52/81

SUPREME COURT OF VICTORIA

BRADY & ORS v EVERTMOUNT PTY LTD & ORS

Kaye J

21 September 1981 — (1981) 53 FLR 289; 38 ALR 345; 12 ATR 396

TAXATION – COMPANY REQUIRED TO ATTEND TAXATION OFFICE AND PRODUCE CERTAIN BOOKS, DOCUMENTS AND PAPERS – COMPANY FAILED TO COMPLY WITH NOTICE – COMPANY CHARGED WITH OFFENCES – SUBMISSION MADE THAT NO VALID NOTICE HAD BEEN SERVED ON THE COMPANY – SUBMISSION THAT SEPARATE NOTICE SHOULD HAVE BEEN SERVED IN RESPECT OF THE SEVERAL ACTS – SUBMISSION UPHELD BY MAGISTRATE AND CHARGES DISMISSED – APPLICATION BY DEFENDANT COMPANY FOR COSTS – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR: *SALES TAX ASSESSMENT ACT* 1930 NOS 1-9.

HELD: Orders nisi discharged.
1. The notice requiring attendance of a person for the purpose of enquiring into his liability under the *Sales Tax Assessment Acts* and without identifying by number the particular Act is not a notice given in conformity with any one of the nine *Sales Tax Assessment Acts*. The enquiry sought to be made by a notice must be limited to the matters which are the subject of the section under which the notice is given. Otherwise the notice suffers from the vice of being completely at large. If the Commissioner wishes to enquire of a person concerning his liability under all of the Sales Tax Acts, it is necessary for him to give a separate notice to that person under each of the Acts numbered 1-9. As the notice was not one given in the proper exercise of the Commissioner's power, it was invalid and accordingly, the magistrate was not in error in dismissing the informations.

2. In relation to the refusal of costs, the magistrate gave no reasons nor was asked to provide any reasons. If the refusal was based on the fact that the defendant succeeded on a technical point, that did not constitute a proper ground for refusing to make an order in favour of the successful party. This was not a case of a mere technicality but a defect of substance. In the absence of material concerning the magistrate's reasons for failing to make an order for costs, the Court was unable to conclude either that the magistrate failed to exercise his discretion or that he took into account irrelevant matters.

KAYE J: On 13th August 1980, by order made in the Magistrates' Court, constituted by Mr JE Wallace SM, an information averring that on 29th January 1980, Evertmount Pty Ltd committed a breach of the *Sales Tax Assessment Acts* 1930 Nos. 1-9 by neglect to attend an officer authorised by the Deputy Commissioner of Taxation and to produce to him certain books, documents and papers was dismissed without costs. For convenience I shall refer to the Deputy Commissioner as "the Commissioner" and Evertmount Pty Ltd as "the taxpayer".

On the hearing of the information, the Commissioner did not call evidence but, pursuant to s63 of the *Sales Tax Assessment Act No. 1*, he relied upon several averments contained in the information. The substance of the relevant averments was as follows: that on 21st December 1979, a notice in writing was posted to the taxpayer pursuant to s23 of the *Sales Tax Assessment Act (No. 1)* 1930 requiring the taxpayer to attend at 11 a.m. on 29th January 1980, in a designated place before a named officer authorised by the Commissioner and to produce books, documents and papers for the purpose of enquiring into the liability under the *Sales Tax Assessment Acts (Nos. 1-9)* 1930 of the taxpayer, Evertsborough Pty Ltd, Evertswood Pty Ltd, Guyatt Home Appliances (Victoria) Pty Ltd, Guyatt Home Furnishings Pty Ltd, and Steven John Baker for the period 1st August 1979, to 19th December 1979, and that the taxpayer neglected to comply with the notice. With the consent of the parties, the magistrate admitted as evidence the notice described in the averment, addressed to the Public Officer of the taxpayer, which reads as follows:

> "TAKE NOTICE that in the exercise of the powers and functions conferred upon me as Deputy Commissioner of Taxation by delegation from the Commissioner of Taxation under the provisions of the *Taxation Administration Act* 1953, I, KEVIN PATRICK BRADY, do by this notice REQUIRE by your

public officer or proper officer TO ATTEND at Room 1, Ground Floor, 270 King Street, Melbourne, on TUESDAY, the 29th day of JANUARY 1980 at 11 o'clock in the forenoon before NOEL JAMES CANTY (an officer of the Australian Taxation Office whom I hereby duly authorise in that behalf) for the purpose of inquiring into the liability of EVERTSBOROUGH PTY LTD (etc) for the period 1 August 1979 to 19 December 1979 inclusive TO PRODUCE the books, documents and papers of EVERTMOUNT PTY LTD relating to the aforesaid liability being all bank statements, cheque butts, paid cheques, bank deposit books and slips, purchase invoices, purchase journals, option documents, duplicate sales invoices, sales journals, merchandise listings, assignment documents, purchase orders, duplicate purchase orders and quotations of certificates from customers in respect of the period 1 August 1979 to 19 December 1979 inclusive. DATED the 21st day of December 1979."

After hearing submissions concerning the validity of the notice made on behalf of the parties, the magistrate stated that, as the several *Sales Tax Assessment Acts* ought to be interpreted strictly, the Commissioner should have served a separate notice under each Act. He then dismissed the information and refused an application for costs made on behalf of the taxpayer in circumstances to which I shall later refer.

The Commissioner, by order nisi, sought to review the magistrate's order dismissing the information on the following grounds:

"1. That the stipendiary magistrate erred in law in holding that no valid notice pursuant to the provisions of *Sales Tax Assessment Acts* Nos. 1-9 had been issued, served or was effective in requiring the defendant to produce documents;

2. That the stipendiary magistrate erred in law in holding that the provisions of the *Sales Tax Assessment Acts Nos. 1-9* require the issue and service of a separate notice in respect of each of the said Acts; and

3. That on a true and proper construction of the provisions of s23 of the *Sales Tax Assessment Act No. 1* and s12 of the *Sales Tax Assessment Acts Nos. 2-9* the stipendiary magistrate ought to have held that the notice issued and served upon the defendant was valid."

Section 23 of the *Sales Tax Assessment Act (No. 1)* 1930 reads as follows:

"23(1) The Commissioner may, by notice in writing, require any person, whether a taxpayer or not—
(a) to furnish him with such information as he requires; or

(b) to attend and give evidence before him or before any officer authorized by him in that behalf, for the purpose of inquiring into or ascertaining his or any other person's liability under any of the provisions of this Act, and may require him to produce all books, documents and other papers whatsoever in his custody or under his control relating thereto.

(2) The Commissioner may require the information or evidence to be given on oath, and either verbally or in writing, and for that purpose he or the officer so authorized by him may administer an oath.

(3) The Regulations may prescribe scales of expenses to be allowed to persons required under this section to attend."

The provisions of s12 of each Act numbered 2-9 being expressed in the same terms, it is sufficient for present purposes to refer only to s12 of Act No. 2. The section appears under Part V of the Act bearing the title "Application of *Sales Tax Assessment Act* (No. 1) 1930" and it reads:

"12(1) The following Parts, sections and sub-sections of the *Sales Tax Assessment Act (No. 1)* 1930-1936, namely, section three, Parts II and III, sub-sections (4), (5B) and (5C) of section eighteen, section twenty-three, sections twenty-seven to thirty-nine inclusive, and Parts VII, VIII, IX and X, and the Second Schedule shall *mutatis mutandis* apply in relation to the imposition, assessment and collection of the tax chargeable under this Act in like manner as they apply in relation to the imposition, assessment and collection of the tax chargeable under that Act but for the purposes of this Act—
(a) sub-section (4) of section eighteen of the *Sales Tax Assessment Act (No. 1)* 1930-1936 shall be read as if the words 'subsection (1) of section four of this Act' were substituted for the words 'sub-section (1) of this section':

(b) section twenty-nine of the *Sales Tax Assessment Act (No. 1)* 1930-1936 shall be read as if the words 'section nine or ten of this Act', were substituted for the words, section twenty-four or twenty-

five of this Act', (wherever occurring); and

(c) subsection (2) of section thirty-five of the *Sales Tax Assessment Act (No. 1)* 1930-1936 shall be read as if the words, 'Part III of this Act' were substituted for the words, 'Part V of this Act'.

(2) The power to make regulations, conferred by the application, by the last preceding sub-section, of section seventy three of Part X of the *Sales Tax Assessment Act (No. 1)* 1930, shall include the power to make regulations for enabling registrations, certificates and securities made, issued or given for the purposes of that Act, to be treated as, or to be deemed to be, made, issued or given for the purposes also of this Act, and shall include the power generally to make regulations for treating acts, matters and things done for the purposes of the *Sales Tax Assessment Act No. 1)* 1930, under the sections and Parts of that Act made applicable to this Act, as done or deemed to be done under this Act."

On the return of the order nisi, Mr Burnside, counsel for the Commissioner, submitted that as a matter of construction s12 of each Act numbered 2-9 did not incorporate into those Acts the several provisions of s23 of Act No. 1. It was contended that as the nine Acts constitute a single legislative scheme in which the operation of all are necessary, the several provisions of Act No. 1 enumerated in s12 of Act No. 2 have an extended operation in relation to the matters with which each subsequent Act is concerned. In particular, the submission proceeded, s23 of Act No. 1 applies to each act numbered 2-9, so that in the whole of the legislative scheme there is but one power requiring attendance and production of documents by a person, and that power is contained in s23 of Act No. 1.

Support for counsel's submission was said by him to be found in the heading of Form J of the *Sales Tax Regulations*. This is the form of notice prescribed by regulation 78 to be given by a defendant to a taxation prosecution who elects under s56 of Act No. 1 to be tried in the High Court or a State Supreme Court. In the heading of Form J there appears the words, "Sales Tax Assessment Acts (Nos. 1-9)" and in the recital of the form there appears the words, "... wherein the defendant is charged with a contravention of s. of the *Sales Tax Assessment Act (No. 1)* 1930-1953"; then follows that notice is given that the defendant elects "pursuant to s56 of the *Sales Tax Assessment Act (No. 1)* 1930-1953" to have the case tried either in the High Court of Australia or in the Supreme Court. Any significance of the words in the heading for these purposes is lost when those expressions are contrasted with the contents of the form of a Notice of Objection to An Assessment of Tax under s41 of Act No. 1 required to be given by regulation 37. The form of notice is contained in Form I the heading of which reads, "*Sales Tax Assessment Act (No.)* 1930". It is apparent therefore that a taxpayer intending to object to an assessment of tax is required to specify the particular *Sales Tax Assessment Act* under which the assessment or decision complained of was made. In any event, the regulations, being made under s73 of Act No. 1 and applying to the subsequent Acts by s12(2) of Act No. 2, cannot extend the operation of s23 of Act No. 1 beyond the scope provided by s12 of Act No. 2.

There is a further observation to be made in this connection. The operative words in s12 of Act No. 2 are those identifying provisions in Act No. 1 which, it is stated. "shall *mutatis mutandis* apply in relation to the imposition, assessment and collection of the tax chargeable under this Act in like manner as they apply" to the same tax activities under Act No. 1. By reference to Part VII of Act No. 1 made by s12 of Act No. 2, s41 of Act No. 1 applies to Act No. 2. It is not possible to read s41 of Act No. 1 together with s12 of Act No. 2 without reading the reference to "under this Act" in the former Act as meaning a reference to "under Act No. 2".

Similarly, much of the force of the submission made on behalf of the Commissioner is at least reduced, if not lost, when consideration is given to the first section of Act No. 1 specified in s12 of Act No. 2. I refer to s3 by which particular words and phrases appearing in the Act are required to be given the meaning therein defined, and particular commercial transactions and events are subject to described deeming provisions. To give effect to those defined meanings and deeming provisions in accordance with s12 of Act No. 2, it is necessary to import the meanings and provisions of s3 into each of the subsequent Acts. Again, s4 of Act No. 1, which reads, "The Commissioner of Taxation shall have the general administration of this Act", would be devoid of any operative effect when applied to Act No. 2 unless it were incorporated in the latter Act.

There are to be found in judgments of members of the High Court relating to the *Sales Tax Assessment Acts* expressions describing particular provisions of Act No. 1 as incorporated in the

subsequent Acts. Thus, in the *Deputy Commissioner v Hankin* [1959] HCA 2; (1958-39) 100 CLR 566 at 572; [1959] ALR 258; 11 ATD 503; 32 ALJR 365 Dixon CJ, Fullagar, Kitto and Windeyer JJ in a joint judgment observed:

> "Section 30 of the Assessment Act No. 1, which is incorporated in the Assessment Act No. 5 by s12 of the latter Act, provides that sales tax when it becomes due and payable, shell be deemed to be a debt to the Queen on behalf of the Commonwealth and payable to the Commissioner."

Again in their judgment at p576 Their Honours said:

> "The Assessment Act (No. 1) contains in s3 a 'definition' of the word 'goods' and s3 is one of the sections of Act No. 1 which are incorporated in Act No. 5 by s12 of the latter Act. It is in fact incorporated in all the other Assessment Acts."

However, it was not necessary for the decision in *Hankin's Case* for the Court to determine the operation of s12 of Act No. 5; it might therefore be assumed that the expression "incorporated" was used by Their Honours parenthetically without intending to give a definitive interpretation of the section.

Similarly, in *Re Dymond* [1959] HCA 22; (1959) 101 CLR 11; [1959] ALR 772; 12 ATD 1; 33 ALJR 48 the Court was not concerned to determine the operation of s12 of Act No. 2 in connection with the provisions of Act No. 1; yet some of the judgments of the Court proceeded on the basis that several provisions of Act No. 1 were incorporated by reference by s12 of Act No. 2 of the latter statute. The question before the Court in that case was whether by reason of its provisions Act No. 2 was a law imposing a tax and thereby of no effect by virtue of s55 of the constitution. It was said by Fullagar J, with whose judgment Dixon CJ and Kitto and Windeyer JJ agreed at p18:

> "By reason of the provisions of s55 (of the constitution) it has been the invariable practice since the establishment of the Commonwealth, when Parliament has proposed to levy a tax on any subject of taxation, to pursue that object by means of two separate Acts, the one of which actually imposes the tax and fixes the rate of tax, and the other of which provides for the incidence, assessment, and collection, of the tax and for a variety of incidental matters. It is common to refer to the latter Act as the Assessment Act, and to the former as the Taxing Act. When Parliament decided in 1930 to levy a tax on sales of goods, this practice was followed, and, since it was proposed to levy the tax on nine different classes of sales, nine pairs of Acts, numbered consecutively, were passed. In each case the tax was imposed by a Taxing Act, which has been amended from time to time. So far as the Assessment Acts are concerned, the necessary general provisions were set out in Act No. 1, and most of these were not repeated but incorporated by reference in each of the other eight Acts."

At p28 Menzies J said:

> "*The Sales Tax Assessment Act (No. 2),* by s12, incorporates much of the *Sales Tax Assessment Act (No. 1)* and with that incorporation the Act (No. 2) deals with (i) the administration of the Act by the Commissioner of Taxation; (ii) the registration of taxpayers and the quotation of certificates; (iii) the liability to taxation; (iv) the making of returns; the collection and recovery of tax; objections and appeals; (vii) the penal provisions; (viii) taxation prosecutions; and (ix) miscellaneous provisions relating to the construction of the Act, the making of regulations, the prevention of imposition by pretending to have paid tax and so on."

Recognition of incorporation by reference made by Their Honours in *Hankin's Case* and *Dymond's Case*, however, was consistent with the settled rule of statutory interpretation stated by Lord Esher MR in *Re Wood's Estate; ex parte Commissioner Works and Buildings* [1886) 31 Ch D 607 at 615 in the following passage:

> "If a subsequent Act brings into itself by reference some of the clauses of the former Act, the legal effect of that Act, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855."

This was said by the Master of the Rolls in connection with s9 of an Act of 1855 by which it was provided that, for the purposes of the Act, enumerated sections of an Act of 1840 "shall be deemed to be herein repeated, with alterations necessary to make the some applicable to the

purposes of this Act". His Lordship stated, at p615, that the legal effect of the ninth section of the Act of 1835 was to incorporate into it certain sections of the Act of 1840, adding "just as if they had been written into it for the first time".

Although expressed in different language, the substance of the expressions in the ninth section of the Act of 1855 with which the Master of the Rolls was concerned, is indistinguishable from the expression "shall *mutatis mutandis* apply" contained in s12 of Act No. 2. Applying this principle of construction to the Sales Tax Assessment legislation, it follows that each Act must be read as though it contains the provisions of the sections and Parts of Act No. 1 described in s12 of Act No. 2 and that, more particularly, s23 of Act No. 1 is incorporated by reference into each of the Acts numbered 2-9. The validity of a notice given by the Commissioner requiring a taxpayer to attend for the purpose of enquiring into his liability and the liability of other named parties under the Sales Tax Assessment Acte must therefore be determined by reading the Acts numbered 2-9 as if s23 of Act No. 1 were repeated *totidem verbis* in each of those statutes.

The power given to the Commissioner by s23 of Act No. 1, and by s12 of each subsequent Act incorporating s23 of Act No. 1, is a separate and different one. Thus nine separate powers under nine separate Acts are conferred upon him. The liability of a person under each Act depends upon and varies according to the nature of the commercial transaction associated with goods and is determined by whether the transaction is one falling within the scope of a particular Sales Tax Assessment Act. The power of the Commissioner is to require by notice in writing any person to attend for the purpose of enquiring into the addressee's or any other named person's liability under any provision of the Act under which the notice is given. Therefore, s23 of Act No. 1, specifying liability under the provisions of that Act, does not enable the Commissioner to require a person to attend for the purpose of enquiring into his liability under Act No. 2 or under any other Act. Similarly, it would not be competent for the Commissioner to give notice to a taxpayer, purporting to be exercising powers under Act No. 5, requiring him to attend for an enquiry into his liability under Act No. 1. It follows that a notice requiring attendance of a person for the purpose of enquiring into his liability under the "Sales Tax Assessment Acts", and without identifying by number the particular Act, is not a notice given in conformity with any one of the nine Sales Tax Assessment Acts.

Mr Burnside contended that the Acts create separate but interlocking powers which enable the Commissioner to conduct a roving enquiry for the purpose of forming a decision concerning the liability of a person to pay tax under any one or more of the *Sales Tax Assessment Acts*. The scope of such an enquiry, whether it be properly described as a roving one or otherwise, however, in limited by the provisions of the Act by which it in authorised to be made, Thus, of a notice given to a bank by the Commissioner under s264(1)(b) of the *Income Tax Assessment Act* 1936 requiring the production of documents relating to a person's income or assessment, Gibbs J, as he then was, in *Federal Commissioner of Taxation v ANZ Banking Group Ltd; Smorgon v Federal Commissioner of Taxation* [1979] HCA 67; (1979) 143 CLR 499; 52 ALJR 73; 79 ATC 4039 at 4046 said:

> "The apparent intention of the Parliament is that the Commissioner is entitled to have produced any books and documents that relate to the taxpayer's income or assessment, even if he does not know what those books and documents may reveal. A document may be required to be produced only if it in fact relates to the income or assessment of the person in question, but if it is of that description, that is enough. In other words, the Commissioner is entitled to make what was described as a "roving inquiry" into the income or assessment of a particular taxpayer and for that purpose to have produced such documents as relate to that income or assessment."

At p4047 His Honour continued:

> "Where, however, the notice is addressed to one person, requiring him to produce the documents of another, the notice must show that those documents relate to the income or assessment of a particular person, who must be identified. The power is confined to giving a requirement of a particular kind – a requirement to produce documents relating to the income or assessment of some person – and a notice requiring the production of documents not so related is beyond the scope of the power."

Gibbs J referred with approval to *Snow v Keating* 78 ATC 4125 at 4127 wherein Burt CJ, referring to the power under the same section of the *Income Tax Assessment Act*, said:

> "The power which is given can only be exercised by "notice in writing" and to be within para(b) of sub-sec.(1) the Commissioner has been granted the power in that way to "require any person ... to attend and give evidence ... concerning his or any other person's income or assessment". Those words are words of limitation upon the power which is given and more particularly upon the means whereby the power which is given can be exercised. A notice requiring a person to appear and give evidence without identifying a subject matter within the sub-section with which the evidence to be given is to be concerned is not a notice within the sub-section; the notice given in the instant case which beyond stating that it is given 'for the purpose of enquiring into or ascertaining liability under any of the provisions of' the Act is completely at large is not such a notice."

In my opinion, the observations made by Their Honours in connection with the Commissioner's power under s264(1)(b) of the *Income Tax Assessment Act* are apposite to the exercise of similar powers under each of the *Sales Tax Assessment Acts*. A notice requiring a person to attend for the purpose of enquiring into his liability and the liability of others under "the Sales Tax Assessment Acts" suffers from the vice described by Burt CJ of being completely at large. The enquiry sought to be made by a notice must be limited to the matters which are the subject of the section under which the notice is given. If the Commissioner wishes to enquire of a person concerning his liability under all of the Sales Tax Acts, it is necessary for him to give a separate notice to that person under each of the Acts numbered 1-9.

The duty to comply with a notice under s23 of Act No. 1 is imposed upon a person by operation of s45(1)(b) of Act No. 1 by which it is provided:

> "Any person who—
> (b) without just cause shown by him refuses or neglects duly to attend end give evidence when required by the Commissioner or any officer duly authorised by him, or to answer truly and fully any questions put to him, or to produce any books or papers required of him by the Commissioner or any such officer;
>
> shall be guilty of an offence. Penalty: not less than four dollars nor more than two hundred dollars."

It follows that the duty to comply with the notice given under s23 depends upon its validity. For these reasons, in my opinion, the notice given to the taxpayer in this case was not one given in the proper exercise of the Commissioner's power and, therefore, it was invalid. It follows that the Commissioner failed to make out the three grounds of the order nisi.

At the time of hearing the informations against the taxpayer there were before the Magistrates' Court similar informations against Evertswood Pty Ltd and Evertborough Pty Ltd averring the same offences and matters as alleged against Evertmount Pty Ltd. The same considerations were applicable to all three informations. At the conclusion of the case against the taxpayer, the magistrate dismissed the informations against the other two defendants without making any order for costs. The Commissioner sought to review those dismissals on the same three grounds as are contained in the order nisi in the Evertmount came. It was agreed between counsel that the same submissions applied to all three respondent/defendants. Accordingly the orders nisi in the three cases will be discharged. After the magistrate dismissed the information, counsel for the taxpayer made application for an order for costs.

Counsel advanced as reason in support of the application that the information had been dismissed due to the invalidity of the notice, that the taxpayer had incurred expense defending the information for which there was no valid basis, and that there had been no default on its part. Opposing the application, it was submitted on behalf of the Commissioner that costs should be disallowed on the grounds that the objections taken on behalf of the taxpayer were technical, that the taxpayer had succeeded on very technical points, and that it appeared from what had been said by its counsel that the taxpayer did not intend to comply with the Act unless it were forced to do so. The magistrate, without expressing reasons, made no order for costs.

The taxpayer sought to review the magistrate's failure to make an order in its favour on the ground stated in these words:

> "That having decided that a valid notice under s23 of the said Act had not been given to the defendant, the stipendiary magistrate was wrong in refusing to order the informant to pay the defendant's costs."

By s97(b) of the *Magistrates (Summary Proceedings) Act* 1975 it is provided that where the Court dismisses an information, it may order the informant to pay the defendant's such costs as it thinks just and equitable. Thus, the section confers a discretion upon the Court to order an informant to pay costs to the defendant upon the dismissal of an information laid against him; *Puddy v Borg* [1973] VicRp 61; [1973] VR 626.There is a body of authority concerning matters which are proper for a magistrate to take into consideration upon the exercise of his discretion in those circumstances. However, the matters upon which the Commissioner relied in opposing the taxpayer's application, insofar as they asserted that the taxpayer had succeeded on a technical point, did not constitute a proper ground for refusing to make an order in favour of the successful party. The magistrate having found in effect that the notice was invalid, it followed that there was no basis for the offence averred in the information and that, therefore, it had to be dismissed. This was not a mere technicality but a defect of substance.

Nevertheless, the magistrate did not disclose what matters he took into consideration and for what reasons he refused to make the order sought. Tempting though it may be to speculate what those reasons were, I refrain from doing so. There may well have been other and proper reasons, not apparent on the material provided, for the magistrate refusing to make the order. Had he been asked upon the request of the taxpayer's counsel to state his reasons for declining to make the order sought, the magistrate would have been obliged to do so. In the absence of material concerning his reasons for failing to make an order in favour of the taxpayer, I am unable to conclude either that he failed to exercise his discretion or that he took into account irrelevant matters in the exercise of his discretion. It follows that the ground of the order nisi was not made out and it must be set aside.
