22/97

SUPREME COURT OF VICTORIA

GUSS v MAGISTRATES' COURT OF VICTORIA and KATZ

Batt J

25, 26 March, 3 April 1997 — [1998] 2 VR 113

CIVIL PROCEEDINGS – PROCEDURE – ORDER MADE IN DEFAULT OF DEFENCE – APPLICATION TO SET ASIDE – APPLICATION REFUSED – SUBSEQUENT APPLICATIONS MADE AND REFUSED – WHETHER SUCCESSIVE APPLICATIONS MAY BE MADE – WHETHER COURT REQUIRED TO CONSIDER ALL MATERIAL IN SUBSEQUENT APPLICATION – CIRCUMSTANCES WHERE COURT MAY HEAR SUBSEQUENT APPLICATION – ORDER MADE BY COURT PREVENTING FURTHER APPLICATIONS EXCEPT BY LEAVE OF COURT – POWER OF COURT TO MAKE SUCH ORDER – INCIDENTAL POWER OF COURT – STATUTORY POWER TO GIVE DIRECTIONS FOR CONDUCT OF PROCEEDING – WHETHER COURT IN ERROR IN MAKING ORDER: *MAGISTRATES' COURT ACT* 1989, SS110, 136.

An order was made against G. in default of defence. Subsequently, G. applied to the Court twice for an order to set aside and was unsuccessful on each occasion. After G. was unsuccessful on a third occasion, the magistrate made an order preventing the issue of any further applications to set aside except with leave of the court. Upon appeal against the order and the dismissal of the application—

HELD: Appeal dismissed.
1. An order refusing an application to set aside is interlocutory, not final, and accordingly, successive applications may be made to the court.
***Carr v Finance Corporation of Australia Ltd (No 1)* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397, applied.**

2. However, the magistrate hearing the subsequent application is not bound to consider the whole of the material including that which has been previously considered. The magistrate may examine the material in the previous application to determine what is new material. Unless there has been a dismissal of the previous application on a technicality or where there is fraud or new evidence becomes available after the dismissal of the previous application, the subsequent application is almost certainly doomed to failure.
***DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582, followed.**
***Hewitt v Mirror Newspapers Ltd* (1977) 17 ACTR 1, not followed.**

3. Whilst a Magistrates' Court has implied and incidental powers to regulate proceedings before the Court, these powers are superseded by the statutory power conferred by s136 of the *Magistrates' Court Act* 1989 which gives power to the court to control its proceedings. The order requiring leave for a further application was made in and for the purpose of controlling the particular proceeding, was conducive to the effective and complete determination of it and was within power.

BATT J: [1] This is the hearing of an originating motion for judicial review under O56, in which the plaintiff seeks against the first defendants, the Magistrates' Court of Victoria constituted by Mr B Coburn, and the second defendant, Mr Joseph Katz, his former solicitor, relief in the nature of *certiorari* to quash:

> (a) the decision of the firstnamed defendant to refuse the plaintiff's application to set aside a default order and for a rehearing made before Mr B Coburn, Magistrate, at the Magistrates' Court of Melbourne on 10 September 1996 seeking rehearing of the proceeding Joseph Katz v Antony Guss, No H02985163; and.
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> (b) the order made by the first firstnamed defendant in the proceeding on 10 September 1996.

The first defendant did not appear but his solicitor notified the Prothonotary that he (now it) submitted to any order that the court might make. The essential chronology for this case is as follows. On 21 December 1995 the second defendant filed a complaint in the Magistrates' Court of Victoria at Melbourne for $2,630.65 for solicitor's fees in relation to a Supreme Court proceeding commenced in 1991 in which the Geelong Building Society sued the present plaintiff and others.

That complaint was filed in proceeding No H02985163 and it and the orders made in it are those with which I am particularly concerned. On the same day the second defendant filed a complaint in the same court in proceeding No H02984669 for $4,857.10 for solicitor's fees in relation to a **[2]** Supreme Court proceeding commenced in 1994 in which the plaintiff and his sister Marilla Suzanne Guss sued the Geelong Building Society.

On 15 February 1996 ministerial orders in default of notice of defence were entered against the present plaintiff on the first of those complaints and against him and his sister on the second of those complaints for the amounts claimed plus interest and costs pursuant to O10 of the *Magistrates' Court Civil Procedure Rules* 1989.

On 13 March 1996 the plaintiff filed his first application to set aside those orders. That was supported by an affidavit of his solicitor Mr Salinger sworn 1 April 1996 and opposed by affidavits of the second defendant sworn on 26 April 1996 and 10 May 1996. An affidavit in support was sworn by the plaintiff on 28 May 1996. The application was heard on 9 May by Mr Myers, Magistrate. He set aside the default order in the second of the complaints I have mentioned but declined to do so in the case of the first complaint. On 13 June 1996 the plaintiff filed a second application to set aside the default order in the first of the complaints. That was supported by an affidavit sworn by him on 10 July 1996. The application was heard on 12 July 1996 by Mr Coburn and he dismissed the application.

The plaintiff filed a third application for setting aside and rehearing in respect of the default order on the first complaint on 7 August 1996. On 3 September 1996 an affidavit in opposition was sworn by **[3]** Mr Rochman. He had earlier, on 30 August 1996, sworn an affidavit in support of a counter-application on behalf of the present second defendant to set aside the third application of the plaintiff and to obtain orders to stop the plaintiff continuing to make applications to set aside the default order. On 6 September 1996 the plaintiff swore an affidavit which contained some manuscript amendments. So far as I can see, the affidavit was not resworn on 10 September, as some of the material suggested, but in any event nothing turns on the precise dates or dates of swearing. The application came before Mr Braun, Magistrate, on 6 September 1996 and he ordered, in substance, that it be heard by Mr Coburn. That hearing occurred on 10 September 1996. In the course of the hearing counsel for the present plaintiff referred to a proposed counterclaim against the present second defendant for damages for negligence as a solicitor and for failure to account.

Mr Coburn dismissed the application and made an order on the counter-application favourable to the second defendant. It is these, strictly two, orders that are called in question in this proceeding. The first of those orders, as I have indicated, was made on the third application for rehearing. So far as material, that order was that the application be refused, that the plaintiff pay the second defendant $951 costs (which was the amount of costs assessed on an indemnity basis) and that a stay of one month be granted. On the counter-application (correctly, in my **[4]** view, recorded in the register as an interlocutory application) it was ordered that it be granted and an order was made:

> ''That the Registrar is not to issue any further applications by the defendant under s110 of the *Magistrates' Court Act* 1989 to set aside the order made on 15 February 1996 unless the defendant first obtains the leave of the court to issue the application to set aside. Such application for leave is to be made pursuant to O20 of the Rules and is to be supported by an affidavit setting out the plea material upon which the defendant would rely if it were permitted to issue an application to set aside."

The magistrate's reasons, according to counsel who then appeared for the present plaintiff, included a statement that:

> "The refusal of the application was an interlocutory decision and that, accordingly, the plaintiff could bring subsequent applications provided he could show new material but that the court was not in a position to consider afresh its decision reached upon material previously before the court. The magistrate [counsel went on] referred to the material before the court both on 9 May and 12 July 1996 when a similar application had been made to him."

More detail, based on notes, appears in the affidavit before me by counsel who then appeared for the second defendant and, in accordance with general principle relating to appeals on questions on law and the old orders nisi to review and from inherent likelihood, I act on that

more detailed version. By way of preliminary, according to counsel for the now second defendant, both he and his opponent made preliminary submissions to the magistrate about the evidence which his opponent was entitled to lead in support of the third application. He (the second defendant's counsel) submitted that his opponent was not entitled to lead any **[5]** evidence which had been before the court in respect of the first and second applications but should limit himself to new evidence. The magistrate accepted that submission. He indicated, however, that he would have to consider the first and second affidavits [described by counsel] in order to determine what material was new and what was not. He also indicated that he was prepared to consider the file relating to the other proceeding if the present plaintiff's counsel thought it was relevant. I may say, parenthetically, that the magistrate's indication of the need to consider other material in order to determine what was new was, in my respectful view, sound, assuming for present purposes that the magistrate was correct in his application of the test of newness. Counsel goes on in his affidavit to say that having heard the arguments of himself and his opponent, Mr Coburn indicated that he wanted time to consider all the material carefully, particularly the first and second affidavits and the file in respect of the other proceeding and accordingly he stood the matter down temporarily. He deliberated for approximately an hour and then delivered his decision. Counsel then sets out from his detailed notes the magistrate's reasons for decision:

> "This is an application in proceeding number H02985163 by the defendant [Mr Guss] for the judgment entered on 15 February 1996 by Joseph Katz to be set aside. The relationship between Mr Katz and Mr Guss was that of solicitor and client. This is the third application brought by Mr Guss to set aside the default judgment, the first two applications having failed. I recant entirely from my earlier comments that this application can only be brought with **[6]** the leave of the court. Leave is not required. [Mr Coburn had indicated at the commencement of the application that he thought the application, not being a first application to set aside the default judgment, would require the leave of the court to be brought. Having examined the rules at the time the point was raised, he had indicated that he was wrong in this regard and that no leave was required.]
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> The earlier decisions in the earlier applications are interlocutory decisions and the applicant can bring subsequent applications provided new material is adduced. 'New material' is given a wide meaning and the applicant is not restricted to material which was not in existence at the time of the earlier application.
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> The new material in this application is set out in the affidavit of 6 September 1996 sworn by Mr Guss and this affidavit seems to introduce four new matters. These are:
> (i) Commonality. Katz did work for Guss in respect of two Supreme Court proceedings, one where Guss was defendant (known as the guarantee proceeding) and the other where Guss was the plaintiff (known as the beneficiary proceeding). Separate accounts were rendered and then separate judgments obtained on those separate accounts. On 29 May 1996 there were two applications before Mr Myers for re-hearing in respect of these separate judgments. Mr Myers granted the application where Guss was the plaintiff in the beneficiary proceeding but refused to grant the present application where Guss was the defendant in the guarantee proceeding. When one looks at the files in the respective proceedings one sees an affidavit from Guss and an affidavit from Katz. When one then turns to Guss' affidavit in the earlier applications they set [sic] out clearly the history of the matter and set out the accounts etc, although there was no effort to distinguish between the two accounts. Nevertheless the circumstances of both accounts were before Mr Myers when he dealt with them and he had the opportunity to take into account the fact that they were interwoven and indeed it is the sort of thing that might have appealed to a judicial officer, but Mr Myers resisted. In my view, the 'commonality' issue has already been tried before Mr Myers.
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> (ii) The $3,500 payment issue. It is a little difficult to work out what Guss means in **[7]** referring to it. It seems to be the first time that it has been raised but only has the effect of increasing Guss' indebtedness and it is really a point I [am] unable to appreciate.
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> (iii) Negligence and overcharging. The allegations of general negligence and overcharging are spelt out more readily in Guss' affidavit. I suppose there is some sort of rehashing [or 'repeating', I cannot make out my note] of old grounds. [He then referred to allegations regarding Mr Dear.] These are the same allegations as made previously. The solicitor/client relationship had been mentioned in previous affidavits. The sum of $3,800 had been mentioned previously [I am not sure if my note here is correct, it may have been a reference to the $3,500 issue, not $3,800.] The allegations regarding Dear were well canvassed in the earlier affidavits. The matters in para19 of Guss' affidavit were raised today but the July affidavit of Guss was in similar terms.
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> (iv) Finally [counsel for Guss] said the costs in the Supreme Court proceeding had been taxed and the defendant now knew the amount of his damages. In respect of this issue, there are sweeping

and general allegations. They don't seem to go very far. This is typical of the allegations made in Guss' affidavit. For instance, in the letter of 2 November 1994 [a reference to a letter in exhibit 'JK5' to Mr Katz' affidavit] and in particular the paragraph on page 2 shows that Mr Katz was turning his mind to these issues. [This is a reference to the negligence issues rather than the issues regarding the taxed costs.]

In my opinion there is no new material and the application is refused."

What I nave set out includes most of counsel's explanatory parenthetic remarks, though I have omitted one as unnecessary. In addition there are three editorial parentheses of my own, in para(i) and para(ii) and at the beginning of para(iv). At the end of para(iii) of the reasons as recorded the date **[8]** of the present plaintiff's affidavit should in fact be 10 July, not 11 July.

Section 110 of the *Magistrates' Court Act* 1989 ("the Act") provides:

(1) If a final order is made by the Court in a civil proceeding against a person who did not appear in the proceeding, that person may, subject to and in accordance with the Rules, apply to the Court for an order that the order be set aside and that the proceeding be re-heard.

(2) On an application under this section, the court may set aside the order subject to any terms and conditions that it thinks just and re-hear the proceeding.

(3) Subject to subs(4), an application under this section does not operate as a stay of the order unless the Court so orders.

(4) An application under this section with respect to an order for the payment of money operates as a stay of so much of the order as relates to the payment of money.

(5) If an applicant under this section fails to appear at the time fixed for the hearing of the application and the application is struck out, the applicant can re-apply only if the applicant first obtains the leave of the Court."

The relevant rules are O30 but they were not mentioned in argument and are not presently material. The parties before me proceeded on the footing that substantially the same principles apply to an application under s110 as to an application to set aside a default judgment in this court: *Seventeenth Febtor Pty Ltd v Household Financial Services Ltd* [1996] VicRp 88; [1996] 2 VR 577 at578; [1996] ASC 56-342, cf *Similar or Equal Approved Products Pty Ltd v Mannway (Victoria) Pty Ltd* (1989) *Magistrates Cases* 205 at 206. I do not find it necessary to investigate this question.

It is well established that an order refusing, **[9]** even after a hearing on the merits, an application under s110 is interlocutory, not final, and that, accordingly, successive applications may be made: *Kinex Exploration Pty Ltd v Tasco Pty Ltd* [1995] VicRp 58; [1995] 2 VR 318 and the cases there cited, deriving, as they do, from the principle stated by the High Court in *Carr v Finance Corporation of Australia Ltd (No 1)* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397 and other High Court decisions there mentioned.

In *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175-176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 the High Court in a joint judgment authoritatively expounded the scope of certiorari and, as appears from CLR page 174, of orders in the nature of *certiorari* under provisions such as O56, which is to be read with s3(6) of the *Supreme Court Act* 1986. Their Honours said (with the omission of footnotes):

"Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior courts thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number or distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'. Where the writ is sought on the grounds of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the 'record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is [10] disclosed by that record."

No ground was here suggested to be relevant beyond the four there stated. Of them, jurisdictional error based on alleged non-service of the complaint on the plaintiff was abandoned by counsel for the plaintiff once there had been filed pursuant to leave on 26 March 1997 an affidavit by the second defendant exhibiting an affidavit below by a process server providing personal service (as required by r5.02) within the extended definition of that expression given by r5.03(1)(b) of the *Magistrates' Court Civil Procedure Rules* 1989.

The nature of jurisdictional error on the part of an inferior court is explained and exemplified in *Craig* at 177-180 and, importantly for present purposes, at page 180 is distinguished from mistake of law in the identification, formulation or determination of relevant issues, which may be corrected on appeal (where appeal is available), and also from failure to take into account some matter which the inferior court as a matter of law is required to take into account in determining a question within jurisdiction or reliance by such a court on some irrelevant matter which as a matter of law it is not entitled to rely on in determining a question within jurisdiction. Neither of those contradistinguished multipartite categories will originally involve jurisdictional error, as the High Court there said. All the more so, I would add in view of some of the plaintiff's arguments, the making of a wrong finding of fact (at any rate if not a jurisdictional fact of the type considered in *re McJannet* [1995] HCA 31; (1995) 184 CLR 620) does not render an order amenable to *certiorari*, for that **[11]** does not constitute an error of law: *Australian Heritage Commission v Mt Isa Mines Ltd* [1997] HCA 10; (1997) 187 CLR 297; (1997) 142 ALR 622; (1997) 71 ALJR 441; [1997] 5 Leg Rep 26 and cases there cited.

Accordingly, the sole ground on which relief in the nature of *certiorari* was ultimately sought before me in respect of the order dismissing the application to set aside and for rehearing was error of law on the face of the record. An authoritative answer to the usually difficult question, discussed in *Craig* at 180-183, of what constitutes the record below is given by s10 of the *Administrative Law Act* 1978 which, so far as material, provides that any statement by an inferior court, whether made orally or in writing, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

I have earlier set out the evidence of the magistrate's statement of his reasons. In addition, in accordance with established principle, the record here also included the initiating process — that is the complaint — and the final order as recorded in the register and, in my view, also the process initiating the interlocutory applications and the orders on them as recorded in the register. In relation to the order requiring the plaintiff to obtain leave before making further applications, the originating motion was amended by leave to add a ground relating to it, namely:

> "8. The first defendant lacked jurisdiction to impose a requirement for leave."

[12] That is an allegation of jurisdictional error, namely, want of jurisdiction. It is convenient, if not entirely logical, to deal with this order first. It is true that there is no provision in the Act or rules authorising such an order in so many words. (Counsel were indeed at one in submitting that there was not such provision expressly authorising the order, but in revising my orally given reasons I have found s136 of the Act, which is discussed below. Having regard to my other reasons and to the fact that counsel did consider the question, I do not consider it necessary to hear argument on s136). Mr Sandbach for the plaintiff picturesquely and with much force submitted that the magistrate had added a subs(6) to s110. He further submitted that the specification of circumstances in which leave is required is exhausted by subs(5). He did not dispute the utility of the order made; a utility which is enhanced when it is appreciated that, in the case of an order for payment of money, the effect of subs(4) is to enable execution to be stayed (and service of a bankruptcy notice prevented) indefinitely by the institution iteratively of a fresh application as soon as the one preceding it has been dismissed. Utility of itself, however, does not necessarily determine jurisdiction.

Much has been written in judgments and learned writings about inherent or implied jurisdiction and inherent or implied power. I think that the question is really one of power (though lack of power would found *certiorari*, in my view, if only as on the face of the record, being relevantly the order itself). The **[13]** received view is, first, that (superior) courts of unlimited or general jurisdiction, being the Courts of Common Law at Westminster and those which are successors to them or derive from them, such as the Supreme Courts of the States, albeit that most at least of

the latter are of a statutory origin and since 1901 have been subject to jurisdictional limitations flowing from the Commonwealth Constitution and its covering clauses — (*Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612 at 618-9; 71 ALR 457; [1987] Australian High Court and Federal Court Practice 96; 61 ALJR 332; [1987] ATPR 40-792; *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1 at 16; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183 (1989), and *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 16-17; (1993) 82 LGERA), have "inherent power" to make orders of the kind I discuss below, the exercise of which is within their "inherent jurisdiction"; but, secondly, that inferior courts, being created by statute, and federal superior courts, whose jurisdiction depends entirely on definition by statute by virtue of s77(i) of the Commonwealth Constitution, have, assuming that there is no expressly given statutory power, "implied power" to make such orders: *R v Forbes: ex parte Bevan* [1972] HCA 34; (1972) 127 CLR 1 at 7; [1972-73] ALR 1046; 46 ALJR 401; *Grassby v R; Jackson v Sterling Industries Ltd* at 616, 618-619, 620, 623-624 and (in ultimately dissenting judgments) 630-631 and 639-640; *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 at 136; [1991] FLC 92-217; 99 ALR 193; (1991) 65 ALJR 280; 14 Fam LR 593 per Toohey J (dissenting, though on a ground that is immaterial); *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514; (1992) 109 ALR 247; (1992) 66 ALJR 839; (1992) 30 ATPR 41-189 at 561; *Bremer Vulkan Schiffbau v South India Shipping Corporation Ltd* [1981] AC 909 at 977-979; [1981] 1 All ER 289; [1981] 1 Lloyds Rep 253; [1981] 2 WLR 141; [1981] Com LR 19; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 16-17; (1993) 82 LGERA 158; cf *Exell v Exell* [1984] VicRp 1; [1984] VR 1 at 7-8.

It is clear from these cases, and in **[14]** particular from *Grassby v R*, which concerned a magistrates' court, that in this case the relevant concept is that of implied power. However, in some of the cases which I have cited Toohey J refers to the passage in *Parsons v Martin* [1984] FCA 408; (1984) 5 FCR 235 at 241; (1984) 58 ALR 395 which I cite later in these reasons. That passage, after referring to implied powers, goes on to speak "in addition" of "incidental and necessary" powers. For the reasons explained in *Grassby v R* and *Logwon* the latter powers must also be implied, but it seems to me that the implication is at one remove, as it were. I shall accordingly call powers of that kind, which indeed are those in question here, "incidental powers".

The principle binding on me in relation to the power of the magistrate has been restated by Brooking J, with whom Nathan and Byrne JJ agreed, in *M v M* [1993] VicRp 29 [1993] 1 VR 391 at 395, to the effect that all courts, including magistrates' and like courts, have control of their own proceedings and may devise a practice for regulating those proceedings that is not inconsistent with their governing Act or what was called in an earlier Full Court decision "the decent administration of justice". In addition to the cases referred to by Brooking J, reference may also be made to *Mason v Ryan* [1884] VicLawRp 115; (1884) 10 VLR (L) 335 at 340; 6 ALT 152; *Metropolitan Bank v Pooley* (1885) 10 AC 210 at 214 and 220-221; *Duncan v Lowenthal* [1969] VicRp 21; [1969] VR 180 at 182 and cases there cited; *Hunter v Chief Constable of West Midlands Police* [1981] UKHL 13; [1982] AC 529 at 536; [1981] 3 All ER 727; [1981] 3 WLR 906; *R v McGowan ex p Macko* [1984] VicRp 78; [1984] VR 1000; *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 25; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307; Keith **[15]** Mason, *The Inherent Jurisdiction of the Court,* (1983) 57 ALJ 449 at 453-454 and 456-457; and, more generally, Professor MS Dockray, *The Inherent Jurisdiction to Regulate Civil Proceedings* (1997) 113 LQR 120 (which contains a useful review of cases using the concept, though the author acknowledges that his view that inferior or statutory courts have inherent jurisdiction arising at common law (which is based in part on the *obiter* view in *R v Norwich Crown Court ex parte Belsham* [1992] 1 All ER 394; [1992] 1 WLR 54 at 66; (1991) 94 Cr App R 382, reversed on another ground in *re Ashton* [1994] 1 AC 9; [1993] 2 All ER 663; (1993) 97 Cr App R 203) is inconsistent with the received view in Australia, which I have set out earlier). In particular, a court has power to prevent abuse of its process, which, to anticipate, repeated applications, if not on new material, would constitute: *Bahr v Nicolay (No 1)* [1987] HCA 32; (1987) 163 CLR 490 at 493; 72 ALR 361 and the cases second last cited. As already indicated, the power in question cannot be inconsistent with or completely covered by statute: *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at 498-499, 510 and 516; 85 ALR 1; (1989) 63 ALJR 352; 15 ACLR 123; 7 ACLC 381, and *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514 at 561; (1992) 109 ALR 247; (1992) 66 ALJR 839; (1992) 30 ATPR 41-189.

I see no objection to the existence of the power in the fact that the practice is new, if it be so, for s110 in its present form is relatively new. The difficult question is whether the practice

embodied in the order is inconsistent with the Act. It is certainly not improper or inconsistent with the decent administration of justice. It will, in my view, be inconsistent with the Act if and only if subs(5) is to be taken as meaning that leave cannot be required **[16]** in any other case than that there mentioned; that is, if it is a negative provision of the kind considered by Lord Lowry in *Harrison v Tew* [1990] 2 AC 523 at 536. In my view, it is not such a provision but is rather an affirmative provision with which the incidental power stated above can co-exist.

A contrary view could only be reached by treating as applicable to subs(5) the principle embodied in the maxim that the express mention of one only of two things implies exclusion of the other. That maxim must be applied with care (*Houssein v Under-Secretary of Industrial Relations and Technology (NSW)* [1982] HCA 2; (1982) 148 CLR 88 at 95; (1982) 38 ALR 577; (1982) 56 ALJR 217) and is inapplicable here, in my view, especially when possible abuse of s110 is considered. For completeness, I express the view that what I have stated in this paragraph is not inconsistent with *Kinex Exploration*. Nor do I consider that the maxim is applicable to the express provision in s21 of the *Supreme Court Act* 1986 with respect to vexatious litigants. That is a provision much more particular and strict, yet potentially of much wider ambit, than the specific order made here by the magistrate or any practice embodied in that order.

The order under consideration did not, in my view, extend the jurisdiction of the Magistrates' Court (which is impermissible: *Jackson v Sterling Industries Ltd* at 619) or go beyond regulation of procedure, as the Full Court of the Federal Court of Australia in *Parsons v Martin* [1984] FCA 408; (1984) 5 FCR 235; (1984) 58 ALR 395 (referred to by Brooking J in *M v M*) held the grant of letters of request to courts **[17]** of other countries did. In my view, the order here is within the latter part of the following statement of principle by the Federal Court at page 241, namely:

> "In our opinion a court exercising jurisdiction conferred by statute has powers expressly or by implication conferred by the legislation which governs it. This is a matter of statutory construction. We are of opinion also that it has in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred."

I have so far considered only the magistrate's incidental power, for argument before me was confined to that. However, s136 of the Act provides:

> "The Court may, except where otherwise provided by this or any other Act, at any stage of a proceeding, give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination."

I consider, for reasons which follow, that the magistrate was empowered by that section to make a direction in terms of the impugned order. In my view, failure to use the word "direct" is immaterial, for the two words, "direct" and "order", are virtually interchangeable (*Benson v Benson* [1941] P 90 at 97 cf *Rome v Punjab National Bank* [1989] 2 Lloyd's Rep 424 at 428), or at the least, if a defect, is, in the circumstances, not fatal but curable or merely irregular. The section, along with the power of the Magistrates' Court to control its proceedings, was considered by the Appeal Division in *Stefanovski v Murphy* [1996] VicRp 78; [1996] 2 VR 442 especially at 461, where it was said to confer a wide statutory discretion. But otherwise the section was not expounded in detail, though its application was exemplified by the discussion **[18]** in the three judgments. For reasons I have already given in considering s110(5), that provision does not "otherwise provide" within the meaning of s136 and I am unaware of any section in the Act or any other Act that does relevantly provide otherwise. Certainly none was drawn to my attention.

Now, by s136 the direction is to be "for the conduct of the proceeding" and may be given "at any stage of [the] proceeding". The word "proceeding" is defined in s3(1) as meaning any matter in the Magistrates' Court. Without purporting to be exhaustive or precise, it may be said that a "matter" is a subject matter of contention calling for the court's adjudication. A proceeding may have stages after the final order or judgment has been made or entered in it, such as applications with respect to execution upon that order or judgment or (at least in this court) with respect to the taxation or assessment of costs. Accordingly, the impugned order was, in my view, made "at [a] stage of ... proceeding" No H02985163. Further, most directions relate to the future conduct of a proceeding. In my view, a fourth application by the plaintiff to set aside the default order, although yet to occur, would, when made, be an interlocutory application within, and would form part of, proceeding No H02985163. Indeed it would have to form part of that proceeding, for otherwise it would not, if successful, have the desired operative effect. My view is confirmed by

the fact that the subject (third) application was so treated by the Magistrates' Court, as appears from the extract from the register, and indeed by the practice in **[19]** this court of applications to set aside default judgments being made in and numbered as part of the proceeding in which the default judgment was given or entered. Accordingly, the impugned order was "for the conduct of ... proceeding" No H02985163. Finally, it was open to the magistrate to think that an order in terms of that impugned order was conducive to the effective and complete determination of the proceeding. That is sufficient for the upholding of the order in that respect, but it is desirable that I express my view that the order was, by its very nature, eminently conducive to the effective and complete determination of the proceeding, for it imposed a barrier to unmeritorious prolongation of it.

In my view, the statutory power conferred by s136, so far as it extends, supersedes the incidental power that I have previously discussed, on the basis of the principle embodied in the maxim that that which is expressed renders inoperative that which is implied. Indeed *Hamilton v Oades* so indicates. In that I appear to differ from Coldrey J in *Nguyen v The Magistrates' Court of Victoria (at Broadmeadows)* [1994] VicRp 5; [1994] 1 VR 88 at 96, though on my view the whole field covered by the incidental power remains but with a different source for the greater part of it.

The examination which I have made of s136 shows that, subject to the existence of s136, the view which I have earlier expressed as to the availability of the incidental power is correct in so far as it assumed that the impugned order was made in and for the purpose of controlling **[20]** proceeding No H02985163.

Certiorari not issuing as of course, Mr Riordan for the second defendant relied on a discretionary argument with respect to this order to the effect that the quashing of the order would only be of value if (contrary to his submission) this court foresaw the benefit of a further — that is, a fourth — application to set aside. In other words, he contended that relief would be futile: *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 [1971] 1 WLR 1578 at 1595. The argument assumes, of course, that the challenge here to the other order fails. I do not find it necessary to consider that discretionary argument, for I have already held that the order requiring leave for a further application was within power and, accordingly, an order in the nature of *certiorari* to quash it should not go.

I turn to the order dismissing the application for rehearing. Mr Sandbach ultimately relied on four grounds or bases. These may not be exactly the same as the grounds in the originating motion and possibly may not all be comprehended within those grounds, but no point was taken for the second defendant about that and I do not pause to consider that point further. The grounds or bases were:

> (a) that the magistrate misconceived the test for second or subsequent applications as being whether there was new material and should rather have considered all the material;
>
> (b) the magistrate erred in failing to have regard to the fact that there was *prima facie* evidence that more than the amount charged had been paid;
>
> **[21]** (c) the magistrate erred in failing to have regard to the fact that no authority was given to take $3,500 out of trust; and
>
> (d) the magistrate erred in failing to have regard to the prima facie case of negligence established by the material.

Most, if not all, the grounds, other than ground (a), could not succeed unless it succeeded. That is to say, the subject matter of most of those grounds had already been relied on before the magistrates hearing the first and second applications. Perhaps ground (c) is an exception.

Leaving aside ground (a), no factual basis for any ground appears on the face of the record as proved before me, careful and detailed though the arguments of Mr Sandbach on them were. That is, the magistrate's reasons do not mention any evidence (as opposed to allegation) of overpayment, lack of authority or negligence. Further, bearing in mind the limited nature of the jurisdiction I am exercising, certainly no error of law in relation to them appears on the face of that record. The very formulation of the grounds in terms of failure to have regard suggests this:

cf *Craig* at 180, discussed above. Mr Sandbach had to go outside the record to affidavits and exhibits in his attempt to demonstrate error of law. (They are not incorporated in the record.) For these reasons, grounds (b), (c) and (d) fail. The second defendant also challenged the putative evidence, at least of grounds (b) and (d), as being merely assertion or conclusion. Whilst there seems much force in the submission, I do not find it necessary to **[22]** decide the point.

It was accepted for the second defendant, correctly in my view, that ground (a) arose on the face of the record and that, if correct, it showed error of law and warranted the quashing of the order. But in my view the second defendant was also correct in his submission that the magistrate was not bound to consider the whole of the material and in particular the material which he and Mr Myers had previously considered. In my view, that conclusion is required by the judgments of Brooking JA and Hayne JA in *DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582 at 595-8 and 601-6, when properly understood, even though small passages in those judgments, if taken by themselves, might be argued to point in the opposite direction. Further, on the view of Hayne JA and, I think, of Brooking JA, the magistrate was probably only bound to consider material that was not available at the time of the previous application.

Their Honours relied on the principle relating to abuse of process, holding that a second application is an abuse of process unless there is proof of fraud or it is sought to adduce "fresh" evidence, in the sense used in relation to admission of evidence in appeals. If the evidence was available at the time of the first application and there is no explanation of why it was not then put forward, then, at least, the second application will constitute an abuse of process. Those conditions were satisfied in the third application in the present case and, if, as I think, that part of *Christie v Baker* is applicable to s110, the magistrate was bound to dismiss the application and not **[23]** to investigate it, contrary to the plaintiff's contention before me. If anything, the magistrate's test of "newness" was too generous. Certainly he should not have gone further, as the plaintiff contended.

In my view, there is no reason for treating the judgments in that case as inapplicable to s110. In other words, there is no reason for considering that those judgments, or the parts of them that I have cited, depended upon features of s23A of the *Limitation of Actions Act* 1958 which are absent from s110. The fact that refusal of an application under s110 leaves a final judgment standing is the counterpart of the consideration discussed in the first full paragraph of page 605 by Hayne JA. Moreover, the considerations discussed by Hayne JA at of 602, 604 and 605 (third paragraph) apply equally here. Mr Sandbach relied strongly on *Hewitt v Mirror Newspapers Ltd* (1977) 17 ACTR 1 at 6, where Connor J said:

> "I think that, if a party has a right to bring more than one application [to set aside an interlocutory judgment], the court or judge hearing the later application must consider it on such relevant material as the applicant chooses to put before the court, whether or not it was used or available to be used in an earlier application; cf *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423; [1966] ALR 705; (1966) 40 ALJR 102, per Taylor J at CLR 440-1."

That case is, I think, probably distinguishable on the facts, in that His Honour had before him a case **[24]** where in substance the previous application had failed on a technicality, namely, absence of an affidavit as to merits through refusal of an adjournment and so no "proper" hearing on merits. The reference to it by Mason J in *Carr* at 256 supports the suggestion. If it is not so distinguishable, in my view, in the light of *Christie v Baker* (where, incidentally, it was mentioned) I should not follow it as, despite its apparent approval by Mason J (only) in *Carr* at 254, it is inconsistent with the two judgments to which I have referred.

I would add that statements in other cases, such as *Carr*, *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423 at 440-1; [1966] ALR 705; (1966) 40 ALJR 102, *Joseph Guss v Johnstone* (unreported, Beach J, 23 March 1994) and *Seymour v Holm* [1961] Qd R 214 at 222 and 223, show that, except where there has been a dismissal of the first application for a technicality or where there is fraud or where new evidence becomes available after the dismissal of the first application, a second application is almost certainly doomed to failure. Statements to that effect seem to me to recognise that the judicial officer hearing the second or subsequent application need not reconsider any of the material considered on earlier applications, save of course to the extent necessary for comparing the corpus of material before him or her with that before his or her predecessor in order to ascertain what is new material.

Counsel for the second defendant advanced a further argument, that the plaintiff's application for a rehearing was bound to fail because it was a third **[25]** application and, if there was new material, the material was available at the time of the earlier applications and there was no explanation of the failure to adduce that evidence; and, because the grant of relief in the nature of *certiorari* being discretionary, a court of review would not grant relief where the hearing was bound to fail, because it is a general principle that discretionary relief is not granted where it would be futile or inutile. He relied on *Malloch* at 1595. I think that that argument is probably correct, but it really does not arise, in my view, because at an anterior point I have held good the argument that no error of law on the face of the record has been shown.

For these reasons, ground (a) fails. Again, I record that I do not consider what I have said about that ground to be inconsistent with *Kinex Exploration*. I would add that, on the test that the magistrate applied, his final observation as deposed to seems incorrect in the case of ground (c) in view of para(ii) of his reasons. But no error of law appears in that paragraph.

Accordingly, for the reasons which I have given, I shall, subject to hearing counsel, make orders as follows:

1. The proceeding be dismissed.

2. The plaintiff pay the costs of the second defendant, including any reserved costs.

3. The time for service of notice of appeal from this judgment be extended to 24 April 1996.

APPEARANCES: For the Plaintiff Guss: Mr A Sandbach, counsel. Jeffrey P Salinger & Associates, Solicitors. No appearance for the 1st Defendant. For the 2nd Defendant: Mr PJ Riordan, counsel. Roy Jaffit, Rochman & Co, Solicitors.
