41/86

SUPREME COURT OF VICTORIA

McCOLL v LEHMANN

Kaye J

29, 30 September, 1, 16 October 1986

[1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234

PROCEDURE – CRIMINAL MATTER – REQUEST FOR ADJOURNMENT – MATERIAL FOR DEFENCE NOT AVAILABLE – COUNSEL NOT SUFFICIENTLY INSTRUCTED – WHETHER ADJOURNMENT APPROPRIATE – SUB-POENA TO PRODUCE DOCUMENTS – REQUESTING DOCUMENTS "RELATING TO" TO BE PRODUCED – DOCUMENTS TO BE CLEARLY IDENTIFIED FOR PRODUCTION – TRESPASSER – STATUTORY DEFENCE – ELEMENTS TO BE PROVED BY TRESPASSER: *SUMMARY OFFENCES ACT* 1966, SS9(1)(d); 9(3); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S168.

McC., an organiser with the Builders' Labourers Federation, was charged before a Magistrates' Court for wilfully trespassing on a building site under the control of a building contractor, Civil and Civic Pty Ltd and the site manager one Walton. It was alleged that McC. refused to leave the site after he had been found talking to a group of the building contractor's employees. McC. stated that he was looking after members of his Union and had a right to be on the premises. When the case was called on, McC.'s counsel sought an adjournment on three grounds, one which concerned the unavailability of certain information which if obtained could be material to the presentation of McC.'s defence. The prosecutor opposed the application, but did not claim that the informant would be prejudiced if the adjournment were granted. The magistrate refused the application. When the hearing commenced applications were made on behalf of the building contractor and the Minister of the Department of Labour to set aside sub-poenas addressed to them requiring the production of: "... all records relating to direction from the Employers Association or Organization, State Government Departments of procedure to adopt if a B.L.F. organizer enters a building site." The magistrate set aside the subpoenas on the ground of insufficient particularity. On Order nisi to review—

HELD: Order nisi absolute. Conviction quashed and case remitted to the Magistrates' Court for further hearing.
(1) It is essential to the fair trial of an action that all parties are able to present their case as fully as necessary and within the limits of the law. Refusal to grant an adjournment for this purpose could constitute an injustice.
***Maxwell v Keun* (1928) 1 KB 645;**
***Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 37 ALR 55; (1981) 55 ALJR 701, applied.**

(2) In the present case as refusal of the application for the adjournment denied the defendant an opportunity to present evidence material to his defence and precluded counsel from obtaining sufficient instructions to present properly the defence, there was a real risk of an injustice to the defendant.

Obiter
(3)(a) In determining whether a summons to produce documents is oppressive and an abuse of process, the fundamental consideration is whether, in all the circumstances including the identity and situation of the recipient of the summons, the class of documents required to be produced is sufficiently clearly identified.
***Lucas Industries v Hewitt* (1978) 45 FLR 174; (1978) 18 ALR 555, applied.**

(b) Having regard to the media publicity given to the deregistration of the B.L.F., and that the employers' organisation was public knowledge, it was open to the magistrate to conclude that—
(i) the assessment or judgment required to be formed by those summonsed was not unreasonable:
(ii) the request for production of the documents did not constitute discovery; and
(iii) the summonses to produce specified with reasonable particularity the documents which the addressees were required to produce.

(4) Where a defendant wishes to rely on the statutory defence provided in s9(3) of *Summary Offences Act* 1966, that person bears the onus of proving that:
(i) he had a right to enter and remain on the premises;
(ii) such right is one known to the law; and

(iii) there existed fair and reasonable grounds for his supposition of the right claimed.
***White v Feast* (1872) LR 7 QB 353;**
***R v Phillips & Pringle* (1973) 1 NSWLR 275, applied.**

KAYE J: *[After setting out the facts, His Honour continued]*: ... **[4]** In connection with the application for adjournment it is significant that the facts stated by the applicant's counsel were neither challenged nor disputed by the prosecutor, and the magistrate did not expressly reject the truth of the facts so stated. Furthermore, it was not claimed by the prosecutor that the informant or his witness would suffer prejudice if an adjournment were granted.

The decision whether to accede to or refuse the application for adjournment of the hearing was within the magistrate's discretion. An Appellate Court will rarely interfere with a trial judge's exercise of discretion upon such an application; *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390; (1981) 55 ALJR 701 at 703; (1981) 37 ALR 55 at 58 per Wilson J. However, **[5]** the result of refusal to grant an adjournment might be to prevent the parties seeking it from presenting his case or defence; in some circumstances such result could constitute an injustice. This is so because it is essential to the fair trial of an action – with civil or criminal – that all parties are able to present their case as fully as necessary and within the limits of the law. To overcome an injustice so brought about or threatened, an Appellate Court will interfere with the trial judge's discretion. This principle was expressed by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645 at 653; [1927] All ER 335 as follows:-

> "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

In *Bloch v Bloch* Wilson J, whose judgment Gibbs CJ, Murphy and Aickin JJ agreed, described the passage cited as "the rule in terms which have won general acceptance". The appeal with which the Court of Appeal was concerned in *Maxwell v Keun* arose out of an order refusing the plaintiff an adjournment of the hearing of his libel action. The ground of the application was that if the action were heard on the date fixed for the trial, the plaintiff, who was serving with his regiment in India, would be unable to be present, and that his claim could not be established in his absence. Lawrence LJ [at 659] said:-

> **[6]** "Further it is plain that if he is not present at the trial his case must fail, in other words, he will not have had an opportunity of having his case properly tried and thus of obtaining justice. I will assume for this purpose that his advisers committed an error of judgment in applying for the postponement of the trial at the time when they did, and that they ought to have applied some weeks earlier. I cannot myself think that the penalty for that error of judgment is that the plaintiff should not have his case properly tried. I have heard no word said on behalf of the defendants that they will in any way be prejudiced by the case being postponed until next term, and there is no evidence whatever that they will be prejudicially affected by such a postponement. It seems to me that, in those circumstances, it would be denying justice to the plaintiff if his case were allowed to remain in the list of cases to be heard this term."

A somewhat similar situation arose in *Walker v Walker* [1967] 1 WLR 327; (1967) 1 All ER 412. There the appeal before the Divisional Court in the Probate Division was against an order made in maintenance proceedings by justices after refusing the appellant's application for an adjournment of the hearing. After service of the summons upon him, the applicant unsuccessfully sought to expedite the hearing. His application for adjournment, which was made by his counsel, was based upon his absence in India under the terms of his employment. Sir Jocelyn Simon P (at p330; p414 All ER) referred to the twofold effect of the authoritative guidance provided by the Court of Appeal in *Maxwell v Keun* in these terms:-

> "First, where the refusal of an adjournment would result in a serious injustice to the party requesting the adjournment, the adjournment should only be refused if that is the only way that justice can be done to the other party; and secondly, that although the granting or refusal of an adjournment is a matter of discretion, if an appellate court is satisfied that the discretion has been exercised in such a way as would result in an injustice to one of the parties, such appellate court has both the power and the duty to review the exercise of the discretion."

[7] His Lordship continued that the refusal of the adjournment in the case under appeal had resulted in a serious injustice to the appellant in that his side of the case had not been heard. The principle laid down in *Maxwell v Keun* was applied again in *In re M, (an Infant)* [1968] 1 WLR 1897; (1968) 3 All ER 878. Convictions suffered after refusal of an adjournment have been quashed by orders for the issue of writs of *certiorari* where the consequences of the refusal of adjournment were denials of natural justice. In *R v Thames Magistrates' Court; ex parte Polemis* [1974] 1 WLR 1371; (1974) 2 All ER 1219 the applicant was the master of a Greek vessel. At 10.30 in the morning of the day on which his ship was due to sail, the master was summoned to appear at a Magistrates' Court at 2.00 pm on the same day. The information alleged that oil or a mixture containing oil was discharged from his ship contrary to law. At 2.30 pm the applicant's solicitors applied for an adjournment to enable them to prepare his defence which involved inspecting the prosecution's samples of oil and seeking witnesses. The justice refused the application. The information was heard some hours later but before a stipendiary magistrate. The application was not renewed before the magistrate although he was aware of the justices having refused it. Widgery LCJ [at 1377 WLR; 1225 All ER] said:-

> " ... I would hold that where the central allegation on which an order of *certiorari* is sought is that the defendant was not given a reasonable time to prepare his case, the mere fact that the matter became apparent as a result of a refusal of an adjournment does not prevent **[8]** the court from treating the basic cause of complaint, namely, the failure to provide the defendant with adequate time, as being a ground on which *certiorari* should go."

Orders for *certiorari* and mandamus were made by the Divisional Court in *R v Croydon Crown Court; ex parte Lenham* [1974] RTR 493 to quash the dismissal of an applicant's appeal against his disqualification from driving a motor car. Before the Magistrates' Court the applicant had pleaded guilty to a charge of driving with excessive alcohol. Evidence of special reasons why he should not suffer disqualification from driving was rejected by the justices. That evidence was given by a witness who said that, unbeknown to the applicant, he had laced the applicant's drink with vodka. When his appeal came on for hearing in the Crown Court, the applicant sought an adjournment because in the short interval between the receipt of the notice fixing the date of the hearing of the appeal and the hearing, neither he nor his solicitors had been able to secure the attendance of the witness. This had been due to the nature of the witness's employment. The application was refused. Counsel for the applicant then informed the judge that the refusal of the application would inevitably involve the appeal being automatically dismissed. He invited the judge to adjourn the appeal on terms; the judge refused to do so. The appeal being called on, counsel for the applicant announced that he was not in the position to call evidence, and it was thereupon dismissed. Edmund Davies LJ, who delivered the leading judgment of **[9]** the court, applied the principles expressed in *Maxwell v Keun* by Atkin J and by Lawrence LJ.

In contradistinction to the facts of the cases to which I have referred, the High Court confirmed that the facts found by the trial judge in *Bloch v Bloch* and upon which he refused the appellant's further application for an adjournment justified the exercise of his discretion refusing it. The court did not interfere with the decision.

Returning to the grounds of the application for adjournment in the present case, it was not indicated to the magistrate that counsel required to confer with the applicant for a period longer than would be available to him if the case were stood down for some hours. In the circumstances, the magistrate might well have concluded that, because counsel's estimate of the duration of the hearing was limited to about a half day, the facts were within small compass. Again, counsel's need to examine the reasons for the judgment in the recent Supreme Court proceedings and the provisions of a Victorian Statute were not the type of circumstances which would have warranted an adjournment for more than some hours. If the judgment were not readily available at the court, the hearing might have proceeded to a conclusion, the magistrate reserving his decision and reserving to counsel liberty to address him further on the judgment if he wished to do so. Furthermore, the magistrate might well have been justified in assuming that counsel could have established by telephone whether the judgment was relevant to the pending proceedings.

[10] However, the third ground of the application was the substantial one for the need for adjournment. It was apparent that counsel was of the opinion that the applicant's defence would at least gain strength from the contents of the documents relating to procedures to be adopted by employers to exclude Builders' Labourers Federation organizers from building sites, which

had been provided to the company by the government and the employer's organization. Those documents were the subject of subpoenas *duces tecum* addressed to Civil and Civic Pty Ltd and its managing director, and to the Minister for the Department of Labour. When the information was first called, Mr Spicer, counsel for the company and Mr Lindeman, solicitor for the Minister, informed the magistrate that they intended to seek orders setting aside the subpoena.

Although he did not so inform the magistrate, it is a fair inference from his expressions that Mr Lazarus hoped that, as a result of service of each subpoena, he would see the required documents before the proceedings commenced. Again, notwithstanding that he did not inform the magistrate, the inference capable of being drawn from his remarks is that he was denied access to the documents. The stand of withholding documents from the applicant's counsel, which was taken by the legal representatives of the company and the Minister, was unexceptional. The persons to whom the subpoenas were addressed were required to produce documents to the court, and not to the applicant; *The Commissioner for Railways v Small* [1938] 38 SR (NSW) 564 at 574; 55 WN (NSW) 215 per Jordan CJ. But it was **[11]** the unavailability of those documents which caused counsel to conclude that he was not sufficiently instructed to present the applicant's defence.

From the evidence of the applicant's explanation of his refusal to leave the site which was given by the informant and Mr Walton, as well as his own evidence during the subsequent hearing, it is clear that his defence was that he so acted under a fair and reasonable supposition that he had a right to remain on the site. This defence was available to him under sub-s(3) of s9 of the *Summary Offences Act*. Mr Lazarus, when making his application for an adjournment, however, did not disclose to the magistrate that the contents of the documents sought were required either to make out or to fortify the statutory defence. It may be that the documents would have proved to be of no assistance to the applicant for that purpose. Nevertheless, in my opinion, the applicant ought to have been given a reasonable opportunity to discover whether the contents did so. His solicitors, on counsel advice, by the issue of subpoenas took appropriate steps to procure the documents, although there might have been doubt whether their service was regular. If the documents did contain material supporting the applicant's defence, the result of the refusal of the adjournment sought was to deny him an opportunity to present evidence material to his defence. The nature of the evidence, if available, might have gone to the heart of his defence.

It was contended by Mr Uren QC, who with Mr Lasry of counsel appeared for the respondent, that it **[12]** was speculative whether the documents sought were relevant to the defence, and consequently that the applicant was not prejudiced by the refusal of his application for adjournment. On the other hand Mr Lazarus, as counsel, made clear to the magistrate that there was a need for further evidence to be led in support of the defence, and that it was necessary to make enquiries to ascertain whether the documents contained such evidence. Furthermore, there does not appear to have been any reason advanced to the magistrate which suggested that the contents were not relevant.

In addition I consider that his statement to the magistrate that there are "matters on the periphery which really ought to be investigated" might have been meant to convey to the magistrate that, in addition to the documents sought by subpoena, there were other documents and other sources of evidence which ought to have been examined for support to the defence. In the course of his submission Mr Redlich QC who appeared with Mr Moloney for the applicant, referred to the existence of a "site agreement" from which the applicant might have derived his asserted right as a union organizer to enter and remain on the site. It was indeed unfortunate that Mr Lazarus did not articulate what were the matters requiring investigation, and in what way those matters might have been useful for the defence. By doing so he would not have disclosed the defence, particularly as the applicant had already done so when he was ordered off the property.

[13] Be that as it may, Mr Lazarus informed the magistrate that certain documents were needed for the defence which were not available to him, and that he was then not sufficiently instructed to present properly the applicant's defence. As I have already indicated, the magistrate did not expressly or by implication reject the reasons advanced by counsel for his predicament. In those circumstances, the refusal of the application for adjournment prevented the applicant from seeking documentary evidence which his counsel anticipated might have been material to his defence, and his counsel was precluded from obtaining what he considered to be sufficient instructions to enable him to present properly the defence. There were, therefore, proper and

adequate grounds upon which the magistrate might have exercised his discretion, and by refusing the application he failed to exercise his discretion properly or at all. As a consequence, there was a real risk that justice was denied to the applicant.

This ground of the order nisi having been made out, the case will be remitted for rehearing, so that determinations of the remaining grounds are not necessary for making the order absolute. However, upon the rehearing of the information, the same or similar issues and questions to those which were the subject of other grounds might arise. Some guidance concerning those matters will be provided to the magistrate by the following comments upon those matters.

The complaints made by the applicant under grounds 1(b) and (c) were that the magistrate misdirected **[14]** himself and thereby failed to exercise his discretion properly in ruling that the subpoena addressed to Civil and Civic Pty Ltd and the managing director, and the subpoena addressed to the Minister of the Department of Labour be set aside. The grounds upon which, in each instance, the subpoena was sought to be set aside arose out of the language which was used to described the documents required to be produced. The description in both subpoenas was identical reading as follows:-

> "to bring with you and produce at the time and place aforesaid circulars, notes, instructions, memos, diary entries and all records relating to direction from the Employers Association or Organization, State Government Departments of procedure to adopt if a B.L.F. organizer enters a building site."

The magistrate heard the applications to set aside the subpoenas during the cross-examination of Mr Walton. Setting aside the Civil and Civic sub-poena, he said:-

> "... in my view, the document cannot stand and I do set it aside. In my view, there is insufficient particularity. It is quite clear that there is no reference to dates, there is no reference to in whose possession the documents called for may reside, and I simply repeat what I say: there is insufficient particularity. The document is set aside."

Although he did not so express himself, it appears that the magistrate set aside the subpoena addressed to the Minister for the same reason. What I am about to say therefore applies to both subpoenas although I shall only refer to "the subpoena".

It was contended in this court that the subpoena was oppressive and an abuse of process because by its language the addressee – a stranger to the proceedings – was required, in order to comply with the **[15]** command, to make discovery of documents. Those documents were not specified by reference to time or date of their origin, and the authors – "Employers Association or Organization" and "State Government Departments" – were not identified. To decide whether a document contains "a direction", it was said, would require the recipient of the subpoena to interpret its language for the purpose of assessing whether it purported to direct or request or suggest a procedure to be followed. In addition, it was asserted, the words "relating to direction", were too wide.

The problem posed by the subpoena was whether, by reason of those features, it failed to specify with reasonable particularity the documents sought. The requirements of a subpoena *duces tecum* addressed to a stranger to litigation was described by Jordan CJ in the *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 (at p573); 55 WN (NSW) 215 in the following passage:-

> "... it must specify with reasonable particularity the documents which are required to be produced. A subpoena *duces tecum* ought not to be issued to such a person requiring him to search for and produce all such documents as he may have in his possession or power relating to a particular subject-matter. It is not legitimate to use a subpoena for the purpose of endeavouring to obtain what would be in effect discovery of documents against a person who, being a stranger, is not liable to make discovery. A stranger to the cause ought not to be required to go to trouble and perhaps to expense in ransacking his records and endeavouring to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant."

Again, in *National Employers' Mutual General Association Ltd v Waind* [1978] NSWLR 372 at 382, Moffitt P said:-

> **[16]** "It is oppressive to place upon a stranger the obligation to form a judgment as to what is relevant to the issue joined in a proceeding, to which he is not a party. Hence it is an abuse of the use of a

> subpoena to impose this obligation. It follows that it is an abuse to use any subpoena, i.e. even to a party to obtain discovery. This was the reasoning in *Small's case*. Of course, discovery as such is otherwise available to a party. It follows that a subpoena can only properly be used for the production of documents described in particular or general terms which does not involve the making of such a judgment."

The need for a stranger to form a judgment of what is relevant to the issue relates to the situation which might arise in civil proceedings. But in criminal or quasi criminal proceedings, where the defence to the charge may be unknown until the accused person enters upon his case, the question of the issue in the trial is not relevant knowledge to a person served with a subpoena. Again, there may be several forms of civil proceedings without pleading where the issue is not known before the hearing commences.

Moreover, in more recent times, it has been accepted that there may be circumstances where, by use of the expression "relating to" for the purposes of describing documents sought, a subpoena might not lack the required particularity of identification. Thus in *Lucas Industries Ltd v Hewitt* (1978) 45 FLR 174; [1978] 18 ALR 555 at 569 Smithers J, with whom Bowen CJ and Nimmo J agreed, said:-

> "No doubt, if the terms of a subpoena are such that although purporting to be a subpoena it is in substance a notice for discovery, it should be set aside. But I am not satisfied that the subpoena before the court is of this kind. The task it imposes on the respondents is to identify documents as relating to particular subjects. This is quite a different task from that of ascertaining issues and identifying the relationship of documents thereto."

[17] In connection with a submission that a subpoena was oppressive and fishing because of the width of the demands and identification of documents sought by the contents relating to some subject-matter, His Honour at p570 said:-

> "It is true that in a subpoena *duces tecum* documents required to be produced must be specified with reasonable particularity. But a degree of generality in the description of the documents may according to circumstances be compatible with reasonableness in this respect. Thus, in respect of documents concerning the treatment of a hospital patient, production of which is required from the hospital, a description such as "the hospital records relating to treatment of Mr X between January and July 1977" would be acceptable. Such a description places upon the hospital the burden of searching for the records but, having regard to modern business organization and practices, such a burden is reasonable.
>
> The purpose of the process of subpoena is to facilitate the proper administration of justice between parties. For that purpose it is the policy of the law that strangers who have documents may be put to certain trouble in searching for and gathering together relevant documents and bringing them to court. It is according to the same principle that persons who have knowledge of facts are put to the inconvenience of being brought to court and required to give evidence.
>
> Assessment of the reasonableness of burdens involved in complying with a subpoena must take account, *inter alia*, of the desirability that justice be administered effectively. The capacity of a party to collect and produce the documents referred to is a relevant circumstance. Large business entities may be thought to be highly organized and well staffed. What may be burdensome to lesser entities may be of small significance to a large one."

At p571 Smithers J expressed his opinion that a person to whom a subpoena is directed is required to read it sensibly and with reference to circumstances known to him.

[18] Cantor J in *R v Barton* [1981] 2 NSWLR 414 at 428, in criminal proceedings on an application to have subpoenas *duces tecum* struck out on grounds, *inter alia*, of lack of particularity, expressed agreement with the opinion of Smithers J in *Lucas Industries v Hewitt* that the mere use of words such as "relating to" does not in all cases impose an unreasonable burden on the recipient. His Honour at p428 said:-

> "I do not believe one can properly declare that any subpoena which requires a witness to form a judgment as to whether particular documents are within the words used in the subpoena must therefore be bad and be struck out. It seems to me all the circumstances must be looked at including the identity and situation of the recipient of the subpoena. The fact is that he may well know from his very position the nature of the documents which he is required to produce. ... The fundamental

consideration, in my view, is whether, in all the circumstances including the identity and situation of the recipient, the class of documents is sufficiently clearly identified."

Similarly, in *Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921 at 929, Waddell J did not accept that the use of the expression "relating to" resulted in all cases in oppression to the recipient of the subpoena or an abuse of process. Whether it did so, he added, depended upon the context in which the expression was used. Clark J in *Southern Pacific Hotel Services Inc v Southern Pacific Hotels Corporation Ltd* [1984] 1 NSWLR 710 at 719 and 720, after referring to *Lucas Industries v Hewitt* and *Spencer Motors*, expressed the same opinion. The reasoning of Smithers J in *Lucas Industries v Hewitt* was applied by Bollen J in *Alliance Petroleum Australia (NL) v* **[19]** *Australian Gaslight Co* (1982) 31 SASR 35; (1982) 65 FLR 243; (1982) 44 ALR 124 at 133. A contrary view was expressed and applied in *Finnie v Dalglish* [1981] 1 NSWLR 400; (1981) 1 ANZ Insurance Cases 60-438 by Rath J. However *Lucas Industries v Hewitt* was not referred to in His Honour's judgment and it does not appear in the list of additional cases which were cited in argument to him.

I would adopt the opinion of Smithers J expressed in *Lucas Industries v Hewitt*. In my opinion it reflects a realistic approach to a situation presented when the addressee of a subpoena *duces tecum*, because of all the relevant circumstances, ought reasonably to recognize the documents described by reference to a particular subject-matter. To reject as oppressive or as an abuse of process a subpoena because it directs production of documents by reference to those relating to a specific subject-matter within the recipient's knowledge, suggests an excessive indulgence in legalism. Determination of whether the description of documents by that mode satisfies the required test of specification by reasonable particularity ought to be made by taking into account the facts and circumstances within the knowledge of the party to whom the subpoena is addressed. It ought to be expected of the addressee, being mindful of the facts about the subject-matter known to him, that he will read the subpoena sensibly.

The form of expression by which the documents were specified in the subpoena, which was before the magistrate, left much to be desired. Nevertheless the following circumstances were relevant to the determination whether the subpoena sufficiently **[20]** particularized the documents sought. The deregistration of the Builders' Labourers Federation on 14th April 1986 was given widespread publicity by the media. Being a matter of particular interest and concern to the State Government and building contractors, it is a reasonable assumption that the responsible Minister of the Crown and Civil and Civic Pty Ltd had knowledge of the deregistration of the union. It was alleged that two days after the deregistration the applicant, a Builders' Labourers Federation organizer, committed wilful trespass on a building site under the control of Civil and Civic. The procedure to be adopted as directed by the employer's organization and the State government Department in the event of such conduct by a B.L.F. organizer, was the subject-matter of the documents sought by the subpoena. From the terms of the description of the subject-matter, the documents required were those which were in existence at the time of the alleged offence.

It is a matter of public knowledge that the employers organization concerned with the building industry is the Master Builders' Association. It would therefore defy credulity if the managing director of Civil and Civic and its proper officer were to deny that, in the circumstances existing in June 1986, the reference in the subpoena to "Employers Association or Organization" identified to him the Master Builders Association. An objection to the subpoena was that the word "direction" would require the recipient to interpret a **[21]** document and form an assessment or judgment whether it contained a direction as distinct from a request or suggestion.

I do not accept that that form and degree of intellectual activity would be beyond what might reasonably be expected of a literate company officer or a Minister of the Crown. Indeed, compliance with a command given by a subpoena must always require the recipient to form a judgment, consciously or otherwise, whether a particular document is the document or of the class of documents sought. The mental process of relating a document to the documents particularized in a subpoena does not *per se* constitute making discovery. I would therefore be satisfied that the subpoena specified with reasonable particularity the documents which the addressees were required to be produced.

The thrust of ground 1(d) of the order nisi was that the magistrate erred in ruling that Mr

Walton could not be cross-examined concerning the destruction of cards containing a pro-forma undertaking by members of the union that they would not remain members of the Builders' Labourers Federation. The ruling was made in the course of the cross-examination of Mr Walton when in answer to counsel's question, Mr Walton swore as follows: On 16th April 1986 he was in possession of cards requesting Civil and Civic employees to join an appropriate union. The cards had been supplied by the Master Builders Association. The Master Builders Association had requested or directed the company to seek from its members their signatures to the cards. Mr Walton did **[22]** not distribute the cards to the company's employees because it was decided that it would not be appropriate to do so. He did not inform the applicant that he did not intend to distribute the cards. Sometime after 16th April, the date of which he did not recall, he destroyed the cards because he had no use for them.

The Police Prosecutor objected to counsel's question: "How did you destroy them?". Counsel sought to justify his question to the magistrate on the ground that it went primarily to the credit of the witness. In the course of ensuing discussion, counsel submitted that the destruction of the cards was also relevant to the defence. Mr Lazarus indicated that he intended to put to the witness that on 16th April 1986 he (the witness) intended to have the cards signed by employees as part of "a general deal being done with the Builder's Workers Industrial Union, the State Government, and the other union involved". He also indicated that he intended challenging the witness's evidence that he had destroyed the cards.

The magistrate stated that he could not see the relevance of counsel's proposed questions, and particularly whether they went to the witness's credit. In the course of further discussion, Mr Lazarus stated that the contents and existence of the cards on 16th April were facts critical to the defence. He said that he intended having the cards produced, examined by the magistrate, and considered in the light of the contractual obligations existing between the Builders' Labourers Federation and its members. In answer to **[23]** counsel's enquiry, the magistrate confirmed as his ruling that the fact of the existence of the cards, their destruction, and the reasons for their destruction were not relevant to the proceedings. Counsel's question to Mr Walton, how he destroyed the cards, which provoked the prosecutor's objection, did not by itself go to the credit of the witness. No doubt it was the lead up to further questions directed to whether the cards had been destroyed. The effect of the magistrate's ruling was that counsel was prevented from questioning further the witness or adducing evidence from the applicant or other witness about the contents of the cards, their existence or destruction. If, by further questions, counsel had elicited from the witness an answer that he had not destroyed the cards, his credibility might have been seriously undermined. In particular it might have at least cast doubt whether the witness's evidence that on 16th April he did not intend seeking signatures to the cards.

The relevance of the contents of the cards, as it was explained by counsel, was that members of the Builders' Labourers Federation were being induced to leave their union and join another union. The applicant, as an organizer of the union, was concerned to dissuade its members from breaking their contractual obligations with the union. He asserted a right to be on the site for that purpose. It was not disclosed by Mr Lazarus whether he intended to call any employees to depose whether a card had been presented for his signature by **[24]** Mr Walton or any other officer of the company. Whether counsel so intended or not, the effect of the magistrate's ruling was to preclude him from doing so and to preclude the applicant from giving evidence concerning the existence of the card.

Ordinarily, the relevance of a document is determined by a magistrate or judge after examination of its contents. In this instance, the magistrate was at a disadvantage because the cards, or a facsimile, were not made available for him before making his ruling. Nevertheless, in my view the magistrate erred in ruling that the cards, their existence or destruction, were neither relevant to the defence nor capable of use in connection with Mr Walton's credit.

Under ground 3 of the order nisi it was sought to impugn the magistrate's finding that, on the evidence, and weight of the evidence, the applicant did not hold a fair and reasonable supposition of his right to remain on the building site. Upon the rehearing of the information, evidence in addition to that called in the former proceedings might be adduced in support of the applicant's defence. In that event the evidence for consideration by the magistrate in reaching his decision might be substantially different from the evidence which was before him during the

hearing under review. Whether that will be so or otherwise, the interpretation and application of the provisions of sub-s(3) of s9 of the Act will no doubt again arise. Without considering whether the magistrate fell into error, the following **[25]** observations in relation to the statutory defence provided by the sub-section are made by way of guidance. The sub-section reads:-

> "(3) Nothing contained in this section shall extend to any case where the person offending acted under a fair and reasonable supposition that he had a right to do the act complained of or to any trespass (not being wilful and malicious) committed in hunting or the pursuit of game."

These observations are addressed in relation to the interpretation to be given to the clause "a fair and reasonable supposition that (the person offending) had a right to do the act complained of" appearing in the sub-section. In the first place, it is significant that there is nothing in the language used to suggest that the right assumed by a defendant is other than a right known to the law. Secondly, for the supposition of a right to be fair and reasonable, it must be founded on grounds rendering it such.

This construction of the sub-section is consistent with a line of authority concerned with the interpretation and operation of provisos to offences expressed in similar language to sub-s. (3). Those authorities establish that to come within the particular statutory proviso, the right claimed must be one known to the law, and there must be a fair and reasonable ground for the supposition of the right. It is instructive for present purposes to refer to those statutory defences and the meaning which has been given to them.

Section 52(1) of the *Malicious Damage Act* 1861 created the offence of wilful and malicious damage to **[26]** property. The section also provided that its provisions did not extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of. The operation of the exculpatory provision in the section was determined by the Court of Queen's Bench in *White v Feast* [1872] LR 7 QB 353. There the appellant had entered the respondent's property and dug a large ditch without permission. The appellant claimed that he had done so acting under the instructions of his employer, one Dawson, and exercising what he believed to be a public right. Cockburn CJ (at pp357-358), referring to the section and proviso, stated that there must have been a fair and reasonable ground for the supposition of the right. On the facts before them, His Lordship said, the justices were justified in their finding that the appellant did not have a fair and reasonable ground for his supposition that he had a public right to dig the ditch. Blackburn J [at p359] said of the section:-

> "The real substance of the enactment is the power given to the justices to award compensation to a small amount, and that power ought to be given and exercised whether the act causing the injury be done under a *bona fide* claim of right or not, if not founded on a fair and reasonable ground. The words are, 'that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of;' and whether the person charged did so act or not, it must be for the justices to decide on a due consideration of the evidence brought before them. As the proviso expressly says that the claim of right must be founded on reasonable grounds, the ordinary proviso, usually implied as to mere *bona fides*, is superseded."

In connection with the facts found by the justices, His Lordship concluded (at p360):-

> **[27]** "Upon these facts it was an unreasonable supposition on the part of Dawson that he had a right to make what amounted to a sewer, through the respondent's property; it is not impossible that he thought he had the right, but on the evidence there was no fair or reasonable ground shown for his supposition; and, consequently, the justices were right in proceeding to convict the appellant."

In *Croydon Rural District Council v Crowley* [1909] 100 LT 441 it was held that, to come within the proviso to s52(1) of the *Malicious Damage Act*, a right claimed by a person must be a claim to a right such as is known to the law. Jelf J [at p444] said:-

> "That proviso is very much the same as the general principle of the common law by which the jurisdiction of justices can be ousted. In order to set up successfully a claim which will oust their jurisdiction either by virtue of the common law principle or of the proviso, it is necessary that the claim should be one which has a foundation in law, and a fair and reasonable supposition as to a right cannot be alleged, unless it can exist in law."

Moreover, expressions contained in various judgments made clear that a mere *bona fide* belief in the existence of a right was not sufficient to satisfy the proviso; see *Birnie v Marshall* [1876] 35 LT (NS) 373 at 376. By the proviso to s195 of the *Crimes Act* 1900 (NSW), no act is deemed malicious which was done by an accused under a reasonable supposition that he had a right to act in the manner complained of. In *R v Phillips & Pringle* [1973] 1 NSWLR 275 the Court of Criminal Appeal considered the application of the proviso to the defence raised by accused persons who were convicted of malicious injury to property. Their convictions arose out of damage which they caused to goal posts at the Sydney Cricket Ground. By way of defence, **[28]** they claimed that they had a right to behave as they did under the United Nations charter, as adopted by a Commonwealth statute, and United Nations resolutions and declarations which were directed against racial discrimination. The court held that it was no supposition of right when an accused, by error of law, believes that he can with impunity do the act with which he is charged, and that no such right could be supposed to exist upon the basis of the United Nations resolutions or declarations upon which the appellants relied. Jacobs J [at pp288-289] after stating that there could be no supposition of right on the part of the appellants, continued:-

> "A supposition of right means much more than a mere belief that there is a legal right to do the act. A mistaken belief of this kind is no defence. A supposition of right in this context is a supposition by an accused that he has particular rights in respect of the subject property, either as a private individual, or as a member of the public or a class of the public which, if he were correct in that supposition, would entitle him to deal with the subject property in the manner in which he dealt with it. A mistaken claim or supposition of right involves a mixture of fact and law and is treated as a mistake of fact: see *Thomas v R*, per Dixon J [1937] HCA 83; (1937) 59 CLR 279 at p306; [1938] ALR 37. It is no supposition of right when an accused, by error of law, believes that he can, with impunity, do the act with which he is charged. All that the accused here claimed was that they in common with all other people were entitled under the law to do the act charged for the purposes alleged by them. I agree with the learned Chairman that there is no law of this State which gives any person the right to damage the property of another in order to give effect to any United Nations resolution or declaration upon the subject matter of racial discrimination."

The authorities to which I have referred fortify the conclusion that, for the applicant to come **[29]** within the provisions of sub-s(3) of s9, the requirements to be satisfied are firstly that the right to enter and remain on the premises claimed by him was a legal right, being a right known to the law, and secondly, that there existed fair and reasonable ground for his supposition of the right claimed. Finally, the onus of proof lies on a defendant to bring himself within the exempting or exculpatory provisions of the sub-section: see *Magistrates (Summary Proceedings) Act* 1975, s168.

As I have already noted, ground 1(a) having been made out, the order nisi will be made absolute, the conviction quashed, and the case referred back to the Magistrates' Court for rehearing of the information.

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Solicitor for the respondent: RJ Lambert, Crown Solicitor.
