**21/13; [2013] VSC 278**

**SUPREME COURT OF VICTORIA**

# *MARWAH v MAGISTRATES' COURT of VICTORIA and ANOR*

**Kyrou J**

**20, 29 May 2013**

**PRACTICE AND PROCEDURE – APPLICATION FOR AN ADJOURNMENT — DECISION BY A MAGISTRATE REFUSING AN APPLICATION BY TWO WITNESSES TO ADJOURN A COMPULSORY EXAMINATION UNDER S104 OF THE *CRIMINAL PROCEDURE ACT* 2009 PENDING THE DETERMINATION OF AN APPLICATION BY THE ACCUSED TO STRIKE OUT THE CHARGES BROUGHT AGAINST THE ACCUSED UNDER THE *OCCUPATIONAL HEALTH AND SAFETY ACT* 2004 — GROUNDS OF REVIEW NOT ESTABLISHED — APPLICATION DISMISSED.**

An application was made by two plaintiffs to a Magistrate for an adjournment of orders for compulsory examination of the two plaintiffs until after the determination of a defendant's strike-out application of charges which it faced. The Magistrate refused the application. Upon review—

**HELD: Application for review dismissed.**

**1. As the validity of the Baiada charge-sheet was not an issue for determination by the Magistrate, the plaintiffs' submission that the substance of their application was about the jurisdiction of the Magistrates' Court to conduct the compulsory examinations was rejected.**

**2. The plaintiffs' submission that, in the circumstances that prevailed at the hearing of their application, the only order that the Magistrate could properly make was an order granting the adjournment sought by them was rejected. In substance and in form, the plaintiffs' application sought a discretionary order, namely an adjournment of the orders for examination. By definition, the seeking of a discretionary order does not involve an automatic entitlement to the order, but the exercise of a discretion which involves the balancing of factors for and against the granting of the order.**

**3. The Magistrate was obliged to consider all the factors upon which the plaintiffs relied in support of their application and all the factors upon which the Informant relied in opposing that application. The plaintiffs did not allege that the Magistrate took into account any irrelevant considerations or that she failed to take into account relevant considerations. The transcript indicates that her Honour engaged with the parties during argument on the various issues that they raised and that, at the conclusion of final addresses, she adjourned the hearing briefly to consider the issues. Although her Honour's ruling was brief, it did not indicate that she failed to properly consider the issues raised by the parties.**

**4. It was appropriate for the Magistrate to take into account: her assessment of the likelihood of Baiada's strike-out application succeeding; whether there was any prejudice to the plaintiffs from a refusal to grant an adjournment; and whether there was any prejudice to the Informant from the granting of an adjournment. The conclusions that the Magistrate reached on these issues were open to her. The plaintiffs failed to satisfy the Court that her Honour made any vitiating error in relation to them.**

**5. Accordingly, the application for review was dismissed.**

## KYROU J:

### Introduction and summary

1. On 12 August 2010, Satinder Sarel died in a workplace accident that occurred at the premises of Baiada Poultry Pty Ltd ('Baiada') in Laverton North ('Factory'). As a result of the accident, Mark Glenister ('Informant'), an inspector under the *Occupational Health and Safety Act* 2004 ('OH&S Act'), charged Baiada with four indictable offences under that Act.

2. The four charges were for alleged breaches of s21(1) (as supplemented by ss21(2)(a) and 21(2)(e)) and s2(1) of the OH&S Act. The charges were set out in a charge-sheet dated 10 August 2012 that was filed with the Magistrates' Court at Melbourne ('Baiada charge-sheet'). The Baiada charge-sheet was filed just prior to the expiration of the two year limitation period referred to in s132 of the OH&S Act for the bringing of proceedings for an indictable offence under that Act.

3. On 25 October 2012, Baiada filed an application in the Magistrates' Court seeking to strike out the charges on the basis that the Baiada charge-sheet was invalid because it did not contain all the information required by law. The application was supported by 35 pages of written submissions dated 27 November 2012.

4. The Magistrates' Court fixed the strike-out application for hearing on 17 December 2012. However, at the Informant's request, this hearing was vacated. The Court initially rescheduled the hearing for 27 and 28 May 2013 and later, again at the Informant's request, for 22 and 23 July 2013. As at 7 February 2013, the Informant had not filed submissions in response to Baiada's submissions dated 27 November 2012.

5. A committal hearing in respect of the charges is due to commence on 16 September 2013.

6. In the meantime, on 25 October 2012, the Informant made an *ex parte* application to the Magistrates' Court pursuant to s103 of the *Criminal Procedure Act* 2009 ('CP Act') for orders that Vishal Marwah, the plant manager at the Factory and Surinder Singh, the operations manager at the Factory, be compulsorily examined. On the same day, the Court made orders under s104 of the CP Act requiring Mr Marwah and Mr Singh (collectively 'plaintiffs') to attend the Court on 7 February 2013 to be examined by the Informant and to produce a number of documents ('orders for examination'). The Court was satisfied that the plaintiffs had refused to make a statement to the Informant.

7. On 31 January 2013, the plaintiffs' solicitors, who are also the solicitors for Baiada, wrote to the Informant seeking consent to adjournment of the orders for examination pending determination of Baiada's strike-out application. The Informant refused.

8. On the return date of the orders for examination, 7 February 2013, the plaintiffs applied to the magistrate scheduled to preside at the compulsory examinations, Magistrate Hawkins, for an adjournment of the orders for examination pending the determination of Baiada's strike-out application. Her Honour made an order refusing the plaintiffs' application ('impugned order').

9. The plaintiffs have commenced this proceeding against the Magistrates' Court and the Informant pursuant to O56 of the *Supreme Court (General Civil Procedure) Rules* 2005 seeking orders to quash the impugned order and to prohibit the Court from conducting the compulsory examinations.

10. The Magistrates' Court did not participate in this proceeding in accordance with *R v Australian Broadcasting Tribunal; Ex parte Hardiman.*[1]

11. For the reasons that follow, I have concluded that Magistrate Hawkins did not err in law in making the impugned order. Accordingly, this proceeding will be dismissed.

**Relevant provisions of the *Occupational Health and Safety Act* 2004**

12. Sections 21 and 26 of the OH&S Act, which Baiada is alleged to have contravened, relevantly provide:

> **21 Duties of employers to employees**
> (1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.
> Penalty: 1800 penalty units for a natural person;
> 9000 penalty units for a body corporate.
>
> (2) Without limiting subsection (1), an employer contravenes that subsection if the employer fails to do any of the following—
> (a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;
> ...
> (e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.
> ...

(4) An offence against subsection (1) is an indictable offence.

**Note**
However, the offence may be heard and determined summarily (see section 28 of the ***Criminal Procedure Act* 2009**).

**26 Duties of persons who manage or control workplaces**
(1) A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health.
Penalty: 1800 penalty units for a natural person;
9000 penalty units for a body corporate.

(2) The duties of a person under subsection (1) apply only in relation to matters over which the person has management or control.

(3) An offence against subsection (1) is an indictable offence.

**Note**
However, the offence may be heard and determined summarily (see section 28 of the ***Criminal Procedure Act* 2009**).

13. Section 132 of the OH&S Act sets out time limits for the commencement of criminal proceedings. It provides:

**132 Limitation period for prosecutions**
Proceedings for an indictable offence against this Act may be brought—
(a) within 2 years after the offence is committed …; or

(b) at any time with the written authorisation of the Director of Public Prosecutions.

**Relevant provisions of the *Criminal Procedure Act* 2009**
14. Section 6(1)(a) of the CP Act provides that a criminal proceeding is commenced by filing at the Magistrates' Court a charge-sheet containing a charge. Under s6(3), a charge-sheet must comply with sch 1.

15. Schedule 1 to the CP Act sets out a number of requirements. Clause 1 provides that a charge-sheet must state the offence that the accused is alleged to have committed and must 'contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the nature of the charge.' Clause 2(1) states that particulars of the offence charged must be set out in ordinary language and that the use of technical terms is not necessary. Clause 3(2) provides that a statement of a statutory offence is sufficient if it identifies the provision creating the offence and 'describes the offence in the words of the provision creating it, or in similar words.'

16. Sections 8 and 9 of the CP Act deal with amendments to a charge-sheet and errors in a charge-sheet, respectively. They provide:

**8 Order for amendment of charge-sheet**
(1) The Magistrates' Court at any time may order that a charge-sheet be amended in any manner that the court thinks necessary, unless the required amendment cannot be made without injustice to the accused.

(2) If a charge-sheet is amended by order under this section, the charge-sheet is to be treated as having been filed in the amended form for the purposes of the hearing and all proceedings connected with the hearing.

(3) An amendment of a charge-sheet that has the effect of charging a new offence cannot be made after the expiry of the period, if any, within which a proceeding for the offence may be commenced.

(4) If a limitation period applies to the offence charged in the charge-sheet, the charge-sheet may be amended after the expiry of the limitation period if—
(a) the charge-sheet before the amendment sufficiently disclosed the nature of the offence; and
(b) the amendment does not amount to the commencement of a proceeding for a new offence; and
(c) the amendment will not cause injustice to the accused.

**Errors etc. in charge-sheet**
(1) A charge-sheet is not invalid by reason only of a failure to comply with Schedule 1.

(2) A charge on a charge-sheet is not invalid by reason only of—
(a) omitting to state the time at which the offence was committed unless time is an essential element of the offence; or

(b) incorrectly stating the time at which the offence was committed; or

(c) stating the offence to have been committed on an impossible day or on a day that never happened.

17. Part 4.3 of the CP Act, which comprises ss103 to 106, deals with compulsory examinations. The purpose of those examinations is to enable the prosecution to obtain evidence from witnesses who are not willing to make a statement. The evidence obtained at a compulsory examination is included in the brief of evidence which is served on the accused, and forms part of the subject matter of the committal hearing.

18. Section 103(2) of the CP Act provides that an application for an order for compulsory examination may only be made after a charge-sheet has been filed and before the committal hearing (if any) commences. Under s103(5), the application may be made with or without notice to the accused. Section 103(7) provides that an accused is not a party to the application and may not address the Court on the application.

19. Section 104(1) of the CP Act provides that the Magistrates' Court may make an order requiring a person to attend before the Court for the purpose of being examined by or on behalf of the informant, or producing a document or thing, or both. Section 105(1) requires that an order for examination be served on the person to whom the order relates and on the accused. Under s106(1), the person being examined may be represented by a lawyer at the compulsory examination. The accused may attend a compulsory examination hearing but cannot cross-examine a witness.[2]

**General principles relating to validity and amendment of charge-sheets**
20. The leading Victorian authority on the common law principles for determining the validity of a charge-sheet and whether a defective charge-sheet can be amended after the expiration of a limitation period is *Director of Public Prosecutions v Kypri*.[3] In *Kirk v Industrial Court of New South Wales*,[4] the High Court considered when a charge is invalid for omitting an essential element of an offence under ss15(1) or 16(1) of the *Occupational Health and Safety Act* 1983 (NSW).

21. It was common ground between the parties that ss8 and 9 of the CP Act do not preclude the application of the common law principles to a charge-sheet filed under the CP Act. In accordance with those principles, if a charge-sheet does not contain all the information required by law, the defect may not be capable of being cured by amendment after the expiration of the limitation period. It follows that, subject to the powers of the Director of Public Prosecutions ('DPP') under s132(b) of the OH&S Act, if the Baiada charge-sheet does not contain all the information required by law, the defect may not be capable of being cured by amendment because the two year limitation period in s132(a) has expired.

22. It is not necessary for me to analyse the common law principles or to apply them in the present case because it was common ground between the parties that the issues in this proceeding do not require a finding on the validity of the Baiada charge-sheet. Consistent with this approach, the parties did not make substantive submissions on the relevant authorities or on the validity of the Baiada charge-sheet.

23. In response to a question from me as to whether the Informant accepted that it was arguable that the Baiada charge-sheet was invalid, senior counsel for the Informant said the following:

> We concede ... that the argument in respect of the formulation of the charges is arguable given the decision in *Kirk* and the points of comparison between the New South Wales and Victorian legislation. However, we do not concede that it is arguable that any defect either invalidates the charge, or is not capable of being cured retrospectively.

**General principles relating to determining preliminary issues as to jurisdiction**

24. It is well established that, where the jurisdiction of a court is challenged in a proceeding, the court must make a determination on the jurisdictional issue before embarking on the merits of the proceeding. This principle was expressed as follows by Kirby J in *BHP Billiton Ltd v Schultz*:[5]

> If, as the appellant asserts, the Tribunal had no power under the DDT Act, properly understood, to exercise its jurisdiction and powers in respect of the first respondent's proceedings, the other issues in this appeal do not arise. In effect, there is then no valid proceeding before the Tribunal. Before entering upon the exercise of jurisdiction and power, every court or tribunal must satisfy itself as to the existence of such jurisdiction and power. At least, it must do so where there is a contest or an apparent problem.[6]

25. The principle was recently applied by the Court of Appeal in *McKenzie v Magistrates' Court of Victoria*.[7] In that case, during a committal proceeding, the accused served witness summonses on two journalists, Nicholas McKenzie and Richard Baker, to give evidence and to produce documents in support of a proposed application for the charges against the accused to be dismissed. The journalists applied to the magistrate hearing the committal for an order setting aside or adjourning the witness summonses. The magistrate made an order dismissing the journalists' application. The journalists then applied to this Court for an order quashing the magistrate's order. Sifris J dismissed the journalists' application. On appeal to the Court of Appeal, the journalists sought to rely upon a ground that was not raised previously, namely, that the Magistrates' Court did not have jurisdiction to accede to the accused's application to dismiss the charges and thus did not have power to compel the journalists to give evidence and produce documents in support of that application.

26. Harper JA, with whom Tate and Coghlan JJA agreed, held that the journalists should be permitted to raise the new jurisdictional issue for the following reasons:

> In my opinion the applicants should be permitted to rely upon the contentions which they now seek to advance. The reason is simple. No court may exceed its jurisdiction or power. The magistrate has proceeded on the basis that, if he is of the opinion that it is in the interests of justice to do so, he may lawfully dismiss the charges faced by the accused. But if the applicants are correct, the magistrate has adopted an impermissibly broad view of his power. The Supreme Court has the responsibility to ensure not only that it acts strictly within power itself, but also that inferior courts are likewise constrained. It follows that, no matter that the point was not taken below, this Court cannot allow an appeal if the result might be that a magistrate hearing a committal proceeding dismisses charges he has no power to dismiss.[8]

27. The Court of Appeal made an order setting aside the witness summonses.

**General principles relating to review of a decision refusing an adjournment**

28. A decision whether to grant or refuse an adjournment of a hearing, whether interlocutory or final, involves the exercise of a discretion.[9] In exercising the discretion the court must weigh up the factors for and against the granting of an adjournment and decide whether the interests of justice warrant the grant.

29. In the context of a criminal proceeding, factors that might favour the granting of an application for an adjournment include:

> (a) the reasons for the adjournment;
>
> (b) the timeliness of the application and the length of the adjournment sought;
>
> (c) where the reason for the application is a legal issue which is scheduled for adjudication in the future, the prospects of that issue being resolved in a manner favourable to the applicant;
>
> (d) whether the applicant would suffer prejudice if an adjournment were refused and whether that prejudice could be mitigated by the court making a particular order;
>
> (e) whether refusal of an adjournment would be contrary to the rules of natural justice or undermine a fair trial; and
>
> (f) the interests of justice.

30. In the same context, factors that might count against the granting of an application for

an adjournment include:

> (a) whether parties other than the applicant would suffer prejudice if an adjournment were granted and whether that prejudice could be mitigated by the court making a particular order;
>
> (b) whether an adjournment would undermine or frustrate the objects of any applicable legislation;
>
> (c) whether the circumstances giving rise to the need for an adjournment were self-induced or involved any misconduct by the applicant;
>
> (d) the desirability of resolving criminal proceedings expeditiously and avoiding any fragmentation;
>
> (e) the need for finality in litigation; and
>
> (f) the interests of justice.

31. Ordinarily, a decision refusing an adjournment is interlocutory in nature because it does not finally determine any issue between the parties.[10] Such a decision is usually not amenable to judicial review and no appeal is available as of right in relation to it.

32. Where an appeal is permitted from a decision refusing an adjournment, the principles in *House v The King*[11] are engaged.[12] In accordance with those principles, it is not enough that the appellate court would have made a different decision from that of the primary judge. The appellant must demonstrate that some error has been made in the exercise of the discretion. An error may be established if the primary judge: acts upon a wrong principle; allows extraneous or irrelevant matters to guide or affect him or her; mistakes the facts; or does not take into account some material consideration.[13]

33. Appellate courts are very reluctant to interfere with a decision refusing to adjourn a hearing.[14] They will usually not do so unless there has been a denial of justice or the discretion has been exercised upon a wrong principle. In *Sali v SPC Ltd*,[15] Brennan, Deane and McHugh JJ stated that:

> In *Maxwell v Keun*, the English Court of Appeal held that, although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions.[16]

34. Where judicial review of a decision refusing an adjournment is permitted, the applicant must demonstrate that the decision is vitiated by a jurisdictional error or an error of law on the face of the record.

**Application of principles to the present case**

35. In the present case, the Informant submitted that the impugned order was not a reviewable decision. The submission was twofold. First, as committal proceedings are administrative in nature and decisions committing a person for trial are not susceptible to relief in the nature of *certiorari*, any ruling in the course of a committal proceeding has the same status.[17] Secondly, the impugned order was not a decision that had a discernible or apparent legal effect on the plaintiffs' rights.[18]

36. However, in *McKenzie*,[19] which involved applications for orders in the nature of *certiorari* by recipients of witness summonses served in the course of a committal hearing, the Court of Appeal had no hesitation in setting aside the witness summonses. In the light of *McKenzie*, I cannot accept the Informant's objection to this Court's jurisdiction.

**Magistrate's ruling**

37. At the hearing of the plaintiffs' application to Magistrate Hawkins on 7 February 2013 for an adjournment of the orders for examination, the plaintiffs submitted: that they have a fundamental right to refuse to provide any information to the Informant in the absence of a valid order for examination under the CP Act; that their fundamental right would be rendered nugatory if they gave evidence pursuant to the orders for examination prior to the determination of Baiada's strike-out application; and that refusal of an adjournment would pre-empt the jurisdictional issue before it is determined in the strike-out application.

38. The Informant submitted: that the Baiada charge-sheet was valid on its face; that the plaintiffs were not at risk of prosecution in relation to the death of Mr Sarel; that if the plaintiffs were concerned about self-incrimination, they could be granted certificates under s128 of the *Evidence Act* 2008; that the plaintiffs would not be prejudiced by giving evidence pursuant to the orders for examination prior to the determination of the strike-out application; that the OH&S Act recognised that it was in the public interest that prosecutions under that Act take place expeditiously; and that this public interest would be prejudiced by an adjournment of the orders for examination because the plaintiffs' memories of the events surrounding Mr Sarel's death would become less reliable with the passage of time.

39. The parties did not make substantive submissions to Magistrate Hawkins about the validity of the Baiada charge-sheet. The plaintiffs' written submissions dealt with the issue briefly in order to assist the Magistrate to understand Baiada's challenge to the Court's jurisdiction. The plaintiffs offered to give to her Honour Baiada's lengthy written submissions[20] but she declined to read them, stating that 'there is a serious issue there.'

40. The Magistrate made the impugned order on 7 February 2013 at the conclusion of the parties' submissions, following an adjournment of about 40 minutes. After summarising the parties' submissions, her Honour gave the following oral reasons for the impugned order:

> On the face of it, the court has jurisdiction to deal with these proceedings and has been so dealing. A charge-sheet has been filed in time. Preliminary procedures under the [CP Act] have commenced. The compulsory examination procedure under s103 of the [CP Act] is part of that preliminary process and the investigation part of this prosecution. *Prima facie* there is power to amend any defect in the charges or to lay a fresh process. The primary objects of the [OH&S Act] include the timely prosecution of offences under the [OH&S Act]. The obtaining of statements from witnesses as close as possible to the original incident form part of the way in which that primary object of the [OH&S Act] can be facilitated.
>
> Apart from an objection to the giving of evidence, I see no actual prejudice to the witnesses should they be required to give their evidence today. [Baiada] ought to know the full case against it as early as possible.
>
> I am satisfied that it is in the interests of justice to refuse this application today for an adjournment ... .

**Grounds of review**

41. The plaintiffs rely on the following grounds of review:

> The Learned Magistrate erred in failing to adjourn the hearing pending determination of the Court's jurisdiction to conduct it.
> PARTICULARS
> The First Defendant did not have jurisdiction to conduct the compulsory examination proceedings in circumstances where there was no valid charge-sheet before the Court.
> The Learned Magistrate erred in, having determined that there was a serious issue to be tried as to the Court's jurisdiction, proceeding to find that there was 'jurisdiction on the face of it'.
>
> PARTICULARS
> The question of the validity of the charges had been listed by order of the Court for determination by the First Defendant on 27 and 28 May 2013.
> The Learned Magistrate erred in finding that there was 'jurisdiction on the face of it' without warning the parties that she proposed to make findings on the issue of the court's jurisdiction.
> The Learned Magistrate erred in the exercise of her discretion in that no Magistrate acting reasonably could have decided to refuse the Plaintiffs' adjournment application.
> The balance of convenience favours the grant of the orders.

**Ground 1: The Magistrate was obliged to grant an adjournment**
**Parties' submissions on Ground 1**

42. In substance, the plaintiffs submitted that, in the circumstances confronting Magistrate Hawkins on 7 February 2013, the only decision that was open to her was to adjourn the orders for examination until after the determination of Baiada's strike-out application. According to the plaintiffs, a compulsory examination can only take place if a valid charge-sheet subsists and, in the present case, the validity of the Baiada charge-sheet was under challenge on grounds which, at the very least, were arguable.

43. The plaintiffs contended that, if the challenge to the validity of the Baiada charge-sheet is upheld, it would mean that the Magistrates' Court would not have had jurisdiction to conduct the compulsory examinations. In those circumstances, so it was said, a failure to grant an adjournment of the orders for examination would involve the plaintiffs being compelled to undergo a process that was beyond the jurisdiction of the Magistrates' Court. According to the plaintiffs, if they are forced to give evidence prior to the determination of the validity of the Baiada charge-sheet, their fundamental right to resist an unlawful process would be rendered nugatory.

44. The plaintiffs submitted that, in these circumstances, the impugned order violated the principle set out at [24] above that, where a court's jurisdiction in a proceeding is challenged, the court should not continue to conduct the proceeding until it first resolves the jurisdictional issue. The plaintiffs contended that, although the form of this proceeding is a challenge to a refusal to grant an adjournment, in substance, the proceeding involves a challenge to the jurisdiction of the Magistrates' Court akin to the challenge in *McKenzie*.[21]

45. The plaintiffs argued that, although they had concerns about incriminating themselves in a compulsory examination, their fundamental right to resist an unlawful process was sufficient to justify an adjournment without the need for them to identify any specific prejudice arising from a refusal to grant an adjournment.

46. The plaintiffs highlighted that they are not seeking to set aside the orders for examination or a lengthy adjournment. Rather, they are seeking a short adjournment to enable Baiada's strike-out application to be determined. The plaintiffs pointed out that the delays in the hearing of the strike-out application had been caused by the Informant rather than by them.

47. According to the plaintiffs, the Informant will not be prejudiced by the adjournment sought by them. They contended that the prejudice to them from having to give evidence in circumstances where the Magistrates' Court may be found to lack jurisdiction to compel them to do so, would greatly exceed any possible prejudice to the Informant.

48. The Informant submitted that the impugned order was made in the exercise of a discretionary power and that the plaintiffs have not demonstrated that the discretion had miscarried. As the Magistrate had properly taken into account all the considerations that were relevant to the exercise of the discretion whether to grant an adjournment, so it was said, there was no basis to set aside the impugned order.

49. According to the Informant, the considerations that the Magistrate had properly taken into account included:

(a) an assessment of the prospects of Baiada's strike-out application succeeding;

(b) the lack of any prejudice to the plaintiffs from a refusal to grant an adjournment; and

(c) the objective of the OH&S Act that prosecutions under that Act be undertaken expeditiously.

50. The Informant submitted that the Magistrate's statement that '[o]n the face of it the [Magistrates' Court] has jurisdiction' and that '[p]rima facie there is power to amend any defect in the Baiada charge-sheet or to lay a fresh process', indicated that her Honour considered that the strike-out application was unlikely to succeed. According to the Informant, this assessment of the prospects of the strike-out application succeeding was open to the Magistrate. The Informant contended that s132 of the OH&S Act was not a true limitation period because, even if it were established that the Baiada charge-sheet was defective and could not be amended, the DPP could authorise the Informant to file fresh charges for the same offences.

51. The Informant submitted that the Magistrate was correct to conclude that a refusal to grant an adjournment would not cause any prejudice to the plaintiffs, as they were mere witnesses who were being asked to assist in the investigation of the facts surrounding the death of Mr Sarel. According to the Informant, the evidence of the plaintiffs was important to that investigation and would be included in the brief which would be provided to Baiada so that Baiada would be aware of the details of the case being brought against it. Senior counsel for the Informant repeated a statement he had made before the Magistrate, namely, that the plaintiffs were not at

risk of prosecution in relation to the death of Mr Sarel and that, if they had concerns about self-incrimination, certificates could be granted to them under s128 of the *Evidence Act* 2008.

52. The Informant contended that the Magistrate was correct to take into account the public interest in prosecutions under the OH&S Act being brought expeditiously and the need to avoid such prosecutions being delayed, frustrated or fragmented, particularly by well resourced litigants who seek to manipulate administrative law processes. The Informant relied on observations to this effect in the Court of Appeal's decision in *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd*.[22] In that case, the Court confirmed that, pursuant to s132(b) of the OH&S Act, the DPP has the power to authorise the commencement of criminal proceedings for indictable offences under that Act notwithstanding that those offences were included in a charge-sheet that was found to be invalid.[23]

53. It is evident from the above that the Informant did not challenge the correctness of the underlying tenet of the plaintiffs' submissions that the requirement in s103(2) of the CP Act — that an application for an order for examination may only be made after a charge-sheet has been filed — can only be satisfied if the charge-sheet is valid. As the Informant did not argue that s103(2) merely imposed a timing requirement that did not depend on the validity of a charge-sheet, I will not consider whether such an interpretation of s103(2) is open.

**Decision on Ground 1**

54. The validity of the impugned order must be determined on the basis of the nature and scope of the application that was before Magistrate Hawkins on 7 February 2013, the issues that required resolution by her Honour, and the evidence and submissions that were presented in relation to those issues.

55. The form, as well as the substance, of the plaintiffs' application on 7 February 2013 was an application for an adjournment of the orders for examination until after the determination of Baiada's strike-out application, which was then scheduled for 27 and 28 May 2013. The application was not made on the basis that the Baiada charge-sheet was invalid but rather that the orders for examination should be adjourned until after Baiada's strike-out application was determined. The plaintiffs elected to define the scope of their application in this manner and must accept the consequences that flow from that.

56. As the validity of the Baiada charge-sheet was not an issue for determination by Magistrate Hawkins on 7 February 2013, I reject the plaintiffs' submission that the substance of their application to her Honour was about the jurisdiction of the Magistrates' Court to conduct the compulsory examinations. That is because that jurisdiction depended on an issue that was not before her Honour, namely, the validity of the Baiada charge-sheet.

57. I also reject the plaintiffs' submission that, in the circumstances that prevailed at the hearing of their application on 7 February 2013, the only order that the Magistrate could properly make was an order granting the adjournment sought by them. In substance and in form, the plaintiffs' application sought a discretionary order, namely an adjournment of the orders for examination. By definition, the seeking of a discretionary order does not involve an automatic entitlement to the order, but the exercise of a discretion which involves the balancing of factors for and against the granting of the order.

58. Once it is accepted that the form and substance of the application before the Magistrate on 7 February 2013 was an application for an adjournment, the principles set out at [28] to [34] above are engaged.

59. The Magistrate was obliged to consider all the factors upon which the plaintiffs relied in support of their application and all the factors upon which the Informant relied in opposing that application. The plaintiffs have not alleged that the Magistrate took into account any irrelevant considerations or that she failed to take into account relevant considerations. The transcript indicates that her Honour engaged with the parties during argument on the various issues that they raised and that, at the conclusion of final addresses, she adjourned the hearing briefly to consider the issues. Although her Honour's ruling is brief, it does not indicate that she failed to properly consider the issues raised by the parties.

60. I agree with the Informant that it was appropriate for the Magistrate to take into account: her assessment of the likelihood of Baiada's strike-out application succeeding; whether there was any prejudice to the plaintiffs from a refusal to grant an adjournment; and whether there was any prejudice to the Informant from the granting of an adjournment. In my opinion, the conclusions that the Magistrate reached on these issues were open to her. The plaintiffs have not satisfied me that her Honour made any vitiating error in relation to them.

61. Inherent in the plaintiffs' submissions is the proposition that the mere existence of an arguable challenge to the validity of the Baiada charge-sheet automatically meant that the Magistrates' Court could not take any step that depended on the validity of the Baiada charge-sheet. If this proposition is correct, then it would necessarily follow that Magistrate Hawkins had no discretion to refuse the adjournment sought by the plaintiffs.

62. In my opinion, the above proposition is not correct. An application to the Magistrates' Court for an adjournment of a hearing engages that Court's discretionary power to grant or refuse the application. Where an application for an adjournment relies on an argument that the substantive proceeding falls outside the jurisdiction of the Court and that the jurisdictional issue is scheduled to be heard at a future time, one of the factors that the magistrate hearing the application must consider is the prospects of success of the jurisdictional challenge. Although the magistrate would not be in a position to form a concluded view about the prospects — and indeed could not properly do so because that issue is to be specifically determined in the future — the magistrate would need to form a 'rough and ready' assessment of this matter.[24]

63. There is nothing new in the above analysis. Courts are regularly required to form 'rough and ready' assessments of the prospects of success of an application or a proceeding to be heard in the future. Examples include an application for leave to commence a proceeding out of time, an application for a stay of a judgment pending the hearing of an appeal, and an application for leave to appeal.

64. An application for a stay of a judgment pending the hearing of an appeal is usually made on the basis that the appeal has good prospects of success and that a failure to grant a stay would render the appeal nugatory. However, it has never been suggested that the mere fact that an arguable appeal is on foot automatically means that a stay must be granted. The correct position is that an application for a stay pending the hearing of an appeal involves the exercise of a discretion based on a consideration of factors for and against the granting of a stay, including the prospects of success of the appeal.

65. It follows that Magistrate Hawkins was obliged to turn her mind to the prospects of success of Baiada's strike-out application without forming a concluded view on the matter. This is precisely what her Honour did. Her statements that '[o]n the face of it, the [Magistrates' Court] has jurisdiction' and that '[p]rima facie there is power to amend any defect in the charges or to lay a fresh process', mean that she did not rate very highly the prospects of Baiada's strike-out application succeeding.

66. The plaintiffs have not sought to impugn the Magistrate's finding that, apart from their objection to giving evidence, the plaintiffs would not suffer any actual prejudice by being required to give evidence. Nor have the plaintiffs sought to impugn her Honour's finding that the giving of evidence by the plaintiffs would facilitate the object of the OH&S Act that prosecutions under that Act take place on a timely basis.

67. It follows from the above that Ground 1 must be rejected.

**Ground 2: Error in finding that the Court had jurisdiction 'on the face of it'**

68. Under cover of Ground 2, the plaintiffs submitted that, as Magistrate Hawkins had acknowledged during argument that Baiada's strike-out application raised a serious issue about the Court's jurisdiction, her refusal to grant an adjournment on the basis that the Court had jurisdiction 'on the face of it' was erroneous.

69. I reject the plaintiffs' submissions. Those submissions amount to the proposition that, whenever an application is made which raises a serious issue about the jurisdiction of the Magistrates' Court in a proceeding and that application is scheduled to be heard in the future,

the Court is automatically precluded from taking any further steps in the proceeding until the jurisdictional issue is resolved. For the reasons set out above in relation to Ground 1, that proposition is fallacious.

**Ground 3: Breach of the hearing rule of natural justice**

70. Under cover of Ground 3, the plaintiffs submitted that Magistrate Hawkins made a finding that the Magistrates' Court had jurisdiction 'on the face of it' in relation to the Baiada charge-sheet without giving them prior notice that she proposed to make such a finding. The plaintiffs contended that, as the strike-out application which raised the validity of the Baiada charge-sheet — and hence the Court's jurisdiction — was set down for hearing on 27 and 28 May 2013, they conducted the adjournment application before Magistrate Hawkins on the basis that her Honour would not make any ruling on the validity of the charge-sheet or the Court's jurisdiction in relation to it.

71. The Informant submitted that a consideration by Magistrate Hawkins of the prospects of success of Baiada's strike-out application was a necessary incident of the plaintiffs' adjournment application. In any event, so it was said, as senior counsel for the Informant had specifically submitted to her Honour that the Baiada charge-sheet was *prima facie* valid, the plaintiffs were on notice about this issue and had an opportunity to address it.

72. For the reasons discussed at [61] to [65] above, an inevitable consequence of the plaintiffs' application for an adjournment on the basis of Baiada's pending strike-out application was that Magistrate Hawkins would need to consider the prospects of success of the strike-out application in the exercise of her discretion whether to grant the adjournment. The plaintiffs were represented by senior and junior counsel before the Magistrate and they were well placed to advise the plaintiffs of the legal issues arising from their application.

73. In any event, I agree with the Informant that the plaintiffs were expressly put on notice about this issue because senior counsel for the Informant made the following submission during the hearing of the application for an adjournment:

> If *prima facie* a valid charge sheet has been filed the jurisdiction of the court is engaged. ... [R]outinely there are submissions made about the way charges are framed ... and it cannot be that ... the right of the parties to be involved in preliminary processes depends on that.

74. I am not satisfied that the hearing before Magistrate Hawkins was vitiated by a breach of the hearing rule of natural justice. Accordingly, Ground 3 must be rejected.

**Ground 4: *Wednesbury* unreasonableness**

75. The plaintiffs submitted that, given that the jurisdictional issue was fixed for hearing on 27 and 28 May 2013, it was unreasonable for Magistrate Hawkins to refuse an adjournment on the basis that there was apparent jurisdiction. For the reasons discussed under Ground 1, I am not satisfied that the impugned order was unreasonable in the *Wednesbury*[25] sense. Accordingly, Ground 4 is not made out.

**Ground 5: Balance of convenience**

76. Ground 5, which refers to the balance of convenience, is not an independent ground of judicial review. As I have rejected the other grounds of review, Ground 5 cannot stand. Having properly considered the competing considerations, it was for Magistrate Hawkins to assess whether the factors favouring the granting of an adjournment were outweighed by the factors against the granting of an adjournment.

**Discretion to refuse relief**

77. As I have concluded that Magistrate Hawkins did not make any error of law that vitiated the impugned order, it is not necessary for me to consider whether there are any discretionary considerations which, if the plaintiffs had established vitiating error, would have warranted refusal of prerogative relief.

**Proposed order**

78. For the above reasons, the application for review will be dismissed. I will hear from the parties on the precise form of the orders to be made by this Court and on the question of costs.

[1] [1980] HCA 13; (1980) 144 CLR 13, 35–6; 29 ALR 289; (1980) 54 ALJR 314.
[2] CP Act ss106(3)–(4).
[3] (2011) 33 VR 157. The principles were summarised in *Contract Control Services Pty Ltd v Brown* [2012] VSC 369 (29 August 2012) [20]–[36], [65].
[4] [2010] HCA 1; (2010) 239 CLR 531, 557–9 [26]–[30]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[5] [2004] HCA 61; (2004) 221 CLR 400; (2004) 211 ALR 523; 79 ALJR 348; [2004] Aust Torts Reports 81-776; 2 DDCR 78 ('*BHP*').
[6] *BHP* [2004] HCA 61; (2004) 221 CLR 400, 454–5 [131]; (2004) 211 ALR 523; 79 ALJR 348; [2004] Aust Torts Reports 81-776; 2 DDCR 78 (citations omitted). See also *Federated Engine-Drivers and Firemen's Association of Australasia v The Broken Hill Proprietary Company Ltd* [1911] HCA 31; (1911) 12 CLR 398, 415; 17 ALR 285, where Griffith CJ said that 'the first duty of every judicial officer is to satisfy himself that he has jurisdiction'. See also *Re Boulton; Ex parte Construction, Forestry, Mining and Engineering Union* (1998) 73 ALJR 129, 133 [21]; (1998) 85 IR 468.
[7] [2013] VSCA 81 (18 April 2013) ('*McKenzie*').
[8] *McKenzie* [2013] VSCA 81 (18 April 2013) [36].
[9] *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390, 395; (1981) 37 ALR 55; (1981) 55 ALJR 701; *Brimbank Automotive Pty Ltd v Murphy* [2009] VSC 26 (10 February 2009) [11].
[10] *Smith v Gannawarra Shire Council* [2002] VSCA 69; (2002) 4 VR 344, 346–7 [11] ('*Smith*').
[11] [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.
[12] *SM v The Queen* [2011] VSCA 332 (2 November 2011) [21].
[13] *House v The King* [1936] HCA 40; (1936) 55 CLR 499, 505; 9 ABC 117; (1936) 10 ALJR 202.
[14] *Smith* [2002] VSCA 69; (2002) 4 VR 344, 346–7 [11], 352 [33]; *SM v The Queen* [2011] VSCA 332 (2 November 2011) [21].
[15] [1993] HCA 47; (1993) 116 ALR 625; (1993) 67 ALJR 841 ('*Sali*').
[16] *Sali* [1993] HCA 47; (1993) 116 ALR 625, 628; (1993) 67 ALJR 841 (citations omitted).
[17] *Potter v Tural* [2000] VSCA 227; (2000) 2 VR 612, 614 [3], 617–21 [20]–[25]; (2000) 121 A Crim R 318; *Murdaca v Magistrates' Court of Victoria* [2008] VSC 578 (18 December 2008) [12].
[18] *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149, 159; (1996) 134 ALR 469; [1996] 3 Leg Rep 2.
[19] [2013] VSCA 81 (18 April 2013).
[20] See [3] above.
[21] [2013] VSCA 81 (18 April 2013).
[22] [2012] VSCA 300 (14 December 2012) [137]–[140] ('*Patrick Stevedores*').
[23] *Patrick Stevedores* [2012] VSCA 300 (14 December 2012) [9], [18].
[24] *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516, 522 [9]; (1998) 153 ALR 276; (1998) 72 ALJR 819; [1998] Aust Torts Reports 81-469; (1998) 8 Leg Rep 33.
[25] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.

**APPEARANCES:** For the plaintiffs Marwah and Singh: Dr D Neal SC with Mr R O'Neill, counsel. K & L Gates, solicitors. For the first defendant Magistrates' Court of Victoria: No appearance. For the second defendant Inspector Mark Glenister (VWA): Mr M Tovey QC with Mr T Wraight, counsel. WorkSafe.

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