SUPREME COURT OF QUEENSLAND

CITATION:	*Coulter v Ryan* [2006] QCA 567
PARTIES:	**COULTER, Michael** (respondent) **v** **RYAN, Anthony Jason** (applicant)
FILE NO/S:	CA No 247 of 2006 DC No 111 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2006
JUDGES:	McMurdo P, Holmes JA and Fryberg J Separate reasons for judgment of each member of the Court, McMurdo P and Holmes JA concurring as to the order made, Fryberg J dissenting
ORDER:	**Application dismissed**
CATCHWORDS:	MAGISTRATES – APPEALS FROM AND CONTROL OVER MAGISTRATES – QUEENSLAND – APPEAL – WHEN APPEAL LIES – costs orders – criminal proceeding – magistrate refused to award costs to applicant upon adjournment – appeal to District Court on costs order – jurisdiction of District Court to entertain appeals under s 222 *Justices Act 1886* – legislative history of appeals from decisions of justices PROCEDURE – JUDGMENTS AND ORDERS – WHAT IS A JUDGMENT OR ORDER – CLASSIFICATION – FINAL AND INTERLOCUTORY – DISTINCTION BETWEEN FOR PURPOSES OF APPEAL – requirements for purposes of s 222 *Justices Act 1886* PROCEDURE – COSTS – purpose for which costs are awarded *Justices Act 1886* (Qld) s 88(3), s 222 *District Court of Queensland Act 1967* (Qld) s 118

Latoudis v Casey (1990) 170 CLR 534, considered
Osgood v Queensland Police Service [2005] QCA 75; CA No 339 of 2004, 17 March 2005, considered
Owen v Cannavan [1995] QCA 324; CA No 199 of 1994, 4 August 1995, distinguished
Paulger v Hall [2002] QCA 353; [2003] 2 Qd R 294, considered
Schneider v Curtis [1967] Qd R 300, followed
Sullivan v Police [2002] SASC 171; SCGRG 264 of 2000, 22 June 2001, considered

COUNSEL: J T Bradshaw for the applicant
M J Copley for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The applicant seeks leave to appeal under s 118 *District Court of Queensland Act 1967* (Qld) from an order of a District Court judge dismissing his appeal under s 222 *Justices Act 1886* (Qld) from an acting magistrate's decision to refuse costs thrown away following the adjournment of the hearing of a charge under s 79(1)(a) *Transport Operations (Road Use Management) Act 1995* (Qld).

[2] The acting magistrate was not apparently referred by the applicant's counsel to *Latoudis v Casey*[1] nor the principle it firmly established, that costs in both criminal and civil summary proceedings are awarded to indemnify a successful party, not to punish misconduct or default on the part of the prosecutor.[2] The acting magistrate declined to award costs because he considered that the need for the adjournment was brought about by an honest mistake on the part of the police prosecutor's service as to when the matter was listed for hearing.

[3] In dismissing the appeal the District Court judge rightly recognized that the acting magistrate had an unfettered discretion as to whether to order costs under s 88(3) *Justices Act*. His Honour was not persuaded that the acting magistrate had acted on an irrelevant matter, not taken a relevant matter into account or erred in principle in making his determination and so refused the appeal.

[4] Although the point was not taken in the District Court appeal, the respondent now contends that the application for leave to appeal to this Court should be refused because the District Court had no jurisdiction to hear the appeal and so the applicant has no right to apply to this Court for leave to appeal under s 118 *District Court of Queensland Act*. He submits that the applicant had no right of appeal under s 222 *Justices Act* because the purported appeal to the District Court was in respect of an interim costs order. Such an order is not a final order upon a complaint under the *Justices Act* so that there is no right of appeal in respect of it under s 222. In

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1 (1990) 170 CLR 534.
2 Above, 542 - 543, 562 - 563, 566 - 567.

support of that contention he cites *Schneider v Curtis*;[3] *Owen v Cannavan*[4] and *Paulger v Hall*.[5]

[5] In my view the respondent's contention is correct. I am unpersuaded that this Court should treat an interim costs order as a final order upon a complaint for an offence under s 222 in the light of the well-settled Queensland cases cited by the respondent.

[6] But even if I am wrong on that point and the District Court judge did have jurisdiction under s 222 to hear the appeal, this is simply not an appropriate case in which to grant leave to appeal under s 118(3) *District Court of Queensland Act*. The application involves a $900 costs order of an adjournment in respect of which, assuming jurisdiction, the applicant has had an unsuccessful appeal to the District Court determined against him on its merits. He has not in my view demonstrated that the District Court judge was plainly wrong and that substantial injustice has resulted; nor does the application involve any important legal principle.

[7] I would refuse the application for leave to appeal.

[8] **HOLMES JA**: I have had the advantage of reading the judgment of Justice Fryberg, and I agree with his Honour's identification of the issues and factual background to this application. There is no ready and obvious answer to the question of whether s 222 permits an appeal against a costs order made in connection with an interlocutory order, but I have, with some hesitation, arrived at a different conclusion from his Honour.

[9] Section 222 extends the right of appeal to "an order made … on a complaint". The Full Court in *Schneider v Curtis*[6] construed that expression as limited to an order "disposing of the complaint itself".[7] Two provisions later inserted in the *Justices Act* make it plain, however, that the orders "disposing of the complaint" must now be regarded as including at least some costs orders. Section 158A[8] of the Act sets out criteria for the exercise of the discretion to order costs in favour of a defendant where the complaint has been dismissed. Subsection (5)[9] provides for a stay of payment where there is an appeal under s 222, clearly enough contemplating the existence of such a right of appeal. Section 222 itself, in subs. (2)(b), limits the complainant's right of appeal against an order made by justices dealing summarily with an indictable offence; but it specifically allows an appeal against an order for costs. Since the aim of the latter subsection appears to be the preclusion of appeals against acquittals, it seems unlikely, however, that it is concerned with any situation but the resolution of a complaint, as opposed to adjournment of it.

[10] Neither subsection says anything as to the position of a defendant wishing to appeal a costs order, or as to the situation where either party wishes to appeal the refusal of a costs order. It might be possible to infer, from those statutory intimations, that an appeal generally lies where a costs order is made on the upholding or dismissal of a

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3 [1967] Qd R 300, 304 - 306.
4 [1995] QCA 324; CA No 199 of 1994, 4 August 1995.
5 [2003] 2 Qd R 294 at 300-301 [26].
6 [1967] Qd R 300.
7 [1967] Qd R 300 at 305.
8 Inserted by s 91 of the *Justice Legislation (Miscellaneous Provisions) Act* 1992.
9 Amended by s 59 of the *Courts Reform Amendment Act* 1997, substituting the reference to appeal under s 222 for a reference to an application for an order to review under s 209.

complaint, but it is not necessary to decide that. Without distorting the reasoning in *Schneider v Curtis*, one can regard a costs order made at, and in consequence of, the disposition of a complaint as one of the orders disposing of the complaint; or, as it was put in *Owen v Cannavan*,[10] as "referable to the determination of a complaint".

[11] The live question here, though, is whether an order granting or refusing costs on an adjournment of a complaint also constitutes "an order made … on a complaint". Resolution of that issue does not necessarily turn on whether a costs order, or the refusal of it, on an adjournment is to be regarded as interlocutory; but it is a starting point. Similar questions have arisen in other jurisdictions where a right of appeal depends on whether the order appealed from is interlocutory or final. Of particular interest is a series of decisions of single judges of the South Australian Supreme Court considering the status of costs orders made in the course of summary proceedings.

[12] The line of cases begins with a decision of Bleby J, given ex tempore in *Grey v City of Charles Sturt*.[11] Leave was required for an appeal against an interlocutory order. Bleby J concluded that a costs order made upon an adjournment was a final order because –

> "It is an order which operates regardless of the final outcome of the proceedings and imposes a financial liability on the appellant regardless of that outcome. That order may be enforced as any other order of the Magistrates' Court made in its Criminal Division. It is an order which, although made in the course of proceedings, was not interlocutory in the sense of assisting in the proper resolution of the proceedings."[12]

[13] That approach was not subsequently followed by other judges of the South Australian Supreme Court. In *Sullivan v Police*,[13] Mullighan J applied the test identified by Gibbs CJ in *Carr & Anor v Finance Corporation of Australia Limited*:[14] whether the judgment or order finally disposes of the rights of the parties. By that standard, an order vacating the trial date was, he said, an interlocutory order; and it would be strange if an order for costs made in consequence of it were to be regarded as final. Neither a costs order nor an order refusing to award costs made in connection with an interlocutory order disposed of the parties' rights in the relevant sense. The fact that such orders were enforceable did not alter their interlocutory character. Mullighan J observed, in passing, that applications for costs thrown away during the proceedings were better reserved and decided at their conclusion, when the result, as part of the final order, could be appealed. The *Sullivan* view - that costs orders on interlocutory applications were also interlocutory in nature - was preferred by Perry J in *McKelliff v Police*[15] and by Gray J in *Taylor v Police*.[16]

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10 [1995] QCA 324 at p 4.
11 [1999] SASC 224.
12 At para [19].
13 [2000] SASC 171.
14 (1981) 147 CLR 246 at 248.
15 [2002] SASC 269.
16 [2002] SASC 317.

[14] By way of example from a different jurisdiction, in *Versace v Monte*[17] the respondents at first instance sought to appeal against a series of declarations, an injunction and an order for costs made by Tamberlin J in the Federal Court. (The costs order was capable of taking immediate effect, because there was a further order that the costs be taxed and paid forthwith.) Tamberlin J, in considering whether leave to appeal was required, concluded that although the orders were "in the nature of final relief in that they are cast in final form and operated immediately",[18] the judgment as a whole did not, in a legal sense, determine all the rights of the parties at issue in the proceedings; hence the orders, including the costs order, were interlocutory.

[15] Finally in this vein, in *Victoria Legal Aid v The County Court of Victoria & Anor*[19] the Victorian Court of Appeal was considering the need for leave to appeal where the applicant had unsuccessfully sought, on originating motion, an order for *certiorari* to quash a costs order made when a subpoena it had issued was set aside. Observing that an application to set aside a subpoena was an interlocutory proceeding, the Court of Appeal continued:

> "… since the application for costs was either part of the proceeding, or ancillary to it, the costs order must also be considered to be interlocutory." [20]

The order dismissing an application for *certiorari* in respect of the costs order was similarly interlocutory; the mere fact that it determined the proceeding commenced by the originating motion did not make it final.

[16] As Fryberg J points out, s 222 does not itself draw a distinction between interlocutory and final orders in conferring a right of appeal, so this line of authority is of limited helpfulness. And, too, the objection to appeals from interlocutory orders based on their disruptive effect does not operate as strongly in respect of costs orders. Nonetheless, if one accepts (as I do) the proposition that a costs order made on an interlocutory application is also interlocutory in nature, it becomes difficult to rationalise a different approach to appealability as between the orders; to say that although the order productive of the costs is not itself an "order made … on a complaint", the associated costs order does have that character.

[17] There is force in what Fryberg J says about the inconvenience which might result if no appeal were possible from costs orders in large sums, leaving the possibility of judicial review as the only remedy. But it is also the case that other forms of interlocutory order may work hardship and cause expense, without so affecting the final result as to be appealable on the reasoning in *Paulger v Hall*.[21] Yet, unless one is to disregard *Schneider v Curtis* entirely, such orders remain without recourse.

[18] I do not think that *Schneider v Curtis*, which has stood as authority in this State for 40 years, and in the light of which amendments to the *Justices Act* have, over that time, been made, should now be departed from. And, since in my view, that case is authority for reading "order made … on a complaint" as limited to orders (including

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17 [2002] FCA 781.
18 At para [11].
19 (2004) 9 VR 686.
20 At 690.
21 [2003] 2 Qd R 294.

costs orders) made by way of final disposition of the complaint, it follows that I do not consider that the costs order in this case falls within the compass of what may be appealed under s 222.

[19] I would dismiss the application for leave to appeal.

[20] **FRYBERG J:** On 25 November 2005, Senior Constable Coulter charged Anthony Ryan with one count of driving under the influence of liquor in McLeod Street, Cairns. The charge came before the Magistrates Court at Cairns on 16 December, when Mr Ryan was represented by Mr Bradshaw of counsel on a direct brief. It was adjourned for mention on 2 March 2006. On that day it was again adjourned for mention on 9 March when, by consent, Mr Ryan was remanded to appear on 8 May for hearing. Mr Bradshaw appeared for him on that remand date and again on 8 May. On that day, as Mr Bradshaw entered the court room, the police prosecutor told him that he would be applying for an adjournment.

[21] The case was called on before Mr Hodgins, an acting magistrate. As he had foreshadowed, the prosecutor applied for an adjournment:

> "I would submit that it would be in the public interest to grant his[22] adjournment for one last occasion to allow the prosecution to organise their witnesses and properly present the case before the Court, your Honour, and other than any further assistance I can give I'm in the hands of the Court in relation to an adjournment."

That was all the prosecutor said.

[22] Counsel for Mr Ryan opposed the adjournment. In a lengthy and discursive address to the Bench he submitted that the matter should proceed and attempted to outline the proposed defence. This apparently involved an allegation that the defendant had been drinking with a neighbour for a considerable period after he last drove a motor vehicle and before being interviewed by the police. Counsel further alleged that proposed police evidence regarding the time of a phone call was corrupt. He asserted that the police had shown very little interest in the pursuit of justice by failing to interview the neighbour. He concluded his submissions:

> "If your Honour does grant the adjournment I'd be seeking costs thrown away of $900. I am prepared for trial, I've got my witness here, I've had lengthy conferences with both my client and the witness and I'm prepared for trial."

[23] In reply the prosecutor submitted that even on the defence submissions alone the matter was one of public interest, that in the interests of justice there should be a trial and that an adjournment should be granted for that purpose. He made no submissions about costs.

[24] The Bench then made the following ruling:

> "BENCH: All right. As you'd appreciate this is the first application I've dealt with, but – and I'm not aware of the practice or the efficiency of the police prosecution in Cairns. However, it is the first occasion that this matter has come on for hearing and it appears that

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22 *Sic. Semble* "this".

> a mistake has occurred and I take into account the fact that it's a drink – it's a drink driving matter which the community generally regards of some seriousness.
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> In the circumstances I am prepared to grant the adjournment and for the matter to be relisted for hearing. I am not prepared to make an order to costs and-----
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> MR BRADSHAW: You're not?
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> BENCH: No.
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> MR BRADSHAW: Could you please give full reasons for that, your Honour?
>
> BENCH: The full reasons are that it's a matter that has been listed for hearing, but the police officer has informed that a mistake or malfunction occurred and I am prepared to accept that and in those circumstances I do not see a necessity to make an order for costs.
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> MR BRADSHAW: Well, with respect, your Honour, I don't want to appear rude, but could I make a submission and ask you to reconsider, because on the question of costs, it's nothing to do with the defendant. We turned up this morning and were told just before you came in that the police had made a mistake.
>
> Everything lies with them. Nothing to do with the defendant. Be a different thing if there was some confusion between the defence and the police, but everything lies at the police doorstep. I mean – look, I don't want to be rude, but I just have to appeal that decision. That's – that's outrageous that I come along prepared and the police are very, very embarrassed in asking for the adjournment and my client, the innocent party in all this, has now got to bear my cost. I'm not going to walk away here doing it for nothing.
>
> BENCH: Yes, all right, I've heard you, Mr Bradshaw. My decision stands ..."

Subsequently he remanded Mr Ryan to appear for hearing on 11 July 2006. On that date, after a hearing, the charge was dismissed. Again there was no order as to costs.

[25] Mr Ryan, and perhaps Mr Bradshaw, was aggrieved by the refusal of costs of the adjournment, so Mr Ryan appealed to the District Court. The appeal came on for hearing before Judge McLauchlan on 14 August 2006. Mr Bradshaw appeared for Mr Ryan and Ms Rankine, instructed by the Director of Public Prosecutions, for Senior Constable Coulter. Mr Bradshaw submitted that the magistrate had wrongly exercised his discretion. Ms Rankine submitted that the decision was purely a discretionary one and that any costs consequences to Mr Ryan could be taken into account at a later time. Both cited *Latoudis v. Casey*[23] and Mr Bradshaw cited *R.v. Bucksath*.[24] The judge delivered an *ex tempore* decision, apparently without reading those cases:

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23 (1990) 170 CLR 534.

24 (2000) 114 A.Crim.R 1.

> "This is an appeal by the appellant against the failure of the Magistrate to award costs in his favour upon granting an adjournment of the proceedings at the instance of the police. Costs can be awarded in those circumstances under s. 88(3) of the *Justices Act*, which reposes a discretion in the justice to order costs as to the Justices appears just.
>
> That discretion can only be interfered with if it can be shown that a relevant matter has not been taken into account by the Magistrate and/or an irrelevant matter has been taken into account, or that he has made an error of principle in making his determination. The Magistrate apparently thought it relevant that the adjournment was not indicative of any lack of good faith by the police, but was just something which had occurred by reason of the way in which the proceedings were developing.
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> In the circumstances I do not think that the magistrate's discretion can be interfered with and the appeal is refused."

Mr Ryan now seeks leave to appeal from that decision.

The magistrate's decision

[26] The power of a magistrate to adjourn a charge of a simple offence is conferred by s. 88 of the *Justices Act* 1886 ("the Act"). That section also provides the power to order payment of the costs of the adjournment:

> "(3) Upon an adjournment the justices or, as the case may be, the justice may order that costs of and occasioned by the adjournment be paid by any party to any other party as to the justices or justice may appear just."

The discretion thus conferred is unconstrained as regards the amount of costs and the circumstances to be taken into account in determining whether to make an order.

[27] The magistrate said he based his decision to refuse Mr Ryan's application for costs on two matters: the fact that the case had been listed for hearing and his assertion that "the police officer has informed that a mistake or malfunction occurred". The first is uncontroversial and correct. The second is more problematical. It is unclear whether the police officer to whom the magistrate referred was the complainant or the prosecutor, but that does not matter. On the record, at no time before he made his decision was the magistrate given the information to which he referred. The source of the information is obscure. It is possible that the (tape recorded) record omitted the prosecutor's opening salvo, but the present respondent does not allege that this occurred and has made no attempt to prove it.

[28] After the magistrate made his decision, and in an apparent attempt to supplement the record, the police prosecutor said, "[T]he prosecution only learnt of this mistake at 9.15 this morning when it was checked with the arresting officer as to the witnesses and the arresting officer was found to be on leave." Even if that had been said before the commencement of the tape recording, it fell well short of the magistrate's assertion, particularly in a case where it was alleged that a police officer was going to give "corrupt evidence". However counsel for Mr Ryan apparently

accepted that the prosecution's inability to proceed was unattended by malice, as he subsequently informed the District Court judge that "the police got their dates mixed up and didn't have any witnesses". I shall therefore proceed on the basis that the facts were as the magistrate asserted; but the case may demonstrate the need to ensure that the tapes are running and that the record is complete.

[29] In *Latoudis v Casey*, Mason CJ wrote:

> "It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli v. Abbott*, at p 111. Most of the arguments which seek to counter an award of costs against an informant fail to recognize this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings."[25]

Toohey J wrote:

> "What has emerged from a number of decisions is recognition that costs are awarded by way of indemnity to the successful party and, expressly or impliedly, that they are not by way of punishment of the unsuccessful party."[26]

McHugh J wrote:

> "An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connexion with the litigation: *Kelly v. Noumenon Pty Ltd* (1988) 47 SASR 182, at p 184. The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory."[27]

The case with which their Honours were dealing concerned costs on the dismissal of a charge, but the principle to which they referred is equally applicable in relation to costs of an adjournment.

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25 (1990) 170 CLR 534, 542-543.

26 *Ibid* at 562-563.

27 *Ibid* at 566-567.

[30] In the present case there were no facts before the magistrate which in my judgment could possibly have supported an exercise of the discretion to refuse Mr Ryan his costs. Plainly they had been incurred: counsel had appeared. Neither in the Magistrates Court or the District Court, nor in the argument before us, was there any challenge to the reasonableness of the amount claimed: a refresher of $900. That amount was inevitably going to be wasted by the adjournment. Mr Ryan was in no way responsible for the adjournment; it was caused on the side of the prosecution, inferentially by late preparation and poor communications. The defence had received very late notification of the prosecutor's intention to apply for an adjournment. The magistrate was given no explanation of how the mistake occurred or why the defence was notified of it so late. The prosecutor had not opposed an order for costs. In the circumstances the only options open to the magistrate were to make an award of costs[28] or possibly, if he felt that further information was required, to reserve costs.[29] Reserving costs is an option which should be avoided if at all possible; but sometimes avoidance is not possible. It was not open to the magistrate to reject the application.

The decision of the District Court

[31] In the District Court the judge referred to a number of the grounds upon which an appellate court may interfere with the exercise of a discretion. He did not refer to *Wednesbury* unreasonableness, but I would not assume from this that he was unaware of the relevant principles. His Honour concluded that it was within the ambit of the magistrate's discretion to refuse costs because he thought there was no lack of good faith by the police and the adjournment was the result of "the way in which the proceedings were developing." As will be apparent from what I have already written, I disagree with that view.

Leave to appeal

[32] That disagreement would not ordinarily be sufficient to impel me to favour a grant of leave to appeal. There is no evidence that the approach adopted by the magistrate is widespread or that a need exists for this Court to give some form of guidance. The applicable principles are not in doubt. The original proceedings have been completed, favourably to Mr Ryan. At first glance, it was not easy to see why this was a case for leave.

[33] That perception vanished when the approach taken by the respondent in this Court became apparent. The respondent made no attempt to justify or uphold the magistrate's decision. Although he did not concede that it was wrong, he made no attempt to demonstrate that it was correct. Instead, he raised for the first time a point not drawn to the attention of the District Court judge. He submitted that the District Court lacked jurisdiction to hear the appeal. For that reason alone, he submitted, the order of the District Court dismissing the appeal was correct. On this

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28 In which case he would, in accordance with the usual practice in Queensland, have proceeded to assess the costs forthwith; see also Allen, W K A: *The Justices Acts of Queensland*, (3d ed, 1956), pp 422-423.

29 Although s 158A had no direct application, the magistrate might have wished to have information about some of the matters therein listed.

submission that result followed from s 222 of the Act as interpreted by a Full Court of this Court in *Schneider v Curtis*.[30]

[34] In my judgment that submission raises a point of law of general importance. For that reason this application should be granted. Moreover, unless there is some objection from the parties, we should treat the argument on the application as the argument on the appeal. I therefore turn to the jurisdictional question.

Jurisdiction of the District Court

[35] Appeals from decisions of magistrates under the Act are dealt with in pt 9. A brief digression into the history of those provisions assists in their interpretation.

History of appeals under the Act

[36] As originally enacted, pt 9 of the Act made provision for three types of appeal. The first was an appeal to the Full Court effected by an application to the Supreme Court for an order calling on the justice, the prosecutor or the party interested in maintaining the decision to show cause why the conviction imposed or order made by the justice should not be quashed.[31] The onus was on the applicant to demonstrate prima facie that the basis on which the justice made the decision was mistaken or in error.[32] The second was to the Supreme Court by way of a special case on the ground that the decision of the justice was wrong in law or made in excess of jurisdiction.[33] The justices could refuse to state a case if they were of the opinion that the application was frivolous.[34] The third was to a District Court if the person aggrieved was empowered to do so under another Act.[35] The *District Court Act 1891* provided for appeals to a District Court from an order or conviction of a justice. A District Court judge had the same power to amend mistakes or errors as a Supreme Court judge.[36] The judge could also state a special case for the opinion of the Supreme Court on any question of law arising from the facts of the justice's order.[37]

[37] District Courts were abolished by the *Supreme Court Act 1921*. By that Act, any references in any act to a District Court were to be read as if the Supreme Court were referred to,[38] and any appeal to a District Court thereafter lay to the Supreme Court.[39] The result was that there were three overlapping modes of appeal to the Supreme Court. The *Justices Act* was not amended at that time.

[38] Part 9 of that Act was repealed and replaced in 1949.[40] The three separate modes of appeal were reduced to two. The old procedure of application to the Full Court of the Supreme Court for an order nisi to quash was replaced by an appeal by way of

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30 [1967] Qd R 300.
31 Section 209.
32 Sections 209 and 213.
33 Section 226.
34 Section 229.
35 Section 237.
36 *District Court Act 1891* s 158.
37 Section 245.
38 *Supreme Court Act 1921* s 3(3).
39 *Supreme Court Act 1921* s 3(4).
40 *Justices Act Amendment Act 1949*, s 34.

order to review, returnable before either the Full Court or a single judge.[41] By s 222, a new right of appeal to a judge of the Supreme Court replaced the other two appeal procedures. That section, much amended since its enactment, was invoked by Mr Ryan for his appeal to the District Court. Section 223 provided that if the judge so ordered or the parties so agreed, the appeal should be by way of rehearing, but otherwise the appeal should be heard and determined upon the evidence and proceedings before the justices. The first limb was interpreted as referring to a rehearing *de novo*.[42]

[39] District Courts were re-established in 1959 by the *District Courts Act 1958*. By that Act, where provision was made in an act for an appeal to a District Court, an appeal lay to a new District Court.[43] By reason of the 1949 amendments, that provision did not affect appeals under the Act. However, s 155 of the *District Courts Act 1958* provided that s 222 of the Act should be read and construed as though the appeal provided lay to a judge of a District Court.

[40] In broad terms the appeal structure remained the same when *Schneider v Curtis* was decided in 1967.

Schneider v Curtis

[41] The critical task in resolving this appeal is determining the precise *ratio decidendi* of *Schneider v Curtis*. To do that requires an examination of the judgment of Gibbs J (with whom Wanstall and Douglas JJ agreed). The appellant had been charged by complaint in the Magistrates Court with an offence under the fisheries legislation. At the close of the prosecution case it was submitted for the defence that there was no case to answer. The magistrate ruled against that submission. The defendant applied for and was granted an adjournment and appealed against the ruling to a District Court. The District Court judge stated a special case for the Full Court, asking the opinion of the Court on the question, "Is the ruling of the stipendiary magistrate that there is a case for the appellant to answer an 'order' within the meaning of that term in s. 4 and/or s. 222 of the *Justices Acts*, 1886 *to* 1965,?".

[42] Gibbs J began his reasons for judgment by analysing the nature of the ruling made by the magistrate. He held that it was of an interlocutory nature, but that it was made upon an implied application to the magistrate to dismiss the complaint. It was more than an expression of opinion; it was a refusal to dismiss the complaint at that stage. Next he referred to the decision of the Full Court of the Supreme Court of Victoria in *Byrne v Baker*.[44] In that case it was held that a ruling by a magistrate that a defendant had a case to answer was an order within the meaning of the *Justices Act*. The definition of order in that Act, although not identical, was very similar to that in the Queensland Act. On the authority of that decision, Gibbs J expressed the tentative view that if the question in the case before him had related to s 209 of the Act, the Court should follow the Victorian decision.

[43] Section 222 was, his Honour observed, worded differently. It gave a right of appeal not from any order but only from

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41 Section 209.
42 *Williamson v Antill* [1955] QWN 43.
43 *District Court Act 1958* s 4.
44 [1964] VR 443.

> "'any order made … upon a complaint for an offence or breach of duty'. The section does not give a right of appeal from any order made in proceedings commenced by a complaint but only from 'an order made upon a complaint'."

He continued, "These words … refer to an order disposing of the complaint itself and do not include an order upon an application made during the course of the proceedings instituted by the complaint."[45] He advanced several reasons for that conclusion.

[44] The first, and most important, reason was a practical one:

> "Serious inconvenience could result if litigants could appeal from any decision on any interlocutory application made during the course of a case, including an application for a ruling on an incidental question that arose during the trial, and the court had no discretion to refuse to entertain such appeals."[46]

That would be the consequence if the magistrate's ruling were susceptible to appeal under s 222. No such inconvenience arose in relation to appeals by way of order to review under s 209 because there was an express provision (s 213) permitting the court to discharge the order *nisi* if it considered that no substantial miscarriage of justice had occurred.

[45] The second reason lay in the nature of the appeal under s 222. Section 223 then had the effect that if the judge so ordered or if the parties so agreed, the appeal was by way of rehearing *de novo*. "A procedure of that kind would be quite inappropriate on an appeal from an interlocutory ruling," wrote Gibbs J.[47]

[46] The third reason derived from the proviso which then stood in s 222. It had the effect that where, following a conviction for an offence or an order made on the breach of a statutory duty, a fine did not exceed £5 or imprisonment was for no longer than one month, an appeal lay only by leave. "[I]f the appellant's argument were correct," his Honour wrote, "the result would be that an appeal might be brought without leave from an interlocutory ruling in a case in which no appeal would lie from the final decision except with leave."[48]

The 1997 amendments

[47] In 1997 pt 9 of the Act underwent further major amendment.[49] Appeals by way of order to review under s 209 of the Act were abolished. Several amendments affecting appeals to the District Court under s 222 were made. That section then took substantially its present form,[50] which, so far as is material, is:

> "**222 Appeal to a single judge**
>
> (1) If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a

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45 [1967] Qd R at 304-305

46 *Ibid* at p 305.

47 *Ibid.*

48 *Ibid* at pp 305-306.

49 *Courts Reform Amendment Act 1997,* ss 61-66.

50 The present s 222 was substituted in 2004 by s 77 of the *Evidence (Protection of Children) Amendment Act 2003,* but no material differences have been suggested.

summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge.

...

(2) However, the following exceptions apply—

(a) …;

(b) if the order the subject of the proposed appeal is an order of justices dealing summarily with an indictable offence, a complainant aggrieved by the decision may appeal under this section only against sentence or an order for costs;

…

223 Appeal generally a rehearing on the evidence

(1) An appeal under section 222 is by way of rehearing on the evidence (***original evidence***) given in the proceeding before the justices.

(2) However, the District Court may give leave to adduce fresh, additional or substituted evidence (***new evidence***) if the court is satisfied there are special grounds for giving leave.

(3) If the court gives leave under subsection (2), the appeal is—

(a) by way of rehearing on the original evidence; and

(b) on the new evidence adduced."

The definition of "order" in s 4 remains as it was in 1967:

> "any order, adjudication, grant or refusal of any application, and any determination of whatsoever kind made by a Magistrates Court, and any refusal by a Magistrates Court to hear and determine any complaint or to entertain any application made to it, but does not include any order made by justices committing a defendant for trial for an indictable offence, or dismissing a charge of an indictable offence or granting or refusing to grant bail and, in the last mentioned case, whether or not the justices are sitting as a Magistrates Court or to hear an examination of witnesses in relation to an indictable offence."

Schneider v Curtis since 1997

[48] Since the 1997 amendments to the Act, Gibbs J's second and third reasons no longer apply. Since then: (a) an appeal under s 222 is by way of rehearing on the evidence given in the proceeding before the justices unless the District Court is satisfied there are special grounds for giving leave to adduce fresh or substituted evidence; and (b) appeals by leave have been abolished.[51]

[49] However his Honour's first reason remains valid. The difficulties to which (in Gibbs J's words) an "appeal from [a] decision on any interlocutory application made during the course of a case" gives rise have been referred to at the highest level:

> "[I]nterlocutory appeals in criminal trials delay the trial and are likely to produce miscarriages of justice in ways unrelated to the

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[51] The inclusion of the words "or application for leave to appeal" in s 224A(3) appears to be the result of a mistake.

> ruling. The personal and financial stress of criminal trials, the dimming of witnesses' memories and the sheer delay between criminal conduct and the administration of condign punishment are factors which weigh heavily in favour of expediting the process of the criminal trial even though incorrect rulings have to be accepted by the prosecution in order to achieve that object … ."[52]

[50] In my judgment the reference to an appeal from a decision on an interlocutory application supplies the key to understanding the ratio of *Schneider*. The decision was designed to prevent appeals as of right from decisions of that sort, and the consequent inconvenience to which such appeals could give rise. At the same time, any inconvenience or injustice which might have resulted from the absence of a right of appeal under s 222 could have been overcome by an appeal brought under s 209. Under that section the Supreme Court had adequate discretionary power to prevent inconvenient appeals.

[51] It is true that the distinction between interlocutory and final orders has often been elusive, particularly when those words have been used in statutory contexts. The present context is not statutory. What Gibbs J had in mind when he used the word interlocutory is clear enough from the context. It would be foolish to attempt to gloss it.

[52] There has sometimes been a tendency to extract some of his Honour's words from his reasons for judgment and apply them as though they were the words of a statute. For example, his Honour referred to an order "made upon an incidental application during the hearing of the complaint, and … not an order made upon the complaint."[53] Those words do not constitute authority for the proposition that only an order disposing of the charge can be appealed; and they are not authority for the proposition that an order made upon an incidental application after a complaint is filed is always an interlocutory order and therefore unappealable. On the other hand, neither do they restrict the category of interlocutory applications from which an appeal does not lie to those made "during the *hearing*" of the charge. To approach them in this way is to fall into fundamental error.[54]

[53] One difficulty to which that approach gave rise was disposed of by the decision of this Court in *Paulger v Hall*.[55] In that case a magistrate refused a prosecutor's application to amend the complaints. Following that ruling, the prosecutor led no further evidence and on the application of the defendant the complaints were dismissed. The prosecutor successfully appealed to the District Court on the ground that the magistrate's discretion in relation to the amendments had miscarried. The defendants sought leave to appeal to this Court, submitting that on the authority of *Schneider*, a right of appeal existed only from an order disposing of the complaints themselves; and that the respondent's manner of proceeding was a circumvention of the law embodied in the case. The Court rejected that submission holding that "an appellant may in an appeal against a final judgment properly raise the issue of the

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52 *R v Elliott* (1996) 185 CLR 250, at 257.
53 [1967] Qd.R. 300 at 306.
54 *Brennan v Comcare* (1994) 50 FCR 555 at p 572.
55 [2002] QCA 353; [2003] 2 Qd R 294.

correctness of an interlocutory order 'which affected the final result'."[56] Holmes J (as her Honour then was, and with the President's agreement) observed that

> "there is much to be said on policy grounds for prohibiting the bringing of appeals under s 222 *against interlocutory rulings*. Such appeals may lead to fragmentation of the criminal process, may in the long run prove to have been pointless, and are capable of being misused to exhaust the resources of a less well-heeled opponent."[57]

A like result was reached on the point in *Andrews v Henderson*.[58]

[54] Support for the foregoing view of *Schneider* is to be found in the statements of conclusion of this Court when disposing of two of the appeals in *Osgood v Queensland Police Service*. In one case the President (with Jerrard JA and Jones J agreeing) said:

> "Her Honour correctly concluded that the order which Mr Osgood sought to appeal from was not an order on a complaint for an offence or breach of duty under s 222 *Justices Act 1886* (Qld) *in that it was interlocutory only*. This again is plainly right: see *Schneider v Curtis* and *Paulger v Hall*."

In another she said:

> "The learned District Court judge again found that the decision sought to be appealed from was *not a final order* from which an appeal lay under s 222 *Justices Act 1886* (Qld). For the reasons given in District Court Appeal No 262 of 2004, that decision was also plainly right." [59]

[55] Counsel for the respondent cited the decision of this Court in *Owen v Cannavan*.[60] There, the Court précised *Schneider* as deciding "that an appeal under s 222 of the *Justices Act* lay only from an order disposing of a complaint, for example, by dismissing it or entering a conviction and imposing a penalty and did not lie from an order made during the course of the proceedings." However that statement is of limited assistance in the present context. The decision was given before the 1997 amendments to the Act. The appellant was not legally represented. No consideration was given to the precise identification of the ratio of *Schneider*; in particular, the considerations referred to above were not before the Court. In my judgment the dictum quoted does not advance the respondent's case.

Jurisdiction in the present case

[56] I turn to the question whether the order in the present case should be regarded as interlocutory or final for these purposes. At the outset I observe the considerable inconvenience which could arise if no appeal lies in relation to orders for costs (including orders refusing costs) of adjournments of proceedings under the Act. In

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56 [2002] QCA 353; [2003] 2 Qd R at 301, citing *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478.

57 *Ibid* (emphasis added).

58 [2004] QCA 145. The decision in that case was affected by the absence of power in s 225 of the Act for the District Court judge to remit the matter to the Magistrates Court. That deficiency was remedied by s 77 of the *Evidence (Protection of Childrem) Amendment Act 2003.*

59 [2005] QCA 75 (emphases added).

60 [1995] QCA 324.

corporate prosecutions costs orders involving large amounts of money are quite possible, even on an adjournment. Such orders, for whatever amount, are by definition made before the final resolution of the proceedings. They may be made before or after the trial commences. I cannot accept that the legislature intended that they be unappealable. However they will never (or hardly ever) affect the final result; so an appeal would not be available on the basis which succeeded in *Paulger v Hall*. At the time *Schneider* was decided, an appeal would have been available by way of order to review under s 209 of the Act, but that section has since been repealed. In some cases it might now be possible to bring proceedings in the Supreme Court for a prerogative order in the nature of certiorari under s 43 of the *Judicial Review Act 1991*, but that is an uncertain remedy dependent upon arcane technicalities. It also depends upon the existence of an adequate record of the adjournment proceedings in the Magistrates Court. It would be much less inconvenient if an appeal could be brought under s 222 of the Act.

[57] I find further support for the availability of an appeal in relation to costs orders in s 222(2). That subsection lists exceptions to the right of appeal conferred by sub-s (1). It assumes that the items on the list would fall within the ambit of the right of appeal in its absence. Paragraph (b) provides that in the case of an order of justices dealing summarily with an indictable offence, a complainant may appeal only against sentence or an order for costs.[61] While it might be possible to argue that "dealing" qualifies "order", the better view appears to be that it qualifies "justices". Justices who are dealing summarily with an indictable offence might easily make an order under s 88(3). Section 222(2)(b) assumes that a right of appeal in respect of an order for costs is conferred by s 222(1), and there is no indication that it is intended to refer only to an order for costs made at the time the complaint is finally disposed of. If s 222(1) confers such a right, there is no reason why it should be limited to cases where the justices were dealing summarily with an indictable offence.

[58] I see little purpose in analysing decisions about what constitutes an interlocutory order in other contexts. It is impossible to reconcile many of them; one can find authority for many propositions and for their opposites. In the present context I see no justification for treating an order for costs made on the occasion of making an interlocutory order as taking its character from the nature of that order. In my judgment, a costs order made under s 88(3) of the Act should for the purposes of s 222 be regarded as a final order.

[59] It follows that the District Court had jurisdiction to hear the appeal to it. Having regard to my findings on the merits, it also follows that the appeal to this Court should be allowed.

Orders

[60] I would make the following orders:

1. Application for leave to appeal granted.
2. Appeal allowed.
3. Set aside the order of the District Court made on 14 August 2006.
4. In lieu thereof order as follows:
   (a) Appeal allowed;

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61 See para [47] above.

(b) Vary the order of the Magistrates Court made on 8 May 2006 by deleting the words “No order as to costs” and in lieu thereof ordering that the complainant pay the defendant’s costs of and occasioned by the adjournment ordered that day, fixed in the sum of $900;

(c) Order that the respondent/complainant pay the appellant's costs of and incidental to the appeal.

5. Remit the matter to the District Court for directions under ss 232 and 232A of the *Justices Act 1886*.

6. Order that the respondent pay the applicant's costs of the application and the appeal to this Court to be assessed.