SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Ash* [2010] QCA 112
PARTIES:	**SMITH, Mykel Anthony** (appellant/respondent) **v** **ASH, Rachael** (respondent/applicant)
FILE NO/S:	CA No 213 of 2009 DC No 228 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	18 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2010
JUDGES:	McMurdo P and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, McMurdo P and Fraser JA concurring as to the orders made, Chesterman JA dissenting
ORDERS:	**1. Application for leave to appeal is granted.** **2. The appeal is allowed with costs.** **3. The orders of the District Court are set aside.** **4. The appeal to the District Court is dismissed with costs.**
CATCHWORDS:	PROCEDURE – COSTS – APPEALS AS TO COSTS – JURISDICTION TO ENTERTAIN – where applicant pleaded guilty to a Complaint and Summons in the Magistrates Court and was fined $40 – where respondent sought orders for costs in addition to the fine being $81.10 for costs of court and $75 for professional fees – where Magistrate declined to award the $75 for professional fees – where respondent successfully appealed to the District Court – where s 222(2)(c) *Justices Act* 1886 (Qld) restricts appeals to the District Court where a defendant has pleaded guilty – whether the District Court had jurisdiction to hear the appeal PROCEDURE – COSTS – APPEALS AS TO COSTS – WRONG EXERCISE OF DISCRETION – where applicant pleaded guilty to a Complaint and Summons in the Magistrates Court and was fined $40 – where respondent sought orders for costs in addition to the fine being $81.10 for costs of court and $75 for professional fees – where Magistrate considered it would be have been more

appropriate for respondent to have dealt with the matter under the *State Penalties Enforcement Act* 1999 (Qld) – where Magistrate refused to award respondent Council costs being $75 professional fees – where respondent successfully appealed to District Court – whether the District Court judge erred in holding that the Magistrate wrongly exercised her discretion in refusing to award costs

Acts Interpretation Act 1954 (Qld), s 14A
Criminal Code 1899 (Qld), s 651, s 651(4), s 652
District Court of Queensland Act 1967 (Qld), s 118(3)
Justices Act 1886 (Qld), s 19, s 72, s 147A, s 157, s 158, s 158A, s 158A(5), s 222(1), s 222(2)(a), s 222(2)(b), s 222(2)(c)
State Penalties Enforcement Act 1999 (Qld), s 4(a), s 4(b), s 4(c), s 16, s 22, sch 2(a)(ii)
Supreme Court Act 1995 (Qld), s 253
Transport Operations (Road Use Management) Act 1995 (Qld), s 106(1)(a)(i)

ACI Operations P/L v Bawden [2002] QCA 286, cited
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd [2008] QCA 100, cited
Cameron v Nominal Defendant [2000] QCA 137; [2001] 1 Qd R 476, cited
Colburt v Beard [1992] 2 Qd R 67, cited
Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453; [1995] HCA 44, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, cited
Coulter v Ryan [2007] 2 Qd R 302; [2006] QCA 567, cited
Dart & Anor v Singer [2010] QCA 75, cited
Jones v Wrotham Park Settled Estates [1980] AC 74, cited
Magrath v Goldsbrough, Mort & Co Ltd (1932) 47 CLR 121; [1932] HCA 10, cited
Mills v Meeking (1990) 169 CLR 214; [1990] HCA 6, cited
Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19, cited
Pickering v McArthur [2005] QCA 294, cited
R v Hayden (1975) 60 Cr App R 304; [1975] 1 WLR 852, cited
R v Young (1999) 46 NSWLR 681; [1999] NSWCCA 166, cited
Ross v The Queen (1979) 141 CLR 432; [1979] HCA 29, cited
Schneider v Curtis [1967] Qd R 300, cited
Shergold v Tanner (2002) 209 CLR 126; [2002] HCA 19, cited

COUNSEL: J Henry SC for the applicant
R G Bain for the respondent

SOLICITORS: Anderson Telford Lawyers for the applicant
Townsville City Council Legal Services for the respondent

[1] **McMURDO P**: I would grant this application for leave to appeal, allow the appeal with costs, set aside the orders of the District Court and instead order that the appeal to that court be dismissed with costs.

The issues

[2] Chesterman JA has set out the principal relevant issues, facts and legal provisions so that my reasons for the orders I propose can be much more briefly stated than otherwise. This case concerns a magistrate's refusal to order $75.00 professional costs in favour of the present respondent (an officer of the Townsville City Council) who successfully prosecuted the present applicant for a minor parking infringement. The respondent successfully appealed to the District Court from the magistrate's order refusing her costs. The first issue in this application is whether the District Court had jurisdiction to hear the appeal under s 222 *Justices Act* 1886 (Qld). If so, the second issue is whether the District Court judge erred in holding that the magistrate wrongly exercised her discretion in refusing to award those costs.

The respondent's right of appeal under s 222 *Justices Act*

[3] I agree with Chesterman JA that the respondent had a right of appeal from the magistrate's decision to a District Court judge under s 222 *Justices Act* and that such an appeal was not prohibited by s 222(2)(c) *Justices Act*.

[4] Currently under s 222(1), a person aggrieved by an order made summarily on a complaint for an offence like the present is given a general right of appeal to a District Court judge. Section 222(2) provides three exceptions to that general right. The first (s 222(2)(a)) excludes appeals from summary convictions or orders made under s 651 *Criminal Code*. (Section 651 allows a person who is charged on indictment before the District or Supreme Court to plead guilty to summary offences and have them dealt with in that court together with the indictable offences.) The second exception is where a complainant is aggrieved by a decision in a summary determination of an indictable offence. Any appeal by such a complainant is limited to an appeal against sentence or an order for costs; the complainant cannot appeal from a not guilty finding (s 222(2)(b)). The third exception, and the one with which this application is directly concerned, is "if a defendant pleads guilty or admits the truth of a complaint, a person may only appeal under [s 222] on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate" (s 222(2)(c)).

[5] The persuasive reasons for judgment of both Fraser JA and Chesterman JA demonstrate the difficulty in construing s 222(1) in the light of s 222(2)(c) and in determining whether the respondent had a right of appeal to the District Court from the magistrate's refusal to make a costs order in the respondent's favour.

[6] As Fraser JA explains, the literal reading of s 222(2)(c) suggests there is no right of appeal. But this seems an unlikely legislative intent and courts are encouraged to

adopt a purposive approach to legislative interpretation.[1] There are, after all, statutory provisions allowing appeals from costs orders made by District and Supreme Court judges. A costs order made by a judge of the Trial Division of the Supreme Court is subject to an appeal to this Court, but only with leave of the judge who made the order: s 253 *Supreme Court Act* 1995 (Qld). By contrast, an appeal from a costs order made by a District Court judge can be brought to this Court sometimes as of right and, in other cases, by leave. This is because a costs order is a "final judgment" under s 118(2) *District Court of Queensland Act* 1967 (Qld): *Colburt v Beard*[2] and *Cameron v Nominal Defendant*.[3] Whether an appeal from a District Court costs order to the Court of Appeal is as of right under s 118(2) or by leave under s 118(3) will depend on whether the amount of the costs order is "equal to or more than the Magistrates Courts jurisdictional limit"[4]: see *Cameron v Nominal Defendant*.[5]

[7] The legislative history of amendments to s 222 may offer some insight in construing the legislative intent in the present s 222(1) and s 222(2)(c). The *Justices Act* has contained a provision in substantially similar terms to the present s 222(1) since 1949.[6] That Act has contained a provision (s 222(1B)) in terms similar to the present s 222(2)(a) since 1997.[7] The present s 222(2)(b) was first added to s 222 in 1997 (s 222(1A)).[8] Since 1949, the present s 222(2)(c) was contained in broadly similar terms in a sub-section dealing with procedural rules and conditions relating to s 222 appeals. In 2003, the then s 222(1A), the then s 222(1B) and the then s 222(2)(e) were amalgamated into the present s 222(2)(a)-(c).[9] All this suggests to me that the present wording of s 222(2)(c), which is well capable of a construction that there is no appeal in respect of a costs order where a defendant has pleaded guilty to a summary offence brought on complaint, is the result of the piecemeal legislative approach to amending s 222 rather than a clearly stated legislative intent. I have not found any relevant second reading speeches or explanatory notes to suggest to the contrary.

[8] As I have noted, s 222(1) confers, in general terms, jurisdiction on the District Court to hear appeals from final orders made by magistrates in a summary way on complaints for an offence or breach of duty. A costs order is a final order: *Colburt v Beard*;[10] *Coulter v Ryan*.[11] Section 222(2)(a)-(c) limits that jurisdiction in specified ways. Legislative provisions limiting jurisdiction are narrowly construed.[12] I consider that if the legislature intended s 222(2)(c) to restrict the District Court's appellate jurisdiction conferred by s 222(1) by prohibiting appeals in respect of costs orders where a person pleaded guilty or admitted the truth of a complaint, it would clearly have stated as much.

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1 *Acts Interpretation Act* 1954 (Qld), s 14A(1).
2 [1992] 2 Qd R 67, 68.
3 [2000] QCA 137, [6].
4 Section 118(2)(a).
5 [2000] QCA 137, [6].
6 *Justices Acts Amendment Act* 1949 (Qld), s 34.
7 *Courts Reform Amendment Act* 1997 (Qld), s 62 introduced a s 222(2D) in terms similar to the present s 222(2)(a). *The Justice and Other Legislation (Miscellaneous Provisions) No. 2* (1997), s 63, added specific reference to s 651 *Criminal Code* and s 222(2D) became s 222(1B).
8 *Courts Reform Amendment Act* 1997 (Qld), s 62.
9 *Evidence (Protection of Children) Amendment Act* 2003 (Qld), s 75.
10 See fn 2.
11 [2006] QCA 567, [9].
12 *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Shergold v Tanner* (2002) 209 CLR 126 at 136; [2002] HCA 19.

[9] Although the disputed costs order the subject of this application involves a mere $75.00, very substantial costs can be awarded following a plea of guilty to a summary offence or offences prosecuted on complaint. See, for example, *Dart & Anor v Singer*[13] which concerned a costs order of about $50,000. I note that in *Dart* the applicants pleaded guilty to charges under the *Animal Care and Protection Act* 2001 (Qld), brought by way of complaint and summons.[14] The applicants in *Dart* appealed without controversy to the District Court under s 222 against both the sentence and other orders including the costs order. The jurisdictional point with which this Court is now concerned was not raised in *Dart*. But that case is an example of the very substantial costs orders which may be made in cases where a defendant has pleaded guilty to or admitted the truth of a summary offence brought on complaint. The fact that such costs orders can be substantial strongly suggests that the legislature, in the absence of unequivocal language, is unlikely to have intended s 222(2)(c) to exclude a party from the opportunity of an appeal in respect of a costs order.

[10] The provisions of an Act must be read, if at all possible, so that they are consistent with each other.[15] As I have noted, appeals under s 222 are limited to appeals on orders which dispose of the complaint itself: *Schneider v Curtis*;[16] a costs order is a final order: *Coulter v Ryan*. Reading the exceptions to the appellate jurisdiction of the District Court conferred by s 222(1) in s 222(2)(a)-(c) consistently with each other, it seems incongruous that the legislature intended s 222(2)(c) to exclude defendants who plead guilty from appealing in respect of final costs orders whilst allowing complainants where a defendant has been found not guilty to appeal under s 222(2)(b) against costs orders.

[11] I consider that s 222(2)(c) should be construed as prohibiting an appeal from the Magistrates Court to the District Court only in respect of findings of guilt or convictions where a defendant has pleaded guilty to or admitted the truth of the complaint. It should not be construed as prohibiting appeals to the District Court from a magistrate's costs order in those circumstances.

[12] This construction of s 222(2)(c) also interacts harmoniously with s 147A and s 158A(5) *Justices Act*. Section 147A enables justices to re-open proceedings, including pleas of guilty, and to set aside a conviction or to vacate or to vary an order in specified and limited circumstances, for example, where the conviction or order has been recorded against the wrong person;[17] the summons issued upon the complaint originating the proceedings did not come to the knowledge of the defendant;[18] the defendant has been previously convicted of the offence;[19] or the conviction or recorded order was made because of deceit.[20] The redress available under s 147A is consistent with a legislative intent in s 222(2)(c) to exclude from s 222(1) appeals against a conviction or finding of guilt where a defendant has pleaded guilty or admitted the truth of a complaint. I also note that s 158A(5)

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13 [2010] QCA 75.
14 Above, [1]-[7] and [16].
15 *Ross v The Queen* (1979) 141 CLR 432 at 440; *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 479; [1995] HCA 44.
16 [1967] Qd R 300.
17 Section 147A(3)(a).
18 Section 147A(3)(b).
19 Section 147A(3)(c).
20 Section 147A(3)(d).

Justices Act refers to appeals on costs orders under s 222. Nothing in its terms supports a construction of s 222(2)(c) that excludes appeals to the District Court from costs orders where a person has pleaded guilty to or admitted the truth of a complaint brought on summons.

[13] For these reasons, I am satisfied that the better construction of s 222(2)(c) is that the District Court had jurisdiction to hear the respondent's appeal from the magistrate's costs order.

The magistrate's exercise of discretion in not awarding costs to the respondent

[14] I consider the District Court judge erred in concluding that the magistrate wrongly exercised her discretion in refusing to award the respondent his $75.00 professional costs.

[15] The applicant elected in writing, as she was entitled, not to appear at the hearing before the magistrate and to plead guilty to the parking infringement prosecuted by the respondent. The applicant provided a written explanation in mitigation, setting out how she came to commit the offence. She concluded: "I accept the fines and any extra penalties applied by the court."

[16] It is clear from the transcript of proceedings that the magistrate determined not to award the respondent her professional costs in an attempt to persuade the respondent's employer, the Council, to adopt alternative and less costly methods of collecting fines for infringement notices from offenders like the applicant through the *State Penalties Enforcement Act* 1999 (Qld) (SPE Act).

[17] I agree with Chesterman JA's précis of the relevant provisions of that Act and the *State Penalties Enforcement Regulation* 2000 (Qld). I further note that the objects of the SPE Act include maintaining the integrity of fines as a viable sentencing or punitive option for offenders;[21] maintaining confidence in the justice system by enhancing the way fines and other money penalties may be enforced;[22] and reducing the cost to the State of enforcing fines and other money penalties.[23] Under the SPE Act the term "fine" includes "for an offence for which a fine is imposed by a court – any amount payable under an ancillary order of the court".[24] Accordingly, "fine" under the SPE Act includes a costs order of the kind in dispute in this application.

[18] The Council had a discretion as to whether it proceeded against the applicant in the Magistrates Court or by way of the SPE Act. A local government authority like the Council should conduct itself as a model litigant and ordinarily prosecute such matters in a way which, within reason, minimises its costs and the cost to the State. The magistrate was concerned that the Council was unnecessarily expending costs by electing to pursue the cooperative applicant (who was pleading guilty) and, inferentially, others like her, through the more expensive court process rather than under the SPE Act. The applicant's plea of guilty, and her statement of willingness to pay any fine and penalties, strongly suggested that she intended to pay whatever was ordered in a timely way.

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21 SPE Act, s 4(a).
22 SPE Act, s 4(b).
23 SPE Act, s 4(c).
24 Sch 2, definition of "fine" (a)(ii).

[19] Under s 157 *Justices Act*, the magistrate had an unfettered discretion to award costs. She was required to exercise that discretion judicially. Ordinarily, that discretion is exercised in favour of a successful prosecutor like the respondent who has incurred professional costs in the prosecution of a summary offence. This is to ensure that a successful prosecutor is properly compensated for the reasonable costs of the prosecution. But here, where the respondent as prosecutor could have adopted, reasonably, an alternative and cheaper method of collecting the fine from the applicant, I consider the magistrate was entitled to refuse to order professional costs for two reasons. First, she was entitled to conclude the costs incurred were not reasonably incurred in the circumstances. Second, she was entitled to exercise her discretion in this way to encourage the respondent, the Council and others, to minimise, within reason, the expenditure of public monies in the method of collecting such fines in the future: cf *Latoudis v Casey*.[25] The magistrate's approach was broadly consistent with the objects of the SPE Act which demonstrate a clear legislative intention that the provisions of that Act be utilised to maintain confidence in the justice system as to the manner of collecting fines[26] and to reduce the cost to the State of enforcing fines.[27]

[20] I do not find *Williams v Spautz*[28] of assistance in this case. It is not necessary that a prosecution amount to an abuse of process to entitle a magistrate to refuse under s 157 to award the prosecution its costs. Indeed, if the prosecution were an abuse of process, the prosecution would be likely to be stayed, to be unsuccessful and not subject to any costs order in favour of the prosecution.

Conclusion

[21] In my view, the respondent has a right of appeal to the District Court under s 222(1) despite s 222(2)(c).

[22] I consider that the magistrate exercised her unfettered discretion as to costs under s 157 judicially. The District Court judge erred in finding otherwise.

[23] Although the amount involved is but $75.00, I consider that the application for leave to appeal should be granted and the appeal allowed. The District Court judge's error has led to an injustice, involves a principle of legal and community interest well beyond the $75.00 dispute between the parties, and should be corrected by this Court. For these reasons, and despite the modest amount involved, I would grant the application for leave to appeal, allow the appeal with costs, set aside the orders of the District Court and instead order that the appeal to that court be dismissed with costs.

[24] **FRASER JA**: I have had the advantage of reading the reasons for judgment prepared by Chesterman JA. I agree in most respects with his Honour's reasons, but in my respectful opinion the respondent's appeal to the District Court judge was incompetent because it was precluded by s 222(2)(c) of the *Justices Act* 1886 (Qld).

[25] I gratefully adopt Chesterman JA's description of the factual and statutory background. I also agree with his Honour's conclusion that the Magistrate's discretion as to costs fundamentally miscarried. I can therefore turn directly to my

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25 (1990) 170 CLR 534, Mason CJ at 544 and Toohey J at 564-566; [1990] HCA 59.
26 SPE Act, s 4(b).
27 SPE Act, s 4(c).
28 (1992) 174 CLR 509; [1992] HCA 34.

reasons for concluding that the District Court lacked jurisdiction to hear the respondent's appeal.

Section 222(2)(c) of the *Justices Act* 1886 (Qld)

[26] Sections 222(1) and (2) of the *Justices Act* 1886 (Qld)[29] provide:

> "(1) If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a 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.
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> *Notes—*
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> 1 Under the Criminal Code, section 669A(6), an appeal against a decision by a person under this section to a District Court judge is removed directly to the Court of Appeal if the Attorney-General also appeals against the decision under section 669A.
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> 2 This division applies in relation to an order made by justices dealing summarily with a child charged with an offence, but appeals must be made to a Childrens Court judge—see the *Juvenile Justice Act 1992*, section 117.
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> (2) However, the following exceptions apply—
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> (a) a person may not appeal under this section against a conviction or order made in a summary way under the Criminal Code, section 651;
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> (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;
>
> (c) if a defendant pleads guilty or admits the truth of a complaint, a person may only appeal under this section on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate."

[27] Section 157 of the *Justices Act* 1886 (Qld) provides that in all cases of summary convictions and orders including such a conviction for an indictable offence, the justices may in their discretion "order by the conviction or order that the defendant shall pay to the complainant" just and reasonable costs. The power to order costs on dismissal of a complaint given by s 158(1) mirrors that technique of making the costs order an aspect of the substantive order: the justices may "by their order of dismissal order that the complainant shall pay to the defendant" just and reasonable costs. Similarly, s 159 requires that the sum allowed for costs "be specified in the conviction or order or order of dismissal…". That context makes it clear, in my view, that the reference in s 222(1) to "an order made by justices …on a complaint"

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29 As in force at the relevant time.

comprehends a costs order made under s 157 or s 158 upon the final disposition of a complaint. That conclusion is consistent with authority.[30] I proceed on the basis that s 222(1) provides a general right of appeal to a complainant or defendant who is aggrieved by such a costs order, subject to the exceptions in s 222(2).

[28] Chesterman JA concludes (in paragraph [75] of his Honour's reasons) that on a literal construction s 222(2)(c) precludes any appeal in cases where, as here, a defendant pleads guilty except (to summarise the permissible grounds) in an appeal concerned with the adequacy of the penalty. That is so even though as Chesterman JA also points out (in paragraph [85] of his Honour's reasons) the language used in the paragraphs of s 222(2) is not consistent: paragraph (a) prohibits appeals against particular orders, paragraph (b) specifies those orders which may be appealed against, and paragraph (c) specifies available grounds of appeal instead of the orders against which an appeal may or may not be brought.

[29] Section 222(2)(c) does not in terms preclude appeals against costs orders, convictions, or any other kind of order. An appeal against any kind of order is authorised under s 222(1) and may proceed consistently with paragraph (c) if there is the necessary connection between the order and inadequacy or excess in the sentence. However, if s 222(2)(c) is given its literal meaning the nature of the permitted grounds must rule out appeals against most orders other than sentences. Relevantly to this application, in an appeal against a costs order only, it is not easy to envisage a case in which a ground specified in s 222(2)(c) would be viable.

[30] Section 222(8)(a) requires that a notice of appeal under s 222 "state …the appeal grounds". In conformity with that provision the respondent's notice of appeal to the District Court set out the grounds of appeal in seven paragraphs. As is typically the case in appeals against costs orders the grounds contended that the discretion to award costs miscarried in various ways. None of them complained of error in the amount of the fine as a ground for impugning the costs order and nor would any such ground have been viable. Accordingly, on a literal construction of s 222(2)(c) the respondent's appeal to the District Court was incompetent.

[31] Decisions of this Court were cited in which s 222(2)(c) (or the indistinguishable enactment which preceded it) was given a literal construction and found to preclude appeals against conviction.[31] The question whether that paragraph also precludes appeals against costs orders otherwise than on the specified grounds was not decided in those cases. We were also referred to decisions in the District Court which assumed that s 222 authorised appeals against the quantum of costs orders on the ground that the costs discretion had miscarried[32] but those cases were not cited as authority on the point here in issue.

[32] The respondent argued that s 222(2)(c) was intended only to preclude challenges to guilt or the admitted criminal allegations, but that is not what it says. The respondent did not articulate any process of construction of s 222(2)(c) which would produce that result. I observe that had such a simple provision been intended it would have been very easy to express it.

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30 *Coulter v Ryan* [2007] 2 Qd R 302.

31 *Long v Spivey* [2004] QCA 118. That decision has often been followed, most recently in *Ajax v Bird* [2010] QCA 2.

32 *Hallam v Condon* (unreported, Wylie DCJ, DC A 1/92, Townsville, 31/1/92) and *Foxwell v Juszczak* (unreported, O'Brien DCJ, DC A 12/93, Townsville, 20/8/93).

[33] Gibbs CJ said in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[33] that departure from the literal meaning may be justified where the result of giving words their ordinary meaning may be "so irrational that the court is forced to the conclusion that the draftsman has made a mistake", but it is clear that departure from the literal meaning may sometimes also be justified in cases falling short of manifest irrationality. The denial of practically any costs appeal in the case dealt with in s 222(2)(c) may result in injustice in particular cases, as in my respectful opinion is demonstrated by this case. That raises the question whether the Court is justified in departing from the literal meaning of that provision on the footing that it could not represent the legislative intention.[34] It is necessary here to discuss only some of the leading authorities on that topic, many of which were collected and examined in detailed reasons given by Muir JA in three recent decisions of this Court.[35]

[34] In *Mills v Meeking*[36] McHugh J said:

> "A court cannot depart from the literal meaning of a statutory provision because that meaning produces anomalies or injustices if no real doubt as to the intention of Parliament arises: *Cooper Brookes (Wollongong) Pty. Ltd. v. Federal Commissioner of Taxation* (1981) 147 CLR 297 at pp 305, 320; *Stock v. Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231 at pp 234-235, 237-238; [1978] 1 All ER 948 at pp 951- 952, 954. But, when the literal meaning of a provision gives rise to an absurdity, injustice or anomaly, a real doubt will frequently arise as to whether Parliament intended the literal meaning to prevail. In such a case, a court may be entitled to disregard the literal meaning. In *Cooper Brookes (Wollongong) Pty. Ltd*. Gibbs C.J. pointed out (at p 304):
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> > "There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case ..."
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> But this does not mean that a court is bound by the literal or grammatical meaning of a statutory provision unless that meaning produces an irrational result. This was made plain by Mason and Wilson JJ. in *Cooper Brookes (Wollongong) Pty. Ltd*. where their Honours said (at p 321):
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> > "On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not

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33 (1981) 147 CLR 297 at 304.

34 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 - 305, 320 - 321.

35 *Nominal Defendant v Ravenscroft* [2007] QCA 435 at [32]-[50]; *St Vincent de Paul Society Qld v Ozcare Ltd & Ors* [2009] QCA 335; *Witheyman v Simpson* [2009] QCA 388 at [38]-[51].

36 (1990) 169 CLR 214 at 242 - 243.

> confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."
>
> Moreover, once it is apparent that the literal or grammatical meaning of a provision does not conform to the legislative purpose as ascertained from the statute as a whole, the court is entitled to give effect to that purpose by addition to, omission from, or clarification of the particular provision: *Kammins Co. v. Zenith Investments* (1971) AC 850 at pp 880-882; *Jones v. Wrotham Park Estates* [1980] AC 74 at p 105; *Cooper Brookes (Wollongong) Pty. Ltd.*, at pp 321-323."

[35] In *Jones v Wrotham Park Settled Estates*[37] Lord Diplock articulated three conditions of a court's power to read words into legislation: the court must know the mischief with which the statute was dealing, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved, and the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect. In my respectful opinion Chesterman JA's cogent reasons certainly justify the suspicion that the stifling effect upon appeals against costs orders effected by s 222(2)(c) may have been inadvertent, but I am not persuaded that there is sufficient contextual or other material about the legislative purpose to justify this Court in taking the strong step of disregarding the literal meaning of that provision.

[36] Although courts may in some cases notionally supply words omitted by the legislature in order to fulfil an ascertained legislative purpose, a court may not do so if that would go beyond the legitimate judicial function of construing the statutory text. So much has often been stressed. In *R v Young*[38] Spigelman CJ said:

> "The process by which words omitted by inadvertence on the part of the draftsperson may be supplied by the court, must remain capable of characterisation as a process of construction of the words actually used.
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> …
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> As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.
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> …

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37 [1980] AC 74. Also reported under the name *Jones v Wentworth Securities Ltd.*

38 (1999) 46 NSWLR 681 at 686-687.

> Putting to one side obvious typographical errors (see Bennion, *Statutory Interpretation: A Code*, 3rd ed (1997) Butterworths, London at 675-677), the court supplies words "omitted" by the draftsperson only in the sense that the words so included reflect in express, and therefore more readily observable, form, the true construction of the words actually used. In my opinion, the authorities do not warrant the court supplying words "omitted" by inadvertence per se.
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> Where the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed. (*McAlister v The Queen* (1990) 169 CLR 324 at 330; *R v Di Maria* [1996] SASC 5882; (1996) 67 SASR 466 at 472-474). If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text — using consequences to determine which meaning should be selected — then the process remains one of construction."[39]

[37] Section 14A of the *Acts Interpretation Act* 1954 (Qld) requires the court to adopt the interpretation that will best achieve the purpose of the Act in preference to any other interpretation.[40] It is legitimate to look for direct evidence of that legislative purpose in extrinsic material in the circumstances mentioned in s 14B of the same Act, but neither party submitted that there was any relevant extrinsic material and I have found none. In some cases assistance may be found in objects expressed in the same statute or the existing state of the law and any mischief which the provision was intended to remedy, but again neither party submitted that any assistance could be found in those areas and my own research has not unearthed anything worthwhile. In the search for the legislative purpose we are therefore confined to the contentious provision itself and its statutory context.

[38] The language of paragraph (c) is itself of particular importance in ascertaining its legislative purpose. As Gibbs CJ observed in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[41], "it is not unduly pedantic to begin with the assumption that words mean what they say". Again, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[42] Hayne, Heydon, Crennan and Kiefel JJ said:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require

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39 This passage was quoted with approval by Muir JA in *Nominal Defendant v Ravenscroft* [2007] QCA 435 at [44] and in *Witheyman v Simpson* [2009] QCA 388 at [49].

40 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

41 (1981) 147 CLR 297 at 304.

42 (2009) 239 CLR 27 at 46-47.

> consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy." [Footnotes omitted]

[39] In ascertaining the legislative purpose I therefore start with the language of paragraph (c) of s 222(2). That language is quite strongly opposed to the legislative purpose for which the respondent contended. I refer in particular to the expressions that where the defendant pleads guilty the defendant may "only" appeal under s 222 on the "sole" ground specified. I will mention other aspects of the text which I think point in the same direction in the course of discussing the context.

[40] I have already expressed my view that s 222(1) confers a right of appeal from a costs order made upon the final disposition of a complaint, but that does not assist the respondent. The introductory words of s 222(2) unambiguously express the legislative purpose of making exceptions to that right in the particular cases described in paragraphs (a)-(c).

[41] Paragraph (a) is a curious provision. Although s 222(1) only confers a right of appeal from orders made by justices, s 222(2)(a) purports to except from that right any right to appeal against orders made in the District Court and the Supreme Court under s 651 of the *Criminal Code*. Section 651 empowers a court in which an indictment has been presented against a person who is also facing charges in a court of summary jurisdiction to deal with those summary charges where certain conditions are met. One of those conditions is that the defendant intends to plead guilty. (I interpolate that this condition makes the case identified in s 222(2)(a) analogous with s 222(2)(c).) Section 652 empowers the court of summary jurisdiction to transmit the relevant complaint or bench charge sheet to the court before which the indictment has been presented. Subsection 651(4) then empowers the court before which the indictment has been presented to make any orders in relation to the conviction of the summary offence which a Magistrate's Court might have made. I have already mentioned my view that those orders would include costs orders under ss 157 and 158 of the *Justices Act* 1886 (Qld).

[42] Accordingly paragraph (a) seems intended simply to put beyond doubt what in any event would have been the effect of s 222(1), namely that s 222 does not provide an avenue of appeal to the District Court from summary convictions or orders made in the District Court or the Supreme Court under s 651 of the *Criminal Code.* It is necessary therefore to direct attention to the statutory provisions which may provide rights of appeal from orders made under s 651, namely ss 668D(2) and 669A of the *Criminal Code***.** Section 668D(2) provides that a person summarily convicted under s 651 may appeal to the court, with the leave of the court, against "the sentence passed on conviction, including any order made under that section". That apparently confers upon a person convicted under s 651 of the *Criminal Code* the right to seek leave to appeal against any costs order made in the District Court or the Supreme Court under s 651(4). As to Crown appeals, s 669A(1) gives the Attorney-General a right to appeal from "any sentence pronounced by... the court of trial". The question whether that extends to an appeal against a costs order depends upon the meaning of "sentence" in that context and bearing in mind the definition of that term in s 668. The learned editors of *Carter's Criminal Law of Queensland* express the view[43], that "sentence" in s 668 includes a costs order, but in my respectful

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[43] At paragraph [s 668.20]

opinion the decisions cited are not authority for that view. In particular, the cited English decision of *R v Hayden* (1975) 60 Cr App R 304 turned upon a broader statutory definition of "sentence". The English definition did not contain the qualification found in the definition of "sentence" in s 668 that the order appealed against must be an order "with reference to the [convicted] person's person or property". The better view seems to be that, unsurprisingly, the Attorney-General is not given any right of appeal against a costs order made under s 651(4), but it is better to leave any decision on that point for a case in which it is necessary to decide it. The more significant point is that the complainant is not given any right of appeal from a costs order made under s 651(4) of the *Criminal Code*.

[43] In summary, in the case identified in paragraph (a) of s 222(2) of the *Justices Act* 1886 (Qld), although it may be arguable that the Attorney-General has a right of appeal against a costs order made under s 651 of the *Criminal Code* the complainant has no such right and the defendant only has a right to apply for leave to appeal. If paragraph (a) sheds any light upon the legislative purpose which informed paragraph (c) it tends to deny that the purpose included the conferral upon complainants of unqualified rights to appeal against costs orders.

[44] I turn then to paragraph (b) of s 222(2). Paragraph (c) in terms limits the permissible grounds of one category of appeals which paragraph (b) expressly sanctions, namely an appeal by a complainant against a costs order made on the summary disposition of a complaint of an indictable offence where the defendant pleaded guilty or admitted the truth of the complaint. I detect no inconsistency between those paragraphs in that respect. If, contrary to my view, paragraph (c) should be construed as having no application to appeals expressly sanctioned by paragraph (b), that would not assist the respondent. She was not convicted of an indictable offence.

[45] What does seem to be much more significant is the stark contrast between the terms of paragraphs (b) and (c). Although paragraph (b) expressly sanctions appeals against "an order for costs" paragraph (c) both omits any similar provision for the case to which it applies and emphatically confines the grounds of appeals to grounds that are manifestly inapt for typical appeals against costs orders. That result is achieved by quite precise language. This context makes it very difficult to accept that the literal effect of paragraph (c) in practically excluding costs appeals inadvertently failed to reflect the legislative purpose, particularly in the absence of compelling evidence of any such purpose.

[46] In addition to that unmistakeable language, the contrast between the subject matters of paragraphs (b) and (c) supplies a ground for thinking that the legislative purpose might have differed according to the literal meaning in each case. Where paragraph (c) applies to preclude appeals against costs orders (where only sentence is in issue in the Magistrates Court) it might have been anticipated that the amount of costs in issue (the difference between the amount of costs ordered in the Magistrates Court and the amount claimed to be appropriate in any appeal) would ordinarily be too small to justify the private and public expense of an appeal to the District Court. This case, in which the Magistrate was found to have made a fundamental error which had an unusually large effect upon the amount of recoverable costs in many cases, is very unusual. The legislative purpose might have been informed by the view that in the vast majority of cases the game would not be worth the candle; that the public and private cost of appeals to the District Court against discretionary

costs orders made in uncontested proceedings in the lower court was not justified. The different approach taken in paragraph (b) might reflect the potentially larger amounts of costs likely to be incurred in contested charges of indictable offences.

[47] I do not mean to convey any view about the appropriateness of any such rationale. The existence of a right of appeal by leave has in many analogous cases been thought appropriate to meet the policy objectives of allowing for appellate correction in appropriate cases whilst at the same time filtering out unmeritorious appeals. That is, however, a matter for the legislature. The point I seek to make is that there may be an objectively defensible rationale for the differential treatment of rights of appeal in paragraphs (b) and (c) of s 222(2). To put it another way, I have found insufficient evidence of an inconsistent legislative purpose to deny the legislature the small compliment of having meant what it said in s 222(2)(c). What otherwise might be thought to be inadvertently unjust results flowing from the literal exclusion of appeals otherwise than on the stated grounds might have reflected a considered legislative purpose in the broader public interest.

[48] Chesterman JA has referred to the broader legislative context of rights of appeals against costs orders in different contexts. Reference to the summary of such appeals in paragraph [88] of his Honour's reasons demonstrates that leave to appeal is required for many categories of such appeals. Perhaps the strongest example is the right of appeal subject to the requirement for leave to appeal against orders as to costs only made by judges exercising the civil jurisdiction of the Supreme Court in s 253 of the *Supreme Court Act* 1995 (Qld). That right has existed for more than 130 years.[44] If it were possible to detect in the *Justices Act* 1886 (Qld) the legislative purpose of conferring a right to seek leave to appeal against costs orders on grounds other than those specified in s 222(2)(c) I would readily accept that this broader legislative context provides some support for the respondent's argument, but that is not possible and the respondent did not advocate it. The respondent instead contended for a right of appeal unqualified by any leave requirement. Acknowledging the real force of my colleague's reasoning, in my respectful opinion the presence of statutory rights to apply for leave to appeal in different circumstances is an insufficient basis for departing from the text of s 222(2)(c).

[49] If the absence of any provision for appeal against costs orders in this kind of case, whether as of right or by leave, is considered to be inconvenient the remedy lies with the legislature.

Leave to appeal

[50] In *ACI Operations Pty Ltd v Bawden*[45] McPherson JA said that the criteria in the previous form of s 118 of the *District Court of Queensland Act* 1967 (Qld) of an important point of law or question of general or public importance "remains a sufficient, but not a necessary, prerequisite to a grant of leave to appeal" under the present enactment. In other cases it has been said that leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[46] It is to be emphasised though that, whilst the Court exercises the discretion on a principled basis and those tests provide very useful guidance, s 118(3) confers a general

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44 *Judicature Act* 1876 (Qld), s 9.

45 [2002] QCA 286.

46 *Pickering v McArthur* [2005] QCA 294 per Keane JA at [3], McMurdo P and Dutney J agreeing.

discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case.[47]

[51] The applicant did not take the present jurisdictional point in the District Court but instead participated in the appeal by opposing it on its merits. However the parties could not confer jurisdiction by agreement and the respondent, as the complainant and the party invoking the jurisdiction of the District Court, was at least equally responsible for the erroneous assumption that the District Court had jurisdiction. If, as I have concluded, the respondent had no right to appeal to the District Court the orders made in that court are void:[48] the applicant would be entitled to ignore those orders with impunity. Such a result should be avoided in the interests of the administration of justice according to law. It is this feature of the application which I consider justifies the grant of leave to appeal.

[52] If leave to appeal is granted and the appeal is allowed, the respondent will be deprived of the indemnity against its liability for costs incurred in the Magistrate's Court that the applicant should have been ordered to pay. That result may seem unjust in this particular case, but in my view it is the unavoidable result of the legislation.

Proposed orders

[53] I would grant leave to appeal, allow the appeal with costs, set aside the orders made in the District Court, and instead order that the appeal to that court be dismissed with costs.

[54] **CHESTERMAN JA**: On 19 June 2008 the respondent, an officer of the Townsville City Council ("Council"), swore a Complaint and Summons in the Magistrates Court district of Townsville alleging that the applicant had parked her Daewoo Sedan 903 KKW in Flinders Street Townsville on 25 March 2008 "without having paid the prescribed charge". The next day the applicant indicated in writing, signed by her, that she pleaded guilty to the charge and requested the proceeding be dealt with in her absence.

[55] The offence is created by s 106(1)(a)(i) of the *Transport Operations (Road Use Management) Act* 1995 (Qld) ("*Transport Act*") which provides that:

> "During the fixed hours, a person must not park a vehicle in a designated parking space –
> (a) unless –
> (i) a parking meter … installed for the space indicates that the parking fee has been paid…"

The maximum penalty was 40 penalty units.

[56] The complaint was dealt with in the Magistrates Court pursuant to s 19 of the *Justices Act* 1886 (Qld) pursuant to which:

> "Whenever by any Act … any person is made liable to a penalty … for any offence … and such offence is … not by the Act declared to be an indictable offence, and no other provision is made for the trial

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47 See *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 at [5] per Fraser JA, McMurdo P and Lyons J agreeing.

48 *Pelechowski v Registrar, Court of Appeal(NSW)* (1999) 198 CLR 435 at [27]-[28], [71]

> of such person, the matter may be heard and determined by a Magistrates Court …".

The *Transport Act* did not make the offence created by s 106 indictable, nor did it provide for the trial of an offender who contravened the section.

[57] The complaint against the applicant was dealt with, together with a large number of similar complaints, on 7 August 2008. The respondent was represented on each complaint by a solicitor, Ms Stockall, employed by the Council. Ms Stockall intimated that "in all of these matters" the respondent was asking for orders for costs in addition to a fine: $81.10 for costs of court and $75 professional fees.

[58] The Magistrate responded to the intimation:

> "… in relation to the professional, I'm not minded to order the professional fee. My understanding – and it's with the greatest respect to you and certainly no criticism of you, my understanding is these matters can go direct to SPER and it just seems to be a little bit of revenue raising. … Because I understand that can … be directed to SPER, can't they?"

Ms Stockall's answer was that an infringement notice issued with respect to the parking offences could have been directed to SPER but that:

> "… because Council hasn't decided to collect them through SPER should not preclude Council … from its other avenue of collection."

The Magistrate acknowledged the force of the point but was unpersuaded by it to alter the opinion already expressed. Her Honour said:

> "…it just seems to be rubber stamping and I'm not minded … today to impose the professional fees. I will the costs (*semble* costs of court) because it's a cost that actually has been occurred (sic) today."

Ms Stockall pointed out that the complainant:

> "has incurred some costing in … the course of preparing these … summonses … and that's what the … professional fees do … it's our preparation fee and not just the … Court costs that we've incurred … . … Council have actually prepared these (complaints) … and have come to … prosecute them and … the professional fees reflecting that."

The Magistrate remained unconvinced, indicating:

> "… it's unnecessary to bring them to Court if they can be directly taken (presumably to SPER) … I understand other councils … do that … they don't prosecute, they send them directly to SPER and that would avoid the unnecessary professional costs to be incurred."

Ms Stockall then pointed out that directing the infringement notices to SPER would incur additional costs, and further informed her Honour that:

> "… Council has taken that on board, but the option of enforcing them through the Courts is available (and is) the option that Council has decided to proceed with … . The fact that they can collect them in another way … (should not prejudice the Council)."

Ms Stockall's last argument was that the decision to proceed by way of complaint and summons was made because the procedure operated as a deterrent to those who park without paying the appropriate fee, and led to a speedier recovery of the fines.

[59] When the applicant's matter was dealt with Ms Stockall informed the Magistrate that the Council sought a fine of $40 and tendered the applicant's written plea of guilty. The fine was imposed and an order made that the applicant pay $81.10 costs of court and the sums be referred to SPER for collection. No order was made for professional costs the Magistrate having said very shortly before dealing with the applicant's case:

> "… I will exercise my discretion today and … not impose the professional fees."

[60] "SPER" is the acronym for the State Penalties Enforcement Registry ("Registry") established by the *State Penalties Enforcement Act* 1999 (Qld) ("*Enforcement Act*"). The offence to which the applicant pleaded guilty was one in respect of which an infringement notice as defined by s 15 of the *Enforcement Act* could be issued. Section 22 of the *Enforcement Act* provides that if an infringement notice is served on an alleged offender he or she must, within 28 days, pay the fine in full to the authority issuing the notice; or elect to have the matter decided in a Magistrates Court; or provide a declaration indicating that the vehicle involved in the offence was owned and/or driven by another when the offence was committed.

[61] By s 23 an offender served with an infringement notice may apply to pay the fine by instalments. The section had no application to this case. It applies only where the fine is "at least the threshold amount", which is, by s 30 of the *State Penalties Enforcement Regulation* 2000 ("Regulation") an amount equal to two penalty units, i.e. $200.

[62] Section 27 of the *Enforcement Act* provides that if an offender served with an infringement notice does not make one of the elections made available by s 22 within 28 days "a proceeding for the offence may be started under the *Justices Act* …". Alternatively, by s 33 of the *Enforcement Act*, if a person served with an infringement notice does not within 28 days pay the fine in full; or apply to pay by instalments; or elect to have the matter dealt with in court; or provide a declaration showing he or she did not commit the offence; the administrating authority (here the Council: s 8BAA of the Regulation) may give a default certificate to the Registry for registration. If the default certificate is registered the amount of the fine is increased by the registration fee and the Registry becomes responsible for collection.

[63] Section 34 of the *Enforcement Act* applies to an order, made by a court, "fining a person for an offence". Subsection 2 provides that if the fine remains unpaid after the time allowed for payment the Registrar of the Court may give the Registry particulars of the unpaid amount and the Registrar must register particulars as soon as practicable. Upon registration an enforcement order or warrant or fine collection notice may be issued to recover the unpaid fine.

[64] Section 38 provides the manner in which the Registry may enforce payment, by issuing an enforcement order. Under section 41, a person served with such an order

may apply to the Registry for an extension of time to pay the amount or to convert the amount into "hours of unpaid community service under a fine option order".

[65] Lastly one should mention s 16 of the *Enforcement Act* which provides:

> "(1) The fact that an infringement notice has been, or could be, served on a person for an offence, does not affect the starting or continuation of a proceeding against the person … in a court for the offence.
>
> (2) This part does not –
>
> (a) require the serving of an infringement notice on a person for an offence, as opposed to proceeding against the person in another way; or
>
> (b) limit or otherwise affect the penalty that may be imposed by a court for an offence."

[66] The respondent appealed to the District Court, pursuant to s 222 of the *Justices Act*, against the Magistrate's refusal to order the applicant to pay $75.00 in professional costs.

[67] The appeal, argued before Judge Durward SC on 20 July 2009 was allowed on 3 August 2009. His Honour concluded:

> "[28] The basis upon which her Honour purported to exercise discretion, if indeed she exercised a discretion at all, was in my view both irrelevant and inappropriate. Whilst other "councils" might elect to proceed in a different way, it could not possibly follow that the appellant was not entitled to professional costs because it elected, as it had a right to do, to proceed differently. The fact that professional costs are not recovered by engagement of the SPER process was not a proper basis for a refusal to award professional costs to the appellant. The referral of infringement notices to SPER is an administrative function. That is a function in contrast to representation in a court proceeding by a solicitor. The availability of the SPER process is also not a proper ground for a refusal to award professional costs, because s 72 of the Act and s 16 of SPERA preserve the entitlement of the appellant to elect to recover the parking fee by court proceedings and through representation by a lawyer.
>
> [29] I agree with the submission of the appellant concerning inconsistency between the award of court costs on the basis of their having been incurred and the refusal of professional costs, in the absence of evidence that they had not been incurred. On the face of the material before me they plainly had been incurred. There was no proper basis for the refusal to make an order for the professional costs.
>
> [30] In order for there to be a proper refusal to order payment of professional costs there would have to be some disentitling conduct on the part of the appellant. There is no evidence of such conduct in this case.

> [31] In my view the learned Magistrate took into account irrelevant and inappropriate reasons for her refusal to order professional costs. Her Honour did not properly exercise her discretion as to professional costs. She was in error and her exercise of discretion has miscarried. Her Honour was wrong as a matter of law to proceed as she did in refusing the application for an order for professional costs."

[68] The order of the Magistrates Court was varied by the addition of an order that the applicant pay the respondent $75.00 by way of professional costs. No order was made as to costs of the appeal to the District Court because it was a "test case" and determined a large number of appeals raising the same point. That order was made by consent.

[69] The applicant seeks leave, pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld), to appeal against the order of the District Court by which the Magistrate's order was varied.

[70] The subject matter of the application for leave to appeal is unpromising material for the grant of leave. Appeals against orders for costs are to be discouraged, allowing for just exceptions. The smallness of the amount, $75.00, is a powerful reason for refusing leave.

[71] The applicant however points to a point of law of some importance which her counsel submits is of general importance. It is that the respondent had no right of appeal to the District Court from the Magistrate's order so the appeal to that court was incompetent. If right the point applies to all appeals to the District Court against costs orders made in the Magistrates Court where there has been a plea of guilty to a summary offence.

[72] Before proceeding further some sections of the *Justices Act* should be noted. Section 72 provides that:

> "Every complainant shall be at liberty to conduct the complainant's case … by the complainant's lawyer."

Section 157 provides that:

> "In all cases of summary convictions and orders … the justices making the same may, in their discretion, order … that the defendant shall pay to the complainant such costs as to them seem just and reasonable."

Section 158 deals with costs which may be awarded against a complaint when a complaint is dismissed. Section 158A limits the order of costs in such a case to those in which the court is satisfied "that it is proper" to make an order for costs against the complainant, and sets out a number of "relevant circumstances" to be considered before making the order.

[73] Section 222 provides:

> "(1) If a person feels aggrieved as a complainant, defendant or otherwise by an order made by justices … on a complaint for an offence … 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) a person may not appeal under this section against a conviction or order made in a summary way under the Criminal Code, section 651;
> (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;
> (c) if a defendant pleads guilty or admits the truth of a complaint, a person may only appeal under this section on the sole ground that a fine, penalty, forfeiture or punishment was excessive or inadequate.
>
> (3) …".

[74] The applicant relies upon the terms of s 222(2)(c), that an appeal in cases where "a defendant pleads guilty" may be brought "on the sole ground that a fine etc., was excessive or inadequate." The applicant pleaded guilty. The appeal was not against the adequacy or inadequacy of the fine but as to the order refusing costs.

[75] On the face of things the applicant's submission appears correct. Read literally s 222(2)(c) prohibits any appeal in cases where, as here, a defendant pleads guilty except an appeal concerned with the adequacy of penalty.

[76] It is no small thing when construing an act of Parliament to depart from the literal meaning of the words chosen by the draftsman. As Gibbs CJ pointed out in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304:

> "… it is not unduly pedantic to begin with the assumption that words mean what they say … . … If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking 'nothing remains but to give effect to the unqualified, words' … ".

There are, however, exceptions. The Chief Justice went on:

> "There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case … ."

[77] The same point was expressed by Mason and Wilson JJ in their joint judgment (320):

> "Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute".

Their Honours also said (321):

> "… when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."

[78] The point was taken a little further by McHugh J in *Mills v Meeking* (1990) 169 CLR 214. His Honour thought that (at 242):

> "… when the literal meaning of a provision gives rise to an absurdity, injustice or anomaly, … a court may be entitled to disregard the literal meaning"

and that a court is not:

> "… bound by the literal or grammatical meaning of a statutory provision unless that meaning produces an irrational result".

[79] Muir JA in *Ravenscroft v Nominal Defendant* [2007] QCA 435 at [36] thought that McHugh J's judgment was:

> "… indicative of a discernible shift towards a more active approach to fulfilling a perceived legislative intention … ".

[80] I do not consider that the result of construing s 222(2)(c) literally, by denying a right of appeal against an order for costs where a defendant pleads guilty, irrational. I do consider that such a result would be anomalous, for reasons I will provide, and as giving rise to injustice if, in a case such as the present, there were no right of appeal. A court is therefore entitled to depart from the literal meaning. I accept the force of Fraser JA's reasons and the authorities referred to by his Honour. They indicate that the course of construction which I think appropriate in this case should be embraced with a degree of hesitation and only when a thorough examination of the text of the legislation and its intended purpose satisfies the court that Parliament could not have intended the words it chose to have their literal meaning.

[81] As Fryberg J pointed out in his (dissenting) judgment in *Coulter v Ryan* [2007] 2 Qd R 302 at 316, s 222(2) lists exceptions to the right of appeal conferred by subsection 1, and assumes that the items in the list would fall within the ambit of the right of appeal in its absence. His Honour also pointed out that s 222(2)(b) assumes that a right of appeal in respect of an order for costs is conferred by subsection 1.

[82] There is some conformity in the subject matter of each of s 222(2)(a), (b), and (c). By (a) a person may not appeal against a conviction made in a summary way under s 651 of the *Criminal Code*. That section is concerned with summary offences to which a defendant pleads guilty before a judge dealing with indictable offences, and applies only where there is a plea of guilty to the summary offences. The subsection prohibits appeals to the District Court against a conviction entered on the plea of guilty.

[83] Section 222(2)(b) precludes a complainant from appealing against an acquittal of an indictable offence determined summarily. It equates the summary acquittal to a jury verdict of "not guilty" after a trial on indictment.

[84] Section 222(2)(c), as I mentioned, deals with cases in which the defendant pleads guilty. It prevents a defendant appealing his conviction.

[85] It is to be noted that there is no consistency of language in the three paragraphs of s 222(2). In (a) the prohibition is expressed to be against appealing particular orders. In (b) the result is achieved by specifying the orders which may be appealed against. In (c) there is a specification of the available grounds of appeal, but not the orders against which an appeal may, or may not, be brought.

[86] It is apparent that the paragraphs are concerned with prohibiting appeals against convictions or acquittals where there is an obvious reason for the prohibition. A person who pleads guilty should not sensibly be permitted to appeal against his conviction. That consideration is the subject of paragraphs (a) and (c). Paragraph (b) is concerned to protect a defendant acquitted of an indictable offence tried summarily against a prosecution appeal which could not have been brought against his acquittal by a jury.

[87] The subject matter of the paragraphs is demonstrably not costs. Subsection 222(2)(c) should be understood as a prohibition on appeals against conviction by a defendant who pleaded guilty. It does not extend to any other prohibition.

[88] The result contended for by the applicant is anomalous. There are rights of appeal (conditional in most cases upon the grant of leave) against costs orders made by all courts save, if the applicant's submission is right, the Magistrates Court exercising summary criminal jurisdiction where there is a plea of guilty. The rights of appeal are:

- from a judgment in the Trial Division of the Supreme Court to the Court of Appeal, with leave of the judge who made the order – s 253 of the *Supreme Court Act* 1995 (Qld);
- from a judgment of the District Court to the Court of Appeal by leave from that court pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) – *Cameron v Nominal Defendant* [2000] QCA 137;
- from the Magistrates Court exercising civil jurisdiction to the District Court by leave of the District Court – s 45 of the *Magistrates Courts Act* 1921 (Qld); and
- from the Magistrates Court exercising criminal jurisdiction to the District Court pursuant to s 222 of the *Justices Act* where the order for costs made are part of the final disposition of the complaint – *Coulter*.

The applicant wants to add as a further exception to the last category, "where the defendant has not pleaded guilty."

[89] There is no rational basis for this further exception to a right of appeal against *costs orders*. There is no discernable reason why a plea of guilty should deprive both defendant and complainant of the right to question an order for costs. The

prohibition is incongruous and would distort the uniformity of rights to appeal costs orders which I have described.

[90] I note the force of the observation made by Fraser JA that Parliament may have considered that the scope for injustice, in the making of the costs order in cases where a defendant pleads guilty to a simple offence, was too small to justify a right of appeal. For my part I think that unlikely. I consider that the abrogation of a right to appeal against costs effected by the literal terms of s 222(2)(c) was unintended. I think it unlikely that Parliament intended to preclude a party who had suffered particular injustice by virtue of a costs order from complaining to a District Court Judge. It is, I think, likely that the draftsman of the subsection was concerned to prevent appeals against conviction by those who had pleaded guilty and used emphatic language to achieve that result without realising that the consequence was to take away a right of appeal that in some few cases may be necessary to avoid injustice.

[91] I therefore conclude that s 222(2)(c) should be construed as applying only to appeals against orders for conviction, or convictions.

[92] The appeal to the District Court was therefore competent. There is no utility in granting leave to appeal to consider a point which is without substance. The remaining grounds of appeal which leave is sought to argue are all complaints that Judge Durward should not have interfered with the discretionary order for costs made by the Magistrate and that no error, of the kind described in *House v The King* (1936) 55 CLR 499, existed.

[93] The Magistrate gave no reasons for her refusal to award professional costs but there are indications in the exchanges with Ms Stockall of what the reasons might have been. They were:

- the Council was engaged in "revenue raising";
- the court was being asked to engage in "rubber stamping";
- the Council could have proceeded by way of infringement notice and referral to the Registry for collection of the fine;
- other local authorities adopted that course and did not proceed by way of complaint and summons.

[94] The Magistrate did not address the points made by the Council in support of an order for professional costs. They were:

- the Council had incurred professional costs in preparing the complaints, preparing the prosecution for costs and appearing at court;
- the Council had a statutorily recognised right to proceed by way of complaint and summons;
- such proceedings brought a speedier payment of fines than the procedures of the Enforcement Act;
- the imposition of fines by the court and their connection pursuant to court order operated as a deterrent against motorists who occupied designated parking spaces for long

> periods at a time without paying the prescribed fees which the Enforcement Act remedies did not provide.

[95] The High Court (Mason CJ, Dawson, Toohey and McHugh JJ) in *Williams v Spautz* (1992) 174 CLR 509 at 519 pointed out that:

> "It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences … ."

The jurisdiction which her Honour was asked to exercise was, no doubt, a humble one. It involved the *ex parte* determination of parking infringements by a number of people on a "bulk" basis. It was, nevertheless, the court's quasi-criminal jurisdiction which had been regularly invoked by the Council and should have been exercised, without complaint, by the Magistrate.

[96] Her Honour's remarks appear to convey an opinion that the court should not have been bothered with the respondent's complaints. That seems to be the purport of the remarks about "rubber stamping" and the praise given to other Councils for utilising the Registry rather than the court. The High Court's admonition that courts should exercise their jurisdiction was, accordingly, disregarded.

[97] *Williams* (at 522) is authority for the proposition that it is no abuse of process if a litigant with a genuine cause of action prosecutes it. The respondent had a complaint and an expressly recognised statutory right to prosecute it in the Magistrates Court. He should not have been criticised for doing so.

[98] The fact that the respondent might have proceeded by way of the *Enforcement Act* is irrelevant. It had a right to proceed either by way of that Act or the *Justices Act*. It was not for the Magistrate to attempt to influence its election. Her Honour's preference for the *Enforcement Act* was not a basis for depriving the respondent of an order for costs to which, as a successful litigation, it was *prima facie* entitled.

[99] In *Latoudis v Casey* (1990) 170 CLR 534 McHugh J said (566-7):

> "An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees … reasonably incurred in connexion with the litigation … . The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the cost of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory."

[100] His Honour also remarked (568):

> "But, despite the differences between civil and criminal proceedings, once the real issues in the summary proceedings are identified, there is no difficulty in applying in such proceedings principles akin to those applicable to the making or refusing of orders for costs in civil cases."

Though costs in summary criminal proceedings do not follow the event as they do in civil proceedings, a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for payment of his costs because it is just and reasonable that the informant should reimburse him for his liability to pay costs which have been incurred in defending the prosecution; *Latoudis* at 569. The same observation applies, I apprehend, to successful prosecutors.

[101] The Magistrate ignored the point, advanced by Ms Stockall, that the Council had incurred professional fees for which it sought reimbursement by the order for costs. Consistently with the order for payment of costs of court the Magistrate should have ordered professional costs. They were required as a partial indemnity of the successful complainant. It was not "revenue raising" to seek reimbursement for expenses actually incurred.

[102] In *Schaftenaar v Samuels* (1975) 11 SASR 266, referred to with apparent approval in *Latoudis* by Toohey J (at 564) and McHugh J (at 568), Wells J identified circumstances which courts of summary jurisdiction might consider when making orders for costs. Relevantly they were (274-275):

> "(2) The discretion must be judicially exercised; that is, the court cannot act arbitrarily or upon the ground of some misconduct wholly unconnected with the prosecution, or of some prejudice. …
>
> (3) The court may act upon any facts connected with, or leading up to, the prosecution which have been satisfactorily proved or which have been observed in the progress of the case.
>
> …
>
> (5) In the exercise of the discretion, there is no question of onus… . A successful party has, in the absence of special circumstances, a reasonable expectation of obtaining an order for payment of costs … . The court should not, however, exercise the discretion against the successful party 'except for some reason connected with the case'."

[103] It is of course well established that the conduct of a litigant which increases the scope of litigation, or its costs, or which places upon the opposing party a burden which he ought not to bear in connection with the litigation, may suffer an adverse costs order as a consequence. It may have been that principle which the Magistrate had in mind when referring to "revenue raising", and to the alternative mode of proceeding, but the principle has no application to the present facts. The prosecution was conducted, as far the material shows, economically and efficiently. The amount sought for professional costs was modest. No unnecessary process was shown to have been involved and no unnecessary costs incurred which were sought against the applicant. The prosecution was a perfectly ordinary one conducted in the usual way. The Magistrate's objection appears to have been to the prosecution itself, and that objection was misguided.

[104] A remark in the judgment of Lord Cave in *Donald Campbell and Co v Pollak* [1927] AC 732 at 810 is apposite:

> "… the trial judge in that case had taken action, not upon materials which emerged in the trial itself, but upon his personal view that no trial should properly have been insisted upon: and in such circumstances there may well have been ground for holding that he had not really exercised his discretion."

[105] There was no reason to doubt the respondent's assertion that proceeding by way of complaint and summons would bring a speedier recovery of the fine than proceeding by way of infringement notice and recovery through the Registry. The *Enforcement Act* contains many provisions by which an offender may obtain an

extension of time for payment or commute to it community service. By contrast a fine imposed by the court may be recovered by execution, or levy and distress. Section 161 of the *Justices Act* preserves that mode of recovery.

[106] Nor was there reason to doubt the contention that curial proceedings offered a form of deterrence which the Registry would not afford.

[107] The Magistrate misconceived the basis on which the discretion as to costs should have been exercised. Her Honour did not exercise her discretion judicially but arbitrarily and upon grounds unconnected with the prosecution. Extraneous considerations were allowed to influence the discretion which failed to address the relevant facts advanced by the respondent in favour of the award. Those errors were amenable to appeal, as Judge Durward explained. There is no reason to doubt the correctness of his Honour's judgment. An award of professional costs, in the modest sum requested, could not have been refused on any reasonable basis.

[108] The application for leave to appeal should be refused, with costs.