12/05; [2005] VSC 99

SUPREME COURT OF VICTORIA

ROADS CORPORATION v MAGISTRATES' COURT of VICTORIA & SEAR

Hargrave J

30 March, 11 April 2005 — (2005) 43 MVR 455

TRAFFIC INFRINGEMENTS – DRINK/DRIVING AND SPEEDING INFRINGEMENTS – TOTAL OF 13 DEMERIT POINTS RECORDED – OFFENDER GIVEN OPTION TO EXTEND DEMERIT POINT PERIOD BY 12 MONTHS – OPTION TAKEN – FURTHER INFRINGEMENT INCURRED DURING 12-MONTH PERIOD AND ANOTHER 3 DEMERIT POINTS INCURRED – DRIVER LICENCE SUSPENDED BY VICROADS – APPEAL TO MAGISTRATE AGAINST SUSPENSION – SCOPE OF APPEAL TO COURT – FINDING BY MAGISTRATE THAT ORIGINAL INFRINGEMENT NOTICE DID NOT CONTAIN ALL OF THE PRESCRIBED PARTICULARS AS REQUIRED BY THE RELEVANT REGULATIONS – FINDING BY MAGISTRATE THAT NOTICE INVALID – APPEAL UPHELD – DIRECTION BY MAGISTRATE TO VIC ROADS TO REMOVE DEMERIT POINTS FROM REGISTER – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS 24, 25, 26.

S. was intercepted driving a motor vehicle. It was alleged he was drink/driving and speeding. As the BAC was less than 0.07, an infringement notice for that and the speeding offence was issued. S. incurred a total of 13 demerit points. Subsequently, S. was served with an option notice under s25(3) of the *Road Safety Act* 1986 ('Act') which gave S. the option to accept an immediate suspension of his driver licence for 3 months or extend the demerit point period for 12 months. S. opted to extend the period for 12 months in full knowledge that if he re-offended within that period he would lose his driver licence for 6 months.

During the extended period, S. was found guilty of a speeding offence thereby incurring a further 3 demerit points. Accordingly, VicRoads suspended S's driver licence for 6 months. S. appealed to the Magistrates' Court under s26(1)(c) of the Act and contended that as the 0.05 infringement notice did not comply with the applicable regulations, the notice was misleading in form and accordingly, the notice was invalid. The magistrate agreed with this submission, upheld S's appeal and directed VicRoads to remove from the Demerits Register the 10 demerit points associated with the 0.05 infringement notice. Upon application for judicial review—

HELD: Application granted. Remitted to the Magistrates' Court for rehearing and determination according to law.

1. Whether or not the 0.05 infringement notice was misleading in that it did not refer to the fact that under amending legislation there was a 10 demerit point penalty for driving with a blood alcohol concentration between 0.05 and 0.07, was not to the point. Once an infringement notice includes all of the prescribed particulars under the regulations, it is a valid notice. If it is misleading in a material way, then the recipient of such a notice can elect to object to it and take his or her chances in court. This may or may not lead to a conviction and, if it does, may or may not lead to a different penalty being imposed to that stated in the relevant infringement notice. However, unless the charge resulting from an objection to an infringement notice which complies with the regulations is dismissed, the infringement notice remains an infringement notice for the purposes of the statutory regime under consideration. It follows that VicRoads was obliged to record the applicable demerit points against the driver referred to in the notice and otherwise follow the mandatory provisions of the Act.

2. The legislature has expressly limited, in a very narrow way, the grounds of appeal available to a driver whose driver's licence is suspended under s25(3B)(a) of the Act. Parliament has done so in plain and unambiguous language. Where the identity of the driver is not in issue, as in this case, then the scope of the appeal under s26(1)(c) of the Act is limited to "miscalculation" in the assessment of the relevant number of demerit points attributable to the driver. The choice of the term "miscalculation" limits the scope of appeal to, and provides a "safety net" in respect of, errors made in the calculation of demerit points attributable to the driver whose licence has been suspended. It would be straining the language of s26(2)(b) to an impermissible extent to interpret it as permitting an inquiry as to whether an infringement notice which was served on the correct driver, and which contained all of the prescribed particulars, was nevertheless "invalid". An appeal under s26(1)(c) could not be based upon an allegation that the relevant infringement notice did not contain all of the prescribed particulars as required by the regulations made under s88(1) of the Act. The recipient of a defective notice has the remedy of objecting to the notice and taking his or her chances in court when a charge is laid. Accordingly, the magistrate exceeded the court's jurisdiction in accepting the arguments advanced by S. and determining the appeal is his favour.

HARGRAVE J:

Background and Facts

1. In this proceeding, the first defendant, trading as VicRoads ("VicRoads"), seeks by Originating Motion under Order 56 of the Rules of the Supreme Court, to challenge the decision of the Magistrates' Court of Victoria to allow an appeal by the second defendant ("Sear") made pursuant to s26(1)(c) of the *Road Safety Act* 1986 ("the Act"). The appeal by Sear arose out of the following factual circumstances.

2. On 21 February 2002, Sear was intercepted driving a motor vehicle. It was alleged that he was speeding and that he was drink-driving. As a result, a member of the Victoria Police issued Sear with two traffic infringement notices. First, a traffic infringement notice alleging that Sear had driven a motor vehicle with a blood alcohol concentration of above 0.05 grams per 100 millilitres of blood but below 0.07 grams per 100 millilitres ("the 0.05 infringement notice"). Second, a traffic infringement notice alleging that Sear had driven a motor vehicle in excess of the speed limit by more than 15 kph but less than 30 kph ("the speeding infringement notice").

3. Under the demerit points regime contained in the Act, as explained hereafter, Sear incurred, and VicRoads was obliged to record against him in its Demerits Register, a total of 13 demerit points for the two offences described in the infringement notices The 0.05 offence attracted 10 demerit points and the speeding offence attracted 3 demerit point.

4. As Sear had incurred 12 or more demerit points, VicRoads was required under s25(3) of the Act to serve a notice on Sear. It did so (the "option notice"). The option notice gave Sear an option to accept an immediate suspension of his driving licence for three months or to extend the "demerit point period" for twelve months By virtue of s25(3C) of the Act, if Sear extended the demerit point period, and incurred no further demerit points during the twelve month extended demerit point period, his licence would not be suspended and the demerit points previously incurred would thereafter be disregarded. However, under s25(3B) of the Act, if Sear did incur one or more demerit points during the extended twelve month demerit point period, VicRoads would be required to suspend his licence for a minimum of six months.

5. Sear elected to extend the demerit point period. During that period, he was charged with speeding. He was found guilty and thereby incurred a further 3 demerit points As a result, on 1 December 2003, VicRoads suspended his licence pursuant to s25(3B) of the Act.

6. On 19 January 2004, Sear appealed to the Magistrates' Court pursuant to s26(1)(c) of the Act against the suspension of his licence. The appeal was heard on 29 April and 21 May 2004.

7. In his appeal to the Magistrates' Court, Sear contended that the 0.05 infringement notice did not comply with the applicable regulations made pursuant to s88(2) of the Act and that the notice was misleading in form. Accordingly, it was submitted that the 0.05 notice was "invalid".

8. The magistrate did not accept that the 0.05 notice failed to comply with the Regulations. However, she found that the 0.05 notice was nevertheless "invalid" because it prevented Sear from making a fully informed decision as to whether to challenge it. On this basis, the magistrate allowed the appeal against the suspension of Sear's licence and directed VicRoads to remove from its Demerits Register the 10 demerit points associated with the 0.05 infringement notice. The magistrate also ordered VicRoads to pay Sear's costs of the appeal.

Nature of this Proceeding

9. VicRoads seeks to review the decision of the Magistrates' Court pursuant to Order 56 of the Rules of the Supreme Court. The grounds of review relied on are jurisdictional error and error of law on the face of the record. In summary, VicRoads contends that, by reason of the limitations contained in s26(2) of the Act on appeals under s26(1)(c) of the Act, the Magistrates' Court did not have jurisdiction to entertain the grounds of appeal put forward by Sear and accepted by the magistrate. Accordingly, VicRoads seeks an order in the nature of *certiorari* to quash the decision of the Magistrates' Court and an order in the nature of mandamus to compel the Magistrates' Court to hear and determine the appeal by Sear under s26 of the Act according to law.

Relevant Provisions of the Act

10. It is first relevant to note that, until December 2001, the Act required the automatic suspension of the licence of any driver found driving with in excess of 0.05 grams per 100 millilitres of alcohol in his or her blood. However, by s12 of the *Road Safety (Further Amendment) Act* 2001 (Act No. 92 of 2001) s25 of the Act was amended. It introduced a regime whereby drivers with a blood alcohol concentration of between 0.05 and 0.07 may or may not lose their licences depending upon their driving record as measured by the demerit points system. This was effectuated by introducing s25(2A) and (2B) into the Act. These provided for 10 demerit points to be incurred by a driver found driving with a blood alcohol concentration of between 0.05 and 0.07. I note that this is just below the twelve point trigger for the service of a notice under s25(3) of the Act, as set out below.

11. The statutory purpose of these amendments may be ascertained from the Explanatory Memorandum to the *Road Safety (Further Amendment) Act* 2001. It is there stated in relation to s12, among other things:

> "Section 12 inserts new sub-sections (2A) and (2B) into section 25 of the Principal Act. Under new section 25(2A), any drink-driver whose licence is not cancelled will incur 10 demerit points.
>
> Taken together, sections 12, 14 and 25 are intended to achieve greater equity as regards licence loss penalties imposed on first-offender drink-drivers Those whose blood alcohol concentration ('BAC') is just above the legal limit may or may not lose their licences, depending on whether they have good or bad driving records (as measured by the demerit points system). Those whose BAC is well above the legal limit will lose their licences In both cases, there will be greater parity as between those who accept an infringement notice and those found guilty by a Court.
>
> To understand how the proposed scheme is intended to achieve this object, it is necessary to understand how the demerit scheme already operates –
>
> • First, a person who accrues 12 points in any 3 year period is liable to have his or her licence suspended for 3 months There is an additional one month's suspension for every 4 points (or part) over 12. Thus, a person with, say, 17 points (5 more than 12) would be liable to licence suspension for 2 more months, making 5 months in total.
>
> • However, any person in this situation has a choice. They can accept licence suspension for a period calculated as above. Or, they can opt to keep their licence. But if the person takes this option they cannot incur any more demerits for 12 months If they do, their licence is automatically suspended for *twice* as long as it would have been suspended otherwise.
>
> The effect of the proposed section 25(2A), therefore, is that drink-drivers whose licences are not cancelled may or may not have their licences suspended, depending on their individual driving records.
>
> A person with no prior demerits would not face immediate suspension, but would incur 10 demerits and would have to drive responsibly in future to avoid risking their licence. A person who already had fewer than 12 demerits could accept suspension, or could choose the 'double or nothing' option. A person who was already on 'double or nothing' would have their licence suspended."

12. It is necessary to set out the applicable legislative regime at the relevant time (there have been amendments since) in some detail. I do so by reference to Reprint No. 7 of the Act.

13. Section 24 of the Act provided as follows:

> "***24. Cancellation, suspension or variation of licences and permits by Corporation***
> (1) The Corporation must, if required by the regulations or section 25 to do so—
> (a) suspend for the prescribed time the driver licence or permit of any person;
> (b) cancel the driver licence or permit of any person;
> (c) vary the driver licence or permit of any person by excluding or including a category of motor vehicle;
> (d) vary the conditions to which the driver licence or permit of any person is subject by imposing, removing or amending a condition.
>
> (2) The Corporation may, in accordance with the regulations –
> (a) suspend for any time that it thinks fit the driver licence or permit of any person;
> (b) cancel the driver licence or permit of any person;
> (c) vary the driver licence or permit of any person by excluding or including a category of motor vehicle;

(d) vary the conditions to which the driver licence or permit of any person is subject by imposing, removing or amending a condition.

(3) In suspending, in accordance with the regulations, a driver licence or permit on the ground that it would be dangerous for the person to drive a motor vehicle because of illness or bodily infirmity, defect or incapacity or because of the effects of treatment for any of those things, the Corporation may do so on the basis of a report given by a registered medical practitioner and without conducting any other hearing or investigation into the matter before the suspension is imposed."

14. It can be seen that s24 deals with a variety of circumstances in which VicRoads is obliged to, or has a discretion to, deal with a driver's licence.

15. Section 25 of the Act provided:

"**25. Demerits Register**
(1) The Corporation must keep a Demerits Register and must record against a person any demerit points that are incurred by that person.

(2) The circumstances in which demerit points are incurred, the number of points incurred the determination of the date on which points are to be recorded as incurred and the circumstances in which, if points are incurred before a conviction or finding of guilt is recorded or made, the points may be cancelled are as prescribed.

(2A) Without limiting sub-section (2), the Corporation must, in respect of the day on which the offence is alleged to have been committed, record 10 demerit points against a person—
(a) who is found guilty of an offence under section 49(1)(b), (f) or (g) but the court does not record a conviction and, in accordance with section 50(1AB), does not cancel the person's driver licence or permit; or
(b) who is convicted or found guilty of an offence under section 49(1)(b), (f) or (g) in circumstances in which section 50(1) applies and the court does not cancel the person's driver licence or permit; or
(c) to whom a traffic infringement notice has been issued in respect of a drink-driving infringement if—
(i) no notice of objection to the infringement notice has been given and the 28 day period referred to in section 89C has expired; and
(ii) the person's driver licence or permit is not cancelled by force of section 89C(1).

(2B) Nothing in sub-section (2A) prevents regulations being made under a power conferred by this Act that make provision to the same effect as that sub-section.

(3) The Corporation must serve a notice containing the prescribed particulars on the holder of a driver licence or learner permit who incurs 12 or more demerit points within any 3 year period.

(3A) A person on whom that notice is served may, within 21 days after service of the notice, notify the Corporation that he or she elects to extend the demerit point period.

(3B) If a person notifies the Corporation under sub-section (3A) that he or she elects to extend the demerit point period, the Corporation must, if the person incurs 1 or more additional demerit points in relation to any offence committed within the 12 month period commencing on the date determined by the Corporation and specified in the notice served under sub-section (3) as the commencement date of the 12 month period –
(a) suspend his or her driver licence or learner permit for 6 months and an additional 2 months for each 4 demerit points in excess of 12 recorded against the person as at the date of issue of the notice under sub-section (3); and
(b) when calculating demerit points recorded against that person at any time after the end of the period of suspension, disregard all demerit points recorded against the person as at the date of issue of the notice under sub-section (3); and
(c) serve on the person a notice containing the prescribed particulars.

(3C) If a person notifies the Corporation under sub-section (3A) that he or she elects to extend the demerit point period, the Corporation must, if the person incurs no additional demerit points in relation to any offence committed within the 12 month period commencing on the date determined by the Corporation and specified in the notice served under sub-section (3) as the commencement date of the 12 month period, when calculating demerit points recorded against that person at any time after the end of that 12 month period, disregard all demerit points recorded against that person as at the date of issue of the notice under sub-section (3).

(3D) If a person on whom a notice under sub-section (3) is served does not, in accordance with sub-section (3A), notify the Corporation that he or she elects to extend the demerit point period, the Corporation must—

(a) suspend his or her driver licence or learner permit for 3 months and an additional 1 month for each 4 demerit points in excess of 12 recorded against the person as at the date of issue of the notice under sub-section (3); and

(b) when calculating demerit points recorded against that person at any time after the end of the period of suspension, disregard all demerit points recorded against the person as at the date of issue of the notice under sub-section (3).

(4) The suspension of a driver licence or learner permit under this section takes effect on and from the date determined by the Corporation and specified in the notice served under sub-section (3) or (3B)(c)."

16. The relevant provision for this case is s25(2A)(c). It obliges VicRoads to record 10 demerit points against any person "to whom a traffic infringement notice has been issued in respect of a drink-driving infringement."

17. Section 88 of the Act provides for the issuing of traffic infringement notices. There is no definition in the Act of a "traffic infringement notice". Section 88(2) provides that every traffic infringement notice must contain the prescribed particulars. The prescribed particulars are contained in reg 603(1) of the *Road Safety (General) Regulations* 1999. I will not set these out. There is no dispute that the 0.05 infringement notice contained the prescribed particulars. Further, the magistrate found this to be the case. Rather, the contention on behalf of Sear, which was accepted by the magistrate, is that the 0.05 infringement notice was misleading and therefore "invalid".

18. Section 89C provides for cancellation of licences, and prescribed periods of disqualification from obtaining a new licence, for drink-driving offences where no notice of objection is given within 28 days of the traffic infringement notice.

19. Section 26 of the Act provided at relevant times:

"**26. Appeal to Magistrates' Court**

(1) If the Corporation decides to—

(a) refuse an application for a driver licence, a driver licence variation or a permit; or

(b) in accordance with section 24, suspend, cancel or vary in any way a driver licence or permit; or

(c) in accordance with section 25(3B)(a) or (3D)(a), suspend a driver licence or learner permit –

the applicant or holder may, in accordance with the regulations and subject to sub-section (2), appeal against that decision to the Magistrates' Court.

(2) An appeal under sub-section (1)(c) may only be made on either or both of the following grounds:

(a) That the appellant was not the person against whom the Corporation was required by this Act and the regulations to record certain demerit points;

(b) That a miscalculation has been made in assessing the total number of demerit points incurred by the appellant.

(3) The giving, in accordance with the regulations, of a notice of appeal under sub-section (1)(c) stays the suspension of the licence or learner permit until—

(a) the date on which the appeal is determined; or

(b) if the appeal is discontinued, the date on which notice in writing of discontinuance is given in accordance with the regulations to both the Magistrates' Court and the Corporation.

(4) On an appeal under sub-section (1) the court must—

(a) re-determine the matter of the refusal, suspension, cancellation or variation; and

(b) hear any relevant evidence tendered by the appellant or the Corporation; and

(c) without limiting its discretion, take into consideration anything that the Corporation ought to have considered.

(5) If the court is satisfied that the refusal, suspension, cancellation or variation—

(a) results from a driving disqualification of the appellant in another State or Territory of the Commonwealth; or

(b) was required by the regulations or section 25—

the court must confirm the decision of the Corporation.

(6) On an appeal under sub-section (1)(c) the court may—

(a) in allowing the appeal, give to the Corporation any directions it thinks proper for the amendment of the Demerits Register; or

(b) in dismissing the appeal, order that the suspension take effect from a date specified in the order.

(7) Every decision of the Magistrates' Court on an appeal under this section is final and conclusive and must be given effect to by the Corporation."

20. The first thing to note about s26 is that it provides for appeals in a wide variety of circumstances, not just in respect of suspensions of licences under the demerit points system. The appeal process which is provided for extends to the refusal of an application for a licence and any suspension, cancellation or variation of a licence by VicRoads which is required or permitted under s24. The decisions which can be the subject of appeal under s26(1) include both mandatory decisions required by s24(1) and discretionary decisions required by s24(2) and (3). This includes, for example, a discretionary suspension due to a medical condition under s24(3).

21. It is next necessary to note that the right of appeal granted by s26(1) is expressly subject to sub-s(2). The issue in this proceeding is the extent of the limitation provided for in sub-s(2)(b). Sub-section (2)(a) is not relevant.

22. There is some authority on the scope of the right of appeal under s26(1)(c) of the Act. In *Roads Corporation v The Magistrates Court of Victoria*; *Parsons and Holloway*[1] Smith J considered two appeals under s26(1)(c). Each appeal concerned the identity of the person against whom VicRoads was required to record demerit points. In other words, the extent of the limitation in s26(2)(a) of the Act. In the course of his reasons for judgment, Smith J accepted that s26(2)(a) was directed at the realities of the situation and allowed an inquiry, on appeal, as to who was in fact driving the relevant vehicle at the time of the alleged offence. His Honour pointed to the practicalities and risk of error and stated, at [24]:

> "One might expect the Parliament to seek to introduce a safety net for those who find out for the first time that they have received demerit points when their licences are about to be, or have been, suspended. Driving licences, while a privilege, can be critical to people's livelihoods. Suspension of a licence can have catastrophic consequences for licence holders. It will also, in my view, be surprising if an appeal procedure to the Magistrates' Court should have been set up to deal only with clerical errors when those responsible for the drafting of the legislation would have been well aware that the system carried with it the risk of serious injustice where the owner was not in fact the driver who infringed."[2]

23. Smith J also briefly considered the scope of the limitation on appeals in s26(2)(b). His Honour accepted that the normal meaning of the term "miscalculation" is to "calculate wrongly", or "wrong or faulty calculation".[3] This *dictum*, based on dictionary meanings of the word "miscalculation", was relied upon by VicRoads as establishing that s26(2)(b) limits appeals under s26(1)(c) to cases of mistaken arithmetic. I accept that Smith J was of this view, but he certainly did not decide the issue as it was not before him. It is this very issue that I must decide in this proceeding.

24. On behalf of VicRoads, it was argued that the magistrate exceeded her jurisdiction by entertaining and deciding the appeal by Sears on the ground that the 0.05 notice was "invalid". Mr Cavanough QC, who appeared with Ms Hubble, for VicRoads, argued, in summary, that:

(1) The Magistrates' Court is a statutory court of limited jurisdiction.

(2) For the purposes of the present case, its jurisdiction was exhaustively stated in s26 of the Act as it stood at the relevant time.

(3) As the appeal was pursuant to s26(1)(c), it was limited by s26(2).

(4) Section 26(2) of the Act had a narrow operation and, insofar as relevant to this case, was limited to "miscalculation" or arithmetical errors only.

(5) The magistrate was not authorised to entertain, let alone decide, the appeal on the ground that the 0.05 infringement notice was "invalid". This was beyond her jurisdiction.[4]

(6) Section 26(4) did not have the effect of broadening the scope of an appeal under s26(1)(c), as

limited by s26(2). The broad nature of s26(4) was explained by the fact that it had a lot of work to do, or acted "distributively", in relation to all appeals under s26(1).

25. On behalf of Sear, Mr Haag and Mr Strahan argued that:

(1) The 0.05 infringement notice was misleading because it gave Sear the clear impression that, if he paid the $300 fine specified therein, that would be the end of the matter and his driver's licence would not be affected.

(2) Section 26(4) informed the construction which ought to be placed upon s26(2) and, in particular, 26(2)(b). It was submitted that s26(4) had the effect that the Magistrates' Court, on the hearing of an appeal, was required and entitled to inquire into the validity of every aspect of the process leading to the incurring of the relevant demerit points, except for an enquiry into the merits of the alleged offence or offences stated in the relevant infringement notices This included, so it was argued, whether or not a notice was in fact issued and, if so, whether it was a valid or invalid notice.

Alleged misleading nature of the 0.05 infringement notice

26. As I have said, the magistrate found, and it was accepted before me, that the 0.05 infringement notice contained all of the prescribed particulars required by the regulations. However, there is one aspect of the prescribed particulars which bears upon the allegation that the 0.05 infringement notice was misleading. Regulation 603(1)(g)(ii) prescribes that a traffic infringement notice relating to an alleged drink-driving infringement must state that, unless a notice of objection is received at the address specified in the notice within 28 days after service of the notice, the notice will take effect as a conviction and will result in cancellation or suspension of the licence or permit of the person on whom it is served. This requirement was a reflection of the position as it stood before the insertion of s25(2A) and (2B) into the Act by the *Road Safety (Further Amendment) Act* 2001. It does not take any account of the limited option arising from the service of an option notice under s25(3).

27. In fact, the form of the 0.05 infringement notice reflected the legislative regime prior to the commencement of s25(2A) and (2B) of the Act.[5] In the first place, under the heading "**DEMERIT POINTS (DRIVER'S LICENCES)**" on the reverse side of the form, it is stated that:

> "Some traffic offences have both a monetary penalty and a **Demerit Points** penalty. Accruing 12 **Demerit Points** within any 3 year period may affect your right to drive. VIC ROADS can advise you of the number of **Demerit Points** that you have on your licence."

There then follows a table setting out a broad range of driving offences and the relevant demerit points applicable to each offence. There is no reference in the table to the offence of driving with a blood alcohol concentration of above 0.05 grams per 100 millilitres of blood but below 0.07 grams per 100 millilitres, or to the fact that, under the new legislative regime, such an offence attracted 10 demerit points.

28. Secondly, also on the reverse of the form, under the heading "**DRIVER LICENCE LOSS INFRINGEMENTS**" it is stated:

> "Unless you lodge a Notice of Objection to Civic Compliance Victoria in time, the infringement will take effect as a conviction and the suspension or cancellation of your right to drive will apply 28 days after the date of this notice."

This part of the form would appear to relate to the box on the front page of the form headed "**ADDITIONAL PENALTY FOR A DRIVER'S LICENCE LOSS INFRINGEMENT EFFECTIVE 28 DAYS AFTER THE DATE OF THIS NOTICE**". In the box bearing this bold heading, there is provision for the police officer completing the notice to indicate whether a driver's licence will be suspended or cancelled after the 28 day period and, if so, to insert the number of months for which the driver will be disqualified from driving.

29. Counsel for Sear submitted that the failure of the form of infringement notice to catch-up with the changes to the legislation, combined with other statements on the 0.05 infringement notice, rendered it misleading so that it deprived Sear of the ability to make a fully informed decision as to whether to lodge a Notice of Objection to the 0.05 infringement notice within the 28 day period. In summary, the following aspects of the 0.05 infringement notice were relied upon to render it misleading:

(1) The omission of the 0.05 infringement notice to refer to the fact that, under the legislation as amended, there was a 10 demerit point penalty for driving with a blood alcohol concentration of between 0.05 and 0.07. This, it was said, amounted to a representation that no demerit points would be incurred for the offence identified in the 0.05 infringement notice.

(2) The fact that, on the front page of the notice, the police officer completing it placed a dash in the period of disqualification box and gave no indication that Sear's driver's licence would be either suspended or cancelled effective 28 days after the date of the notice. It was submitted, in effect, that, the combination of (1) and (2) meant that the reference to "**DRIVER LICENCE LOSS INFRINGEMENTS**" on the reverse page was represented to Sear as having no application to the offence alleged against him.

(3) Under the heading "**IF YOU PAY ON TIME**" on the reverse page of the notice, it was stated that: "For all persons except Licensees Nominees and Directors under the *Liquor Control Act*, the matter is finished. It will not go to court."
This, it was submitted, amounted to a representation that, if the fine stated in the notice was paid on time, the matter would go no further and there would be no further consequences for Sear arising out of the alleged offence.

(4) Also on the reverse side of the notice, under the heading "**EFFECT ON DRIVER'S LICENCES**" it is stated that:
"If this infringement notice is for exceeding the prescribed concentration of alcohol and the blood alcohol reading is 0.100 per cent or less, a different decision may be made by a Court."

It was submitted that this bolstered the impression created by the statement referred to in (3) above that the offence alleged in the notice would carry no further consequences unless it was considered by a court following a notice of objection.

30. There is some force in the submission that the form of the 0.05 infringement notice was, in the circumstances of the case, misleading, for one or more of the reasons submitted on behalf of Sear.

31. Whether or not the 0.05 infringement notice was misleading is not, however, to the point. In my opinion, once an infringement notice includes all of the prescribed particulars under the regulations, it is a valid notice. If it is misleading in a material way, then the recipient of such a notice can elect to object to it and take his or her chances in court. This may or may not lead to a conviction and, if it does, may or may not lead to a different penalty being imposed to that stated in the relevant infringement notice. However, unless the charge resulting from an objection to an infringement notice which complies with the regulations is dismissed, the infringement notice remains, in my view, an infringement notice for the purposes of the statutory regime under consideration. It follows that VicRoads will be obliged to record the applicable demerit points against the driver referred to in the notice and otherwise follow the mandatory provisions of the Act.

Interpretation of s26(2)(b)

32. On behalf of Sear, it was argued that the effect of s26(4) was to override the express words of s26(2), so that the Magistrates' Court, on appeal, was not limited to an inquiry as to whether there was a relevant infringement notice containing the prescribed particulars, and an examination of the calculation of the applicable demerit points, but could also inquire into whether the notice complied with the statutory purpose underlying the applicable legislative regime.

33. In this regard, reliance was placed upon *Director of Public Prosecutions v Korybutiak*[6] in which Chernov JA, speaking for the Court of Appeal, said in respect of infringement notices:

"It seems that the legislation now under consideration seeks to strike a balance between the need to streamline the procedure for disposing of infringement notices without resort to the courts, on the one hand, and, on the other, the need to preserve the right of the alleged offender to have the matter determined by the courts. Thus, the legislation prescribes a range of penalties that are to apply to specified infringements committed in particular contexts and places on the alleged offender the onus of electing, within a limited period, to contest in court the police allegations as to the infringement. It is in that context that the legislation has prescribed what information must be provided to the alleged offender in the notice of infringement in order to enable him or her to make an informed decision whether to make the election to go to court."[7]

34. Mr Haag submitted that, if an infringement notice was misleading in any respect, or did not contain all of the information upon which a recipient might require to make an informed decision, that it would be an "invalid" notice which would not constitute a traffic infringement notice for purposes of the Act.

35. In my view, the submissions on behalf of VicRoads are to be preferred. The legislature has expressly limited, in a very narrow way, the grounds of appeal available to a driver whose driver's licence is suspended under s25(3B)(a). Parliament has done so in plain and unambiguous language.

36. Where identity of the driver in question is in issue, that issue may be explored in full on appeal. In this respect, I agree with the decision of Smith J in *Parsons and Holloway*, as discussed above.

37. Where the identity of the driver is not in issue, as in this case, then the scope of the appeal under s26(1)(c) is limited to "miscalculation" in the assessment of the relevant number of demerit points attributable to the appellant. The choice of the term "miscalculation", in my view, limits the scope of appeal to, and provides a "safety net" in respect of, errors made in the calculation of demerit points attributable to the appellant whose licence has been suspended.

38. Demerit points arise from the service of an infringement notice or, if objection is taken, a conviction following a charge. Once demerit points are incurred, it is necessary that the raw information be collated by VicRoads in its Demerits Register required to be maintained by s25(1) of the Act. In maintaining that register, VicRoads must rely upon information which it receives from others, in particular Civic Compliance Victoria which, in turn, must rely upon the Victoria Police and others responsible for the issue of infringement notices.

39. There are many opportunities for errors to be made. No doubt the register is maintained by computer, thus increasing the scope for error in the course of processing data on the computer system. Infringement notices consist of standard forms on which are completed, in handwriting, the essential details enabling the calculation of demerit points and the allocation of those points to the driver in question. There is much scope for error as to matters such as the date of the alleged offence and the particulars of the offence. For example, an error in the date of the offence could mean the difference between demerit points being incurred within a relevant three year period or outside of it. A mistake as to the alleged speed could result in a higher number of demerit points being allocated than was appropriate.

40. In my view, it is against this kind of error that Parliament intended to provide a safety net by providing for appeals in respect of any "miscalculation". It would be straining the language of s26(2)(b) to an impermissible extent to interpret it as permitting an inquiry as to whether an infringement notice which was served on the correct driver, and which contained all of the prescribed particulars, was nevertheless "invalid". One asks, where would the line of "invalidity" be drawn? By the use of language limiting the appeal to the ground of "miscalculation", Parliament could not have intended an inquiry such as that contended for on behalf of Sear.

41. As to the submission on behalf of Sear that the broad terms of s26(4) are inconsistent with giving s26(2)(b) its ordinary meaning, I accept the submission on behalf of VicRoads that s26(4) must be read subject to s26(2). The right of appeal under s26(1)(c) is expressly made subject to s26(2). Accordingly, s26(4) only applies to an appeal under s26(1)(c) to the extent that it is consistent with the limitations placed on that appeal by s26(2). Thus, where there is no issue as to the identity of the driver, and the appeal grounds are limited by s24(2)(b):

> (1) the re-determination spoken of in s26(4)(a) is a re-determination in the sense of a re-calculation if any error in calculation can be shown;
>
> (2) the evidence which is admissible on appeal under s26(4)(b) is limited to evidence which is relevant to the question of calculation, and not otherwise;
>
> (3) s26(4)(c) has no work to do, because there is no discretion involved in the decision of VicRoads to suspend a driver licence in accordance with either s25(3B)(a) or (3D)(a).

42. In my opinion, the above reasoning applies irrespective of whether the 0.05 infringement notice in this case was misleading as contended for on behalf of Sear. Furthermore, although it is not necessary for me to decide it, it is my view that an appeal under s26(1)(c) could not be based upon an allegation that the relevant infringement notice did not contain all of the prescribed particulars as required by the regulations made under s88(1) of the Act. In my opinion, the recipient of a defective notice has the remedy of objecting to the notice and taking his or her chances in court when a charge is laid. To hold otherwise would leave open the distinct possibility that, with the effluxion of time involved with appeals, an alleged offender could escape all liability due to the statutory time limit of 12 months for prosecution for summary offences provided for by s26(4) of the *Magistrates' Court Act* 1989[8].

Discretionary Considerations

43. It was submitted on behalf of Sear that the relief which VicRoads is seeking in this proceeding is discretionary. I accept that this is so. It was then submitted that I should refuse the relief sought by VicRoads in the exercise of my discretion because the evidence before the magistrate, which was accepted, was that Sear was in fact misled by the 0.05 infringement notice and elected not to serve a notice of objection based on the belief that there would be no effect on his driver's licence if he paid the fine of $300 stated on the notice.

44. It seems that there is a factual basis for this submission. The magistrate did find that, at the time he paid the fine of $300, Sear believed that his choice was between paying that fine and going to court and risking a higher penalty than the fine.[9]

45. However, that is not an end of the relevant factual history. Albeit after a delay of some seven months, Sear received an option notice under s25(3) of the Act. Whatever may have been the position before that time, Sear then knew that he had incurred 13 demerit points and that, unless he extended the demerit point period for 12 months, his driving licence would be suspended for three months. He also knew that, if he re-offended within the extended 12 month period, he would lose his licence for a period of six months. On receipt of this notice, Sear elected to extend the demerit point period. He did so in full knowledge of the consequences for his licence if he re-offended within that extended 12 month period. He did re-offend and was issued with a further infringement notice. This time, he objected. The charge was heard and a conviction for speeding resulted. A further three demerit points were incurred. As a result, VicRoads was obliged under s25(3B) of the Act to suspend the driver's licence of Sear for a period of six months. This is what has occurred.

46. In light of the conduct of Sear after the receipt of the option notice, I do not believe that it is appropriate for me to refuse relief to VicRoads in the exercise of my discretion. I am also mindful in reaching this view that this case involves a drink-driving offence. The seriousness of the offence of drink-driving, and the opprobrium attaching to such conduct by parliament and the community generally, are notorious. Although some very limited latitude has been introduced by the amendments to the statutory scheme discussed in this judgment, Parliament ought not to be taken to have intended to thereby provide further grounds for technical arguments to escape the penalties which Parliament intended for such offences.

Appropriate Relief

47. The Magistrates' Court exceeded its jurisdiction in entertaining the arguments put on behalf of Mr Sear and determining his appeal under s26(1)(c) of the Act on those grounds. There is an error of law on the face of the record, constituted by the oral reasons of the magistrate to allow the appeal by Sear on those grounds[10]. Accordingly, I propose to order that:

> 1. The decision of the first defendant made on 21 May 2004, whereby the first defendant allowed the appeal of the second defendant under s26 of the *Road Safety Act* 1986 ("the Act") against the decision of the plaintiff to suspend the second defendant's driver licence and to direct the plaintiff to remove from its Demerits Register 10 demerit points which it had recorded against the second defendant pursuant to s25 of the Act in respect of Traffic Infringement Notice 0308725045 dated 21 February 2002 and to require the plaintiff to pay the second defendant's costs, be set aside.
>
> 2. The matter be referred back to the Magistrates' Court of Victoria for re-hearing and determination according to law. 3. There be no order as to costs.[11]

[1] [2004] VSC 387 (7 October 2004).
[2] See also paragraphs [29], [33] and [34].
[3] At [40].
[4] Reliance was placed on *Wilson, Chief Executive Department of Transport v Glasgow & Anor* [2001] QSC 378 (1 October 2001) and also on s100(2) of the *Magistrates' Court Act* 1989 (Vic).
[5] A copy of the 0.05 infringement notice is attached as Schedule A.
[6] [2004] VSCA 29.
[7] At paragraph [3], footnotes omitted.
[8] Cf. *Sher v DPP* [2001] VSCA 110 at [5]; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[9] Page 44, unofficial transcript of proceedings before the magistrate, Exhibit "JZC1" to the affidavit of Joel Cox sworn 23 July 2004. I note that this is the only written record of the decision of the Magistrates' Court. Despite promising to provide written reasons, on a request by VicRoads, the magistrate has yet to deliver any written reasons for her decision.
[10] Section 10 *Administrative Law Act* 1978.
[11] I note that VicRoads informed me at the conclusion of the hearing that it did not intend to seek costs against Sear in the event that it was successful, given the fact that the matter involves the public generally.

APPEARANCES: For the Plaintiff Roads Corporation: Mr A Cavanough QC and Ms G Hubble, counsel. Phillips Fox, solicitors. For the secondnamed Defendant Sear: Mr P Haag and Mr A Strahan, counsel. GPZ Pty, solicitors.
