14/03; [2003] VSC 126

SUPREME COURT OF VICTORIA

HICKMAN v SMITH & ANOR

Ashley J

4 April, 7 May 2003

INTERVENTION ORDERS – APPLICATION BY PLAINTIFF AND HER CHILDREN FOR AN INTERVENTION ORDER ALLEGING THEY WERE VICTIMS OF STALKING BY ADJOINING LANDOWNERS – PREVIOUS INTERVENTION ORDERS MADE AGAINST PLAINTIFF – UNSUCCESSFUL APPEAL BY PLAINTIFF TO COUNTY COURT – ORDER FOR COSTS MADE AGAINST PLAINTIFF – COSTS ORDER NOT SATISFIED WHEN PLAINTIFF SOUGHT INTERVENTION ORDERS – APPLICATIONS STRUCK OUT BY MAGISTRATE ON GROUND THAT COSTS NOT PAID – WHETHER MAGISTRATE IN ERROR

H. (and her 3 children) sought an intervention order against S. who were adjoining landowners. In previous proceedings between S. and H. an intervention order had been made against H. in favour of S. On appeal to the County Court H. was unsuccessful and ordered to pay the sum of $15,052 within 120 days.

When the applications by H. (and her children) came on for hearing before a magistrate, S's counsel submitted that the magistrate had a discretion to deny H. a hearing until the outstanding costs order had been met. The magistrate agreed that the costs order should be met before the matter proceeded any further and ordered that if the costs order was not met by a certain time, the matter would be struck out. In due course, as the costs order had not been met the complaints were struck out and a costs order made against H. Upon an origination motion to quash and mandamus—

HELD: Orders made by the magistrate quashed.
The magistrate struck out H's complaints without any consideration of their merits upon the footing that H. (and her children) should be denied a hearing unless H. met the order for costs made in another matter not involving the identical parties. It was an irrelevant consideration for the magistrate to focus upon H's failure to pay costs in the other matter. Accordingly, the magistrate's exercise of discretion miscarried.

ASHLEY J:

The proceedings

1. Before the Court are two originating motions. The plaintiff in each is Mandy Hickman. The first defendants in the proceedings are respectively Allan Smith and Jocelyn Smith. The second defendant in each instance is the Magistrates' Court of Victoria. The second defendant has said that it will abide the decision of the Court. It is convenient to refer to Mr and Mrs Smith simply as "the defendants".

2. The proceedings in this Court arise out of separate proceedings brought in the Magistrates' Court by the plaintiff for herself and three children against the defendants pursuant to the provisions of the *Crimes (Family Violence) Act* 1987 (the Act) and s21A of the *Crimes Act* 1958. The Magistrates' Court made distinct orders in respect of the two complaints on 30 August and 17 September 2002.

3. The plaintiff by her proceedings in this Court seeks orders in the nature of *certiorari* and mandamus. She seeks that the orders made on 30 August and 17 September 2002 be set aside; and orders that the Magistrates' Court hear the complaints. She seeks other relief also. I need not now refer to it.

The proceedings in the Magistrates' Court

4. The plaintiff sought an intervention order against each defendant. She alleged that she and her three children were the victims of stalking by the defendants. The offence of stalking is created by s21A of the *Crimes Act.* By subsection (5) of that section:

> "Despite anything to the contrary in the *Crimes (Family Violence) Act 1987***,** the Court within the meaning of that Act may make an intervention order under that Act in respect of a person (the

> defendant) if satisfied on the balance of probabilities that the defendant has stalked another person and is likely to continue to do so or to do so again and for this purpose that Act has effect as if the other person were a family member in relation to the defendant within the meaning of that Act if he or she would not otherwise be so."

5. That takes me to the Act, s4 of which provides:

> "***Intervention orders*** (1) The Court may make an intervention order in respect of a person if satisfied on the balance of probabilities that—
>
> (a) the person has assaulted a family member or caused damage to property of a family member and is likely to again assault the family member or cause damage to property of the family member; or
> (b) the person has threatened to assault a family member or cause damage to property of a family member and is likely to assault the family member or cause damage to property of the family member; or
> (c) the person has harassed or molested a family member or has behaved in an offensive manner towards a family member and is likely to do so again.
>
> (2) The order may impose any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances to the court.
>
> (3) An intervention order may be made in respect of more than one aggrieved family member if the court is satisfied in accordance with sub-section (1) in respect of each aggrieved family member."

6. By s7(1)(c)(ii) a complaint seeking an intervention order may be made, if the aggrieved family member is a child, by a parent of the child. By sub-s(4) of that section a child's complaint may be included in a complaint in respect of the child's parent if the complaints arise out of the same or similar circumstances.

7. Section 8 provides for the making of intervention orders in the absence of a defendant. Interim orders were, according to certified extracts, made on 15 May and 31 May 2002. According to those extracts neither Mr or Mrs Smith was in court on 15 May; but they were in court on 31 May. The orders made on the latter date were given force until 26 August.

8. Something should be said, I think, about the jurisdiction to grant an interim intervention order. Whether such an order is made in the presence or absence of the defendant, it is an order which has far-reaching consequences. Of course the safety of the complainant is a crucial consideration. But it must be remembered that if such an order is made the consequences for a defendant are serious indeed. His or her conduct is inhibited; and any failure to abide the order constitutes an offence which may lead to the imposition of substantial penalties. Moreover, the order is made having heard one side of things only.

9. I do not know what oral evidence was given in support of the application for an interim order in this case[1]. Unless it went beyond the statement of circumstances made in the complaints[2] it is not easy to understand why the Magistrates' Court concluded, as it must have done, that it was necessary to make interim orders to ensure the safety of the plaintiff and her children. Had the Court declined to make an interim order the plaintiff could still have pursued her complaints; and, had they been pursued, the very likely competing evidence could have been heard and assessed at the one time.

10. In any event, the interim orders having been made, the complaints came on for hearing before the Magistrates' Court on 26 August 2002. I will describe what occurred in reliance upon affidavit evidence to the receipt of which no objection was taken.

11. Counsel for the defendants informed the court that he wished to make a preliminary submission. He commenced his submission this way:

> " ... It's an application either that this matter not proceed at all as an abuse of process or to not proceed for the present on the basis of similar grounds."[3]

The application was developed by statements as to the factual background of the matters which were made from the Bar table; and a little evidence. The evidence went to show that the plaintiff's

written complaints were in one respect a gross overstatement of the conduct relied on by the plaintiff; and that the plaintiff was a woman with criminal convictions, including convictions for dishonesty.

12. Much of what was said from the Bar Table was not in dispute. But this was not universally the case. The material put before the learned magistrate can be summarised this way:

> • The defendants and the plaintiff and her family are adjoining landowners in the Yarra Valley. In April 2001, Allan Smith initiated a proceeding by which he sought an intervention order against the plaintiff and her husband. He alleged that in the period February to April 2001 the Hickmans had discharged firearms across his property, had verbally harassed him and his wife by the use of a loud speaker, and had discharged gas guns in the vicinity of his property.
> • On 6 April 2001 Mr Smith obtained an interim intervention order against the plaintiff and her husband.
> • On 17 April 2001 the hearing of the application for a final order was adjourned on the application of the plaintiff and her husband. A costs order was made in favour of Mr Smith. The order was not complied with until a Magistrate threatened to make a final order on the application without further hearing unless there was compliance.
> • There was a lengthy hearing of Mr Smith's complaint in the Magistrates' Court on various dates between April and September 2001. The complaint was upheld. Final orders were made against each of the plaintiff and her husband.
> • The plaintiff[4] thereafter appealed in the County Court.[5] The appeal, by way of rehearing, was also a protracted affair — extending over some 8 days. The learned County Court judge found in favour of Mr Smith. She described the plaintiff and her husband as not being credible witnesses; and she rejected their evidence. She made an order in Mr Smith's favour in substantially the same terms as that which had earlier been made in the Magistrates' Court. She also considered that there were exceptional circumstances[6] which warranted the making of a costs order. She made such an order, [7] fixing costs of the County Court hearing at $15,052, and granting a stay of 120 days.
> • The costs remained unpaid as at 26 August 2002.
> • In the period between 22 February 2002, when the substantive order was made in the County Court, and 16 May 2002, when the plaintiff initiated her complaint, the plaintiff was convicted of breaching the intervention order.
> • The plaintiff's complaint, in essence, was that the Smiths had videotaped the activities of she and her children. That was no more than the gathering of evidence in respect of suspected breaches of the orders which Mr Smith had in his favour.

13. Against that background counsel made this submission:

> "The application by the, by Mandy Hickman, is extraordinarily thin on its very face and its erroneous in some respects, for instance, in relation to the allegation about the number of tapes. That perhaps is not so important. And you can see already the very essence of what is alleged is simply that the Smiths who have been the beneficiaries of orders by the Magistrates' Court and by the County Court after very lengthy hearings indeed, have taken short video footage and you've heard the extent of it from the Senior of what they say they suspect to be breaches of the outstanding orders. That's the essence of what is to be traversed before you if you permit it to proceed. On the other hand to what you now know is in general terms the history of this matter, they (sic) way in which another Magistrate has viewed the case, the way in which a Judge of the County Court has viewed the case. You know the criminal background of the person applying for it. You know that on a previous occasion a cost order was not met and you know that on this occasion $15,000 of cost orders have not been met. In my submission you have a discretion about how this Court runs and it is appropriate for you to exercise that discretion. Either not to permit the matter to go ahead at all, or certainly not to permit it to go ahead until the Applicant comes here in a bona fide way having demonstrated her bona fides by meeting the orders of the County Court. At this stage that has not happened and in my respectful submission in the particular circumstances of what is alleged, what has already taken place and the demonstrated mala fides of this Applicant the matter should not proceed."[8]

Counsel for the plaintiff shortly submitted, in response, that the matter was "ready and able at law to proceed today".[9]

14. The learned Magistrate evidently concluded that the fact that another Magistrate and a County Court judge had resolved certain factual matters in dispute between the plaintiff and the defendants adversely to the plaintiff was not a basis for not proceeding with her complaints. He also concluded, evidently, that it remained a matter undetermined on the evidence whether the filming of the plaintiff[10] was for the purposes alleged by the defendant and could be accounted no breach of s21 of the Crimes Act. The plaintiff makes no complaint about those conclusions.

That left only the fact that costs remained unpaid. The learned Magistrate said this:

> "So, the third plank, which I find far more inviting is that, well, there's been an ongoing dispute between the parties for quite some time. Orders have been made. A cost order, a significant cost order has been made and it hasn't yet been fulfilled."

and

> "So, the third argument is well look really that cost order should be paid before I permit this matter to proceed and I find that argument quite appealing."[11]

15. After further submissions for the plaintiff, the learned Magistrate said this:

> "Well, I think the cost order should be paid. I think that given the history of this matter and, as I say, I'm not seen to judge the rights or wrongs of the application before me today, I haven't had the evidence, any evidence at all, in relation to the substance of the allegations made by Mrs Hickman and what she says may be right, it may be wrong, I don't know, I certainly can't determine whether it's right or wrong based on what other Judges or magistrates have determined in the past in relation to other different applications. But it is clear that over a period of many years there has been an ongoing dispute between the Hickmans and the Smiths. That dispute, unfortunately, lead to many, many days of Court hearings in both the Magistrates' and the County Court. Orders were made in favour of the Smiths and cost orders were made. The most recent of those, the cost order made by Judge Rizkalla of the County Court, being for a very substantial amount of money, has not yet been paid. In my view, given that these matters, this dispute is really of an ongoing nature and this is yet another variant as far as I can see of that ongoing dispute, I think the cost order should be made before this matter proceed. I fix Friday at 4 o'clock by which time the cost order has to be paid. If it is not paid by, that's the County Court cost order, if it is not paid by Friday at 4 o'clock, this matter will be struck out."[12]

16. The costs order not having been met, the complaints were indeed struck out on 30 August 2002; and, despite their having been struck out, a costs order was made against the plaintiff on 19 September 2002.

An unsatisfactory procedure

17. The application which resulted in the orders made on 30 August and 17 September 2002 was, as these reasons show, made in an informal manner. It is impossible to say whether consideration was given whether the plaintiff's complaints were brought in the civil or criminal jurisdiction of the Magistrates' Court. Certainly, if that matter was considered, and if it was concluded that the complaints were brought in that court's civil jurisdiction, the application was not brought in the manner contemplated by order 20 of the *Magistrates' Court Civil Procedure Rules* 1999. Before me, counsel for the defendants submitted that the learned Magistrate had acted under powers given him by ss128 and 136 of the *Magistrates' Court Act* 1989.

The former empowers the Magistrates' Court to adjourn the hearing of a proceeding. The latter provides that the Magistrates Court may give directions for the conduct of a proceeding. Putting to one side the merits or otherwise of that submission, I have seen no reference in the application made on 26 August 2002 to either of those sections. The learned Magistrate was left with the very broad assertion that he had a discretion about how "this Court runs"; and he was invited to exercise this discretion either to preclude the plaintiffs' complaints being heard at all, or at least to deny the plaintiff a hearing until the outstanding costs order had been met. Counsel referred to "the demonstrated *mala fides*" of the plaintiff. That was apparently a reference simply to her failure to meet the costs order.

18. In my opinion, the course which counsel for the defendants adopted was very unsatisfactory. The problems to which it was likely to give rise were not addressed by counsel for the plaintiff. The learned magistrate was not assisted by this train of events. The informality of the application was such that the foundation in law for the existence of the asserted discretion was never properly examined. In turn, the question whether any of the circumstances relied upon could justify an exercise of the alleged discretion in the manner which the defendants sought was not fully explored.

19. The judgment of McDonald J in *Gunes v Pearson; Tunc v Pearson*[13] shows that the proceedings before the Magistrates' Court were civil in nature, not criminal[14]. The defendants were able to bring, and they should have brought, their application in the manner contemplated by Order 20 of the Rules of that Court.

The Proceedings in this Court

20. Counsel for the defendants drew attention to the fact that these proceedings had been commenced by originating motions under 056 of Chapter 1 of the Rules. He submitted, correctly, that when the appellate procedure set up by ss92 and 109 of the *Magistrates' Court Act* 1989 is available the Order 56 procedure will most often be inappropriate.[15] Counsel observed that the proceedings in the Magistrates' Court had been struck out, no right of reinstatement being reserved. That suggested, he submitted, that the order was final in character, in which case an appeal should have been brought. In those circumstances the present proceedings should be dismissed. Any application to treat the proceedings as appeals should be denied. But if the strike out orders were not final orders, reinstatement properly depended on the plaintiff paying the outstanding costs. It would not be a 'proper course' to 'consume time in the Supreme Court' hearing the plaintiff's applications.

21. In my opinion the orders made on 30 August 2002, were probably not final orders. The proceedings were not dismissed. An application to reinstate was not foreclosed because no such liberty was reserved by the strike out orders. Those conclusions do not depend on the decision of Byrne J in *Kay v Kay and Anor*[16] which counsel for the plaintiff conceded was adverse to his argument. *Kay* concerned an order staying a proceeding; not an order striking a proceeding out.

22. But assume that the orders made on 30 August 2002 were not final. The plaintiff did not bring an appeal under the *Magistrates' Court Act* at all, let alone within the period of 30 days specified by s 109 of that Act. Rather, these proceedings were initiated a few days outside the 30 day period which commenced on 30 August 2002. But I think it clear that the plaintiff's adoption of the Order 56 procedure was not a device designed to avoid the effect of the 30 day time limit. Bear in mind the fact that orders about which the plaintiff seeks to complain were also made on 17 September 2002, assumedly in the same proceedings in the Magistrates' Court.

23. In the particular circumstances, if the order made on 30 August 2002 should be considered a final order I would have been prepared to treat these proceedings as being appeals under s109 of the *Magistrates' Court Act*, granting leave to the plaintiff, so far as was necessary, to commence them out of time. I say "so far as was necessary" because the orders attacked include orders made on 17 September 2002; and these proceedings were issued well within 30 days of the making of those orders.

24. This should be added with respect to the orders made on 17 September 2002. Described in certified extracts of orders[17] as having been made on interlocutory application – although in what proceedings, for the substantive complaints had been struck out, and were not on the face of the orders reinstated – they might be characterised as final orders. There was no argument concerning those orders discretely. It would not matter whether they were characterised as final or interlocutory. The Order 56 proceedings were commenced within 30 days of the orders being made, and I would be prepared to treat the proceeding as raising an appeal under s109 of the *Magistrates' Court Act* if it was necessary to do so.

25. I should next refer to a submission made by defendants' counsel concerning the relief sought by the plaintiff. He submitted that "mandamus is only available for jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud or error of law on the face of the record". He cited *Craig v South Australia,*[18] and *Lednar v Magistrates' Court*[19] He contended that the plaintiff had not made it clear which of those errors she asserted had been made.

26. The reference in counsel's submission to mandamus was, I think, an error. It was presumably an intended reference to *certiorari*. That said, I think there was nothing to the submission. The grounds set out in the originating motions focussed only on the orders made on 30 August 2002; but that was not the gist of counsel's submission. Pertinent to that submission, I consider that it was unnecessary for the plaintiff to clothe the alleged error with a legal tag.

It was enough, I think, to specify the substance of that error. In my view ground 1 did so; and ground 3 did so if it should be deduced from what the learned Magistrate said that he dealt with the defendants' application on the footing that the plaintiff's failure to pay the costs constituted an abuse of process. Ground 2 was broad and imprecise. Had that been the only

ground specified, the defendants could have made a complaint of some substance. But it was not the only ground specified.

The Merits of the Matter

27. According to grounds 1 and 3 of each of the originating motions the learned Magistrate "erred in law" by striking out the plaintiff's complaints because the plaintiff had not paid the costs which she had been ordered to pay by the County Court; and by holding that her complaints were an abuse of process because she had not complied with the costs order.

28. In the context of *certiorari*, error of law may be constituted by jurisdictional error or by error of law on the face of the record. Were it said to be the latter in the present case, then the limits of "the record" would become relevant.

29. The true character of the alleged error(s) was not debated before me. There is a question as to the extent to which and circumstances in which an alleged error of an inferior court may be regarded as jurisdictional. Compare *Craig* with *The Returned and Services League of Australia (Victorian Sub-Branch) Inc v Liquor Licensing Commission and Anor;*[20] and see the relevant commentary in Aronson and Dyer, *Judicial Review of Administrative Action.*[21] In some instances the characterisation of the alleged error could be decisive. But that, in my opinion, is not the case here. What the plaintiff complains of, concerning the orders of 30 August, is that the Magistrates' Court took into account, decisively, an irrelevant consideration. Assuming that the Magistrates' Court so acted, and that "the record" revealed the fact, it would not matter whether the error be characterised as jurisdictional or non-jurisdictional. In my opinion the Magistrates' Court did so act and the fact that it did so is apparent on the face of the record.

30. I should say a little about "the record". In the present case it consisted of the plaintiff's complaints, the oral application which initiated the impugned proceeding, the impugned orders themselves and, by reason of s10 of the *Administrative Law Act* 1978, the learned Magistrate's reasons for the pertinent decision. So there is revealed the nature of the application made for the defendants, the basis upon which his Worship resolved it, and the formal orders which ensued.

31. The basis upon which his Worship resolved the application is very clear. He considered that the costs order made in the County Court should be satisfied before the plaintiff was permitted to litigate "yet another variant as far as I can see of (an) ongoing dispute". If the costs order was not satisfied the plaintiff's applications would be struck out.

32. Before me, counsel for the defendants submitted that the learned Magistrate had exercised powers available to him under ss128 and 136 of the *Magistrates' Court Act*. Counsel submitted that his Worship had adjourned the hearing of the complaints on 26 August, then giving directions that unless the plaintiff paid the outstanding costs by 30 August the complaints would be struck out. He contended further that in each instance the learned Magistrate had been invested with a discretion; and that the Court should rarely interfere with an exercise of discretion. He cited *House v R.*[22]

33. The submissions just mentioned focussed on orders said to have been made on 26 August; not the orders of 30 August about which the plaintiff now complains. But let it be assumed that the defendants could successfully meet the plaintiff's complaint about the orders made on 30 August by showing that they were simply the outcome of orders properly made on 26 August. Upon that assumption, I consider that there is nothing to show that the learned Magistrate sought to exercise powers under ss128 or 136 of the *Magistrates' Court Act* on 26 August. No reference was then made to those sections either by counsel in his application or by his Worship in his reasons. Further, even if what his Worship said could somehow be made to fix an exercise of power under s128, I cannot accept that the same could be said about s136. An order that unless the complainant paid costs awarded against her in another proceeding her complaints should be struck out could not be described, in my opinion, as a direction for the conduct of the proceedings then on foot.

34. If I was wrong in concluding that his Worship did not exercise powers under ss128 or 136 of the *Magistrates' Court Act* on 26 August 2002, I consider there is no doubt that his exercise of discretion miscarried in the exercise of those powers. It is crystal clear that he focussed upon

the plaintiff's failure to pay costs in the other matter. In my opinion that was an irrelevant consideration. The learning with respect to unpaid interlocutory costs in the same proceeding[23] and concerning unpaid costs in a second action between the same parties and involving the same subject-matter[24] does not assist the defendants. The costs order in the County Court was not an interlocutory order. Nor was it an order in another action between the same parties and involving the same subject-matter. The plaintiff's children were not parties in the County Court appeal; nor was Mrs Smith a party. Concerning subject-matter, it is no doubt true to say that the plaintiff's complaints arose out of persistent friction between neighbours; but, as his Worship recognised, the subject-matter of the plaintiff's complaints was not the same as the subject-matter of the complaint which had been pursued by Mr Smith.

35. If it be the case, as I consider it was, that the learned Magistrate did not, in striking out the plaintiff's complaints, exercise power under ss128 and 136 of the *Magistrates' Court Act*, the position is no better for the defendants. Whatever source of power be imagined, the essential problem is that his Worship struck out the plaintiff's complaints without any consideration of their merits upon the footing that the plaintiff (and her children) should be denied a hearing unless she met an order for costs made in another matter not involving the identical parties.

36. Counsel for the defendants sought, as an alternative to his reliance on ss128 and 136 of the *Magistrates' Court* Act, to rely on s4 of the Act, noting that the Court may, not must, make an intervention order if it is satisfied of a variety of matters. He submitted that the learned Magistrate appropriately had regard to matters relevant to his exercise of a discretionary jurisdiction.

37. That argument could not be accepted. Section 4 is relevantly concerned with the discretion whether to make an order upon examination of the merits of an application. Here there was no such examination.

38. Again, the basis for the defendants' application, as articulated by counsel at the outset in the Magistrates' Court, was that the plaintiff's complaints constituted an abuse of process. The circumstances in which a proceeding may be permanently stayed or dismissed as an abuse of process are said not to be closed; but there is a substantial jurisprudence about the matter. [25] It may be supposed that the defendants sought to contend, in substance, that the plaintiff's complaints were brought for an improper purpose – simply to harass them in circumstances where they had successfully brought proceedings against the plaintiff and her husband; and that the improper purpose was discernible from evidently unreliable particularisation of the plaintiff's complaints in one respect, against the background of her past convictions for dishonesty and the large unpaid costs order. I doubt that the application, so considered, should have succeeded; but in any event it is clear that it was not considered by the learned Magistrate in that way.[26]

What Orders should be made?

39. The orders made on 30 August 2002 should be quashed.

40. Applications for costs were in some way entertained on 17 September 2002, despite the plaintiff's complaints having been struck out. There is a question whether one or two costs orders were made. A comparison of exhibits MH6 and MH12A suggests that there was only one substantive order for costs, though an order was made in each proceeding. Both those orders should be quashed, they depending upon the correctness of the orders made on 20 August 2002.

41. The orders being quashed, the plaintiff's complaints become extant and unresolved by the Magistrates' Court. They are, of course, founded upon allegations long out of date. If they are pursued upon that material they must be heard.[27] Whether the Magistrates' Court would now make orders based upon such material may be doubted. But that is a matter for that Court. The outdated nature of the plaintiff's allegations is, however, presently pertinent in one way. The plaintiff seeks an extension of the interim orders made on 31 May 2002 until her complaints are heard in the Magistrates' Court. It would be inappropriate to make such an order. True it is that the plaintiff deposed by her affidavit in each proceeding[28] that she remained in fear of harassment of herself and her family. Why she should have that fear was not explained; and in any event the affidavit was sworn quite some months ago.

42. I should finally mention one matter that might conceivably bear on the presentation by the

plaintiff of her complaints in the Magistrates' Court. Mr Smith, I was informed, is taking steps to have the plaintiff made bankrupt, relying upon her failure to pay the County Court costs order. If the plaintiff was made bankrupt a question might arise whether she was able to continue the complaints – at least for herself – without election by her trustee in bankruptcy: see s60(2)(3) and (5) of the *Bankruptcy Act* 1966 (Cth). I express no opinion concerning the issue which might arise. It is enough to say that I do not consider that it provides a reason why the orders made on 30 August and 17 September 2002 should not be quashed.

Orders

43. In each proceeding, subject to anything that counsel might wish to say as to form, I shall order that the orders made by the Magistrates' Court on 30 August 2002 and 17 September 2002 be brought up and quashed. The defendants must pay the costs of the proceedings. They should have certificates under the *Appeal Costs Act* 1998.

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[1] see s 8(2).
[2] part of exhibits MH2 and MH9.
[3] Exhibit MH4, p1.
[4] and perhaps her husband
[5] see s20 of the Act
[6] see s14(1) of the Act
[7] it was made against both the plaintiff and her husband, though the authenticated certificate refers only to the plaintiff as being the appellant
[8] exh MH4, pp18-19
[9] exh MH4, p19
[10] and her children
[11] exh MH4, T 21
[12] exh MH4, T22-23.
[13] (1996) 89 A Crim R 297.
[14] See at 301
[15] See *Kuek v Victoria Legal Aid and Anor* [2001] VSCA 80; (2001) 3 VR 289. The court excepted a situation of 'exceptional circumstances'. See per Phillips JA at [16]-[18].
[16] judgment 24 October 1997.
[17] exh MH6 and MH 12 A
[18] [1995] HCA 58; (1995) 184 CLR 163 at 175-178; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[19] [2000] VSC 549 at [104]; (2000) 117 A Crim R 396.
[20] [1999] VSCA 37; [1999] 2 VR 203; 15 VAR 96.
[21] 2nd Edition, pp170-172.
[22] [1936] HCA 40; (1946) 55 CLR 449 at 504-505.
[23] As to which see Rule 63.03(3) of Chapter 1 of the Rules, not applicable in this case; and *Exell v Exell* [1984] VicRp 1; [1984] VR 1.
[24] See *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443 at 448-450.
[25] See Williams, *Civil Procedure Victoria* paragraph 23.01.47.
[26] So his Worship said, Exhibit MH4, p24: " ... at this stage, I don't think I can determine whether ... the application is vexatious, frivolous or in bad faith."
[27] Which is not to say that an order in the nature of Mandamus is required. In my view it is not.
[28] sworn on 7 October 2002.

APPEARANCES: For the plaintiff Hickman: Mr JP Brett with Mr S Anger, counsel. Stephen Andrianakis, solicitors. For the defendants Smith: Dr IRL Freckleton, counsel. Ken Smith & Associates, solicitors.
