SUPREME COURT OF QUEENSLAND

CITATION:	*Shield v Topliner P/L*; *Shield v Eaton* [2004] QCA 476
PARTIES:	**GRAHAM BLAIR SHIELD** (complainant/appellant/applicant) **v** **TOPLINER PTY LTD** (defendant/respondent/respondent) **GRAHAM BLAIR SHIELD** (complainant/appellant/applicant) **v** **MICHAEL JOHN EATON** (defendant/respondent/respondent)
FILE NO/S:	CA No 136 & 137 of 2004 DC No 97 & 98 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2004
JUDGES:	McPherson JA, Jerrard JA, Holmes J Separate reasons for judgment of each member of the court, McPherson JA and Holmes J concurring as to the orders made, Jerrard JA dissenting in part
ORDERS:	**1. Leave be granted to appeal from the decisions given on 19 April 2004 in the appeals numbered D 97/04 and D 98/04 in the District Court, and that each of those appeals be allowed by setting aside the decisions of the District Court dismissing those appeals** **2. The order or orders made on 12 December 2003 in the Magistrates Court at Brisbane dismissing the complaints now in that Court, and numbered 31265/03 and 31262/03, be set aside** **3. Proceedings on those complaints be remitted to the Magistrates Court at Brisbane for hearing and determination according to law** **4. That the complainant pay to the defendants their costs (to the extent not already paid) of and incidental to:**

a) these applications and appeals, to be assessed on an indemnity basis
b) the appeals in the District Court as ordered by Brabazon DCJ; and
c) the hearing before the magistrate on 12 December 2003, such costs having been fixed in the sum of $250.

CATCHWORDS: MAGISTRATES COURTS – DISMISSAL OF COMPLAINT – where magistrate dismissed summary charges against the defendant, after the complainant failed to appear at a mention – whether the magistrate, by dismissing the complaint, erred in the exercise of his discretion

Justices Act 1886 (Qld) s 141, s 147

Andrews v Henderson [2004] QCA 145, cited
Doonan v McKay [2002] QCA 514, cited
Fitzgerald v Newing; ex p Newing [1965] QWN 14, cited
James v Williams; ex p James [1967] Qd R 496, considered
Kimlin v Wilson; ex p Kimlin [1966] Qd R 237, cited
Paulger v Hall [2003] 2 Qd R 294, cited
R v His Honour Judge Dodds, ex p Smith and Graham [1990] 2 Qd R 80, cited
R v T [1995] 2 Qd R 192, cited

COUNSEL: A J MacSporran for the applicant
P J Davis for the respondent

SOLICITORS: Department of Primary Industries/Fisheries for the applicant
McNamara Garrahy for the respondent

[1] **McPHERSON JA:** The defendants, who are Topliner Pty Ltd and Mr Eaton, were charged on complaints by Graham Shield (who is a fisheries inspector employed by the Department of Primary Industries) in the Magistrates Court at Redcliffe with various contraventions of the *Fisheries Act 1994*. At intervals during the ensuing ten months there were appearances in that court at which both complainant and defendants were represented but, because of the state of the lists there, the complaints were not able to be heard. Two days were needed for the hearing, which were not available at Redcliffe. Eventually, on 19 November 2003, the parties consented to the matters being adjourned for mention to 12 December 2003 in the Magistrates Court in Brisbane, where there were better prospects of the complaints, now reduced to two in number, being heard.

[2] On 12 December 2003 the defendants by their solicitor appeared at the Magistrates Court at Brisbane, where the complaints were shown as being listed in court 8 at 9.00 am. At 10.10 am on the morning of that day, they came before a magistrate in that court. There being no appearance for the complainant, the magistrate, on the application for the defendants' solicitor, dismissed the complaints as he said "for want of prosecution" and ordered that the complainant pay the defendants' costs fixed in the sum of $250.

[3] By 21 January 2004,[1] or at some time before then, news had reached the Department of Primary Industries of what had happened on 12 December 2003. On that day in January Mr MacSporran of counsel for the complainant, and Mr Everson of counsel for the defendants, appeared before the magistrate who had heard the matter on 12 December 2003, on an application by the complainant for what was described as a re-opening or reinstatement of the complaints under s 147A(2) of the *Justices Act 1886*. Mr MacSporran submitted on behalf of his client that, on the previous occasion on 12 December 2003, the magistrate had, within the meaning of s 147A(2), made an error of fact. Mr Everson opposed the making of any order for re-opening.

[4] The magistrate stood the proceedings down while he refreshed his memory of the matter and prepared his reasons, which he gave a little later in the afternoon. He said he accepted that both sets of complaints, those against Topliner and those against Eaton, had been adjourned from Redcliffe to Brisbane for mention on 12 December 2003, which was a callover date and not a date for a "summary trial per se", as he described it. After observing that the *Justices Act* contained no relevant definition of the word "hearing" and no reference to adjournment of a complaint to a date "for mention", he remarked, in effect, that it was well known in the profession that such a designation meant that the matter in question would not proceed to a hearing of evidence at that date but would be set down for a subsequent day, if not resolved before then.

[5] His worship nevertheless held that there had to be a consequence for failing to appear even on a mention date. He rejected the complainant's submission that he had no power to make the order he had made on 12 December under the *Justices Act*; and held that, under s 142A[2] of that Act, the defendants were at liberty to have the matters dismissed in the event of the complainant's failure to appear. The court registry had, however, in the meantime received a faxed letter from the complainant, which the magistrate read into the record. It explained the failure to appear on 12 December 2003 as having been due to an oversight on the part of a junior officer of the Department who, during the complainant Mr Shield's absence on leave, had failed to enter the mention date in the office diary. It had always been the intention of the complainant to proceed with the complaints, which were matters of some importance, and he asked that they be re-opened "in the interests of justice".

[6] The magistrate said that he had not made any error of fact on that occasion and was aware that 12 December was simply a mention date. He also said he accepted that the failure of the prosecution to appear on 12 December was "simply a mistake on their part". He considered that the Court had an inherent jurisdiction, and recognised that "mistakes do occur". It would, he said, be denying natural justice to the complainant to dismiss the matters outright, and in the circumstances he set aside the orders made on 12 December 2003 dismissing the complaints, but not the orders for payment to the defendants of their costs of $250 made on that day. After submissions from counsel, he ordered that the complainant pay the defendants'

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1. The transcript of the hearing on what is described as Day 1 gives the date as 21/06/2004, but the parties agree that it was 21 January and not June.

2. He appears to have meant to refer to s 141 or s 147 rather than s 142, which is concerned with the case of an absent defendant not a complainant.

costs thrown away of the application on 21 January 2004 to re-open the order made on 12 December 2003 dismissing the complaints.

[7] In the meantime, the complainant had on 13 January 2004 lodged appeals to the District Court pursuant to s 222 of the *Justices Act* against the decision of the magistrate dismissing the complaints on 12 December 2004. The appeals came before Brabazon DCJ on 19 April 2004, when, after hearing submissions from counsel, his Honour dismissed the complainant's appeals and ordered him to pay the defendants' costs of the appeal. It is against those orders that the complainant now seeks leave to appeal to this Court under s 118(3) of the *District Court of Queensland Act 1967*. At the same time, cross-appeals to the District Court by the defendants were allowed against the magistrate's orders on 21 January 2004 setting aside the orders made on 12 December 2003 dismissing the summonses.

[8] The principal question argued on the complainant's appeals before Brabazon DCJ was the power of the magistrate to dismiss the complaints on a day to which they had been adjourned for mention. The defendants' cross-appeals had raised the question of the magistrate's power subsequently to set aside his orders for dismissal on the ground, as his worship explained it, of natural justice; but those cross-appeals were conceded by the complainant and are not pursued here. The submissions of the parties before his Honour on the complainant's appeals canvassed a number of provisions of the *Justices Act*, which were said to bear upon that issue or issues. Without referring to those provisions in detail, I will say now that I consider the present case to be covered by the authority of the Full Court in *James v Williams, ex p James* [1967] Qd R 496, 501-502. There, Hanger J (with whom Mack CJ agreed) said:

> "If a defendant who has been served with a summons to appear on a certain day attends at Court on that day ready to answer the complaint, and the complainant is not then ready to proceed, then, if nothing else appears, the *prima facie* order to be made would be to adjourn the hearing and to require the complainant to pay the expenses of the defendant - the costs thrown away. If justice can be done by adjourning the case and ordering payment of costs, there is no justification for dismissing the complaint where the *bona fides* of the complainant is not challenged."

Remarks to somewhat similar effect are to be found in the reasons of Hart J ([1967] Qd R 496, 506), who was the third member of the Full Court on that occasion.

[9] The circumstances of that case are in some ways not unlike those presented here. The complainant there attended by his solicitor's clerk at the Brisbane Magistrates Court on the return date of the complaint without having prepared in any way for a hearing of the matter on that day. His solicitors had assumed that, because of the notorious congestion in the court lists, there was no prospect of his client's matter being reached or heard on that day. Contrary to general experience, however, the matter was in fact reached and called on for hearing. The defendant being ready to proceed, the magistrate on the application of defence counsel struck out the complaint with costs, having refused to adjourn the matter at the request of the clerk appearing for the complainant. The order of the Full Court was that the magistrate's order striking out the complaint should be set aside with costs, and the

matter remitted to the Magistrates Court with a direction to proceed with the hearing.

[10] We were informed by Mr MacSporran that the procedure now followed in the Brisbane Magistrates Court on a mention resembles that referred to in *James v Williams* on the daily Callover in 1967. There is, however, this difference between that case and this; that there the complainant's solicitors did at least appear by their clerk and ask for an adjournment, whereas here no one at all appeared for Mr Shield. On the other hand, in this instance it was known to everyone concerned that 12 December 2003 had been designated as a date only for mention of the complaints at which the hearing of the matter would not take place, but rather that some days in the future would then be appointed for a hearing to be held. The matter had for reasons of necessity or convenience only recently been transferred from Redcliffe, where, as can be seen from the notations in the record or files, the complainant had appeared on each of the several occasions on which the matter had previously come before the court. There was no reason for supposing that the complainant, who was an officer of a State Department, was no longer intending to proceed with the complaints, and none at all for supposing that he was intent on abusing the process of the court. There is no suggestion that the defendants themselves were expecting or ready to proceed to a hearing on 12 December 2003.

[11] It is, of course, true that, as the magistrate said, it is not the duty of a court to communicate with absent litigants to find out why they have not appeared. It is, however, another matter to say that their proceedings should be peremptorily dismissed for failing to do so. Even if there is in such circumstances a power under the *Justices Act* to dismiss the complaint, the magistrate ought not, in my opinion, to have exercised it in the circumstances here. He should on this occasion have followed the course called for in *James v Williams* of adjourning the complaints to another date for mention, and of ordering the complainant to pay the respondents' costs thrown away by the adjournment on 12 December. Predictably, taking that course would have alerted the complainant to the oversight that had taken place and discouraged the Department from making the same mistake again. Instead, there have now been two abortive appearances in the Magistrates Court accompanied by appeals to the District Court, as well as these applications to permit further appeals to this Court, with all the considerable costs which that process has occasioned.

[12] On the applications before this Court for leave to appeal, Mr Davis of counsel, who now appears for the defendants, submitted that on 12 December 2003 the magistrate had not simply based his decision to dismiss the complaints on the complainant's failure to appear on the mention date. The magistrate, it was said, had the court files before him and might well have followed the past progress of the matters in the court at Redcliffe. There is in fact no indication from the transcripts of the proceedings or of his worship's reasons given on that day or on 21 January 2004 that he based his decision to dismiss on either of those sources as distinct from the complainant's failure to appear on 12 December 2003. It is true that, in asking that all charges against the existing defendants be dismissed, the defendants' solicitor gave some account derived from his Redcliffe principal of the history of the matter in the Redcliffe court. In the course of doing so he said that only three of the original nine charges against Topliner and only six of 12 against Eaton remained, the balance having been dismissed due to the complainant's failure to particularise the days on which the defendants had carried out fishing. His submission was that the complainant's failure to appear that day was "just a

continuation of poor form on their part" and if the Department "couldn't get their act together and properly prosecute their case", then all charges should be dismissed against both defendants.

[13] Nothing in the magistrate's reasons given on 12 December 2003, or those given on 21 January 2004, suggests that, in dismissing the complaints, he was acting on these statements in the defendants' submissions. In his reasons given on the former occasion, he said simply that the defendants' solicitor was present but not the prosecution, before concluding:

> "No good cause is placed before me as to why the prosecution is not here. There is no correspondence, of which I'm aware, on the court file. Each of the complaints are dismissed for want of prosecution".

Indeed, if the magistrate had taken into account the submissions of the defendants' solicitors to the effect that the non-appearance of the complainant was a continuation of his "poor form" in the past, it would have amounted to a breach of natural justice. He would have been acting on potentially contentious submissions from one party without hearing from the other or affording him an opportunity to be heard on those matters. It is nothing to the point to say that the complainant had notice that the complaints would come before the court on 12 December 2003. What he had was notice that 12 December was to be an occasion for mentioning them in order to fix dates for their hearing, and not an occasion on which submissions would be received about whether any past conduct of the complainant justified dismissal of the complaints. It would, I consider, have been open to the magistrate in the absence of the complainant on 12 December to fix dates for hearing the complaint; but not to dismiss it outright, which was an order of which the complainant had no prior notice at all.

[14] That the magistrate was by 21 January 2004 conscious of these considerations is apparent from references in his reasons given that day to a denial of natural justice to the complainant. The question was not whether he had power under s 147 of the *Justices Act* to dismiss the complaints on 12 December 2003; but whether in doing so he exercised it properly on the ground that the complainant had without explanation failed to appear on the mention fixed for that day. For the reasons I have given, it was in my opinion a wrong exercise of his discretion to dismiss the complaints as he did instead of either adjourning them for mention to a later date, or else proceeding to assign dates for hearing the complaints, doing so without further reference to the complainant. It was not shown or suggested that any delay involved in adjourning the date for mention would have caused prejudice to the defendants that could not have been met by an appropriate order for costs.

[15] Before this Court Mr Davis submitted that the complaint that the magistrate's discretion had miscarried was a new one, which had not previously been submitted either to the magistrate or to Brabazon DCJ in the complainants' appeals to the District Court. His submission is literally correct, although it is relevant primarily to the discretion to be exercised by this Court in deciding whether or not to allow appeals now to be brought to this Court. As to that, it is clear, and was conceded by Mr MacSporran for the complainant both in the District Court and in this Court, that the magistrate had in the circumstances no power, either under the general law or under the specific provisions of s 147A to recall the orders for dismissal made on 12 December 2003. The former appears to be inferentially precluded by decisions of

the Full Court in *Fitzgerald v Newing, ex p Newing* [1965] QWN 14 and *Kimlin v Wilson, ex p Kimlin* [1966] Qd R 237; and the latter, among other matters, by the circumstance that in dismissing the complaints the magistrate was not (as at first had been supposed by the complainant) under a misapprehension that 12 December 2003 was designated only as a date for mention. Nevertheless, it was, as the magistrate himself later recognised, a denial of natural justice to dismiss the complaints without a hearing, when he could have adjourned them with costs at no discernible prejudice to the defendants. The point is sufficiently fundamental to the administration of justice as to persuade me that this is a matter in which the Court's discretion under s 118(3) of the *District Court Act* should be exercised to grant leave to appeal, the more so as the limited time allowed by the *Fisheries Act* for issuing fresh complaints against the defendants has now expired.

[16] The parties agreed that if this was the decision reached by the Court, it was appropriate to treat the hearing of the application as the hearing of the appeal. On that footing, the application for leave to appeal will be granted and the appeals will be allowed in each instance. The applicant complainant must pay the defendants' costs of and incidental to the application and appeals to this Court. The specific point on which he has succeeded here was not as such raised before Brabazon DCJ in the District Court.

[17] Allowing the appeals does not, however, necessarily determine the course that the proceedings on the complaints should now take. The appeal to the District Court was instituted under s 222 of the *Justices Act*, and, as has more than once been decided in this Court, there is no express procedure under that provision for remitting the proceedings which are the subject of a successful appeal to that court to the Magistrates Court from which they came. See *R v His Honour Judge Dodds, ex p Smith and Graham* [1990] 2 Qd R 80; *Paulger v Hall* [2003] 2 Qd R 294, 304-305; and *Andrews v Henderson* [2004] QCA 145. Judicial recommendations for reform of s 222, perhaps by incorporating the wide powers formerly associated with the now repealed s 209 of the *Justices Act*, have so far not produced any legislative response.

[18] It is plainly undesirable that the District Court should continue to be burdened with the duty of hearing proceedings which, apart from the accident of a successful appeal and deficiencies in the ensuing procedure, were intended to, and would ordinarily be, heard in the Magistrates Court. Under s 209 the Full Court in *James v Williams* was able simply to set aside the order of the magistrate and remit the proceedings to the Magistrates Court with a direction to proceed with it according to law. The procedure under s 209 was a simplified form of the old prerogative writ of certiorari followed technically by a procedendo requiring the court of first instance to resume the hearing and determine it according to law. The old forms of prerogative writ have now been converted by s 41 of the *Judicial Review Act 1991* into orders for judicial review granting relief which is the nature of and to the same effect as that formerly provided by prerogative writ. An account of the law that now prevails is given in *R v T* [1995] 2 Qd R 192, 194-195. In that case it was held that, on setting aside the primary decision, as I consider we should do here, this Court was authorised by s 47(3) of the *Judicial Review Act* to remit the proceedings to the court in which it originated. Mr MacSporran asked, without objection from Mr Davis, that we take that course here.

[19] The orders will therefore be:

1. That leave be granted to appeal from the decisions given on 19 April 2004 in the appeals numbered D 97/04 and D 98/04 in the District Court, and that each of those appeals be allowed by setting aside the decisions of the District Court dismissing those appeals.
2. That the order or orders made on 12 December 2003 in the Magistrates Court at Brisbane dismissing the complaints now in that court, and numbered 31265/03 and 31262/03, be set aside.
3. That proceedings on those complaints be remitted to the Magistrates Court at Brisbane for hearing and determination according to law.
4. That the complainant pay to the defendants their costs (to the extent not already paid) of and incidental to:
   (a) these applications and appeals, to be assessed on an indemnity basis;
   (b) the appeals in the District Court as ordered by Brabazon DCJ; and
   (c) the hearing before the magistrate on 12 December 2003, such costs having been fixed in the sum of $250.

[20] **JERRARD JA**: In this appeal I have had the benefit of reading the reasons for judgment of McPherson JA, and I respectfully agree with His Honour's construction of the provisions of the *Justices Act* 1886, with nearly all of his reasoning, and that leave to appeal should be granted pursuant to s 118(3) of the *District Court of Queensland Act* 1967, as the application raises an important point of law not previously settled by this court. I respectfully disagree with the proposed order overturning the magistrate's original exercise of discretion.

[21] Section 147 of the *Justices Act* 1886 provides:

> "If at the time or place to which a hearing or further hearing is adjourned, either or both of the parties does not or do not appear personally or by counsel or solicitor, the justices then present may proceed to such hearing or further hearing as if such party or parties were present, or if the complainant does not appear the justices may dismiss the complaint with or without costs."

The appellant's counsel conceded in this court that he could not maintain the argument made on the complainant's behalf both before the magistrate, and again to the District Court, that s 147 did not give the magistrate power to dismiss the complaint for want of prosecution, when the complainant had failed to appear in person or by legal representation on the date to which the hearing had been adjourned. Counsel conceded that power to dismiss existed pursuant to that section, even though the date to which the hearing had been adjourned was a "mention date", that is, a date to which a hearing had been adjourned pursuant to s 88 of the *Justices Act*, and on which it was provided by the order for adjournment that the relevant complaint would not be listed for hearing and determination on that day.

[22] Counsel for the appellant conceded on the hearing that s 141 and s 142 of the *Justices Act* apply to the first return date of a summons, or, to use the terminology of s 141, "the day and at the place appointed by the summons for hearing and determining a complaint"; s 142 refers to "the time and place so appointed". Those concessions seem unavoidable. The appellant further conceded that in the absence of any limiting definition of the term "hearing", the power generally given by s 88 to adjourn a "hearing" to either a certain time and place, or to a time and place to be later determined by the court, had the result that a complainant who did appear on the first return date, and who thereby satisfied the obligations described in s 141, but

who repeatedly failed to appear thereafter at the time or place in which the "hearing" or further hearing was adjourned, could expect an order for dismissal made pursuant to s 147. The appellant's counsel did not challenge, and I accept, the respondent's submission that the terms of s 88 and s 141 have the effect that a hearing commences on the first return date of the summons, and it is that "hearing" which can thereafter be adjourned more than once until it is finally determined.

[23] *A defendant* who does not appear on the first or adjourned date for hearing runs the risk of being convicted in absentia, pursuant to the provisions of s 142A; that defendant may apply pursuant to s 142A(12) for a re-hearing within 28 days after an adverse determination, and the court may "for such reason as it thinks proper" grant a re-hearing. A defendant, whose legal representatives omitted to make arrangements in the period in which the person with the carriage of the matter for the defendant was on holidays, might well persuade a magistrate that that omission by the legal representatives was a proper reason for granting a re-hearing; but that would be a matter in the Magistrate's discretion.

[24] In this court the appellant argued instead that the magistrate should not have exercised the admitted power to dismiss, and that the magistrate's discretion miscarried. This was because the circumstances the magistrate had to consider included that the complainant had appeared by his lawyers to prosecute the complaint over a period of nearly a year, and on a number of different occasions. The appellant admitted that some of the complaints against the respondent defendants which had originally been laid had already been dismissed on those earlier hearings, for failure to provide particulars as directed. Further, in respect of complaints in associated matters against some other defendants, all those complaints had been dismissed.

[25] I agree with McPherson JA that the magistrate did not canvass those last matters when exercising the power to dismiss, namely the history of the proceedings including earlier failures by the complainant to provide particulars against the respondent defendants in some matters, and the complainant's withdrawal or abandonment of prosecutions against other defendants. Those matters would have been relevant on a proper determination of that application to dismiss. Serious previous tardiness or previous non-compliance with court orders by a complainant may show an attitude to the court, the complaint, or the defendant, which can justify orders for dismissal for non-appearance made pursuant to s 147.

[26] The magistrate was certainly not obliged to make orders for dismissal, and would have been justified in making the orders suggested by McPherson JA. Nevertheless, I respectfully consider it was open to the magistrate to make orders of dismissal given the history of the proceedings, and the Magistrate did. Although the appellant framed a ground of appeal to this court complaining about the denial of natural justice resulting from the dismissal of the complaints without the appellant having the opportunity to explain his absence or that of his legal representative, I respectfully agree with the respondent's submission that default provisions are not uncommon. The whole point of provisions like s 147 is to enable a court to proceed in the absence of a party, who runs the risk of a summary dismissal if a complainant, or conviction if a defendant, when in breach of the primary obligation to attend in person or by legal representative at the time fixed by the court.

[27] It was only in this court that the appellant put its case as a complaint about the manner in which the magistrate had exercised a discretion the appellant admitted to exist, and only in response to the written outline of argument from the respondent defendant, which outline persuasively identified the power to dismiss given in terms by s 147. In those circumstances I would decline to overturn the order, even accepting that the discretion had been wrongly exercised, as the majority in this court hold.

[28] The present case differs from the position in *James v Williams* (referred to by McPherson JA) in that the complainant there did appear, but was not ready to proceed. I respectfully consider that it was with regard to those circumstances that the Full Court said in that case that the prima facie order to be made would be to adjourn the hearing and require the complainant to pay the defendant's costs thrown away. To apply that as a general rule when a complainant entirely failed to appear may not sufficiently discourage conduct by complainants which disrupts and inconveniences the court, and the other party or parties brought to the court by the complaint.

[29] As to the form of this court's order, I agree that it is undesirable that the proceedings continue in the District Court. I respectfully observe that *UCPR* 766(1)(a) gives this court the powers and duties of the District Court, that being the court that made the decision appealed from, which powers and duties do not include the power of remitter. As the power to remit given by s 47(3) of the *Judicial Review Act* 1991 is exercisable on an application to this court for certiorari, and as no application for an order for instanter certiorari was made, there seems a significant impediment to an order remitting the complaint to the Magistrates Court at Brisbane for further hearing and determination. This court has often enough recommended an amendment to the powers of the District Court when hearing appeals under s 222 of the *Justices Act* 1886, and were these applications for leave to appeal to cause inconvenience because of a want of power in the District Court to order remitter, it might encourage that long suggested amendment of the law.

[30] However, in *Doonan v McKay* [2002] QCA 514 this court, when constituted by de Jersey CJ, Williams JA, and Mullins J, granted leave to appeal from an order of a District Court which in turn had dismissed an appeal to that court from an order from a magistrate granting a permanent stay of prosecution. This court granted leave to appeal, allowed the appeal, set aside the order granting a permanent stay, and remitted the matter to the Magistrates Court, with a direction to enter up all necessary adjournments and proceed according to law. The power to remit to the Magistrates Court was not questioned, although the District Court would not have had that power itself when hearing the appeal from the magistrate. It is therefore an odd but apparently newly settled consequence that a matter can thus be remitted by this Court to the Magistrates Court when there has been an error in the intermediate appeal to the District Court, but not otherwise.

[31] **HOLMES J:** I agree with the reasons of McPherson JA and with the orders he proposes.