57/10; [2010] VSC 631

SUPREME COURT OF VICTORIA

TORNEY v VICTORIA LEGAL AID & ANOR

Cavanough J

3, 12 March, 23 December 2010

PRACTICE AND PROCEDURE – COSTS – ERROR OF LAW ON THE FACE OF THE RECORD – POWER OF ONE MAGISTRATE TO DEPART FROM PROCEDURAL DECISION OF ANOTHER MAGISTRATE IN SAME MATTER – MAGISTRATE'S DECISION ON COSTS QUASHED: *MAGISTRATES' COURT ACT* 1989 SS131, 132.

1. A magistrate who conducts a final hearing should not necessarily be slow to depart from an earlier interlocutory order of another magistrate, "at least when it is clear that the earlier decision is wrong or inapplicable in the way in which circumstances may have developed since it was made". However the freedom of a court to depart from a prior interlocutory order of the court is no less when considering the making of a further interlocutory order than it is when considering the making of a final order. This inherent jurisdiction is possessed by all courts, including inferior courts, unless taken away by statute.

***Thomas v Campbell* [2003] VSC 460; (2003) 9 VR 136; MC32/2003, considered.**

2. Where a magistrate proceeded on the basis that if (contrary to his primary view) he had any power at all to examine the correctness of a previous magistrate's determination, it was not a proper course to do so unless there was something before him that was not or could not have been before the first magistrate. That self-imposed restriction was erroneous in law.

CAVANOUGH J:

1. This is an application for *certiorari* on the ground of alleged error of law on the face of the record in respect of an order made by a Victorian Magistrate. The order requires the plaintiff, who was the accused in a summary criminal proceeding and who had issued subpoenas in the proceeding to four officers of the defendant ("VLA"), to pay the costs of VLA of an application which had earlier succeeded before a different Magistrate to set aside the subpoenas.

2. The history of this matter is extremely tangled and a multitude of points have been argued before me on both sides. Five grounds of review are stated in the amended originating motion, with various sub-grounds. However in the end it seems to me that the plaintiff should succeed on a point which in substance is encapsulated in ground 2,[1] whereby the plaintiff alleges that the second magistrate erred in law in holding that he was bound by the determination of the first magistrate that the subpoenas were not issued for a legitimate forensic purpose. I agree with the plaintiff that this was an error and that it appears on the face of the record, even on the narrowest possible view of the scope of "the record" in this case.[2] It is necessary to remain focused on the strict limits of the doctrine of error of law on the face of the record because, for some unexplained reason, the plaintiff did not allege that the second magistrate's decision was affected by jurisdictional error: compare *Kirk v Industrial Court of New South Wales*[3].

The reasons of the Magistrates' Court

3. Plainly, the written reasons of the second magistrate, Mr Rozencwajg, for the costs decision are part of the record of the Magistrates' Court in this matter.[4] The document also includes his Honour's reasons for decision on a related costs application made by the plaintiff's solicitor, Mr Kuek, personally against VLA. It would be misleading, if not impossible, to edit the document so as to exclude any reference to the related dispute. Neither party submitted that any such editing should be done. Accordingly I will have regard to the written statement of reasons as a whole. It reads:

> "On 23 March 2006 President Torney was charged under the *Control of Weapons Act* 1990 with being in possession of a prohibited weapon on 29 December 2005.

The first mention of this case was listed on 2 May 2006. The history of this matter from this point on is, in case management terms, nothing short of tragic. Until the charge was finally determined on 15 May 2009 following refusal of a further adjournment application, there had been some 28 listings involving this matter, including ex-parte hearings and several applications for re-hearing.

Thankfully, it is unnecessary for me to outline the entire history of events in this case, so I will confine myself to the salient dates.

On 26 September 2008, Mr Kuek appeared for the accused and indicated to Magistrate Gurvich, who was seized of the matter, that an application for the magistrate to disqualify himself would be made. The case was then adjourned.

On the same day, Kuek had subpoenas issued and served against four officers of Victoria Legal Aid, to attend to testify and produce documents in the hearing of the application for His Honour to disqualify himself.

On 30 September 2008, Ms Ellyard of counsel appeared for the respondents to the subpoena and applied to have them struck out.

Mr Perkins of counsel appeared for Torney. During the course of submissions, Ms Ellyard sought to produce a document to the court that fell within the scope of the subpoena. Mr Perkins objected to the tendering of the document submitting it should be proved by the calling of witnesses. This resulted in the document not being placed before the Magistrate due to the objections of counsel for the accused.

That document was an internal email between officers of legal aid, dated 15 August 2008. The officers were the respondents to the relevant subpoenas.

The email reads:

'I confirm that pursuant to authority from Carolyn under s 43AA, Louise James provided information over the phone regarding the matter of Torney to the MMC (clerk Tom) at the request of Magistrate Gurvich. Information provided was the status of funding i.e. Termination of assistance, reason for termination i.e. client failed to follow legal advice, and the client's right of reconsideration.

I instructed Louise to provide the information over the telephone and that if the Court wanted an appearance we would attend, however, the information already provided over the phone is the only information that we would be providing to the court if we attended. This information was conveyed to the clerk at court'"

The matter was adjourned to 3 October for ruling, when Ms Zantuck appeared for legal aid. On that date, Magistrate Gurvich struck out the subpoenas stating:

'*I am not persuaded Mr Perkins identified any legitimate forensic purpose for the witness summonses. On the material before me I am unable to conclude that any witness could give relevant and admissible evidence as to the principal application. I think the submissions of Ms Ellyard and Senior Constable Collins are correct, and particularly that the summonses have been issued for an impermissible purpose – that is a fishing exercise*'.

Ms Zantuck then applied for costs on behalf of VLA and asked the magistrate to exercise his discretion under s132 of the *Magistrates' Court Act* to order indemnity cost against Mr Torney's practitioner, Access Law.

At page 32 of the transcript, the following exchange occurs in relation to the cost application:

'*Magistrate: Are you seeking – are you seeking against the defendant or against the solicitor'*
Ms Zantuck: Against the solicitor pursuant to section 132'.

The cost issue relating to Kuek
On 2 February 2008 [*scil.* 2009], VLA advised Mr Kuek that they would no longer seek an order against him under s132 of the *Magistrates' Court Act*. Two days later they offered to pay his "reasonable costs". On 5 February, Kuek rejected this offer and demanded "indemnity costs".

Section 131 of the *Magistrates' Court Act* 1989 reads as follows:

"(1) the costs of and incidental to all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid."

Plainly, the magistrate has an unfettered discretion both in relation to the awarding of costs and in relation to the fixing of the amount.

In an excellent analysis of the issue of costs in the criminal jurisdiction, Phillips JA in *Norton v Morphett and Anor* His Honour outlined the misconceptions that arise from the use of expressions such as "costs are awarded to indemnify" and indeed the term "indemnity costs" itself. It is certainly my view that the use of the expression "indemnity costs" is often misleading.

Justice Phillips concludes that the most useful formulation of the test for costs may still be that framed by Parker J in *Peel v London and North Western Railway Co.* namely:

'*Would it be necessary or proper for a reasonably prudent man, endeavouring to get justice, but endeavouring to get it without any undue expenditure of money to incur the expense in question*'.

The essential question for the exercise of the magistrate's discretion must always be whether a particular item of costs was reasonably necessary or reasonably incurred, as well as being reasonable in quantum. The issues raised in the case before me are identical with the issues considered in *Norton v Morphett*. Where the appeal was dismissed primarily on the basis that even if a successful party is entitled to be indemnified, that does not mean the other party should be liable for costs unreasonably or unnecessarily incurred.

It follows that the offer by VLA on 4 February 2008 [*scil.* 2009] could properly have been accepted by Mr Kuek subject to a magistrate ruling on the issue of the reasonableness of any particular item, in the event the parties could not agree.

Should there be a cost order against Torney?
Mr Hancock of counsel submitted that there should be no cost order following the striking out of the subpoenas on the basis that viz a vis Torney, the court was now *functus officio*. He contends that when Magistrate Gurvich asked counsel for VLA on 3 October 2008 whether she was seeking costs against Torney or his solicitor she effectively elected the latter.

Mr McKenna for VLA submits to the contrary, as the response to the learned magistrate's question on 3 October was: "Against the solicitor pursuant to section 132"; which necessarily implies obtaining a cost order against Torney, as only then would the section give the magistrate power to order that the costs be met by the defendant's solicitor.

Section 132 of the *Magistrates' Court Act* 1989 states:

'*(1) If a legal practitioner for a party to a proceeding, whether personally or through a servant or agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct or default, the Court may make an order that (a) ..... (b) the legal practitioner pay to the client all or any of the costs which the client has been ordered to pay to any party;*'

It is clear that the power to make an order for the legal practitioner to pay costs only comes into play *once a cost order has been made against the client*.

Mr McKenna submitted that this is what Ms Zantuck meant when she informed the magistrate on 3 October 2008 that she was seeking costs against the solicitor pursuant to s132.

Whether either of the parties were aware of the precise operation of section 132 on the 3 October does not need to be determined here, as I find it difficult to accept that the court is functus officio on the issue of costs when no order was made on that date due to the application of Mr Kuek that the magistrate disqualify himself. That left the issue of costs live. Indeed His Honour's order at the conclusion of submissions on 3 October 2008, was "Reserve question of costs of the witness summonses applications".

Mr McKenna [*scil.* Mr Hancock] then submitted that on the authority of *Thomas v Campbell* [2003] VSC 460; I should revisit the decision to strike out the subpoenas as there was now before me, in contrast to magistrate Gurvich, the above quoted email dated 15 August 2008, which he contended evidences a legitimate forensic purpose for the issue of the subpoenas.

In *Thomas v Campbell*, Nettle J states (para 33):

'*That does not mean that a party who has lost an interlocutory application before one magistrate at a preliminary hearing should be precluded from revisiting the matter with another magistrate at the final hearing. Plainly, it would be open to do so. And it does not mean that the magistrate who conducts*

the final hearing should always be slow to depart from an earlier interlocutory order of another magistrate, at least where it is clear that the earlier decision is wrong or inapplicable in the way in which circumstances may have developed since it was made'.

The sense in such an approach is clear. However, I find it difficult to see my position in determining the cost issue following the disqualification of the magistrate who made the order, as possibly being construed differently to that magistrate. Surely in these circumstances, I must, in terms of this dichotomy, be in the precise position of Magistrate Gurvich.

In any case, were I to have the power to reconsider the order to strike out the subpoenas based on what is contained in the relevant email, I would nevertheless refuse to do so. The transcript clearly shows that VLA sought to tender the email to the magistrate in the course of a submission that the subpoenas be struck out, but were precluded by counsel for Torney, Mr Perkins' objection, claiming the relevant parties in the email should be called to give evidence of its contents. Whether the aim of this tactical objection was to achieve the object of the subpoenas, namely having the respondents give evidence; or whether, as Mr McKenna contends, the basis for the objection was that the email contradicted Mr Perkins central argument that his Honour had incited the commission of an offence under s43 of the *Legal Aid Act*, is not for me to determine.

However, having deliberately chosen not to put the email before Magistrate Gurvich, I do not see how it can now be relied upon before me as a basis for revisiting the decision of the learned Magistrate to set aside the subpoenas.

Moreover, the contents of the email were known to Magistrate Gurvich at the time of making the order well in advance of the application by Mr Kuek on 26 September 2008. In giving his ruling on 31 October 2008, Magistrate Gurvich said:

'*On 25 August 2008 the defendant tendered copies of two letters as a result of which I adjourned the case for a further mention on 29 August 2008. One letter was from Victoria Legal Aid, bearing the date 12 August 2008. In that letter, among other things, it referred to the defendant's assistance being terminated. And it said:*

'Legal Aid has been advised that you have failed to follow the instructions of your solicitor and/or counsel. As you have breached a condition of the grant of assistance, legal aid is now terminated'.

The quoted portion of the letter is precisely what is contained in the email dated 15 August 2008. If evidence of the communication of this information to the Magistrate was the basis of the application to disqualify, then this had already been achieved by the defendant. If some perceived breach of section 43 of *Legal Aid Act* was the basis of the application, then the email dated 15 August 2008 clearly indicates that the communication was authorised under s 43AA of the Act.
There being nothing before me that was not or could not have been before the learned Magistrate making the order setting aside the subpoenas, I do not consider it a proper course to review his decision.

It follows that the Respondents are entitled to costs following the order striking out the subpoenas by Magistrate Gurvich.

Orders: President Torney is ordered to pay the Respondent's costs to be agreed upon, failing which liberty apply. VLA is ordered to pay the costs of Mr Kuek to be agreed upon, failing which, liberty to apply."

4. Although in argument before me both parties, and the plaintiff in particular, ranged far and wide through the voluminous court book and took me to other material as well, I propose to restrict myself to the second magistrate's reasons and order for the purpose of demonstrating that an error of law as identified above was made by him and appears on the face of the record. It is arguable that the first magistrate's reasons should also be regarded as part of the relevant record, but the plaintiff did not distinctly so submit before me and the defendant submitted to the contrary (at least implicitly) and so I will assume that the first magistrate's reasons are not part of the record: compare *Returned and Services League of Australia (Victoria Branch Inc) (Pascoe Vale Sub Branch) v Liquor Licensing Commission*[5].

The second magistrate erred in law and the error appears on the face of the record

5. The second magistrate's abovementioned error of law appears from his reasons as a whole, and in particular from the passages in which he commences to deal with the plaintiff's submission that he should revisit Magistrate Gurvich's decision to strike out the subpoenas. Immediately

after the quotation from the judgment of Nettle J in *Thomas v Campbell*[6], Magistrate Rozencwajg says:

> "The sense in such an approach is clear. However, I find it difficult to see my position in determining the cost issue following the disqualification of the magistrate who made the order, as possibly being construed differently to that magistrate. Surely in these circumstances, I must, in terms of this dichotomy, be in the precise position of Magistrate Gurvich. In any case, were I to have the power to reconsider the order to strike out the subpoenas based on what is contained in the relevant email, I would nevertheless refuse to do so."

Similarly, towards the end of his reasons, Magistrate Rozencwajg says:

> "There being nothing before me that was not or could not have been before the learned Magistrate making the order setting aside the subpoenas, I do not consider it a proper course to review his decision."

6. The fact is, of course, that Magistrate Rozencwajg was not in precisely the same position as Magistrate Gurvich had been. Even putting aside that there was evidentiary material before the former that had not been before the latter, Magistrate Rozencwajg's own reasons clearly show that:

> • Magistrate Gurvich's decision to set aside the subpoenas was made on 3 October 2008, some ten months before the date of Magistrate Rozencwajg's order (11 August 2009);
>
> • The plaintiff's application that Magistrate Gurvich should disqualify himself from the criminal proceeding as a whole remained on foot even after he had set aside the subpoenas;
>
> • Magistrate Gurvich did indeed disqualify himself from the criminal proceeding as a whole prior to the costs issues being passed over to Magistrate Rozencwajg.

7. In those circumstances no criticism can be levelled at the plaintiff for not launching a direct Supreme Court challenge to Magistrate Gurvich's decision to set aside the subpoenas. It was not inappropriate for the plaintiff to hold off on any such challenge until Magistrate Gurvich decided whether or not to disqualify himself in any event.[7] And, of course, when Magistrate Gurvich did disqualify himself,[8] there was no longer any occasion to bring a Supreme Court challenge in respect of the setting aside of the subpoenas.

8. The question of the costs of the subpoena issue remained. Questions of costs are to be determined as a matter of broad discretion and in accordance with the justice of the case as perceived by the court, subject to the usual principle that costs follow the event. However Magistrate Rozencwajg apparently believed that "the event" had been irrevocably determined, and that he had no ability to view the matter otherwise. But he did. Indeed the very fact that there could no longer be any other forum in which the correctness of the first magistrate's determination could be canvassed only heightened the obligation of the second magistrate to give attention to that matter if asked by the plaintiff to do so.[9]

9. VLA argues[10] that contrary to the allegation in ground 2 of the amended originating motion, the second magistrate did not hold that the Court "was bound by" the determination made on 3 October 2008 that the witness summonses were not issued for a legitimate forensic purpose. Rather, says VLA, the second magistrate, after referring to *Thomas v Campbell*, stated that, in circumstances where he was to determine the witness summonses following the decision of Magistrate Gurvich, " ... I must, in terms of this dichotomy, be in the precise position of Magistrate Gurvich". VLA submits that there is no error in that approach.

10. I have already explained in part why there was indeed error in that approach. Further, it is clear that the second magistrate did regard himself as "bound by" the first magistrate's determination that the witness summonses were not issued for a legitimate forensic purpose. The sentence beginning "In any case" set out above confirms that the second magistrate believed that he had no "power" to consider the correctness of what he called the order to "strike out"[11] the subpoenas.

11. VLA further submits that the observation made in *Thomas v Campbell* was not directly

applicable to the second magistrate's situation. According to VLA, whereas *Thomas v Campbell* addressed the situation where there has been an interlocutory application at a preliminary hearing and then a final hearing is held, the situation presented here was for the determination of the costs of the one (interlocutory) application (that is, the costs of the witness summonses applications).

12. It is true that in *Thomas v Campbell* the situation was different in that Nettle J was dealing with a final order (a conviction) which he found to be vitiated by reason of an error of law that had informed a prior interlocutory order to set aside a witness summons. Nettle J said that a magistrate who conducts a final hearing should not necessarily be slow to depart from an earlier interlocutory order of another magistrate, "at least when it is clear that the earlier decision is wrong or inapplicable in the way in which circumstances may have developed since it was made". [12] However the freedom of a court to depart from a prior interlocutory order of the court is no less when considering the making of a further interlocutory order than it is when considering the making of a final order. In *Wilkshire v Coffey*[13], after an analysis of authority, Muirhead J held that the Supreme Court of the Northern Territory had inherent power to set aside its own procedural orders, even where made by consent, provided they have not determined in whole or in part the rights or status of parties or the essential issues involved in the case.[14] In my view this inherent jurisdiction is possessed by all courts, including inferior courts, unless taken away by statute.[15] Nettle J plainly proceeded on this basis in *Thomas v Campbell* in the passage just cited.

13. VLA further submits[16] that the second magistrate went on to say that "in any case" he would have rejected the plaintiff's submissions on a reconsideration of the first magistrate's decision to set aside the witness summonses. Hence, VLA submits, "the qualification in *Thomas v Campbell* at [33] – that it must at least be clear the earlier decision was wrong or inapplicable – was not satisfied".

14. There are several answers to this submission. First Nettle J did not say that it "must" at least be clear that the earlier decision was wrong or inapplicable. His Honour indicated that he disagreed with the proposition that a second magistrate "should always be slow" to depart from an earlier interlocutory order of another magistrate, "at least" where it is clear that the earlier decision is wrong or inapplicable. His Honour did not impose a precondition that it "must" be "clear" that the earlier decision was wrong or inapplicable. The relevant jurisdiction is a discretionary one, and it is not to be fettered by strict judge-made rules. Second, even if there were such a precondition, the question whether or not it was "satisfied" would, upon judicial review, ultimately turn not on the magistrate's opinion but on the supervisory court's opinion. Third, it is clear that Magistrate Rozencwajg did not examine for himself the correctness of Magistrate Gurvich's decision in its own right. Magistrate Rozencwajg proceeded on the basis that if (contrary to his primary view) he had any power at all to examine the correctness of Magistrate Gurvich's determination, it was not "a proper course" to do so unless there was something before him that "was not or could not have been" before Magistrate Gurvich. In my view, that self-imposed restriction was erroneous in law.

15. In oral submissions[17] VLA contended in effect that any such error should not lead to relief in this case because it was induced by the plaintiff himself. VLA submits that, before the second magistrate, the plaintiff had put forward only one relevant basis for reconsidering the first magistrate's determination, namely the existence of material that was not before the first magistrate, being the email of 15 August 2008. VLA submitted that in circumstances where the plaintiff's counsel had objected to VLA's counsel handing that email up to the first magistrate, the second magistrate was entitled to hold that this was not a proper basis for reconsidering the first magistrate's decision.

16. However, in my view, the onus lies on VLA to satisfy me that the plaintiff ran his case before the second magistrate in the particular way suggested, and that the second magistrate's error of law should be disregarded on that account. Otherwise, I am entitled in this case to proceed on the basis that, but for the identified error of law, which was a serious one, the decision of the second magistrate on costs might have been different and that that is sufficient to justify relief. [18]

17. It is true that the second magistrate said that the plaintiff's counsel had submitted that

on the authority of *Thomas v Campbell* he should revisit the decision to strike out the subpoenas "as there was now before me, in contrast to Magistrate Gurvich, the above quoted email dated 15 August 2008 which he contended evidences a legitimate forensic purpose for the issue of the subpoenas". It is true also that the second magistrate went on to refer to the question of his power to reconsider the order to strike out the subpoenas "based on what is contained in the relevant email". And it is also true, of course, that the second magistrate concentrated exclusively on this point in the remainder of his reasons.

18. However, the second magistrate did not say in terms that the plaintiff had confined his attack on the correctness of the first magistrate's decision in this way, and I am not satisfied that he did. It is odd that the Magistrate did not in his reasons detail the submissions that were before him. Since, in my view, this is an issue on which VLA, not the plaintiff, has the onus of proof (or the burden of satisfaction), I would not confine VLA to "the record" for this purpose. However VLA is no better off. The material before me (none of which was the subject of any evidentiary objection) contains two sets of written submissions made by counsel for the plaintiff for the benefit of the second magistrate, as well as VLA's written submissions to him. The plaintiff's written submissions include cogent submissions attacking the first magistrate's decision.[19] Although the submissions made passing reference to the email of 15 August 2008, they were not dependent upon it. VLA submits that the plaintiff's counsel may have restricted himself further during oral submissions before the second magistrate, but no transcript or other record of those oral submissions has been placed before this Court. In summary, VLA has failed to satisfy me that I should treat the second magistrate's error of law as inconsequential or as not warranting the grant of relief because of submissions made to him on behalf of the plaintiff.

Other grounds of review

19. As a result of the upholding of ground 2, the question of the costs of the application to set aside the subpoenas will need to be reheard and redetermined afresh, and so it not strictly necessary for me to consider the remaining grounds of review.

20. However for completeness I will deal with the other grounds briefly.

21. Ground 1 alleges:

> "The Court erred in the construction which it placed on the order of his Honour Mr. Gurvich, Magistrate, made on 3 October 2008, and in particular in construing that order as reserving, not merely the determination of the particular costs applications then before his Honour, but the question of costs generally. This constituted error on the face of the record."

22. This ground was explained and elaborated in argument as asserting that at the hearing on 3 October 2008 VLA expressly declined to claim costs against the plaintiff himself, as distinct from Mr Kuek, and that, as a result, the Magistrates' Court became *functus officio* in relation to any claim for costs by VLA against the plaintiff.

23. I agree with VLA that the plaintiff cannot even begin to support this ground without straying outside the record. In any event, if I were to have regard to the transcript of the hearing before Magistrate Gurvich and the other "extra-record" material to which the plaintiff took me in this regard, I would not be satisfied that Magistrate Rozencwajg erred as alleged.[20]

24. Ground 3 could not succeed for numerous reasons, including that it raises points of fact, not law, and because those points could not be made out without recourse to transcripts and other material outside the record.

25. Ground 4 alleges a failure to "give weight" to certain alleged relevant considerations. That is not an appropriate ground of challenge to a discretionary decision on costs.[21] Further in part the ground could only be supported by reference to matters not contained in the record.

26. Ground 5 alleges that Magistrate Rozencwajg failed to give adequate reasons. Counsel for the plaintiff treated this as his principal ground in oral argument. However I would not uphold it. There are some vagaries in the magistrate's reasons but, read in isolation, they are not so unclear as to render them legally inadequate. The plaintiff submitted that the magistrate had failed to deal with various matters raised in written submissions that were filed in the Magistrates' Court,

but this criticism cannot be made out in this proceeding. It would require travelling beyond the record. In any event, as I have mentioned, no transcript or other record of the oral hearings before Magistrate Rozencwajg was put before me.

Costs order in favour of or against VLA as distinct from subpoenaed individuals

27. On the first day of the hearing in this Court I raised the question on what basis the Magistrate had made his costs order in favour of VLA as distinct from the individuals who had been subpoenaed. VLA itself had not been subpoenaed, whether by its proper officer or at all. Ultimately, in the course of his counsel's reply on the second day of hearing, the plaintiff sought leave to further amend his originating motion to add a distinct ground based on this point. I refused the application for leave. I gave reasons, which were essentially to the effect that the application was made too late.

28. The plaintiff's counsel submitted in the alternative that I could take cognisance of the point under ground 5 (failure to give adequate reasons). But plainly it does not fall under that ground.

29. In any event, since the whole question of costs will need to be determined afresh in the Magistrates' Court, the parties will be free to make such submissions, if any, as they are advised to the Magistrates' Court in relation to whether VLA itself is entitled to be paid costs, or liable to pay costs, in respect of the subpoena issue.

Discretion to refuse relief

30. VLA submits that in any event this Court should refuse the plaintiff relief in the exercise of its undoubted discretion.

31. VLA points out that the order impugned is merely for the costs of an interlocutory matter which, by its nature, fell within the discretion of the Magistrates' Court under s131 of the *Magistrates' Court Act* 1989. VLA says that there would be little utility in granting relief given that on any remitter the Court would "likely make the usual order as to costs". VLA also says that if the matter is remitted, the costs that VLA alone would incur may exceed the amount of its estimated costs below, being $2,220.20. VLA says that there must be an end to litigation[22], and draws attention to the following remarks of Hayne JA in *Norton v Morphett*[23]:

> "The proceedings below sought to challenge a discretionary decision about costs. No question of principle was shown to arise. Such proceedings are not to be encouraged; still less on further appeals. They are properly to be seen as an extravagant use of the resources of the courts and the parties."

32. Finally VLA submits[24] that there is no substantial injustice to the plaintiff, whereas VLA would suffer prejudice in expending resources in respect of a proceeding to which it was not a party and where it successfully applied to have the plaintiff's witness summonses struck out and obtained an order for its costs, which is the "usual order" in such a case.

33. However I am not persuaded that relief should be refused as a matter of discretion. I accept, of course, that there must be strict control of challenges to discretionary decisions, especially decisions as to costs. However I note that *Norton v Morphett* was a case about the quantum of costs, not about the incidence of liability for costs. In any event, in my view, this is an unusual case and questions of principle have arisen, especially in connection with the extent to which it was open to the second magistrate, and appropriate for him, to consider the correctness of the decision of the first magistrate.

34. I do not accept that on any remitter the Magistrates' Court would "likely make the usual order as to costs". VLA assumes that this remains a case in which it can be expected that costs will follow the event and that the "event" is the order to set aside the subpoenas. But this assumption is falsified by my upholding of ground 2. On remitter, the plaintiff will be much freer than he was here to criticise the decision of the first magistrate. I note that counsel for VLA endeavoured only faintly to defend the first magistrate's decision to set aside the subpoenas. On remittal, the Magistrates' Court might think that there is much to be said for the view that, even on the material that was before the first magistrate (excluding the email of 15 August 2008 but including the first magistrate's own knowledge that he had caused inquiries to be made to VLA about the plaintiff, and had received adverse information about the plaintiff, without the plaintiff's consent

or knowledge) that the subpoenas were not "fishing".[25]

35. I note also that, perhaps somewhat belatedly, the plaintiff made a cross-application for costs against VLA.[26] That application remains undetermined. It cannot be said to be hopeless.[27]

Conclusion and orders

36. For these reasons there will be an order in the nature of *certiorari* to quash the order made by the Magistrates' Court of Victoria at Melbourne on 11 August 2009 that the plaintiff pay the costs of the first defendant "on subpoena issue, to be agreed upon, failing which liberty to apply". There will also be an order in the nature of mandamus requiring the Magistrates' Court to rehear and redetermine the question of the costs of the application made to set aside the subpoenas.

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[1] And which is also indirectly related to matters referred to in grounds 3 and 4.
[2] See *Easwaralingam v DPP* [2010] VSCA 353 at [21]; 208 A Crim R 122 and following and cases there cited concerning the incidents and the limits of the ground of "error of law on the face of the record".
[3] [2010] HCA 1; (2010) 239 CLR 531 at 571-578 [66]- [90]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[4] See footnote 2 above.
[5] [1999] VSCA 37; (1999) 2 VR 203 at 215 [29], 226-227 [63]-[64]; 15 VAR 96.
[6] [2003] VSC 460; (2003) 9 VR 136 at 148 [33].
[7] *Thomas v Campbell* [2003] VSC 460; (2003) 9 VR 136 at 147-149 [30]-[36], esp at [31] and [36].
[8] I do not assume that Magistrate Gurvich ultimately disqualified himself on the basis of the matters originally complained of by the plaintiff to which the subpoenas were said to be directed. Indeed I assume in VLA's favour that he disqualified himself for largely independent reasons. If I were permitted to take into account the transcript of the relevant hearing on 9 February 2009 before Magistrate Gurvich, to which I was taken, the latter view would emerge as the more accurate, but I put that aside.
[9] See and compare *Garwolin Nominees Pty Ltd v Statewide Building Society* [1984] VicRp 38; [1984] VR 469.
[10] Written submissions before this Court at CB 308-309; transcript of argument in this Court pp120-130.
[11] No authenticated or other copy of the formal order of the first magistrate is before this Court. In his reasons for decision (which I mention only for the sake of accuracy on this point) the first magistrate announced that he would "set aside" the subpoenas.
[12] [2003] VSC 460; (2003) 9 VR 136 at 148 [33].
[13] (1976) 9 ALR 325.
[14] See also my judgment in *Booth v Ward* [2007] VSC 364; (2007) 17 VR 195 at 204-205 [39]- [40] and cases there cited.
[15] See and compare *Duck Boo International Co Pty Ltd v Mizzan Pty Ltd* [2006] VSCA 241 at [13]- [14] and my judgment in *Cooper Morison Pty Ltd v Tennozan Pty Ltd* [2008] VSC 273 at [27]- [30]. The cited observations made in those two cases support this proposition, notwithstanding that both of the cases concerned the setting aside of orders obtained *ex parte*. It is noteworthy that the orders in question were final or effectively final.
[16] CB 309.
[17] Transcript 120-130.
[18] See my decision in *Wilson v County Court of Victoria* (2007) 14 VR 461 at 472 [47] which VLA's counsel ultimately acknowledged (transcript 91) was correct in this respect.
[19] CB 215-216 (paras 9, 10) and 215 (paras 5-8). See especially the reference therein to *Gilfillan v County Court of Victoria* [2001] VSC 360 at [18-25]; 123 A Crim R 433. The plaintiff's point would have been further supported by references to *Tahmindjis v Brown* [1985] FCA 181; (1985) 7 FCR 277; (1985) 60 ALR 120 and *Eastman v Somes* (1992) 106 FLR 346 at 351-356.
[20] However, in passing, I note that in relation to the *functus officio* point the Magistrate and all parties appear to have overlooked the possible significance of s132(1)(c) of the *Magistrates' Court Act* 1989 for the purposes of analysing what counsel for VLA said to Magistrate Gurvich on 3 October 2008 about claiming costs from Mr Kuek as distinct from the plaintiff.
[21] *Hobsons Bay City Council v Viking Group Holdings Pty Ltd* [2010] VSC 386 (Osborn J) at [19].
[22] *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148; (2004) 21 VAR 429; *Shire of Carnarvon v Klein Corporation Pty Ltd (No 2)* [2009] VSC 30.
[23] (1995) 83 A Crim R 90 at 104. VLA referred also to the concurring remarks of Ormiston JA at 91 and Phillips JA at 100.
[24] CB 311.
[25] See and compare *Tahmindjis v Brown* [1985] FCA 181; (1985) 7 FCR 277; (1985) 60 ALR 120; *Eastman v Somes* (1992) 106 FLR 346, esp at 351-356.
[26] CB 217.
[27] See and compare *Garwolin Nominees Pty Ltd v Statewide Building Society* [1984] VicRp 38; [1984] VR 469.

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