Woodward & Anor v Loadman & Anor [2007] NTSC 60

PARTIES:	WOODWARD, Lucinda AND BRADDY, Vicki v LOADMAN, David AND MINDIL BEACH SUNSET MARKETS ASSOCIATION INCORPORATED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SC 45 of 2007 (20711094) LA 6 of 2007 (20625162)
DELIVERED:	9 November 2007
HEARING DATES:	7 & 17 September 2007
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

Appeal from local court and application for judicial review – originating application by appellants in local court summarily dismissed by Magistrate on basis that cause of action frivolous, vexatious or an abuse of process of the Court and also because further and better particulars of claim supplied did not comply with the Local Court Rules – Magistrate indicated his

conclusion at outset of proceedings, made order on basis not sought by the defendant and without affording appellants an opportunity of being heard – whether order made a final or interlocutory order – whether appeal brought as of right – whether appeal out of time and incompetent by reasons of provisions of s 19(30) of the Local Court Act – whether claims brought by appellants enlivened jurisdiction of Local Court – whether appellants denied procedural fairness – whether Magistrate fulfilled his duty to appellants as self-represented litigants – principles on which relief in the nature of certiorari granted – whether circumstances justify relief of that nature – appeal dismissed as incompetent – order quashing impugned order and proceedings remitted back to Local Court for rehearing before another Magistrate

REPRESENTATION:

Counsel:

Appellant:	W Piper
Plaintiff:	D Alderman
Respondent / 1st Defendant:	W Priestley
Respondent / 2nd Defendant:	G Clift

Solicitors:

Appellant:	Pipers
Plaintiff:	Pipers
Respondent / 1st Defendant:	Solicitor for the Northern Territory
Respondent / 2nd Defendant:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	Ols0707
Number of pages:	42

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Woodward & Anor v Loadman & Anor [2007] NTSC 60
No. SC 45 of 2007 (20711094) & LA 6 of 2007 (20625162)

BETWEEN:

LUCINDA WOODWARD
1st Plaintiff

AND

VICKI BRADDY
2nd Plaintiff

AND:

DAVID LOADMAN
1st Respondent

AND

MINDIL BEACH SUNSET MARKETS ASSOCIATION INCORPORATED
2nd Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 9 November 2007)

Olsson AJ:

Introduction

[1] I have two separate proceedings before me for consideration.

[2] First, in matter LA 6 of 2007, the appellants seek to prosecute an appeal as of right pursuant to s 19 of the Local Court Act. They complain that a

stipendiary magistrate inappropriately made a summary order on 21 February 2007 that an originating application filed by them on 3 October 2006 be struck out with costs.

[3] The striking out order was expressed to be on the grounds that the claim did not comply with Local Court Rule 28.01, did not disclose a cause of action, was scandalous, frivolous and vexatious, was an abuse of the process of Court and that, in any event, there had been a failure by the appellants to comply with their obligations in relation to supplying further and better particulars.

[4] Second, in matter SC 45 of 2007, the appellants in the first matter have filed an originating motion for Judicial Review dated 20 April 2007 in this Court. They seek an order in the nature of certiorari pursuant to Supreme Court Rule 56 quashing the striking out order to which I have referred.

[5] For the sake of simplicity I will globally refer to the applicants for relief in both proceedings as “the appellants”.

[6] In each context the core complaint of the appellants is essentially the same. They assert that, in a situation in which they were litigants in person, the learned Magistrate, whilst hearing a defendant’s application to strike out the appellants’ claim for failure to provide proper particulars of claim, proceeded to make the impugned order, in effect of his own motion, without first hearing from the appellants or affording them an adequate opportunity of being heard.

Relevant narrative history

[7] The originating application in the Local Court asserted that the applicants had been members and stallholders of the Mindil Beach Sunset Markets Association, a body which is said to be incorporated pursuant to the provisions of the Associations Act. That body was named as the respondent in the Local Court and, it seems, was responsible for the conduct of the well-known Mindil Beach Sunset Markets.

[8] The statement of claim was expressed in these terms:

> "The applicants were members and stallholders of the MBSMA. In June 2006 the MBSMA Public Officer forwarded letters names (sic) 'Default Notices' to the applicants.
>
> The default notice contained allegations about the applicants. The applicants requested particulars of the allegations made. Particulars were provided to applicant Braddy on 26 September 2006. Applicant Braddy was unable to respond to the allegations and/or particulars as they were incomprehensible. Because Ms Braddy did not respond to the liking of the MBSMA, the said association on 26 September expelled her from the MBSMA. As for applicant Woodward, particulars were not provided because she did not attend the meeting scheduled by the MBSMA, and the MBSMA henceforth on 26 September expelled her from the association.
>
> The applicants claim that they have not been afforded due process and that they have been treated oppressively and unreasonably."

[9] The originating application was clearly endorsed as having been brought pursuant to sections 39 and 109 of the Associations Act. It sought the following specific orders:

"1. That the Mindil Beach Sunset Markets Associations (sic) (MBSMA) forthwith reinstate the applicants as members of the MBSMA.

2. That the MBSMA reinstate the applicants as stallholders at Mindil Markets.

3. That the MBSMA pay to the applicants, all lost income (to be assessed or agreed) for the period of disqualification.

4. That the MBSMA provide all particulars in detail of allegations made against the applicants.

5. That there be an investigation into the conduct of the MBSMA."

[10] Having been served with the originating application, the respondent Association (to which I shall refer as "*the MBSMA*") filed a notice of intention to appear on 3 November 2006.

[11] The proceedings were listed for a conciliation conference on 21 December 2006. On that occasion the appellants appeared in person and the MBSMA was represented by a legal practitioner, instructed by its Public Officer. All parties expressed the view that conciliation would be fruitless.

[12] In those circumstances leave was given to the respondent to file and serve a request for further and better particulars by the close of business on 12 January 2007 and the appellants were directed to respond to such a request by 29 January 2007. Mutual discovery was also ordered and the proceedings were listed for a pre-hearing conference on 21 February 2007 and for trial commencing on 3 April 2007.

[13] It appears that a formal request for further and better particulars dated 11 January 2007 was duly made to the appellants and filed by the respondent's solicitors. This requested the appellants to provide:

> "1. Full particulars and any oral material in respect of the allegation that the respondent failed to afford the applicants due process.
>
> 2. Full particulars and any oral material in respect of the allegation that the respondent treated the applicants oppressively.
>
> 3. Full particulars and any oral material in respect of the allegation that the respondent treated the applicants unreasonably."

[14] The appellants filed and served a written response on or about 29 January 2007. This was to the following effect:

> "We will not be relying upon any unrecorded oral conversations between the Applicants and the Respondents. All necessary oral material can be taken directly from the tapes of the appropriate General Meetings (verbatim).
>
> Any other oral material will come from witnesses at the court hearing. As we do not wish to be perceived as coaching the witnesses, we have not requested detailed accounts from them.
>
> In regard to item 1.
>
> Provide full particulars and any oral material in respect of the allegations that the Respondent failed to afford the Applicants due process.
>
> We have taken Grievance Settling Procedures from the following documents.

[Then follows a list of eight references to specific documentation sought to be relied on by the appellants, including various references to statutory provisions]

We believe that the above listed documentation will prove that the Respondent failed to follow any of the required procedures.

In regard to item 2 & 3.

Provide full particulars and any oral material in respect of the allegation that the Respondent treated the Applicants oppressively and unreasonably

1. All correspondence between the Applicants and MBSMA from 15 July 2004

2. Correspondence between the Justice Department and MBSMA. All documentation is in the possession of the Respondents. We will be requesting that the respondent provides copies to us of this written communication at Mutual Discovery.
   All tapes of General Meetings. We will be requesting that the Respondent provides copies to us of the tapes of General Meetings at Mutual Discovery.

3. And Documents 1 to 8 in regard to Grievance Settling Procedures as mentioned in reply to Item 1."

[15] Unsurprisingly, the MBSMA was not satisfied with the form of the further and better particulars so supplied. By letter dated 30 January 2007, its solicitors demanded a more explicit definition of the matters relied on.

[16] It is common ground that the appellants in person filed and served a response to that request on or about 7 February 2007. In part this purported to give specific particulars as to the three identified topics. The remainder of the document appears to be intended to constitute the making of

discovery and a request for production of a large number of documents said to be relevant to the issues in the proceedings.

[17] In so far as the lastmentioned response purported to supply the requested particulars it was expressed in these terms:

> "**ITEM ONE**
>
> ……
>
> **HISTORY OF THE ISSUE**
>
> We were active members of the MBSMA.
> We felt it was our obligation and responsibility to the Association to be fully informed on the workings of the Association.
> We believed some of the actions of the Committee and Management were questionable and were not in the best interests of the Association.
> Our concerns covered serious issues such as accusations of bribery, harassment of members at Mindil, harassment of members attending other markets, mismanagement, and mismanagement of MBSMA funds.
> We had repeatedly requested the Committee and Management to explain a number of situations with which we had concerns.
> We believed we were entitled to be kept informed of the workings of the MBSMA Management/Committee by the management and committee of the MBSMA.
> We have used every available avenue to make these requests of the Management and Committee of MBSMA. (Face-to-face discussion, Communication-Written and Electronic, Brought Issues to General Meetings).
> Our requests for clarification of the issues of concern were ignored or shouted down by a small number of Association Members.
> The only response we receive from MBSMA Management/Committee was ultimately to be issued with a 'Default Notice'.
>
> **DEFAULT NOTICE**
>
> - 30/06/2006 MBSMA Management/Committee issued us with 'Default Notice' under the MBSMA 2003 Constitution.

- Due process was not applied to us by MBSMA Management/Committee in accordance with the MBSMA 2003 Constitution or the Associations Act.
- MBSMA 2006 Constitution came into effect 05/09/2006.
- MBSMA Management/Committee gave notice to all association members that 2006 new constitution was in effect.
- MBSMA Management/Committee refused us the right to be treated in accordance with the 2006 Constitution or the Associations Act.
- MBSMA Management/Committee refused us the right to be treated in accordance with the concepts of natural justice.
- MBSMA Management/Committee made vague unsubstantiated accusations in regard to alleged wrongdoing by us – to Association members and us.
- MBSMA Management/Committee refused to supply to us any proof of alleged wrongdoing by us to
  - Us
  - Association members
  - Legal representatives for members named in 'Default Notice' procedure
- MBSMA Management/Committee supplied false and misleading information to legal representative of members affected by issue of 'Default Notice'.
- MBSMA Management/Committee engineered our termination from the Association with the distribution of misinformation to the members about us and our issues.
- We were evicted from the Association illegally, our membership removed. Our right to trade was revoked.

ITEM TWO

REQUEST TO THE COURT

WE WILL BE SEEKING THE FOLLOWING RELIEF FROM THE COURTS IN THE MATTER OF OPPRESSIVE AND UNREASONABLE ACTIONS COMMITTED AGAINST US BY THE MBSMA management/committee

1. THAT ALL LOSS, LOSS OF INCOME AND EXPENSES INCURRED BY US
   - THROUGH THE ACTIONS OF THE COMMITTEE INCLUDING THE ISSUE OF THE DEFAULT NOTICE
   - AND THE OUTCOME OF THE ACTIONS OF THE COMMITTEE MEMBERS TOWARDS US BE RECOGNISED

AS THE RESPONSIBILITY OF THE MBSMA management/committee.

We were personally treated in an oppressive manner by members of MBSMA Management/Committee
The conduct of the MBSMA Management/Committee

- Refusal to respond to our requests for information in regard to the management of the markets and the actions of the Committee.
- The issue of a 'Default Notice'.
- Refusal of MBSMA Management/Committee to treat us in accordance with the appropriate MBSMA Constitution, the Associations Act, Natural Justice, Australian Competition and Consumer Commission, the Justice Department Business Affairs.
- Harassment of us on-site at Mindil Beach Sunset Markets by members of MBSMA Management/Committee.
- Harassment of us by MBSMA Management/Committee at General Meetings.
- Actions against L. Woodward by particular members 2002.
- The removal of our Membership on 26/9/06.
- Loss of income from 26/9/06 until the end of the trading season in late October.
- Loss of standing within the community, with our peers, business associates and MBSMA members.
- Business Goodwill damaged by our inability to present ourselves in our place of business due to illegally applied Default notice.
- Loss of our deposit.

ITEM THREE

REQUEST TO THE COURT

WE WILL BE SEEKING THE FOLLOWING RELIEF FROM THE COURTS IN THE MATTER OF OPPRESSIVE AND UNFAIR ACTIONS COMMITTED AGAINST US BY THE MBSMA management/committee

IF THE COURT CONSIDERS THE MBSMA management/committee HAVE NOT ACTED IN THE BEST INTERESTS OF THE ASSOCIATION MEMBERSHIP

WE WILL BE SEEKING THE FOLLOWING RELIEF FROM THE COURTS IN THE MATTER

1. THAT AN UNBIASED INVESTIGATION BE INITIATED BY THE APPROPRIATE GOVERNMENT AGENCIES WITH A VIEW THAT ANY AND ALL APPEARANCE OF WRONGDOING BY THE MBSMA management/committee BE FULLY INVESTIGATED.

2. THE APPROPRIATE GOVERNMENT AGENCIES APPLIED FOR PENALTIES FOR ANY PROVEN WRONGDOING BY MEMBERS OF THE MBSMA management/committee.

3. THAT THE APPROPRIATE GOVERNMENT AGENCIES (THE JUSTICE DEPARTMENT – BUSINESS AFFAIRS) BE REQUESTED TO ASSIST THE MBSMA TO REVISE AND UPDATE THE COMMITTEE AND MANAGEMENT MODEL OF THE MBSMA TO ENSURE AN OPEN, HEALTHY, ECONOMIC ENVIRONMENT FOR STALLHOLDERS AND THE ONGOING BUSINESS WORKINGS OF THE ASSOCIATION.

Actions of wrongdoing against the general members of the MBSMA (Including us) by the MBSMA Management/Committee
The conduct of MBSMA Management/Committee

Refusal of MBSMA Management/Committee to act in accordance with the appropriate MBSMA Constitution, The Associations Act, Natural Justice, Australian Competition and Consumer Commission, the Justice Department Business Affairs, in the management of the Mindil Beach Sunset Markets.

The manner in which we were summarily issued with a default notice and had our membership removed poses a threat to the MBSMA membership. We believe the Committee have acted in a way which is not in the best interests of the Association (currently and historically).

We believe the actions of the committee/management have brought the MBSMA into disrepute. In our opinion the actions of the Committee should be an issue of great concern for all remaining MBSMA Association members.

We believe our case will prove the MBSMA Committee and Management has acted illegally by;

- Incorrect Financial Reports
- Misleading Financial Statements
- Financial expenditures not detailed
- Minutes not kept accurately
- Threats issued by Particular Committee members against Association members
- Slander by Particular Committee members
- Slander by Particular Members
- Motions passed by members ignored by management to assist Particular Members
- MBSMA Employee Code of Ethics 14/3/2006 not complied with
- Accusations of Bribery
- Conformation (sic) of Constitution
- Refusal of Committee to reply to members inquiry's (sic) in regard to the management of MBSMA
- Outline of wrongdoing by management
- Outline of wrongdoing by Committee members
- Personal power plays by Committee members
- Protection of Income for Committee members
- Acts of impropriety by Committee members
- Requests for clarity in regard to some actions of the Committee ignored
- Shouting down members who asked questions of the committee at general meetings
- Refusal to supply any proof of wrongdoing by the members issued with a 'default notice'
- Threats by management against Committee members
- Management giving misleading information to Committee members
- Management attempting to manipulate MBSMA Committee for personal agenda
- The Committee supporting unethical actions of another committee member
- The use of the proxy vote system to manipulate the workings of the association for a predetermined purpose
- The Question of mismanagement of MBSMA funds. (The Discussion in regard to payment of money to Catheryn Downey)

- Particular Committee members disregarding direction from the majority Committee members in establishing business relationships with DCC
- The Committee disregarding professional opinions from such authorities as the Justice Department and the NT Electoral Commission
- The Committee's reliance on their positions to take advantage of the weaker parties in order to intimidate them."

[18] On 12 February 2007 the respondent issued an interlocutory application pursuant to Local Court Rules 10.04 and 28.02, seeking an order that the applicants' claim be struck out for a failure to provide proper particulars. That application came before the learned Magistrate on 21 February 2007.

[19] The appellants could fairly have been bewildered at what then happened with somewhat remarkable speed.

[20] Counsel for the respondent having announced his appearance the learned Magistrate required the appellants to nominate one of their number to act as spokesperson. This proved to be Ms Woodward.

[21] When counsel sought to address the court the learned Magistrate informed him that he did not want to hear from him "*at this stage*". The following exchanges then occurred –

> "HIS HONOUR: … Ms Woodward, have you at any stage at all seen fit to consult a solicitor in relation to the formulation of what you apparently are seeking from this court?
>
> MS WOODWARD: Yes, sir, we have. We have been taking advice.
>
> HIS HONOUR: Well, if you have, all I can tell you is that the advice that you've been getting is sadly wanting in quality and this entire

application is such to – never mind the issue about the further particulars, and obviously I've – other than having read Mr Jones' affidavit, I haven't heard from him at all. However, I'm trying to constrain myself with language which is temperate.

I'll try and not be too scathing about the quality of the claim, but why didn't you make an application to strike out, Mr Jones, on the basis that it didn't comply with rule 28.01? It doesn't. There is no cause of action at all. It's vexatious, frivolous, ambivalent and a complete waste of the court's time.

MR JONES: My apologies for overlooking the particular rule, Your Honour. I've essentially obtained carriage and conduct of this file late in the proceedings. My principal, Mr DeSilva, had –

HIS HONOUR: All right, it doesn't matter. The second thing about this matter, apart from the fact that the claim is such that it ought not be allowed to stand, simplistically, alone – forget about anything else – the other rules of the Local Court which require you to answer the further and better particulars, which you haven't given – I mean, you've just delivered an amorphous mass of nonsense which doesn't answer the specific questions, it doesn't comply with the rule and it's in no way acceptable and simply dictates that, on that ground also, your claim ought be struck out.

So in my perception, your claim ought to be struck out, firstly, because it doesn't comply with rule 28.01, it does not disclose a cause of action, it's scandalous, frivolous and vexatious and it's an abuse of the process of court. But, in any event, in addition to that it also warrants being struck out because it fails – because you've failed to comply with your obligations in relation to supplying further and better particulars.

This is a court of law, it's not some sort of bar conversation piece and you have to comply with rules. You have to have a cause of action, it has to be properly framed and when you get a request for particulars you're obliged to answer it in accordance with those legal rules which apply. Do you have anything to say in response to what I've said?

MS WOODWARD: Only I can plead ignorance because we can't afford a solicitor to –

HIS WORSHIP: Well, that's too bad. If you can't get it right without a lawyer then there is no redress available to you unless you can persuade some lawyer to act for you pro bono, which means for nothing.

MS WOODWARD: Sir, we will get a lawyer."

[22] At that juncture the learned Magistrate simply asked counsel for the respondent if he wished to say anything. Counsel indicated that he desired to seek an order for costs. A discussion ensued between counsel and the learned Magistrate as to the basis upon which costs ought to be allowed and taxed. Ms Woodward seems to have largely been ignored during the debate that ensued.

[23] At the end of the discussion as to costs the learned Magistrate said "*Anyway, okay, I'll ask Ms Woodward whether she even knows what's going on. Do you understand what is being debated?*"

[24] That question was followed by these exchanges:

"MS WOODWARD: About whether or not we should pay costs.

HIS HONOUR: Well, there's no doubt about that, I'm afraid.

MS WOODWARD: Sir, are you going –

HIS HONOUR: The law is very clear in that regard. You come to court and drag someone into court and you do so in a manner which must cause failure, which is what has happened, you have to pay costs and there is no argument about that. The solicitors representing this organisation – it will be Sunset Markets Association Incorporated – asked me to order what's called indemnity costs against you. That is a category of costs which used to be called solicitor and own client costs, it's the highest possible amount of

costs that can be awarded against a litigant. You've heard what I've said.

I said in response to that, that in my perception an application ought immediately to have been made to strike out the claim which is simply spurious, specious and whatever else, so that – because some proceedings have been taken this may have been avoided had, what I perceive, been the appropriate step, the request for that level of costs I've indicated I'm not prepared to make. What I then have to do in terms of the Local Court Rules is to decree a percentage of costs.

The computation of costs is set out in the thing called the appendage to the Supreme Court Rules and it allows so much for coming to court and so much for drawing an affidavit and whatever. The percentage, at its maximum, is 100% and the percentage otherwise is to be fixed by me having regard to matters that are set out in the Rules. I suspect you're simply not equipped to be able to deal with the argument properly but I have to do the best I can in the circumstances.

I will make a costs order against you. You can tell why, if you're able to formulate any form of rational contention, why I should make an order at less than 100%.

MS WOODWARD: Sir, does that mean you've struck the case out?

HIS HONOUR: Well, I thought I'd made that clear at the outset. The case is struck out on the basis that the cause of action is frivolous, vexatious, scandalous etc or it's struck out on the basis that the further and better particulars did not comply with the Rules as they are set out. And what I'm now asking you to do, although you don't seem to comprehend what has happened, is to deal with the issue of costs.

MS WOODWARD: Can we not just get a solicitor and do it again?

HIS HONOUR: If you wish.

MS WOODWARD: This is a very serious thing, Sir. We may –

HIS HONOUR: Well, you say that but as far as I'm concerned – I don't give legal advice but I think you'd need Jesus Christ not a solicitor to formulate the cause of the action that you've brought; it's simply got no legs, but if you want to have another go that's your business. I am not dealing with that, I'm dealing with what I've got to deal with.

MS WOODWARD: Then could we not have an extension of time for another go?

HIS HONOUR: No, I don't see any point. The so-called statement of claim is just simply so lacking – utterly lacking in merit that it would be inappropriate to deny the defendant the right to have the matter struck out.

MS WOODWARD: But, Sir, the defendant himself seems to know more about it than we do."

[25] The learned Magistrate thereupon expressed the view that neither the Local Court, or for that matter the Supreme Court, possessed the necessary power to provide any of the relief sought by the appellants. He thereupon made a formal order that the whole of the originating motion be struck out and awarded costs against the appellants to be taxed at 100% of the appendix to the Supreme Court Rules.

Grounds of appeal relied upon

[26] By their notice of appeal, the appellants plead the following grounds of appeal:

"1. The learned magistrate erred in law in finding the whole of the originating motion should be struck out for failure to disclose the cause of action.

2. The learned magistrate erred in law in finding the whole of the originating motion should be struck out as being scandalous, frivolous or vexatious.

3. The learned magistrate erred in law in finding the proceeding brought by the appellants was an abuse of process of court.

4. The learned magistrate erred in law in failing to provide the appellants with any or any adequate opportunity to present their case.

5. The learned magistrate erred in law in failing to recognise the appellants had a right to bring proceedings in the nature of those brought, pursuant to section 109 of the Associations Act.

6. The learned magistrate erred in law in determining the question of whether the claim should be struck out for failure to provide further particulars under a wrong but relevant assumption, being that the proceedings were futile in any event.

7. The learned magistrate erred in law in finding the response of the appellants to the request for further particulars by the respondent to be a ‘complete and absolute failure to comply’ with the Local Court Rules.

8. The learned magistrate erred in law in failing to examine at all what particulars had been provided, before exercising his discretion to strike out the proceeding for failure to provide particulars.

9. The learned magistrate erred in law in failing to examine at all what attempts had been made by the appellants to provide particulars, before exercising his discretion to strike out the proceeding for failure to provide particulars.

10. The learned magistrate erred in law in determining the question of whether the claim should be struck out for failure to provide particulars, under a misapprehension that it (sic) would have no power to make final orders in the matter, irrespective of compliance by the appellants with request for particulars.

11. The learned magistrate erred in law in failing to give the appellants procedural fairness.

12. The learned magistrate erred in law in failing to have due regard to the difficulties that the appellants faced as unrepresented litigants."

Originating motion for orders in the nature of certiorari

[27] The originating motion filed by the appellants in matter 45 of 2007 seeks relief by way of judicial review pursuant to Rule 56.01 of the Supreme Court Rules.

[28] On the basis of the narrative history as I have already traversed it, the appellants seek orders in the nature of certiorari quashing the impugned decision and an order returning the proceedings back to the Local Court to be heard and determined afresh by a different magistrate.

[29] The originating motion complains that, in making the impugned decision without giving the appellants a proper opportunity to be heard, the defendant magistrate failed to accord natural justice to them and thereby committed a jurisdictional error.

Discussion of issues

Has the appeal properly been instituted as of right pursuant to s 19 of the Local Court Act?

[30] Subsection (1) of s 19 stipulates that a party to a proceeding in the Local Court may, within the prescribed time or after the expiration of that time by leave, appeal to this Court on a question of law from a final order of the

Local Court in that proceeding. An appeal against any other order may only be brought by leave in accordance with the provisions of s 19(3) of the statute.

[31] The statute does not define the expression "*final order in that proceeding*" and it therefore falls to be interpreted according to the normal and usual meaning of the words employed, given the statutory context in which they are found. The construction to be adopted is that which promotes the purpose or object underlying the relevant statutory provision (Interpretation Act s 62A).

[32] The word "*proceeding*" is defined in s 3 of the Local Court Act to mean "*a proceeding in the Court*". i.e. the Local Court.

[33] A reading of s 19(1), unencumbered by published authority, indicates that the scheme of the legislation is that appeals as of right from the Local Court to this Court are to be confined to questions of law arising in relation to what are described as "*final*" orders made in relevant proceedings.

[34] It follows that it is vital to accurately categorise the impugned order, in the context in which it was made. In the instant case, an immediate difficulty arises from the manner in which the learned Magistrate expressed the order in question.

[35] As sealed and entered, the order made by the learned Magistrate was expressed to be that "*The Originating Application is Struck Out*". There can

be no doubt that, in making such an order on the basis that the application was doomed to failure because it did not enliven any relevant jurisdiction of the Local Court, the learned Magistrate intended to fully terminate the proceedings adversely to the appellants.

[36] There is an important difference between what occurred in the instant case and situations in which, for example, a statement of claim is struck out as not disclosing an arguable cause of action. That distinction is plainly recognised by the provisions of Rules 28.01 and 28.02 of the Local Court Rules.

[37] The former Rule confers power to either stay a proceeding generally or a claim in a proceeding or to give judgment against the claimant where the claim or proceeding does not disclose a cause of action, is scandalous, frivolous or vexatious or is an abuse of the process of the Court.

[38] The latter Rule, *inter alia*, authorises the striking out of a pleading on similar bases. In such a situation the action remains on foot and, subject to the Rules, it would be open to a plaintiff to file a fresh, amended statement of claim.

[39] Having regard to what fell from Taylor J in *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439-440, an order striking out a pleading would plainly be of an interlocutory and not of a final nature.

[40] The processes envisaged by Rules 28.01 and 28.02 are to be contrasted with those contemplated by Rule 10.04 which, *inter alia*, the MBSMA sought to invoke by its application. In part, this stipulates that, if a party fails to comply with a notice requiring further and better particulars, the party who served the notice may apply for an order (if the party in default is the plaintiff or other party claiming relief) striking out the "*claim*". The word "*claim*" is not defined and is not necessarily synonymous with the word "*proceeding*".

[41] The essential problems in this case are that not only did the learned Magistrate elect to proceed of his own motion under Rule 28.01 when that Rule had not even been invoked by the MBSMA, but also the actual order made, in its mode of expression, was not one which was in strict conformity with any of the provisions of Rule 28. For example, it certainly was not, in either form or intention, an order merely striking out a pleading.

[42] It was plainly an order intended to bring the proceedings to a conclusion - finally terminating those particular proceedings in a manner whereby they could not be re-opened or re-heard (cf Local Court Act s 20). In other words it was, however expressed, obviously intended to constitute the pronouncement of a judgment dismissing the proceeding generally, because, apart from making a stay order, that was the only other course open to the learned Magistrate under Rule 28.01 (1) upon the basis of which he purported to act. That, of course, left open the issue of any right to start again in fresh proceedings.

[43] That being so, can it be said that the order made by the learned Magistrate was a final order for the purposes of s 19 (1) of the Local Court Act?

[44] A perusal of the published authorities readily reveals that the expression "*final order*" has been singularly resistant to any precise legal definition that may simply be applied to all circumstances. So it was that, in *Salter Rex & Co v Ghosh* (1971) 2 QB 597 at 601, Lord Denning MR was constrained to comment "*This question of 'final' or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look at the practice books and see what has been decided on the point. Most orders have now been the subject of decision*". However, that advice is not necessarily helpful, bearing in mind the seemingly inconsistent nature of some published decisions.

[45] The obvious commencement point in relation to general principle is what fell from Taylor J in *Hall v Nominal Defendant* (supra at 440), as more recently applied in *Bienstein v Bienstein* (2003) 195 ALR 225 and *Re Luck* (2003) 203 ALR 1. As McHugh, Kirby and Callinan JJ said in *Bienstein* [25]:

> "The usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties. The test requires the appellate court to look at the consequences of the order itself and to ask whether it finally determines the rights of the parties in a principal cause pending between them. Accordingly, orders refusing to set aside a default judgment or refusing to grant an extension of time are not final judgments because the unsuccessful party could make a further application for the same relief, even though such an application might have very little prospect of success".

[46] In *Re Luck* McHugh, Gummow and Heydon JJ emphasised that, in applying that test, the question is answered by determining whether the *legal* effect of the judgment is final or not. If the legal effect of the judgment *is* final, it is a final order; otherwise it is an interlocutory order.

[47] Their Honours, in *Re Luck*, went on to make these points:

> "… no case in this Court has expressly decided that interlocutory orders include an order dismissing an action because it is frivolous, vexatious, an abuse of process or because it fails to disclose a reasonable cause of action. But a number of cases decided in this Court before and after *Tampion* [*Tampion v Anderson* (1973) 3 ALR 414 at 416] are consistent with the view that an order falling within any of these categories is an interlocutory order. In *Pye v Renshaw* [(1951) 84 CLR 58 at 77], the Court held that an order dismissing a suit if no amendment were made to the statement of claim within 21 days was an interlocutory order. In *Hall v Nominal Defendant*, the Court held that an order refusing an extension of time in which to sue was an interlocutory order. Taylor J referred with evident approval to the rule, established in England, that an order striking out a claim on the ground that it was frivolous, vexatious or an abuse of process or that it disclosed no cause of action was interlocutory in nature. In *Carr v Finance Corp of Australia Ltd (No 1)* [(1981) 147 CLR 246], the Court held that an order of the Supreme Court of a State refusing to set aside a judgment obtained upon the default of the defendant in delivering a defence was an interlocutory order. In *Bienstein* the Court found that orders made by a single justice (a) to dismiss an application to disqualify himself from hearing the application for removal, and (b) to remove a particular cause pending in the Family Court into the High Court, were interlocutory Court orders.
>
> Given the long-established English rule, the decision in *Tampion* and our decisions in *Pye*, *Hall*, *Carr* and *Bienstein*, we see no valid reason for departing from the rule laid down in *Tampion*. An order is an interlocutory order, therefore, when it stays or dismisses an action or refuses leave to commence or proceed with an action because the action is frivolous, vexatious, an abuse of the process of the Court or does not disclose a reasonable cause of action."

[48] In the instant case the appellants sought to derive considerable comfort, as a matter of general approach, from the decision of the Full Court in *Florida Investments Pty Ltd v Milstern (Holdings) Pty Ltd* (1972) WAR 148. That decision related to a situation in which the judge at first instance made an order striking out the statement of claim on the ground that it disclosed no reasonable cause of action. He then made a further, consequential, order dismissing the action with costs.

[49] In the course of his reasons for decision, with which the other members of the Full Court concurred, Hale J said that, if the only order had been striking out the statement of claim, the action itself would have remained on foot, the rights of the parties would not have been finally disposed of and the order would have been interlocutory. But, he said, nothing could be more final than a dismissal of the action.

[50] The Full Court in *Little v The State of Victoria* (1998) 4 VR 596 made the point that *Florida Investments* could not be reconciled with the decision of the Privy Council in *Tampion* and declined to apply it, saying that, in the circumstances under consideration, it was not necessary to consider whether the view expressed in *Tampion* was one that was consistent with the view taken in certain Australian authorities.

[51] Callaway J seems to have accepted in *Little* that there may well be a difference between a case in which the action is frivolous or vexatious in the ordinary sense, or in which the proceedings disclose no reasonable cause of

action, and a case in which the abuse of process lies in an attempt to litigate an issue that is *res judicata*. He cited a dictum of Gibbs J in *Port of Melbourne Authority v Anshun Pty Ltd (No 1)* (1980) 147 CLR 35 at 38 to the effect that *Tampion* has nothing to say about a case of the latter kind.

[52] In his reasons for decision, Callaway J noted the existence of certain authorities potentially bearing on the issue of what was meant by the phrase "*a principal cause*" as adverted to in *Hall*, but found it unnecessary to dilate on that topic.

[53] I merely comment that it may well be that the reason why *Tampion* has nothing to say about cases in which a dismissal is based on issues of estoppel or *res judicata* is that it could fairly be argued in such a case that the practical effect of the order sought to be impugned is that it does, in fact, finally determine the rights of the parties in the relevant legal sense.

[54] It follows that, *prima facie*, the present contentions of the appellants run foul of what fell from the High Court in *Bienstein* and *Re Luck*. (See also *Lashansky v Bruvecchis Pty Ltd* [2005] FCAFC 64).

[55] Mr Piper, of counsel for the appellant, sought to avoid such a conclusion by submitting that, given the general principles espoused by the High Court, nevertheless, at the end of the day, the critical question to be addressed was what was intended by the legislature, having regard to the express language employed in, and the express context established by, s 19 of the Local Court Act.

[56] He argued that s 19(1) of that statute was essentially preoccupied with the genus of order that could properly be described as "a final order of the Court *in that proceeding*". He contended that the words of the subsection literally mean what they say and that the phrase "*final order*" refers to "*an identifiable Court process in the Local Court, not a matter of dispute between parties at large*". It was submitted that, on that basis, the type of final order there in contemplation is one that finally disposes of the relevant proceeding in the Local Court.

[57] That was, he said, exactly what the order of the learned Magistrate achieved. It had the effect of terminating the proceeding in a manner that ensured that it could not subsequently be resurrected. Accordingly, it was a final order in the proceeding and an appeal against it lay as of right.

[58] Mr Piper sought to contend that such a construction ought to be preferred because, unlike the situation with interlocutory orders in many other jurisdictions, there is no power under the Local Court Act to grant leave where the quite short time for seeking leave to appeal has expired.

[59] I am unable to accept the arguments advanced by Mr Piper. On a fair reading of it, s 19 does not indicate that the phrase "*final order*", as utilised in subsection (1), is intended to have other than its normal and usual meaning. It is to be noted that the statutory provision adverts to a "*final order of the Court*" "*in that proceeding*". It does not speak of an order of finally disposing of that proceeding in such clear and unequivocal terms as

to take the situation outside of the now well settled principles governing the distinction between relevant final and interlocutory orders generally.

[60] I consider that the expressions employed are intended simply to identify the genus of "*final order*" made within a particular proceeding in the Local Court, that is to say, orders that have the effect, within a specific proceeding, of finally determining the rights of the parties as to a principal cause arising between them.

[61] This was not the situation in the instant case, because the learned Magistrate simply resorted to the powers conferred by Rule 28.01 of the Local Court Rules and did not ever purport to address and determine any legal rights possessed by the appellants by virtue of the Associations Act. That is so, notwithstanding the fact that the learned Magistrate appears to have failed to address the provisions of s 109 of that statute. It would seem obvious that there would have been no impediment to the appellants instituting fresh proceedings in the Local Court seeking any relief available to them under the Associations Act.

[62] It follows that, in my opinion, the appeal has not been properly instituted as of right and is incompetent.

[63] As already appears, it is not now open to the appellants to seek an extension of time within which to appeal pursuant to the provisions of s 19(3) of the Local Court Act (*Collins v Deflaw Pty Ltd* (2000) 157 FLR 121).

[64] In case it be considered that I am an error in arriving at the foregoing conclusions, it is desirable that I make some remarks as to the merits of the purported appeal.

Did the subject matter sought to be ventilated by the appellants enliven any jurisdiction conferred on the Local Court by the Associations Act?

[65] Distilled to the essence, the core complaints sought to be advanced by the appellants were to the effect that:

(1) They had been members of the MBSMA;

(2) They had been expelled from such membership;

(3) That expulsion was either contrary to law or had otherwise been effected in a manner that was in discord with the concept of natural justice;

(4) The actions of the management or committee of the MBSMA had been oppressive and unfair; and

(5) The management committee of the MBSMA had been refusing to act in accordance with the constitution of that entity and that their actions had been "*illegal*".

[66] Section 109 of the Associations Act, *inter alia*, confers certain specific jurisdictions on the Local Court. It provides that a member of an unincorporated association or a former member expelled from the association (provided that the application is made within six months after

the expulsion) who holds any one or more listed beliefs, may seek an order or orders from the Local Court (relevantly in this case):

> "(b)… regulating the future conduct of the association's affairs;
>
> (c)… restraining a person from engaging in specified conduct or from doing a specified act;
>
> (f)… requiring a person to do a specified act; and
>
> (h)… that the member expelled be reinstated as a member of the association".

[67] The Local Court is also empowered to make orders consequential on or ancillary to any of the foregoing orders.

[68] Subsection (1) of s 109 provides that (relevantly for present purposes) it is a condition precedent to the making of an application that the applicant hold a belief that:

> "(a) the affairs of the association are being conducted in a way that is oppressive or unfairly prejudicial to, or unfairly discriminating against, a member ('the oppressed member') or in a way that is contrary to the interests of the members as a whole;
>
> (b) an act or omission, or a proposed act or omission, by or on behalf of the association was or would be oppressive or unfairly prejudicial to, or unfairly discriminating against, a member (also 'the oppressed member') or was or would be contrary to the interests of the members as a whole;
>
> (c) …[not relevant]
>
> (d) the expulsion of the member was oppressive or unreasonable".

[69] It is further provided in subsection (9) of s 109 that a breach of the constitution of an incorporated association by its committee may be regarded as constituting action that is oppressive to members of the association.

[70] I agree with counsel for the appellants that it appears from the transcript of proceedings before the learned Magistrate that he seems to have been unaware of the existence of the relevant provisions of s 109 of the Associations Act. Not only did he make no reference to them but, as already appears, he simply expressed the views that there was "*no cause of action at all*" and that neither the Local Court nor the Supreme Court possessed power to grant *any* of the relief sought. He did not afford either party an opportunity of promoting a contrary proposition.

[71] Whilst it may well be arguable that certain of the relief sought – at least in the manner in which was expressed – may have been beyond power to grant, nevertheless, a good deal of it manifestly fell fairly and squarely within the jurisdiction conferred by s 109. In particular, the issues of the propriety of the expulsion of the appellants and whether they had been afforded due process were plainly justiciable, as were issues related to the mode of conduct of the affairs of the association.

[72] Equally, it simply could not be concluded, as the learned Magistrate did, that the proceedings instituted by the originating application were wholly scandalous, frivolous or vexatious within the meaning of Rule 28. I accept

the appellants' submission that a proceeding may only properly be categorised as frivolous and vexatious if it can be said to be so obviously untenable that it cannot possibly succeed (*Burton v President of Shire of Bairnsdale* (1908) 7 CLR 76 at 92*)*.

[73] If there is a real question to be determined, whether of fact or law, and the rights of the parties depend on it, the action may not be dismissed as frivolous and vexatious. Nor can it be said to constitute an abuse of process (*Dey v Victorian Railways Commissioners* (1948-1949) 78 CLR 62 at 91*)*. As was accepted by Dixon J, it is only in exceptional cases that an action may be properly be dismissed as an abuse of process.

[74] In so far as the learned Magistrate concluded that he was justified by Rule 28.01 in proceeding as he did, he patently fell into error.

What was the duty of the learned Magistrate to the appellants as self represented litigants and was that duty discharged?

[75] It has long been recognised that the presence of litigants in person has been increasing numerically and creates very real problems for the courts (*Cachia v Hanes and Anor* (1993-1994) 179 CLR 403 at 415*)*.

[76] In presiding over a hearing in which a self represented litigant is involved, a judicial officer is in a difficult and unenviable situation. He or she must straddle a fine line between discharging an obligation to adequately inform the self represented litigant of his or her rights in order that such person may determine how to conduct the case so as to ensure a fair trial whilst, at

the same time, avoiding tendering advice in a manner that might give rise to a reasonable perception by any other party of inappropriate partiality (cf *R v Zorad* (1990) 19 NSWLR 91*).*

[77] Whilst it must be conceded that the obligations of a trial judge in a criminal proceeding affecting a self represented litigant may be more onerous than those arising in the context of the civil case (as to which the dicta in *MacPherson v The Queen* (1981) 147 CLR 512 are pertinent), nevertheless, the nature and extent of the responsibilities of a judicial officer in the latter context will depend on the litigant, the nature of the case and the litigant's intelligence and understanding of the case.

[78] At the end of the day the touchstone in both settings is the need to do that which is necessary to ensure the conduct of a proceeding that is fair and in accordance with law (cf *MacPherson at 523, Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129 at [29] and *Pezos v Police* [2005] SASC 500*).* As Debelle J said in the latter case, there is a tension between maintaining the impartiality of the judicial officer and the provision of the appropriate degree of assistance to an unrepresented litigant.

[79] In the course of its judgment in *Tobin v Dodd and others* [2004] WASCA 288 the Full Court made the point that, where there are unrepresented litigants, impugned pleadings should be examined with care with a view to ensuring that, in the case of a poorly expressed or unstructured statement of

claim, there is no viable cause of action which, with appropriate amendment or permissible assistance from the court, could be put into proper form. A similar point was made by Sackville J in *Re Morton; ex parte Mitchell Products Pty Ltd* (1996) 21 ACSR 497.

[80] In discharging such a function an important distinction must be drawn between advising a claimant how to conduct his or her case (which is inappropriate) and informing the party of his or her rights in order that such party may determine a course of conduct.

[81] The requirement is to ensure that the self represented litigant is put in a position of being able to make effective choices as to exercise of his or her rights, by way of contrast with telling that person how to exercise those rights (see general discussion as to this in *Pezos*). The fundamental aim must be to diminish, so far as is feasible, the disadvantage that the self represented litigant would normally suffer when faced by a lawyer acting for his or her opponent, without, at the same time, conferring on that litigant a positive advantage over the represented opponent (*Rajski v Scitec Corporation Pty Ltd* (CA (NSW), 16 June 1986, unreported)).

[82] It is clear from my recital of the narrative facts that the learned Magistrate did not discharge his specific responsibility to the appellants to ensure that, as self represented litigants, they clearly understood their rights and were in a position to make informed procedural choices. It also seems obvious that

he did not inform himself of the relevant provisions of the Associations Act. He certainly made no mention of them.

[83] On any view, the statement of claim and particulars supplied plainly identified potential causes of action recognised by s 109 of the statute – however inelegantly they may have been expressed. No doubt there were matters referred to that apparently extended beyond any jurisdiction conferred by the section. However, that situation should have led to a proper discussion and explanation of the concept of jurisdiction and the need for and technical requirements of a better particularised expression of the permissible causes of action. This did not occur. The failure to do so constituted an error of law.

Was there a failure to accord natural justice to the appellants?

[84] It is beyond question to say that the responsibilities of the learned Magistrate towards the appellants had to be discharged in the wider context of the duty of a judicial officer to accord parties appearing before him procedural fairness.

[85] The deprivation of a party of a reasonable opportunity to be heard and to present his or her case at a hearing necessarily constitutes a clear breach of the rules of natural justice and thus an error of law (cf *The Nominal Insurer v Miljanovich* [1994] NTSC 98 pars [39] and [43], *Escobar v Spindaleri and Anor* (1986) 7 NSWLR 51).

[86] A consideration of the relevant extracts of the transcript, as earlier recited, readily reveals that, with respect, the learned Magistrate did not accord procedural fairness to the appellants.

[87] The appellants would be pardoned for concluding that he had already made up his mind adversely to them as to the issue of causes of action at the outset of the hearing and he afforded Ms Woodward no opportunity of making relevant submissions, despite her attempts to address him. Any tentative protests by Ms Woodward or attempts to address the learned Magistrate or seek an adjournment to enable legal assistance to be obtained were peremptorily brushed aside.

[88] There is no doubt that the appellants should have been afforded a proper opportunity of placing the pleadings and particulars in order and given a proper explanation as to what was required in that regard, but they were effectively denied any possibility of doing so.

Conclusion as to merits of appeal

[89] It follows that, if the purported appeal had been competent, I would unhesitatingly have allowed it, set aside the impugned orders and remitted the proceedings back to the Local Court, for reconsideration by another magistrate. As matters stand, I have no option but to dismiss the appeal on the basis that it does not enliven the jurisdiction conferred by s 19(1) of the Local Court Act.

Given the incompetency of the appeal, have the appellants made out a case for judicial review?

[90] In the concluding stages of the hearing before me I gave the appellants leave to file an affirmation as to when the appellants first sought legal advice, following the making of the impugned orders. This was by way of supplementation to an affirmation made by Mr Piper, which stated that the appellants first contacted him seeking legal advice on 15 March 2007. He was first able to see Ms Woodward on 19 March 2007, at which time she did not possess a copy of the relevant transcript of proceedings and, in its absence, had no clear recollection of precisely how the learned Magistrate had expressed himself.

[91] Mr Piper says that he attended the Local Court on 20 March 2007 and listened to the audiotape of the proceedings on 21 February 2007 and thereafter filed the notice of appeal on 21 March 2007. Having been advised by letter dated 3 April 2007 written to him by the solicitors for the MBSMA that it would be contending that the appeal was incompetent, Mr Piper sought counsel's advice as to the situation, as a consequence of which the originating motion seeking judicial review was filed.

[92] The affirmation of Ms Woodward renders it clear that, immediately following the making of the impugned orders, the appellants somewhat desperately sought to secure legal advice as to their position. *Inter alia*, they sought assistance from an officer of the Department of Business and Infrastructure to identify and procure suitable legal representation. They

were unable to secure such representation until Ms Woodard first saw Mr Piper. I infer that, prior to seeing him, they were unaware of the detailed provisions of s 19 of the Local Court Act and, in particular, the time constraints imposed by it.

[93] I note that, in a separate affirmation made by her, the second appellant, Ms Braddy, states that she was booked to go overseas to Bali from 23 February 2007 and did not obtain legal advice in relation to the decision of the learned Magistrate until she went, with Ms Woodward, to see Mr Piper on 21 March 2007.

[94] Leaving aside other relevant considerations, it must be said that the narrative events, as I have recorded them, compellingly indicate that the conduct of the learned Magistrate effectively resulted in a serious miscarriage of the proceedings in the Local Court. The appellants were not accorded due process, they were not rendered that assistance that unrepresented litigants are entitled to expect, the matter was dealt with, at the instance of the learned Magistrate, on a basis that had not even been propounded on behalf of the MBSMA and it is beyond question that the learned Magistrate had effectively prejudged the matter prior to either party having an opportunity of being heard.

[95] The truly unfortunate aspect of the matter was that the learned Magistrate not only elected, of his own motion, to proceed under a Rule that had not been relied on by the MBSMA, but also completely ignored the relevant

provisions of s 109 of the Associations Act. His conclusion, arrived at without hearing the parties, that there was nothing in the stated basis of the relief sought by the appellants that could enliven any relevant jurisdiction that could be exercised by the Local Court was plainly erroneous. It is a matter for some surprise that, at the time, counsel for the MBSMA stood mute on this aspect and did not invite the attention of the learned Magistrate to the obviously applicable provisions of the section.

[96] The principles related to the concept of apprehended bias by reason of pre-judgement are well-settled. They were canvassed by the High Court in *Johnson v Johnson* (2000) 174 ALR 655 and subsequently discussed and applied by the Court of Appeal in *Kwan v Kang* [2003] NSWCA 336 (see also the discussion by Hayne J in *Minister for Immigration and Multicultural Affairs v Jia Legeng and White* (2001) 205 CLR 507 at 563-564).

[97] In the instant case, the learned Magistrate having indicated his views to the parties in quite forceful and colourful terms, this was a classic instance of a situation in which a fair-minded lay observer might reasonably have apprehended that the judicial officer concerned might not bring an impartial and unprejudiced mind to bear on the matter.

[98] Of course, the situation thereafter developed far beyond that stage. Having announced his perception of the legal position, the learned Magistrate then proceeded to give effect to his perception without affording the appellants

any opportunity of effectively addressing him on the subject or allowing them an opportunity of seeking appropriate advice. It seems to me that, in the end result, a condition of actual bias by reason of pre-judgment clearly arose. As to this, the comments of Kirby J. in *Antoun v R* (2006) 224 ALR 51 at 59 are pertinent.

[99] The appellants base their claim to relief by way of judicial review on the failure of the learned Magistrate to accord them natural justice, specifically a failure to afford them procedural fairness. What is sought is an order in the nature of certiorari.

[100] It is trite to say that the remedy of certiorari enables the quashing of an impugned order or decision of an inferior Court upon one or more of a number of distinct established grounds, the most relevant of which for present purposes is failure to observe some applicable requirement of procedural fairness (*Craig v The State of South Australia* (1994-1995) 184 CLR 163). The requirements of natural justice are not rigid and technical. They will depend on the circumstances of the case, the nature of the proceeding, the rules under which the Court is acting, the subject matter being dealt with and so forth (*Stolley v The Greyhound Racing Control Board* (1973) 128 CLR 509 at 526).

[101] It is well-settled that an order in the nature of certiorari is a discretionary remedy. It is not normally to be resorted to in circumstances where there is a right of appeal that is at least as efficacious (*Re Carey; ex parte Exclude*

Holdings Pty Ltd [2006] WASCA 219 at [138]). Nor, absent what has been described as "*exceptional circumstances*", should it be allowed to circumvent a time limitation where the subject matter was proper for determination by appeal and the claimant for relief has failed to pursue an appeal in a timely manner (*Keuk v Victoria Legal Aid* [2001] VSCA 80). This is particularly so where what is an issue is an asserted error of law on the face of the record (*Re McBain; ex parte Australian Catholic Bishops Conference & Anor* (2002) 209 CLR 372).

[102] Having said that, it must be noted that there is certainly no absolute rule that the existence of a statutory right of appeal or even the unsuccessful exercise of such a right is necessarily a bar to the seeking of a remedy by way of judicial review. It is, rather, the situation that the existence and/or exercise of such a right is a relevant consideration as to whether the Court ought to exercise its discretion in a particular case to grant or refuse certiorari (*Gudgeon v Black: ex parte Gudgeon* (1994) 14 WAR 158). Indeed, in a clear case of absence of jurisdiction, for example, the Court may well be bound to issue prerogative relief (*Yirrell v Yirrell* (1939) 62 CLR 287). Considerations of balance of convenience, the public interest and relative forms of relief available are relevant to the exercise of discretion (*Gudgeon* at 181, 185).

[103] It is fair to say that, in the instant case, Mr Clift, of counsel for the MBSMA, virtually sought to elevate what fell from the Court in *Keuk* (supra) to the status of an almost absolute rule. That is clearly not the

situation. As pointed out by Kirby P (as he then was) in *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 and Malcolm CJ in *Gudgeon* at 187 (citing Bingham MR), there are few cases in which relief has been denied to applicant who has established a clear abuse of power – particularly in the context of a serious departure from the rules of natural justice.

[104] In this case I have already demonstrated that the appellants, as litigants in person, had no relevant knowledge of the provisions of s 19 of the Local Court Act and that, despite their active efforts to obtain legal advice immediately following the making of the impugned orders, they were in fact unable to obtain such advice until 21 March 2007, by which date the applicable time for appeal had actually expired.

[105] It is plain that Ms Woodward was quite desperately endeavouring to seek advice. There was no lack of diligence on her part. Further, as these reasons indicate, there was, in any event, a very real issue as to the nature of any permissible appeal to be brought and thus the specific time limit applicable to it. Had the appeal been as of right, it would have been within time.

[106] Even more importantly, within the concept discussed in *Keuk*, the circumstances of the instant case are exceptional. I have already pointed out that, against a background that the appellants were self represented, what occurred were very serious breaches of natural justice.

[107] The learned Magistrate effectively denied the appellants any opportunity to address him as to the course that he proposed to adopt, inappropriately ignored an application for an adjournment to seek legal advice and put their pleadings and particulars in order, failed to render them the assistance as self represented litigants that they were entitled to receive, had plainly prejudged the matter before either party had been given any opportunity to address him at all and then proceeded to deal with the substance of the matter without affording them any such opportunity.

[108] To compound those problems his prejudgment was patently wrong, in so far as he failed to recognise the obvious enlivenment of at least some jurisdictional aspects arising under s 109 of the Associations Act.

[109] In those circumstances it would be an affront to any reasonable notion of justice and contrary to the public interest to decline to grant the appellants to relief that they seek by way of judicial review. To do so would, in my opinion, necessarily bring the administration of the law into disrepute.

Conclusion as to judicial review

[110] It follows that the appellants have demonstrated a right to relief by way of an order in the nature of certiorari. The impugned orders will be quashed and the proceedings remitted back to the Local Court for rehearing before another magistrate.

[111] I will hear counsel as to any ancillary orders sought.