B), such orders being expressed to last until 30 June 1998. The order against Ms Hunter was in terms similar to that made subsequently on 17 July 1998 except that the earlier order:

> (a) included an additional prohibition from "assaulting, harassing, molesting, threatening or intimidating the aggrieved family member", and
>
> (b) did not include the requirement of the Court's approval to the making of a complaint to the Victoria Police which was added on 17 July 1998.

11. The order against Mr Aulich prohibited him from:

> "Damaging property owned/jointly owned by the aggrieved family member. Approaching, telephoning or contacting the AFM except in the company of a police officer or in accordance with an order of the Family Court. Knowingly being at or within 200 metres of premises situated at 18 Estate Road, Don Valley or any other place where the AFM lives or works except in the company of a police officer or in accordance with an order of the Family Court. Causing another person to engage in conduct prohibited by this order. Denigrating, insulting or maligning the AFM or discussing any issues in dispute between the defendant and the AFM in any public place. The defendant shall not be prohibited from doing any of the things referred to in this order if such things are done in the course of performance of his duties as a member of the Victoria Police Force at any place in Victoria, nor from being stationed at Warburton Police Station nor possessing or carrying any firearms, nor holding a fire arms licence."

12. On 28 May 1998 and on 9 June 1998, the plaintiff and the second defendant, respectively, applied for extensions of the intervention orders. By consent, the orders were extended to 17 July 1998. The extension applications were listed for hearing in the Magistrates' Court on 17 July 1998.

The Hearing on 17 July 1998

13. Evidence of what occurred at the hearing has been given by the parties and the lawyers who represented them. The evidence conflicts.

14. The evidence of both Mr Aulich and Ms Hunter should be approached with great care. There is a long history of animosity between them. In addition, in relation to Mr Aulich, a letter to the Registry of Births Deaths and Marriages shows him dishonestly attempting, in a situation where he should have been telling the truth, to maintain the position that he was not the father of the child. I refer also to his breaches of police regulations. In addition, in his affidavit and through his counsel before the Magistrate Mr Aulich asserted that the complaints made against him to the police had failed. This was not so. His answers in evidence before me were always very carefully considered and at times he used fine distinctions to support his case. Ms Hunter remains very angry towards Mr Aulich. In addition, when cross-examined, she was in great pain from a very recently broken ankle and was on Panadeine Forte. She was obviously finding giving evidence very difficult.

15. Counsel for Mr Aulich submitted that I should follow the rule of practice that is applied in appeals from magistrates of accepting the account that supports the decision below in the absence of any fair and practicable method of resolving the conflict[1]. Without ruling on that submission, I will proceed on the basis that the practice is applicable. In this case, the practice

is best addressed by accepting the evidence advanced for the respondent where there is conflict, notwithstanding my concerns about Mr Aulich, unless there is a fair and practicable method of resolving such conflict.

16. Both parties were represented at the hearing on 17 July 1998 – Ms Hunter by Mr Willcox and Mr Aulich by Ms James. At the outset of the hearing, the learned Magistrate stated that he had dealt with the matter from the beginning and that he was familiar with the history of the matter.

17. At his Worship's invitation, counsel outlined their client's cases. I propose to proceed on the issue of what was outlined by accepting for present purposes the evidence of Mr Aulich. The most detailed account is contained in his affidavit sworn 13 June 2000.

18. Mr Aulich deposed that Mr Willcox on behalf of the plaintiff outlined to the Magistrate that Mr Aulich had breached the intervention order by:

> (i) driving within two hundred metres of the plaintiff's new address at 45 Riversdale Road, Yarra Junction, by driving past on his way to work[2], and
>
> (ii) that the plaintiff had received and answered several telephone calls with no one speaking on the other end of the telephone.

He also deposed that Ms James on his behalf said that he would give evidence that:

> (i) he was not aware that the plaintiff had changed address at the time he travelled past her residence,
>
> (ii) Riversdale Road, Yarra Junction was his normal route to work,

and that he had ten witnesses available to give evidence that would say that the plaintiff had harassed him in public places, denigrated and maligned him in public with numerous people at various places including the Upper Yarra Secondary College, the Yarra Junction Shopping Centre and with a representative of Channel 7 in Melbourne, continually contacted his employer, the Victoria Police Department, and made false reports.

19. His Worship then stated that he did not consider that the plaintiff's case constituted any breach of the order or provided any grounds for extension. At that point he had not heard evidence or cross-examination. His Worship then outlined three options to the parties. The evidence differs. According to Mr Aulich the options were:

> (a) a full hearing in Court,
>
> (b) discuss the application for an Extended Order against Ms Hunter in open court before him; or
>
> (c) negotiate the matter in his chambers with both counsel.

20. It is common ground that the option of a full hearing was raised. As to the other options mentioned, Ms James deposed that the alternatives raised were discussion between the parties and their counsel and, if agreement was reached, that his Worship be advised either in open court or in chambers as the result. The evidence of Ms Hunter and Mr Willcox supports the evidence of Mr Aulich of the option being offered of a negotiation involving counsel in his Worship's chambers and the taking up of that offer. I have come to the conclusion that Ms James' recollection on this issue is not accurate.

21. I am satisfied that the matter was stood down to enable counsel to confer with their clients. When the Court reconvened, counsel advised the Magistrate that their clients wished to adopt the chambers option. The matter was again stood down to enable counsel to discuss the matter in the Magistrate's chambers.

22. There are then some further differences in the evidence. I note that Ms James has maintained that the parties actually reached an agreement before going to his Worship's chambers, and went there to inform him of the settlement. This is not the recollection of the other participants. Her recollection on other matters such as the orders consented to was also shown to be incorrect.

The "agreement" of which Ms James gave oral evidence was one whereby:

> (a) Mr Aulich would give an undertaking to stay away from the plaintiff but not consent to extensions of the order against him, and
>
> (b) Ms Hunter would consent to an indefinite order against her.

While she subsequently altered her oral evidence to apply Ms Hunter's consent to the 10 year order that was made, it is significant that her recollection before assistance from counsel was that the consent was to an indefinite order. Mr Aulich also deposed that Ms James told him that Ms Hunter was prepared to consent to the extension of the order against her until further order – an indefinite order. I also note, in any event, that Ms James deposed that his Worship, during their meeting, put forward his own proposals – suggesting that a discussion of possible orders occurred in his chambers, not the conveying of the terms of any settlement.

23. It is in fact conceded by Ms James that in any event his Worship proposed changes to the alleged consent proposal namely:

> (a) a requirement that Ms Hunter seek his approval before she could make any complaint about Mr Aulich to his superiors in Victoria Police,
>
> (b) removal of the prohibition against "assaulting, harassing, molesting, threatening or intimidating the aggrieved family member".

Counsel returned to their clients for instructions. Mr Aulich also gave oral evidence that the order made was "crafted" by both counsel and his Worship.

Ms Hunter denies consenting to any orders or accepting an undertaking from Mr Aulich. In light of the history of the matter, it is most unlikely that she would have done so. Her account of what she was told by Mr Willcox is that the situation was not good and that she was going to have an order against her and that "they don't want an order against him". Mr Willcox is adamant that he did not consent to any orders and that he did not have instructions to do so. He said that when the Court reconvened, and before anything further happened, he submitted that if orders were to be made they should be mutual, otherwise there should be no orders at all. This is disputed by Ms James and Mr Aulich. Ms Hunter has said that Mr Willcox stood up for a few minutes but got nowhere.

24. The Magistrate made the orders against Ms Hunter[3] and received the undertaking of Mr Aulich. Either then, or when expressing his earlier opinion about the outlines of the cases of the parties, His Worship also stated that he had made mutual orders initially in an attempt to separate the parties, and that there had been no evidentiary basis for an order against Mr Aulich. He also said that he had made the order against Mr Aulich by consent in the belief that it would make the plaintiff more compliant.

25. After the order had been made, the plaintiff sought an opportunity to speak. It is common ground that she launched into a highly emotional statement. She and Mr Willcox have given evidence that she complained about the unfairness of the orders and that they were made without hearing any evidence and without her consent. This is disputed by Mr Aulich and Ms James, who gave evidence that her remarks focused on Mr Aulich and his behaviour, and contained no comment on the order and lack of hearing or consent.

Subsequent Alterations to the Register

26. Those whose task it was to enter the decision in Courtlink, the computerised Register, appear to have been somewhat confused. They recorded initially, as appears from the original certified extract of the order against Ms Hunter (A3), the following:

> "You were not at Court ... By consent without admission of allegations in complaint Defendant did not agree to the order being made."

27. Mr Aulich contacted Mr Pattison, and asked him to correct the Register. Mr Pattison was the officer in charge of the family law register at the time. He corrected the register on about 22 July

1998. Significantly he deleted the reference to the consent to the order – leaving the reference to her absence from Court and the fact that she did not agree. The plaintiff received an extract in that form on about 4 September 1998.

28. On about 18 September 1998, Mr Aulich was served with the present proceedings. On about 21 September 1998, Mr Aulich again contacted Mr Pattison to have the record changed to record that the order was a consent order. Mr Pattison sought, and obtained, confirmation from his Worship that the order was a consent order and amended the Register. I note that evidence of the conversation between his Worship and Mr Pattison was not tendered by counsel for Mr Aulich as evidence that the order was a consent order but for the limited purpose of establishing how the record came to be altered.

29. Mr Pattison then spoke to the plaintiff's solicitor, Mr Barrett. Mr Pattison said to Mr Barrett that there had been a mistake made in the certified extract of the orders made on 17 July 1998. He said the mistake was the statement that the defendant did not agree to the order. Mr Barrett objected to this most strongly, pointing out that his client had not been given the opportunity to be heard, that she had desperately wanted to be heard and that in no circumstances would she have consented to a restraining order against her for ten years while Mr Aulich had no restraint at all. He recorded that he asked Pattison who brought this to his attention. He said it was Mr Aulich who had done so late the previous week. He challenged Mr Pattison as to how he could provide sealed orders more than two months ago and now provide a different extract, and how could he say one set of orders was right and the other wrong.

The Consent Order Issue

30. As noted above, there is a conflict on the evidence on the issue of whether Ms Hunter gave any consent to any of the orders made or the undertaking given. I incline to the view that Ms James and Mr Aulich are mistaken. It is clear from Mr Aulich's evidence that his knowledge of what Ms Hunter did or did not consent to was obtained from Ms James. Ms James' recollection was shown to be flawed. One side or the other, however, must be mistaken, either in their original perception of the events or the recollection of them – or both. The issue, however, can be resolved fairly and in a practical way by a consideration of contemporaneous records and documents.

(a) The Decision Sheet

His Worship followed the usual procedure of completing a "Decision Sheet". It contained a number of boxes to be ticked, including "By Consent" boxes if the order was made by consent. It may be said to be the best evidence available as to whether the order of his Worship was by consent. His Worship entered the date to which the order would operate (1/7/2008), deleted the order against "assaulting etc" the family member and added to the prohibition on complaints to the police the words "and with the express approval of this Court". He did not tick any "By Consent" boxes.

(b) Backsheet to the Brief of Mr Willcox

Mr Willcox endorsed his backsheet as follows:

> "Coram: Smith
> Contra: James
> Order: Intervention Order in favour of Aulich enclosed. Aulich gave undertaking to the Court that he would not approach the residence of Hunter unless on police business. His Worship explained to Hunter that at the last hearing there were no grounds for an order to be made in her favour, but in an attempt to separate the parties and to allow a "cooling off period" mutual orders were made. That has not been successful. This time there were no grounds for an order in favour of her. Aulich, however, was in a different position but not overly so. Hunter's complaints to E.S.D. were causing extreme difficulties in Aulich's employment. If there are to be further complaints by Hunter they are to be addressed to his Worship who will allow or disallow the complaint procedure."

I accept Mr Willcox's evidence that his practice was, when an order was made by consent, to record that fact when noting the orders made on his backsheet and thus the absence of such an entry supports the conclusion that the order was not made by consent.

(c) Record of Ms James

It appears from the evidence that Ms James's original notes of the hearing before his Worship

could be produced, but they have not been produced. She did, however, write on 27 July 1998 (Exhibit A9) to Sergeant Neal of the Ethical Standards Department of the Victoria Police, who was carrying out an investigation into Mr Aulich's conduct. With her letter she enclosed a copy of the order against Ms Hunter. What form the copy took is not known. In her letter she informed Sergeant Neale about the hearing on 17 July 1998 as follows:

> "After consideration of both Mr Aulich's case and Ms Hunter's case Mr Smith SM refused to make any Order against Mr Aulich and commented that, having regard to Ms Hunter's conduct over the last twelve months and preceding, the 1997 Order against Mr Aulich should not have been made. Mr Aulich did promise to the court that he would not go to Ms Hunter's residential address except on police business. The Order against Ms Hunter runs until 1 July 2008. Mr Smith SM stated in court that he may convey this Intervention Order to your Department so that you are aware of the prohibition against Ms Hunter making any complaints save and except with the express approval of the Magistrates Court. Mr Smith SM has noted on the court file that all future matters relating to Ms Hunter are to be dealt with by him. Mr Smith SM commented that Mr Aulich was the victim of a campaign by Ms Hunter to discredit Mr Aulich's reputation in the community and with his employer, the Victoria Police and that Mr Aulich was entitled to the protection of an Intervention Order for a ten year period to achieve a complete separation and allow a cooling off period. Ms Hunter's case, as stated to the Magistrates Court by her Barrister, Mr R Wilcox, was that Mr Aulich would not acknowledge his child and would not sign the birth certificate. Both the writer and Mr Aulich do not understand why Ms Hunter would complain of this when Mr Aulich has co-operated with parentage blood testing, consented to an Order of the Family Court of Australia declaring him as the father of the child and, pays child support for the child in accordance with an administrative assessment of the Child Support Agency."

This letter was not available when Ms James gave evidence in these proceedings. I, therefore, do not draw any conclusions from the *prima facie* inconsistencies between her account in the letter and her evidence. For present purposes, it is sufficient to note that her description of what occurred is not consistent with a negotiated settlement resulting in a consent order. One might also have expected the letter to refer to Ms Hunter ultimately consenting to the orders and accepting the outcome in that, if that occurred, it strengthened Mr Aulich's position; for it would suggest that she also acknowledge that there was no basis for her complaints.

As to the stated attitude of Mr Aulich on the paternity issue, and the refusal to sign the birth certificate, I assume Ms James was unaware of Mr Aulich's letter of 10 March 1998 to the Registry of Births, Deaths and Marriages, denying paternity.

31. Thus the contemporaneous documentation supports the conclusion that Ms Hunter did not consent to any orders.

32. Alternatively, and in any event, the evidence of Ms James and Mr Aulich in fact supports the conclusion that Ms Hunter did not consent to the particular orders actually made.

33. In Mr Aulich's first affidavit[4], he deposed that Ms James told him that the plaintiff would consent to the "extended order until further order" and that she informed him that the Magistrate was advised of the parties' consent to "this proposal". This evidence was repeated in his second affidavit[5].

34. Ms James' account is less specific – in particular she did not initially refer to the duration of the order to which Ms Hunter is alleged to have agreed. In her oral evidence, her initial recollection was that the duration of the order made was indefinite. In cross-examination she changed her evidence to refer to a ten year duration when her error was pointed out. I am satisfied that this was a reconstruction. In addition, her affidavit also records the Magistrate imposing the limitation on complaints to police after being advised of the agreement between the parties, and does not depose to any express consent by Ms Hunter to that limit before it was formally imposed.

35. Thus the evidence given by Mr Aulich and Ms James supports the conclusion that her consent was not given to the orders ultimately made because she did not consent to the ten year duration or the limit on complaints to police.

Natural Justice on 17 July 1998

36. For the foregoing reasons, I am satisfied that Ms Hunter did not at any time consent to the

orders that were made against her or accept Mr Aulich's undertaking in lieu of an order extending her order against him. At the most, and this may explain the belief of Ms James and his Worship, she consented to adopting the third option offered by his Worship – negotiation in his chambers. In that situation, however, to make the orders after the negotiations failed involved a denial of natural justice because there was no hearing accorded to her.

37. Alternatively, if it be accepted that she consented to a package of proposals in which

> (a) the order against Mr Aulich would not be extended provided he undertook not to attend at her premises except on police business, and
>
> (b) the order against her was extended indefinitely,

I am satisfied that she did not consent to an order against her for a ten year period nor did she consent to the order requiring her to go to his Worship for permission before making a complaint to the police.

38. Counsel for Mr Aulich argued that the ten year limit was less onerous than an indefinite order. I disagree. In my view it is a more serious restriction than an indefinite order. It carries with it the implication that his Worship had concluded that the situation was one where the orders were needed for at least ten years. Consent by Ms Hunter to such an order would carry the implication against her that she conceded that it was necessary. As a result, attempting to vary or remove a ten year order would be more difficult than attempting to vary or remove an indefinite order.

39. His Worship imposed those requirements without her consent and without a hearing. Thus, on that more limited basis, there was also a denial of natural justice.

Natural Justice and the Alterations to the Register

40. There is no express provision given by statute, or under the Rules of the Magistrates' Court, dealing with errors in judgments or orders and expressly empowering the Court to amend such errors. There is authority, however, that the courts have the inherent jurisdiction or power to correct errors in the records of the courts at a later date – *Kelly v Von Einem*[6]. O'Bryan J in that case, in *obiter*, lent support to the view that there is an inherent jurisdiction to correct judgments or orders to give effect to what the Court intended to do. His Honour quoted a passage from a Full Court decision of *De Zylva* (1988) 38 A Crim R 207, where the Chief Justice said, on behalf of the Court[7]:

> "Any court has an inherent jurisdiction to correct any judgment or order which owing to error does not give effect to what the court intended to do. It is a power which is essential to ensure that justice is done. It is not possible pursuant to the power to vary an order which the court intended to make, but an error in an order can be corrected so as to do justice and to give effect to the court's intention."

41. The power to correct a mistake or slip is to be distinguished from the power to vary or vacate orders made where there has been no mistake or slip[8].

42. Accepting an inherent jurisdiction, or power, to amend accidental errors or slips in orders, it seems to me that the provisions of Rule 20.01 of the *Magistrates' Court Civil Procedure Rules* 1989 and following, dealing with applications, would apply to the situation. Thus, in this case, Mr Aulich could have applied under Order 20 to have the record of the order corrected.

43. What happened, however, was informal to say the least. Mr Aulich had ease of communication with Mr Pattison, the Deputy Registrar, because they had come to know each other quite well over the years in their work as police officer and court official, respectively, in the area for many years.

44. It is unfortunate that Mr Pattison did not contact Mr Barrett before causing the Register to be altered. In my view he should have contacted Mr Barrett, or required Mr Aulich through his lawyers to contact Mr Barrett, to determine whether the change sought could be made by consent. If it could not, Mr Aulich should have been required to formally apply by summons served on Ms Hunter to amend the register. I am satisfied that there was a denial of natural justice in the steps taken to amend the register.

Bias

45. In the particulars relied upon in support of its case of ostensible bias, reliance is placed upon the statement, amongst other things, by his Worship that he should not have granted an intervention order in favour of the plaintiff originally and did not propose to do so on her current application.

46. I refer to my above summary of the events that occurred. It is unclear on the evidence whether this statement was made early in the proceedings or at the time his Worship was announcing his orders in Court after the negotiation. For present purposes, I will assume that his statement was made early in the proceedings as is asserted, as I understand it, by Mr Aulich, this being an account more favourable to the analysis of the conduct.

47. His Worship's statements need to be considered in the context of other conduct of his Worship. For example, I refer to my summary above from the affidavit of Mr Aulich of the outlines of the cases given by counsel. As noted above, his Worship formed the view that the outline given for Ms Hunter did not reveal a breach by Mr Aulich of the order against him or any grounds upon which it could be extended. He could not have reached that conclusion, however, unless he took the view that the driving within 200 metres of the plaintiff's address was an accidental breach, as opposed to a deliberate breach by Mr Aulich. To conclude that it did not constitute a breach involved his Worship accepting the untested case outlined for Mr Aulich that he was not aware that the plaintiff had changed her address. A reasonable bystander would have a legitimate concern in those circumstances that the Magistrate was pre-judging the matter.

48. It must also be borne in mind that while his Worship had handled the previous applications, at no time had there been any exploration of the facts by sworn evidence and cross-examination before him relating to the past history. It is also relevant to bear in mind that his Worship appears to have, on his own initiative, made the order a ten year order and imposed the additional constraint on complaints to the police. The latter also showed that he had a view as to the substance, or lack of it, in the complaints that she had made to the police and had formed a view about those matters without the benefit of a hearing. These restrictions were imposed without consent and without a hearing, thus providing further evidence suggesting pre-judgment by his Worship and, therefore, a reasonable basis for having an apprehension of bias on his part.

49. It was submitted for the defendant that if there was any basis for finding apprehended or ostensible bias, Ms Hunter had waived any objection (*Vakauta v Kelly*)[9]. Counsel submitted that at no time was the issue raised. In particular, no application was made to the Magistrate that he disqualify himself. Therefore, it is said, the plaintiff must be regarded as having waived any objection on the ground of apprehended bias.

50. There is force in this argument, to the extent that it is directed to waiver in respect of events that occurred immediately prior to the return of his Worship to the bench to announce the orders. As I have noted above, however, his actions at that point provided further evidence supporting a finding of ostensible bias. They may be viewed in the context of his earlier conduct[10]. I am satisfied that it is unrealistic to suggest that Ms Hunter might have done anything at that point to raise the issue of ostensible bias.

Discretionary Matters

51. Counsel for the defendant submitted that relief in the nature of *certiorari* should not be granted because there are alternative remedies available which should have been employed.

52. Counsel referred in particular to the opportunity that had been available to Ms Hunter to appeal under s109 of the *Magistrates' Court Act* 1989 on questions of law and the authority of *Kuek v Legal Aid*[11], where the view was expressed by the Court of Appeal that the Order 56 procedure, employed in the present case, should only be used in exceptional circumstances when the party also has a right of appeal under s109 of the *Magistrates' Court Act* 1989.

53. In considering this argument it is necessary to consider a further unfortunate chapter in this case.

54. Following the decision of his Worship on 17 July 1998, Ms Hunter decided to appeal to the County Court. When her appeal came to be considered, the Judge took the view that there was

no right of appeal from the order because it was a variation order and not an original order. That was the judicial view at the time and led to amendment to the legislation. Ms Hunter then had the choice of trying to obtain an extension of time in which to appeal to this Court under s109 *Magistrates' Court Act* 1989, or issuing the originating motion. Bearing in mind that she is not in this appeal seeking to argue an error of law in the decision but is arguing breach of natural justice and ostensible bias, it was entirely appropriate in my view for her to issue these proceedings.

55. Counsel for Mr Aulich also submitted that another remedy available to her was to apply in the Magistrates' Court to revoke or vary the intervention order. It is not clear to me why this argument is advanced as a satisfactory alternative; for, to complete the unfortunate history, Ms Hunter did apply to the Magistrates' Court to revoke or vary the intervention order, after that option had been canvassed in this Court at an earlier stage in the proceedings. The parties returned to the Magistrates' Court on 15 December 2000. The Magistrate concerned took the view that, while Supreme Court proceedings were pending, it would be inappropriate for the Magistrates' Court to deal with such an application. Thus Ms Hunter was placed in the position that to proceed in the Magistrates' Court she had to abandon these proceedings in the Supreme Court. She chose to return to this Court.

56. The discretionary arguments advanced for Mr Aulich are, in my view, without any merit. A consideration of alternative remedies, and those that in fact have been attempted, strongly supports the conclusion that it is high time that the issues between the parties were determined and that they should be determined in these proceedings.

Conclusion

57. For the foregoing reasons I am satisfied that the plaintiff has made out her case of a denial of natural justice and of ostensible bias. The decisions and orders made should be quashed and the matter returned to the Magistrates' Court at Ringwood for hearing a determination at that Court. In light of the conclusions I have reached it is necessary that another Magistrate hear the matter.

58. To conclude, the case is testimony to the pressure the Magistrates' Courts are under in dealing, in particular, with intervention order applications and the attempts by that Court to devise practical and efficient approaches to such applications. The unfortunate outcome in the present case appears to me to be likely to be the result of a breakdown of communication and a misunderstanding between the Magistrate, the lawyers and the litigants as to precisely what was envisaged in the options made available by the Magistrate. On the evidence before me, the way his Worship conducted himself suggests to me that he was under the impression that the parties had waived their right to a hearing and had consented to the option of a negotiated settlement in his chambers. Further, my impression is that, his view of that option was that the parties had empowered him to impose a solution upon them in light of what they stated were orders to which they would agree. That may lie behind the perception of Ms James and Mr Aulich, that there was in the end a consent result. On the other hand, I am satisfied that Ms Hunter did not appreciate that that might be the outcome.

59. This hypothesis, however, has not been explored before me and, of course, it must be borne in mind that we do not have the Magistrate's own account of what occurred. I express no view as to the propriety of such a course, if in fact that was the course that was adopted. It would seem to me, however, that where a judicial officer with the agreement of the parties acts as a mediator in a proceeding and a settlement is not achieved, the proceeding must ordinarily go to trial. The prudent course would be to conduct the trial before another judicial officer.

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[1] *Buzatu v Vournazos* [1970] VicRp 63; [1970] VR 476; applied in Order 56 proceedings in *Cooper-Baker v His Honour Judge Ross & Anor* [2000] VSC 221; (2000) 114 A Crim R 40; (2000) 31 MVR 235 (31 May 2000).
[2] I proceed on the basis that the concession that he was on his way to work was made, although it is unlikely and was not mentioned by Mr Willcox in his account.
[3] see above.
[4] para 11(a).
[5] para 5(h)(H).
[6] (1995) 84 A Crim R 37.
[7] At 208.
[8] *Ashbourne Security & Investigation Services* (SC) Vic, Coldrey J, 3 October 1997, unreported; The judgment of Coldrey J is not concerned with the failure to record accurately the order of the Court, but rather an

attempt to vary an order made in relation to costs on the basis of evidence later produced to the Court of an offer. His Honour held that the Magistrate in that case was *functus officio* and could not vary the order made. The present case is a slip case. See also *Carroll v Price* [1960] VicRp 101; [1960] VR 651, 657-660 and *Paroukis v Katsaris* [1987] VicRp 4; [1987] VR 39, 52-53..

[9] [1989] HCA 44; (1989) 167 CLR 568; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277.

[10] *Vakauta v Kelly*, above, at 573, 579, 588.

[11] [2001] VSCA 80; [2001] 3 VR 289, paras 15-21.

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