19/03; [2003] VSC 25

SUPREME COURT OF VICTORIA

AHMED v RUSSELL KENNEDY

Balmford J

5, 19 February 2003

CIVIL PROCEEDINGS – COSTS – RETAINER TERMINATED BY SOLICITORS – REFUSAL BY SOLICITORS TO RELEASE DOCUMENTS HELD ON BEHALF OF CLIENT – COSTS INCURRED BY CLIENT IN OBTAINING RELEASE OF DOCUMENTS – REQUEST BY CLIENT FOR BILL OF COSTS – DELAY OF FOUR MONTHS IN PROVIDING BILL OF COSTS – NO SATISFACTORY REASON GIVEN FOR NOT COMPLYING WITH REQUEST – ORDER BY MAGISTRATE THAT CLIENT RECEIVE REASONABLE COSTS ON THE APPROPRIATE SCALE – SOLICITORS' CONDUCT CONSIDERED BY MAGISTRATE – NOTWITHSTANDING THE REFUSAL TO SURRENDER THE CLIENT'S DOCUMENTS, ORDER BY MAGISTRATE THAT SOLICITORS' COSTS SHOULD BE AWARDED SUBJECT TO A REDUCTION FOR TIME SPENT IN SUCCESSFULLY DEFENDING PART OF THE CLIENT'S COUNTERCLAIM – REASONS FOR DECISION – WHETHER SUFFICIENT.

RK, a firm of solicitors, sued A. for work done in an action involving A. in the County Court. When RK provided a bill of costs to A., they notified him that they were not prepared to act for him any further. A. sought release to him of his documents held by RK and engaged another firm of solicitors to assist in the obtaining of the documents. Subsequently, RK filed a complaint seeking payment of their costs and A. filed a counterclaim. When the matter came on for hearing, a magistrate made a decision in favour of RK. On appeal, a judge of the Supreme Court set aside this decision and ordered that the claim be remitted for consideration whether RK terminated their retainer with good cause and on reasonable notice, that an order be made on the counterclaim for the costs incurred by A. in obtaining the release of the documents and for the question of costs to be re-determined. On the remitted hearing, a magistrate made an order for costs on the appropriate scale in favour of the client and whilst not condoning the conduct of RK, made an order for costs on the claim subject to a reduction for an amount reasonably attributable to its successful defence of the counterclaim. Upon appeal—

HELD: Appeal dismissed.

1. In dealing with the duty of judicial officers to give reasons for their decision, the question in the present case was how far the magistrate needed to go in justifying his opinion and whether the simple expression of that opinion, without detailed justification, constituted sufficient reasons. Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judicial officer will have had good reason for the award made. In the great majority of cases in all probability the costs will follow the event, and where the reasons for the judicial officer's order are plain, there is no need for the officer to give reasons for making the order. However, if a judicial officer does depart from the ordinary order (that is in this case the costs following the event) it is incumbent on him/her to give reasons, albeit short reasons, for taking that unusual course.

***English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 3 All ER 385; [2002] 1 WLR 2409; [2002] All ER (D) 302; [2003] IRLR 710; [2002] UKHRR 957; [2002] CPLR 520; 164 JP 240, applied.**

2. In the present case, the magistrate gave clear reasons for his order in which he did no more than exercise his discretion, in the circumstances of the case before him, to apply the ordinary principle that costs follow the event. Considering those reasons in the light of the authorities there is no insufficiency in the reasons given.

3. In relation to the conduct of RK in refusing to surrender A.'s file, the magistrate had a discretion as to the amount of costs to be awarded to the solicitors having regard to the degree of heinousness of that conduct in the whole context of the litigation. There was no ground on which it could be said that the magistrate, in exercising his discretion as to costs, did not give sufficient weight to the conduct of RK.

***Ritter v Godfrey* [1920] 2 KB 47; [1918-19] All ER 714, considered;**

***Bendigo Bank v Russo*, unrep, VSC, Hedigan J, 27 October 1997; and**

***Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109, applied.**

BALMFORD J:

Introduction

1. This is an appeal under section 109 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") against that part of an order made on 13 August 2002 by the Magistrates' Court at Melbourne constituted by Mr Smith, Magistrate, whereby it was ordered, in effect, that the defendant in that Court, who is the appellant in the present proceeding ("Mr Ahmed"), pay to the plaintiff in that Court, who is the respondent to the present proceeding ("Russell Kennedy"), an amount of $22,812 for costs.

2. On 3 October 2002 Master Wheeler ordered that the questions of law shown by the appellant to be raised on the appeal were:

> (a) did the learned Magistrate err in failing to give any or any sufficient reasons for in [sic] determining that the Appellant pay the costs of the Respondent in respect of its claim?
>
> (b) in awarding the Respondent costs on its claim did His Worship err in the exercise of his discretion in failing to give any or any sufficient weight to the finding of His Worship Magistrate McLean as to the conduct of the Respondent? (See pages 12 and 13 of Magistrate McLean's reasons for decision made 18 August 1997.)

3. The history of this matter is extensive and I set out only those parts of that history which are relevant as background or otherwise to the issues before me. In June 1992 Mr Ahmed engaged a firm of solicitors, Abbott Tout Russell Kennedy, a predecessor of Russell Kennedy, to act for him in defence of a County Court proceeding. On 25 March 1994 Abbott Tout Russell Kennedy provided a bill of costs in taxable form to Mr Ahmed and on the same day notified him that they were not prepared to act for him any further. In September 1994 Russell Kennedy filed a complaint in the Magistrates' Court seeking payment of their costs from Mr Ahmed, the amount claimed ultimately being $14,191.30. It is not in issue that Russell Kennedy and Abbott Tout Russell Kennedy were for present purposes the same firm. In October Mr Ahmed filed a counterclaim, including in the particulars the statement that when they withdrew from acting for him Russell Kennedy had refused to release his file to his new solicitors.

4. The claim and counterclaim were heard by Mr McLean, Magistrate between September 1997 and June 1998. An appeal to the Supreme Court against his decision was heard by Ashley J. On 11 October 2000 His Honour ordered *inter alia*:

> • that the orders of Mr McLean be set aside;
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> • that the claim be remitted for determination of the question whether Russell Kennedy terminated their retainer to act for Mr Ahmed with good cause and on reasonable notice;
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> • that the counterclaim be remitted so that an order might be made in favour of Mr Ahmed in the sum of $114.20[1] ; and
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> • that the costs of the proceeding generally, including the costs of the hearing before the Magistrates' Court, be re-determined by the Magistrate to whom the claim and counterclaim were remitted in the exercise of his or her discretion.

5. The remitted hearing took place before Mr Smith on 13 June 2002, and this appeal is brought only against that part of His Worship's order referred to in [1] above, to the effect that Mr Ahmed should pay the costs of Russell Kennedy in respect of the claim. His Worship confirmed the orders of Mr McLean on the claim, expressly finding that Russell Kennedy terminated the retainer agreement with Mr Ahmed with good cause and on reasonable notice. He made the order of $114.20 on the counterclaim.

6. It is convenient to set out here certain materials relevant to the questions to be determined on this appeal. As to question (a), in determining that Mr Ahmed should pay the costs of Russell Kennedy in respect of the claim, Mr Smith said:

> Before determining these issues of costs I would make the observation that as a result of the decision of Ashley, J and my subsequent findings the plaintiff [Russell Kennedy] has ultimately been successful on its claim and the defendant [Mr Ahmed] has ultimately been successful as plaintiff on

his counterclaim. Considerations which were raised in submissions as to whether in these proceedings costs ought or ought not to simply follow the event, therefore apply to both parties as plaintiffs.

The counterclaim as well as alleging a retainer agreement different to that found by the court alleged a number of misrepresentations and breached warranties, it further stipulates seven particulars of negligence against the plaintiff.

On only one of these particulars, as I read the findings of McLean, M., and Ashley, J. was the defendant ultimately successful. The particular on which he did succeed was that the plaintiff had wrongly refused to release the defendant's file to his new solicitors upon a unilateral determination of the retainer agreement.

It was put in submissions by the plaintiff that given that the defendant had failed in his counterclaim on all matters save for that last and given that the award of damages was but $114.20 on a counterclaim of $20,000, the Court in its discretion ought not to award costs on the counterclaim.

At the hearing of this matter I indicated and I will indicate again that while the amount of court time devoted to this one particular of negligence was minor, to say the least, in the context of the conduct of the proceeding as a whole, the nature of the allegation upon which the defendant was successful by counterclaim was sufficient to persuade me that he ought to be awarded reasonable costs on the appropriate scale. . . .

[After dealing with that issue]

The remaining issues in respect of costs concern the plaintiff's entitlement to costs on the claim, having regard to matters raised by the defendant and the question of the proper reduction of the costs order in favour of the plaintiff made by Magistrate McLean to take account of the fact that some part of that costs order must necessarily have related to the plaintiff's successful defence of the counterclaim before him. I could find no indication that these costs had been separately itemised and considered by McLean, M.

As far as the first issue is concerned, it was put by the defendant, that the conduct of the plaintiff in respect of certain matters integral to its proceeding against the defendant was such as to require that the plaintiff, albeit successful, ought not to be awarded its costs.

The conduct concerned was is [sic] the conscious and deliberate action of the plaintiff in refusing to surrender the defendant's file and papers to his new solicitor. I have considered the submissions of counsel on this issue and have also considered the examples and principles provided by the relevant case law. While I do not wish to be seen to be condoning the conduct of the plaintiff in this particular regard, I am of the opinion that such conduct was not such, in all the circumstances, as to disentitle the plaintiff to its costs or to disturb the ordinary rule that costs should follow the event.

The plaintiff will therefore recover its costs on the claim subject to any reduction to take account of an amount reasonably attributable to its successful defence of the counterclaim before Magistrate McLean.

7. The passage from pages 12 and 13 of Mr McLean's reasons for decision which is referred to in question (b) reads as follows:

The plaintiff ceased to act for the defendant and refused to release its file

It was clearly established after the plaintiff ceased to act for the defendant it retained the file of papers accumulated by it while it acted for the defendant. It did this by way of exercise of a lien in respect of the costs it alleged were owed by the defendant. The defendant argued retention of or refusal to release the papers in the circumstances of this case was in breach of the retainer agreement and/or in breach of the duty of care the plaintiff owed to the defendant. There appear to be two arguments open to the defendant; they are that :-

• As the plaintiff discontinued the retainer it had no lien over the file that enabled it to assert a right to retain the file [See: *Re Faithfull: Re London, Brighton & South Coast Railway Co.* (1868) LR 6 Eq. 325; *Robins v Goldingham* (1872) LR 13 Eq. 440; *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* (1980) 1 All ER 1049; [1980] 1 WLR 614]; and

• The plaintiff was in breach of clause 5(1)(a) of the *Solicitors' (Professional Conduct and Practice) Rules* 1984 which requires delivery of all documents held by a solicitor on behalf of a client (including documents otherwise subject to a lien) within one month of a request in writing by the client "unless the solicitor has a sufficient and satisfactory reason for not complying with the request of the . . . client".

As to the first of these arguments there was in evidence a letter from the plaintiff to the defendant

> of 26 April 1994 (Ex G) which said in part (after canvassing the terms of the defendant's retainer) :-
> We are not prepared to act for you any further and unless you obtain another solicitor to take over the conduct of the file, we will make application to the Court to be removed from the Court record.
> While I heard evidence from Harcourt and Main [of Russell Kennedy] as to the background to this letter, I can see no basis on which I could come to any conclusion other than that the retainer was terminated by the plaintiff.
> In so far as the second argument is concerned the evidence established a request in writing for a bill of costs in taxable form was made by the defendant on or about 24 November 1993 (Ex J) and that the bill was not received until after 25 March 1994 (Ex N). No explanation for the delay was proffered by the plaintiff other than that it was a large bill in respect of a complex matter. In the circumstances I am unable to conclude the plaintiff has shown a "sufficient and satisfactory reason for not complying with the . . . request . . . of the client". The plaintiff also argued the period between 24 December 1993 and 25 March 1994 was a period that was "reasonable" in the circumstances (clause [Rule] 5(1)(a)) so as to prevent the rule coming into operation. However no evidence was called to explain the delay and I am therefore not able to accept this proposition.
> These conclusions cause me to find the plaintiff was not entitled to retain the papers of the defendant when a request for their delivery was made by Koltay and Myers [the defendant's then solicitors] on 6 June 1994. While the refusal to release the papers appears to have been deliberately and consciously made by the plaintiff I am compelled to find it was made with knowledge of the obligation to release the papers as a result of the fact the defendant's retainer was discontinued by the plaintiff and/or because of the plaintiff's failure to comply with the rule to which I have referred. Therefore I am satisfied, given the plaintiff was aware of or should have been aware of the common law or equitable rules as to lien and/or of the terms and effect of rule 5, the action of the plaintiff in refusing to release the papers constitutes a breach of the agreement and/or a breach of the duty of care it owed to the plaintiff.

8. It should be noted that Mr McLean found that none of the items of damage particularised in the counterclaim as flowing from the refusal or failure of Russell Kennedy to release the file to Mr Ahmed were incurred as a result of that refusal or failure. On the appeal Ashley J found that Mr McLean should have made an order on the counterclaim for $114.20, on the basis of the bill of costs of Messrs Koltay and Myers showing the costs referable to their unsuccessful attempts to obtain the file. However, his Honour concluded, "Beyond that [Mr McLean] was not compelled to go; and, indeed, his reasons generally on the issue are unexceptionable".

9. Rule 5 of the *Solicitors (Professional Conduct and Practice) Rules* 1994, on which Mr McLean relied, reads so far as relevant (and appears to have read at the relevant time):

> 5.(1) (a) Subject to sub-rule (3) hereof, a solicitor shall, within a period of one month after being so requested in writing by a client or such further period as the client in writing allows or as may in the circumstances be reasonable, render to the client a Bill of Costs in such detail as to be capable of being taxed and covering all work performed for that client to which such request relates and for which the solicitor has not already rendered such a Bill or Costs or been paid. . .
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> (2) Without prejudice to any other liability of the solicitor, if the solicitor fails or neglects to render such a Bill of Costs within such period as aforesaid the solicitor shall, subject to sub-rule (3), forthwith pay to the client all moneys and deliver to the client all documents which the solicitor is holding on behalf of that client notwithstanding that the solicitor may otherwise be entitled to a lien upon those moneys or documents for payment of the solicitor's costs.
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> (3) The foregoing provisions of this rule shall not apply to a solicitor who has a sufficient and satisfactory reason for not complying with the said request of the solicitor's client.

10. The award of costs in the Magistrates' Court is a matter within the discretion of the court, by virtue of section 131 of the *Magistrates' Court Act* which reads, so far as relevant:

> (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.
>
> (2) Sub-section (1) applies unless it is otherwise expressly provided by this or any other Act or by the Rules or the regulations.

11. The principles governing appeals against discretionary judgments were set out by Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth*[2] and have been frequently applied. His Honour said:

> I shall not repeat the references I made in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513, at pp532-534; [1950] ALR 944 to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

Both questions in the Master's order must be considered in the light of those principles.

Question (a)

12. As appears from [6] above, Mr Smith gave reasons for his decision to apply the ordinary rule that costs follow the event, by stating expressly his opinion that the conduct of Russell Kennedy in refusing to surrender Mr Ahmed's file was not such as to disturb the application of that rule. The only issue under paragraph (a) is therefore whether those reasons were "sufficient".

13. The duty of a court to give reasons was considered at length by the New South Wales Court of Appeal (Kirby P, Mahoney and McHugh JJ A) in *Soulemezis v Dudley (Holdings) Pty Ltd* [3]. Mahoney JA[4], summarising the judgment of Gibbs CJ, with which the majority of the High Court agreed, in *Public Service Board of New South Wales v Osmond*[5], noted His Honour's finding that "the giving of reasons is a normal but not a universal incident of the judicial process: there are some cases, or kinds of cases, where they need not be given". His Honour went on to cite from his own judgment in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd*[6] an extensive passage as to the existence in various circumstances of a duty to give reasons, in which he noted:

> Nor is it necessary for a judge who is exercising a discretionary judgment to detail each factor which he has found to be relevant or irrelevant[7].

14. McHugh JA[8] found that the duty to give reasons did not arise only where there was a right of appeal against the decision; the foundation of the duty was the principle that justice must not only be done but must be seen to be done. He continued:

> However, neither the need nor the appearance of justice requires that reasons be given for every decision made by a judicial tribunal: *R v Awatere* [1982] NZCA 91; [1982] 1 NZLR 644 at 649 and *Public Service Board of New South Wales v Osmond* [1986] HCA 7; (1986) 159 CLR 656; 63 ALR 559; (1986) 60 ALJR 209. In the course of an action, a judge may make many decisions concerning interlocutory matters which cannot reasonably be held to require reasons; *Capital and Suburban Properties Ltd v Swycher* [1976] Ch 319 at 325, 236. Justice is a multi-faceted concept. In determining whether justice was done and seen to be done other interests and values, beside the giving of reasons, have to be considered. The limited nature of judicial resources and the cost to litigants and the general public in requiring reasons must also be weighed. For example, many questions concerning the admissibility of evidence may require nothing more than a ruling: in New South Wales common law judges have long held that they are not obliged to hear argument on the admissibility of every question of evidence let alone give reasons. It all depends on the importance of the point involved and its likely effect on the outcome of the case.

But when the decision constitutes what is in fact or in substance a final order, the case must be exceptional for a judge not to have a duty to state reasons. In *Brittingham v Williams* [1932] VicLawRp 35; [1932] VLR 237; 38 ALR 176, Cussen ACJ, in giving the judgment of the Full Court, gave some examples of cases which might not require reasons. His Honour said (at VLR 239):

> "... A case may turn entirely upon a finding in relation to a single and simple question of fact, or be so conducted that the reason or reasons for the decision is or are obvious to any intelligent person; or a claim or defence may be presented in so muddled a manner that it would be a waste of public time to give reasons; and there may be other cases where reasons are not necessary or even desirable. But in many cases, of which this was one, we agree with Irvine CJ in *Donovan v Edwards* [1922] VicLawRp 10; [1922] VLR 87; 28 ALR 51; 43 ALT 139 that a judicial officer should state the facts he finds and the reasons for his decision. Such a statement is desirable for the information of the parties, and in order to afford assistance to the Court of Appeal in the event of there being an appeal."

In that case the trial judge had given no reasons. However, the Full Court held that "having regard to the only defence raised" the proper conclusion to be drawn from a judgment for the defendant was that the judge had not accepted the plaintiff's evidence. Where the resolution of the case depends entirely on credibility, it is probably enough that the judge has said that he believed one witness in preference to another; it is not necessary "for him to go further and say, for example, that the reason was based on demeanour": *Connell v Auckland City Council* [1977] 1 NZLR 630 at 632-633 per Chilwell J. The position will usually be different if other evidence and probabilities are involved. A superior court, considering the decision of an inferior tribunal, should not be left to speculate from collateral observations as to the basis of a particular finding: *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 701, 713.

15. These passages deal with the duty to give reasons, rather than the adequacy of reasons, but the two clearly overlap; inadequate reasons are no reasons. The real question here is how far Mr Smith needed to go in justifying his opinion; and whether the simple expression of that opinion, without detailed justification, constituted sufficient reasons for his decision here under review.

16. The only authority to which I was referred by either counsel which related specifically to the giving of reasons for costs orders was the very recent decision of the English Court of Appeal (Lord Phillips of Worth Matravers MR, Latham and Arden LJJ) in *English v Emery Reimbold & Strick Ltd*[9] which was cited by Mr Bevan-John, for Russell Kennedy. The Court said (omitting matters deriving only from legislation not relevant to this country)[10]:

> 27. At the end of a trial the judge will normally do no more than direct who is to pay the costs and upon what basis. . . . Swinton Thomas LJ, in a judgment with which Scott V-C, who was the other member of the court agreed, said this in *Brent London BC v Aniedobe* [1999] CA Transcript 2003, in relation to an appeal against an order for costs:
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> > " . . . this court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the county court[11] by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."
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> 28. It is, in general, in the interests of justice that a judge should be free to dispose of applications as to costs in a speedy and uncomplicated way . . .
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> 30. Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order. This has always been the practice of the court (see the comments of Sachs LJ in *Knight v Clifton* [1971] 2 All ER 378 at 393, [1971] Ch 700 at 721. Thus in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs.

I would, with respect, adopt those passages, which seem to me to be consistent with "a remark made by Sir William Blackstone, that the rules of the common law are rules of common sense, and, if any rule is suggested the application of which would lead to any absurd result, there is at least a *prima facie* presumption that it is not a rule of the common law."[12]

17. Mr Smith gave clear reasons for his order, in which he did no more than exercise his discretion, in the circumstances of the case before him, to apply the ordinary principle that costs follow the event. Considering those reasons in the light of the authorities to which I have referred, I find no insufficiency. The answer to question (a) is accordingly No.

Question (b)

18. In finding that the conduct of Russell Kennedy, in refusing to surrender Mr Ahmed's file,

as found by Mr McLean, was not such as to disturb the application of the ordinary rule, Mr Smith was exercising the discretion conferred upon him by section 131 of the *Magistrates' Court Act*[13].

19. Mr Strang, for Mr Ahmed, relied on the enunciation by Atkin LJ in *Ritter v Godfrey*[14] of one of the circumstances in which a successful defendant should not receive costs, namely where that party has done some wrongful act in the course of the transaction of which the plaintiff complains. Such a wrongful act would include "improper conduct in or connected with the litigation calculated to defeat or delay justice", as well as "cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public" such as some criminal or quasi-criminal misconduct or some act of serious oppression, in the course of the transaction complained of. In his submission, the conduct of Russell Kennedy in withholding Mr Ahmed's file fell under both of those heads. Accordingly, in exercising his discretion as to the costs, Mr Smith had not given sufficient weight to that conduct; if he had given it sufficient weight, he would not have ordered that Mr Ahmed pay Russell Kennedy's costs of the claim.

20. It is not in issue that the conduct of Russell Kennedy which is in question was improper, for the reasons carefully stated by Mr McLean and set out in [7] above. Whether their impropriety extended from the private to the public sphere is not necessary for me to determine. However, it is to be remembered that, as Hedigan J said in *Bendigo Bank v Russo*[15] the principles enunciated by Atkin LJ are not "rules", and do not fetter the exercise of the discretion exercisable by Mr Smith.

21. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[16] Mason J was considering failure to take into account a relevant consideration, and taking into account irrelevant considerations, as grounds on which a party with sufficient standing might seek judicial review of an administrative decision. His Honour set out a number of propositions drawn from the cases, and in the course of doing so relied *inter alia* on the "close analogy" with the role of an appellate court in reviewing discretionary decision of a judicial officer made in the exercise of a discretionary power. The following passages are quoted from his Honour's judgment.

> (d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 at 228; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
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> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. . . . I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in *Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 pp230, 233-234; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in ss 5(2)(g) and 6(2)(g) of the [*Administrative Decisions (Judicial Review) Act* 1977] in these terms. The test has been embraced in both Australia and England. . . . However, in its application, there has been considerable diversity in the readiness with which courts have found the test to be satisfied. . . . But guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion. In the context of the latter, it has been held that an appellate court may review a discretionary judgment that has failed to give proper weight to a particular matter, but it will be slow to do so because a mere preference for a different result will not suffice. . . . So too in the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits.

22. Mr Strang referred to a number of decisions on the exercise of the discretion to order costs. However, cases relating to the exercise of discretions must, inevitably, each turn on their particular facts, and I did not find any of those cases to be particularly relevant to the question before me.

23. Mr Strang noted also that Mr Smith had said that he did not wish to be seen as condoning the conduct of Russell Kennedy, and submitted that by his costs order he was in fact condoning it. However, His Worship was entitled to exercise his own judgment as to the degree of heinousness of that conduct in the whole context of the litigation, and I see no inconsistency between the statement and the order.

24. I am satisfied, on the basis of the authorities to which I have referred, that there is no ground on which this Court should find that Mr Smith, in exercising his discretion as to costs, did not give sufficient weight to the conduct of Russell Kennedy. The answer to question (b) is accordingly No.

25. There is nothing in the context of either question in the Master's order to justify a finding that the decision made by Mr Smith in the exercise of his discretion is so "clearly wrong" or "so unreasonable or plainly unjust"[17] as to justify setting it aside. The appeal will be dismissed. Counsel may wish to make submissions as to costs.

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[1] As to the counterclaim, see [8] below.
[2] [1953] HCA 25; (1953) 94 CLR 621 at 627.
[3] (1987) 10 NSWLR 247.
[4] at 269.
[5] [1986] HCA 7; (1986) 159 CLR 656 at 666-7; 63 ALR 559; (1986) 60 ALJR 209.
[6] (1984) 54 ALR 155; [1983] 3 NSWLR 378 at 385-6; (1983) 53 LGRA 325; (1984) 58 ALJR 553.
[7] at 270.
[8] at 278-9.
[9] [2002] EWCA Civ 605; [2002] 3 All ER 385; [2002] 1 WLR 2409; [2002] All ER (D) 302; [2003] IRLR 710; [2002] UKHRR 957; [2002] CPLR 520; 164 JP 240.
[10] at 2419-20.
[11] Read, in the present case, "overworked magistrates".
[12] per Griffith CJ in *Reid v Smith* [1905] HCA 54; (1905) 3 CLR 656 at 660; 12 ALR 126.
[13] See [10] above.
[14] [1918-19] All ER 714 [1920] 2 KB 47 at 60-61.
[15] unreported, decided on 27 October 1997, at 9.
[16] [1986] HCA 40; (1986) 162 CLR 24 at 39-42; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109.
[17] see the passage from *Australian Coal and Shale Employees' Federation v The Commonwealth* cited at [11] above.

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