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|  | **CASE SUMMARIES 2011** |
| **1** | **Witness summons – matters to consider when issuing sub-poena**  In *Comm’r of AFP v Magistrates’ Court of Victoria & Ors* MC01/11, J Forrest J determined an appeal against a magistrate’s refusal to set aside a witness summons. In allowing the appeal His Honour set out the principles which apply in determining whether a party is entitled to access documents the subject of a sub-poena.  1. The following principles apply in determining whether a party is entitled to access documents the subject of a subpoena:  (a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;  (b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;  (c) the applicant for the witness summons must also satisfy the court that it is “on the cards”, or that there is a “reasonable possibility”, that the documents sought under the subpoena “will materially assist the defence”.  (d) a “fishing expedition” is not a legitimate forensic purpose and will not be permitted;  (e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.  (f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied.  (g) in criminal proceedings a “more liberal” view is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of the accused.  (h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.  2. In relation to the submission the magistrate failed to give adequate reasons for his decision this ground of appeal cannot be sustained. The Magistrate gave detailed reasons as to why he refused to set aside the witness summons and set out the arguments of each of the parties. He stated succinctly and correctly the issue he had to resolve in relation to the first affidavit. He referred to a number of authorities relevant to the question of legitimate forensic purpose and access to documents and to the relevant provisions of the Act. He analysed the evidence before him and particularly referred to the Zuccato affidavit. He set out his conclusion in such a form that one can identify a discernible and clear path of reasoning (whether correct or incorrect is not to the point).  3. The assertion by the Commissioner – that there is an obligation upon the Magistrate to ensure that certain aspects of the reasons were “explicitly stated” was satisfied – does not reflect the law in this State. Moreover, as the authorities make clear, one has to bear in mind the circumstances in which the Magistrate was required to deliver this ruling. This was a “three-headed” committal, with a number of witnesses assembled to give evidence. His Honour was required to deliver his ruling on the admissibility of evidence within a short period of time, having heard complex and detailed arguments on a difficult aspect of law.  4. The Commissioner's objection was to each of the three affidavits. However, the Magistrate confined his analysis to the first affidavit and there was no subsequent consideration of the other two affidavits or how his conclusion as to the first affidavit could be applied to the second and third affidavit. In so doing, the Magistrate fell into error and he should be required to reconsider the Commissioner's objection in relation to the second and third affidavits.  5. It was not disputed that there was a legitimate forensic purpose for P. seeking access to the affidavits. The issue was whether there was evidence available to the magistrate which permitted the conclusion that there was a reasonable possibility, or that it was “on the cards” that the contents of the AFP affidavits could have misled the AAT member.  6. The facts relied upon by the Magistrate in the context of the requirements of s42 and s46A of the *Telecommunications (Interception and Access) Act* 1979 entitled him to infer that the details of the s46 warrants and the information obtained from their use had been placed before the AAT member – but not to go the next step namely to conclude that there was a reasonable possibility that the AAT member or members had been misled. There was nothing in the historical matters, the issuing of the s46A warrants or in the construction of the legislation which permitted the Magistrate to draw this inference.  7. In the result, there was no evidence available to the Magistrate to conclude that it was on the cards, or a reasonable possibility, that the warrants were obtained as a result of an application made in bad faith or upon misleading material. Therefore, both error of law on the face of the record and jurisdictional error are made out.  8. Further, there was no probative evidence to support the logic utilised by the Magistrate in reaching his conclusion that there was a reasonable possibility of the information provided by the AFP as being misleading or in bad faith. The ground of illogical reasoning was made out as this was, patently, a crucial determination and therefore the error goes to jurisdiction. |
| **2** | **Principles applicable to a Notice to Produce**  In *Messade v Baires Contracting Pty Ltd* MC02/11, J Forrest J determined the principles which apply in relation to a Notice to Produce in civil proceedings.  1. The principles relevant to determining whether a party is required to produce documents under subpoena are:  (a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;  (b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;  (c) the applicant for the witness summons must also satisfy the court that it is “on the cards”, or that there is a “reasonable possibility”, that the documents sought under the subpoena “will materially assist the defence”.  (d) a “fishing expedition” is not a legitimate forensic purpose and will not be permitted;  (e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.  (f) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.  *Commissioner of Australian Federal Police v Magistrates' Court of Victoria & Ors* [2011] VSC 3; MC01/11, applied.  2. The notice to produce failed at the first hurdle – its purpose was neither legitimate nor forensically specific. It was far too wide. To endeavour to attack histories given to particular doctors would only be a legitimate forensic exercise if BP/L identified precisely in what way M.'s account to the doctors was inconsistent with the photographic evidence – assuming it existed. The submission did not descend to this detail – it was general, not limited to specific assertions made by M. to the doctors (such as what he was and was not capable of doing on the trip, or as another example, whether he was or was not working whilst away). The authorities demonstrate that the forensic purpose must be identified with precision. It has not been in the present case.  3. Also, there was no evidence to suggest (a) that such photographs existed; or (b) that it was 'on the cards' that such photographs (if they existed) would in some way impugn M.'s account to doctors, or contradict his evidence. This was the casting of a line with the hope that something may be caught in a very large pond. It was impermissible. |
| **3** | **Natural justice – family violence proceedings**  In *AB & Anor v Magistrates’ Court at Heidelberg & Ors* MC03/11 a consent order was made in relation to the a family violence matter. Mukhtar AsJ dealt with an appeal against the order as follows:  HELD: Appeal dismissed.  1. A mention hearing is an occasion on which the parties inform the Court about the state of the contest. That is, whether the matter is still proceeding, or whether interim orders are to be extended or varied by consent, or whether final orders can be made by consent. In the event that the order is to become contested, the purpose of the mention hearing is to fix a date for the hearing of a contest. In the meantime the interim orders can continue, without admissions, akin to an interim injunction. If no agreement can be reached on interim orders, then the Court can hear evidence for interim purposes on a standard under the *Family Violence Protection Act* 2008 ('Act'). In that regard, the legislation does not require that any alleged family violence be proved before an interim order may be made. What matters is the safety or well-being of the child. Matters are mentioned, then stood down to enable parties to discuss their differences and try to agree on interim orders at least. The philosophy, naturally enough, is to let parties reach an acceptable position for themselves on an interim basis, rather than have an imposed legal intervention. It stands to reason that Magistrates will encourage continuation of interim orders consensually without admissions to minimise the inflammation of family conflict with interim contests, and defer the contest to a final hearing when evidence can be adduced and carefully considered.  2. Every step the Magistrate took was within power. The Act by its nature and its purpose contains many provisions which place positive obligations on the Magistrate to intervene in the proceeding in the sense that the Magistrate must be independently satisfied of certain matters before they proceed to make decisions concerning intervention orders in cases of family violence. Above all, there are positive obligations on the Magistrate to have regard to the welfare of children. Thus, it is not just up to the parties to decide what is in the welfare of the children. It is an issue for the Magistrate as well in exercising a protective jurisdiction especially where there are serious allegations of a history of domestic violence.  3. In the present case the Magistrate was certainly concerned to carry out that statutory dictate. By and large, the legislation looks to the Magistrate to undertake or allow a form of inquisitorial justice. A demonstration of that is s78(5) itself. Another example is s81 which permits the Court to include in a family violence intervention order “any conditions that appear to the Court necessary or desirable in the circumstances”.  4. The Magistrate, in refusing to make a final order to which the parties consented, acted within power under s78(5). The exercise of the power is discretionary. Further, the refusal to allow the consent order was manifestly based on grounds under s78(5). The reasons for disallowing the consent order were obvious or apparent. The Magistrate believed that the consent order may pose a risk to the child, based upon the seriousness of the allegations made including the further particulars that day, and prevailing force of the pre-existing intervention orders. Those existing orders were based on a conclusion by the Court, presumably on the balance of probabilities under s53, that family violence had been committed by the two boys or that there was a risk that it might or in any event there was a risk to the child. In those circumstances, the brothers cannot mount an attack on the Magistrate for giving insufficient grounds for the belief that was formed. Whatever the expression “believes” means, the belief here was formed faithful to the purposes of the Act, and was justifiable.  5. The Magistrate was not bound to conduct a hearing into the particulars under s78(4). It was a matter of discretion. She was within jurisdiction without holding a hearing to form the view that the allegations were so serious that the exception being sought was unacceptable in the interests of the child. Moreover there were two subsequent occasions on which the Magistrate was ready to undertake the task of hearing the evidence that day from the mother so as to assess the strength of the allegations. On each occasion, no sooner had the prospect of evidence been instigated, counsel for the respondents spontaneously deterred the Court and gave consent.  6. The Magistrate did not commit jurisdictional error in suggesting or proposing a consent order that she would be prepared to make. To tell the parties that she would make a consent order if there were different terms was within power. To suggest what terms would be acceptable is part of the discourse that is necessary to understand the refusal of consent, and how to then advance the matter. Further, section 81(1) permits the Court to include any conditions that it regards as necessary or desirable in the circumstances. That, together with the inquisitorial features of the Act, unquestionably permits the Court to not only decline the consent order but to suggest or encourage orders that would be acceptable before the Court would give its consent. To sit there Sphinx-like, and simply refuse consent without suggesting alternatives adds to problems.  7. The Magistrate was doing no more than looking to direct the parties to a consent order on terms that she regarded protected the interests of the child. That is not jurisdictional error.  8. The inclusion of the condition that was eventually included in the consent order was within power. It was within power under section 81 and because by its nature requirement to keep the brothers away for the sake of the child fell squarely within the protective purposes of the Act.  9. Accordingly, the challenge to jurisdictional error must fail. |
| **4** | **Amendment of Pleadings after proceeding commenced**  In *Namberry Craft v Watson* MC04/11, Vickery J dealt with an appeal against a Magistrate’s decision in a civil matter whereby it was suggested that the pleadings be amended.  His Honour held:  HELD: Originating motion dismissed.  1. A decision by a trial judge to accede to an application for the amendment of pleadings is a discretionary decision provided there is power conferred on the judge to make such an order. In the present case it was for the applicant seeking the amendment to demonstrate under a proper reading of the applicable Rules of Court that leave should be granted.  2. The rules concerning civil litigation are no longer to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants.  *Aon Risk Services Australia v Australian National University* [2009] HCA 27; 83 ALJR 951; 258 ALR 951, applied.  3. The object of doing justice between the parties is not to be ignored. A just resolution of proceedings between the parties remains a critically important consideration, which will necessarily include as part of that process, a proper opportunity being given to the parties to plead and re-plead their respective cases, should that need arise and the circumstances are present to warrant the discretion being exercised in favour of the grant of the amendment. The principle that a civil trial should be conducted fairly to the parties is beyond controversy. It is a human right enshrined in s24(1) of the *Charter of Human Rights and Responsibilities Act* 2006.  4. Nevertheless, there are to be limits placed upon re-pleading. The High Court in *Aon* referred to a range of other considerations which need to be weighed in the balance in the exercise of the discretion to grant an amendment to a pleading. The High Court made reference to the following factors:  (a) Whether there will be substantial delay caused by the amendment;  (b) The extent of wasted costs that will be incurred;  (c) Whether there is an irreparable element of unfair prejudice caused by the amendment, arising, for example, by inconvenience and stress caused to individuals or inordinate pressures placed upon corporations, which cannot be adequately compensated for, whatever costs may be awarded;  (d) Concerns of case management arising from the stage in the proceeding when the amendment is sought, including the fact that the time of the court is a publicly funded resource, and whether the grant of the amendment will result in inefficiencies arising from the vacation or adjournment of trials;  (e) Whether the grant of the amendment will lessen public confidence in the judicial system; and  (f) Whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.  5. The Magistrate had power to grant the amendment pursuant to Rule 35.02 of the *Magistrates' Court Civil Procedure Rules* 2009 ('Rules'). This Rule should be construed with reasonable amplitude so as to arm a court with the necessary discretion to determine whether or not to grant an amendment. The interests of justice are best served by such a construction.  6. Even if the Rules are found wanting, in that they fail to cover the situation which occurred in this case, rule 1.12 of the Rules renders Order 36.03 of the *Supreme Court Rules* applicable to proceedings in the Magistrates’ Court, such as to confer the necessary jurisdiction on the Magistrate to make the order to amend which he did. Such rules exist to promote the attainment of justice, not to impede it. The Magistrate also had power to grant the amendment pursuant to rule 1.12 of the Rules, if it was necessary to rely upon this source of jurisdiction.  7. In light of the Magistrate's finding that the application to amend was brought as a result of analysis of the issues by the court, which was open, in the absence of other vitiating discretionary factors, in order to do justice between the parties the grant of the amendment was necessary.  8. Given the delay in the hearing of the matter, it could not be concluded that a fair trial conducted on the basis of the amended pleading would not be possible or at least compromised to the point where the amendment should not be permitted. Nor was there any basis for concluding that inordinate costs had been incurred or would be incurred by reason of the amendment nor any element of non-compensable prejudice being suffered by NCP/L. |
| **5** | **Rehearing of an appeal in relation to demerit points**  In *Sherman v Roads Corporation* MC05/10, Whelan J dealt with an appeal against a Magistrate’s decision to grant a rehearing where a party did not appear.  HELD: Application by originating motion dismissed.  1. In relation to the submission that there was no jurisdiction to make this order and that it was an error of law on the face of the record S. submitted that the appeal under s26AA of the *Road Safety Act* 1986 was not a proceeding within either the civil or criminal jurisdiction of the Magistrates’ Court but rather was a proceeding standing apart from the provisions of the *Magistrates’ Court Act* dealing with such proceedings.  2. S110 of the *Magistrates' Court Act* 1989 ('Act') applied to this proceeding. It is clear that the appeal was not a criminal proceeding and could be appropriately described as a civil proceeding in the context. Section 100 of the Act is not determinative of the issue even if it does operate as S. suggested. It would be extraordinary if there were no power to rehear a matter determined in the absence of a party.  3. In relation to the submission that the Roads Corporation was not a party to an appeal under s26AA of the *Road Safety Act* and that the Corporation had no power to seek a rehearing, that submission was rejected. The Roads Corporation is obviously a necessary and proper party to an appeal under s26AA. The Roads Corporation (called “Vic Roads”) was named by S. as a respondent to his appeal.  4. Accepting that an appeal to the County Court did not operate as a stay upon the conviction for the 15 February 2009 offence it was also clear on 14 September 2010 when the appeal under s26AA was dismissed, that S. did incur 13 demerit points during the relevant period. Accordingly, there is no basis in law for requiring the Roads Corporation to now alter their records in that respect.  [See [2011] VSCA; MC18/11, for result of appeal to the Court of Appeal] |
| **6** | **Procedure to be followed where a person is alleged to be in contempt of court**  In *Zukanovic v Magistrates’ Court at Moorabbin* MC06/11, J Forrest J dealt with an appeal against a Magistrate’s decision to summarily imprison a person who blew bubble gum in Court when facing the Magistrate.  HELD: Application granted. Decision of the Magistrate quashed.  1. There is no doubt that where a judicial officer perceives that there is a challenge to his or her authority, then that officer is entitled to take steps, including the laying of a charge of contempt, to preserve the authority of the Court. It is readily accepted that a Magistrate in a busy court is subject to many instances of untoward behaviour not usually encountered in higher courts and that the preservation of his or her authority is integral to the office and the interests of justice. However, in the application of the law – particularly that of a charge of contempt – firmness must be accompanied by fairness.  *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573, and  *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186, applied.  2. In the present case it was appropriate for the Magistrate to deal with this matter himself and to exercise summary jurisdiction. It would appear that he was the only witness to the asserted contempt which was committed in the face of the Court. Given that the Magistrate in this case was the only person who appeared to have perceived the “popping” of the bubble gum, it was reasonable for him to determine the charge himself. However, once the Magistrate decided to hear the charge there were two important propositions that had to be borne in mind. The first was that contempt of court is a criminal offence which has the potential (and as it transpired, the reality) to result in a period of imprisonment. As such it was essential that the Magistrate ensured that the rights of the alleged contemnor to a fair hearing were preserved. Second, as the authorities demonstrate, the Magistrate was required to proceed with great caution, because of the position he was in – namely witness, prosecutor and judge.  3. In light of the authorities and unambiguous statements of principle, a fair hearing of the charge of contempt against Z. required the following steps to be taken by the Magistrate prior to determination of the charge.  First, to set out the charge. This could be done either orally or in writing. What was essential was that Z. understood the charge the Magistrate was laying.  Second, to afford Z. the opportunity to consider the charge and if necessary, to seek further legal advice, or an adjournment or, perhaps, further particulars of the charge.  Third, to give Z. the opportunity to state whether he pleaded guilty or not guilty to the charge.  Fourth, in the event that Z. pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.  Then, having adopted this procedure, the Magistrate was required to be satisfied beyond reasonable doubt that Z. was guilty of the charge. In doing so, he was required to consider carefully all the evidence and keep at the forefront of his mind the unusual role he was undertaking in this process.  4. Nothing in what has been said should be taken to condone actions which constitute a deliberate contempt of court. The Court’s authority must be upheld and alleged contemnors should be subject to due process. But due process, particularly where the end result may be incarceration, must be accompanied by procedural fairness. Each concept is an essential pillar of the proper administration of justice in this State.  5. Often where *certiorari* runs against an inferior court or an administrative decision maker, directions are given by the Supreme Court as to the future disposition of the matter by the body or person whose decision is impugned. However, in the present case, the Supreme Court was not prepared to make any direction in respect of the future prosecution of the charge for several reasons. First, the charge could not, given what had happened, be determined by the Magistrate who laid it. It must be heard by another Magistrate and the difficulties associated with adducing evidence, although not insurmountable, were significant. Second, and perhaps more importantly, Z. had already been incarcerated for nearly half a day. Finally, it would be unfair, given what had happened in this case, to subject Z. to further process even if it be assumed that he would at that hearing be found guilty of contempt. |
| **7** | **Ordering costs against the Magistrates’ Court where Magistrate acted ‘perversely’**  In *Zukanovic v Magistrates’ Court at Moorabbin (No 2)* MC07/11, J Forrest J dealt with the question of whether the Magistrates’ Court should be ordered to pay costs where the Magistrate in MC06/11 was found to have acted ‘perversely’ in the legal sense.  HELD: Application granted. Order for costs made against the Magistrates' Court at Moorabbin.  1. Whilst orders against a Magistrate for costs are a rarity, they will only be made where there is either serious misconduct or where it can be concluded that the Magistrate behaved perversely.  *Magistrates' Court of Victoria at Heidelberg v Robinson* [2000] VSCA 198; (2000) VR 233; MC03/01, applied.  2. The word "perverse" is a word used to suggest something more than an error or manifest error and conveys some such notion as obstinacy or persistence in error. Where a Magistrate acts perversely he is disregarding his judicial position.  3. In Z'.s case, once the Magistrate perceived an arguable slight on the Court's authority he made up his mind as to how to deal with Z. and chose to ignore essential aspects of procedural fairness.  4. In dealing with the charge in less than a minute and in failing to give Z. any opportunity to answer it, the Magistrate did not exercise the caution necessary, indeed vital, in the circumstances. Here, the Magistrate’s exercise of judicial power extended to imposing a period of imprisonment. Notwithstanding judicial statements of the highest authority over many decades as to the procedure to be followed given the unique position he occupied, the Magistrate proceeded, hastily and without due process, to convict Z.  5. In the circumstances, the Magistrate acted perversely (in the legal sense as explained in *Robinson*) and that an order for costs should be made against the Magistrates' Court at Moorabbin. |
| **8** | **Relevant sentencing factors in Children’s Court matters**  In *DPP v Hills & Ors (Ruling No 11)* MC08/11 Kaye J dealt with the question whether general deterrence and denunciation are applicable factors in relation to the sentencing of children. Kaye J held:  1. General deterrence and denunciation are relevant when sentencing an offender who, at the relevant time, is a child for the purposes of the *Children, Youth and Families Act* 2005 ('Act').  2. A proper analysis of the sentencing provisions of the Act supports the conclusion that the factors referred to in s362(1) were not intended to be exclusive, and that in particular, they did not preclude considerations such as general deterrence and denunciation.  *H v Rowe & Ors* [2008] VSC 369, not followed. |
| **9** | **Legal Professional Privilege in relation to psychiatric reports**  The question of whether legal privilege applies in relation to a report from a psychiatrist in an Accident Compensation matter was considered by Habersberger J in *Qantas Airways Limited v Portelli* MC09/11. His Honour held:  HELD: Appeal dismissed.  1. The wording of s55A of the *Accident Compensation Act* 1985 ('Act') does not detract from the conclusion that the intention of the Act as far as the medical evidence is concerned is to have “the cards ... on the table ... face up”. It should not be overlooked that in s55AB and the other relevant sections of the Act, failure to provide the medical reports has consequences as far as the admissibility of the withheld evidence is concerned. No such provision is included in s104B(2) of the Act. The obligation to provide the documents is clear and absolute. Where the language of the statute is clear, legal professional privilege can be overridden.  2. Accordingly, s104B(2)(g) of the Act has abrogated legal professional privilege. This means that Q. was required to provide a copy of the psychiatrist's report to P., even if the dominant purpose of obtaining it had been for the giving of legal advice.  3. A different way of reaching the same conclusion would be to regard the dominant purpose of obtaining all assessments as to the degree of permanent impairment (if any) of workers as being to satisfy the requirement of s104B(2)(b) that such assessments be obtained. Thus, legal professional privilege would not arise even if it was intended, as a subsidiary purpose, to use the medical report in the giving of legal advice.  4. The result is, therefore, that each of the questions of law should be answered “yes”, which means that the appeal should be dismissed. |
| **10** | **Negligence – shed in kit form – value of manual**  In *Vale & Anor v Shanklyn Investments Pty Ltd* MC10/11, J Forrest J dealt with an appeal against a Magistrate’s dismissal of a claim for damages were a shed in kit form was being erected. J Forrest J HELD: Appeal allowed. Remitted for further hearing by the Magistrate.  1. The central point to V's claim was the inadequacies of the manual and its relationship to the shed's collapse.  2. The first issue to be determined by the Magistrate was the existence and scope of the duty of care. The Magistrate was undoubtedly correct in concluding that a duty of care was owed by SIP/L to V. This was a product liability case – the duty of SIP/L to take reasonable care extended to the provision of instructions or warnings with the components of the shed.  3. The next task was to determine the question of breach. This was to be resolved by the application of the principles set out in Part X of the *Wrongs Act* s48 which reflect to a large extent, but not entirely, the principles set out in *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40.  4. The issue of causation could not be properly resolved by looking at what approach V. had actually taken as that ignored the negligent omission which made out the breach. There had to be an analysis of what would have happened, hypothetically, if the manual had contained instructions concerning the early erection of the bracing. In determining the case on the basis of what happened in fact, not the hypothetical, the Magistrate fell into error. The question of breach was not dependent upon reliance.  5. All the evidence concerning the use of the manual had to be evaluated on this issue and then considered in the light of what the manual should have contained. On the balance of probabilities, would the roof bracing have been erected prior to the collapse? If so, the breach was a cause of the shed’s demise. If not, V's case would have failed.  6. The case is remitted to the Magistrate to determine the questions of breach of duty and causation in accordance with this judgment. |
| **11** | **Company Insolvency – Unfair preference**  In *Metcalf Crane Services Pty Ltd v Rathner* MC11/11 Robson J dealt with an appeal against a Magistrate’s decision whereby he found that a company had not proved that it had no reasonable grounds for suspecting that another company was insolvent at the relevant time.  Robson J dismissed the appeal:  1. After taking in account the authorities referred to and the question of law raised and the ground of appeal alleged, to successfully appeal under s109 of the *Magistrates' Court Act* 1989, the appellant must satisfy the Court that it was not reasonably open on the evidence for the magistrate to conclude that MC had not proved both of the elements of the statutory defence in sub-s2(b) of s588FG of the *Corporations Act* 2001 ('Act'). The point of law was whether the conclusion of the magistrate was reasonably open on the evidence.  2. There was no dispute that CCGV was insolvent at the time of the payments to MC and that they were unfair preferences within the meaning of s588FA of the Act and accordingly were insolvent transactions within s588FC. The court’s power to make orders, including repayment under s588F, was established.  3. MC bore the onus of establishing the statutory defence under s588FG(2) of the Act. The central issue before the magistrate was whether or not MC had proved the matters referred to in sub-s(2)(b).  4. The conduct of CCGV raised the inference that CCGV may have been unable to pay its debts as they fell due and that CCGV’s conduct in resisting MC's just claim was evidence of that inability.  5. The conduct of CCGV may well have been consistent with a desire to delay payment. But the issue before the magistrate was whether MC had proved that they had no reasonable grounds for suspecting CCGV was insolvent at that time and a reasonable person in MC's position would have no such grounds for suspecting. Suspecting involves more than idle wondering and must be a positive feeling of actual apprehension or mistrust without sufficient evidence. Suspecting is a state of mind that may not be evidenced by any outward conduct on the part of the person suspecting. In such cases it is a question of inference from the information available to that person whether or not the person relevantly suspects.  6. The relevant statutory test asks whether MC proved that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting that the company was insolvent. A Court should not consider the evidence with the benefit of hindsight and should consider the cumulative impact of the relevant evidence both for and against establishing absence of the relevant suspicion. The mere failure to pay debts on time does not by itself constitute grounds for suspecting insolvency.  7. The evidence before the Magistrate left reasonably open the conclusion that MC had not proved that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting (being a state of mind in the relevant sense) that CCGV was insolvent when the settlement was reached. Accordingly, the appeal was dismissed with costs. |
| **12** | Whether an unwelcome kiss amounts to an indecent assault  In *Sabet v The Queen* MC12/11 an appeal was heard by the Court of Appeal in relation to a conviction of a person for indecent assault where the person had made an unwelcome kiss.  HELD: Appeal allowed. Conviction and sentence set aside.  1. To constitute an indecent assault, the act must be 'indecent', as unbecoming or offensive to common propriety and an affront to modesty or offending the ordinary modesty of the average person.  2. A specific requirement of a charge of indecent assault is that the assault be accompanied by sexual connotations.  *R v Harkin* (1989) 38 A Crim R 296, applied.  3. Even where an assault is not such as unequivocally to offer a sexual connotation, it may still constitute an indecent assault if accompanied by an intention of the part of the assailant thereby to obtain sexual gratification  *R v RL* [2009] VSCA 95, applied.  4. On the evidence before the jury in respect of the charge of indecent assault, the jury could not have been satisfied beyond reasonable doubt that S. was guilty of indecent assault. The gist of the evidence of the complainant was that S.'s kiss was unwelcome. However, circumstances of indecency have not been made out in this instance, as would support a verdict that S. was guilty of indecent assault. |
| **13** | **Trespass by Vic Roads Officers**  In *Brown v Spectacular Views Pty Ltd* MC13/11, Macaulay J dealt with an appeal against dismissal of charges brought by Vic Roads officers in respect of a person’s conduct in relation to a tow truck operation.  HELD: Appeal dismissed.  1. In the present case the officers had a tacit or implied licence to be on the premises. They were business premises with an unobstructed means of access and with an open door permitting members of the public to enter a front office for a lawful purpose. What was in dispute was whether that implied licence was effectively revoked.  2. The evidence which enabled the Magistrate to form the conclusion that E. (or the companies of which he was an agent) was in possession of the premises were firstly, that he was physically in occupation of the building, and occupied an office within it; secondly, he told the Vic Roads officers that he was ‘the boss’ and they were to deal with him; thirdly, B. gave evidence that he believed E. to be the boss at the premises; fourthly, the reasons E. gave why the relevant tow truck records were not kept at the Mulgrave premises E. told them and fifthly, the signage on the building contained the names of Ultra Finish, Advanced Towing and Armstrong Towing, all of which were a reference to companies of which E. was either a director or accepted to be in charge.  3. In relation to the question whether E. revoked the officers' implied licence to remain on the premises, it was open to the Magistrate to conclude that the licence was revoked having regard to the use on several occasions of the words 'get out' and the words uttered by E. in the context of the whole exchange between E. and the officers.  *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427, applied.  4. In relation to the question whether the officers lawfully made a demand for the 'authority to tow' prior to being asked to leave, it was not clear what demand the officers were making, that is, whether for 'authority to tow' forms or something else. The officers were only protected from being trespassers if they expressed their demand in 'unmistakable and unambiguous language'. There was no evidence to establish that the 'dockets' requested were in fact 'authorities to tow'. Accordingly, it was open to the Magistrate to conclude that the relevant request had not been made before the demand to leave was made.  5. The delegations under the *Transport Act* 1983 and *Road Safety Act* 1986 did not appoint either of the officers as an ‘authorised officer’ for the purpose of reg 8(d), the critical regulation for present purposes. Accordingly, unless some other source of power existed to authorise the officers to make the demand on E. that he produce the authority to tow forms (even if that is what ‘dockets’ is taken to mean) then any request they might have made of E. to produce them was not lawful. Thus, by failing to leave when requested to do so by E., the officers became trespassers. Also, there was no evidence to suggest that the officers purported to exercise the power under s112(1)(a) of the *Road Safety Act* 1986 to carry out inspections and searches of heavy vehicles and premises.  6. *Obiter*. In relation to the charge alleging assault by E. on officer B., an assault is any act of one person which directly, and either intentionally or negligently, causes another person to immediately apprehend unlawful contact with his or her person. It is clear that whilst a person must be placed in a reasonable apprehension of imminent unlawful contact, it is not necessary that they anticipate fear, however it is usually the case that they will.  7. The Magistrate did not formulate an inappropriate test for assault. Properly understood, her Honour stated in a shorthand way, that she was not satisfied that either officer apprehended immediate unlawful contact, nor were they in the throes of fear. Her Honour made clear her application of the correct test at law. |
| **14** | **Admissibility of opinion evidence from a Psychologist**  In *R v Dupas* MC14/11, Hollingworth J dealt with the question whether expert evidence from a psychologist was admissible on the trial of a person charged with murder.  HELD: Application refused.  1. Section 79 of the Act contains an exception to the opinion rule. The opinion rule is contained in s76 of the Act, and provides that “Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.”  2. Section 79(1) provides that “If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”  3. Section 80 is also relevant, as it provides that evidence of an opinion is not inadmissible only because it is about (a) a fact in issue or an ultimate issue; or (b) a matter of common knowledge.  4. The psychologist in his report outlined scientific research conducted on human memory and the ways in which memory can be affected by exposure to "post-event information". He said research shows that people can incorporate information that they acquire after an event into their memory of the event without being aware that they have done so. Such information includes information from media sources such as newspapers and television.  5. The psychologist was allowed to give general evidence about exposure to post-event information and its effect on memory. Given the psychologist's own acknowledgement that the research did not allow him to say that post-event information had any impact on the memory of any particular witness, such an opinion was not admissible. Accordingly, that evidence was not allowed to be led from the psychologist but that ruling did not preclude defence counsel from attacking the reliability of the evidence of the witnesses through cross-examination and/or by way of closing address.  6. In relation to the photoboard evidence, the psychologist referred to experimental psychological research which had been conducted in factors which affect the accuracy and reliability of identification evidence collected using photoboards.  7. Had the psychologist opined that the photoboard was biased or unfair based on the results of testing conducted using the established research methods to which he referred, that may well have involved the expression of an opinion based on specialised knowledge. But he had done no such testing. Rather, he had simply given his subjective opinion, based on what he personally saw when he looked at the photoboard. Such an opinion was not one based wholly or substantially on any specialised knowledge, and was therefore not admissible under s79 of the Act. Accordingly, the psychologist was not allowed to express the proposed opinion. |
| **15** | **Magistrates erquired to give reasons for judgment**  In *Brown v Tabro Meat Pty Ltd* MC15/11 Kaye J dealt with an appeal in relation to a dismissal of an application pursuant to the *Accident Compensation Act* and the reasons the Magistrate gave for the dismissal.  1. A requirement to give reasons for decision is based on two principal considerations. First, a failure by a judge or Magistrate to provide adequate reasons for decision can give rise to a legitimate sense of grievance on the part of the losing party, which is left in ignorance as to why the decision, adverse to its interest, has been made. That consideration is closely related to the public interest in maintaining the community’s acceptance of judicial decisions, and in maintaining the perception of the integrity of the judicial process. The second consideration is that, in cases in which an appeal lies, the provision of adequate reasons for judgment identifies to the appellate court the reasoning and basis upon which the decision, under appeal, is made. The provision of such reasons is thus important in ensuring that the losing party maintain its rights of appeal.  2. The nature and extent of the reasoning which is required of a court must necessarily depend upon the particular circumstances of the case.  3. There are three fundamental elements of an adequate statement of reasons, namely: the judge should refer to relevant evidence; the judge should set out any material findings of fact and conclusions, or ultimate findings, of fact reached; and the judge should provide reasons for making the relevant findings of fact (and conclusions), and reasons in applying the law to the fact so found.  *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 440, applied.  4. In the present case it is clear, from the Magistrate's reasons, that he did not rely on one single factor, alone, to conclude that the appellant was not a witness of truth but reached his conclusion, as to the credibility of the account given by the appellant, based on a combination of the six factors, which he expressly identified in the last sentence of paragraph 14 of his reasons.  5. Where a court assesses the credibility of the witness in the light of a number of different circumstances, generally that assessment of the witness’s credibility is not conducted by a process, in which the various factors are considered and analysed in isolation from each other. Not uncommonly, it is the coincidence and concatenation of a number of factors, acting together, which constitutes the basis upon which the court ultimately makes its determination as to the credibility of a particular witness. In such a case, it is the united and combined force of a number of different items of evidence, and the coincidence of them in the particular case, which constitutes the basis for the finding in relation to a particular witness’s credibility. In that process, while each particular factor, relied on by the court, might be susceptible of an explanation, it is the combined weight of them which ultimately produces the court’s conclusion in relation to the particular witness’s truthfulness.  6. In the circumstances of the present case, the Magistrate was not required to give reasons why he did not accept the evidence given by the plaintiff in respect of the six factors, on the basis of which the Magistrate concluded that the plaintiff was not a witness of truth. The Magistrate clearly identified the particular factors, on the basis upon which he rejected the appellant’s truthfulness on the critical issue as to whether the incident of 5 February 2009, alleged by the appellant, in fact occurred. The identification of those factors, by the Magistrate in his reasons, was sufficient to satisfy the relevant legal principles.  7. As the appellant has not established that there was any relevant error of law by the Magistrate the appeal should be dismissed. |
| **16** | **Claim for interest where amount recovered in civil proceedings**  In *Healthscope (Tasmania) Pty Ltd & Anor v Australian Hospital Care Pty Ltd & Anor (No 2)* MC16/11, Sifris J dealt with an application for interest in respect of an amount recovered in a civil proceeding.  Where interest is payable from the time when a valid demand of payment was made, and a date in 2005 was said to be sufficient, the applicant must show good cause why interest should not run from that date. Good cause may arise out of a substantial delay between the date of the demand (February 2005) and the commencement of proceedings in 2008. The period between February 2005 and the commencement of proceedings in 2008 was too long and the delay unexplained and unreasonable. Accordingly it was just and reasonable to allow interest from the date of the commencement of proceedings and not earlier. |
| **17** | **Natural Justice – right to legal representation**  In *Tomasevic v Toll Holdings Ltd & Ors* MC17/11, Mukhtar AsJ dealt with an appeal against a Magistrate’s order in relation to a claim for damages arising from a motor vehicle accident.  1. No application for an adjournment was sought therefore T. was not denied natural justice.  2. The Magistrate's refusal to allow T's father to act as his advocate was not a denial of natural justice. It is a duty of a judge or Magistrate in exercising relevant judicial powers and discretions to ensure a fair trial and to provide assistance to a self-represented litigant. Such an obligation, plain enough, is said to be consistent with international obligations specified in the International Covenant on Civil and Political Rights. This obligation requires a judge to intervene where this is necessary to ensure the trial is just and fair. In the present case, the Magistrate did precisely that.  *Tomasevic v Travaglini* [2007] VSC 337, MC38/07, referred to.  3. It will be a question of law if an appellant can show that there was some departure from the requirements of procedural fairness or natural justice. The Supreme Court is not concerned with the merits of the decision but only with the conduct of the proceeding below to see if it in some way deprived the plaintiff of a fair hearing. Enough in this case to state, resolutely, that there is not a particle of evidence that there was denial of natural justice. The proceedings were conducted in an orderly and fair fashion and T. was given every opportunity to give his explanation for how the accident occurred, and he did so. Naturally, there is an imbalance of skill of advocacy as between a barrister and a litigant in person. But nothing in this case supports the view that it was somehow abused or permitted by the magistrate to be abuse in any way so as to obscure a proper revelation of the facts. |
| **18** | **Right of absent party to a rehearing**  In *Sherman v Roads Corporation & Anor* MC18/11, The Court of Appeal (Mandie JA and Almond AJA) heard an appeal from the decision in MC05/11 as to whether a person who did not appear in relation to a demerit points application had standing to seek a rehearing. The Court held:  authority of the HELD: Appeal dismissed.  1. In relation to a preliminary point raised by S., namely, that the Corporation was not a necessary or proper party to a s26AA appeal and had no standing to seek a rehearing (or indeed to appear) in this proceeding or appeal, this contention is rejected. It is obvious that the Corporation must be entitled to appear and to dispute the grounds of appeal (albeit somewhat limited) set out in s26AA of the Act. This is confirmed by the provision requiring service on the Corporation not less than 14 days before the hearing date. The argument that the Corporation is not a proper party to such an appeal is without foundation.  2. In relation to the question whether the Magistrates' Court had power to rehear S.s appeal pursuant to s26AA of the Act, it is open to characterise a s26AA appeal as a 'cause of action' under statute within the meaning of s100(1)(d) of the *Magistrates' Court Act* 1989. However, the contrary is arguable whereby it could not be said that S. had no prospect of succeeding in his submission.  3. It was submitted that even if the Magistrates' Court had no power to rehear the s26AA appeal under s110 of the *Magistrates' Court Act* 1989, the Magistrates' Court had an inherent discretionary power to set aside an order made in the absence of a party and to rehear the matter the subject of that order.  *Taylor v Taylor* [1979] HCA 38; (1979) 143 CLR 1; and  *Cameron v Cole* [1944] HCA 5; (1944) 68 CLR 571, referred to  4. It is inconceivable that the Magistrates' Court does not have a discretion to rehear a s26AA appeal decided in the absence of the Corporation pursuant to an inherent jurisdiction or power to do so. Accordingly, S's principal argument has no prospect of success.  5. At the time of the s26AA appeal that took place in the absence of the Corporation on 1 February 2010, the suspension of S's driver licence was in existence, albeit stayed pending the result of that appeal. The consequence of the appeal being allowed was that the suspension was set aside. However the necessary consequence of the grant of a rehearing of that appeal was that the ‘allowing of the appeal’ by the Magistrates’ Court was itself set aside by virtue of the order for a rehearing. This had the additional consequence of reviving the suspension, although it remained stayed pending the result of the rehearing of the appeal. S.s argument that there was no valid suspension because of the missing two points was no more valid in relation to the rehearing of the appeal than it was in relation to the initial hearing of the appeal. The argument that the addition of the points was incorrect remained to be determined once a rehearing of the appeal was granted. By the time that determination came to be made, S's conviction had had the effect that the said two points were taken to have been properly incurred and there was no longer any basis for challenging the suspension. |
| **19** | In *Priest v West & Anor* MC19/11, the Court of Appeal (Maxwell P, Harper JA and Kyrou AJA) considered an application by the Attorney-General for leave to appear as a Friend of the Court. In refusing the application, the Court held:  1. The role of a friend of the court is to provide assistance – on a matter of law or fact – which the court would not otherwise receive. In contradistinction to the position of a person seeking leave to intervene as a party, a person seeking leave to appear as a friend of the court does not need to demonstrate that his or her interests may be affected by the outcome of the proceeding. Typically, a friend of the court will be independent of the parties and neutral about the outcome of the proceeding, although neither independence nor neutrality is a prerequisite to the grant of leave.  2. Where a person is given leave to appear as a friend of the court, he or she does not become a party to a proceeding and hence has neither the rights nor the obligations of a party, such as the right to appeal and the obligation to pay costs. By contrast, a person who is given leave to intervene as a party enjoys all the benefits, and bears all the burdens, of a party to the proceeding.  3. The court has a broad discretion to allow a person to appear as a friend of the court. Where it is in the interests of justice to do so, the court can hear a friend of the court by allowing him or her to make oral submissions or to file written submissions, or to do both. Only in an exceptional case will a friend of the court be permitted to adduce evidence or to raise a new issue or special defence.  4. The court’s power to grant such leave is not limited to any particular individuals or organisations or to any particular types of cases or circumstances. The individuals or organisations may include the holder of a non-governmental office, a Minister of the Crown, a public interest body, or a professional organisation.  5. Ordinarily, the court will not grant such leave unless it is of the opinion that the person will be able to assist the court in a way that the court would not otherwise have been assisted.Even when that criterion is satisfied, the court will need to be persuaded that the grant of leave will not result in additional costs to the parties, or delay in the proceeding, which would be disproportionate to the assistance expected to be derived.  6. Where the Attorney-General's contention was that, because of his ‘particularly informed perspective’ on the Coroners Court, he was ‘uniquely positioned’ to assist the Court in this appeal, the assistance would, so it was said, be directed at ‘contextualising’ the issues of statutory interpretation which are raised by the grounds of appeal.  7. The fundamental obstacle in the way of the Attorney’s application in the present case was that he was unable to point to any matter, whether of fact or law, likely to arise in this appeal on which the Attorney could provide assistance which the Court would not otherwise receive from the parties themselves.  8. A friend of the court may be heard only ‘if good cause is shown for doing so and if the court thinks it proper [to do so].’ A non-party’s desire to be present in case something is said, or omitted to be said, by the parties which might warrant the non-party making submissions to the court is not ‘good cause’ and – certainly where (as here) one of the parties opposes the course – the grant of leave in such circumstances would not be ‘proper’.  9. Finally, the Attorney-General has failed to show that the parties ‘are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case.’ |
| **20** | In *Tatana v DPP (Cth)* MC20/11, two questions arose whether a magistrate’s striking our order was a final order capable of appeal and whether a private party remains a party to a criminal proceeding when the DPP takes over the prosecution. Mukhtar AsJ held:  Appeal dismissed.  1. T. had no standing to bring the appeal because he was not a party to a criminal proceeding as required by s272 of the *Criminal Procedure Act* 2009.  2. When the DPP takes over a matter, he does so to the exclusion of the former prosecutor. Therefore, the former prosecutor has no standing and becomes entirely removed from being a party to the action. It was no longer the prior prosecutor’s “matter” at all and the only powers of appeal were vested in the Director, faithful to the whole idea that the taking over of the prosecution is done to instil the independence of the office of the Director.  *Price v Ferris* (1994) 34 NSWLR 704, followed.  3. It is now established that a decision to strike out a proceeding is not an adjudication of the merits of the proceeding, and is therefore not a final order. Although the words “final order” in section 272 of the *Criminal Procedure Act* are not defined, much judicial discourse has taken place on the issue when it comes to a distinction between a final order and its antonym, the interlocutory order. The distinction is not always easy to draw but the determinative test is whether the order finally determines the rights of the parties having regard to the legal, rather than the practical effect of the judgment or order.  4. In the present case T's appeal was not legally competent because the Magistrate's order in striking out the charges was not a final order. |
| **21** | In *R v Lubik (No 2)* MC21/11 the accused applied for certificates from the Appeal Costs Fund where the hearing had been adjourned by the court. Robson J held:  Certificates were awarded in respect of certain days but not in relation to those days when the Court adjourned to consider the rulings sought by L.  1. The application of s17 of the *Appeal Costs Act* 1998 is a two stage process. The first stage is to determine whether the Court's jurisdiction to grant a certificate is enlivened. The second stage is, if the Court's jurisdiction is enlivened, the exercise of the Court's discretion as to whether or not to grant a certificate.  2. A further condition of the court’s jurisdiction being enlivened is that the Court may only grant an indemnity certificate if it is satisfied that—  (a) it is inappropriate to make an order for costs against any party or any other person; and  (b) the reason for the adjournment was as set out in subsection (1)(b).  3. Whilst the adjourned days on which the Court reserved to consider the rulings sought by L. were not attributable in any way to the act, neglect or fault of L. or his legal practitioners, the “act” referred to in the Act must be an act other than counsel making proper submissions on behalf of his client during the normal course of the trial. Whilst it is not necessary to fully characterise what is involved in an “act” for the purpose of the Act, it does not cover L.'s application for a ruling.  4. Accordingly, a certificate was granted in the case of all the adjourned days save for those adjourned to consider the rulings sought by L. The adjournment on those occasions were a readily foreseeable consequence of the extensive submissions made on behalf of L. about the exclusion of certain evidence. L. should have readily anticipated that the court would require time to consider the lengthy and detailed issues raised and make the rulings sought of the Court. His expenses for those days were not an expense that should be thrown on the appeal costs fund. It was an expense that L. should have expected to incur. It was not an expense that had been thrown onto him through the actions of others for which he should have been compensated. |
| **22** | In *Hodgson v Amcor Ltd (No 5)* MC22/11, Vickery J has to decide whether a solicitor’s file (or part thereof) was admissible as a business record. HELD: (1) The document was an internal record of the firm and admissible in evidence. (2) The file note from the other firm of solicitors was admissible as a business record but excluded from evidence.  1. The word "records" is not defined in the Act but its concept is a broad one. It is said to include a history of events in some form which is not evanescent although it connotes the idea that information is kept in an organised form accessible in the usual course of business and generally connotes documents truly regarded as internal records in respect of the company's business.  2. The document of the firm of solicitors was an internal memorandum, in which a solicitor within the firm sought advice from another solicitor within the same firm as to a particular business in order to advise clients of the firm. In those circumstances, it fell within s69(1) of the Act and was therefore able to be admitted as such.  3. In relation to the undated file note of an unidentified person from another firm of solicitors, whilst it may have been admissible as a business record, given its rather cryptic nature and confusing elements in it, it should not be admitted into evidence. Such probative value as it might have, given the shortcomings as to the proof of the document and its precise meaning, were substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or be confusing. |
| **23** | In *Hodgson v Amcor Ltd (No 6)* MC23/11, Vickery J dealt with an application by a party to examine a witness by asking non-leading questions. HELD: Application granted.  1. Whilst the nature of cross-examination is not defined in the Act, the common law has long provided that cross-examination may consist either of non leading questions being put to the witness or more commonly, leading questions being put. The court retains control over the questioning of a witness.  2. Being satisfied that the matters upon which counsel sought to examine the witness were relevant to his case and in the interests of conducting a fair trial, examination of the witness was allowed to take place.  3. The Court set out the procedure to be followed. See [27]. |
| **24** | In *CL (a minor by his Litigation Guardian) v DPP & Ors* MC24/11, the Court of Appeal (Warren CJ and Sifris AJA) dealt with an appeal from a trial judge’s decision that the Children’s Court did not have jurisdiction to determine a child’s fitness to plead. HELD: Summons dismissed.  1. In relation to procedural issues, having regard to the peculiar procedural circumstances of the case, the application for the extension of time would be granted.  2. The order made by the trial judge was an interlocutory order. Orders refusing judicial review of a ruling made in criminal proceedings in the Magistrates' Court have been held to be interlocutory orders.  *Hornsby v Kaschke* [1999] VSCA 153; [1999] 3 VR 27, and  *Kassionis v Magistrates' Court of Victoria* [2002] VSCA 73; MC11/02, applied.  3. The order of the trial judge did not dispose of the principal cause, namely the pending charges or the guilt or innocence of the applicant. Although resolving an important matter, the order was ancillary to the principal cause. A matter does not cease to be interlocutory merely because it finally disposes of or resolves an important matter or issue. As long as it does not determine the rights of the parties in the principal cause, an order will usually be interlocutory.  *Dodoro v Knighting & Anor* [2004] VSCA 217; (2004) 10 VR 277, applied.  4. The critical question to be determined was whether the Children's Court had jurisdiction to hear and determine the question of fitness to plead.  5. In seeking to resolve this critical question, the trial judge had regard to the *Crimes (Mental Impairment and Unfitness to Be Tried) Act* 1997 ('CMI Act') and gave particular emphasis to s7 of that Act, which provides that the issue of a person's fitness to be tried is a question of fact and ‘... is to be determined on the balance of probabilities by a jury empanelled for that purpose.’ His Honour held that the CMI Act, a comprehensive Act dealing with the very issue, did not specifically or expressly vest the Children's Court with jurisdiction to determine the issue of fitness to plead. If the intention was to include the Magistrates' Court, it would and should have been included.  6. His Honour held that although the defence of mental impairment could be raised in the Magistrates' Court and therefore the Children's Court (s5 of the CMI Act), the question of fitness to plead was a distinct anterior question from the defence of mental impairment. Fitness to plead concerned the capacity of an accused or defendant to participate in the curial process by understanding the significance of a plea and inability to give proper instructions.  7. There was no error in his Honour's decision to the effect that the CMI Act does not confer any jurisdiction on the Children's Court, whether expressly or by necessary implication.  *C L (A minor) v Tim Lee and Ors* [2010] VSC 517,  8. Further, the *Children, Youth and Families Act* 2005 ('CYAF Act') contains no express conferral of jurisdiction and there was no warrant for implying jurisdiction in relation to such an important matter as fitness to plead.  9. The trial judge also rejected the applicant's claim that s356(3) of the CYAF Act ought to be construed so as to vest jurisdiction in the Children's Court to deal with fitness to plead issues. His Honour found that in light of his reasons, this interpretation was not a possible interpretation and accordingly, s32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 was not attracted. No error had been demonstrated in relation to this issue. |
| **25** | In *Ellis v Caine* MC25/11, the defendant was convicted of an offence under s123(2) of the *Family Violence Protection Act* 2008 and sentenced to a term of imprisonment. The original order was made under the provisions of the *Stalking Intervention Orders Act* 2008. On appeal, Beach J allowed the appeal, set aside the conviction and the proceeding was remitted for further hearing and determination by the Magistrates' Court as originally constituted.  1. On no basis could it be said that E. committed an offence under s123(2) of the *Family Violence Protection Act*. It was sufficient to say that the evidence given before the Magistrate well justified a conclusion that E. breached the original order made under the *Stalking Intervention Orders Act*. That breach did not constitute an offence under s123(2) of the *Family Violence Protection Act* – rather, it constituted an offence under the equivalent section in the *Stalking Intervention Orders Act*, namely s32 of that Act.  2. There was some doubt as to whether the slip rule had any application in this case. Any application to amend would have to be made in the light of s8 of the *Criminal Procedure Act* 2009. Consistently with the submission that the learned Magistrate in reality made a finding of guilt under the *Stalking Intervention Orders Act*, the respondent wished to have the opportunity to make an application for an amendment. Having regard to the way the case had been conducted to date, the respondent should have that opportunity. However, the question of any amendment to the charge was one to be determined by the Magistrate on proper material, rather than by the Supreme Court.  3. Accordingly, the appeal was allowed and E.'s conviction set aside. Notwithstanding E.'s arguments as to the likely lack of success of any application to amend, the appropriate order was to remit the proceeding for further hearing and determination by the Magistrates’ Court as originally constituted. |
| **26** | In *Rodin v Voyler Pty Ltd* MC26/11 the question of wording in a Real Estate Agent’s Contract came up for interpretation. Words inserted in the authority were that the relevant period commenced “60 days from date of certificate of occupancy granted”. The magistrate held that the relevant date was the date when the Authorities were signed. In dismissing the appeal, Emerton J held: 1. The Court was presented with competing constructions of the Authority and, in particular, the words inserted by the parties for the Exclusive Authority Period. One construction accorded with common commercial sense; the other, more literal meaning, did not make commercial sense. In such circumstances, the Court may interpret the agreement to accord with commercial common sense. The way in which this could be done in the present case was to interpret the Exclusive Authority Period to commence on the day the Authority was signed and to continue until “60 days from the date of the Certificate of Occupancy granted”.  2. It is very unlikely that a professional real estate agent would have accepted the uncertain and protracted arrangement for which R. contended. Such an arrangement would flout business common sense. The argument put on behalf of R. that it was open to VP/L to sell the units before the Exclusive Authority Period commenced and that the agent would have been entitled to some kind of recompense for the work he performed in selling the units – albeit not commission – does not cause any change of view. There is no reason why the agent would enter into an agreement that required him to seek recompense for his work on such an ill-defined basis.  3. Accordingly, it was necessary to interpret the words describing the Exclusive Authority Period so that the period commenced on the day that the Authority was signed. To reach such a conclusion was not to interpret the Authority so as to turn a poor bargain into a reasonable one. Rather, it was to give the words a meaning which accorded with business common sense and was consistent with the surrounding circumstances as found. The alternative, albeit more literal, meaning would result in an arrangement that flouted business common sense.  4. Having regard to what reasonable persons in the position of the parties would have understood the words to mean by reference to the text of the Authority, the surrounding circumstances known to the parties and the purpose or object of the agreement between them based on the evidence accepted by the learned Magistrate (but excluding post-contractual conduct), the proper construction of the Authority and the Exclusive Authority Period was as contended for by VP/L.  5. There was, therefore, no error in the conclusion reached by the learned Magistrate that the Exclusive Authority Period commenced upon the signing of the Authorities and that VP/L was entitled to be paid commission pursuant to the terms of the Authorities for any sale effected during the period commencing on that date and concluding 60 days after the issuing of the certificate of occupancy for the unit.  6. This construction reflects the parties’ intentions that the words “60 days from the date of the certificate of occupancy granted” meant “until 60 days from the date the certificate of occupancy is granted”. It was not necessary to rectify the Authority to achieve this purpose, because the Court can supply words where, as a matter of construction, in the surrounding circumstances, it is clear that a mistake has been made. |
| **27** | In *DPP v Kypri* MC27/11, the Court of Appeal (Nettle, Ashley and Tate JJA) heard an appeal from the dismissal of a drink/driving charge where the charge laid by the informant failed to specify which of the various statutory requirements under s55 of the *Road Safety Act* 1986 were relevant. In allowing the appeal and remitting the matter to the magistrate for consideration of whether the charge should be amended, the Court held: 1. Section 49(1)(f) of the Act creates but one offence (of having a blood alcohol concentration greater than the prescribed percentage) albeit that the offence may be committed in a number of different circumstances. Contrastingly, s49(1)(e) creates as many different offences (of failing to comply with a requirement under s55) as there are different kinds of requirements under s55.  2. The proper characterisation of an act which comprises an offence under s49(1)(e) is one of failure to comply with a particular kind of requirement under s55. It follows that, in order to identify the act which comprises the offence, it is necessary to identify the particular kind of requirement under s55 with which it is alleged that there was non-compliance. Hence, it was an essential element.  3. Where the charge and summons did not allege sufficient facts to enable a reasonable defendant to determine *ex facie* the sub-section of s55 under which the requirement is alleged to have been uttered, the charge was defective because it failed to convey the nature of the offence alleged.  4. If the police brief in this case were provided to K. before the expiration of the limitation period, and its contents were such as to enable K. to understand that the case alleged against him was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because K. had undergone a preliminary breath test and in the opinion of the informant it indicated that K.'s breath contained alcohol, it would be open (and, other things being equal, it would be appropriate) to amend the charge to make clear that the reference to s55 is a reference to sub-section (1) of s55.  5. The magistrate having embarked on a consideration of whether the defect in the charge in this case should have been amended, as he was right to do, the questions which the magistrate needed to decide were as follows:  a) Whether, before the expiration of the limitation period, the police brief was supplied to the defendant or his representatives and whether it made clear that the case alleged against the defendant was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent’s breath contained alcohol;    b) If so, whether the defendant was able to point to anything which showed that he could not reasonably have understood that the case alleged against him was one of failing to comply with a requirement to accompany the informant to a place for the purposes of a breath test, which requirement was made because the respondent had undergone a preliminary breath test and in the opinion of the informant it indicated that the respondent’s breath contained alcohol; and  c) If not, whether there was any reason, in those circumstances, which would render it unjust to allow the charge to be amended so as to make specific reference to s55(1) (and thereby to make the form of the charge accord to the case which the defendant had always understood was alleged against him).  6. Accordingly, the appeal was allowed, the magistrate's order dismissing the charge quashed and the matter remitted to the magistrate for reconsideration of whether the charge should be amended. |
| **28** | In *Silberman v Citigroup* MC28/11, Mukhtar AsJ heard an appeal from an order made by a magistrate in relation to a person who had defaulted in payment of his credit card. In dismissing the appeal, His Honour held: 1. The paramount question before the magistrate was whether S.'s personal circumstances attracted the provisions of s70 of the Consumer Credit Code so as to make the relevant transaction unjust. Under that section, in determining whether a credit contract is unjust in the circumstances, the Court can have regard to the public interest and to all the circumstances of the case and (as was relevant in this case), could have regard to any of the following:  (b) the relative bargaining power of the parties;  (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor ... and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;  (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable enquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.  (o) any other relevant factor.  2. The purpose of the *Consumer Credit Code* is, broadly speaking, to protect consumers from unfair or improper practices by credit providers. Provisions such as s70 are designed to relieve borrowers from certain consequences of “unjust” dealings where some unfair advantage has been exerted, possibly exploitative, but overall looking to protect the weak, the uneducated, the impoverished or the irresponsible or (for those not so unfortunate) to protect those who are not able to conserve their own interests and might fall prey to the attraction of available money when they cannot afford to incur the repayment obligation. Other descriptions can be used, but that is the essential purpose of the section. Here, S. was educated, a practising lawyer, and a man possessed of business and financial acumen. Whilst that does not make him impervious to unfair pressure or tactics, or incapable of exploitation, the evidence in the case naturally defied any sense of an individual being treated unfairly or whose interests this piece of consumer law was really meant to protect.  3. The Magistrate found as he was bound to, that the relative bargaining power of the parties under s70(2)(b) was simply not a factor. S. was a highly educated and highly intelligent person, not to mention a qualified lawyer. The transactions here were not the outcome of any “bargaining”. That term means the ability of one party through a contract of adhesion or some other economic ascendancy to insist on certain terms which in the circumstances might be thought to be unfair or unjust. But there was no such situation here at all. The credit provider was offering an increase in facilities. It was not exerting itself or exercising any economic or financial ascendancy.  4. Section s70(2)(j) refers to the exertion of unfair pressure or unfair tactics. S.'s case was that in providing or offering an extra credit (that is to say tempting him with more money) the credit provider was exerting undue pressure. But, in this case, there was no factual basis whatsoever for the magistrate to conclude that the credit provider had perpetrated undue pressure, influence or tactics.  5. In the end, the magistrate found that not only was there no evidence that there was substantial hardship, but there was no basis for a conclusion that the credit provider knew, or could have ascertained by reasonable enquiry, that he could not pay without substantial hardship. There was no evidence of actual knowledge. Nor was there reason for the credit provider to be put on enquiry.  6. The default notice did not say, as s83(3) required it so say, “that a subsequent default of the same kind that occurs during the period specified in the default notice for remedying the original default may be the subject of enforcement proceedings”. The first question of law raised by S. was that the Court erred by not dismissing the proceeding because of the invalid default notices under s80(3). It is to be borne in mind that Mr Silberman accepted that he has not remedied his default. The case for the credit provider was that this omission in the default notice was of no consequence. The Magistrate took the view that there was no prejudice to S. here because the notice specified the default and informed the consumer what was required to be done to remedy the default specified even though it did not contain the notification concerning subsequent default.  7. The magistrate found that the Court was empowered under s80(4)(c) to authorise the credit provider to begin the enforcement proceedings and that could be done *nunc pro tunc*. The basis for that view was that the consumer in this case could not be said in any way to be embarrassed by the default notice or to misunderstand its nature and effect. The magistrate proceeded on a proper authoritative basis.  *Bank of Queensland Limited v Dutta* [2010] NSWSC 574, applied. |
| **29** | In *Bahonko v Moorfields Community and Ors* MC29/11, the question of a judge’s expressed attitude to unrepresented persons in Court came under scrutiny. The presiding judge had previously made a submission to the Law Reform Commission in relation to litigants who were not legally represented. The Court of Appeal held: Where, before the trial of a proceeding in which the appellant was not legally represented, the judge made a submission to the Law Reform Commission in relation to litigants who were not legally represented, the conclusions expressed by the trial judge might have led a fair-minded observer to think that the judge had prejudged issues at the heart of the appellant's claim and was thus prevented from bringing an impartial mind to the conduct of the trial and its resolution. |
| **30** | In *Faldon v Newbury* MC30/11, the operator onus provisions of the *Road Safety Act* came before Osborn J. The owner of the vehicle had nominated the defendant as the driver on the relevant occasion. Upon appeal, Held: Appeal dismissed.  1. The camera operator gave evidence first that a nomination had occurred. This evidence was not hearsay; it was evidence of a procedural fact. Further, the camera operator was also entitled to produce the known user statement received in respect of the incidents of which he gave evidence. The known user statement constituted hearsay evidence of the identity of the driver but this was precisely what the Act contemplated and permitted.  2. The initial oral evidence of the camera operator that the appellant was nominated as driver, coupled with the known user statement, constituted *prima facie* evidence that F. was the driver. Indeed, because of the provisions of s84BG(2), it was in the absence of evidence to the contrary, proof of the matters stated in it. The known user statement contained the information prescribed by the Act. No cross-examination was directed to displacing the *prima facie* case put forward on behalf of the respondent. Once F. was nominated, it fell upon him to displace the *prima facie* proof that he was the driver at the relevant time.  3. The statement contained the particulars prescribed by the Act for a known user statement. As such it was capable of constituting such a statement in the terms of the Act.  4. The statement contained reference to an obligation number and vehicle owner which on their face referred to a particular incident although that incident was not otherwise particularised. In other words, it disclosed on its face particulars which sensibly might have enabled the camera operator to state that it related to the incident in question.  5. The combination of the oral evidence of the camera operator and the production of the statement constituted evidence of the nomination of F. as the driver at the time of the offence before the court. No lack of nexus between the document and the offence was suggested or established in cross-examination. There was no evidence to the contrary of the *prima facie* evidence constituted by the operator’s evidence and the production of the document. Accordingly, no error of law was shown in the Magistrate's decision. |
| **31** | In *DPP v Piscopo* MC31/11, the Court of Appeal (Ashley, Weinberg and Tate JJA) dealt with an appeal against a dismissal by a Magistrate of a drink/driving charge where the police informant had failed to inform the driver at the scene of the temporal limitation involved if he accompanied the officer to a police station for a breath test. The Court held: Appeal allowed. Orders set aside. Matter remitted to the Magistrates' Court so that a conviction can be entered on that charge and for determination of penalty.  The power to require a person to accompany a police officer and remain conferred by s55(9A) of the Act is a statement of two component parts of a single requirement rather than a statement of two discrete powers. The making of a requirement to accompany does not require a statement of what can be called the three-hour period. |
| **32** | In *DPP v Rukandin* MC32/11, the Court of Appeal (Ashley, Weinberg and Tate JJA) dealt with a point which had some similarity with that raised in *DPP v Piscopo* MC31/11 and made the same decision. |
| **33** | In *Silberman v Citigroup* MC33/11, S. appealed to a Judge of the Supreme Court against a decision of Mukhtar AsJ (MC28/11) where the Associate Justice dismissed an appeal by S. against a Magistrate’s decision in respect of a claim made by Citigroup. In dismissing S.’s appeal, Whelan J held:  1. In relation to the argument which focused on the term “substantial hardship” in s70(2)(l) of the *Consumer Credit Code*, the Magistrate concluded that this expression was to be given its ordinary meaning. Definitions found in the *Shorter Oxford English Dictionary* and the *Macquarie Dictionary* were “painful difficulty, severe suffering or privation”, the other was “a condition that bears hard upon one, severe toil, trial, oppression or need”. The Magistrate also said that the presence of the word “substantial” meant that Parliament intended to convey something more than mere hardship.  2. The dictionary definitions of the expression “hardship” were appropriate in the circumstances and the Magistrate was correct to conclude that Parliament had intended the expression “substantial” to indicate that something more than mere hardship was required. This was not a case where what was being considered was in any sense a technical term and the Australian Securities and Investment Commission’s view of responsible lending conduct did not relevantly alter the analysis. The definition contended for by S. was a definition which would enable asset rich but income poor persons to establish “substantial hardship” within the meaning of the subsection in the absence of any genuine hardship at all.  3. In the absence of a thorough and comprehensive analysis of S.'s financial position, the Magistrate could not have concluded that S. was at the relevant time suffering hardship. In this respect the Magistrate's conclusion was clearly correct.  4. The notices given prior to the institution of the CP/L proceeding had not complied with s80(3) of the Code. The reason for that non-compliance was inconsequential in the circumstances of this particular case. The default notices did specify the defaults, which was a failure to meet certain minimum payments due. They did specify the action necessary to remedy them. What they failed to do was to notify S. that a subsequent default of the same kind that occurred during the period specified in the default notices for remedying the original default might be the subject of enforcement proceedings without further notice. There was a theoretical possibility of a subsequent default of that kind. The omission was practically inconsequential in this case as S. had no intention of paying any amount. He denied all liability and claimed that the contracts ought to be reopened.  5. The magistrate held that in the circumstances the notices given were “appropriate to enable proceedings to be commenced”. He also held that he had power to give CP/L leave to commence proceedings *nunc pro tunc*, and that he should do so. He reached this conclusion relying on a decision of the Supreme Court of *New South Wales in Bank of Queensland v Dutta* [2010] NSWSC 574.  6. The magistrate found that the Court was empowered under s80(4)(c) to authorise the credit provider to begin the enforcement proceedings and that could be done *nunc pro tunc* (now for then). The basis for that view was that the consumer in this case could not be said in any way to be embarrassed by the default notice or to have misunderstood its nature and effect. The magistrate proceeded on a proper authoritative basis and was correct that there was power to grant leave under s80(2)(4) *nunc pro tunc*.  *Bank of Queensland Limited v Dutta* [2010] NSWSC 574; and  *Perpetual Trustees Victoria Limited v Monas* [2011] NSWSC 57, followed.  7. There is a power under s85(2)(c) of the Code to authorise the bringing of an acceleration clause into operation without the required notice.  8. To have refused authorisation would or might have rendered the extensive court time spent on the proceeding wasted. It would have achieved nothing other than more delay. The relevant matters and all of the defences had been dealt with over several days before the Magistrate and there was no error on the part of the Magistrate having granted authorisation. If his remarks were to be interpreted as not having done so, authorisation would be granted *nunc pro tunc* insofar as it is necessary to do so. |
| **34** | In *TRA Global Pty Ltd v Kebakoska* (MC34/11), the question of estoppels by representation came before the Court in a claim where an employee who had been terminated was paid a redundancy payment by mistake. The magistrate upheld the defence of estoppels by representation. Upon appeal, Osborn J held:  Appeal dismissed.  1. It was open to the Magistrate to conclude that the redundancy payment was made by mistake. The evidence did not support the conclusion that it was voluntary in the sense for which the employee contendes.    2. Although the fact of payment by mistake gave the company a *prima facie* claim for restitution of the redundancy payment, the employee changed her position in reliance upon receipt of the payment. More particularly, the employee disclosed receipt of the payment in an application for unemployment benefits and in consequence was denied payment of such benefits during a period of unemployment which followed the termination of her employment by the company. In turn, she spent the redundancy money on living expenses during a period of unemployment. The Magistrate’s conclusions with respect to these matters were correct in law.  3. The Magistrate was correct to conclude that estoppel by representation remains, in appropriate circumstances, an alternative potential defence to a claim for restitution of moneys paid by mistake.  4. It was open to the Magistrate to conclude that the defence of estoppel was a complete bar to the counterclaim and not merely a defence with respect to a sum equivalent to the unemployment benefits lost in consequence of the company’s representation as to the employee’s redundancy entitlement.  5. It was open to the Magistrate to conclude that the defence of estoppel by representation was made out on the facts. |
| **35** | In *TRA Global Pty Ltd v Kebakoska* MC35/11, the question of costs came before Osborn J in relation to the principal judgment delivered in MC34/11. His Honour held:  Application allowed. Costs awarded to K. on a solicitor and client basis.  1. Although, as a general rule, the Court will order costs to be taxed on a party and party basis, it retains a discretion to order costs on a solicitor and client basis. That discretion is not fettered by specific pre-requisites, but a case must have some ‘special’ attribute to qualify for the award of costs on a higher basis.  2. In the present case, the appellant/employer fundamentally failed to make out its case with respect to the demise of estoppel by representation as a separate defence to claims for restitution of money paid under mistake.  3. This was not a case in which the facts were in dispute. The Magistrate was either correct or wrong in law. When the current state of authority was considered, the appeal was hopeless. It was submitted on behalf of the appellant that it could not be said that the appeal had no chance of success and that several of the arguments and contentions advanced by the appellant were not foreclosed by authority. That submission is not accepted. The appellant did not properly identify or acknowledge the effect of the authorities conclusively binding upon the Magistrate nor the authority correctly stating the current state of the law in England and Wales.  4. There were three further matters which tended to favour the award of costs on the higher basis:  (a) First, the subsidiary proposition that it was not open to the Magistrate to conclude estoppel by representation was made out on the evidence was not tenable for the reasons explained in the principal judgment.  (b) Secondly, although the appeal was not determined on the ‘change of position’ arguments, the appellant’s arguments in respect of this issue did not acknowledge or confront the New South Wales authorities referred to at [34] following in the principal judgment. Further, the fact that the appellant also failed on this subsidiary aspect of its appeal was of some significance.  (c) Thirdly, the defence of estoppel upheld by the Magistrate was founded on the notion of holding the appellant to its own prior representation and the consequent avoidance of detriment to the respondent. The underlying equity supported the view that the respondent should not suffer consequential detriment by reason of the appellant’s unsuccessful appeal. |
| **36** | In *Peluso v Safi* MC36/11, the construction of a contract of sale came before a magistrate who decided that a claim for the balance of deposit payable was not made out. On appeal, Osborn J held: Appeal dismissed.  1. The terms of the contract made time of the essence and required an initial deposit to be paid upon the signing of the contract and payment of the balance on 9 March 2010.  2. It was not open to the vendor P. to accept the offer on 17 March 2010 as:  (a) The offer comprised in the documents signed by the S. comprehended sequential obligations intended to commence with the conclusion of the contract by acceptance of the offer before 9 March 2010.  (b) There was fundamental uncertainty as to what, if any, was the obligation of S. to pay the deposit if the contract was not concluded before that date. Having regard to the dates for payment, this required payment before the contract was entered into. As pleaded, the statement of claim contained no allegation that a deposit was payable at all.    (c) There was a fundamental uncertainty as to S.'s rights, if any, under the special condition pursuant to which he made the offer to purchase. The evidence showed that no finance was ultimately able to be obtained for the proposed purchase, but the effect of the special condition was both nugatory and/or fundamentally uncertain upon the purported date of acceptance of the offer, namely 17 March 2010. This is because the two days’ notice provided for in General Condition 14 expired on 10 March 2010, before the contract was allegedly entered into. The delay by the vendor P. thus deprived S. of any opportunity to take advantage of the special condition strictly in accordance with its terms.    (d) Where no date for lapse was specified in an offer, it was deemed to lapse unless accepted within a reasonable time. Such time could not extend beyond a date which gave S. a reasonable opportunity to exercise an unqualified right under Condition 14. That date was necessarily some time prior to the approval date specified in the contract.  3. Accordingly, the contract upon which P. purported to sue was not in fact effected by the purported execution of the document by his attorney on 17 March 2010. |
| **37** | In *Singh v Alston Post Pty Ltd* MC37/11, a magistrate upheld a claim in a motor vehicle collision case and held that the driver was not guilty of contributory negligence. In dismissing the appeal, Osborn J held:  1. Given that the Magistrate accepted that the accident occurred on a roadway on which trucks were prohibited, which was narrow and overhung by trees, and that the probability was that the truck was travelling ‘at least in the middle of the road, if not further to the right’ it was open to the Magistrate to find that the truck driver's negligence was a cause of the respondent's damage.  2. Likewise, the Magistrate’s finding as to speed could not logically materially affect the case as to contributory negligence. In view of the Magistrate's finding that the truck driver 'was oncoming at a speed', this finding did not demonstrate error with respect to the issue of contributory negligence. It could not compel a conclusion the driver of the motor car was guilty of contributory negligence.  3. In the circumstances, the truck driver failed to demonstrate that the Magistrate was bound to conclude, either that there was no negligence on the motor car driver's part, or that the evidence as a whole necessarily required a finding of contributory negligence. |
| **38** | In *DPP v Marijancevic* MC38/11, the Court of Appeal (Warren CJ, Buchanan and Redlich JJA) heard an appeal against a trial judge’s decision to exclude evidence obtained by police officers pursuant to search warrants which had been supported by affidavits which had not been sworn or affirmed. In dismissing the appeal, the Court held;  1. The parties proceeded on the basis that the discretionary decision required by s138 of the Act did not essentially differ from that at common law save that s138 placed the onus upon the prosecution to establish that the evidence should be admitted notwithstanding the impropriety or contravention. The qualified proscription in s138(1) that ‘the evidence is not to be admitted unless’ indicated the importance of according appropriate weight to the effect of any impropriety or unlawfulness.  2. The discretionary judgment called for did not involve a simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice. The trial judge was right to emphasise as a relevant consideration the undesirable effect of curial approval being given to the unlawful conduct of those whose duty it is to enforce the law. In doing so he was drawing upon the implied power of the courts to protect the integrity of the judicial process.  3. It was accepted both before the trial judge and on appeal that for the conduct to be ‘reckless’, it must involve some advertence to the possibility of a breach of the obligation and a conscious decision or a ‘don’t care’ attitude to proceed regardless of that possibility.  4. If the conduct was deliberate as the trial judge found, and it is assumed for present purposes that his Honour meant thereby that it was knowingly illegal, it was not conduct that fell at the most serious end of the range. It was not engaged in for the purpose of obtaining an advantage that could not by proper conduct have been obtained. However, the Court was not persuaded that his Honour intended by the use of the phrase ‘impropriety of the highest order’ to convey more than was submitted by the respondents, that the impropriety was ‘of such a high order’ as to justify the exclusion of the evidence. Accordingly, this specific error was therefore not made out.  5. It was for the applicant to demonstrate that it was not open to the trial judge to ultimately form the view that he did as to the officers’ credibility. There was considerable force in the applicant’s submission that the practice followed by the police officers was neither deliberate, in the sense of knowingly illegal, or reckless but was rather inadvertent. The evidence did not show that this was an intentional abuse of power or a wilful disregard of rights. Having regard to s142(2) of the Act and the requirement that the standard of proof is the balance of probabilities and keeping also in mind the principle in *Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, there were countervailing reasons to a finding that this was deliberate conduct.  6. Allowing for the view that the probabilities of the case were strongly against his Honour’s finding and the other concerns expressed as to the reasoning employed by his Honour, it could not be said that the finding was glaringly improbable or was not one reasonably open. Accordingly, This error has not been established.  7. In relation to the contention that the discretion was wrongly exercised by the trial judge, s138(1) of the Act requires the trial judge to apply a very general standard, that is, to decide whether ‘the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.’ Moreover, the section calls for ‘an overall assessment’ in the light of the factors mentioned in s138(3). Because the assessment called for a value judgment in respect of which there was room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involved the exercise of a judicial discretion with which the Court was not entitled to interfere unless persuaded that it was an opinion that was not reasonably open. This was not an appeal where the Court could ‘decide for itself’ whether the desirability of admitting the evidence outweighed its undesirability.  8. Once it was accepted that it was open to the trial judge to find that the officer’s conduct was deliberate in the sense that it was knowingly illegal, it followed that the applicant was unable to discharge the burden of establishing that it was not open to the trial judge to conclude that the desirability of excluding the evidence outweighed the desirability of admitting it. The decision was reasonably open because of the finding that the conduct was deliberate, meaning knowingly illegal, and that the gravity of the impropriety was of a high order.  9. Although the Court concluded that the appeal must be dismissed, the Court stated that they would not wish it to be thought that the discretion should necessarily be exercised in the same way were the same issues to arise again for consideration in similar circumstances. Whilst the Court identified error in his Honour’s reasons and expressed their serious reservations as to various findings made by his Honour, it was not be assumed that the Court would have made like findings or would have exercised the discretion in the same way had a finding of inadvertent or careless conduct been made. |
| **39** | In *Green v Magistrates’ Court of Victoria & Anor* MC39/11, Pagone J dealt with an appeal against a Magistrate’s decision to imprison a witness for contempt of court. Held: Application granted. Orders set aside and remitted to the Magistrates' Court for directions and re-determination.  1. Contempt of court is a serious criminal offence which requires a Magistrate to ensure that an alleged contemnor has a fair hearing. In *Zukanovic v Magistrates’ Court of Victoria at MoorabbinI* J Forrest J considered the steps necessary to be taken by a Magistrate prior to determining a charge of contempt of court under s133 of the *Magistrates’ Court Act* 1989 (Vic).  *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141; MC06/11, applied.  2. Whilst the Magistrate may have thought it sufficient to proceed as he did in view of what had occurred before him only moments before, a fair hearing of the contempt charge required the Magistrate to articulate the charge as a separate step in the proceeding and to do so with sufficient precision to have enabled G. to address submissions on the charge as formulated. The Magistrate had not long before ruled that the privilege against self incrimination had not been made out during that part of the hearing in which G. had been attending to give evidence. G. was not formally represented during that part of the hearing under s56A of the *Magistrates’ Court Act* 1989 (Vic). He was subsequently charged with a failure to answer questions without excuse and of prevarication but was not given details of the charge beyond the earlier ruling which had been made in the context of whether he had reasonable grounds to object to answering questions on the basis of self incrimination. The conclusion, and the ruling, on that question did not automatically or inevitably mean that G. was in contempt.  3. G. had refused to answer questions claiming reliance upon the privilege against self incrimination protected by s128 of the *Evidence Act* 2008 (Vic). He was charged with contempt under a different section of a different Act. G. ought to have had the benefit of a sufficient articulation of the charge for consideration of that part of the procedure dealing with that charge under that section. It may have seemed obvious and inevitable to all present that the plaintiff would be found to be in contempt because the Magistrate had only minutes before ruled that G. was not entitled to refuse to answer questions relying upon the privilege against self incrimination, but a finding of contempt was not an automatic consequence of the ruling which required no separate process to be followed. The finding of contempt in this case required the laying of a charge under a particular section and carried with it the right and obligations considered by Forrest J in *Zukanovic.*  4. The failure by the Magistrate to take a plea was contrary to the principles as enunciated in *Zukanovic*. For present purposes it may be sufficient to note that s134 did not depend upon or use the words “exceptional circumstances” as a factor in the finding of contempt or in the imposition of a penalty.  5. The absence of an articulation of a separate charge of contempt and the apparent treatment of the ruling and direction in the context of s128 of the *Evidence Act* 2008 during a hearing under s56A of the *Magistrates’ Court Act* 1989 (Vic) as sufficient for the finding of contempt under s134(2) of the *Magistrates’ Court Act* 1989 (Vic) were revealed on the face of the record and constituted a misconception of the nature of the function which the learned Magistrate was performing. |
| **40** | In *Trkulja v Gibsons Solicitors Pty Ltd* MC40/11 a summary order was made against T. where the application had not been properly served on him. The Magistrate rejected T.’s application for a rehearing on the ground that he did not have an arguable defence. Upon appeal it was held:  Application granted. Remitted to the Magistrates' Court to be re-heard and determined by another Magistrate.  1. As the order made in the proceeding was obtained without any or any sufficient service on the defendant of notice of application for summary judgement, the judgment or order was irregularly obtained and the defendant was entitled as a matter of right to have it set aside.  2. Accordingly, as the magistrate refused to entertain the issues as to service but proceeded on the basis that the applicant needed to demonstrate an arguable defence, the Magistrate was wrong in law to do so and this led to the applicant being denied procedural fairness or natural justice. |
| **41** | In *DPP (Cth) v Magistrates’ Court of Victoria* (MC41/11) T Forrest J dealt with an appeal against a Magistrate’s refusal to make a suppression order in respect of witnesses’ evidence in a committal proceeding. HELD: Appeal refused.  1. Section 126(1) of the *Magistrates' Court Act* 1989 ('Act') makes it clear that a Magistrate can set aside a suppression order if he or she was of the opinion that the order was no longer necessary to achieve the purpose originally contemplated.  2. Section 126(1)(c) of the Act involves a consideration of both the necessity to make a suppression order and whether in fact a person's physical safety is endangered.  3. The suppression order sought by the prosecution sought to prohibit publication of evidence and information derived from the committal proceeding about a fact that the main witness had been in the public domain for at least 18 months. Suppression orders of this type are creatures of statute with defined capacities. They enable a court to close civil or criminal proceedings in various ways to the public. The power of the Court to suppress the reporting of facts is confined to reportage of facts from those proceedings. If the facts are in the public domain independently of those proceedings, then the Court has no power (under s126) to prohibit further publication of those facts.  4. Accordingly, the finding by the Magistrate that the main witness was already at extreme risk and that further disclosure of her activities did not escalate that risk was reasonably open and it was reasonably open to the Magistrate to vacate the suppression order previously made. |
| **42** | In *DPP v Hamilton* MC42/11, a person was charged with resisting a police officer when he took flight after being approached by a police officer. The Magistrate dismissed the charge. The appeal was dismissed:  1. Authorities make it clear that at common law, and in the absence of specific legislation to the contrary, H. was not required to stop when he was requested to do so by the police. Whilst, in requesting H. to speak to them, the police were acting in the course of their duties as police constables, they were not, at that point, acting “in the execution” of their duties as police members for the purpose of s52(1) of the Act. It followed that, in the absence of any specific legislative provision of imposing on H. an obligation to remain and speak to the police, H. would not be guilty of any offence under s52(1) of the Act.  2. The critical question in this case was whether, in the light of the common law principles, the provisions of subdivision 30A of the *Crimes Act* 1958 had the effect that H. was obliged to remain and speak to the police.  3. The correct construction of the provisions of Division 30A of the *Crimes Act* 1958 is that the intention of the subdivision was to ensure that suspects, who are undergoing questioning by a police officer, have the same rights and protections as those which are provided by the subdivision to suspects who are under lawful arrest. Subdivision 30A constitutes a scheme or code, stipulating a number of basic protections which are to be assured to a suspect who is being questioned.  4. None of those provisions give rise to an implication, let alone a necessary implication, that the police have a right to detain a person, in custody, for questioning, without arresting that person. Rather, it is clear, from the structure of subdivision 30A, that that set of provisions is designed to extend the basic protections, stipulated by subdivision 30A, to persons who are being questioned, notwithstanding that they are not under arrest. It followed that subdivision 30A did not impose on H. a legal obligation to obey the instructions given to him by the police officer during the pursuit that he was to stop and speak to him. Accordingly, the Magistrate was correct in concluding that the charge should be dismissed. |
| **43** | In *Taha v Broadmeadows Magistrates’ Court & Ors*; *Brookes v Magistrates’ Court of Victoria & anor* MC43/11 the interpretation of the *Infringements Act* 2006 s160 came under consideration by Emeron J. Her Honour held: 1. Section 160(1) of the Act confers on the Magistrates' Court the power to order that an infringement offender be imprisoned for the specified period, but sub-ss (2) and (3) contemplate the making of special orders for certain infringement offenders. These include persons, like T. and B. who have intellectual impairments or mental illnesses.  2. The Act, read as a whole, affords protection to vulnerable people who are inappropriately caught up in the infringement system, in that it contains a series of filters to remove vulnerable people from the infringement regime. If the filtering mechanisms up to the point of an infringement warrant being issued have been unsuccessful, or if the fines have not otherwise been paid, the Act provides for the Magistrates' Court to retain a range of options to prevent imprisonment other than as a last resort.  3. The role or function of the Court under s160 of the Act, and whether it is permitted to ‘sit back’ and have no regard to the possibility that the offender has an intellectual disability or mental illness that would enliven the powers in sub-ss (2) or (3) unless raised by the infringement offender, will depend on how the powers conferred by s160 of the Act are to be construed.  4. Section 160 of the Act must be construed in a unified fashion, and that the power conferred by sub-s (1) must be exercised by reference to the powers contained in sub-ss (2) and (3). By enacting s160, the legislature has given the Court a variety of powers to make different kinds of imprisonment and related orders. Those powers give the Court a range of options to deal with the kinds of offenders who commonly come before the Court, having exhausted all the other possibilities for repayment or expiation of the fines. The powers in s160 comprise a ‘package’ of measures, to which the Court must have regard as a whole when deciding how best to deal with the individual infringement offender.  5. The interpretation of s160 that least infringes the rights in ss21 and 24(1) of the *Charter of Human Rights and Responsibilities Act* 2006 is one that requires the Court to address the possibility that the alternative orders in sub-ss (2) or (3) may be available before making an imprisonment order under sub-s (1). This requires the Court to consider the individual circumstances of the infringement offender. In undertaking this task in a manner that least infringes the right to the equal protection of the law in s8(3) of the *Charter*, the Court may be required to make inquiries of the infringement offender aimed at ascertaining whether he or she answers one or more of the descriptions in sub-ss (2) or (3). It is in the nature of an intellectual disability or a mental illness that it may prevent the offender from triggering the operation of sub-ss (2) or (3) by raising the condition with the Court. It would defeat the purpose of sub-s (2), in particular, if it could only be enlivened by the actions of a person burdened by a condition that may disable them from forming and exercising the necessary judgement to do so.  6. Hence, while sub-ss (2) and (3) require the Court to be ‘satisfied’ of the matters described therein before making any of the alternative orders, that does not mean that it is left to the infringement offender to satisfy the Court of those matters. The Court may reach the requisite state of satisfaction as a result of its own inquiries and from information that emerges during the course of the s160 hearing as a result.  7. In failing to address the possibility that orders could be made under sub-s (2) or sub-s (3) in lieu of an imprisonment order under sub-s (1), and by simply making an imprisonment order under s(1) because T. did not raise with the Court his intellectual disability, the Magistrate misapprehended or misconceived the nature of the Court’s function under s160 of the Act. The Court took the view that it was not required by s160 of the Act to address the possibility that alternative orders in sub-ss (2) or (3) could be made before making an imprisonment order unless T. first raised that fact that he had an intellectual disability. This was a misconception of the nature of the Court’s jurisdiction to make an imprisonment order under sub-s(1).  8. Moreover, because conduct resulting from the misconception of the Court’s function under s160 of the Act and the failure to accord procedural fairness were co-extensive, the failure to accord procedural fairness caused the Court to make a decision of a kind that was beyond its powers. Jurisdictional error was therefore also to be found in the Court’s failure to accord procedural fairness to T.  9. In relation to B. the Magistrate misconceived the Court’s function under s160 of the Act in that he proceeded to make an imprisonment order under sub-s (1) without addressing the possibility that it might be open to the Court to make the alternative orders under sub-ss (2) or (3) and without considering B.s particular circumstances.  10. In B.'s case, the Court was informed by the duty lawyer acting for B. that sub-s (2) was – or might be – enlivened because B. suffered from a mental illness. In those circumstances, the Court should have made inquiries to enable it to determine whether it was appropriate to make orders under sub-ss (2) or (3) before making an imprisonment order under sub-s (1). The requirement that the Court be ‘satisfied’ of one or more matters in sub-s (2)(a) and (b) or of the matter in sub-s (3) did not impose an obligation on the offender to provide proof in the conventional sense. The Court could satisfy itself through its own inquiries. If documentary evidence of B.'s mental illness was required by the Court, the s160 hearing should have been adjourned in order for that evidence to be obtained and put before the Court.  11. Accordingly, the orders made against T. and B. were set aside and the matters remitted to the Magistrates' Court for determination according to law. |
| **44** | In *Fernando v Port Phillip City Council & Ors* MC44/11, a Magistrate declined to discharge outstanding fines due under the *Infringements Act* 2006. Hollingworth J held: 1. The exercise of the power in s160(1) of the Act is subject to the discretionary powers created by ss160(2) and (3). Those sub-sections permit the court to do a number of things, including discharging some or all of the outstanding fines, or adjourning the further hearing of the matter for up to six months. In the case of sub-section (3), the court may also order a lesser period of imprisonment, or make a community based order under the *Sentencing Act* 1991. F'.s application was made under sub-section (3).  2. The court may exercise its power under s160(3) if it is satisfied that “having regard to the infringement offender’s situation, imprisonment would be excessive, disproportionate and unduly harsh”. A court that has made an imprisonment order under s160(1) of the Act may, under s160(4)(b) of that Act, make an instalment order under the *Sentencing Act*. Such an instalment order effectively stays the operation of the imprisonment order, for so long as the infringement offender complies with the instalment order. The magistrate made such instalment orders against F. If an infringement offender defaults on an instalment order, they can be immediately arrested and imprisoned for the default period, without further hearing.  3. Whilst the order made by the Magistrate was a final order, it was not made in a criminal proceeding. Accordingly, F. could not bring the appeal against the Magistrate's order.  4. *Obiter*: The Magistrate's conclusion that F. fitted within the recalcitrant group was perfectly open on the evidence. |
| **45** | A claim for unpaid wages was the subject of *Felstead v Gatto* MC45/11. The Magistrate hearing the claim decided that the claimant was precluded from holding both the employed and elected positions with the Council. Held: Appeal allowed. Matter remitted to the Magistrates' Court for hearing and determination.  1. The general powers of employment in the rules of the Council (cl 6.3) authorised the employment of a person to perform the duties of a secretary/treasurer where that person was or became the elected secretary/treasurer under those rules. Those powers of employment were amply wide enough to permit an engagement of that kind. There was no basis for imposing some qualification on the interpretation of those powers which would prevent the adoption of that course.  2. Accordingly, the Magistrate erred in deciding otherwise. Under the rules, a person could be both an employed and an elected secretary/treasurer on a parallel basis. |
| **46** | In *Patrick Stevedoring Pty Ltd v Chasser (WorkCover Authority)* MC46/11, an employer was charged with offences alleging discrimination against an employee because the employee raised a concern about health or safety issues in the workplace. The Magistrate found the charges proved and imposed a conviction and aggregate fine. Upon appeal: HELD: Appeal dismissed.  1. It is an offence pursuant to s76 of the OHS Act to dismiss, injure or alter an employee’s position to his or her detriment or threaten to do so, for the dominant reason that the employee raised an issue or concern about health or safety to his or her employer or exercised a power as a health and safety representative. Under s77, if all the facts constituting the offence other than the reason are proved, the accused bears the onus of proving that the reason alleged in the charge was not the dominant reason for the conduct. This onus falls to be discharged on the balance of probabilities.  2. The Magistrate's conclusions with respect to the elements of the charges and as to motive were open on the evidence. The Magistrate was entitled to find that PSPL had not discharged the onus of disproving that the raising of a safety issue was not the dominant reason for the letter to the employee.  3. In relation to the submission that the evidence did not establish injury as particularised in the charge, the standing down of the employee itself constituted injury despite there being no loss of pay or that his entitlement to pay was subsequently restored. Further, the injury was to be assessed as at the date it was inflicted, not be referenced to subsequent consequences. The evidence justified the Magistrate's conclusion that the employee suffered injury because the standing down went on his file and was a black mark against his name.  *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155, applied.  4. In relation to the question of sentencing, the Magistrate was under a duty to provide reasons for her sentencing decision. The reasons of a sentencing judge should cover all the important considerations so as to be sufficient to meet both the offender’s right to know why he or she has received the particular sentence and the public’s right to understand the process of sentencing. However, reasons for sentence need not be full and detailed in every case. A sentencing judge is not obliged to state in his or her reasons for judgment every single matter that he or she has taken into account, nor to give reasons for every step he or she takes.  5. The Magistrate's Reasons for Sentence disclosed the critical considerations which her Honour took into account in sentencing and they also disclosed a logical process of reasoning. The Reasons for Sentence referred to the critical matters upon which PSPL placed reliance, namely the interrelated nature of the charges, the absence of prior convictions, the potential adverse effects of recording a conviction, the fact that the case was not of the worst kind in which an employer required a worker to adopt a demonstrably unsafe practice, the fact that the employee was not fired and did not actually lose pay, the senior officers’ belief that the lifting technique was safe, the undertaking of harassment training, the asserted relatively low significance of special deterrence and liability for associated costs of the hearing. Accordingly, the Magistrate did not err in failing to give any or any adequate reasons for the quantum of penalty imposed.  6. In relation to the submission that the Magistrate failed to take into account current sentencing practices for occupational health and safety offences, only one previous relevant sentence was cited to the Magistrate and this could not be said to establish current sentencing practice in any relevant sense.  7. It must also be recognised that comparison of fines is not to be equated with comparison of terms of imprisonment. Section 50 of the *Sentencing Act* 1991 requires the sentencer to take account as far as practicable of the financial circumstances of the offender and the nature of the burden that a fine will impose. Section 50(5)(b) further enables a court to have regard to the value of any benefit derived by the offender as a result of the offence. These commercial considerations materially detract from the sense in which a particular fine can necessarily be seen as objectively reflecting the gravity of an offence.  8. Insofar as PSPL sought to rely on sentences for other offences under the OHS Act, it was not accepted that sentences in respect of different offences constituted relevant sentencing practice. Likewise, it was not accepted that sentences imposed in respect of analogous offences in a different State were relevant.  9. In relation to the imposition of a conviction, it was plainly within the discretion of the Court to impose a conviction. PSPL raised aspects of the circumstances of the case which favoured a lower rather than a higher penalty, but there were others which favoured both conviction and a substantial penalty. The Magistrate could not be said to be bound as a matter of law not to convict. The course she took in this regard was plainly open to her and it was the only course properly open to her.  10. In relation to the submission that the penalty was manifestly excessive, manifest excess cannot be justified simply by comparison with other sentences. Nor is it to be treated as something recognised on a fundamentally intuitive basis. What must be considered is all of the matters that are relevant to fixing the sentence. Having regard to the Magistrate's Reasons for sentence, there was no basis to infer from those Reasons that she had regard to erroneous principles.  11. The penalties imposed by the Magistrate were not manifestly excessive in the relevant sense, having regard in particular to the deliberate nature of the discriminatory conduct, the relationship within which it occurred, the nature of the safety issue, the impact upon the employee and the significance of s76 in the scheme of the OHS Act.  12. In relation to the question of proportionate sentencing, the total sentence must be proportionate to the totality of the offending. It is a basic principle of sentencing law that a sentence should never exceed that which can be justified as proportionate to the gravity of the crime committed in the light of its subjective circumstances. That principle is reflected in the *Sentencing Act* 1991.  13. The Magistrate expressly addressed the relationship between the three offences in issue and her Reasons did not disclose any error of principle. Nor could it be positively inferred from the aggregate sentence imposed that she misapplied sentencing principles including the principle of totality. Accordingly, the appeal was dismissed. |
| **47** | In *DC Consolidated Investments Pty Ltd v Maroondah City Council* MC47/11, a Magistrate imposed a conviction and fine on an owner of land on which 33 native trees had been poisoned. Held: Appeal dismissed. The Magistrate was correct to reject both submissions.  1. The Magistrate was correct to conclude that it was not necessary for the prosecution to establish either that the owner caused the poisoning to occur, or that it knew of the behaviour breaching the scheme.  2. The language and statutory context of the section supported this view; there was an absence of language in s126 suggesting the contrary; the subject matter of the statute was the regulation of land use in the public interest, including the conservation of native vegetation and the maintenance of ecological processes and genetic diversity; that subject matter was properly characterisable as regulatory and involving matters of public interest of a kind in which statutory offences have been recognised which did not require proof of *mens rea*; the imposition of liability without proof of *mens rea* would directly respond to difficulties of proof otherwise inherent in effective enforcement of the planning scheme, would impose a burden upon owners in circumstances where owners ordinarily have a capacity to manage what occurs on their land, and would have a general deterrent effect; and, lastly, neither the gravity of the offence, nor the penalty applicable, supported the view that Parliament intended *mens rea* be a necessary element of the offence.  *He Kaw Teh v R* (1985) 157 CLR 523, discussed.  3. In relation to the submission that the penalty imposed was excessive, the Magistrate took into account the factors emphasised by CD but was entitled to reach the conclusion by having regard among other things to the need for general deterrence, the maximum penalty applicable of $130,000, the value of the trees destroyed (over $146,000) and the nature of the offender. |
| **48** | In *Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd* MC48/11, the parties entered into a contract for the installation of a fence and gates. The purchaser unilaterally repudiated the contract. The Magistrate found that the claim for the return of the deposit was not proved. Upon appeal: HELD: Appeal dismissed.  1. The first submission made by F. was that the principles relating to the forfeiture of deposits upon breach of contract only applied to contracts for the sale of real property. The principles relating to the forfeiture of deposits, upon the failure of the party which paid the deposit to complete the contract, apply equally to contracts for the sale of real property and to all other contracts. The authorities demonstrate that the principles, stated by the Court of Appeal in *Howe v Smith* (1884) 27 Ch D 89, and which are longstanding, have been applied, regardless of whether the transaction, in respect of which the deposit is paid, concerns a contract for the sale of real property. Accordingly, the submission made by F. on this point was rejected.  2. The second submission made by F. was that as a result of the application of equitable principles the Magistrate should have ordered that PF. repay the deposit less the loss sustained by PF. This submission which was an alternative and different claim in equity was not made to the Magistrate. As this point did not raise an error of law, it did not fall within the ambit of an appeal which might be brought in relation to the Magistrate's decision.  3. Further, the onus was on F. the appellant, to satisfy the Supreme Court that, if it had made the claim based on the equitable principles, that claim could not possibly have been met by further evidence at the trial before the Magistrate. In light of the matters referred to, if the equitable claim had been made before the Magistrate, that claim might have been met by other evidence adduced before the Magistrate. For those reasons, F. ought not to be permitted to rely upon the second alternative argument, based on equitable principles, on the appeal.  4. Obiter: It could not be concluded that, on the evidence adduced before the Magistrate, the deposit was penal in nature, or that it was unconscionable for PF. to retain the whole of it. Accordingly, applying those principles in equity, F. would not be entitled to repayment of the amount of the deposit, less the losses sustained by PF as a consequence of the repudiation of the agreement F. |
| **49** | In *Semenov v Pirvu* MC49/11 a claim was brought against a painter/tradesman who wrongfully retained window shutters. The question of the amount to be paid by the painter/tradesman was in dispute. Held: Appeal allowed. Judgment set aside and judgment entered for S. in the sum of $10,000.  1. In relation to the correct measure of damages in conversion, the general rule, where a plaintiff has been permanently deprived of goods, is that the measure of damages, whether in conversion, detinue or trespass, is the value of the property converted, together with any consequential loss that may be proved by the plaintiff. The defendant to a claim bears the burden of showing that the general rule should be set aside. A further aspect of the general rule is a rebuttable presumption that damages are assessed as at the date of the conversion. While in most cases, the application of the general rule permits the injured party to recover the full value of the converted goods, the assessment of compensation will be directed to providing reasonable compensation for injury and loss. The broad principle, qualifying that general rule, is that the compensation awarded meet the objective of placing the wronged party, so far as is possible, in the position in which that party would have been but for the conversion.  2. S. was not required to provide painted shutters on the settlement of the property. Accordingly, the broad principle could not be met in the present case.  3. The question for the Magistrate was the application of the factors relevant to the assessment of the quantum of damages for conversion when the general rule did not apply. The Magistrate was required to examine the terms of the compromise agreement between S. and the Patons and compare it with the claims made. As the Magistrate assessed damages as the sum allowed for re-installing the painted shutters, the Magistrate did not address the correct issue on the assessment and accordingly, fell into error.  4. It was not open to the Magistrate to conclude on the evidence to value the contractual obligation to supply the shutters at $625. The value of the shutters obligation that contributed to the reduced residue payment to S. was $4375. In all of the circumstances, the quantum of S.'s damages in conversion was assessed at $10,000. |
| **50** | In *Saric v Tehan* MC50/11 the Court of Appeal dealt with an appeal whereby a Magistrate rejected a person’s claim for damages where the repairer was unable to claim because he did not obtain written approval before repairing the damage. Held: Appeal dismissed. *Tehan v Saric* [2010] VSC 175; MC18/10, approved.  1. Adopting the approach outlined by Dixon CJ and Windeyer J in *The National Insurance Company of New Zealand v Espagne* (1961) 105 CLR 569, it is appropriate to consider the character of the Act, and in particular the legislative provision from which the benefit to T. in this case was derived. It was common ground that the Act was a piece of consumer legislation and that s153 of the Act was intended to deter repairers and to protect the owners of motor vehicles involved in accidents as defined. It is obvious that the benefit conferred on the owner, where the repairer had no approval in writing to perform the repairs, was conferred on an owner ‘independently of the existence in him of a right of redress against others.’ Clearly enough, the legislation manifested no intent that this benefit was intended to be provided in relief of liability in any others to compensate the owner. Indeed, the provision is not restricted to collisions involving other vehicles.  2. Subsequent High Court decisions do not appear to have moved from the approach taken in *Espagne*. The question posed by Mason and Dawson JJ in *Redding v Lee* (1983) 151 CLR 117, while in that case directed to social services payments, was applicable to the present case involving a benefit constituted by immunity from action rather than a monetary payment. The question is: ‘was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?’ – and, allowing for the different statutory context, the answer must be in the affirmative.  3. To the extent that, as some of the cases have suggested, the question really depends upon reason, justice and policy, in the present case the cardinal principle of compensation was trumped by the intent of the legislation as indicated by the character of the Act and of the particular provision, and the nature of the benefit involved.  4. Per Robson AJA: The relevant provisions of the *Accident Towing Services Act* 2007 were not intended to confer any benefit on Mr Saric as a tortfeasor. On the contrary, the provisions were intended as a penalty to be levied against the repairer for failing to obtain written authority for its repair work. |