**38/97**

**SUPREME COURT OF VICTORIA**

# *ROADS CORPORATION v GREEN and ANOR*

**Chernov J**

**17 June 1997 — (1997) 25 MVR 426**

**PRACTICE AND PROCEDURE – NATURAL JUSTICE – PROCEDURAL FAIRNESS – CHARGE DISMISSED – NON-PARTY REQUIRED TO SHOW CAUSE WHY COSTS SHOULD NOT BE ORDERED AGAINST IT – NON-PARTY REFUSED LEAVE TO LEAD EVIDENCE AND CROSS-EXAMINE WITNESSES – COSTS ORDERED AGAINST NON-PARTY – WHETHER NON-PARTY DENIED PROCEDURAL FAIRNESS.**

G. was convicted in his absence of driving whilst disqualified and his licence cancelled. Three days later Roads Corporation issued a licence to G. apparently in ignorance of the order made three days earlier. Subsequently, G. was charged with driving whilst disqualified and successfully defended the charge on the ground that he honestly and reasonably believed that he was licensed to drive. G. applied for costs on the dismissal and this question was adjourned for the Roads Corporation to show cause why it should not pay G.'s costs. On the adjourned date, Roads Corporation sought leave to cross-examine witnesses and to lead evidence about whether the Roads Corporation caused G. to believe that he was licensed to drive. Leave was refused and an order for costs was made against the Roads Corporation. Upon the return of an originating motion to quash the refusal and the order—

**HELD: *Certiorari* granted. Decision quashed.**
**It may be unjust to make an order against a non-party without affording that person a proper hearing. In the present case, one could not say that Roads Corporation had a proper hearing given the denial to it of the ability to cross-examine the relevant witnesses and to lead evidence going to the question of whether or not Roads Corporation was in any relevant way connected with the belief held by G. as to his entitlement to drive a motor vehicle.**

**CHERNOV J: [1]** This is the return of an originating motion issued by the plaintiff on 24 April 1997 seeking orders in the nature of *certiorari* to quash the decision and the order of the second defendant made on 25 February 1997 in which the second defendant ordered the plaintiff to pay the costs of the first defendant of the hearing held on 19 and 25 February 1997.

The background to the matter can be stated briefly. On 27 September 1994 it would seem that the first defendant was disqualified from driving a motor vehicle for a period of four months. On 24 January 1995 a charge was heard against the first defendant that he drove a vehicle while disqualified. It appears that this charge was heard in the absence of Green and in the end his licence was cancelled. There was a requirement that the court inform the person whose licence has been cancelled by it of that fact. Whether or not that information was in fact given to the first defendant is not clear. There is also a requirement under s28(3) of the *Road Safety Act* 1986 for the court which cancels the licence held by a person to cause particulars of the order made to be sent immediately to the plaintiff. Again, the material does not show whether that requirement was discharged or satisfied.

On 27 January 1995 the plaintiff issued the first defendant with a licence to drive a motor vehicle and it can be assumed that this was done in ignorance of the order of the Magistrates' Court made three days earlier and to which reference has been made. The material also shows that on 3 February 1995 the plaintiff became aware of the cancellation of the first defendant's licence on 24 **[2]** January 1995. On 5 February 1995 the first defendant was charged with driving while disqualified. He apparently pleaded guilty to that charge and did not raise the defence of honest and reasonable belief that he was duly licensed.

On 28 March 1995 the first defendant was again apprehended for driving whilst disqualified and that matter came on for hearing in the Magistrates' Court at Wodonga on 19 February 1997. From the material presented to me it seems that on that day the first defendant successfully defended the charge on the ground that he had an honest and reasonable belief that he was qualified or licensed to drive by reason of what the plaintiff had done on 27 January 1995, namely,

the provision to him of a licence to drive a motor vehicle. The matter was then adjourned to 25 February 1997 with a view to the Magistrate considering whether he should order the plaintiff to pay the costs of the first defendant.

When the matter came on for hearing Mr Judd, who appeared for the plaintiff, asked the Magistrate for particulars of the basis for his apparent order that the plaintiff show cause why a costs order to which I have referred should not be made against it. The Magistrate stated that he had accepted the submission of the first defendant that he had an honest and reasonable belief that on 28 March 1995 he had been duly licensed (by the plaintiff) and was entitled to drive. The Magistrate further said that the factual findings were immutable and no submissions or evidence designed to overturn those findings would be entertained. Mr Judd sought leave to cross-examine witnesses who **[3]** were not present in court but apparently no order recalling them was to be made. Mr Judd made a number of submissions to the Magistrate as to why his client should not be ordered to pay costs but in the end the order was made that the plaintiff do pay the costs of the first defendant. The Magistrate said he was satisfied that the first defendant was not aware of the cancellation of his licence made on 24 January 1995. He also said that the plaintiff became aware that the licence in question was cancelled on 3 February 1995. Apparently that conclusion was reached on the basis of the evidence of a Mr Eton, who was an employee of the plaintiff, and who was called as a witness.

The Magistrate said that the plaintiff took no action in relation to the licence it had issued to the defendant on 27 January 1995 and that the defendant continued to drive until he was apprehended on 28 March 1995. The Magistrate dismissed the charge and said that the costs were incurred by the defendant because VicRoads had issued a licence on 27 January 1995.

The principal ground on which the relief is sought is that the plaintiff was denied natural justice in that it was refused the opportunity to test the evidence upon which the Magistrate said he found that the plaintiff should pay the costs, and he also failed to allow the plaintiff to lead evidence about whether or not any honest and reasonable belief held by the first defendant was caused by action or inaction of the plaintiff. It is clear that the Magistrate was "functus officio" so far as the case of the prosecution was concerned whereby the first defendant was charged with driving a vehicle whilst **[4]** unlicensed, but it seems to me that there was no reason why the evidence on which the Magistrate chose to proceed to make his finding that the plaintiff should pay the costs of the first defendant should not have been permitted to be challenged by cross-examination and by the leading of further evidence. The issue before him, when Mr Judd appeared on 25 February, was whether or not the plaintiff was causative of any relevant belief held by the first defendant as to his entitlement to drive a motor vehicle. The opportunity of properly dealing with that was denied to the plaintiff. I need not go through the material in detail that is set out in the affidavit of Mr Judd, but it is quite plain that Mr Judd could have cross-examined Mr Green in relation to the matters set out in paragraphs 11.2.1 to 11.2.4 of Mr Judd's affidavit and also on the important question of whether or not the court informed the first defendant of his disqualification of 24 January 1995. Similarly, Mr Judd could have led evidence as to whether or not the court did, in compliance with s28(3) of the *Road Safety Act* in fact inform VicRoads of the conviction of the first defendant. Similarly, he could have led evidence as to whether or not the court informed the first defendant of his conviction. The ability to do this was denied to the plaintiff.

It is plain that where there is such denial in procedural fairness an order in the nature of *certiorari* will go, and the recent High Court case of *Craig* is ample authority for that. Also the case of *Bischof v Adams* [1992] 2 VR 198, which was referred to His Worship, makes it clear at page 205 that it would be **[5]** unjust to make an order against a non-party without affording that person a proper hearing. One could not say that the plaintiff had a proper hearing given the denial to it of the ability to cross-examine the relevant witnesses and to lead evidence going to the question of whether or not the plaintiff was in any relevant way connected with the alleged belief held by the first defendant as to his entitlement to drive a motor vehicle.

For these reasons it is my view that relief in the nature of certiorari quashing the decision should go. Normally such an order is accompanied by an order that the matter be remitted to the Magistrates' Court to be dealt with in accordance with law. Dr Hanscombe, who appeared for the plaintiff in this case, submitted that given the amount of funds involved it would be impractical to make the

additional order to which I have referred. I accept that submission. In light of that I propose to make an order that the decision and order of the second defendant made on 25 February 1997 in which it ordered the plaintiff to pay the costs of the first defendant of the hearing held on 19 and 25 February be quashed. I will initial the minutes of proposed order and leave them on the file. (Discussion ensued re costs and application under Appeal Costs Fund.) It seems to me that definition is probably wide enough to embrace the present proceeding and I will make the order under s13 of the *Appeal Costs Act* 1964.

**APPEARANCES:** For the Plaintiff: Dr K Hanscombe, counsel. Phillips Fox, Solicitors. For the defendants: No appearance.

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