

08/13; [2013] VSC 50

SUPREME COURT OF VICTORIA

BRITTAIN v MANSOUR

Dixon J

31 October 2012; 19 February 2013

CRIMINAL LAW – SENTENCING – STATUTORY CONSTRUCTION – PROSECUTION UNDER *FOOD ACT* 1984 – WHETHER MAGISTRATE ERRED IN ADJOURNING THE PROCEEDING AND RELEASING THE OFFENDER ON AN UNDERTAKING WITH A SPECIAL CONDITION REQUIRING A DONATION TO A NOMINATED CHARITY – MEANING OF ‘FINE’ – WHETHER CONDITION FOR MONETARY PAYMENT TO A THIRD PARTY A FINE – WHETHER THE IMPOSITION OF MONETARY PAYMENTS AS SENTENCES MUST, EXCLUDING RESTITUTION, COMPENSATION, AND COSTS, BE BY FINE: *SENTENCING ACT* 1991, SS3, 5, 7, 49, 59, 70, 75, 77, 83A, 83AC, PART 3B, PART 3BA; *MAGISTRATES’ COURT ACT* 1989, S3; *FOOD ACT* 1984, SS12, 57.

STATUTORY CONSTRUCTION – *SENTENCING ACT* 1991 (VIC) – MEANING OF ‘FINE’ – WHETHER POWER TO IMPOSE SPECIAL CONDITIONS ON AN UNDERTAKING UNDER S75 OF THE ACT IS FETTERED OR LIMITED – WHETHER PART 3B OF THE ACT IS THE ONLY POWER TO IMPOSE A MONETARY IMPOST ON AN OFFENDER AS A PENALTY OR PUNISHMENT: *SENTENCING ACT* 1991, SS3, 5, 7, 49, 59, 70, 75, 77, 83AC, PART 3B, PART 3BA.

HELD: Appeal allowed. The Magistrate was not authorised to impose the condition of the undertaking that the defendant make a payment of \$2500 to St Vincent de Paul.

1. Special conditions imposed in an undertaking on an offender being released under s75 of the *Sentencing Act* 1991 ('Act') must be consistent with the purposes of making an order under Part 3B Division 2. The condition that the offender pay \$2,500 to St Vincent de Paul was not directed to achieving any of the five purposes that are set out in s70 of the Act. It was not contended that the payment required was nominal and it was a payment that appeared to be within the range that would be considered for a fine. The sentencing purposes dictated by s70 of the Act for adjournments as sentences would not ordinarily permit the imposition of a monetary payment as a special condition, because it was, in substance, the imposition of a fine, a punishment that was not nominal or a display of mercy. A purpose of the special condition was as a penalty or punishment. The limitations on the power to impose special conditions in undertakings are found in s70 of the Act and, in this instance, those limitations were exceeded.

2. Once the sentencing court determines that imposing some financial consequence is an appropriate purpose for the sentence, that purpose cannot be achieved by a dismissal, discharge, or adjournment. The requirement for a monetary payment as a special condition effectively imposes a fine or a form of monetary impost of a kind that the Act requires to be imposed as a fine. Applying s5(7) of the Act, the court must impose a fine in accordance with Part 3B Division 1 of the Act.

3. Accordingly, the magistrate erred when he required the defendant to make a payment to St Vincent de Paul as a condition of the undertaking because such a condition was beyond his powers and was not a sentence passed in accordance with Part 3BA Division 1 (Adjournment) or Part 3B (Fines) of the *Sentencing Act*.

DIXON J:

1. Mr Brittain appeals on a question of law pursuant to s272 of the *Criminal Procedure Act* 2009 (Vic) from a decision of a magistrate made on 30 August 2011. On a prosecution under the *Food Act* 1984, following a guilty plea, the hearing was adjourned under s75 of the *Sentencing Act* 1991 (Vic) on an undertaking given to the court by Mr Mansour to be of good behaviour. As a special condition of that undertaking, Mr Mansour was required to pay the sum of \$2,500 to St Vincent de Paul (a charitable organisation).

2. The question on the appeal is whether it was open to the magistrate, when adjourning the proceeding and releasing Mr Mansour, to impose, as a special condition of an undertaking given, the obligation to make that payment to St Vincent de Paul and whether any penalty ordered should have been made payable to the City of Melbourne.

3. Mr Mansour did not appear. I granted the Public Interest Law Clearing House (PILCH) leave to appear as *amicus curiae* in the hearing, and it filed an affidavit and made submissions.

Background

4. Mr Brittain is an Environmental Health Officer with the City of Melbourne, authorised to act as an informant and bring proceedings in relation to offences under the *Food Act* 1984. Mr Mansour is the director of Melbourne Chef (Aust) Pty Ltd. Melbourne Chef is a processor and manufacturer of prepared/packaged meats.

5. Mr Brittain charged Mr Mansour and Melbourne Chef with offences under the *Food Act* that were heard and determined at the Magistrates' Court at Melbourne. Both Mr Mansour and Melbourne Chef pleaded guilty to one charge of selling food that was not suitable, in breach of s12(2) of the *Food Act*.

6. On 30 August 2011 at the plea hearing, the magistrate ordered:
Without conviction, adjourned to Melbourne Magistrates' Court on 29/08/2012 at 10.00am. Accused released upon giving an Undertaking starting on 30/08/2011. To appear before adjourned date if called upon during the period of adjournment. Accused to be of good behaviour during the period of adjournment.
Further order conditions:
To make a donation to St Vincent de Paul for their "Food Van" Service to the Needy/Homeless in an amount of \$2,500 – payment to be made by 28 October 2011.

7. Neither Mr Mansour nor the prosecutor suggested that a payment be made to St Vincent de Paul. The submission for Mr Mansour on the plea was that he be fined without conviction. The magistrate proposed the special condition and Mr Mansour, through his counsel, agreed to give that undertaking, which the magistrate duly took. Melbourne Chef was convicted and fined \$5,000 with costs. The solicitors for Mr Brittain provided a copy of the undertaking to me.

UNDERTAKING WITH CONDITIONS

CP230-7

The Magistrates' Court at MELBOURNE on 30/08/2011

Case Number : B11124555

found **ELLIE MANSOUR**

Date of Birth :

of

Licence No. :

State :

guilty of

CHARGE 2 - SELL FOOD THAT IS UNSUITABLE

and released you on an undertaking with the conditions written below. The court without conviction adjourned the further hearing of your case to MELBOURNE MAGISTRATES' COURT ON 29/08/2012 at 10:00 am
The undertaking starts on 30/08/2011 and goes to 29/08/2012
You must be of good behaviour during the time the undertaking is in force.

☐ You must appear at Court on the date that this case has been adjourned to.

☐ You must appear at Court before the date that this case has been adjourned to only if you get a notice from the Court telling you to appear.

☒ The other special conditions that apply to you are :

TO MAKE A DONATION TO ST VINCENT DE PAUL FOR THEIR 'FOOD VAN' SERVICE TO THE NEEDY/HOMELESS IN AN AMOUNT OF \$2,500 - PAYMENT TO BE MADE BY 27 OCTOBER 2011.

☐ You must complete an accredited drink-driving education program.

☐ You must complete 'FOCIS' the approved drug education and information program.

☐ To pay \$ _____ costs, \$ _____ to the Court Fund, \$ _____ compensation.

I, **ELLIE MANSOUR**
of _____

agree to comply by the conditions of this undertaking :

This undertaking was acknowledged
Before _____ On 30/08/2011
Signature _____ Magistrate _____

WARNING - If you break the conditions of this undertaking :
-You may be punished for any offence that has been affected on you agreeing to this undertaking.
-You may also be punished for failing to comply with the conditions of the undertaking by a fine of up to \$1,521.

8. The copy of the undertaking comes from the court file and is unsigned by Mr Mansour, although it is clear from the transcript of the proceedings that Mr Mansour gave the undertakings orally through his counsel. The want of a signature is insignificant for the issues on the appeal.

Grounds of appeal

9. The two grounds of appeal raised (in summary) are:

(a) Does s75 of the *Sentencing Act* 1991 (Vic) authorise the court when adjourning the proceeding and releasing the offender to impose a condition on the undertaking that an offender make a payment of \$2,500 to St Vincent de Paul?; and

(b) If the court is empowered to require a payment as a condition of such an undertaking, does s 57 of the *Food Act* 1984 (Vic) require that the payment be made to the prosecuting authority, in this case, the Melbourne City Council?

The statutory framework

Food Act 1984

10. Section 12(2) of the *Food Act* 1984, provides:

12. **Handling and sale of unsuitable food**

...

(2) A person must not sell food that is unsuitable.

Penalty: \$40,000 in the case of an individual and \$200,000 in the case of a corporation.

The maximum penalty is a fine. In sentencing an offender, the court has regard to the provisions of the *Sentencing Act* 1991.

Sentencing Act 1991

11. Relevant purposes of the *Sentencing Act* 1991^[1] include having within the one act all general provisions dealing with the powers of courts to sentence offenders and to provide sentencing principles to be applied by courts in sentencing offenders. Various provisions govern how Victorian courts impose a fine on an offender, which is the penalty identified by the *Food Act* 1984. Other provisions govern how Victorian courts may adjourn a proceeding on the offender entering into an undertaking, the disposition adopted by the magistrate in this case.

12. As appears from Part 3, Division 1 of the Act, which deals generally with sentences, each form of disposition is a sentence. Section 7 relevantly provides:

7. **Sentences**

(1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and subject to this Act—

...

(f) with or without recording a conviction, order the offender to pay a fine; or

...

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing on conditions;

13. Section 3 of the *Sentencing Act* 1991 defines a 'fine' as:

the sum of money payable by an offender under an order of a court made on the offender being convicted or found guilty of an offence and includes costs but does not include money payable by way of restitution or compensation or any costs of or incidental to an application for restitution or compensation payable by an offender under an order of a court

14. Section 3 of the *Magistrates' Court Act* 1989 states that a 'fine':

includes any penalties, forfeitures, sums of money and costs ordered to be paid by the person fined.

15. Section 5(1) of the *Sentencing Act* 1991 sets out the purposes for which sentences may be imposed. Section 5(7) provides that a fine must not be imposed unless the court has been satisfied that the purpose for which the sentence has been imposed cannot be achieved by a dismissal, discharge, or adjournment. The Act distinguishes fines and adjournments as sentences. An order made, without recording a conviction, that the offender pay a fine is distinct to circumstances

where an order is made, without recording a conviction, that the offender enter into an adjourned undertaking on conditions. This distinction, when it came into force under predecessor legislation, affected the range of sentencing dispositions available to magistrates seeking to avoid imposing consequences that followed on the fact of conviction, while still imposing a penalty.

16. Under the *Sentencing Act* 1991, the power to fine is not dependant on imposing a conviction. Part 3B Division 1 of the Act contains the statutory regime for fines. Section 49 of the Act provides:

49. Power to fine

(1) If a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.

(2) The maximum fine that a court may impose under subsection (1) is the appropriate maximum specified in the specific provision or, if no maximum is specified there, then that specified in section 52.

17. If a court decides to fine an offender, the exercise of the power to do so is governed by s50 of the Act and the process of imposing the fine, the terms of the order, the process for enforcement of fines and various other matters including the manner of their appropriation are governed by the provisions of this Part.

18. Part 3BA Division 1 of the Act governs dismissals, discharges and adjournments. The Act abolishes the common law bond.^[2] The disposition of the offender in this proceeding was pursuant to this Part. Section 70 spells out the purposes of orders under this Division.

70. Purpose of orders under this Division

(1) An order may be made under this Division—

- (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;
- (b) to take account of the trivial, technical or minor nature of the offence committed;
- (c) to allow for circumstances in which it is inappropriate to record a conviction;
- (d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment;
- (e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender.

It must be supposed that the magistrate's purpose was that articulated in sub-paragraphs (c), (d), or (e) of s70(1). The magistrate proceeded under s75 of the Act which states:

75. Release on adjournment without conviction

(1) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceeding for a period of up to 60 months and release the offender on the offender giving an undertaking with conditions attached.

(2) An undertaking under subsection (1) must have as conditions—

- (a) that the offender attends before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned; and
- (b) that the offender is of good behaviour during the period of the adjournment; and
- (c) that the offender observes any special conditions imposed by the court.

(3) Subject to Division 3 of Part 3B, a court may attach a justice plan condition that the offender participate in the services specified in a justice plan for a period of up to 2 years specified by the court or the period of the adjournment, whichever is the shorter.

(4) An offender who has given an undertaking under subsection (1) may be called on to attend before the court—

- (a) by order of the court; or
- (b) by notice issued by the proper officer of the court.

(5) An order or notice under subsection (4) must be served on the offender not less than 4 days before the time specified in it for the attendance.

(6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must dismiss the charge without any further hearing of the proceeding.

19. The term 'special condition' is not defined by the Act, but the term itself neither precludes, nor implicitly authorises, a financial penalty in the form of a condition that is an imposed obligation to pay money to a third party. The offender's obligation is to 'observe' a special condition, meaning

to 'obey, comply with, or conform to' it.^[3] An analogous provision, s72 that enables disposition of an offender by release on adjournment with conviction, provides for an undertaking to have conditions that the offender observes any 'conditions attached by the court'.^[4] On the other hand, s83A, which allows a court to defer sentencing following a finding of guilt is silent as to whether, when releasing the offender on an undertaking, that undertaking may be conditioned. The purposes for which a court may defer sentencing set out in s83A(1A) would seem to imply that conditions will often be imposed or attached to such an undertaking.

20. A further provision in Part 3BA Division 1 of the Act is relevant.

77. Compensation or restitution

A court may make an order for compensation or restitution in addition to making an order under this Subdivision.

It was not suggested that the condition requiring Mr Mansour to pay \$2,500 to St Vincent de Paul could be characterised as an order for compensation or restitution. It is clear, from s77 and from the definition of 'fine' in s3, that a condition in a court order requiring payment of compensation or restitution could not be characterised as a fine. On the other hand, a sum of money payable for costs under an order is a fine.

21. Part 3C of the Act, which deals with contravention of sentences now^[5] provides:

83AC Contravention of order for release on adjournment

An offender who is subject to an order under section 72 or 75 for release on the adjournment of the proceeding must not contravene that order, unless the offender has a reasonable excuse.

Penalty: Level 10 fine.

22. This statutory framework for sentencing is of general application, but there is a particular provision of the *Food Act* that lies behind the issue arising in this proceeding. Regarding the appropriation of fines, s59 of the *Sentencing Act* 1991 provides:

59 Application of fines etc.

The whole or any part of a fine, penalty or sum of money which by or under any Act is authorised or directed to be imposed on a person forms part of, and must be paid into, the Consolidated Fund if no other way of appropriating or applying it is prescribed by law.

23. In the case of prosecutions under the *Food Act* 1984, that Act prescribes another manner of appropriation or application of fines recovered. Section 57 specifies the manner for payment of penalties in *Food Act* prosecutions.

57. Payment of penalties

(1) Where an offence against this Act has been prosecuted by the council, all penalties recovered in relation to the offence shall be paid into the municipal fund of that council.

(2) If an infringement notice has been issued by a council under this Act, the infringement penalty recovered in relation to the notice is payable to the municipal fund of the council.

(3) For the purposes of this section—

(a) an offence prosecuted by an authorized officer of a council is taken to have been prosecuted by the council; and

(b) an infringement notice issued by an authorized officer of a council is taken to have been issued by the council.

24. If the payment required to be made to St Vincent de Paul is, on the proper construction of the statute, a fine, then the penalty must be imposed in compliance with the relevant provisions of the *Sentencing Act* and the City of Melbourne municipal fund is entitled to the revenue from recovered fines. In most cases of release on adjournment without conviction on an undertaking, where the court requires a monetary payment to be made to a nominated charity or to the court fund as a special condition of the undertaking, the Consolidated Fund is deprived of the revenue. In a *Food Act* prosecution, the local council's municipal fund sustains the loss of revenue.

25. On the other hand, funds that are diverted from the Consolidated Fund or from a municipal fund are directed to charitable purposes by such conditions. If such payments, as fines, must be paid to the Consolidated Fund or a municipal fund, charitable beneficiaries are likely to sustain a loss of revenue

26. I have evidence from Mr Brittain of three occasions in 2010 when offenders found guilty of breaches of the *Food Act* made payments to charitable organisations^[6] totalling \$70,000. I have evidence from Mr Brittain of eight occasions between 2007 and 2011 of payments totalling \$339,500 imposed by different magistrates for statutory offences.^[7] Information provided from the Lighthouse Foundation suggests that between August 2011 and June 2012, it received \$6,500 from the court fund and \$17,800 from 'court directed' payments. This evidence, which is not based on a proper statistical sample or a survey, does not reveal the frequency with which special conditions requiring a payment to the court fund or a charity are imposed on offenders or the total sums that may be involved.

27. The printed form used by magistrates to acknowledge an undertaking includes a box that can be ticked and a clause that can be completed to provide for such a condition. I suspect that many hundreds of thousands, possibly millions, of dollars are contributed annually to the court fund and charities by offenders released on adjournment without conviction. I believe dispositions of summary offences in this manner are a common practice of long standing. The court fund is distributed to not-for-profit organisations that provide charitable or community services for the benefit of Victorians in need or at a disadvantage within local communities. It is often the case that a charity expressly nominated by a magistrate to receive the payment provides relief from the disadvantages that flow from the offending conduct. As will become apparent, negative and possibly unintended^[8] consequences, for beneficiaries of the court fund and charities, may follow if the construction of the *Sentencing Act* contended for by Mr Brittain is correct.

28. Although I have drawn attention to these matters, they do not influence my task, which is to determine the proper construction of the statute and the intention of the legislature so expressed.

Mr Brittain's submissions

29. Mr Brittain submitted that the special condition to make a payment to St Vincent de Paul, or any monetary payment, was a 'fine' as it falls within the definition of a 'fine' in s3 and enlivens s49 of the *Sentencing Act* concerning the court's powers to fine. The *Sentencing Act* prescribes the manner in which fines can be imposed. Because a failure to pay in breach of the special condition of an undertaking is an offence, the special condition payment is a sum of money payable on an order, and it is therefore a 'fine' under s3 of the *Magistrates' Court Act* and s3 of the *Sentencing Act*.

30. There is no express power in the *Sentencing Act* to impose a financial penalty, other than a fine, compensation, restitution or costs. Section 7 does not specify that a court may sentence an offender by, with or without conviction, ordering the offender to pay a sum of money to the court fund or a charity.

31. Alternatively, if the special condition did not fall precisely within the definition of a 'fine', because the *Sentencing Act* specifically deals with monetary impost by court order the general condition making power under s75A encroached impermissibly on that specific process. *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trade Union of Australia*^[9] stands for the proposition that express or special powers in legislation preclude the court from relying on a general provision in the legislation to achieve the same outcome. The question is whether the *Sentencing Act* confers only one power to impose a monetary impost on an offender necessitating the confinement of the generality of another apparently applicable power, the power to impose a monetary impost by a special condition in an undertaking, by reference to the restrictions in the former power.^[10] In particular, Mr Brittain points to the process and limitations that apply to fines imposed as sentences under the Act. The provisions of the Act in relation to fines are detailed and exhaustive and it is therefore inappropriate to rely on a general condition making power for undertakings to imply a statutory power to impose, in the exercise of an unfettered discretion, a monetary impost that is not a fine as part of a sentencing disposition.

32. Mr Brittain's final contention was that s57 of the *Food Act* does not permit a court to require or impose a condition by way of an undertaking that an offender make a payment to a charity. It was contended that there is no express power in the *Food Act*, which permits this course, and it is inconsistent with both the *Food Act* and *Sentencing Act* provisions, which enable a magistrate to impose a pecuniary penalty, restitution, or compensation. Directed by the magistrate in terms

of its quantum, recipient, and timing, the required payment is plainly intended as a penalty or punishment.

33. It was also argued that in prosecutions under the *Food Act*, s57 of the Act requires that all penalties recovered in relation to the offence be paid in to the municipal fund of the prosecuting council. It was submitted that a payment pursuant to a condition to an undertaking to an adjournment amounted to a penalty under s57 and therefore it was not open to the magistrate to direct the payment to be made to St Vincent's de Paul. Mr Brittain contended, citing *Zarb v Kennedy*,^[11] that a general sentencing provision must yield to a contrary intention found, expressed or by necessary implication, in the statute creating the particular offence.

PILCH's submissions

34. PILCH submitted firstly that a special condition to make a payment to a charity under s75(2)(c) of the *Sentencing Act* does not amount to a fine as it is required by way of an undertaking, an implicit agreement between the offender and the court, that is fundamentally different to a fine which is imposed upon an offender. Secondly, the special condition payment to St Vincent de Paul is not a 'recovered penalty' under s57 of the *Food Act* as it is not an amount of money recoverable or received by any entity under the *Food Act*.

35. The legislature has not sought to limit the power of the court to frame appropriate undertaking conditions, evident from the absence of a limiting definition of 'condition' or 'special condition' under the *Sentencing Act* that would exclude a monetary payment to a charitable purpose. If the legislature intended to exclude the practice of requiring a payment be made to charity or, as is perhaps more common, to the court fund as a condition of adjourning the sentencing stage of disposition of summary offence prosecutions, the *Sentencing Act* could prescribe that a special condition of an undertaking imposed by the court shall not 'include an obligation to pay a sum of money'.^[12]

36. Rather, s75(2)(c) is a broad enabling power, 'any special condition' may be used to impose conditions such as medical treatment, psychiatric treatment, reporting to police, or passport surrender. Its broad characteristics have long been used by magistrates to frame special conditions responsive to the facts of the offence and the circumstances of the offender. An anecdotal example raised in argument was an adjournment following proved assault charges on an undertaking that the offender to make a payment to an anti-violence charity. I might add that a special condition that the offender successfully complete an anger management course would be clearly within power.

37. PILCH submitted that the principle in *Anthony Hordern & Sons*^[13] did not apply. A general condition making power to determine the content of an undertaking to the court when used to require a donation to a charity did not amount 'to the same thing' as a 'fine' payable to an authority under the Act.

38. PILCH noted that s75 is also used by the Magistrates' Court to enable donations to be made by offenders to the Magistrates' Court fund which was historically known as the 'poor box'. It was argued that parliament has not set out to remove the ability of magistrates to seek undertakings to make charitable donations and therefore such a legislative intention should not be implied.

What is the proper characterisation of the payment required by the special condition?

39. The payment required by the special condition is a fine as that term is defined by the Act. A fine is the sum of money payable by the offender under an order of the court on the offender being convicted or found guilty of an offence. In dealing with the proceeding as the magistrate did, on being found guilty of the offence, Mr Mansour was required to pay \$2,500 under the court's order disposing of the proceeding by adjournment.

40. I cannot accept PILCH's submission that a special condition to make a payment to a charity will not be a fine. That contention was advanced on two grounds. A fine is an obligation to pay money that is imposed by a court. A payment made under a special condition of a recognisance to be of good behaviour is voluntary. Secondly, a fine is a payment to consolidated revenue, that is, a payment subject to appropriation in accordance with s59 of the *Sentencing Act* 1991. A payment under a special condition to a charity or to the court fund is of a different character.

41. The statutory definition of a fine is not avoided because an obligation to make a payment is agreed to by the offender, in the sense that recognisances are, strictly speaking, entered into voluntarily, rather than the offender receiving the judgment of the court.^[14] I accept that an offender might refuse to give an undertaking, in which case that particular form of disposition might not be available to, or preferred by, the court. The fact that an offender chooses to submit to a special condition is not determinative in characterising the payment required by the special condition.

42. Interpreting an analogous provision, s556A of the *Crimes Act 1900* (NSW), Gleeson CJ (as he then was) in *R v Ingrassia*^[15] said:

It is contrary to common law principle that a person who has not been convicted of an offence should be punished by order of a court. No doubt, legislation expressed in sufficiently clear terms may displace that principle, but that has not been done by the language of s556A. The conditions which may be imposed (or, more accurately, to which an offender may be required to submit) under s556A(1)(b), cannot be of such a nature that they involve punishment for an offence of which, by hypothesis, the offender has not been convicted.

43. In acting under s75 to adjourn the proceeding and release the offender, the court makes an order. Its power to do so is conditional on the offender giving an undertaking, which must have as conditions the matters specified in s75(2), including ‘that the offender observes any special condition imposed by the court’. The use of the word ‘imposed’ recognises that the offender’s decision to undertake to abide by a special condition is part of the sentencing process and that a requirement to pay money is an imposed obligation, albeit, one accepted by the offender. The offender is, as Gleeson CJ put it, required to submit to the condition. The payment is not intended as a gift, or a donation. It is in discharge of an obligation imposed by a court.

44. A payment required by a special condition is a payment made ‘under an order of a court’ that is made on the offender being found guilty of an offence. The payment is not payable by way of restitution or compensation. Such a payment is, by definition, a fine. The fact that the offender has submitted to the obligation does not alter that characterisation.

45. A special condition of an undertaking requiring a payment of money must be observed and a failure to do so will be a contravention of the s75 order for release of the offender on the adjournment of the proceeding. Further, that failure to make the payment is itself an offence. At the relevant time, these consequences were prescribed by the now repealed s79, which was headed ‘Breach of order for release on adjournment’ but s83AC of the Act, set out above, is to the same effect.

46. The second basis for PILCH’s submission that a payment in the nature of a charitable contribution was also dealt with by the NSW Court of Appeal in *Ingrassia*. In that case, the condition under contemplation was whether an offender could be required to pay a fine as a condition of discharge on a recognisance. Gleeson CJ said:^[16]

There was some argument before this Court as to whether the word “fine” was strictly applicable to a payment of the kind now in contemplation. What was involved, counsel said, was more in the nature of a donation to the revenue. That suggestion underlines the conceptual difficulty. If donations to the State Treasury can be made the subject of conditions under s556A then so, presumably, can donations to other equally worthy objects of bounty, such as charities or victims.

If the law does not permit the imposition of a fine when an offender is dealt with under s556A, and if the imposition of a punishment would be inconsistent with the hypothesis that the court is not proceeding to convict the offender, then it would represent a triumph of words over ideas to avoid that consequence by describing the payment as a donation to the revenue. In any event, s556A is not a provision to be used for the purpose of soliciting gifts, whether to the revenue, to charities, or to anyone else.

47. That the power to impose special conditions does not extend to monetary payments other than compensation or restitution can be demonstrated in another way. It is well established in relation to analogous provisions that the power to impose conditions is not completely at large. In *Ingrassia*,^[17] Gleeson CJ stated that while provisions empowering the release of offenders on recognisances commonly provide that they may contain any conditions which the court considers appropriate, the scope of such conditions is not unfettered.

48. In *The Queen v Keur*,^[18] Zelling J observed:

The section certainly refers to the accused during the period of the bond complying “with such conditions as the Court thinks fit to impose” but those words must be given a reasonable meaning. The Court clearly could not impose an illegal or impossible condition nor a condition which it was beyond its power to impose and in accordance with normal rules of statutory interpretation.

49. In *Bantick v Blunden*,^[19] Green CJ agreed stating:

Section 20(I) of the *Crimes Act* 1914 gives the court the power to impose such conditions as it thinks fit. Although the power is not expressly made subject to any limitations, it is obvious that its scope is not unlimited: for example conditions imposed pursuant to it must bear some relationship to the offence or to the circumstances of the offender and may not be such as to oblige a defendant to do something which is unlawful or impossible: see *Isaacs v McKinnon* and *R v Keur*. A further limitation is indicated by the words of the subsection itself. Two conditions of the exercise of the power conferred by the first limb of s20(I) are that the court thinks that it is appropriate to “release [the defendant] ... without passing any sentence upon him” and that in fact it does so. The imposition of a condition which operated so that the defendant was not in fact released, or which amounted to the passing of a sentence upon him, would be bad because it would be inconsistent with the object of the subsection and, possibly, also because it would be beyond power, as it would result in the conditions for the operation of the subsection not being satisfied.

50. Bearing these considerations in mind, special conditions imposed in an undertaking on an offender being released under s75 must be consistent with the purposes of making an order under Part 3B Division 2. I have set out above the provisions of s70 which states these purposes. The condition that the offender pay \$2,500 to St Vincent de Paul is not directed to achieving any of the five purposes that are there set out. It was not contended that the payment required was nominal and it is a payment that appears to be within the range that would be considered for a fine. The sentencing purposes dictated by s70 of the Act for adjournments as sentences would not ordinarily permit the imposition of a monetary payment as a special condition, because it will be, in substance, the imposition of a fine, a punishment that is not nominal or a display of mercy. As I have said, a purpose of the special condition was as a penalty or punishment. The limitations on the power to impose special conditions in undertakings are found in s70 of the Act and, in this instance, those limitations have been exceeded.

51. A fine may be imposed without a conviction being recorded. A sentencing court’s decision that a punishment is appropriate that imposes some financial consequence, but without the consequences of a conviction, can be achieved. That appears to be the intention in this case. Once the sentencing court determines that imposing some financial consequence is an appropriate purpose for the sentence, that purpose cannot be achieved by a dismissal, discharge, or adjournment. The requirement for a monetary payment as a special condition effectively imposes a fine or a form of monetary impost of a kind that the Act requires to be imposed as a fine. Applying s5(7), the court must impose a fine in accordance with Part 3B Division 1 of the Act.

52. A money payment for a charitable purpose, and, specifically, a financial contribution to the court fund are not identified in the section, or elsewhere in the Act, as purposes for which an order may be made under the sub-division. Payments of that type, unlike payments in restitution or of compensation, are not excluded from the definition of a fine. The legislature has not seen fit to empower a sentencing court, where it is a Magistrates’ Court, to impose obligations to make monetary payments under a special condition in an undertaking to provide funds for the Magistrates’ Court’s court fund or such community based charities as a magistrate may wish to support. The legislature could have achieved that objective by extending the excluded purposes for monetary payments from the definition of a fine, beyond restitution or compensation, to make clear that such payments are not fines. It has not done so. The language of the statute makes clear the legislative intention.

53. There may be cases where the proper balance of a sentencing discretion warrants both the imposition of a monetary impost and an opportunity to demonstrate that the offender has the ability and the motivation to not re-offend. Such purposes were once commonly achieved by the type of sentence passed in this case. That sentencing purpose is now partly recognised in s83A(1A) of the Act. The provisions of s83A(1A) may be contrasted with s70. It is unnecessary for me to determine whether a special condition such as that imposed in this case would be permitted

by the purposes set out in s83A(1A). It can be observed that when the court defers sentencing under Part 3B, Division 4, it may release the offender on an undertaking, but the terms of the Division are silent as to whether such undertakings may contain any conditions which the court considers appropriate.

54. The special condition that the offender pay \$2,500 to St Vincent de Paul is a ‘fine’ that is imposed other than in accordance with the provisions of the *Sentencing Act* 1991 (Vic). Although the payment was in this case directed to a nominated charity that bore some apparent connection with the nature of the offending, the special condition is indistinguishable, in the circumstances of this prosecution, from the more common form of monetary payment required, a payment to the court fund. A special condition of an undertaking under s75(1) that an offender make a monetary payment, irrespective of the nominated recipient of the payment, is likely, depending on the purposes of the sentence, to be a fine imposed other than in accordance with the provisions of the Act. The apparently applicable power to impose special conditions in undertakings under s75 of the Act is fettered or limited by the purpose and context of the sentencing process as it is now governed by the Act as I have explained above.

55. Although not necessary to justify the conclusion I have reached, I would add that where the sentencing court has as its purpose that the monetary payment is a penalty or a punishment, the principle in *Anthony Hordern & Sons* comes into play. Mindful of the recent observations of the Court of Appeal in *R v Dale*^[20] when reviewing the important authorities on the interpretation of statutes, and having regard to the purposes and language of the statute as a whole in the context of the application of the rule in *Anthony Hordern & Sons*, the only process for the imposition of an obligation to make a monetary payment as a sentence is that found in Part 3B of the Act. The only process for the imposition of an obligation to make a monetary payment in addition to a sentence is that found in Part 4 of the Act. The apparently applicable power to impose special conditions in undertakings under s75 of the Act cannot be relied on to imply a statutory power to impose, in the exercise of an unfettered discretion, a monetary impost as part of a sentencing disposition by adjournment.

56. Having regard to the history and significance of the court fund and the support provided by local courts to their communities,^[21] it may be that the absence of power to impose on an offender a monetary payment obligation to a charity as a condition of release on adjournment to be of good behaviour is an unintended consequence of reforms to sentencing, but that is a matter for others.

57. I am satisfied that the magistrate erred when he required Mr Mansour to make a payment to St Vincent de Paul as a condition of the undertaking because such a condition was beyond his powers and was not a sentence passed in accordance with Part 3BA Division 1 (Adjournment) or Part 3B (Fines) of the *Sentencing Act*. I will allow the appeal and declare that the *Sentencing Act* 1991 (Vic) did not in this proceeding authorise the magistrate to impose on Mr Mansour a condition on his undertaking that he make a payment of \$2,500 to St Vincent de Paul when adjourning the proceeding and releasing Mr Mansour. It is unnecessary to consider either the other arguments raised by Mr Brittain or the second question.

58. I will hear from counsel as to the appropriate orders.

^[1] Section 1(b) and 1(e) of the Act.

^[2] Section 71 of the Act.

^[3] See *Macquarie Dictionary*, 5th Ed.

^[4] Section 72(2)(c) of the Act.

^[5] Section 83AC was inserted into the Act when s79 which dealt with breach of an order for release on adjournment was repealed. Section 79 was in force when the order for release that is the subject of this application was made. No breach of the order made is alleged.

^[6] Make a Wish Foundation, Lighthouse Foundation and Royal Children’s Hospital.

^[7] The legislation included *Accident Compensation Act* 1985, *Crimes Act* 1958, *Country Fire Authority Act* 1958, *Occupational Health and Safety Act* 2004, *Road Safety Act* 1986, *Planning and Environment Act* 1987, and *Building Act* 1993.

^[8] There is nothing in the *Sentencing Act* or in the speeches made in respect of it in the legislature that expressly evinces an intention on the part of the legislature to deprive magistrates of the power to direct monetary payments to the court fund or to charities and at no stage does it appear that the common practice of magistrates has been challenged to preserve the Consolidated Fund.

^[9] [1932] HCA 9; (1932) 47 CLR 1 at 7; 38 ALR 355 (Gavan Duffy CJ and Dixon J).

^[10] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 589 [59]; (2006) 230 ALR 370; (2006) 81 ALJR 1; 93 ALD 1 (Gummow and Hayne JJ).

^[11] [1968] HCA 80; (1968) 121 CLR 283; [1969] ALR 292; 43 ALJR 1.

^[12] compare the definition of fine in s3(1), *Sentencing Act* 1991, noting the absence from the existing exclusions from the definition of a monetary payment for a charitable purpose.

^[13] [1932] HCA 9; (1932) 47 CLR 1; 38 ALR 355 referred to at [26] and [72] of the Appellant's submissions dated 10 February 2012.

^[14] See the examination of the history of the recognisance or bond by Jacobs J in *Griffiths* [1977] HCA 44; (1977) 137 CLR 293 at 319–323; (1977) 15 ALR 1; (1977) 51 ALJR 749.

^[15] (1997) 91 A Crim R 383 at 386; (1997) 41 NSWLR 447 at 450.

^[16] (1997) 91 A Crim R 383 at 386–7; (1997) 41 NSWLR 447 at 451.

^[17] (1997) 91 A Crim R 383 at 385; (1997) 41 NSWLR 447 at 450.

^[18] (1973) 7 SASR 13 at 15; (1973) 2 ALR 237.

^[19] (1981) 58 FLR 414 at 416; (1981) 36 ALR 541; [1981] Tas R (NC) N9.

^[20] [2012] VSCA 324 (20 December 2012)

^[21] See *Administration of Court Poor Box Funds*, Law Department, Victoria, May 1985.

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