41/06; [2006] VSC 468

SUPREME COURT OF VICTORIA

MURDOCH v SMITH and ANOR

Cavanough J

27 June, 4 July, 8 December 2006 — (2006) 15 VR 175; (2006) 175 A Crim R 361

PRACTICE AND PROCEDURE – SUMMARY CRIMINAL PROCEEDING – CHARGES FILED WITH REGISTRAR OF MAGISTRATES' COURT – SUMMONS ISSUED AND SERVED REQUIRING DEFENDANT TO ATTEND AT PROPER VENUE AT MELBOURNE ON MENTION DATE – DEFENDANT ATTENDED AT MELBOURNE ON THE MENTION DATE BUT MATTER NOT LISTED – ON SAME DAY REGISTRAR AT BROADMEADOWS MAGISTRATES' COURT PURPORTED TO ADJOURN PROCEEDING – WHETHER ADJOURNMENT EFFECTIVE – WHETHER SUMMONS LAPSED – WHETHER MAGISTRATES' COURT RETAINED POWER TO HEAR AND DETERMINE CHARGES: *MAGISTRATES' COURT ACT* 1989, SS3, 26, 28, 33, 34, 41.

1. The primary purpose of a summons to appear before a court of summary jurisdiction to answer an information is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. This purpose will be fulfilled if the defendant receives a true copy of the summons at least 14 days prior to the first day on which the matter is listed before the Magistrates' Court.

***Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635; (1991) 98 ALR 353; 65 ALJR 231; [1991] Aust Torts Reports 81-084, applied.**

2. Where a summons required the defendant to appear at the Melbourne Magistrates' Court but was not listed on the return date, and was adjourned on the same day by a Registrar of the Broadmeadows Magistrates' Court, the proceeding did not lapse. It survived and was capable of reactivation by administrative as distinct from judicial intervention. The order of the Registrar at Broadmeadows was an administrative act postponing or refixing the mention date and as such was within the Registrar's power. The summons having been duly issued and served remained on foot until the charges had been determined. The circumstances of the present case did not infringe the literal terms of the statutory provisions nor any implied mandatory requirement of the statutory scheme,

***R v McGowan* [1984] VicRp 78; [1984] VR 1000, applied.**

CAVANOUGH J:

Overview

1. This is an application under Order 56 of the *Rules of the Supreme Court* for judicial review of two decisions made by the Magistrates' Court of Victoria in the course of a pending road traffic prosecution against the plaintiff. Certain ancillary declarations were also sought in the originating motion.

2. In the hearing before me, counsel agreed that the fate of the whole case turned on a single question. The question may be stated as follows:

> If a defendant duly served with a summons to answer a charge for a summary offence attends on the date and at the venue of the Magistrates' Court specified in the summons, but the proceeding is neither listed nor called on there and instead, on the same day and without notice to the defendant, a registrar at a different venue of the Court purports to adjourn the proceeding, is the Court thereafter precluded from proceeding to hear and determine the charge?

3. The essential facts of this case are as indicated in the question. The plaintiff submits that in the circumstances the summons lapsed, and that therefore the proceeding could no longer go ahead. The first defendant (who is the informant in the prosecution) denies this. She says that the summons remained on foot and that the proceeding could continue.

4. This matter is complicated by the fact that, after the critical events, the plaintiff was arrested and bailed pursuant to a warrant of arrest issued by a particular Magistrate on the basis of non-appearance by the plaintiff at the adjourned hearing (of which the plaintiff claims

to have had no notice). His bail was extended on several later occasions. Many months after the arrest, the plaintiff applied to the issuing Magistrate for the cancellation or setting aside of the warrant and the associated bail undertakings. The Magistrate refused, holding that he had no power to entertain the application. That decision was the first of the two decisions the subject of challenge in the originating motion. The second decision, made later again, was that of another Magistrate to the effect that the prosecution could continue despite the events in question. The plaintiff's counsel acknowledged[1] before me that the challenge to the first decision, including the indirect challenge to the warrant, the arrest and the bail undertakings, would become a matter of "triviality" if I concluded that the Magistrate who made the second decision was right to decide, as she did, that the summons had not lapsed.

5. For reasons I will explain, I have arrived at that conclusion. In my view the summons did not lapse and it remains on foot.

6. Accordingly, given the plaintiff's concession, it becomes unnecessary for me to determine whether the warrant, the arrest and the bail undertakings were valid, or whether the Magistrate who made the first decision had power to entertain the plaintiff's application. Further, it becomes unnecessary for me to consider whether relief should be refused in any event for certain discretionary reasons which were relied on by counsel for the first defendant, or for any other discretionary reasons. However, at the end of these reasons I will make some observations about some of those matters.

7. I should explain at this stage that the significance for the parties of the abovementioned question arises from s26(4) of the *Magistrates' Court Act* 1989 ("the Act") which provides[2]:

> "(4) A proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed, except where otherwise provided by or under any other Act."

In this regard, the survival or otherwise of the summons is crucial because, subject to one possibility referred to below[3], counsel for both parties contended that a summons could only be issued once in a given proceeding. They disagreed with the suggestion to the contrary by the learned authors of *Victorian Courts*.[4]

8. The plaintiff was in a position to raise his objection to the summons about four months before the period referred to in s26(4) of the Act expired, but he chose not to do so until several months *after* it expired. Further, the events which he claims caused the summons to lapse came to his knowledge at least eight months or so before he first raised them and about ten months or so before he commenced this proceeding.

9. Had my conclusion on the critical point been different, a real question may have arisen as to whether the plaintiff was disentitled to relief for reasons of delay and/or acquiescence.[5] A further question may well have arisen as to whether the proceeding was, in substance, outside the 60 day time limit imposed by Rule 56.02 of the Supreme Court Rules notwithstanding that, in form, it sought orders in the nature of the prerogative writs in respect of, only, the two abovementioned relatively recent decisions of the Magistrates; and notwithstanding that, otherwise, it sought only declaratory relief.[6]

A criminal proceeding commences

10. On 9 September 2004 a form entitled "Charge and Summons"[7] was filed with a registrar of the Magistrates' Court of Victoria at Moonee Ponds. The document recited that Senior Constable Hayley Smith, as informant, charged Owen James Murdoch, as defendant, with three summary offences under the *Road Safety Act* 1986, namely driving while his licence was suspended, driving carelessly and failing to notify Roads Corporation of a change of address. The driving had allegedly occurred on 14 April 2004.

11. As completed and signed by the informant and the registrar respectively, the form also recited that the case would be heard at the Magistrates Court of Victoria at Melbourne at 9.30 am on 22 October 2004. Copies were made as required. The "process" comprising the charge-sheet and the corresponding summons was thus "issued" by the registrar. [8] A criminal proceeding had been commenced.[9]

The accused is served and steps are taken in the Magistrates' Court

12. Senior Constable Smith served Mr Murdoch personally with a copy of the charge and summons (as issued) on 15 September 2004 at his home.

13. On 22 October 2004, the day specified in the charge and summons, Mr Murdoch went to the Magistrates' Court at Melbourne. He told a coordinator that he intended to plead not guilty to the charges. The coordinator told him that there were no charges relating to him listed at the Melbourne Magistrates' Court that day. He telephoned a lawyer, Mr Sean Hardy, who later appeared on his behalf as counsel in this matter. Mr Hardy checked the court list for Melbourne for that day online and confirmed that the matter was not listed. He advised Mr Murdoch to make a note of his attendance and return to work.

14. On the same day, at the Broadmeadows venue of the Magistrates' Court of Victoria, one BJ Luker, a registrar of the Court, purported to adjourn the hearing of the charges against Mr Murdoch until 10 am on 19 November 2004 at Broadmeadows Magistrates' Court. The evidence does not disclose how the matter came to be listed at Broadmeadows on 22 October 2004[10], or whether anyone on behalf of the prosecution had any involvement there (or anywhere else) on that day. There is no evidence that either Mr Murdoch or his legal representatives knew anything about the happenings at Broadmeadows, although the court register at Broadmeadows refers to a plea of not guilty on each charge.

15. The matter was next dealt with on the adjourned date, 19 November 2004. However, for reasons not explained in the evidence, it was dealt with at Melbourne, not Broadmeadows. Again, there is no evidence that either Mr Murdoch or his legal representatives were notified of the listing of the matter for 19 November 2004. A Magistrate, Mr D Reynolds, ordered, in relation to each charge, that a warrant be issued for the arrest of Mr Murdoch "who fails to appear on summons". Further orders were made by Mr Reynolds adjourning each matter to a date to be fixed at Melbourne Magistrates' Court. The warrant which was issued that day stated as reasons for the warrant: "Defendant fails to appear on summons".[11]

16. Apparently, Mr Murdoch heard no more until 28 December 2004. On that day Senior Constable Smith went to Mr Murdoch's home and executed the warrant to arrest him. She immediately released him on bail upon his undertaking to appear at the Magistrates' Court at Melbourne on 4 February 2005.

17. Mr Murdoch himself appeared accordingly on 4 February 2005. The evidence is unclear as to whether he was also legally represented on that day. There is no evidence that he appeared under protest. In due course the charges were listed for a contested hearing on 14 June 2005. On that day, Mr Murdoch's solicitor appeared. Again there is no evidence that the solicitor appeared under protest. The prosecution was not ready to proceed. The matter was adjourned to 31 August 2005 for a contested hearing.

18. On 17 August 2005 Senior Constable Smith left a notice at Mr Murdoch's home confirming that the matter was next listed for 31 August 2005.

19. On 25 August 2005, Mr Murdoch applied by his counsel, Mr Hardy, to the Magistrates' Court at Melbourne for orders, among others, declaring that the warrant for arrest of 19 November 2004 was null and void *ab initio*, that his arrest was unlawful and that he was not bound by any undertaking as to bail. I gather that Mr Murdoch did not attend in person. The application was listed before Magistrate Hannan but she decided to adjourn it so that it could be heard by Magistrate Reynolds who had ordered that the warrant be issued.

20. On 30 August 2005 the application came before Mr Reynolds. Mr Hardy appeared for Mr Murdoch, who did not attend. Sergeant Coulson appeared on behalf of Senior Constable Smith. [12] Mr Hardy advanced arguments all or most of which were linked to the complaint about what had occurred on 22 October 2004. Mr Reynolds dismissed the application on the basis that he had no jurisdiction to grant any of the relief sought.

21. On the next day, 31 August 2005, the contested hearing came on before Magistrate Spanos. Again, Mr Hardy and Sergeant Coulson appeared.[13] Mr Hardy announced that he appeared under

protest. Mr Murdoch was not present. Mr Hardy submitted that the Court should not proceed to hear and determine the charges because Mr Murdoch was not properly required to be before the Court. He submitted that the only summons that had been served on Mr Murdoch had become spent on 22 October 2004 because it had not been properly dealt with on that day. He further submitted that, for related reasons, the warrant of 19 November 2004 had not been validly issued.

22. Magistrate Spanos wished to take time to consider the arguments and authorities which had been put to her, with a view to delivering her decision on the preliminary point on 8 September 2005. She made an order which is recorded in the register as follows:

> "Remanded to MELBOURNE MAGISTRATES' COURT on 8/9/2005
> at 10 am
> Defendant's undertaking of bail is extended."

23. On 8 September 2005 Magistrate Spanos delivered a written "Ruling as to Jurisdiction" which included reasons. After discussing the cases cited to her (see further below) she concluded that the summons had not lapsed. She also observed that, "arguably", there was an *alternative* basis for finding jurisdiction, in that a warrant for Mr Murdoch's arrest had been issued under s41 of the Act, the warrant had been executed and Mr Murdoch was on bail. She ruled that the Court had jurisdiction to proceed. As recorded in the court register, the actual order she made on that day was

> "Remanded to MELBOURNE MAGISTRATES' COURT on 22/11/05 10 am.
> Defendant's undertaking of bail is extended in his absence."

The proceeding in this Court

24. Mr Murdoch commenced the present proceeding by originating motion under Order 56 of the *Supreme Court Rules* on 25 October 2005. The statement of relief or remedy sought is as follows:

"The plaintiff seeks orders as follows:

1. That the requirements of Rules 5.03(1) and 8.02 be dispensed with.
2. That the plaintiff have leave to commence this proceeding by way of originating motion in Form 5C of the said rules.
3. An order quashing the orders made by the second defendant on 31 August 2005 and 8 September 2005 in proceeding S02229694 ('**the Proceedings**').
4. An order prohibiting the Second Defendant from hearing and determining the Proceedings otherwise than in accordance with the orders of this Honourable Court.
5. An order that the charges laid against the Plaintiff in the Proceedings be dismissed, or in the alternative an order in the nature of mandamus directing the Second Defendant to dismiss the charges laid against the Plaintiff in the Proceedings.
6. A declaration that on 22 October 2004 the Plaintiff appeared at Melbourne Magistrates Court in answer to a summons to answer the charges laid against him in the Proceedings.
7. A declaration that the order of the Magistrates Court at Broadmeadows made on 22 October 2004 by Registrar Luker in which the Proceedings were adjourned to be heard at an *ex parte* hearing on 19 November 2004 is *ultra vires* and void.
8. A declaration that the order for the issue of a warrant to arrest the Plaintiff made by the second defendant on 19 November 2004 is *ultra vires* and void.
9. A declaration that the arrest of the Plaintiff on or about 28 December 2004 by the first defendant was unlawful.
10. A declaration that on 30 August 2005 the second defendant constituted by Mr D. Reynolds fell into error in holding that it had no jurisdiction to grant any of the relief sought by the Plaintiff that day.
11. A declaration that on 8 September 2005 the second defendant constituted by Magistrate Spanos fell into error in holding that the arrest of the Plaintiff together with the 'Notice to Defendant' given to the Plaintiff in August 2005, which informed the plaintiff that the Proceedings were listed for hearing on 31 August 2005, was capable of compelling the attendance of the Plaintiff in accordance with the *Magistrates' Court Act* 1989.
12. A declaration that the order made by the second defendant on 8 September 2005 in which Magistrate Spanos extended the Plaintiff's undertaking of bail is *ultra vires* and void.
13. A declaration that the plaintiff is not bound by any undertaking given in respect of his bail or his arrest.
14. The defendant pay the plaintiff's costs of the proceeding before this court and before the Magistrates Court of Victoria.
15. Such further or other orders as this Honourable Court deems fit."

25. The statement of grounds for the claimed relief consists mainly of a chronological summary of most of the facts referred to above. However it includes the following paragraphs which capture the essence of the case argued before me:

> "(f) The Plaintiff having complied with the summons that was served on him, it became spent on 22 October 2004 when the Proceedings were not adjourned or dealt with in accordance with the *Magistrates' Court Act* 1989. ...
> (h) There was no legal basis for the issue of a warrant to arrest the Plaintiff purportedly pursuant to s41(2)(a) [of the *Magistrates' Court Act* 1989] or at all."

26. On 21 November 2005 Master Evans made an order by consent staying the further prosecution of the Magistrates' Court proceedings until the hearing and determination of this proceeding.

The plaintiff's arguments

27. The plaintiff's arguments may be summarised as follows.

28. The Magistrates' Court does not have power to deal with a charge unless the defendant has been properly served with a summons or brought to court under a validly issued warrant. Nothing in the Act permits the court to proceed without the defendant being properly served or arrested. On 22 October 2004 the matter was called on at Broadmeadows. The plaintiff had not been summoned to appear at Broadmeadows. The proceeding could not lawfully continue in his absence.

29. Nothing in s41 of the Act authorised the Magistrates' Court to proceed with the matter on 22 October 2004. Section 41(2) provides that if a defendant does not appear in answer to a summons to answer to a charge for a summary offence, the Court may, among other things, adjourn the proceeding on any terms it thinks fit. However Mr Murdoch did not fail to appear on 22 October 2004. He duly attended at the Melbourne Magistrates' Court on that day in answer to the summons.

30. In any event, Registrar Luker had no power to adjourn the proceedings in the circumstances prevailing on 22 October 2004. The powers of registrars are limited. They do not extend to the adjourning of criminal proceedings except in the circumstances referred to in clause 3 of Schedule 2 of the Act, which provides:

> "3. The *appropriate* registrar may, *on the application of the defendant* –
> (a) if the defendant is not on bail or in custody, adjourn the proceeding *prior to the mention date* to a later date; and
> (b) *if the defendant is on bail*, adjourn the proceeding on the mention date to a later date and extend bail but not vary the conditions of bail or revoke bail." (Emphasis added)

Registrar Luker was not the "appropriate registrar" (as defined); the plaintiff had made no application for an adjournment; the order was made *on* not *prior to*, the mention date; and the plaintiff was *not* on bail. For each of these reasons, clause 3 of Schedule 2 was not applicable.

31. Any other power of the Court to adjourn proceedings, such as the general power conferred by s128, was not exercisable by the Court constituted by a registrar. Although s4(2) of the Act provides that the Court shall consist of the Magistrates, the judicial registrars and the registrars, this must be read subject to s4(3) of the Act which provides:

> "(3) The Court shall be constituted by a Magistrate except in the case of any proceeding for which provision is made by any Act or the Rules for the Court to be constituted by a registrar."

32. The summons served on the plaintiff requiring him to attend the Melbourne Magistrates' Court was spent on 22 October 2004. The summons was not duly adjourned and no order was made on it. Accordingly the summons lapsed and ceased to have any further effect. There is an analogy with a summons for oral examination of a debtor which becomes spent if neither party attends court.

33. Further or alternatively, the Magistrates' Court must not proceed with a case until it is satisfied that the mandatory requirements as to service of a summons as contained in ss33 and

34 of the Act have been complied with.

34. Section 33(1) provides:

> "(1) A summons to answer a charge must direct the defendant to attend at the proper venue on a certain date and at a certain time to answer the charge."

This provision was not complied with because the summons did not direct Mr Murdoch to attend at Broadmeadows.

35. Section 34 requires, so far as relevant, that every summons to answer a charge must be served at least 14 days before the "mention date".[14] This is a mandatory requirement: *Platz v Barmby*[15]; *Smith v Chalmers*[16]; *Nitz v Evans*[17]. Once again, this requirement was not complied with because the summons did not direct Mr Murdoch to attend at Broadmeadows (where the matter was "mentioned" on 22 October 2004).

36. Although the plaintiff had knowledge of the proceedings in the Magistrates' Court as from the date of his arrest, that knowledge is no cure for defective service, or lack of service, of a summons: *Sinclair v Magistrates' Court at Ringwood*[18]. The plaintiff's counsel appeared under protest and did not waive the requirements in question: *Nitz v Evans*[19].

37. Any conviction of the plaintiff under s41(2) of the Act on 19 November 2004 would have been wrongful because he had had no notice of the hearing, had not been properly summoned and had been denied natural justice. If a conviction would have been wrongful then the issuing of the warrant must have been invalid. Mr Murdoch had not failed to appear in answer to the summons and the proceeding had unlawfully been adjourned and transferred to Melbourne from Broadmeadows.

38. The warrant being invalid, the arrest of the plaintiff was unlawful and so were the imposition and the subsequent extensions of his bail undertaking.

39. Magistrate Reynolds was in error in concluding that he did not have power to declare the warrant to have been unlawfully issued, to declare that the arrest of the plaintiff had been unlawful and to discharge the plaintiff's bail. The Magistrates' Court has power to correct its own errors: see *Bazeley v O'Halloran*[20].

40. Magistrate Spanos was wrong to distinguish *Nitz v Evans, Platz v Barmby, Smith v Chalmers* and *Sinclair v Magistrates' Court at Ringwood* and to regard *Sammassimo v Franich*[21] and *Gahan v Frahm*[22] as providing the proper analogy, as she did. She was also wrong in observing that there was an arguable alternative basis for "finding jurisdiction", namely the existence of the warrant which Magistrate Reynolds had issued and which he had not set aside. Further, she was wrong in holding that the Notice to Defendant of 17 August 2005 "served the purposes of procedural fairness and cured any prior procedural defects".

The first defendant's arguments

41. Senior Constable Smith, for whom Ms Judd of counsel appears, opposes the relief sought, relying on both substantive and discretionary matters. Her responses to the plaintiff's arguments may be summarised as follows.

42. The summons must be distinguished from the charges themselves. Under s26(1) of the Act, the filing of a charge, without more, commences a criminal proceeding. The issue and service of a summons is simply *a* means of compelling the attendance of a defendant at court (s28 of the Act), although the summons does also serve the purpose of putting a defendant on notice that there has been a charge filed against the defendant (there being no separate requirement to serve the charge itself).

43. In the present case –

> (a) the criminal proceeding was properly commenced by the filing of a charge;
> (b) a summons to answer the charge was properly issued by a registrar (s28 of the Act);
> (c) a summons to answer the charge was served on Mr Murdoch in accordance with s34 of the Act.

44. The summons did not become "spent". Mr Murdoch has never been excused or discharged from further attending court nor has the charge and summons been finally heard and determined. Charges are frequently adjourned for hearing on a later date. The summons is to answer to the charge, not simply to turn up on the first mention date.

45. It is true that neither clause 3 of Schedule 2 of the Act nor s41 of the Act was a source of power for a registrar to make an order of adjournment in circumstances of the kind prevailing on 22 October 2004. However, the Court's powers of adjournment of a criminal proceeding are not confined to those provisions. They include the general power in s128. They also include the implied power of the Court to regulate and control its own proceedings: *Grassby v R*[23], *Connelly v DPP*[24], *Williams v Spautz*.[25]

46. The adjournment on 22 October 2004 should be characterised as an *administrative* adjournment, rather than a judicial adjournment. On that basis it was within the power of Registrar Luker. Registrars are employed to "assist in the administration of the Court": s17(1). It is not necessary that every kind of administrative step be specifically provided for in the Act. This adjournment occurred as a matter of practicality. It did not affect the rights of the plaintiff. The Court at Broadmeadows did not proceed to deal with Mr Murdoch on the charge.

47. The Magistrates' Court of Victoria is a single, State-wide entity.[26] It is the Court as such that adjourns a charge and summons or makes any other relevant order. Clause 1 of Schedule 2 of the Act carries into effect a clear legislative policy that administrative errors concerning the proper venue of the Court do not affect the validity of a criminal proceeding (including a summons).

48. Even if the order made on 22 October 2004 adjourning the matter until 17 November 2004 was not valid, neither the summons nor the charges lapsed. They both remained on foot. They could still be dealt with on proper notice. In effect, there was the equivalent of an adjournment *sine die*. There is nothing analogous to a summons for oral examination. The Act as a whole, and sections 41 and 61 in particular, proceed on the assumption that a summons duly issued and served remains on foot until the charges have been determined.

49. None of the cases relied on by the plaintiff is in point. They deal with defects in the summons itself or in the service of the summons. Here the summons was duly issued and duly served. Ms Spanos was right to hold that *Sammassimo v Franich*[27] and *Gahan v Frahm*[28] supply the proper analogy.

50. Reference can be made to the common law principle that "however a person has been brought before a court, that person is liable to answer any charge or information then and there brought against him": *Onus v Sealey*[29]; *R v Hughes*[30]; *Kingstone Tyre Agency Pty Ltd v Blackmore*[31].

51. The plaintiff's reliance on ss33 and 34 is misplaced because he cannot point to any actual non-compliance with either of those sections.

52. Alternatively, even if, contrary to the above, the summons did lapse, the charges themselves still remained on foot, and a fresh summons could be issued on those charges, even now. It is true that the scheme of the Act, especially ss28, 33, 34, 41 and 61 and the definition of "mention date" in s3, tends to indicate that only one summons can be issued in relation to a particular charge. However, if a summons which has been duly issued and served can lapse and does lapse, then s40 of the *Interpretation of Legislation Act* 1984 would operate in combination with s28 of the Act to authorise the issue of a fresh summons and the fixing of a fresh "mention date".

53. Accordingly, there is no basis for an order precluding the Magistrates' Court from hearing and determining the proceeding against the plaintiff.

54. Ms Judd acknowledges that if, contrary to her submissions, the summons had lapsed on 22 October 2004, then it would be difficult, if not impossible, to argue that the warrant of 19 November 2004 was validly issued. Therefore, insofar as Magistrate Spanos may have held (in the alternative) that the proceeding before her gained *fresh and independent* life from the issuing of the warrant, Ms Judd would not support her reasoning.

55. On the other hand, if the summons did not lapse on 22 October 2004, then not only did the proceeding as a whole remain on foot but also the warrant of arrest was validly issued on 19 November 2004. The fact is that on 19 November 2004, when the matter was called on at the Magistrates' Court, Mr Murdoch did not appear. Magistrate Reynolds appropriately turned to s41(2) as the relevant source of power on that day. He chose to issue a warrant under s41(2)(a) rather than proceeding to hear and determine the charge in Mr Murdoch's absence or otherwise adjourning the criminal proceeding on terms. As stated by Magistrate Spanos, it can only be assumed "that the warrant was issued on the basis of [Mr Murdoch's] failure to answer the summons, and/or concerns about proceeding *ex parte*".

56. It follows that the later arrest was valid and so was Mr Murdoch's bail undertaking and its extensions.

57. In any event, the actions of the arresting officer are protected because she was acting in accordance with a warrant that appeared to be good on its face: *Corbett v The King*[32].

58. There is no point in considering whether Magistrate Reynolds had power to declare the warrant invalid on 30 August 2005, because the warrant was not invalid.

59. For the reasons already advanced, Magistrate Spanos was right to rule that the proceeding should continue.

60. To the extent that the plaintiff requires an extension of the time limited by Order 56 of the Rules for seeking judicial review of any of the matters complained of, any such extension is opposed.

61. Relief under Order 56 of the *Supreme Court Rules* is discretionary.

62. The real purpose of this proceeding is to put a stop to the prosecution. There is no point in considering the validity of the warrant if, for other reasons, the Court decides that the proceeding can continue to be heard and determined in the Magistrates' Court. Mr Murdoch will receive due notice of the resumption of the Magistrates' Court proceeding. Relief should be refused if there would be no utility in granting it: *Victoria Legal Aid v County Court of Victoria*[33].

63. Further, and in any event, no relief at all should be granted because the plaintiff's application involves fragmentation of the criminal process: *Rozenes v Beljajev*[34]; *Atlas v DPP*[35].

Consideration

64. The plaintiff's arguments should not be accepted.

65. It is no small thing to convince a court that a criminal proceeding should be permanently stopped before being heard and determined. In *Jago v District Court (NSW)*[36], in discussing the power of courts to stay proceedings for abuse of process (in particular, on account of delay), Gaudron J said:

> "The nature of the power to grant a permanent stay of proceedings itself reveals an important principle which confines its exercise. The power is, in essence, a power to refuse to exercise jurisdiction. It is thus to be exercised in the light of the principle that the conferral of jurisdiction imports a prima facie right in the person invoking that jurisdiction to have it exercised. In this context it is relevant to note the remarks of Deane J in *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (98), that the 'prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is 'amenable to the jurisdiction' of the courts and other public tribunals'. Thus, the power is one that is readily seen as exercisable (whether in civil or criminal proceedings) only in exceptional cases or, as was said by this Court in refusing special leave to appeal in *Attorney-General (N.S.W.) v Watson* (99), 'sparingly, and with the utmost caution'. See, generally, *Cocker v Tempest* (1); *Lawrance v Norreys* (2); *Humphrys* (3); and *Reg. v Derby Crown Court; Ex parte Brooks* (4)."

66. Mr Hardy points to four cases[37], including *Sinclair v Magistrates' Court at Ringwood*, in which this Court has held that the provisions of ss33 and 34 of the Act impose mandatory

requirements, non-compliance with which may result in orders prohibiting the continuation of proceedings or quashing convictions. On the other hand, in the two cases cited by Ms Judd, *Sammassimo v Franich* and *Gahan v Frahm*, non-compliance with aspects of those provisions was held not to be fatal to the relevant prosecutions. It is true that in *Brereton v Sinclair*[38], the Court of Appeal held that the decision in *Sinclair* was not attended with sufficient doubt to warrant the grant of leave to appeal. However, as the Court of Appeal itself noted in that case, this does not mean that the Court of Appeal affirmed the decision, nor that the decision acquired the precedential status of that Court. I note that neither *Sammassimo v Franich* nor *Gahan v Frahm* was cited by the Court of Appeal in *Brereton v Sinclair*. In *Guss v The Magistrates' Court at Victoria*[39], Osborn J held, *obiter*, that "short service would in my view result in no more than an irregularity for the reasons stated by O'Bryan J in the case of *Sammassimo v Franich*". Compare the recent decision of the New South Wales Court of Appeal in *Di Natale v Kelly*[40].

67. However that may be, Mr Hardy argued only faintly that what happened in the present case amounted to a direct breach of, or non-compliance with, a provision of s33 or s34. He referred to the disconformity between what was envisaged in the summons and what occurred in fact on 22 October 2004, in that the summons did not direct his client to attend at Broadmeadows where the case was actually dealt with on 22 October 2004.

68. I do not regard that as showing a breach of the literal terms of s33 or s34.

69. The plaintiff had been duly served with a summons in proper form. The summons complied with s33(1) in that it directed Mr Murdoch to attend at a place which was "the proper venue" (Melbourne), on "a certain date" (22 October 2004) and at "a certain time" (9.30 am), to answer the relevant charges.

70. The service of the summons complied with s34(1)(a)(ii) in that it occurred on a date (15 September 2004) which was more than 14 days before "the mention date". The "mention date", for the purposes of s34(1)(a)(ii), was 22 October 2004. The expression "mention date" is defined in s3 as follows:

> "**mention date**, in relation to a criminal proceeding, means the first date on which the proceeding is *listed* before the Court." (My emphasis)

71. The proceeding was "listed" before the Court on 22 October 2004, in two senses. First, in issuing the summons the registrar at Moonee Ponds "listed" the matter for 22 October 2004 (at Melbourne) by specifying that date in the summons. This is the sense in which the expression "mention date" is used throughout s 33, and it would be surprising if the expression had a different meaning in s34.[41] Second, in any event, the matter was in fact "listed" before the Court (at Broadmeadows) on 22 October 2004, at least in the sense that it came before Registrar Luker and was made the subject of a purported order of adjournment at that venue on that day. It may also have been included in a published "list" of matters for hearing at Broadmeadows for that day, but the evidence does not make this clear.

72. The real question is whether the Court should read into the statutory scheme relating to the "mention system" a mandatory requirement that once a summons has been served the proceeding must actually be called on before a Magistrate at the time and place specified in the summons as served, unless the mention date be (earlier or on that day) adjourned pursuant to clause 3 of Schedule 2.

73. Although the scheme may well envisage that, *in the ordinary course*, matters would at least be mentioned on the day and at the place specified in the summons, I do not interpret those provisions as *requiring* the same, much less as intending that the summons would cease to have effect if this did not occur, such that the proceeding could no longer be heard and determined.

74. The Court should not be astute to read words into the Act. In 1910, in *Thompson v Gould & Co*[42], Lord Mersey said:

> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."

75. In *DPP v Diamond*[43], Kaye J rejected an attempt to read into the Act a requirement that the charge and summons must indicate the designation of the issuing officer who signed the charge and summons. As his Honour said[44]:

> "The existence or otherwise of any such requirement must be derived from the terms of the relevant legislation: see *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 43 to 44 (per Windeyer J with whom Dixon CJ and Owen J agreed)."

76. The Courts have identified three minimum conditions to be satisfied before consideration may be given to reading words into legislation (or finding implications in legislation):

> "First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect."[45]

77. In my opinion, none of these conditions is satisfied in the present case. Quite the contrary. It is not essential to the achievement of the purposes of the "mention system" (or of the provisions relating to summonses in particular) that there be no postponement of the mention date after service except in the circumstances referred to in clause 3 of Schedule 2. There is a discernible statutory policy that there be a *minimum* of 14 days between the service of the summons and the mention date. (And, as discussed above, it has been held in several cases that that requirement is mandatory, though in other cases short service has been treated as a mere irregularity.) However, to permit a *postponement* of the mention date after service obviously does not infringe the policy of giving a *minimum* of 14 days' notice.

78. Further, as the name suggests, the legislation envisages that on the "mention date" there will be no more than a "mention" of the matter, unless the defendant wishes to plead guilty. Accordingly, counsel told me that informants usually do not attend on the mention date. A defendant on summons is under no obligation to attend in person and may appear by a legal representative only.[46] I gather that witnesses would usually not attend. So, if a mention hearing date is overlooked or otherwise goes off, it is unlikely that the parties or any witnesses will be significantly inconvenienced. A defendant may be awarded costs as compensation for any expense thrown away: see s131 of the Act.

79. Further, a very wide power of adjournment is conferred on the Court by s128[47], and nothing in the provisions relating to summonses or the mention system expressly restricts the exercise of that power. The power is exercisable not only on the application of *any* party to a proceeding but also of the court's own motion. In addition, in *Lee v Saint*[48], Herring CJ proceeded on the basis that every court has a wide *inherent* power to adjourn proceedings before it, including power to adjourn cases *sine die* where appropriate.

80. Further again, clause 4 of Schedule 2 provides that if *the informant* does not appear at the (final) hearing date, the court may either dismiss the charge or "adjourn the proceeding on any terms that it thinks fit". This discretion to adjourn the *final* hearing is apparently unfettered. In those circumstances, it would be incongruous to find an implication that the Magistrates' Court was in effect obliged to dismiss the proceeding if (due to administrative error or for any other reason) neither party, or only the defendant, attended at the time and place specified in the summons for the initial "mention" of the matter.[49]

81. If, then, a Magistrate sitting at the time and place specified in the summons may validly adjourn a mention hearing where neither party (or only the defendant) attends, it would seem to follow that a Magistrate sitting elsewhere on that day would also have the power to adjourn the matter were it to come before him or her and were no party (or only the defendant) to appear. Even if this amounted to an irregularity, it would not nullify the proceeding, because clause 1(3) of Schedule 2 provides:

> "A proceeding is not void because it was returnable or heard and determined at a venue of the Court other than the proper venue."

82. And even if, in such circumstances, the Magistrate decided to strike out the proceeding rather than adjourn it, the proceeding would remain in existence and capable of reinstatement to the list of active cases: *R v McGowan*[50], *DPP v Sabransky*[51].

83. From there, it is a very small step to conclude that Parliament did not intend that a proceeding would be void if it was not dealt with at all by anyone, anywhere, on the mention date.

84. If that is right, as I think it is, then, in the present case, the proceedings (including the summons) survived after 22 October 2004 even apart from the purported "order" of Registrar Luker made on that day.

85. At worst, the proceeding went into abeyance or temporary suspension when the matter was not called on at Melbourne on 22 October 2004. But it survived, awaiting reactivation by appropriate means. It did not lapse.

86. Further, I think that the proceeding was capable of reactivation by administrative, as distinct from judicial, intervention. The case simply needed to be re-listed. Subject to any contrary statutory indication, the listing of cases and the general arrangement of the business of a court can be characterised as administrative functions. The registrars of the Magistrates' Court of Victoria are employed to, among other things, "assist in the administration of the Court": s17(1) of the Act. So the "order" of Registrar Luker made on 22 October 2004 at Broadmeadows can be characterised as being, in effect, an administrative act postponing or refixing the mention date. As such, it was within the Registrar's power. Of course, the principles of natural justice would require that Mr Murdoch be given fair notice and a fair opportunity to be heard before the Court proceeded to hear and determine the charges. However, I agree with Ms Judd's submission that the Act as a whole, and ss41 and 61 in particular, proceed on the assumption that a summons duly issued and served remains on foot until the charges have been determined.

87. Mr Hardy did not cite any legal principles or any cases that would gainsay the above analysis. He did not refer to the maxim of statutory interpretation *expressio unius est exclusio alterius*, or the maxim *expressum facit cessare tacitum* or the maxim *generalia specialibus non derogant*. Nevertheless I have considered whether they might apply in his client's favour. In the end I think not, mainly because, on consideration of the statutory scheme as a whole, I do not conclude that the provisions for adjourning mention dates in clause 3 of Schedule 2 are meant to be exhaustive or exclusive, at least in relation to the situation *after* service of the summons.[52] Indeed I think that the above analysis actually gains support from some further cases to which I will now refer, albeit that they are mostly cases which relate to civil litigation.

88. In *Portelli v Seltsam Ltd*[53], the Full Court held that the Prothonotary of the Supreme Court had power to extend the return date of a summons which had been validly issued by him pursuant to s23A of the *Limitation of Actions Act* 1958 and which had not been served. The Full Court further held that, in any event, the act of the Prothonotary in extending the return date of a summons, even if beyond power, could not render a valid summons a nullity. Once a judge had extended the return date (even after that date had passed), and the summons had been duly served, then it could form a sound basis for the making of the order sought. On the other hand, I acknowledge that *Portelli* does not deal with the extension of return dates *after* service.

89. In *Griffiths v Boral Resources (Qld) Pty Ltd*[54], a very recent decision of the Full Court of the Federal Court on appeal from the Federal Magistrates' Court, it was determined that the "slip rule" had not authorised the making by the Federal Magistrates' Court of an order extending the life of a creditor's petition under the *Bankruptcy Act* 1966 (Cth) after the expiry of the statutory time limit for doing so. The "slip rule" was held to be applicable only where the Court had, within time, done something which amounted to the making of an order. Otherwise, there would be no order to "correct" under the slip rule. The Federal Magistrates' Court had heard the petition within time and reserved its decision. While the decision stood reserved, the time limit expired. When this came to its attention, the Federal Magistrates' Court treated its prior reservation of its decision as the making of an order which it could correct under the slip rule, and it purported to "correct" the "order" by extending the life of the petition. The Full Court held that this course was not open to the Federal Magistrates' Court. The significance of the case for present purposes is twofold. First, the Full Court held that, under the relevant Rules of Court, the functions of fixing

hearing dates and advising parties of them were to be regarded as administrative, rather than judicial.[55] (I acknowledge that that view was based in part on a rule which expressly conferred on the Registrar the primary responsibility for those functions.[56]) Second, and more importantly, the Full Court held that a proceeding will not ordinarily lapse because it is adjourned without the making of any *order* for an adjournment.[57]

90. The Full Court said[58]:

> "We are aware that at least until quite recently practitioners were often concerned that a particular proceeding might lapse if not mentioned and disposed of in some way on the nominated hearing date. We have sought to identify any basis for such concern."

Their Honours then carried out an historical analysis of English and Australian authorities. The upshot, as I read their Honour's judgment, was a conclusion that, at least in Australia, proceedings would not ordinarily lapse if not dealt with by some form of order on the appointed hearing date. Certainly their Honours were of that view in relation to notices of motion under the former High Court Rules, as to which they observed[59], by reference to *Thunderbird Products Corporation v Thunderbird Marine Products Pty Ltd*[60], that the filing of such a notice of motion "commenced proceedings". Their Honours continued[61]:

> "It follows that in the event of non-appearance on the nominated date, the proceedings might be struck out, but they would not lapse."

As to the *Federal Magistrates Act* 1999 (Cth) and the *Federal Magistrates Court Rules* 2001, their Honours said[62]:

> "We find nothing in the FMA or the FM Rules which suggests that proceedings in that court will lapse if not dealt with by some form of order on an appointed hearing date."

91. As mentioned above, Mr Hardy submitted to me that an analogy could be drawn with a summons for oral examination of a debtor which, he said, lapsed if no-one attended on the return. However Mr Hardy did not refer me to any relevant statutory provisions or to any relevant authority in that regard and I have not myself been able to find anything of assistance in that field.

92. *Grassby v R*[63] contains a reminder that in committal proceedings a Magistrate is performing ministerial or administrative, rather than judicial, functions. This is at least consistent with the view that the function of a registrar in "adjourning" a hearing at which no-one appears is properly characterised as administrative rather than judicial.

93. In *Guss v The Magistrates' Court at Victoria, supra*[64], a summary proceeding was commenced by the filing of a charge and summons under the Act on a particular day. Service was sought to be effected on the same day by leaving a copy of the summons for the plaintiff at a particular business address. The plaintiff in fact received the copy summons shortly thereafter. It specified a particular initial return date. On that day the plaintiff attended the Court and, to use the language of Osborn J[65], the proceeding was "*adjourned administratively*" by consent to a contest mention date on a later day. Osborn J ultimately held that there had been good service even though the place at which the summons was left was not the plaintiff's usual place of business. I infer from the phrase "adjourned administratively" that the adjournment was effected by a registrar. There is no suggestion that this was beyond the registrar's power or ineffective, notwithstanding that it did not fall under clause 3 of Schedule 2.

94. *Guss* fortifies in another way the view to which I have come on this aspect of the present case. Osborn J points out[66] that the underlying purpose of the provisions in question is merely to ensure procedural fairness. Similarly, in *Plenty v Dillon*[67], Mason CJ, Brennan and Toohey JJ said:

> "A summons to appear before a court of summary jurisdiction to answer an information or complaint does not of itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. ... The essential nature of a summons as the means of according natural justice has been established by long practice."

95. This purpose will be fulfilled to the extent (if any) *mandatorily* required by the Parliament, if the defendant receives a true copy of the summons at least 14 days prior to the first day on which the matter is listed before the Magistrates' Court. What happened in the present case was unfortunate, but it did not infringe either the literal terms of the statutory provisions or any implied mandatory requirement of the statutory scheme. It did not involve short service of the summons. Quite the reverse. It led to the plaintiff being afforded a greater period of notice prior to being called upon for the first time to respond to the charges.

96. Accordingly, I would decline to prohibit the Magistrates' Court from proceeding to hear and determine the charges and I would decline to make any of the declarations sought by the plaintiff.

Closing observations: the warrant, the arrest and the bail undertakings

97. There is no need for me to deal with any of the other submissions that were made by the parties. However, for completeness, I would indicate that, in my view, Mr Hardy's decision not to press any *independent* attack on Magistrate Reynolds' decision of 31 August 2005 (or on the validity of the warrant, the arrest and the bail undertakings themselves) was soundly based. The difficulties facing any such attack would have included the following:

(a) By hypothesis, the summons was still on foot on 19 November 2004.

(b) It is at least arguable that, where a summons is on foot, a Magistrate has *power* to issue a warrant under s41 or s61 of the Act on the basis that the defendant "does not appear in answer to [the] summons" (s41) or "fails to appear in answer to [the] summons" (s61), even if the Magistrate *knows* that the defendant has not had any notice of the actual hearing date. Such a power might appropriately be exercised in a case, for example, where the Magistrate has evidence that the defendant had deliberately absconded before an adjourned hearing date was fixed[68]. It is true that in *Nitz v Evans*[69] Hayne J held that it is implicit in the expression "if a defendant does not appear in answer to a summons" in s41(2) that the defendant has been "afforded the opportunity to appear". However, his Honour immediately went on to say[70]:

> "Clearly the defendant has been afforded that opportunity if the summons has been served in accordance with the Act."

In the present case I have held that the summons was duly served on Mr Murdoch in accordance with the Act.

(c) In any event, there is high authority for the view that the question whether the defendant has been sufficiently served falls to be determined *by the Magistrate*, on the material before him or her, not collaterally or as a "jurisdictional fact" by another or higher court[71]. On that basis the true question for this Court would have been:

> 'Was it *open* to Magistrate Reynolds on 19 November 2004 to be satisfied *on the material before him* that Mr Murdoch had been duly served?

rather than: 'Was Mr Murdoch in fact duly served in relation to the hearing on 19 November 2004?'
The plaintiff's evidentiary material before me was not really directed to identifying the (totality of) the material that was before Magistrate Reynolds on 19 November 2004. For example, the plaintiff did not produce the Magistrates' Court file or adduce evidence from any officer of the Magistrates' Court. Unsurprisingly, the plaintiff's evidence did show that on 30 August 2005 Magistrate Reynolds had no recollection at all of having issued the warrant on 19 November 2004. For this evidentiary reason alone the putative challenge may well have failed.

(d) The decision of Magistrate Reynolds, to the extent that it was a decision to refuse the plaintiff's application for a (*retrospective*) declaration of invalidity of the warrant, may have been (further) justified by s 100(2)(a) and/or (b) of the Act. Those provisions, which are contained in Part 5 of the Act (entitled "Civil Proceedings") deny to the Magistrates' Court jurisdiction in any cause of action in which the "validity or invalidity", of any "act, matter or thing", done by any person or body "under any statute" is sought to be "determined or declared". They also provide that the Court does not have jurisdiction in any cause of action "in the nature of a proceeding for a prerogative writ". I am not aware of any authority on the question whether s100(2) inhibits the Magistrates' Court from examining the validity of its own prior decisions; or on the question whether it applies in relation to decisions made in criminal as distinct from civil proceedings. The section was not cited to or by Magistrate Reynolds, nor was it cited in the case which was referred to by Mr Hardy both before Magistrate Reynolds and before me, namely *Bazeley v O'Halloran*[72].

(e) Turning to discretionary matters, the first defendant's ability to establish what happened in October-November 2004 was presumably hindered by the plaintiff's undue delay. I have already mentioned the detriment caused to the informant by the expiry of the limitation period while the plaintiff stood by for months before raising his objection.[73]

(f) Further, it may well have been open to the plaintiff (and it may still be open to him) to apply to the Magistrates' Court, without relying on any alleged invalidity of the warrant, for an order discharging his bail undertaking *for the future* (if he were troubled about it). It is arguable that s58 of the Act ("Recall and cancellation of warrant") may permit this, notwithstanding the execution of the warrant. The plaintiff's written application to the Magistrates' Court did cite s58, and Mr Hardy did briefly mention this possibility to Magistrate Reynolds on 30 August 2005, but Mr Hardy then seemed to resile from it. Alternatively, the Magistrates' Court may have power to discharge the bail undertaking on the basis that the original order for the issue of the warrant was an interlocutory order made without notice[74]. Again, any discharge of the bail undertaking done on such a basis would only operate prospectively, not retrospectively. In the further alternative, by virtue of s40 and/or s41A of the *Interpretation of Legislation Act* 1984, the power of the Magistrates' Court under s41 or s61 of the Act to issue a warrant of arrest may be accompanied by a power to revoke the warrant (prospectively), even after the warrant has been executed[75]. No developed argument along any of these lines was put to Magistrate Reynolds on 30 August 2005. In any event, at all times the plaintiff has been at liberty to seek the leave of the Magistrates' Court to be absent from Court pursuant to s15(1) of the *Bail* Act 1977. Of course, any application now to discharge or modify the bail undertaking on any basis may have to contend with whatever factors might now bear on the question whether the plaintiff should or should not be compelled to appear personally at the final hearing.[76] However, the various considerations mentioned in this and the previous sub-paragraph may well have contributed to a conclusion that, in any event, "the justice of the whole situation"[77] was against the grant by this Court of any relief to the plaintiff at all.

Form of Order

98. In the event that her client was successful, Ms Judd requested[78] that the Court make an order dismissing the judicial review application with costs and a further order otherwise referring the proceeding to the Magistrates' Court at Melbourne for hearing and determination. This was sought on the basis that it was the form of the order made by O'Bryan J in *Sammassimo v Franich*[79] and would avoid any doubt about what was to happen at the Magistrates' Court. However, with respect, I think that it is sufficient for me to indicate here, as I do, that the challenge to the future prosecution of the Magistrates' Court proceeding has failed, that the informant is therefore free to seek the re-listing of the matter for hearing in due course, and that the Magistrates' Court of Victoria has the power and the duty to hear and determine the charges against the plaintiff should the informant desire to proceed with them.

99. As far as the formal order of this Court is concerned, I think it would be appropriate simply to order that the proceeding be dismissed and that the plaintiff pay the first defendant's costs of the proceeding (including any reserved costs). Subject to anything further that counsel may wish to submit about the form of the order, I propose to make orders in that form.

)

[1] Transcript p72.

[2] When ss15(2) and (3) of the *Courts Legislation (Jurisdiction) Act* 2006 ("the amending Act") come into operation, s26(4) will be amended and a new s6(5) will be inserted whereby the time limit in s26(4) will become subject to extension by consent of both the prosecution and the defence. The amending Act was assented to on 15 August 2006 and s15(2) and (3) will come into operation on a day or days to be proclaimed or on 1 July 2007 at the latest: see s2 of the amending Act.

[3] See para 52.

[4] Law Book Company, *Victorian Courts* para [30.837], where the learned authors distinguish *Hargreaves v Bourdon* [1963] VicRp 13; [1963] VR 89.

[5] See *Minister for Youth and Community Services v Kew Cottages and St Nicholas Parents Association Inc* (1996) 10 VAR 293 at 297-298; *Zimpel v Allard* (1905) 2 CLR 117; *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VicRp 10; [1973] VR 122.

[6] Compare *Rozenes v Judge Kelly* [1996] VicRp 20; [1996] 1 VR 320 at 334; *Minister for Youth and Community Services v Kew Cottages and St Nicholas Parents Association Inc* (1996) 10 VAR 293 at 297-298; *Portelli v Stewart*, unreported, Supreme Court of Victoria, Smith J, BC9603571 at 2; *Kuek v Victoria Legal Aid* [1999] VSC 46 (Smith J) at [24]; 15 VAR 35.

[7] Magistrates Court General Regulations, Form 7.

[8] *Magistrates' Court Act* 1989 s20 and s3 (definition of "process").

[9] *Magistrates' Court Act* 1989 s26(1)(a).
[10] However I notice that on the second page (though not the first page) of the copy of the charge and summons exhibited to Mr Murdoch's affidavit in this proceeding, in the box marked "Charge filed at", the word "Broadmeadows" was originally included but has been struck through and replaced by "Moonee Ponds".
[11] Presumably, this statement was included pursuant to s61(6) of the Act.
[12] A transcript of the hearing was put before me in evidence.
[13] Again, a transcript of the argument was made available to me.
[14] As to the meaning of "mention date" in s34 of the Act, see s33 and see the definition of "mention date" in s3.
[15] [2002] VSC 531; 135 A Crim R 571.
[16] [2003] VSC 236.
[17] (1993) 19 MVR 55.
[18] [1998] VSC 170 (leave to appeal refused: *Brereton v Sinclair* [2000] VSCA 211; (2000) 2 VR 424; (2000) 118 A Crim R 366).
[19] *Supra*.
[20] (1994) 20 MVR 268 (Cummins J).
[21] Unreported, Supreme Court of Victoria, O'Bryan J 11 March 1994.
[22] [1999] VSC 410 (Hedigan J).
[23] [1989] HCA 45; (1989) 168 CLR 1 at 16; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[24] (1964) AC 1254 at 1301; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145.
[25] [1992] HCA 34; (1992) 174 CLR 509 at 518; 107 ALR 635; (1992) 66 ALJR 585; 61 A Crim R 431.
[26] *Hynes v Bux*, unreported, Supreme Court of Victoria, Nathan J, 13 November 1996; *Gahan v Frahm* [1999] VSC 410 (Hedigan J) at [6].
[27] *Supra*.
[28] *Supra*.
[29] [2004] VSC 396 at [25]; 149 A Crim R 227.
[30] [1879] 4 QB 614 at 626-7.
[31] [1970] VicRp 81; [1970] VR 625 at 638.
[32] [1932] HCA 36; (1932) 47 CLR 317 at 328.
[33] [2004] VSCA 113; (2004) 9 VR 686 at [9].
[34] [1995] VicRp 34; [1995] 1 VR 533 at 571; (1994) 126 ALR 481; 8 VAR 1.
[35] [2001] VSC 209; [2001] 3 VR 211; (2001) 124 A Crim R 180.
[36] [1989] HCA 46; (1989) 168 CLR 23 at 76; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307. See also per Mason CJ at 34 and Deane J at 60. Brennan J and Toohey J would have imposed an even stricter rule. And see further *Walton v Gardiner* [1993] HCA 77; (1993) 112 ALR 289; (1993) 67 ALJR 485; (1993) 112 A Crim R 289; (1993) 177 CLR 378.
[37] *Nitz v Evans; Sinclair v Magistrates' Court at Ringwood; Platz v Barmby* and *Smith v Chalmers*; *supra*.
[38] [2000] VSCA 211; (2000) 2 VR 424; (2000) 118 A Crim R 366.
[39] [2003] VSC 365 at [26].
[40] [2006] NSWCCA 201; 66 NSWLR 130. Note in particular the reference to the abovementioned Victorian decisions by Hall J (with whom Grove J agreed) at [71]-[80] and, contrastingly, by Smart AJ at [100]-[108].
[41] To the extent that the defined meaning of "mention date" set out in s3 may be different, the defined meaning would give way to any contrary intention, though this qualification is not expressed in s 3: See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 321; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434.
[42] [1910] AC 409 at 420.
[43] [2004] VSC 35; 142 A Crim R 116.
[44] At [21]. However, for an example of this Court finding an implication in the Act, see *Nitz v Evans* (1993) 19 MVR 55 (Hayne J) at 59 (passage referred to below at para 97(b)).
[45] *Newcastle City Council v GIO General Ltd* [1997] HCA 53; (1999) 191 CLR 85 at 113; (1997) 149 ALR 623; (1997) 72 ALJR 97; (1997) 9 ANZ Insurance Cases 61-380; (1997) 19 Leg Rep 2 per McHugh J. See also Pearce and Geddes, Statutory Interpretation in Australia, 6th edition, 2006 at [2.28]-[2.32] and cases there cited, especially *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681; 107 A Crim R 1.
[46] See s38 of the Act; and see Fox, *Victorian Criminal Procedure* 2005 at [6.2.4.1].
[47] See Fox, *op. cit* at [6.2.28].
[48] [1958] VicRp 25; [1958] VR 126 at 129; [1958] ALR 545.
[49] Compare the provisions of the *Justices Act* 1915 under consideration in *Khyatt v Schmidt* [1924] VicLawRp 83; [1924] VLR 499; 30 ALR 352; 46 ALT 72, as expounded by McInerney J in *Kingstone Tyre Agency Pty Ltd v Blackmore* [1970] VicRp 81; [1970] VR 625 at 631-634.
[50] [1984] VicRp 78; [1984] VR 1000 (Kaye J).
[51] [2002] VSC 143 (Kellam J) at [35]-[38].
[52] See Pearce and Geddes, *op cit* at [4.28]-[4.32], [7.18]-[7.21], and see now also and compare *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50 at [2], [43]-[70], [148]-[169]; (2006) 228 CLR 566; (2006) 230 ALR 370; (2006) 81 ALJR 1; 93 ALD 1 and *New South Wales v Commonwealth of Australia* [2006] HCA 52 at [233]; (2006) 229 CLR 1; (2006) 231 ALR 1; (2006) 81 ALJR 34; (2006) 156 IR 1.
[53] [1988] VicRp 43; [1988] VR 337 at 341-343; (1987) 89 FLR 195.
[54] [2006] FCAFC 149; 154 FCR 554 (20 October 2006).
[55] [2006] FCAFC 149 at [44]; 154 FCR 554.

[56] Ibid.
[57] [2006] FCAFC 149 at [46]-[63]; 154 FCR 554.
[58] [2006] FCAFC 149 at [54]; 154 FCR 554.
[59] At [57].
[60] [1974] HCA 51; (1974) 131 CLR 592 at 602-603; 4 ALR 687; (1974) 48 ALJR 456; 1A IPR 511.
[61] [2006] FCAFC 149 at [57]; 154 FCR 554.
[62] [2006] FCAFC 149 at [59]; 154 FCR 554.
[63] [1989] HCA 45; (1989) 168 CLR 1. See esp at 17, 19; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183.
[64] [2003] VSC 365.
[65] At [4].
[66] [2003] VSC 365 at [20]-[22].
[67] [1991] HCA 5; (1991) 171 CLR 635 at 641; (1991) 98 ALR 353; 65 ALJR 231; [1991] Aust Torts Reports 81-084. See also *Davidson v McCarten* [1953] VicLawRp 96; [1953] VLR 697 at 702; [1954] ALR 42; *Commissioner for Public Employment v Bartolo* [1994] SAIRC 33 (20 May 1994) at p4 of 12 of Austlii print; Fox, Victorian Criminal Procedure at [4.3.2].
[68] Compare *R v Gibbons*, [1997] VSC 25; [1997] VICSC 25 unreported, Court of Appeal, Supreme Court of Victoria, 30 June 1997 (Brooking, Hayne and Charles JA). Warrants of arrest for non-appearance are, by definition, issued *ex parte*. If the rules of natural justice are applicable at all, their applicability must surely be modified accordingly.
[69] (1993) 19 MVR 55 at 59; cited in *Smith v Chalmers* [2003] VSC 236 at [24].
[70] Ibid.
[71] *Parisienne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1937) 59 CLR 369 at 389; [1938] ALR 119 per Dixon J (cited by Gillard J in *Hannan v Norman* [2006] VSC 228 at [40]; (2006) 45 MVR 520); *Posner v Collector for Interstate Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461 at 470-471, 477, 484, 487; [1947] ALR 61; *Smith v Chalmers* [2004] VSC 236 at [21]; but see *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597; (2002) 187 ALR 117; 67 ALD 615; (2002) 76 ALJR 598; (2002) 23 Leg Rep 16.
[72] *Supra*. (1994) 20 MVR 268.
[73] See para 8 above.
[74] *Posner, supra*, [1946] HCA 50; (1946) 74 CLR 461 at 476; [1947] ALR 61 at 476 per Starke J; cf at CLR 484 per Dixon J.
[75] See, generally, *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Gillard J) at [39]-[75]; 24 VAR 90 and cases there cited; *R v Ng* [2002] VSCA 108; (2002) 5 VR 257 at 282; (2002) 136 A Crim R 299. See also *Richmond Sales Pty Ltd (In Liq) v Robert McDermott* [2006] FCA 52; 224 ALR 405; (2006) 56 ACSR 323 (Kenny J) (Belated application to set aside a warrant to seize property after execution in civil proceedings). Compare *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149 at 194-195; (1996) 134 ALR 495; (1995) 40 ALD 385.
[76] I note that on 16 August 2006 a new sub-section (4) was inserted into s 41 of the Act, as follows: "If the Court proceeds to hear and determine a charge in the defendant's absence and finds the defendant guilty, the Court must not make a custodial order under Division 2 of Part 3 of the *Sentencing Act* 1991". See also, to comparable effect, cl 6(7) of Schedule 2 to the Act.
[77] *R v Lilydale Magistrates' Court* [1973] VicRp 10; [1973] VR 122 at 135. See also *Re McBain; ex parte Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 at [281]-[283]; (2002) 188 ALR 1; (2002) 76 ALJR 694; [2002] EOC 93-207; (2002) 23 Leg Rep 2 (per Hayne J).
[78] Transcript p102.
[79] *Supra*.

APPEARANCES: For the plaintiff Murdoch: Mr S Hardy, counsel. The Law Offices of Barry Fried, solicitors. For the defendant Smith: Ms K Judd, counsel. Victorian Government Solicitor's Office.