32/13; [2013] VSC 340

SUPREME COURT OF VICTORIA

WADDINGTON v MAGISTRATES' COURT of VICTORIA & KHA (No 2)

Emerton J

8 May, 28 June 2013

PRACTICE AND PROCEDURE – APPLICATION TO REVIEW A DECISION OF THE MAGISTRATES' COURT OF VICTORIA – WHETHER MAGISTRATE IN ERROR IN REFUSING TO ALLOW LAY PERSON TO REPRESENT APPLICANT – WHETHER POWER OF ATTORNEY SUFFICIENT TO EMPOWER ANY PERSON TO APPEAR ON BEHALF OF A LITIGANT – WHETHER MAGISTRATE WAS BIASED OR COULD BE PERCEIVED AS BIASED – POWER OF COURT TO REGULATE APPEARANCES – WHETHER COSTS ORDER MADE BY MAGISTRATE IN GRANTING THE ADJOURNMENT WAS APPROPRIATE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS100(6), 131; *LEGAL PROFESSION ACT* 2004, S2.2.2; *INSTRUMENTS ACT* 1958.

Section 100(6) of the *Magistrates' Court Act* 1989 ('Act') provides:

"A party to a civil proceeding (including an arbitration) may appear—
(a) personally; or

(b) by legal practitioner or other person empowered by law to appear for the party; or

(c) in the case of a cause of action for a debt or a liquidated demand, by a person in the exclusive employment of the party who is authorised in writing to appear for the party."

W. instituted a civil proceeding against K. and another. The Magistrate declined to permit W. to be represented by a person on the basis that the person was not legally qualified. W. submitted that the person was empowered by law to appear for him because W. had given him a power of attorney to that effect. Upon application for an originating motion, Lansdowne AsJ dismissed the proceeding. Upon appeal—

HELD: Application for judicial review dismissed.
1. W. failed to pay attention to the words, '[except] where a statute prevents it' in the passage to which he referred the Court. Section 100(6) of the Act prevents his agent from appearing in a civil proceeding in the Magistrates' Court unless the agent falls into one of the categories of persons whom it allows to appear. Moreover, if W. is correct about the issue being one of simple agency, the power of attorney given to Mr McDonald under the *Instruments Act* would be superfluous, as would s100(6) of the Act. A party could simply inform the court that another person was acting as his or her agent, and that person would have the right to appear on the first person's behalf in court.

2. In enacting s100(6) of the Act, the legislature did not intend to give any person authorised by a party the right to appear on that person's behalf in civil proceedings in the Magistrates' Court. The words 'empowered by law to appear for the party' do not mean empowered (in the sense of 'authorised') by the party to appear on his or her behalf. Although a person may appoint an attorney to do a great many things on his or her behalf, that does not include a thing for which specific provision is made that it be done by specified persons or categories of persons. An appearance in the Magistrates' Court of Victoria on behalf of a party is one such thing. In specifying who may appear in court on behalf of a party, s100(6) operates to limit representation to those categories of persons.

3. The purpose of s100(6) is to ensure that only legal practitioners and certain very limited classes of non-lawyers are eligible to appear for parties in civil proceedings in the Magistrates' Court.

4. In the circumstances, the magistrate did not refuse to exercise his power to control the processes in his court in the interests of justice and the exercise of any discretion to hear from Mr McDonald did not miscarry.

5. There was no basis upon which an allegation of actual bias could have been made out based on what occurred at the hearing in the Magistrates' Court. Furthermore, a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question or to the adjudication of the civil claim brought by W.

6. In relation to the order for costs against W., although the amount of $1,800 awarded for costs thrown away seemed high, there was no evidence to suggest that those were not the actual costs or expenses incurred by the second respondent. There was no reason to conclude that in making an order compensating the defendant for his costs thrown away as a result of the adjournment, the magistrate applied the wrong principle, took into account an irrelevant consideration, failed to take into account a relevant consideration, or made a decision that was so unreasonable no reasonable decision-maker could have made it.

EMERTON J:

Introduction and conclusion

1. The appellant, Mr Waddington, has appealed from the judgment and orders of Lansdowne AsJ made on 13 March 2013 summarily dismissing his application for judicial review in respect of a proceeding in the Magistrates' Court of Victoria. Her Honour held that Mr Waddington's application for judicial review had no real prospect of success and dismissed the application pursuant to s63 of the *Civil Procedure Act* 2010 (Vic).

2. The appeal has been brought under r77.06 of the *Supreme Court (General Civil Procedure) Rules* 2005. In such an appeal the Court has all the powers of the court constituted by the Associate Judge, may give any judgment and make any order which ought to have been given or made and make any further or other order as the case may require. Such an appeal is no longer a re-hearing *de novo*. Mr Waddington must therefore identify error in the decision of the Associate Judge to summarily dismiss his application for review.

3. For the reasons that follow, I have heard both the appeal and the application for judicial review. Although I do not share her Honour's view that the review proceeding raised no real question to be tried, I agree with her Honour's reasoning as to why the grounds for review are not made out. Having regard to the merits of the grounds of review raised by Mr Waddington, the application for review must be dismissed.

Events in the Magistrates' Court

4. Mr Waddington brought a civil claim in the Magistrates' Court of Victoria seeking damages from the second respondent, who is a rooming house proprietor. At the hearing, Mr Waddington sought to have his case presented to the magistrate by a lay person. The magistrate refused to allow Mr Waddington to be represented by a person who was not legally qualified, granted an adjournment to enable him to obtain legal representation and ordered him to pay the second respondent's costs thrown away as a result of the adjournment. Mr Waddington claims that the magistrate erred in refusing to allow his case to be presented by a person who was not a legal practitioner and displayed bias against him in the conduct of the hearing.

5. At the commencement of the Magistrates' Court hearing, Mr Waddington informed the magistrate that his case would be presented by a Mr McDonald. The magistrate ascertained that Mr McDonald had no legal qualifications and told Mr Waddington that as Mr McDonald was not legally qualified, he had 'no standing' and that Mr Waddington would have to present his case himself. Mr Waddington informed the magistrate that he had given Mr McDonald a power of attorney. The magistrate responded:

> Well you're not going to have Mr McDonald present your case. If he's not a legally qualified legal practitioner, he does not have the right and he is not qualified to represent you. End of story. If you want to run the case, certainly – you can proceed. If you don't want to run the case unrepresented you can seek an adjournment.

6. Mr Waddington informed the magistrate that he was under medical supervision for anxiety, depression and 'frustration', that he was not in a financial position to have a legally qualified person present his case and that he might have some difficulty doing so himself. The magistrate replied that Mr Waddington could seek his advice from time to time if he wished and agreed that Mr McDonald could remain at the bar table to assist Mr Waddington as a McKenzie friend.[1]

7. Mr Waddington attempted to explain his case to the magistrate but soon gave up. He applied for an adjournment to obtain representation, which was granted. His Honour asked the solicitor for the second defendant to quantify the defendant's costs thrown away as a result of the adjournment and, without further inquiry or hearing any submissions, ordered Mr Waddington to pay that amount, being $1,800 (the 'costs order').

Application for review

8. By originating motion filed on 28 September 2012, Mr Waddington sought relief in the nature of *certiorari* and mandamus in respect of the events in the Magistrates' Court on the following grounds:

> (a) the magistrate erred by not allowing him to be heard through his 'elected representative' (Ground 1);
>
> (b) the conduct of the hearing was biased and perceived as prejudiced against him (Ground 2);
>
> (c) the costs order was unfair and inappropriate (Ground 3).

9. Ground 1 is based on the magistrate's refusal to allow Mr McDonald to present Mr Waddington's case when Mr Waddington had given Mr McDonald a power of attorney to enable him to do so. Mr Waddington contends that the magistrate erred in failing to recognise Mr McDonald's right to appear in the proceeding by virtue of the power of attorney and/or as his agent.

10. Grounds 2 and 3 flow from the decision to refuse to allow Mr McDonald to present Mr Waddington's case as his attorney or agent. In respect of Ground 2, Mr Waddington contends that he was interrupted and not given an opportunity to properly explain the legal position.

11. The relief sought by Mr Waddington is somewhat unusual. In respect of Ground 1, he seeks an order directing the Magistrates' Court at Dandenong to pass the question of representation over to the Supreme Court for determination and adjudication.

12. In fact, by bringing the application for review, Mr Waddington has asked the Supreme Court to determine whether the magistrate erred in refusing to allow Mr McDonald to present his case in the Magistrates' Court proceeding. He has obtained the relief that he seeks by bringing the application for review. What he in fact needs is an order directing the Magistrates' Court to apply what he contends to be the law relating to appearances in the Magistrates' Court, that is, that Mr McDonald be permitted to present his case in the Magistrates' Court proceeding.

13. In respect of Ground 2, Mr Waddington seeks an order that a different magistrate hear and determine the Magistrates' Court proceeding and, in respect of Ground 3, he seeks to have the costs order set aside.

The decision to summarily dismiss the review proceeding

14. On 13 March 2013, Lansdowne AsJ made orders summarily dismissing the application for judicial review pursuant to s63 of the *Civil Procedure Act* 2010 (Vic). The basis for her Honour's decision was that Mr Waddington's application for judicial review had no real prospect of success and there was no real question to be tried in respect of the complaints in Grounds 1 or 2 or in respect of the costs order.

15. The summary judgment provisions of the Civil Procedure Act have very recently received detailed consideration in the Court of Appeal in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd.*[2] The Court of Appeal held that, on the present state of authority:

> (a) the test for summary judgment under s63 of the *Civil Procedure Act* 2010 is whether the respondent to the application for summary judgment has a 'real' as opposed to 'fanciful' chance of success;
>
> (b) the test is to be applied by reference to its own language and without paraphrase or comparison with the 'hopeless' or 'bound to fail' test essayed in *General Steel*;
>
> (c) it should be understood, however, that the test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test essayed in *General Steel* and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;
>
> (d) at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action (and the defect cannot be cured by amendment) or on the basis that the action if frivolous or vexatious or an abuse of process or where the application is [not] supported by evidence.[3]

16. The Associate Judge referred to and purported to apply the test for summary dismissal set out in an earlier decision of the Court of Appeal in *Karam v Palmone Shoes Pty Ltd*.[4] In *Lysaght*, the Court of Appeal clarified its decision in *Karam*, saying that the part of that decision that stated that the change in terms in s63 of the *Civil Procedure Act* 'was not intended to establish a new or different test'[5] from the existing General Steel 'hopeless' or 'bound to fail' test was incorrect.[6] The Court recognised that the test under s63 had been interpreted as a more liberal test which might in some circumstances extend to cases not regarded as sufficiently hopeless to warrant striking out under the *Supreme Court (General Civil Procedure) Rules* 2005.[7]

17. The Associate Judge observed that *Karam* held that the change of terms was not intended to establish a new or different test. Her Honour said that, for the avoidance of doubt, she would determine the application under the 'old standard', being that summary judgement would only be given if it was clear that there was no real question to be tried.[8]

18. In fact, while the Associate Judge purported to apply the 'old standard', she did not apply the *General Steel* test. Nothing that her Honour did was inconsistent with the application of the test in *Lysaght*. Her Honour recognised that she was required to make a judgment as to whether Mr Waddington's application for review raised any real question to be tried. Her Honour held that it did not and that none of the grounds had any real prospect of success.

19. The focus of Mr Waddington's submissions was whether he had an entitlement to nominate a person of his choosing to represent him in the Magistrates' Court proceeding. However, he addressed the question on appeal by submitting that the Originating Motion contained substantially meritorious grounds that were worthy of adjudication.

20. The complexity and the importance of the issues raised in the judicial review proceeding will bear upon the Court's ability to take the view that the proceeding is capable of being determined by summary judgment. The judicial review proceeding involves a question of statutory construction involving the meaning of the words 'empowered by law to appear' in s100(6)(b) of the *Magistrates' Court Act* 1989 (Vic) and necessitates analysis of the powers of the Magistrates' Court in light of its limited statutory jurisdiction and in the context of the exercise of judicial powers by magistrates. It is quite clear that, having regard to the length and complexity of the reasons given by the Associate Judge and the time required to produce the judgment, at least Ground 1 raised a real question to be tried, notwithstanding that its prospects of success may have been poor.

21. This was not, in my view, a proceeding that was appropriate for summary dismissal. The exercise of the power of summary dismissal is reserved for clear cases.[9] The Associate Judge dealt with the central ground of review at length, before concluding that it had no real prospect of success. With respect, the detailed analysis carried out by the Associate Judge was precisely what would and should have occurred had the matter been allowed to proceed to trial. I therefore accept Mr Waddington's submission that the review proceeding should not have been summarily dismissed.

22. Section 47 of the *Civil Procedure Act* empowers the Court to give directions to ensure that a civil proceeding is conducted in a manner that facilitates the just, efficient, timely and cost-effective resolution of the real issues in dispute. In determining whether the Associate Judge erred in summarily dismissing the judicial review proceeding, it was necessary to consider the merits of the grounds of review. It is therefore convenient to avoid further delay by determining Mr Waddington's application for review at the same time as his appeal from the orders of the Associate Judge. The Court is in a position to determine whether the relief sought by Mr Waddington should be granted, having heard full argument on the grounds for review by the parties.

Ground 1

23. Ground 1 is that the magistrate erred in refusing to allow Mr McDonald to appear for Mr Waddington in the Magistrates' Court proceeding. Although not submitted expressly, I take Ground 1 to encapsulate two propositions:

> (a) By reason of the power of attorney, Mr McDonald had a right to appear in the Magistrates' Court. As a corollary, Mr Waddington had a right to be represented by Mr McDonald;
>
> (b) Alternatively, the magistrate ought, as a matter of discretion, to have given Mr McDonald leave to appear on behalf of Mr Waddington.

24. There is a preliminary difficulty with this ground in that *certiorari* and mandamus are not available to correct legal error *per se*, but are only available for error of law 'on the face of the record'. Pursuant to s10 of the *Administrative Law Act* 1978 (Vic), the 'record' includes:

> ... any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for decision...

25. In this case, the only orders made by the Magistrates' Court were to grant an adjournment (on the application of Mr Waddington) and the costs order. However, it is clear from the transcript that the magistrate effectively made a decision not to allow Mr McDonald to appear for Mr Waddington on the basis that the right to appear was confined to parties and their legal representatives.

26. The transcript of the hearing in the Magistrates' Court was exhibited to Mr Waddington's affidavit and is relied upon by him generally in his application for review. The transcript sets out the magistrate's reasons for not allowing Mr McDonald to appear and therefore forms part of 'the record'. In any event, as Mr Waddington's complaint is also a complaint that he was denied procedural fairness (in that he was not heard in the way that he contends he was entitled by law to be heard) the transcript of what occurred in the Magistrates' Court is admissible to determine whether there has been such a breach.

27. The *Magistrates' Court Act* makes specific provision for appearances in civil proceedings. Section 100(6) provides that a party to a civil proceeding may appear:

> (a) personally; or
>
> (b) by legal practitioner or other person empowered by law to appear for the party; or
>
> (c) in the case of a cause of action for a debt or liquidated demand, by a person in the exclusive employment of the party who is authorised in writing to appear for the party.

28. Mr Waddington's first ground of appeal turns on the proper construction of the words in paragraph (b), 'empowered by law to appear', because he contends that Mr McDonald was so empowered by reason of the power of attorney he was given and therefore had a legal right to appear to present Mr Waddington's case.

29. Mr Waddington submits that Mr McDonald was a person 'empowered by law' to appear for him because Mr McDonald was appointed as Mr Waddington's attorney using a power of attorney given under the *Instruments Act* 1958 (Vic) which apparently expressly authorised Mr McDonald to present Mr Waddington's case in the Magistrates' Court proceeding. According to Mr Waddington, a power of attorney, being a legal instrument, empowers its holder by law to do certain things. Mr McDonald therefore falls within the words in s100(6)(b).

30. Mr Waddington also refers more generally to the principles of agency, which he submits permit any person to have any other person act for them as their agent, including in legal proceedings. He refers to the decision in *Spina v Permanent Custodians Ltd*,[10] in which Hammerschlag J quoted from Halsbury's Laws of England, 5th edition, as follows:

> As a general rule whatever a person has power to lawfully to do can be done by him, her or it through an agent. There are exceptions including where a statute prevents it and where the power concerned is purely personal and therefore not capable of delegation.[11]

31. Mr Waddington submits that Mr McDonald was entitled to appear as his agent in legal proceedings because it was something that he, Mr Waddington, had the power to lawfully do himself.

32. However, Mr Waddington has not paid attention to the words, '[except] where a statute prevents it' in the passage to which he referred the Court. In my view, for the reasons that follow, s100(6) prevents his agent from appearing in a civil proceeding in the Magistrates' Court unless the agent falls into one of the categories of persons whom it allows to appear. Moreover, if Mr Waddington is correct about the issue being one of simple agency, the power of attorney given to

Mr McDonald under the *Instruments Act* would be superfluous, as would s100(6) of the *Magistrates' Court Act*. A party could simply inform the court that another person was acting as his or her agent, and that person would have the right to appear on the first person's behalf in court.

33. I reject the arguments advanced by Mr Waddington as to the proper construction of s100(6) of the *Magistrates' Court Act*. In my view, in enacting s100(6), the legislature did not intend to give any person authorised by a party the right to appear on that person's behalf in civil proceedings in the Magistrates' Court. The words 'empowered *by law* to appear for the party' (emphasis added) do not mean empowered (in the sense of 'authorised') *by the party* to appear on his or her behalf. Although a person may appoint an attorney to do a great many things on his or her behalf, that does not include a thing for which specific provision is made that it be done by specified persons or categories of persons. An appearance in the Magistrates' Court of Victoria on behalf of a party is one such thing. In specifying who may appear in court on behalf of a party, s100(6) operates to limit representation to those categories of persons.

34. The limiting nature of s100(6) is consistent with both the text and context of s100(6), and with its purpose.

35. The text of s100(6) is not consistent with there being an open-ended permission for parties to nominate persons who are not legally qualified to appear for them. The fact that paragraph (c) makes provision for employees to appear for employers in certain types of civil proceedings indicates that the provision as a whole does not otherwise allow such persons to appear. Had the legislature intended to do what Mr Waddington contends for, it would not have been necessary to enact paragraph (c). If Mr Waddington's construction were adopted, any employer could simply authorise any employee to appear on its behalf and would have no need to rely on the statutory permission granted by paragraph (c). Section 100(6)(c) would be redundant.

36. Furthermore, the purpose of s100(6) is not advanced by Mr Waddington's construction. In my view, the purpose of s100(6) is to ensure that only legal practitioners and certain very limited classes of non-lawyers are eligible to appear for parties in civil proceedings in the Magistrates' Court. While Mr Waddington may point to good public policy reasons why non-lawyers ought to be able to appear for parties in legal proceedings,[12] there are equally if not more compelling reasons why the Parliament might legislate to prevent any person nominated by a party from appearing for that party in court. It is not the function of this court to rehearse reasons why the legislature might wish to place limits on who can appear in civil proceedings in the Magistrates' Court. However, I observe that legal practitioners have ethical obligations arising from their privileged position in the administration of justice and owe special duties to the courts, the proper exercise of which is important to the administration of justice.

37. This is reflected in s2.2.2 of the *Legal Profession Act* 2004 (Vic), which prohibits a person '[engaging] in legal practice' unless the person is a legal practitioner. Section 2.2.2(2)(f) creates an exception to this rule where a person represents another person in a proceeding before a court or tribunal 'if the person is so authorised by or under a law of this jurisdiction, or has leave of the court or tribunal'. Mr Waddington submits that appearing in the Magistrates' Court on behalf of a party without charging a fee does not involve engaging in legal practice. I disagree. The fact that representing a person in a court or tribunal in specified circumstances is exempted from the prohibition in s2.2.2(1) shows that representing a person in court does constitute engaging in legal practice for the purposes of the *Legal Profession Act*. It involves the provision of legal services, that is, the carrying out of work of a kind done in the ordinary course of legal practice.[13] It is the character of the work carried out that is important. Whether the person is paid for the services provided is of no moment.

38. The purpose of s100(6) is quite plainly to regulate who may appear in civil proceedings in the Magistrates' Court. If it were the case, as Mr Waddington submits, that a party could simply nominate a person to appear on his or her behalf (with or without a power of attorney), s100(6) would have no work to do.

39. The words 'empowered by law' in s100(6) do not open a window for any person chosen by a party to assert a legal entitlement to appear for that party in court. I reject Mr Waddington's submissions on this question.

40. Mr Waddington relies on the interpretative obligation in s32 of the *Charter of Human Rights and Responsibilities* 2006 to submit that, as s100(6) of the *Magistrates' Court Act* must be interpreted compatibly with the rights in the Charter providing for a fair and public hearing[14] and the right to equality before the law,[15] his broad construction of 'empowered by law' should be preferred to a narrower one, as it permits a greater range of representation and better access to justice for persons who cannot afford legal representation.

41. The Charter does not alter the way in which s100(6) must be construed. Although compliance with the interpretative obligation in s 32 means exploring all 'possible interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights',[16] I do not consider that the construction advanced by Mr Waddington is a 'possible' interpretation in the relevant sense. Even accepting for the sake of argument that it may be 'fairer' for parties to have a broader choice in who appears for them in legal proceedings, the construction advanced by Mr Waddington is not open, having regard to the fact that it would permit any person appointed as attorney or nominated as agent to appear in civil proceedings the Magistrates' Court, when the legislature has expressly legislated to limit who may do so. Moreover, s8 of the Charter is inapplicable, because there is no suggestion that s100(6) is discriminatory or discriminates within the meaning of the *Equal Opportunity Act* 2010 (Vic).[17]

42. In my view, the words 'empowered by law' in s100(6) of the *Magistrates' Court Act* refer, as Lansdowne AsJ found, to statutory provisions, that is, to laws of general application, enabling certain persons or entities to bring legal proceedings on behalf of certain others. Thus, for example, s58B of the *Guardianship and Administration Act* 1986 (Vic) empowers an administrator appointed under that Act to bring and defend actions and other legal proceedings in the name of the represented person; and s442A of the *Corporations Act* 2001 (Cth) gives the administrator of a company under administration the power to bring and defend proceedings in the company's name and on its behalf.

43. Mr Waddington drew the attention of the Associate Judge to a number of decisions that he said supported his argument. He made brief reference to some of these decisions in submissions before me.[18] The decisions in question are not concerned with the construction of s100(6) or equivalent statutory provisions. In my view, they shed no light on the construction of s100(6) of the *Magistrates' Court Act*.

44. There remains the question, however, as to whether the learned magistrate had a discretion to hear from Mr McDonald and, if so, whether the exercise of the discretion miscarried.

45. Mr Waddington drew the Court's attention to the case of *Hindson v County Court of Victoria*; *Goudy v County Court of Victoria*,[19] in which the Court of Appeal permitted a person with no relevant legal qualifications to represent a party. Of course, unlike the Supreme Court, the jurisdiction of the Magistrates' Court is conferred by its governing statute, which is quite specific about who may appear in civil proceedings. However, magistrates, as judicial officers, enjoy powers incidental to or necessary for the performance of their judicial functions.[20] As Tadgell J said in *Stefanovski v Murphy*:

> It is an obvious and elementary necessity of our legal system that those presiding in courts of law should have full authority to exercise procedural control. Without a proper and effective exercise of the authority the system would be unworkable. The power to control procedure exists for the benefit alike of courts, litigants and the community as a whole; and it is of course exercisable with the object of achieving justice according to law.[21]

46. If a litigant appears in person who cannot speak English, for example, or is disabled and unable to speak or hear, it must be open to the magistrate to permit someone to speak for that person, at least as an interim measure.

47. However, the authority to exercise procedural control may be restricted by statute. In this case, it has been. Having regard to the clear terms of s100(6), any discretion to hear from a person who does not fall within s100(6) must be a very limited one.

48. In this case, it was put to the magistrate that Mr McDonald had a right to appear by reason of the power of attorney. The magistrate rightly rejected that submission. His Honour did not give

further consideration to whether he could or should hear from Mr McDonald. However, although Mr Waddington informed him that he was under 'medical supervision for anxiety, depression and frustration', there was nothing in Mr Waddington's conduct or demeanour to indicate that he might need to have someone else speak for him. The magistrate could see and hear Mr Waddington. Mr Waddington was plainly capable of articulating his complaint, and to do so using legal concepts. There was therefore no basis upon which to consider hearing from Mr McDonald. The magistrate took steps to ensure that Mr Waddington would have a fair hearing by offering him the assistance of the court and agreeing to him retaining the assistance of Mr McDonald. Mr Waddington's position as an anxious unrepresented litigant was taken into account.

49. In the circumstances, the magistrate did not refuse to exercise his power to control the processes in his court in the interests of justice. I am not persuaded that the exercise of any discretion to hear from Mr McDonald miscarried.

50. Ground 1 is not made out.

Ground 2

51. Ground 2 is that the magistrate is biased against Mr Waddington. Mr Waddington seeks to have the adjourned proceeding referred to a different magistrate for hearing and determination. I take it, therefore, that Mr Waddington apprehends that the magistrate may have a predisposition (or bias against him) affecting not only the decision to refuse permission for Mr McDonald to appear, but also affecting Mr Waddington's claim for damages in the Magistrates' Court more generally.

52. Mr Waddington makes no distinction between actual bias and apprehended bias. As a result, the Associate Judge proceeded on the basis that both were alleged, but concluded that there was no factual foundation to enable either allegation to succeed, having carefully read the transcript and formed the view that, at most, the conduct of magistrate towards Mr Waddington could be described as 'abrupt'.

53. I have also read the transcript.

54. Like the Associate Judge, I find that the magistrate treated the Mr Waddington abruptly. He dealt with the request for Mr McDonald to appear for Mr Waddington very shortly. However, having made the decision that Mr McDonald could not appear, the magistrate sought to give Mr Waddington an opportunity to present his case (by offering the assistance of the court and permitting Mr McDonald to assist Mr Waddington as a McKenzie friend) or to apply for an adjournment. Having regard to the pressures faced by magistrates in running a busy court, the restrictions on representation in s100(6) and the measures available to the court to assist unrepresented litigants, the steps taken by the magistrate were unremarkable.

55. Bias, as the learned authors of *Judicial Review of Administrative Action* have observed, is both a loaded and open word.[22] It is an open word because it may encompass many different things. However, it is usually associated with a lack of partiality or predisposition in favour or against one of the parties on an issue for reasons unconnected with the merits of the issue.[23] It is unnecessary to make out actual bias in order to have a decision set aside. It is sufficient to show that a fair-minded lay observer might reasonably apprehend that a judicial officer might not bring an impartial mind to the resolution of a question he or she is required to decide. The question is one of possibility (real and not remote), not probability.[24]

56. In *Ebner v Official Trustee in Bankruptcy*,[25] the High Court of Australia set out a two-step process for applying the 'apprehension of bias principle':

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.[26]

57. The two-step test in *Ebner* required Mr Waddington to identify what he says might have led the magistrate to decide the question of representation and/or the question arising in his civil claim other than on its legal and factual merits and then to show a connection between that matter and the deviation from deciding the question on the merits. For the first step, Mr Waddington points to rudeness, abruptness and an unwillingness to listen. However, Mr Waddington has made no connection between what he perceived to be rudeness or abruptness and a predisposition or prejudice against his case for reasons unconnected with the merits. Unfortunately, judicial officers are sometimes rude or abrupt and may seem to be unwilling to listen to everything the litigant wishes to say. That may well be a function of 'grumpiness' and a burdensome workload rather than a sign of predisposition or partiality. As a general rule, it would not, without more, give rise to an apprehension that the judicial officer might not bring an impartial mind to the resolution of a question he or she is required to decide.

58. Mr Waddington also relies on the manner in which the magistrate dealt with the question of costs. The costs order was made, as the Associate Judge found, in accordance with the principle that a party will usually be entitled to their costs thrown away as the result of an adjournment sought by another party. The fact that Mr Waddington was ordered to pay the defendant's costs thrown away could not, in and of itself, constitute bias or give rise to an apprehension of bias. Furthermore, the fact that the magistrate did not accede to the application for an order that costs be reserved is also unremarkable, given the circumstances in which they were incurred.

59. Mr Waddington contended that the amount of the costs order was exorbitant and that this displayed bias. However, he did not put before the Associate Judge or before this court, any material to show that the costs awarded were in fact out of the ordinary.

60. In any event, whether or not the costs were out of the ordinary, I do not consider that the amount of costs awarded is evidence of bias. The fact that the magistrate accepted without question the figure put forward by the solicitor for the second respondent might be evidence of impatience or unreasonableness, but so much would not amount to bias. The magistrate asked the solicitor for the second respondent what his actual costs were, he received an answer, and he fixed the costs in that amount. The magistrate did not, in my view, display any partiality or predisposition in making the costs order and a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question.

61. In my view, there is no basis upon which an allegation of actual bias could be made out based on what occurred at the hearing in the Magistrates' Court. Furthermore, and a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question or to the adjudication of the civil claim brought by Mr Waddington.

62. Ground 2 is not made out.

Ground 3: costs order

63. This ground was only faintly pressed by Mr Waddington in oral submissions. However, he alleged in his originating motion that the costs order was so 'grossly and manifestly unfair and inappropriate' as to make it unlawful.

64. The court's discretion as to costs is very wide. Section 131(1) of the *Magistrates' Court Act* provides:

> 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.

65. Given that the magistrate made no error in not permitting Mr McDonald to appear for Mr Waddington, and his conduct did not amount to actual bias or give rise to apprehended bias, Mr Waddington's need for an adjournment was borne of his own misunderstanding of what was likely to happen when he put forward Mr McDonald as his advocate. In the normal course, he would be liable to pay the other party's costs thrown away as a result of the need for an adjournment. That is what happened.

66. Although the amount of $1,800 awarded for costs thrown away seems high, there is no evidence to suggest that those were not the actual costs or expenses incurred by the second respondent. I agree with the Associate Judge that there is no reason to conclude that in making an order compensating the defendant for his costs thrown away as a result of the adjournment, the magistrate applied the wrong principle, took into account an irrelevant consideration, failed to take into account a relevant consideration, or made a decision that was so unreasonable no reasonable decision-maker could have made it.

67. Ground 3 is not made out.

Conclusion

68. Mr Waddington's appeal from the orders of the Associate Judge is allowed but his application for judicial review is dismissed.

---

[1] *McKenzie v McKenzie* [1970] 3 All ER 1034; [1970] 3 WLR 472; [1971] P 33.
[2] [2013] VSCA 158 ('*Lysaght*'). The provisions have also received detailed consideration in the Trial Division of his court by J Forrest J in *Matthews v SPI Electricity Pty Ltd* [2011] VSC 168; by Dixon J in *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd* [2011] VSC 222; by Croft J in *JBS Southern Australia Pty Ltd v Westcity Group Holdings Pty Ltd* [2011] VSC 476.
[3] *Lysaght* [35].
[4] [2012] VSCA 97, [28] ('*Karam*').
[5] *Karam* [28].
[6] *Lysaght* [32].
[7] Ibid.
[8] *Waddington v Magistrates' Court of Victoria and Kha* [2012] VSC 101, [26].
[9] *Lysaght* [12].
[10] [2008] NSWSC 561; 13 BPR 98,316.
[11] Ibid [101].
[12] Mr Waddington advanced what he described as good policy reasons for allowing unrepresented parties to be represented in a court of law by someone they believe to be more competent in managing court appearances than them. He argued that it would improve access to justice and that individuals would make rational decisions about representation, based on their knowledge of their own abilities and those they choose to represent them.
[13] *Legal Profession Act*, s1.2.1 (definitions).
[14] Section 24(1) of the Charter.
[15] Section 8 of the Charter.
[16] *Momcilovic v R* [2010] VSCA 50; (2010) 25 VR 436, 464 [103]; (2010) 265 ALR 751.
[17] Section 6 of *the Equal Opportunity Act* 2010 (Vic) lists attributes in respect of which discrimination is prohibited including age, disability, political belief or activity, race, religious belief or activity, sex and sexual orientation. Mr Waddington does not allege discrimination on any of these grounds.
[18] *Cornall v Nagle* [1995] VicRp 50; [1995] 2 VR 188; *Spina v Permanent Custodians Ltd* [2008] NSWSC 561; 13 BPR 98,316.
[19] [2006] VSCA 57.
[20] *Guss v Magistrates' Court of Victoria* [1998] 2 VR 113, 120 (Batt J); *Stefanovksi v Murphy* [1996] VicRp 78; [1996] 2 VR 442, 443.
[21] *Stefanovksi v Murphy* [1996] VicRp 78; [1996] 2 VR 442, 443.
[22] Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, (Thompson Reuters, 5th Ed, 2013) 610.
[23] *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Viv 1117, [28].
[24] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 345; (2000) 176 ALR 644; 63 ALD 577; 75 ALJR 277; (2000) 21 Leg Rep 13 ('*Ebner*').
[25] [2000] HCA 63; (2000) 205 CLR 337; (2000) 176 ALR 644; 63 ALD 577; 75 ALJR 277; (2000) 21 Leg Rep 13.
[26] Ibid [8].

APPEARANCES: The applicant Waddington appeared in person. For the second respondent Kha: Mr B Cook, solicitor. Cook & Associates, solicitors.
