Woodward & Anor v Mindil Beach Sunset Market Association [2009] NTSC 18

PARTIES:	WOODWARD, LUCINDA and BRADDY, VICKI v MINDIL BEACH SUNSET MARKET ASSOCIATION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	LA7 of 2008 (20625162)
DELIVERED:	29 April 2009
HEARING DATE:	2 February 2009
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellants:	Self Represented
Respondent:	D De Silva

Solicitors:

Appellant:	Self Represented
Respondent:	De Silva Hebron

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Woodward & Anor v Mindil Beach Sunset Market Association [2009] NTSC 18
No. LA7/2008 (20625162)

BETWEEN:

WOODWARD, Lucinda
and
BRADDY, Vicki
Appellants

AND:

MINDIL BEACH SUNSET MARKET ASSOCIATION
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 29 April 2009)

[1] This is a "Request for Judicial Review" by the appellants from a decision of a magistrate in the Local Court. I agree with the submission made by Mr De Silva for the respondent that whilst the appellants have made a request for "judicial review" it is in fact an appeal under s 19 Local Court Act. Section 35 of the Local Court Act precludes judicial review - see *Woodward & Anor v Loadman & Anor (No. 2)*[1]. It is conceded on behalf of the respondent that it is open to the appellants to seek other declaratory relief.

[1] [2008] NTSC 6 delivered 12 February 2008 paragraph 8

[2] The orders appealed from are interlocutory in nature. This involves the application of s 19(3) of the Local Court Act which provides as follows:

> "A party to a proceeding may, within 14 days after the day on which the order complained of was made, appeal to the Supreme Court from an order of the Court, (other than a final order) in that proceeding, with the leave of the Supreme Court."

[3] The appellants require the leave of the Court to appeal. The onus is on the appellants to establish error on the part of the magistrate vitiating his decision.

[4] On 11 August 2008, the learned stipendiary magistrate gave a decision on an application brought by the respondent pursuant to Rule 28.01 of the Local Court Rules. The respondent is an incorporated association to which the provision of the Associations Act apply. Mr De Silva, on behalf of the respondent, sought a stay of proceedings initiated by the appellants on an Originating Motion in the Local Court on the basis that it was an abuse of the process of the court. Rule 28.01 provides as follows:

> **"28.01 Stay or judgment in proceeding**
>
> (1) Where a proceeding generally or a claim in a proceeding –
>
> (a) does not disclose a cause of action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court,
>
> the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

(2) Where a defence to a claim in a proceeding –

(a) does not disclose an answer;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the Court,

the Court may give judgment in the proceeding generally or in relation to the claim.

(3) In this rule –

(a) a claim in a proceeding includes a counterclaim and a claim by third party notice; and

(b) a defence includes a defence to a counterclaim and a defence to a claim by third party notice."

[5] Based upon certain affidavit evidence and after hearing lengthy submissions from both parties, the order made by the learned stipendiary magistrate was to stay the plaintiffs' application in relation to prayer for relief (1) and (2). He further found there was no cause of action legitimately before the Court with respect to the plaintiffs' prayers for relief (3), (4) and (5) and these were struck out.

History of the proceedings

[6] On 3 October 2006, the appellants issued an originating application pursuant to Rule 7.08(1) of the Local Court Rules applying to the Court for the following orders:

"1. That the Mindil Beach Sunset Market Association (MBSMA) forthwith reinstate the applicants as members of the MBSMA.

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

3. 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.

The applicants relied on s 39 and s 109 of the Associations Act (NT).

The facts, matters and circumstances supporting this application are:

The applicants were members and stallholders of the MBSMA. In June 2006 the MBSMA Public officer forwarded letters name[ed] "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 a meeting scheduled by the MBSMA, and the MBSMA henceforth on 26 September expelled her from the association.

The applicants' claim they have not been afforded due process and that they have been treated oppressively and unreasonably."

[7] The appellants were members and stallholders of the MBSMA. On 30 June 2006, the MBSMA public officer forwarded "Default Notices" to the appellants.

[8] The Default Notices were in exactly the same terms with respect to each appellant. Omitting formal parts they read as follows:

"Default Notice

Following a unanimous decision by the Management Committee this notice is served without prejudice on the following grounds.

1. Colluding with others with the intent to malign and defame certain members of MBSMA by making available for broadcasting, slanderous material per the medium of public radio to covertly incite division among the general membership of the association and to bring the MBSMA into disrepute.

2. Colluding with others with the intent to malign and defame certain members of MBSMA by making available for broadcast, slanderous material per the medium of an apparent covert website to incite division among the general membership of the association and to bring the MBSMA into disrepute.

3. Obstructing the Management and Committee of MBSMA from attending to the business of the Association by covertly disseminating masses of deceitful and defamatory email material to the Management office and certain members of the committee and the membership at large, with the intent to incite division and dispute amongst the members and to bring the MBSMA into disrepute.

4. Without the permission of the Association or its members, illegally using MBSMA membership details, knowing them to have been illicitly downloaded from the Association's computer by other persons, to defame certain members of MBSMA and the Association itself, by disseminating offensive and incorrect material to the Department of Justice, the Northern Territory Tourist Commission thereby bringing the Association into disrepute.

At a General Meeting of the Association conducted on Tuesday 23rd May 2006, the Committee received a very strong mandate from the members to attend without delay to this Default Notice.

You are required to respond to the Management Committee under 4.6.2(e) (within no less than 14 days and no more than one month following the date of the Default notice) attend a Committee meeting where the member shall be given an opportunity to present his or her case to the Committee. If the member fails to comply with these directions the Committee will refer the matter to eligible members to decide whether to expel the member from the Association.

Section 4.6 of the current Constitution clearly expresses your responsibility regarding this notice."

[9] Prior to the issue of the Default Notice, the appellants had raised a number of concerns with the Committee of the Management of the Association including allegations of mismanagement of the Association funds and

harassment of members at Mindil Beach Market. The appellants state that when they sought clarification of these and other issues from the Management Committee, they were either ignored or shouted down by a small number of members and personally treated in an oppressive manner by members of the Management Committee of the MBSMA.

[10] A general meeting of the Association was held on 26 September 2006 at which a decision was made to cancel the membership of each of the appellants and removal of their name from the register.

[11] The appellants were served with "Notification of Cancelled Membership", dated 27 September 2006, which omitting formal parts reads as follows:

> "Following the General Meeting held at the Fannie Bay Turf Club, Darwin, on 26th September 2006, 7.30pm to 1030pm, the Committee wish to notify you of the decision made by the members present at the meeting.
>
> The Committee presented to the members information it had received in relation to your involvement in the matters outlined in your Default Notice (see letter to you, dated 30th June 2006).
>
> A Motion was put to the meeting to cancel your membership forthwith. A secret ballot was undertaken. The votes were counted and the Chairperson of the meeting declared the Motion Carried.
>
> The Committee therefore is obliged to notify you that your membership has been cancelled and your name removed from the register of members. This will take effect 14 days from the date of this letter."

[12] On 3 October 2006, the appellants issued an originating application in the Local Court as detailed in paragraph [6] of these reasons for judgment.

[13] 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 appellants' claim be struck out for a failure to provide proper particulars.

[14] This application came before Mr Loadman SM who, on 21 February 2007, made an order that the whole of the Originating Motion be struck out and costs awarded against the appellants at 100 percent of the appendix to the Supreme Court Rules.

[15] The appellants filed a Notice of Appeal dated 21 March 2007 setting out a number of grounds relating to errors of law the appellants asserted had been made by the learned stipendiary magistrate.

[16] On 17 May 2007, the respondent's taxation of costs was adjourned sine die with liberty to apply. The application for a stay of the costs order was withdrawn.

[17] The appeal came before Olsson AJ. His Honour delivered reasons for judgment on 9 November 2007 (*Woodward & Anor v Loadman & Anor*).[2] His Honour found that the appeal had not been properly instituted as of right and was incompetent. He stated at paragraph 63: "… it is not now open to the appellants to seek an extension of time within which to appeal under s 19(3) of the Local Court Act (*Collins v Deflaw Pty Ltd*)".[3]

[2] [2007] NTSC 60 SC45 of 2007
[3] (2000) 157 FLR 121

[18] His Honour identified a number of errors made by the learned stipendiary magistrate that had demonstrated serious departures from the rules of natural justice. He stated he was satisfied the appellants had demonstrated a right to relief by way of an order in the nature of certiorari. His Honour quashed the impugned orders and remitted the proceedings back to the Local Court for rehearing before another magistrate.

[19] On 12 December 2007 the appellants filed a further summons seeking the following orders:

> "1. An order that the(sic) in the making of the order on 21 February 2007 striking out the originating application filed by the plaintiffs on 3 October 2006, the Learned Magistrate failed to accord the plaintiffs natural justice and acted with actual bias.
>
> 2. Such further or other orders as the court deems appropriate."

[20] On 12 February 2008, Olsson AJ delivered further reasons for judgment. He accepted further argument from the parties as to the effect of s 35 of the Local Court Act. This section had not previously been averted to by either party. His Honour found this provision precluded him from making "orders in the nature of certiorari, mandamus, prohibition or quo warrants against the Local Court or an officer of the Local Court (*Woodward & Anor v Loadman & Anor*).[4] His Honour then made the following orders:

> "(1) That the originating motion in matter SC 45 of 2007 be amended so as to claim, in the alternative, declaratory relief of the nature specified in the summons filed in those proceedings on 12 December 2007.

[4] [2007] NTSC 60 SC45 of 2007

(2) That this Court declares that, having regard to the attendant circumstances, the making by the first defendant on 21 February 2007 in Matter 20625162 in the Local Court at Darwin of an order striking out the originating application in that matter and the associated order for costs did not accord the plaintiffs in that matter natural justice. Accordingly, it further declares that the jurisdiction of the learned magistrate has constructively not been exercised as to that order."

[21] On 13 February 2008 the Registrar of the Supreme Court authenticated the following orders made by the Court on 12 February 2008:

"THE COURT ORDERS THAT:

1. The order of 9 November 2007 in matter No SC 45 of 2007 is recalled and vacated.

2. The Originating Motion in matter No SC 45 of 2007 be amended so as to claim, in the alternative, declaratory relief of the nature specified in the summons filed in those proceedings on 12 December 2007.

3. The order of 9 November 2007 in matter No LA 6 of 2007 is not recalled and is to stand.

4. There is no order as to costs.

AND THE COURT DECLARES THAT

1. Having regard to the attendant circumstances, the making by the first defendant on 21 February 2007 in matter No 20625162 in the Local Court at Darwin of an order striking out the originating application in the matter and the associated order for costs did not accord the plaintiffs in that matter natural justice. Accordingly, the jurisdiction of the learned magistrate has constructively not been exercised as to that order."

The practical effect of these orders was that the appellants' originating application was referred back to the Local Court for hearing before another magistrate.

[22] On 18 March 2008, the respondent filed an application pursuant to Local Court Rule 28.01 that the proceedings be stayed and for a further order that the appellants, in the substantive action, pay the respondent costs of this application. Rule 28.01 has been set out in full at paragraph [4] of these reasons for judgment.

[23] This application was supported by an affidavit of Damien Joseph Jones sworn 18 March 2008. Annexed to this affidavit is copy of a letter dated 13 March 2008 from solicitors for the respondent to the appellants. This letter, omitting formal parts reads as follows:

> "Our client has given your application to the Court further consideration, and our client has also closely considered the best interests of the Association and its members. Having done so, our client cannot justify the continuation of the Court proceedings and has made the decision, on a commercial basis [to] withdraw the notice cancelling both of your membership[s] dated 27 September 2006.
>
> The effect of our client's decision is that you remain a member of the Association and the basis for the Court proceedings no longer exists.
>
> Please find enclosed (*)[1] Consent Order which we ask you to sign and return to us, to enable it to be filed on Monday 17 March 2008 when the writer is appearing in the Local Court on another matter at 10.30am.
>
> Should you not return the Consent Order to us, at the above time we shall advise the Court we have no other option but to make the appropriate application to the Court to finalise the proceedings.
>
> We await your reply.
>
> Naturally, should you wish to discuss the matter, please do not hesitate to contact the writer.
>
> [1]Consent Order"

[24] The proposed consent order was that the proceedings be dismissed on the basis the appellants remain members of the respondent Association. Further, that each party bear their own costs.

[25] The appellants were not prepared to sign such a consent order. Accordingly, the respondent's application to stay the proceedings came on for hearing before his Honour Mr Wallace SM on 10 April 2008.

The hearing of the respondent's application

[26] For various reasons the matter was adjourned part heard on 10 April and further heard on 26 May 2008, 21 July 2008 and 11 August 2008.

[27] On 11 August 2008, the learned stipendiary magistrate made the orders as set out in paragraph [5] of these reasons for judgment. I set out hereunder relevant parts of the learned stipendiary magistrate's reasons for decision which was given ex tempore (tp 28-30):

> " What is before me at the moment, what we've been talking about for the last three, four, five months is an application brought by the respondent seeking that the proceedings brought by the applicants, Ms Woodward and Ms Braddy, be stayed. The proceedings brought by Ms Woodward and Ms Braddy are brought pursuant to section 109 of the Associations Act which give the Local Court powers to do some things – I stress some things not others – in relation to the relief against oppression and unreasonable action on the part of the associations towards their members. Ms Woodward and Ms Braddy were and perhaps are again or perhaps can be again, member of the association which is the respondent.
>
> The originating application brought Ms Woodward and Ms Braddy sought this relief: first, that the association forthwith reinstate them as members of the association; secondly, that the association reinstate them as stallholders at Mindil Markets. It's

quite clear that the first relief is one which the court can give and I refer there to section 109(2)(h) of the Associations Act. Indeed, the relief sought is precisely that which the law allows and that order is one that the Local Court can make pursuant to subsection (5) of that section.

Subsection (2), the order to reinstate them as stallholders, is not on the face of it the sort of order the court can make, but it seems to me clear that in order to be fully fledged members of the association, on the material before me, Ms Woodward and Ms Braddy would need to be stallholders, and it would therefore seem that that order would be one consequential on or ancillary to an order for their reinstatement. It would be a necessary adjunct to that order and it seems to me therefore, according to the provision of subparagraph (i) of section 109(2), the court can grant that order as well.

The applicants, Ms Woodward and Ms Braddy, sought three further heads of relief: first, and this is number 3, that the association pay the applicants all lost income to be assessed or agreed for the period of disqualification; fourthly, that the association provide all particulars in detail of the allegations made against the applicants; and, fifthly, that there be an investigation into the conduct of the association. It is clear to me that those three reliefs are not matters that can be offered by this court pursuant to section 109 of the Associations Act or any other section of the Associations Act. As far as this application is concerned, those prayers for relief are not founded.

I say this: that in respect of any claim for lost income, there is an action that could be lodged in the Local Court in the form of an ordinary statement of claim, though it wouldn't be an ordinary one, it would be an unusual one. It would be some sort of action in conspiracy or breach of contract or tort or something in relation to that lost income, but it is not a relief that section 109 offers. There is no provision for this court to give damages, restitution, compensation or anything of the sort in these proceedings, and number 3 is therefore a claim not known to the law, at least in these proceedings.

Clause number 4 or head number 4, that the association provide all particulars in detail of allegations made against the applicants is again something that doesn't seem to me – well, it's quite clearly not provided for in section 109, nor does it seem to me to be consequential on or ancillary to the relief that can legitimately be asked for. Ms Woodward and Ms Braddy may well feel, and they may well be right, that their names and reputations have been traduced in the proceedings of the association which led to their

suspension, expulsion or whatever it was. If they have been defamed, libelled, slandered, then there is remedies offered by the courts in various kinds – well, there aren't various kinds of defamation actions anymore, there's only one. But that once again is a separate action; it's not an action that can be squeezed into an action - on this originating application pursuant to section 109 of the Associations Act and that prayer for relief number 4 is therefore not properly before the court and seeks relief not know to the law.

Fifthly, the applicants seek that there be an investigation into the conduct of the Mindil Beach Sunset Markets Association and on every appearance before me, including the affidavits that have been filed this morning, both Ms Woodward and Ms Braddy have made it clear that that's something they want. I have said before and I say again after again looking through the Act, that there seems to be no part for the court to play in arranging for, recommending such investigations.

I suppose it's conceivable that if the court were legitimately hearing a case of some sort and it came to the court's attention incidentally during the course of such a case that something was rotten in the affairs of an incorporated association, then the court might well bring to the attention of the appropriate authority – in this case, the Commissioner – that there might be something for the Commissioner to look at.

And that sort of thing happens and has happened in relation to a number of actions that turn out to be – well, things turn up in actions which are so disturbing to the court that the court feels the need to do something. More commonly, issues arise concerning people's taxation, income taxation, payment of taxation, that sometimes the court feels moved to inform the Commissioner of Taxes that there might be something worth looking at in such and such a case and so on.

So it could happen but it is not, in my view, anything that is central to the court's function and it's not the Local Court's function under the Associations Act to instigate, recommend or pursue these investigations. If somebody can interest the Commissioner into doing what is desired, fine; if they can't, they can't. It is clear to me that it is not a legitimate purpose to keep this case going in order to open everything up to the point where it might be that the court might be moved to send off a letter to the Commissioner suggesting the Commissioner might like to look at what's going on. It's not impossible that that would happen but it is not a legitimate purpose of litigation and the relief sought in clause, that there be an

investigation into the conduct of the association, is relief which is not within the court's power to order.

So that is the situation. There are two heads of relief which it is legitimate for the applicants to ask for and three which it is not. As for those two which are legitimate to be asked for, the association says this: that they have, by withdrawing the original notice directed towards the applicants, the association says it has effectively rescinded the applicants' expulsion from the association and that everything that happened between the issue of those notice and the withdrawal of the issue of the notice can be, as it were, wiped out, expunged from the record, forgotten about and we can all pretend it never happened. Therefore, the ladies are free to once again apply, fill in their application forms or pay their dues, or whatever is necessary for ordinary members of the association to do on an annual or monthly or weekly basis, whatever it is, and they'll be treated as they were before those notices were issued."

[28] His Honour then went on to point out that with respect to paragraphs (1) and (2) of the plaintiffs' application they were at liberty to apply for membership as stallholders which was why he ordered a stay of the proceedings with respect to paragraphs (1) and (2) of the prayer for relief.

The appeal to the Supreme Court

[29] On 22 August 2008, the appellants filed a "Notice of Appeal for a Request for Judicial Review" to the Supreme Court as follows:

> The proceeding appealed for judicial review was heard in Darwin by the Local Court on 11 August 2008 and decided on 11 August 2008.
>
> The appellant appeals for Judicial Review from the decision of Mr Wallace SM.
>
> 1. Striking out the Applicant's Originating Application so far as the relief's sought Numbered 3, 4 and 5 are concerned (Local Court Rule 28.02(a) – no cause of action;

2. Staying generally the Applicants Originating Application so far as the relief's sought Numbered 1 and 2 are concerned (Local Court Rule 28.01(1)(c) – abuse of process;

GROUNDS:

1. The Magistrate displayed an unseemly and unprofessional bias against us the Appellants.

2. The Magistrate displayed an unseemly and unprofessional bias for the Respondent.

3. The Magistrate failed to give due regard to the difficulties that we the Appellants faced as unrepresented litigants.

4. The Magistrate failed to give we the appellants procedural fairness.

5. The Magistrate refused to recognise the relevant jurisdiction of the Local Court in regard to the Associations Act specifically s109.

6. The Magistrate refused to recognise the relationship between the Mindil Beach Sunset Markets (sic) Associations Act.

7. The Magistrate failed to determine the legal and legislative rights of the parties before making a judgement.

8. The Magistrate refused to consider the findings of the Supreme Court in regard to the matter. SC 45 of 2007 (20711094), LA 6 of 2007 (20625162).

9. The Magistrate refused to examine the particulars supplied before exercising his authority.

10. The decisions made by the Magistrate in this matter are not in compliance with the legislative requirements of the Associations Act and the Mindil Beach Sunset Markets (sic) Association Constitution.

11. The decisions made by the Magistrate allows and encourages the Respondent to continue to act in a matter which does not comply with the legislation of the Associations Act and the Mindil Beach Sunset Markets (sic) Association Constitution.

12. The decisions made by the Magistrate ensures we the Appellants and all other Association members continue to be treated by the Respondent in a manner which does not comply

with the requirements of the Associations Act or the Mindil Beach Sunset Markets (sic) Association Constitution.

13. The Magistrate did not afford we the Applicants with Natural Justice.

14. The Magistrate failed to finally dispose of the proceeding before the court.

[30] The appellants sought the following orders:

1. An order that the decisions of the Magistrate be set aside.

2. An order that the matter be heard in the Supreme Court in accordance with the law.

3. An order that the matter be finally disposed of by the Supreme Court in accordance with the requirements of the Associations Act and the Mindil Beach Sunset Markets (sic) Association Constitution.

4. An order that the respondent pay the costs of the appellants in connection with this matter.

5. Such further or other orders as this Honourable Court considers fit.

[31] The matter came before the Supreme Court on appeal on 2 February 2009. On the appeal the appellants made it clear that their underlying concern was with the way the respondent was conducting the affairs of the Association. What the appellants are seeking to achieve is an order from this Court which will be a basis for the Commissioner of Consumer Affairs to carry out an investigation of the respondent Association pursuant to Part 10 of the Associations Act.

[32] The appellants have made a number of allegations concerning the conduct of the Association which are extremely serious. However, the appellants

recognise that this Court has no power to initiate an investigation into the way the respondent has conducted their affairs. That is a matter which is solely within the authority of the Commissioner of Consumer Affairs (Part 10 Associations Act). The appellants advised the Court that although they have previously taken their concerns to the office of Consumer Affairs, it seems they have not been able, to this date, to satisfy the Commissioner that it would be appropriate to commence such investigation.

[33] The main thrust of the appellants' submissions to this Court, is to seek a finding by the Court, under s 109(1)(d) of the Associations Act, that their expulsion from membership was oppressive or unreasonable. Based on such a finding the appellants would then renew their application to the Commissioner of Consumer Affairs to investigate the affairs of the respondent association.

[34] Section 109(1)(d) of the Associations Act provides as follows:

> **"109 Oppressive or unreasonable acts**
>
> (1) An application to the Local Court or Supreme Court for a particular order or orders specified in subsection (2) may be made by a member of an incorporated association or former member expelled from the association (provided the application is made within 6 months after the expulsion) who believes that:
>
> ……
>
> (d) the expulsion of the member was oppressive or unreasonable."

[35] Section 109(2)(h) provides as follows:

"(2) For subsection (1), the orders are as follows:

……

(h) an order that the member expelled be reinstated as a member of the association."

[36] The appellants maintain that the respondent's decision to rescind the original decision to expel them from membership as expressed in the letter to them dated 13 March 2008, is in breach of the Constitution of the Association. Accordingly, the position of the appellants is that the Association is purporting to act unconstitutionally and their actions in expelling the appellants from membership of the Association were oppressive or unreasonable or both.

[37] The appellants seek this Court to make such a finding which they assert will constitute a basis for them to satisfy the Commissioner of Consumer Affairs that it would be appropriate to investigate the affairs of the Association.

[38] I am not able to accept the argument that the actions of the Association were unconstitutional. The default notice forwarded to the appellants, details of which are set out under the heading "History of the Proceedings" in the course of reasons for judgment, was dated 30 June 2006.

[39] At that time the Association was operating under the 2003 Constitution for the Association. Paragraph 4.6.2 of the 2003 Constitution provided as follows:

"Where the Committee has sufficient evidence and the majority of Office-Bearers form the opinion that a Member;

(a) has persistently refused or neglected to comply with these rules and the regulations; or

(b) has persistently and willfully acted in a manner prejudicial to the interests of the Association,

the Committee shall, by resolution, give written notice to the Member ("the default notice") to-

(c) comply with these rules and the regulations as and when directed; and/or,

(d) immediately cease the actions which are prejudicial to the interests of the Association; and,

(e) (within no less than fourteen days and no more than one month following the date of the default notice) attend a Committee meeting where the Member shall be given an opportunity to present his or her case to the Committee."

[40] The default notice requested that the appellants:

> "… respond to the Management Committee under 4.6.2(e) (within no less than 14 days and no more than one month following the date of the Default notice) attend a Committee meeting where the member shall be given an opportunity to present his or her case to the Committee. If the member fails to comply with these directions the Committee will refer the matter to eligible members to decide whether to expel the member from the Association.
>
> Section 4.6 of the current Constitution clearly expresses your responsibility regarding this notice."

[41] The Association was at the time going through the process of amending the Constitution of the Association to bring it in line with the new Associations Act.

[42] The new Constitution referred to as the "2006 Constitution" came into effect on 26 September 2006. This was the date of the general meeting of the Association. On the same date, a motion was put to the meeting to cancel the appellants membership forthwith. This motion was carried. A letter was

forwarded to the appellants dated 27 September 2006, advising the appellants of this decision.

[43] The decision to cancel the membership of the appellants was made under the 2006 Constitution.

[44] The appellants argue that as it was "the membership" of the Association who voted to cancel their membership then only "the membership" could reinstate them. The provisions of the 2006 Constitution differ to the provisions in the earlier 2003 Constitution with respect to suspension or expulsion of members. Section 21 of the 2006 Constitution dealing with suspension or expulsion of members, enables the Committee to expel a member and s 22 gives that member a right to appeal and for that appeal to be considered at a general meeting of the Association. The member has a right to be heard at the meeting or to make representations in writing prior to the meeting for circulation at the meeting. It further provides that the members must then decide whether to confirm the decision of the Committee to expel the member or set aside the decision of the Committee.

[45] The notification of cancelled membership dated 27 September does not appear to comply with the provisions of the 2006 Constitution because of a failure to follow the procedure set out in sections 21 and 22.

[46] This may have been the reason the Association did not proceed with the decision to cancel membership. I am not able to make such a finding because the Association's reasons for deciding to withdraw the cancellation

of membership was not explained to the Court or to the appellants. However, the fact the default notice was issued under the 2003 Constitution and the notice of cessation of membership issued under the 2006 Constitution clearly presented problems.

[47] I do not think the actions of the committee of the Association, in advising the cancellation of membership was no longer in effect, was unconstitutional. Rather, it was in all probability, a recognition of a defect in the process which resulted in the members voting to cancel the membership of the appellants.

[48] Accordingly, I am in agreement with the learned stipendiary magistrate that the appellants can apply to continue their membership upon payment of the requisite fees and compliance with other conditions relating to stallholders of the Association. The appellants have chosen not to do so. That is their right, but they can no longer complain they have been expelled from membership.

[49] Ms Vicki Braddy and Ms Lucinda Woodward have both detailed how difficult it is, as a practical matter, to return to the Association which has acted toward them in a hostile manner. I can understand those difficulties. However, the Association is now well aware that its conduct has been the subject of complaint by the appellants. It must be in the interests of the Association to ensure it behaves properly toward the appellants. Failure by the Association to accept the appellants back into the membership could

result in the appellants returning to court to continue with their application for orders (1) and (2) in the originating application of 3 October 2006. Alternately, this may give grounds for an investigation by the Commissioner of Consumer Affairs.

[50] I consider the learned stipendiary magistrate was correct in ordering a stay of the prayer for relief in paragraphs (1) and (2). The appellants are at liberty to apply to the Association for renewal or continuation of their membership.

[51] In addition to this, the appellants are aware that they still have a right to make a claim for damages with respect to any losses they may have suffered as a consequence of being unable to trade as stall holders. I understand that such claims have in fact been lodged with the Local Court and will be resolved in due course in separate proceedings. There is no cause of action with respect to the request by the appellants that they be provided with particulars of allegations made against them. The Court has no authority to investigate the conduct of the respondent under the Associations Act. Such an investigation is the prerogative of the Commissioner of Consumer Affairs. I agree with the learned stipendiary magistrate that the appellants cannot substantiate the prayer for relief in paragraphs (3), (4) and (5) by reference to s 109 of the Associations Act. There being no legitimate cause of action, the learned stipendiary magistrate was correct in his decision to strike out prayer for relief paragraphs (3), (4) and (5).

[52] I now deal with the Grounds of Appeal set out in the formal Notice of Appeal. There are 14 grounds of appeal. They are all essentially assertions by the appellants that they were denied procedural fairness and natural justice. The appellants also assert various failures by the learned stipendiary magistrate to give a decision in accordance with the Associations Act and the Constitution of the Mindil Beach Sunset Market Association.

[53] The appellants have not established that in reaching the conclusion he did, the magistrate was in error.

[54] I do not accept the assertions made by the appellants that the magistrate failed to afford them natural justice or that he was biased either for the respondent or against the appellants or that he failed to take into account relevant material or that the appellants were denied procedural fairness.

[55] I have read in full the transcript of the proceedings before the learned stipendiary magistrate. His Honour was robust in his questions to the appellants and in expressing his thoughts as the matter proceeded. However, this was no more than was necessary to elicit the real issues with respect to the applications of both the appellants and the respondent. His Honour did from time to time explain the law and certain procedural matters to the appellants but not in a manner that could be described as either insulting or demeaning to them. The appellants may not have liked some of the matters the learned stipendiary magistrate put to them or the views he expressed but

in doing this he was giving them an opportunity to know and understand what he was thinking which would guide them in making relevant and appropriate submissions. This did not amount to any unfairness or demonstration of bias.

[56] During the course of the protracted hearing of this matter, it is clear the learned stipendiary magistrate gave the appellants every opportunity to present their case and to put forward their submissions. He emphasised the limits to the powers of the Court. His Honour exhorted the appellants to at least make an attempt to be reinstated as members of the Association and that if they were refused then they may have a cause of action the Court could deal with. An example of this is the interchange between Ms Woodward and the learned stipendiary magistrate as appears on page 19 of the transcript of evidence of the hearing on 26 May 2008:

> "MS WOODWARD: No. No. We actually want the court - - - just to decide whether or not in any one instance that we were treated in an unfair or an oppressive manner as an individual or as an association member and allocate the authority to the Commissioner of the Associations Act to investigate the matter further.
>
> HIS HONOUR: Well, Mr De Silva is saying that he has and the Market has rendered all of that completely unnecessary. It may not satisfy you. There won't be any investigations in public or in private or at all, but he's saying you're reinstated, the action can be discontinued.
>
> The only legitimate relief that the action offered you which is reinstatement has been effected and as far as I can see, that seems likely to be true because Ms Gibson, the only one of who has bothered to take them up on the offer appears to have been found a site and admitted back into the Association.

MS WOODWARD: Your Honour, I'd like to seek an adjournment. Obviously you want something from us that we don't quite understand. - - -

HIS HONOUR: Well the one thing I want from you, Ms Woodward, and I don't blame you for not grasping this in its fullness, is to concentrate on the matter in hand. The matter in hand is not the whole case. The matter in hand is the application to have the case struck out because it no longer serves any useful purpose to keep it going because, according to Mr De Silva, the remedy you wanted has been given to you.

MS WOODWARD: Well that's actually incorrect because I'm an Association member and I find it offensive that my Association committee has just spent over $50,000 in keeping a matter in the courts that should never have been before the courts to start with. This should never have been before the courts. We haven't wasted one second of the court's time in this. We have repeatedly asked to be taken to the Justice Department. We don't have the money for this. This is what's been all counted. They have spent over $50,000 on court costs, your Honour. That's my money as an Association member. That's every other Association member's money.

HIS HONOUR: I can't help being continually astounded by the paradoxes that this matter's throwing up and among them, hearing someone who's bought (sic) an application and started the court proceeding saying "We never wanted this matter in court" is first rate. The reason this matter's in court is because you started it."

[57] On 21 July 2008, being the third day of the hearing, the learned stipendiary magistrate said as follows (tp 24):

"… Ms Woodward, this is the last thing I'm going to say today and that is this: the matter is adjourned for three weeks to 11 August at 9 o'clock for mention and, in the absence of any evidence from you or Ms Braddy or both of you that you, the two of you or one of you has been excluded from membership of the association or from trading, the originating application in this matter will be dismissed."

[58] When the matter resumed on 11 August 2008, the Court was advised that neither of the appellants had attempted to trade, neither had they paid their membership dues. His Honour noted that (tp 28):

> "… So at this stage we just don't know whether - - - the action to reinstate you has succeeded."

[59] His Honour then proceeded to give reasons for his decision which have already been referred to.

[60] Throughout the whole of the hearing, the learned stipendiary magistrate was attempting to explain to the appellants that their course of action was to take up the respondent's offer to reinstate themselves as members of the association and that a failure to do so would mean the respondent would succeed in their application. The appellants did not want to listen to the advice they were being given. If they had made appropriate attempts to seek to be reinstated as members and this had been rejected or refused by the respondent or the respondent had thwarted them in some way, then the result for the appellants may have been very different.

[61] In their written submissions the appellants support their contentions about the manner in which the magistrate dealt with this matter by a detailed reference to transcript pages. In these references it is asserted the magistrate transgressed or demonstrated bias or unfairness.

[62] Many of the grounds of appeal overlap. I have read every transcript reference. A reading of the transcript does not support the appellants' assertion as to the manner in which the magistrate conducted the hearing.

Ground 1. The magistrate displayed an unseemly and unprofessional bias against us the appellants.

In the hearing of this matter it appeared to us that the magistrate had made a biased prejudgment against us. He made numerous personal, judgmental, derogatory references about us and about the matter before his court.

(i) In the magistrate's opinion, our action before the court was based on our desire to "grind the faces of the other side by just no letting go of an action that no longer has much point in itself for one reason or another".

Transcript 10 April 2008, page 12 – line 22 to 28.

[63] This comment was made by the learned stipendiary magistrate in conversation with Mr De Silva. It was made in the context of trying to understand why the appellants would be bringing such application that had no apparent purpose.

(ii) Magistrate Wallace stated – "You've got your relief and everything else is just making a nuisance of yourself".

Transcript – Thursday 10 April 2008, page 34, lines 25-28

[64] These words appear in the context of a much longer statement by the learned stipendiary magistrate in which he was attempting to explain to the appellants that if in fact they had been re-admitted to the Association then they had no cause of action. He also explained that if they had been effectively kicked out and they had not been effectively readmitted then they still had a cause of action.

(iii) In Magistrate Wallace's opinion our application to the Court was "bizarre".

Transcript – Monday 26 May 2008, page 20, line 7

[65] This is stated by the learned stipendiary magistrate almost immediately after the interchange between the magistrate and Ms Woodward as set out in

paragraph [56] of these reasons for judgment. It explains why the learned stipendiary magistrate considered the action by the appellants was "bizarre".

(iv) Magistrate Wallace was rude and dismissive towards us. Transcript 26 May 2008, page 27, lines 17-19

[66] I quote hereunder the full statement made by the learned stipendiary magistrate from transcript of 26 May 2008, page 27, lines 6-19 inclusive:

> "HIS HONOUR: Ms Gibson, parties to actions, settle actions for all sorts of reasons, but mostly they settle them because although they'd like to go on, though they'd like to prove their or vindicate their case, whatever it is, mostly they settle cases because it's just not worth it. It's not worth the trouble to get 100% of what they want.
>
> So whether the Mindil Beach Market Association has accepted Mr De Silva's view that there's a risk, that there's a flaw in the process, or whether they've said it's just costing too much and we want to stop or both of those reasons, they want to stop and they reckon they've found a way to stop the process which gives you everything you legitimately asking for and leaves you with a sense of grievance about what's happened, but that's history.
>
> Why do you say that they can't go backwards, say, 'Okay, we withdraw the notice.' The expulsion's a nullity. You're back as a member. You're back trading. Carry on. If people hate you that's bad luck. Off we go."

This was actually addressed to Ms Gibson who was an applicant before the learned stipendiary magistrate but is not an appellant in these proceedings. These words were said in the context of a longer statement by the learned stipendiary magistrate explaining why the respondent would withdraw their decision to expel the appellants from membership. It does not amount to a rude or dismissive comment.

(v) Magistrate Wallace considered the matter of the unfair and oppressive treatment of us by the MBSMA to be – "Just one of the every day little notions".

Transcript – Thursday 10 April 2008, page 25, lines 10-18.

[67] These words were used by his Honour in the context of explaining to the appellants why he did not consider it appropriate for the Court to refer the matter to the Commissioner for Consumer Affairs. The comments do not indicate a biased pre-judgment against the appellants.

(vi) It appeared to us that Mr Wallace had the opinion that our case before the court was not legitimate in some way.

Transcript – Monday 21 July 2008, page 30, lines 14-18.

[68] The transcript for 21 July 2008 concludes at page 26. Lines 14-18 on page 30 of the transcript of the hearing on 11 August 2008 reads as follows:

> "I suppose it's conceivable that if the court were legitimately hearing a case of some sort and it came to the court's attention incidentally during the course of such a case that something was rotten in the affairs of an incorporated association, then the court might well bring to the attention of the appropriate authority – in this case, the Commissioner – that there might be something for the Commissioner to look at."

These comments were made by the learned stipendiary magistrate during the course of his reasons for decision which are set out in full at paragraph [27] of these reasons for judgment. The comments were relevant to his conclusion that the court does not have the power to investigate these matters.

(vii) Magistrate Wallace consider this matter to be a burden in the court system.

Transcript – Thursday 10 April 2008, page 20, lines 35 to 37.

[69] This was said in the context of the learned stipendiary magistrate explaining why he intended to grant Ms Gibson's application for an adjournment. This was despite the fact that he recognised the inconvenience this would cause the respondent. His Honour then said:

> "… The trouble is I'm going on holiday on Tuesday, I won't be back until the middle of May. So that's when it will have to come on again I'm afraid. I'm not going to burden any of my colleagues with starting this thing from scratch. But I can carry on with the other two ladies, I believe, they haven't filed anything new, have they? Or have they?"

The word "burden" is understandable in view of the amount of time his Honour had already spent on the matter. He did not wish to abrogate his responsibility and transfer the matter to be heard by another magistrate.

(viii) Magistrate Wallace appeared to believe that the only reason we are determined to pursue this matter is for the petty reason of taking revenge on our enemies.

Transcript – Thursday 10 April 2008, page 28, lines 23-26.

[70] These words were said in the context of a lengthy statement by the magistrate explaining why the respondent Association did not have to provide the appellants' particulars of the allegations that led to their original dismissal from the Association.

[71] This did not indicate an unseemly or unprofessional bias against the appellants. The magistrate was attempting to explain in plain English why the appellants could not succeed in seeking particulars of the allegations

against them when such allegations were no longer maintained by the respondent.

Ground 2:

(i) Magistrate Wallace was unconcerned if Mr De Silva had committed perjury in the hearing of this matter.

(ii) Magistrate Wallace was unconcerned if the actions of the respondent was legally sound.

[72] Grounds 2(i) and (ii) are not made out on a reading of the transcript of proceedings.

(iii) Magistrate Wallace expressed personal concerns about the inconvenience of this matter on Mr De Silva's time.

Transcript 10 April 2008, page 22, line 18 to 19.

[73] His Honour said (tp 22):

> "… Hang on. Mr De Silva, I suppose any date is as inconvenient to you and your clients as any other once we get into May."

This does not demonstrate a bias toward the respondent merely an acknowledgment that the adjournment application made by Ms Gibson to enable her to amend her original application would cause inconvenience to the respondent who wanted to have the whole matter resolved quickly.

Ground 3: The magistrate failed to give due regard to the difficulties that we the appellants faced as unrepresented litigants.

[74] The matters set out under this heading are statements by the appellants as to the difficulties they experienced as unrepresented litigants. There is nothing

in these statements to support any finding of error or inappropriate behaviour by the magistrate. They conclude by stating:

> "What we do have is hundreds of documents, dozens of witnesses and real first hand experience to prove there is corruption within the MBSMA. All we are seeking is natural justice."

There is nothing to stop the appellants from presenting this evidence to the Commissioner of Consumer Affairs who has the power to undertake an investigation into the running of the Association.

Ground 4: The magistrate failed to give we the appellants procedural fairness.

A. Two separate actions were filed in the Local Court of Darwin for consideration by a magistrate.

(i) File Number 20625162 between Lucinda Woodward and Vicki Braddy (applicants) and Mindil Beach Sunset Market (Respondent)
Date 3 October 2006.

(ii) File Number 20708853 between Wendy Gibson (applicant) and Mindil Beach Sunset Market (respondent)
Date _____.

B. In the course of time both these matters come before Magistrate R.J. Wallace SM for consideration.

(i) Both applications to the Court are based on the legislative requirements of the Associations Act and the contractual constitutional requirements of the valid 2006 MBSMA Constitution.

(ii) However both applicants are pursuing vastly different lines of argument to present to the Court. The magistrate did not consider the merits of each separate case on its individual basis. Preferring to 'mentally sort of kept the causes separate" in his mind.

Transcript – Thursday 10 April 2008, page 3, lines 6-8.

[75] These words were said in the context of a much longer statement by the learned stipendiary magistrate on 10 April 2008 commencing on page 2 as follows:

> "Ms Gibson, I don't think I can, strictly speaking, hear these cases simultaneously. I think in theory at least they're being held one after another, but it does appear from what the little that Mr De Silva has told me that some of the arguments that he will be directing to the application brought by Ms Woodward and Ms Braddy may well be repeated in your case. So I guess it's going to be worth your while paying close attention to what he says and with a bit of luck he'll indicate what he's saying only applies to the other two ladies and not to you, your application. That would help you to understand what it is that he's going to be arguing. But it's, I gather, his client's application that I'm needed here today. So I'll listen to what that application is about and mentally sort of keep the causes separate in my mind. Although to some degree they obviously overlap."

[76] This does not indicate any procedural unfairness. It was a sensible way to deal with the respondent's application which at that time affected three separate appellants.

(iii) The applicants of the two separate cases were not consulted, informed nor given any prior warning nor offered any options in regard to the magistrate's intentions to combine both actions into [a] single matter.

(iv) Magistrate Wallace combined the two separate matters and heard them simultaneously as a single application before his court.

Transcript – Thursday 10 April 2008, page 1.
Transcript – Monday 26 May 2008, page.

(v) The consideration of the two separate matters by the magistrate as a single application placed the fair and equitable resolution of both matters in jeopardy.

[77] His Honour was well aware the case involving Ms Gibson was separate to the case involving Ms Woodward and Ms Braddy. That is how he dealt with them. There was no procedural unfairness.

[78] There is no evidence to support the appellants' assertion that the consideration of two separate matters together placed the fair and equitable resolution of both matters in jeopardy. The second action to which the appellants refer is an application by Wendy Gibson, another member of the Association. On 26 May 2008, the respondent's application with respect to Ms Gibson's application was adjourned by the learned stipendiary magistrate to 18 August 2008. The application by the respondent with respect to the two appellants in this matter was adjourned and continued on 21 July 2008 and finalised on 11 August 2008.

4C(i) We complied with the orders made by the court in regard to the discovery process in a timely fashion. The respondent ignored the orders made by the court in regard to the discovery process. The respondent offered no reason to us, or the court as to why they refused to comply with the order made by the court.

4C(ii) We applied to Magistrate Wallace to require the respondent to comply with the orders of the court.

4C(iii): Magistrate Wallace, in rebuttal of our reasonable request for Discovery process to continue –

a. Would not allow us the court's legal process in the matter of Discovery.

b. Expressed his personal concerns about the costs involved in hearing this matter.

c. Expressed his personal concerns about wasting the respondent's time.

d. Without hearing the matter fully, expressed his opinion this matter would be stayed or not go ahead.

e. Referred to us in a derogatory manner describing us as "these bloody women".

f. Referred to our legitimate request to the court for the Discovery process to proceed as "heckling".

Transcript 10 April 2008, page 35, line 11 to 22.

4C(iv) In Magistrate Wallace's opinion it would be stupidly inefficient for the court to demand that all parties do everything they should do. Furthermore, it is his belief that it is very sensible for parties not to waste money complying with court orders.

Magistrate Wallace considered Mr De Silva's refusal to comply with the court order for discovery as a "minor naughtiness among solicitors".

Transcript – Monday 26 May 2008, page 38, lines 13-41.
Transcript – Monday 26 May 2008, page 34, lines 34 and 35.

[79] At page 35 in the transcript of proceedings on 10 April 2008, there was the following exchange between the learned stipendiary magistrate and Ms Woodward:

> "MS WOODWARD: One last thing. The court order Da (sic) Silva Hebron and the association to make available documents to us in discovery. And I spoke to Mr Da Silva Hebron (sic) on Monday and he said he had no intention of doing discovery. We have actually fulfilled all our obligations with the documents. We were wondering if we could ask for Mr Da (sic) Silva to perhaps make a bit of an effort to help us along because the matter is still afoot?
>
> HIS HONOUR: As to that, - - - I've expressed my opinion several times. I don't want to add to the cost of this thing. Discovery is not a cheap process. It takes hours of lawyers' time and costs hundreds of dollars. Courts order discovery without thinking about it. High courts order massive discovery that ends up costing millions of dollars for third party discovery. If his argument is right, then there's no point because one way or the other this thing will be stayed or not go ahead. So I'm very reluctant to criticise him at this juncture for not in effect throwing money away.

> If he does throw money away, in the end the cost will be borne by you because he will come up and say look, I actually tried to save money by not wasting two days' work making discovery and these bloody women came around and just kept heckling me and got a court order that I make the discovery and I spent another $15,000 and why shouldn't they have to carry it."

This puts into context the magistrate's comments that were not aimed at being derogatory toward the appellants but rather explaining why courts have an obligation in these circumstances to contain unnecessary waste of time and money in litigation proceedings. The magistrate exercised a discretion to refuse the appellants' request for further discovery. This discretion has not been shown to be wrongly exercised. The magistrate spent some time explaining why the respondent's failure to provide further discovery was inconsequential to the appellants' claim (26 May 2008 tp 31-32).

Ground 4D: We the applicants were under the impression that court protocol required that documents supplied by us to the court for its consideration must also be supplied to the respondent, and conversely documents supplied by the respondent to the court would also be supplied to us.

(i) All documents we supplied for the consideration of the court were also supplied to the respondent by us for their perusal.

(ii) Mr De Silva did not supply to us documents he supplied to the court in regard to this matter.

(iii) Magistrate Wallace took it upon himself to justify this lack of curtsey (sic) towards us by Mr De Silva.

(iv) In Magistrate Wallace's opinion it was more than likely that there were limits to how much the respondent was prepared to spend on photocopying to supply documents to us.

Transcript – Thursday 10 April 2008, page 10, lines 35 and 36 continued, page 11, lines 1-20.

[80] This ground of appeal has been dealt with under Ground 4C. The ground of appeal has not been made out.

Ground 5: The magistrate refused to recognise the relevant jurisdiction of the Local Court in regard to the Associations Act specifically s 109.

Transcript – Thursday 10 April 2008, page 10, lines 13 and 14.

Transcript – Monday 26 May 2008, page 11, lines 2-6.

Transcript – Monday 26 May 2008, page 27, lines 24 and 25.

Ground 6: The magistrate refused to recognise the relationship between the Mindil Beach Sunset Market Associations Constitution and the Associations Act.

Transcript – Thursday 10 April 2008, page 25, lines 25-29.
Transcript – Monday 26 May 2008, page 3, lines 1-18, page 4, lines 25-27, page 7, lines 34-37 continued, page 8, line 1.

[81] I have already provided reasons why I reject these grounds of appeal. I consider the learned stipendiary magistrate was correct in his application of the Associations Act and the Constitution of the MBSMA.

Ground 7: The magistrate failed to determine the legal and legislative rights of the parties before making a judgment.

(i) Magistrate Wallace sated that he could not investigate his way out of a paper bag.

Transcript – Thursday 10 April 2008, page 10, lines 12 and 13.

(ii) Little idea about corporate law.

Transcript – Thursday 10 April 2008, page 6, lines 10 and 11.

(iii) Not widely versed in civil law.

Transcript - Thursday 10 April 2008, page 8, lines 14 and 15.

(iv) No idea what membership of the MBSMA entailed.

Transcript – Monday 21 July 2008, page 32, lines 1-3.

(v) No idea what being a stallholder of the MBSMA entailed.

Transcript – Thursday 10 April 2008, page 6, lines 39 and 40.

(vi) Appeared to be unsure of what Act this matter was being heard under.

(vii) Had no idea who had authority under the Associations Act.

Transcript – Thursday 10 April 2008, page 9, lines 27-30.

(viii) Knew that there was some question as to whether that procedure used to return us to the membership was effective.

Transcript - Monday 21 July 2008, page 31, lines 4-6.

(ix) Was unconcerned if the actions of the respondent was legally sound.

Transcript - Monday 21 July 2008, page 36, lines 4 and 5.

(x) Was unconcerned if Mr De Silva had committed perjury.

Transcript – Monday 21 July 2008, page 32, lines 30-34.

(xi) Did not consider that the legislative requirements of the Associations Act or the associations own constitution need to be part of his decision making process.

Transcript – Monday 26 May 2008, page 33, lines 36-41.

[82] I have already given reasons for rejecting these grounds of appeal. The appellants complain that the learned stipendiary magistrate made a number of statements to the effect that he had little experience in this area of the law. Such statements are irrelevant. It is for the parties to make submissions as to the law and for the magistrate to make a ruling. This is what the magistrate did after apprising himself as to the law. I have found that his ruling on the law does not demonstrate any error.

Ground 8: The magistrate refused to consider the findings of the Supreme Court in regard to the matter. SC 45 of 2007 (20711094, LA 6 of 2007 (20625162).

1. **Supreme Court Justice Olsson considered the subject matter and nature of the appellant's claim to relief and the serious nature of the denial of procedural fairness well justified the exercise of discretion to grant appropriate declaratory relief.**

   Judgment of Olsson AJ
   12 February 2008, page 8, paragraph [21]

2. **Paragraph [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 specific act;

   (f) requiring a person to do a specified act; and

   (h) that the member expelled be reinstated as a member of the association."

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

   Paragraph [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 applicants 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 discriminated 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 discriminated 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."

Paragraph [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 constitution action that is oppressive to members of the association.

Judgment of Olsson AJ
9 November 2007

[83] The decision of Justice Olsson on 9 November 2007 and 12 February 2008, was based on an entirely different consideration to the matters which Mr Wallace SM had to decide. Olsson AJ had to decide whether there was procedural unfairness to the appellants in the original hearing before another magistrate, Mr Loadman SM, in the Local Court. His Honour Olsson AJ, held that there had been procedural unfairness and referred the matter back to the Local Court for rehearing before another magistrate. This is what occurred. Olsson AJ found the magistrate who initially heard the appellants' claim had not given the appellants an opportunity to be heard and to present their case. Olsson AJ was not asked to make findings as to the merits of either the appellants' or the respondent's substantive applications. Mr Wallace SM was dealing with the merits of the respondent's application which entailed some consideration as to the merits of the appellants' claim. Mr Wallace SM then made the interlocutory orders as previously stated.

Ground 9: The magistrate refused to examine the particulars supplied before exercising his authority.

[84] This ground was fully particularised in the appellant's written submissions and a number of transcript references were provided.

[85] I do not consider the learned stipendiary magistrate has been shown to be in error. He had no powers to investigate the conduct of the respondent under the Associations Act. If the appellants are in possession of all the particulars and the documentation as they assert, then they can present these to the Commissioner of Consumer Affairs who has authority under the Act to conduct an investigation into the affairs of the respondent association.

Ground 10: The decisions made by the magistrate in this matter are not in compliance with the legislative requirements of the Associations Act and the Mindil Beach Sunset Market Associations Constitution.

Ground 11: The decisions made by Magistrate Wallace allows and encourages the respondent to continue to act in a matter which does not comply with the legislative requirements of the Associations Act and the Mindil Beach Sunset Market Associations Constitution.

Ground 12: The decisions made by the magistrate ensures we the appellants and all other association members continue to be treated by the respondent in a manner which does not comply with the requirements of the Associations Act or the Mindil Beach Sunset Market Associations Constitution.

[86] Grounds 10, 11 and 12 are dismissed for the reasons already stated in dealing with the findings made by the learned stipendiary magistrate with respect to the provisions of the Associations Act and the constitution relevant to the respondent.

Ground 13: The magistrate did not afford we the appellants with natural justice.

[87] The appellants argue that when their membership was cancelled their membership fees were in credit for a further eight months and these fees have never been refunded to them. The respondent has withdrawn the decision to cancel the appellants membership. This means the appellants are eligible for membership once they fulfil certain requirements. There is no evidence the appellants have sought to pay the annual membership fee. There is no evidence that the appellants have sought to negotiate the amount of the membership fee with the respondent taking into account the amount which they say they are in credit. Under the Constitution of the Association they can only access the grievance procedures if they are members and resuming membership is a matter for them.

[88] The appellants appear to be saying they do not want to be members of the association, what they seek is an investigation into the way the respondent conducts its business. Such an investigation is not within the powers of the court.

[89] The learned stipendiary magistrate made it clear that unless the appellants could demonstrate they had again been excluded from the membership then he had no alternative other than to dismiss their application. He adjourned the proceedings to enable them to take the necessary steps to resume their membership of the respondent Association. The appellants did not avail themselves of the opportunity. This ground of appeal cannot succeed.

Ground 14: The magistrate failed to finally dispose of the proceeding before the court.

[90] The magistrate was dealing with the respondent's application to stay the appellants proceedings on the grounds they were an abuse of the process of the court.

[91] The orders made by the learned stipendiary magistrate were with respect to the respondent's application. It was an interlocutory order that disposed of the matters the learned stipendiary magistrate was required to consider on the respondent's application but was not an order designed to dispose of the whole proceedings. The appellants may want to consider their position and apply to resume their membership of the Association.

[92] The appellants are of course at liberty to take copy of these reasons for judgment together with other information they have that they consider founds a basis for investigation into the conduct of the respondent Association to the Commissioner of Consumer Affairs. Whether or not the Commissioner decides to undertake such investigation is entirely a matter for the Commissioner.

[93] The order of the Court is that the application for leave to appeal headed on the appellants' documents "Application for Judicial Review by way of appeal" is dismissed.

[94] I grant liberty to apply on the questions of costs if no agreement is reached between the parties.