SUPREME COURT OF QUEENSLAND

CITATION:	*Slatcher v Globex Shipping S.A.* [2019] QCA 167
PARTIES:	**MATTHEW JOSEPH SLATCHER** (appellant) **v** **GLOBEX SHIPPING S.A.** (respondent)
FILE NO/S:	Appeal No 7442 of 2018 SC No 8772 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 138 (Davis J)
DELIVERED ON:	27 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2018
JUDGES:	Fraser and Philippides JJA and Douglas J
ORDERS:	**1. Appeal allowed.** **2. Set aside the orders made in the Trial Division.** **3. Respondent to pay the appellant's costs of the proceedings in the Trial Division and in this appeal.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – PROSECUTION – COMMITTAL FOR TRIAL BY JUSTICE OR CORONER – POWERS AND DUTIES OF MAGISTRATE OR CORONER – OTHER MATTERS – where the appellant alleged that the Panamanian-flagged ship "Regina" committed offences by discharging oil into the exclusive economic zone and outer territorial sea off the coast of Queensland – where a complaint and summons concerning the alleged offences and directed to the respondent, a corporation registered in South Korea, was delivered to locations within Australia including the offices of Thynne + Macartney – where the magistrate ruled that the complaint and summons had been duly served upon the respondent – where the primary judge declared *inter alia* that the complaint and summons had not been served upon the respondent, and that the Magistrates Court has no power to proceed with an examination of witnesses in the absence of service or waiver of the requirement for service – whether the complaint and summons was served upon the respondent – whether the Magistrates Court has power to conduct an

examination of witnesses in the absence of service or waiver of the requirement for service of a complaint and summons

Justices Act 1886 (Qld), s 54(1A), s 56(1)
Magistrates' Court Act 1989 (Vic), s 34, s 41
Navigable Waters (Oil Pollution) Act 1960 (Vic)
Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth), s 9, s 29A
Transport Legislation Amendment Act 1991 (Cth)

Capper v Thorpe (1998) 194 CLR 342, [1998] HCA 24, cited
Cuttler v Browne & Anor [2010] QCA 346, cited
FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd [2018] 3 Qd R 258; [2017] QSC 322, cited
Goodes v James Patrick & Co [1963] VR 334; [1963] VicRp 50, cited
Guss v Magistrates' Court at Victoria [2003] VSC 365, considered
Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542; [1996] NSWSC 314, cited
Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627; [2009] HCA 37, applied
Nitz v Evans (1993) 19 MVR 55; [1993] VicSC 177, distinguished
Pino v Prosser [1967] VR 835; [1967] VicRp 107, applied
Plenty v Dillon (1991) 171 CLR 635; [1991] HCA 5, applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v Ampol Refineries Ltd [1978] Qd R 378, cited
Warren v Legal Services Commissioner [2014] QCA 150, cited

COUNSEL: M G McHugh QC, with K W Gover, for the appellant
J R Hunter QC for the respondent

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
Thynne + Macartney for the respondent

[1] **FRASER JA:** This appeal raises issues about the proper construction of the provisions for service of a summons upon a complaint of an indictable offence in the *Justices Act* 1886 (Qld) ("the *Justices Act*") and the proper construction of s 29A of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) ("the *POTS Act*").

[2] After an investigation the appellant alleged that on or around 16 July 2015 the Panamanian-flagged ship Regina, then owned by the respondent, discharged about 90 tonnes of oil into the seas in Australia's exclusive economic zone and outer territorial sea off Queensland during a voyage from Singapore to New Zealand, the oil travelled into the Great Barrier Reef Marine Park, and it ultimately landed on the Queensland coast from about 24 July 2015.

[3] The appellant made a complaint in accordance with the *Justices Act* that the respondent had committed indictable offences under s 9 of the *POTS Act* that on or

about 16 July 2015 in waters off the coast of Queensland (count 1) it was the owner of the ship, Regina, when oil was discharged from the ship into the sea in the exclusive economic zone and (count 2) it was the owner of the ship, Regina, when oil was discharged from the ship into the outer territorial sea. Upon that complaint a Justice of the Peace issued a summons commanding the respondent to appear on 22 May 2017 at the Magistrates Court at Townsville before a justice taking an examination of witnesses in relation to an indictable offence.

[4] The complaint was made pursuant to s 42(1), in Division 1 of Part 4 of the *Justices Act*, which (subject to exceptions not presently relevant) provides that proceedings under that Act shall be commenced by a complaint in writing. The summons was issued pursuant to s 53(1), in Division 5 of Part 4, which provides that a justice may issue the justice's summons when a complaint is made before a justice that any person is guilty of or is suspected of having committed any indictable offence, simple offence, or breach of duty, within the jurisdiction of such justice. The summons conformed with the requirement in s 54(1) that a summons "shall be directed to the defendant and shall require the defendant to appear at a certain time and place before the Magistrates Court, or, as the case may require, before justices taking an examination of witnesses in relation to an indictable offence, to answer the complaint and to be further dealt with according to law".

[5] Also in Division 5 of Part 4 are two of the provisions relating to service which are significant in this appeal. Section 54(1A) requires that every summons "shall be served in accordance with this Act" and, in a case such as this of a summons issued on a complaint in writing other than an entry on a bench charge sheet, "a copy of such complaint shall be served with and in the same manner as the summons". Section 56(1) provides in its introductory text that, "[a] summons shall be properly served upon the person to whom it is directed if it is served in accordance with this subsection, that is to say— …". In relation to a summons to answer a complaint of a simple offence or breach of duty, paragraph (a) of s 56(1) refers to "posting (by means of registered post) a copy thereof addressed to the person at the person's place of business or residence last known to the complainant at least 21 days before the date on which the defendant is, by the summons, required to appear". The relevant paragraph is (b), which provides:

> "(b) in all cases (including the case referred to in paragraph (a)) – by delivering a copy thereof to the person personally or, if the person cannot reasonably be found, by leaving a copy thereof with some person for the person at the person's usual place of business or residence or place of business or residence last known to the person who serves the summons."

[6] Section 29A of the *POTS Act* provides:

> "(1) A document to be served on the master or any other member of the crew of a ship, or on the owner of a ship, in respect of an offence against this Act may be served on the agent of the ship instead.
>
> (2) A document served on the agent of a ship under subsection (1) is taken to have been served on the master or other member of the crew of the ship, or on the owner of the ship, as the case requires."

[7] A magistrate rejected the respondent's argument that the Magistrates Court lacked jurisdiction to hear an examination of witnesses upon the appellant's complaint because the respondent had not been served in accordance with the *Justices Act* or s 29A of the *POTS Act*.

[8] The respondent challenged that ruling, and the magistrate's consequential decision to proceed with an examination of witnesses, by an application for a statutory order of review under the *Judicial Review Act* 1991 (Qld). The grounds of that application were that the decision that the applicant had been properly served involved an error of law, for that reason the magistrate did not have jurisdiction to undertake an examination of witnesses, and a decision to commit the applicant for trial would therefore be contrary to law. The primary judge held that the magistrate had erred in law and ordered declarations that the complaint and summons had not been lawfully served upon the respondent in accordance with s 29A of the *POTS Act* or otherwise, there had been no waiver of the requirement for service, and in the absence of service of the complaint and summons and any waiver of the requirement for service, the Magistrates Court had no jurisdiction to proceed with an examination of witnesses.[1]

[9] The appellant contends that the primary judge erred (ground 1) in declaring that the complaint and summons had not been lawfully served upon the respondent and (ground 2) in declaring that the Magistrates Court had no jurisdiction to proceed with an examination of witnesses.

Evidence relating to service

[10] In an oath of service sworn on 21 March 2017, the appellant stated that he had served the respondent with a copy of the complaint and summons by registered post on that day in a letter addressed to the respondent at the address of a firm of solicitors, Thynne + Macartney, which was described as the last place of business of the respondent known to the appellant. The evidence before the magistrate concerning the role of Thynne + Macartney is to the following effect:

(a) A search of the maritime database "Seaweb" on the ship "Regina" showed that the Protection and Indemnity (P&I) Club History for the Ship identified Steamship Mutual U/W (Bermuda) ("the Club"). A search of its website showed that the ship was on the "List Entered Vessels" and the worldwide list of "Correspondents for the Club" included, for Brisbane, Thynne + Macartney. The contact persons for that firm, including the partner of that firm who subsequently had the conduct of the matter for the respondent, were named. The text on the Club's website includes statements that a listed correspondent "acts for the shipowner/charterer whose vessel is entered with the Association" and the "Club does not appoint Agents when difficulties arise at or near any of the places listed below" but "Members or their Masters are recommended to apply to any of the following firms for assistance".

(b) On 16 June 2016, an officer of the Queensland Department of Transport and Main Roads wrote to Thynne + Macartney informing that firm of the alleged oil spill and clean up and sampling operation over several days. The officer referred to the belief of a joint agency investigation team comprising investigators from Maritime Safety Queensland and the Great Barrier Reef Marine Park Authority that it had sufficient evidence to identify the ship as responsible for

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1 [2018] QSC 138 (Reasons).

the oil discharge. The officer stated that the investigation had determined (as was common ground before the primary judge) that the respondent was the owner of the ship and Samsun Logix Corporation was the operator of the ship at the time of the incident, that both were corporations registered in South Korea, and that the ship had since been re-named and its ownership had changed. The letter continued that it was the understanding of the joint investigation team that the P&I Club representing the owner of the ship at the time of the incident was Steamship Mutual U/W (Bermuda) and that Thynne + Macartney was its local legal representative. The officer wished to offer an opportunity to participate in recorded interviews concerning the matter to persons authorised on behalf of the owner (the respondent), the operator, and the chief engineer at the time of the incident, and enquired whether Thynne + Macartney acted on behalf of the Club or the respondent shipowner and operator.

(c) On 14 July 2016, Thynne + Macartney replied that the firm had received instructions on behalf of the owners of the ship in relation to the letter of 16 June 2016, the owners declined the request to participate in a recorded interview, the Department's comments that it believed the owners had committed an offence had been noted, and the Department was invited to provide details of the alleged offences and evidence obtained in that respect.

(d) On 22 December 2016 an officer in the Commonwealth Director of Public Prosecutions wrote to Thynne + Macartney referring to previous correspondence between it and the Great Barrier Reef Marine Park Authority in relation to the ship (which was not in evidence). It was noted that the office had received a brief of evidence from that authority in relation to the alleged oil spill originating from the ship, that at the time of the incident one Kuk Hyun Jang was the master of the ship, the respondent was the owner of the ship, and Samsun Logix Corporation was the operator of the ship, offences had been referred in relation to all three parties, a brief had been considered by the office, and it had been determined that proceedings should be commenced against those three parties. The writer stated that complaints were currently being drafted and enquired whether Thynne + Macartney acted for any of the parties referred to and, if so, whether it held instructions to accept service of the complaints and summons.

(e) On 2 February 2017 (after a reminder letter from the Director) Thynne + Macartney replied that the firm did not have any instructions in relation to the Director's letter. On 26 April 2017 Thynne + Macartney wrote to the Director referring to the sending of the complaint and summons to the respondent and Jang to Thynne + Macartney's office, purportedly by way of service, and observing that the firm did not hold any instructions to accept service of the charges against the defendants and that the firm also was not an agent of the ship as contemplated by the *POTS Act*. Those copies of the complaint and summonses were returned under cover of that letter.

(f) On 18 May 2017 Thynne + Macartney wrote a letter to the registrar of the Townsville Magistrates Court, with a copy to the Director, which recorded the solicitor's instructions to appear in relation to the complaint and summons, denied that the respondent had been properly served, and stated that the respondent wished to be heard "subject to the proviso that our

appearance should not be taken as any waiver of defective service or as a submission to the jurisdiction of the court".

[11] In the appellant's second oath of service sworn on 21 March 2017, he stated that he had served the respondent with a copy of the complaint and summons by registered post on that day and a letter addressed to the respondent at the address in Western Australia of "Monson Agencies Bunbury" ("Monson"), which was described as the last place of business of the respondent known to the appellant. The evidence before the magistrate concerning the role of Monson is to the following effect. The ship arrived in the port of Bunbury in Western Australia on 18 June 2011 and departed on 22 June 2011. At that time the respondent was the owner of the ship and Samsun Logix Corp was the operator. A "Ship Pre-arrival Report" dated 17 June 2011 attached to a statement by another officer of the Australian Border Force describes Monson as the "Local Ship's Agent" in relation to the ship owned by the respondent. That record is in the form of a declaration which is required to be completed by "Authorised Operator/Agent/Master". Another record attached to the same statement and headed "Report of Ship's Stores" describes Monson as "Principal Agent".

[12] On 2 August 2017 senior counsel instructed by a solicitor retained by the respondent appeared before a magistrate to argue that the respondent had not been properly served with the complaint and summons and the Magistrates Court therefore had no jurisdiction to hear any examination of witnesses in relation to the offences. At the outset of the hearing senior counsel described the respondent's appearance as "conditional" and "in accordance with" the letter of 18 May 2017 from Thynne + Macartney. It was common ground in the hearings before the magistrate and the primary judge, and in this appeal, that the respondent's "conditional appearance" in the Magistrates Court did not amount to a waiver of compliance with any requirements for service of the complaint and summons.

The magistrate's reasons

[13] The magistrate ruled that the complaint and summons had been duly served upon the respondent for the following reasons. The purpose of service of a complaint was to put the defendant upon notice of the charges against it; the respondent was "acutely aware of the proceedings", and service was effective upon that basis. There was no other explanation for the defendant's appearance or for the interaction of the Thynne + Macartney partner with a variety of witnesses in relation to the matter. It was "clear, just on the face of it, that they have been served". As reasons for that conclusion, other than "the obvious fact that they [were present] and they [were] aware of it", the magistrate remarked that it was clear that when the complaint and summons were delivered to Thynne + Macartney, that firm had taken some instructions in relation to the matter. That was why the partner had been apprised of the factual surroundings of the allegations. In the partner's capacity as a representative of the respondent he was aware of the complaint and summons and in consequence the respondent was aware of them. The respondent was served on the basis that, at that time, the partner or his firm were acting as agents for the respondent. The magistrate also accepted submissions that Monson was served as the last known agent of the ship, reasoning that Monson's agency persisted until someone else was appointed as agent for the ship.

The primary judge's conclusions

[14] The primary judge framed the following questions for consideration:

(i) In the absence of waiver of the necessity for service, was service of the summons a precondition to the exercise of the power to proceed on the complaint?

(ii) Was Thynne + Macartney "the agent of the ship" for the purposes of s 29A of the *POTS Act*?

(iii) Was Monson an "agent of the ship" for the purposes of s 29A of the *POTS Act*?

[15] The primary judge gave an affirmative answer to question (i), holding that the Magistrates Court has no power to hear an examination of witnesses in the absence of service under s 56 of the *Justices Act* or some other statutory provision whereby documents might be served (such as s 29A of the *POTS Act*).[2] The primary judge gave negative answers to questions (ii) and (iii).

[16] Those answers are in issue in this appeal.

Question (i): In the absence of waiver of the necessity for service, if a summons issued under the *Justices Act* upon a complaint that a corporation committed an indictable offence is not served in a way authorised by a different Act, is service of the summons in a way described in s 56(1)(b) of the *Justices Act* a precondition of the power of justices to conduct an examination of witnesses?[3]

[17] I have reframed question (i) to make it relate more closely to the issues as they were agitated in this appeal, in which the parties' arguments differed in some respects from the arguments before the primary judge. In particular, the primary judge remarked that the appellant did not submit that the complaint and summons were served in accordance with s 56,[4] but although the appellant did not argue that the complaint and summons were served in a way described in s 56(1)(b) its arguments comprehended a contention that the respondent's knowledge of the content of those documents nevertheless amounted to service in accordance with the *Justices Act*.

[18] The magistrate did not find in terms that the respondent received copies of the documents from its solicitor. If that were found as a fact, a decision that the complaint and summons had been "properly served" in a way described in s 56(1)(b) would not involve an error of law for the reason that, consistently with the decision in *Guss v Magistrates' Court at Victoria*,[5] upon the proper construction of s 56(1)(b) the words "delivering a copy thereof to the person personally" do not require that the copy be delivered by the complainant or directly to the defendant without the intervention of a third party (such as the respondent's solicitor).

[19] The magistrate's findings are to the effect, however, as the respondent acknowledged at the hearing of the appeal, that before the hearing in the Magistrates

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2 Reasons at [98].

3 The reference to service in a way authorised by a different Act comprehends service under s 29A of the *POTS Act*, which is the subject of questions (ii) and (iii). Otherwise the appellant does not submit that any other Act authorised service. Nor does the appellant submit that the necessity for service was waived.

4 Reasons [60].

5 [2003] VSC 365.

Court the respondent had notice of the complaint and the summons and, indeed, was entirely aware of their content.[6] The respondent argues that the magistrate erred in law in making those findings by taking into account the respondent's solicitor's letter of 18 May and the fact that the respondent appeared at the hearing. To take those matters into account is submitted to be inconsistent with the appellant's acknowledgment that the respondent's appearance in the Magistrates Court did not waive compliance with any requirements for service of the complaint and summons. It is submitted that the 18 May letter formed part of the process of the respondent's conditional appearance.

[20] In my view, whilst the respondent's solicitor's letter of 18 May refers to the condition the respondent sought to impose upon its appearance, that letter, read together with the previous correspondence, sustains the magistrate's findings of fact. The magistrate did not treat the letter or the subsequent appearance as a waiver of a right to rely upon the suggested defect in service as a ground for denying that the Magistrates Court had jurisdiction. Rather, the magistrate relied upon the letter and the subsequent appearance by the respondent's previously retained solicitor, in circumstances in which the solicitor had obtained instructions about the complaint and summons, as confirmation that the defendant had been served by virtue of its knowledge of the content of the complaint and summons.

[21] The primary judge's reasons convey that the respondent's knowledge of the content of the complaint and summons does not amount to service because the *Justices Act* requires that in the case of an indictable offence the complaint and summons may be served only by one of the methods described in paragraph (b) of s 56(1). In that respect the primary judge held that s 56 prescribes how service should be effected in a way which does not admit of the possibility of service other than pursuant to s 56(1).[7]

[22] The respondent argues that the primary judge's construction is required by the decision in *Nitz v Evans*.[8] Section 34(1)(b) of the *Magistrates' Court Act* 1989 (Vic) provided that a summons "must be served … by delivering a true copy of the summons" to the defendant. The magistrate convicted the defendant of the charged summary offence in reliance upon s 41(2)(b), which empowered the court to hear and determine a charge of a summary offence in the defendant's absence if the defendant "does not appear in answer to a summons to answer a charge for a summary offence". A document purporting to be a summons to attend court was served on the defendant. The document was not a true copy of the summons because it did not indicate that the original had been signed by the Registrar or that the Registrar's title was noted on the original. The defendant appeared, but left after contending that the court lacked jurisdiction to hear the matter. Hayne J held that what s 34 required was service of a true copy of the summons which shows the defendant that the summons has been issued, thereby requiring service of a copy which shows it had been signed by the issuing authority. Hayne J noted that s 34 was "cast in mandatory terms": the provision "says that ""Except where otherwise expressly enacted" every summons to answer to a charge "must be served" before a particular time and "must be served on the defendant" by one of two prescribed methods, each of which requires the delivery or leaving of a true copy of the summons."" In relation to s 41, Hayne J held that it was implicit in the expression

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6 Transcript 17 October 2018 at 1 – 32.

7 Reasons at [76], [80].

8 (1993) 19 MVR 55. That decision was followed in a case concerning a charge of a summary offence under the same legislation: *Sinclair v Magistrates Court of Victoria at Ringwood* [1998] VSC 170.

"if a defendant does not appear in answer to a summons" that there has been service in accordance with the Act, and that provision was not satisfied by the fact that the defendant was by some other means aware of the fact that a summons had been, or might have been, issued. The decision was that the defects in service were such as to preclude the Magistrates Court from proceeding to hear and determine the charge.

[23] The primary judge considered that the relevant provisions of the *Justices Act* are much like the provisions considered in *Nitz*, observing that s 54(1A) is in mandatory terms and that s 56 prescribes how service should be effected. In my respectful opinion, *Nitz* does not assist in the construction question in this case because s 54(1A) and s 56(1)(b) of the *Justices Act* differ in material ways from s 34 of the Victorian Act and because there is no analogue of s 41 of the Victorian Act in the provisions of the *Justices Act* relating to an examination of witnesses upon a complaint of an indictable offence by a corporate defendant.

[24] As to the first point of distinction, whilst a possible construction of s 54(1A) and s 56(1) of the *Justices Act* is that service of a summons may be effected only in a way described in the applicable paragraph of s 56(1), that is not the only available construction. Section 54(1A) mandates only service "in accordance with this Act" and, unlike s 34 of the Victorian Act, s 56(1) of the *Justices Act* does not purport to confine the available ways of service in accordance with the Act to the ways of service described in that subsection. Section 56(1) is akin to a deeming provision: it provides only that compliance with a way of service described in the applicable paragraph amounts to proper service of a summons. A consequence of that aspect of s 56(1) together with the use of different terminology in s 54(1A) ("served in accordance with this Act") and s 56(1) ("properly served") is that no construction of those provisions is completely reconcilable with their text.

[25] The statutory context is important in any attempt to resolve that ambiguity and to address the ultimate issue whether the power to conduct an examination of witnesses is conditional upon service in a way described in s 56(1)(b), but the legislative history also has some relevance. When the *Justices Act* was enacted in 1886 there was no analogue of s 54(1A) and s 56 provided that a summons "must be served upon the person to whom it is directed by delivering a copy thereof to him personally, or, if he cannot be found, by leaving it with some person for him at his last known place of abode". The text of s 54(1A) and parts of the text of s 56(1) were introduced by amendments made in 1964[9] and those provisions were brought into their current form by an amendment in 1968.[10] As the primary judge concluded, nothing in the parliamentary speeches relevant to the Bill for the 1968 Act is of assistance in the construction of the present form of s 66, and the same is true in relation to the amendment made in 1964. It is nonetheless evident that s 56 as originally enacted was more emphatically prescriptive as to the manner of service than are s 54(1A) and s 56(1) in their current form.

[26] The second point of distinction between *Nitz* and this case requires reference to other provisions. As I have mentioned, s 34(1)(b) of the *Magistrates' Court Act* 1989 (Vic) required service of a summons by delivering a true copy of it to the defendant and s 41(2)(b) of the same Act empowered the court to hear and determine a charge of a summary offence *ex parte* if the defendant did not appear

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9 *Justices Acts Amendment Act* 1964, No 32 of 1964 (Qld), s 27.

10 *Justices Acts and Other Acts Amendment Act* 1968, No 14 of 1968 (Qld), s 5.

"in answer to a summons to answer a charge for a summary offence". An examination of the *Justices Act* reveals that, whilst it contains analogues with s 41 of the Victorian legislation in relation to the issue of a warrant to apprehend a defendant or in an *ex parte* proceeding before justices for a simple offence or breach of duty, there is no such analogue in relation to an examination of witnesses upon a complaint that a corporation committed an indictable offence.

[27] Part 5 of the *Justices Act* regulates proceedings in the case of indictable offences. The powers conferred upon justices hearing an examination of witnesses are found in Division 5 ("Examination of witnesses") and Division 7 ("Corporation charged with indictable offence"). In Division 5, s 103B(1) and (2) give a magistrate overall supervisory responsibility for any committal proceeding coming before a Magistrates Court, including setting a timetable for the committal proceeding, and s 104(1)(a) provides that the examination of witnesses in relation to an indictable offence may be conducted by a single justice. Division 3 of Part 5 contains only s 103. Its effect is that, where a defendant charged with an indictable offence does not appear when called before the justices at the time and place mentioned in a summons issued against the defendant, the justices may issue their warrant to apprehend the defendant and bring the defendant before justices to answer the complaint, and be further dealt with according to law, if the justices are satisfied by oath or by deposition as provided in s 56 that the summons was "properly served" on the defendant at a reasonable time before the time appointed for appearance and, from information given on oath, that the matter of complaint is substantiated.

[28] In the case of an individual, such a warrant is required because the presence of an individual defendant at the committal hearing is necessary. In that respect, s 104(1)(b) provides that, subject to s 40 (which empowers a court or justice to exclude from the court or examination of witnesses a person who engages in various forms of misbehaviour, such as wilful insults, interruptions, assaults and the like), the examination of witnesses in relation to an indictable offence shall be conducted in the presence and hearing of the defendant if the defendant is required to be present and of the defendant's lawyer (if any). The proviso is explicable by s 104A, which empowers the justices, upon a defendant's application, to excuse the defendant from attendance during the taking of any evidence for the prosecution. That provision does not extend to the requirements in s 104(2), (3), and (5) that after the prosecution evidence has been adduced and the justices form the opinion that the evidence is sufficient to put the defendant upon trial for an indictable offence, the justices must cause the deposition of the witnesses who gave evidence at the examination in the defendant's absence (otherwise than pursuant s 104A) to be read to the defendant, the justices must address the defendant concerning the defendant's opportunity to give evidence on oath (s 104(2)(b)), and the justices must warn the defendant about alibi evidence (s 104(5)).

[29] The provision in s 103 for the issue of a warrant and the requirements in s 104 for the examination of witnesses to be conducted "in the presence and hearing of the defendant" (s 104(1)(b)) and (in the context of that provision) for the justices to address "the defendant", are inapt in the case of the present kind, in which the defendant is a body corporate. That is so also in relation to the provisions in s 108(1) and s 113(1) for warrants committing defendants to prison where:

(a) the justices are of the opinion that the evidence is sufficient to put the defendant upon trial for an indictable offence: under s 108(1) the justices shall "order the defendant to be committed to be tried for the offence before a

court of competent jurisdiction, and in the meantime shall by their warrant commit the defendant to prison, to be there safely kept until the defendant is delivered by due course of law or granted bail"; and

(b) where the defendant pleads guilty: under s 113(1) the justices shall "order the defendant to be committed for sentence before some court of competent jurisdiction, and, in the meantime shall, by their warrant, commit the defendant to prison to be there safely kept until the defendant is delivered by due course of law or granted bail".

[30] In relation to the concluding part of s 108(1), in *R v Ampol Refineries Limited*[11] Kelly J held that justices may validly commit a body corporate for trial notwithstanding their inability to exercise the powers of committal to gaol or admission to bail following such committal. As a result of deficiencies in the statutory provisions concerning the prosecution of corporations for offences which are discussed in *Ampol Refineries Limited*, various procedural provisions concerning corporations were introduced by the *Justices Act and the Criminal Code Amendment Act* 1978, including s 113A of the *Justices Act*. So far as is presently relevant, s 113A (which is the only provision in Division 7 of Part 5) provides:

"(1) Where a corporation is charged with an indictable offence, it may appear before the justices by a representative at the time and place mentioned in the summons issued against it.

(2) A representative may on behalf of a corporation do either or both of the following—

(a) make a statement before the justices in answer to the charge;

(b) enter a plea to the charge;

and any statement so made or plea so entered shall for all purposes be taken to be a statement made or plea entered by the corporation.

(3) Where a representative appears, any requirement of this Act that anything shall be done in the presence of the defendant, or shall be read or said to the defendant, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or said to the representative.

(4) Where a representative does not appear—

(a) any requirement referred to in subsection (3) shall not apply; and

(b) the justices may nevertheless, if upon a consideration of all the evidence adduced upon an examination of witnesses in relation to the offence they are of the opinion that the evidence is sufficient to put the corporation upon its trial for an indictable offence, order the corporation to be committed to be tried for the offence before a court of competent jurisdiction.

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11 [1978] Qd R 378 at 380.

(5) Justices may commit a corporation for trial or for sentence notwithstanding their inability to exercise their powers of committal to prison or granting bail following such committal.

(6) Where a representative does not appear and justices order the corporation to be committed for trial, the clerk of the court at which the corporation has been so committed shall forthwith give to the corporation a notice in writing of such committal containing particulars in relation thereto.

(6A) The notice may be given to the corporation by leaving it at or sending it by post to the registered office of the corporation or to any place at which it trades or carries on business.

(7) In this section—

representative means a person appointed by the corporation to represent it for the purposes of this section, but a person so appointed is not, by virtue only of being so appointed, qualified to act on behalf of the corporation before justices for any other purpose."

[31] The primary judge observed of s 113A(1) that the reference to the power of the corporation to appear by its representative "at the time and place mentioned in the summons" referred to a summons served pursuant to s 56.[12] Bearing in mind that the provision confers a power upon the corporation, rather than upon justices conducting an examination of witnesses, I respectfully consider that there is no sufficient basis in the *Justices Act* for an implication that the power conferred upon the corporation is qualified by a requirement that it has been served in a way described in s 56(1)(b). What is perhaps more significant for present purposes is that no provision of the *Justices Act* makes service of the complaint and summons in a way described in paragraph (b) of s 56(1) a condition of the power of justices to hear an examination of witnesses upon a complaint of an indictable offence by a corporation. Most relevantly in this case, there is no such provision relating to a complaint against a corporate defendant which proceeds in reliance upon the powers in s 113(A)(4) – (5).

[32] The primary judge referred to the procedure for proof of service of a complaint and summons in s 56(3) as support for a conclusion that the summons must be served where a complainant relies upon a summons (as opposed to arrest or a notice to appear) to bring a defendant to court.[13] The effect of s 56(3) of the *Justices Act* is that the person who serves a summons shall either depose to service before the Magistrates Court or, as the case may be, the justices taking the examination of witnesses in relation to an indictable offence, at the place and time for hearing mentioned in the summons, or depose to service on oath before a Justice of the Peace and in writing endorsed on a copy of the summons. Details of the necessary deposition as to service in the case described in s 56(1)(a) are specified in s 56(4). By s 56(5), such a deposition shall, upon production to the relevant court, magistrate or justices, be evidence of the matters contained therein and sufficient proof of service of the summons on the defendant. However s 56(3) does not confine the evidence of service in the case of an indictable offence to evidence of a method of

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12 Reasons [82](vi).

13 Reasons [82](iv).

service described in s 56(1)(b) and s 56(4) has no application in such a case. Whatever might be the position in relation to service of a complaint of a simple offence or breach of duty (which is not in issue in this appeal), my view is that s 56(3) does not support a construction of the *Justices Act* that the power of justices to hear an examination of witnesses upon the complaint of an indictable offence is conditional upon service of a summons in a way described in s 56(1)(b).

[33] Part 6 of the *Justices Act* concerns proceedings in relation to simple offences and breaches of duty. Section 141 empowers the justices to dismiss a complaint where the defendant attends voluntarily in obedience to the summons or is bought before the justices by virtue of a warrant but the complainant of a simple offence or breach of duty does not appear personally or by lawyer. That provision does not appear to bear upon the present question. Sections 142(1)(a) and (b) relevantly provide that, in a case where the defendant does not appear when called "and the justices are satisfied, on oath or by deposition as provided in s 56, that the summons was properly served on the defendant a reasonable time before [the appointed day]" the justices may proceed to hear and determine the case *ex parte* as if the defendant had appeared "in obedience to the said summons" or issue a warrant to apprehend the defendant and bring the defendant before justices to answer the complaint, if satisfied from information given on oath that the complaint is substantiated.

[34] The primary judge noted that these provisions in Part 6 concerned proceedings relating to simple offences and breaches of duty but observed that proceedings under that Part followed from the operation of Part 4,[14] which includes ss 54(1A) and 56(1). Acknowledging the force of the primary judge's detailed analysis of the Act, I would place more emphasis upon the differences between the nature and potential consequences of a proceeding under Part 5 and the nature and potential consequences both of a proceeding under Part 6 and (in the case of an individual defendant) of the issue of a warrant of apprehension. In an examination of witnesses under Part 5 a magistrate exercises executive power, a result of which may be that the defendant is put on trial; and if that is the result in the case of a corporate defendant who chooses not to appoint a representative to appear despite having notice of the complaint of summons and knowledge of their contents, the corporation must be given a notice in writing of the committal to trial in the way described in s 113(6A). On the other hand, a proceeding of the kind regulated by Part 6, including an *ex parte* proceeding under s 142(1), is judicial in character and may result in a finding of guilt of an offence, a conviction, and a sentence, or instead the issue of a warrant of apprehension. The finality of the judicial proceeding and the seriousness of its potential consequences, and (in the case of an individual defendant) the fact that a warrant of apprehension authorises the deprivation of liberty, are capable of explaining why proof that a summons was "properly served" is made a condition of the exercise of the statutory powers to proceed *ex parte* upon a complaint of a simple offence or breach of duty or to issue a warrant to apprehend a defendant, whereas no similar condition is expressed in relation to the exercise of the executive power to conduct an examination of witnesses upon the complaint of an indictable offence by a corporation.

[35] In the absence of any provision expressly making a way of serving a complaint and summons described in s 56(1)(b) a condition of the power of justices to conduct an examination of witnesses upon a complaint of an indictable offence against a corporation,

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14 Reasons [82](vii)-(xii) and [97].

the statutory purpose underlying ss 54(1A) and 56(1) may be significant in determining whether such a condition is implicit.

[36] In *Plenty v Dillon*, Mason CJ, Brennan and Toohey JJ stated:[15]

> "A summons to appear before a court of summary jurisdiction to answer an information or complaint does not itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. Service of a summons, unlike the execution of a warrant of arrest, does not coerce a defendant to appear, though a failure to appear in answer to the summons may lead to the issue of a warrant (see Jervis' Act - *the Summary Jurisdiction Act* 1848 (U.K.) (11 & 12 Vict. c. 43). The essential nature of a summons as the means of according natural justice has been established by long practice."

[37] The provisions for a summons in the *Justices Act* were modelled on *Jervis' Act* and the subsequent amendments do not suggest any change in the essential nature of a summons. The primary judge considered, and I respectfully agree, that the question whether service of a summons in a particular way is a condition of a statutory power must depend upon the construction of the relevant provisions, but the nature of a summons as a means of according natural justice, or procedural fairness, is nonetheless capable of shedding light upon the construction of the ambiguous provisions of the Act. Procedural fairness is achieved if, as the magistrate's findings establish in this case, the defendant is made aware of the content of a complaint and summons. Cranworth LC observed in *Hope v Hope*[16] that "[t]he object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required." That statement has been cited and applied in numerous cases. For example, in *Howship Holdings Pty Ltd v Leslie*,[17] Young J cited *Hope v Hope* and other decisions and observed:

> "The ordinary meaning of "service" is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended."

[38] Consistently with the observations of Mason CJ, Brennan and Toohey JJ in *Plenty v Dillon* and of Cranworth LC in *Hope v Hope*, the evident object of s 54(1A) and the mode of personal service in s 56(1)(b) ("delivering a copy thereof to the person personally") is to ensure that the defendant is made aware of the complaint and summons so as to be able to resist that which is sought by the complainant. The circumstance that service of an originating process is the means of according natural justice has been taken into account in the construction of many other statutory provisions. Upon that point, in addition to *Howship Holdings Pty Ltd v Leslie* the primary judge cited *Capper v Thorpe*,[18] *Warren v Legal Services Commissioner*,[19]

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15 (1991) 171 CLR 635 at 641.
16 (1854) 43 ER 534 at 539 – 540.
17 (1996) 41 NSWLR 542 at 544.
18 (1998) 194 CLR 342.
19 [2014] QCA 150.

FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd,[20] and *Pino v Prosser & Anor.*[21] As the primary judge explained, those decisions are distinguishable because the legislative provisions differ from those in the *Justices Act*, but they nonetheless serve to illustrate the significance of the statutory purpose for the construction of ambiguous provisions about service.

[39] It is sufficient to refer to two cases in that category. In *Guss v Magistrates' Court at Victoria*,[22] the relevant provision, s 34(1) of *The Magistrates' Court Act* 1989 (Vic), relevantly provided in the case of a charge of an indictable offence where a committal mention date had been fixed by the registrar, that the summons "must be served" by a certain time before that date and "must be served on the defendant by … delivering a true copy of the summons to the defendant personally; or … leaving a true copy of the summons for the defendant at the defendant's last or most usual place of residence or of business with a person …". The magistrate concluded that the summons was not served at the correct address, the defendant's most usual place of business. On the defendant's own evidence he received the copy of the summons several days after it was left at the address of a business which the defendant attended in his capacity as a consultant to the company carrying on business there. Osborn J regarded that evidence as proof that the defendant was personally served with the copy summons by delivery to him. Osborn J quoted from *Pino v Prosser*[23]and observed that the plaintiff did not suffer any lack of procedural fairness in relation to service of the document: "[t]he purpose of s 34(1)(b)(i) is not that the defendant to a summons be delivered a true copy by a particular person but that he personally receive it", and that "Section 34(1) is not concerned with abstract rituals but with the fact of service."[24]

[40] In *Pino v Prosser* a defendant's own affidavit admitted receipt of a writ. McInerney J referred to *Hope v Hope* and other cases and observed that a construction which excluded that form of personal service would be "remarkable to the point of seeming absurdity". In the present case, the construction advocated by the respondent seems distinctly odd in circumstances in which the facilitative modes of service permitted by s 56(1)(b) (those ways of service other than delivery to the defendant) may well not result in a defendant becoming aware of the complaint and summons. With that in mind, the effect of the respondent's construction may fairly be described as absurd where, as the magistrate found, a defendant has, through a solicitor retained by it in relation to the investigation of an offence subsequently charged, acquired full knowledge of the content of a complaint and summons sent to the solicitor.

[41] Two other cases are sufficient to illustrate how the underlying purpose of service may influence the construction of statutory provisions in relation to a question whether jurisdiction is made conditional upon service in a specified way.

[42] In *Cuttler v Browne & Anor*[25] this Court endorsed the rejection of a contention in a statutory order of review that the Misconduct Tribunal had erred in law in ruling that the Deputy Commissioner of Police acted unlawfully in conducting a

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20 [2018] 3 Qd R 258.
21 [1967] VR 835.
22 [2003] VSC 365.
23 [1967] VR 835 at 838 – 9.
24 [2003] VSC 365 at [20], [22].
25 [2010] QCA 346.

disciplinary hearing in the absence of a police officer. The direction to attend the disciplinary hearing had been served personally but it had not been served in the way prescribed, that it "is to be" served personally "by a member of the Service".[26] Muir JA, with whom the present Chief Justice and myself agreed, rejected the contentions upon the ground that the Deputy Commissioner of Police was empowered to dispense with compliance of the requirement that the direction be served by a member of the Service.[27] The relevance of the case for present purposes is that Muir JA went on to consider the point upon the assumption that the question was whether a failure to comply with that requirement would result in invalidity of the disciplinary hearing. Analogously with this case, there was no provision prescribing the consequences of a failure to comply with the requirement. Muir JA adopted the methodology endorsed in *Project Blue Sky Inc v Australian Broadcasting Authority*[28] of construing the provision in its context to determine whether, "by reference to the language of the statute, its subject matter and objects, and the consequence for the parties of holding void every act done in breach of the condition", the relevant act done in breach of the condition regulating the exercise of the statutory power was invalid. After referring to Cranworth LC's observation in *Hope v Hope*, Muir JA stated:

> "[41] Were it not for the requirement that the personal service be by 'a member of the Service', personal service would have been proved by the evidence referred to earlier. The reasons for this unusual requirement are unclear. It may have to do with economy, reliability, confidentiality, or perhaps with maintenance of *esprit de corps* (the treatment of an officer with due respect even though disciplinary proceedings have been instituted against him or her). Whatever the reason, it is unlikely that it was intended that the disciplinary proceedings would miscarry if the subject officer had full notice of the re-hearing and of the allegations against him, particularly if he participated in the hearing and no denial of natural justice occurred.
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> [42] The requirement of service by "a member of the Service" is peripheral to the central purpose of s 18.3.4.2. To borrow from the reasons of the Court in *Minister for Immigration and Citzenship v SZIZO*, 'the manner of providing timely and effective notice of hearing is not an end in itself'. Section 18.3.4.2 is procedural in nature and, together with other provisions, is directed at ensuring that officers subjected to disciplinary proceedings are given due notice of the allegations they have to meet, the possible consequence of those allegations being made out, and that procedural fairness is observed."

[43] *Minister for Immigration and Citizenship v SZIZO*[29] concerned the question whether a determination of the Refugee Review Tribunal was invalidated by jurisdictional error comprising the Tribunal's non-compliance with an allegedly imperative duty to give notice of a hearing under s 441G of the *Migration Act* 1958 (Cth). The relevant provision provided that, in the prevailing circumstances, "the Tribunal must

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26 [2010] QCA 346 at [20].
27 [2010] QCA 346 at [28] – [32].
28 (1998) 194 CLR 355 at 388 – 390.
29 (2009) 238 CLR 627.

give the authorised recipient, instead of the applicant, any document that it would have otherwise have given to the applicant" (s 441G(1)). It was common ground that the minister did not contend that the required notice inviting appearance before the Tribunal had been given to the "authorised recipient", as required by s 441G. The notice was instead given to one of the applicants for review and it came to the attention of the other applicants for review and the authorised recipient in due time. The High Court (French CJ, Gummow, Hayne, Crennan and Bell JJ) observed of s 441G, and the provision requiring notice to be given to an applicant (s 425A) imposed obligations which facilitated the conduct of a procedurally fair hearing, but "the *manner* of providing timely and effective notice of hearing is not an end in itself":[30]

> "The procedural steps dealing with the manner of giving notice are to be distinguished from other components of the statutory statement of the hearing rule, including the obligation to give particulars of adverse information (s 424A(1)) and to invite the applicant to appear to give evidence and to present arguments relating to the issues arising in the decision under review (s 425). While the legislature may be taken to have intended that compliance with the steps in ss 441G and 441A would discharge the Tribunal's obligations with respect to the giving of timely and effective notice of the hearing, it does not follow that it was the intention that any departure from those steps would result in invalidity without consideration of the extent and consequences of the departure. The respondents acknowledge that they suffered no injustice by reason of the Tribunal's omission and they do not take issue with the Full Court's characterisation of the result in the circumstances as being "rather absurd". The admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing."

[44] The Court concluded that, despite the use of imperative language and the detailed prescription of the regime, the relevant provisions did not condition the Tribunal's jurisdiction to conduct and decide a review but were instead procedural steps designed to ensure that the applicant properly could advance the case at the hearing and a failure to comply with the requirements required consideration of whether the applicant was denied natural justice.[31]

[45] Those cases concerned different legislation and the issue concerned jurisdiction rather than statutory power, but they – particularly the passage quoted from *SZIZO* – are illuminating upon the approach to statutory construction in a broadly similar context.

[46] Focussing upon the particular provisions of the *Justices Act*, s 54(1A) requires every summons to be served "in accordance with this Act", s 56(1) does not expressly require a summons upon a complaint of an indictable offence by a corporation to be "properly served" in one of the ways described in s 56(1)(b), and no provision expressly makes proper service, or even service in accordance with the Act, a condition of the power of justices to conduct an examination of witnesses. In this context, and

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30 238 CLR 627 at 639 [34] – 640 [35].

31 238 CLR 627 at 640 [36].

taking into account that the evident purpose of those provisions is to ensure procedural fairness and the statutory context (particularly the strong contrast within the scheme of the *Justices Act* discussed in [34] of these reasons), I would construe that Act as empowering justices to conduct an examination of witnesses upon a complaint of an indictable offence by a corporate defendant both where the complaint and summons has been served in a way described in s 56(1)(b) and where (as in this case) procedural fairness has been afforded to the defendant by virtue of it having acquired knowledge of the content of the complaint and summons in some other way.

[47] It follows that question (i) should be answered "no" and the appeal should be allowed.

Question (ii): Was Thynne + Macartney "the agent of the ship" for the purposes of s 29A of the *POTS Act*?

[48] The primary judge made some general observations about the meaning of the expression "agent of the ship" in s 29A, which I will summarise. That expression might have a meaning in the maritime industry gained from common usage. Where it had been used in statutes and in documents considered in reported cases it usually appeared as part of a composite expression which included "owner of the ship" and "master of the ship". The expression appeared in the *POTS Act* only in s 29A, but the term "owner of the ship" appears in many provisions of that Act. The latter term often appears as part of the term "the master and the owner of the ship" as a reference to two separate entities. Many sections, of which s 9 is an example, create offences which might be committed by the "master", "the charterer", or "the owner of the ship". Some sections of the *POTS Act* refer to the agent of the owner of the ship as opposed to "the agent of the ship". In ss 40(5) and (6) reference is made to the owner of the ship who has an office or agent in Australia", and a similar concept appears in other provisions.

[49] The primary judge rejected a construction under which the term "the owner's agent" is synonymous with "agent of the ship", taking into account the use of those different terms in different provisions of the *POTS Act*. The term "agent of the ship" refers to a person who has authority in relation to the ship. The primary judge referred to *Goodes v James Patrick & Co*,[32] in which Adams J considered the meaning of the term "the agent … of the ship" in s 6(a) of the *Navigable Waters (Oil Pollution) Act* 1960 (Vic), under which "the owner, the agent and the master of the ship severally" were rendered liable for an offence in relation to the discharge of oil from a ship. Adams J took into account the particular context of s 6(a). Passages from his Honour's reasons quoted by the primary judge include the following:

> "It will be noticed that those liable for the offence of the discharge of oil from a ship are 'the owner', 'the agent' and 'the master'. As to two of them, the owner and the master, either in law or in fact they are persons having control over the ship, including whatever could result in the discharge of oil from the ship to the harbour. 'The agent', which is sandwiched between 'owner' and 'master', is, of course, the word for interpretation, but one is predisposed to reading the word 'agent' as of like import to 'owner and master' -- that is as

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32 [1963] VR 334.

> one having some charge or authority which would enable that person to prevent an offence being committed.
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> … It seems a very unreasonable interpretation of that, that 'the agent' should include someone who is in no way concerned, having regard to his authority, with the occurrence of the discharge of oil.
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> …
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> The result then is, just on the mere construction of the Act and in the absence of any technical meaning of 'agent of the ship', I would construe it as indicating a person having similar authority to the owner or master so far as the control, discharge and management of the ship in relevant respects. The magistrate has found for the defendant on the broad ground that 'the agent of the ship' means a general agent, and that it is an answer that there is *any* limitation on this authority. I would, myself, think that was going too far, but without attempting a complete definition, the relevant point is that 'the agent' is not one within whose authority it is to control the ship so as to avoid the commission of the offence charged."[33]

[50] The primary judge considered that in the context of s 29A, which does not impose a criminal liability upon "the agent of the ship", considerations underlying Adams J's reasons were inapplicable, and "the agent of the ship" referred to in s 29A was not necessarily a person with authority over the control of the ship. The primary judge concluded:

> "However, the term used in s 29A importantly identifies the agent as one 'of the ship'. While 'the agent of the ship' will likely also be the agent of the owner for some purposes, the term identifies a particular connection to the ship. What the section contemplates is, at least, the classic shipping agent, namely an agent of the owner within the jurisdiction making arrangements to accommodate and manage the ship on its voyage through Australian ports. It is very difficult to see how a ship which doesn't dock at Australian ports can have the need for an Australian 'agent'."[34]

[51] The appellant argued for the adoption of a broader interpretation which would comprehend as "the agent of the ship" a person in Australia who was authorised to facilitate a ship's activities in Australia or otherwise to represent the owner in respect of the ship. The appellant submitted that this interpretation should be adopted because it "would best achieve the purpose or object of the Act" as required by s 15AA of the *Acts Interpretation Act* 1901 (Cth) which enacted s 29A. The appellant submitted, as it had submitted before the primary judge, that a purpose which was consistent with the broader interpretation appeared both from a consideration of the *POTS Act* and also by reference to the Explanatory Memorandum to the Bill which became the *Transport Legislation Amendment Act* 1991 (Cth). The relevant passage reads:

> "47. … The Principal Act will therefore now cover both overseas and Australian ships in respect of pollution incidents committed within the territorial sea but outside State and

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33 [1963] VR 334 at 335-338.

34 Reasons [116].

> Territory jurisdiction. It is therefore appropriate to provide for the service of summonses or other documents under the Principal Act. In respect of Australian ships such documents can always be served on the ship's master or owners, but service of documents on the master or owners of an overseas ship may not be possible, since the ship may have left Australian waters before the incident is discovered.
>
> 48. Clause 23 will therefore insert a new section 29A providing that documents in respect of offences against the Principal Act may be served on the ship's agent in Australia rather than on the master or owner of the ship directly. This will facilitate service on overseas ships which have left Australian waters."

[52] The Explanatory Memorandum does not support the appellant's proposition that the expression "the agent of the ship" comprehends any person who is authorised to represent the owner of the ship in respect of the ship. I would respectfully affirm the primary judge's conclusion that the solicitors, who merely provided legal services for the owner and master after the ship had left the jurisdiction and had no involvement in the management of the ship itself, could not be regarded as "the agent of the ship".

Question (iii): Was Monson an "agent of the ship" for the purposes of s 29A of the *POTS Act*?

[53] The primary judge accepted that Monson was "the agent of the ship" in 2011: "[t]he obvious purpose of s 29A is fulfilled where a ship has such an agent in Australia, the ship pollutes the sea, leaves Australian waters and the shipping agent can then be served with the proceedings on behalf of the owner and master".[35] The primary judge held, however, that the fact that Monson was then "the agent of the ship" did not mean that Monson was such an agent for subsequent voyages in the absence of any evidence of such an agency. The only evidence was that Monson was the shipping agent for a voyage in 2011 and there was no evidence that Monson was such an agent at the time of the oil spill in 2015 or at the time when the complaint and summons were served upon Monson. As to the latter time, the primary judge also noted that between the time of the alleged oil spill and the service of the complaint and summons the ownership of the ship had changed.

[54] The appellant challenged the primary judge's ruling that Monson was not "the agent of the ship", again upon the basis that a broader interpretation of s 29A would be consistent with the statutory purpose and the Explanatory Memorandum for the Bill for the Act which enacted s 29A. The Explanatory Memorandum does not assist the appellant's argument. Arguably, paragraph 48 of that Memorandum suggests that it is necessary that the person served be "the agent of a ship" at the time of service of the complaint and summons. If so, that would be an obstacle for the appellant's case because there is no evidence that Monson had any authority in relation to the ship at that time. Section 29A is, however, open to the broader construction that it is sufficient if the person to be served is the agent of the ship at the time of service, or when the offence in relation to which the document is served was committed, or at any other time during the voyage in Australian waters in the course of which the offence was committed. As the primary judge considered, s 29A(1) also might

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35 Reasons [120].

encompass a case of an enduring agency, under which the ship's agent obligations arise whenever the ship berths in Australia. It is conceivable that other arrangements might render a person engaged by an owner, charterer, or master "the agent of the ship" even though the ship does not berth in Australia during the voyage in which the offence occurs.

[55] I would affirm the primary judge's conclusion that Monson was not proved to be "the agent of the ship" in terms of s 29A(1). It is not necessary to attempt any comprehensive definition of the scope of that expression. Upon the only evidence about Monson's role, that it was the shipping agent in relation to the ship in connection with a voyage to the south of Western Australia about four years before the voyage directly from Singapore to New Zealand during which the offences were allegedly committed in Australian waters off North Queensland, it would be manifestly inapt to describe Monson as "the agent of the ship" for the purposes of service of process relating to the alleged offences.

Proposed orders

[56] I would allow the appeal, set aside the orders made in the Trial Division, and order the respondent to pay the appellant's costs of the proceedings in the Trial Division and in this appeal.

[57] **PHILIPPIDES JA:** I agree with the reasons of Fraser JA and with the orders proposed by his Honour.

[58] **DOUGLAS J:** I agree with Fraser JA.