SUPREME COURT OF QUEENSLAND

CITATION:	*Graham v Magistrate Pinder* [2014] QSC 114
PARTIES:	**NOEL JAMES GRAHAM** (applicant) **v** **MAGISTRATE PINDER** (respondent)
FILE NO/S:	SC No 194 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	20 and 21 May 2014
DELIVERED AT:	Cairns
HEARING DATE:	20 May 2014
JUDGE:	Henry J
ORDERS:	**1. The decision of the respondent of 7 May 2014 be set aside.** **2. The matter be mentioned in the Magistrates Court at Cairns on a date to be fixed by the coordinating Magistrate at Cairns and proceed thereafter according to law.** **3. No order as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NATURE OF HEARING – CROSS-EXAMINATION – where the applicant seeks to set aside the respondent's order of 7 May 2014 – where the applicant claims the respondent breached the rules of natural justice by failing to afford procedural fairness to the applicant by denying him the right to pursue an application to cross-examine witnesses at committal – where the applicant claims there was a denial of procedural fairness by the respondent directing a hand-up committal in the absence of a prosecution response to the defence communication regarding cross-examination – whether the applicant was denied procedural fairness – whether the respondent's order went beyond the powers of a Magistrate ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – where the

applicant seeks an order the respondent pay the applicant's costs of and incidental to the application – where the respondent played no active role in the application – whether the respondent engaged in gross misconduct warranting judicial discretion to award costs against the respondent

Judicial Review Act 1991 (Qld), s 20, s 49
Justices Act 1886 (Qld), s 83A, s 103B, s 110A, s 110B
Magistrates Act 1991 (Qld), s 51
Uniform Civil Procedure Rules 1999 (Qld), r 681

Ex Parte Blume; re Osborn (1958) 58 SR (NSW) 334, cited
Kioa v West (1985) 159 CLR 550, cited
Reed v Director of Public Prosecutions (Qld) [2008] QCA 123, cited
The Magistrates' Court of Victoria at Heidelberg v Robinson & Anor (2000) 2 VR 233, applied
The Queen v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13, applied

COUNSEL: KT McCreanor for the applicant
GP Sammon for the respondent

SOLICITORS: O'Reilly Stevens Lawyers for the applicant
Crown Law for the respondent

HENRY J: This application for a statutory order of review seeks to set aside a Magistrate's order of 7 May 2014, listing criminal charges against the applicant for a full hand-up committal proceeding pursuant to s 110A of the Justices Act.

The application, filed 13 May 2014, was first before me on 14 May 2014. On that occasion, a lawyer of the Crown solicitor appeared for the respondent, indicating, as is the usual convention, that the respondent would abide the order of the court. He sought only to be heard as to costs. Orders were made excusing the further attendance and participation of the respondent and/or his legal representatives but preserving the respondent's right to be heard.

An appearance was also made by a legal representative of the Police Service which is prosecuting the charges below but which had not been named as a party. That practitioner appeared under the mistaken understanding the applicant sought to join the Police Service as a party. It did not. After being given time to take instruction, the legal representative of the Police Service indicated the service did not intend to apply to be made a party to the application. Given the interest of the Police Service in the decision it would likely have been successful in an application under s 28 of the *Judicial Review Act* 1991 (Qld) to be made a party. Its decision not to do so heralded the compelling strength of the application which proceeded to hearing before me today.

The novel absence of an adversary to the applicant arguing in support of the decision below was unfortunate. However, the applicant appeared to approach the conduct of the application recognising its special obligation to assist the court in these circumstances, by identifying and addressing any considerations potentially adverse to its application

Relevant legislation and practice directions

Section 103B of the *Justices Act* confers upon a Magistrate overall supervisory responsibility for the committal process, including the setting of timetables to the extent not provided for by practice directions. Section 110A contains a presumption that where the prosecution tenders and the Magistrates Court admits a written statement of a witness, the witness must not be required to appear to give evidence unless the prosecution and defence agree the witness will be present to be cross-examined or the witness is required to do so in consequence of a direction by a Magistrate pursuant to s 83A(5AA). Section 110B(1) provides such a direction may only be given if there are substantial reasons why, in the interests of justice, the maker should attend to give oral evidence or be made available for cross-examination.

An application for such a direction may be made only if the three requirements of s 110B(3) are complied with. Firstly, the applicant must write to the prosecution, identifying the witness or witnesses the application will relate to, and indicating the general issues relevant to the application and the reasons to be relied on to justify the calling of the witness to give oral evidence. The time within which such correspondence is to be sent to the prosecution is not stipulated in the section, but the correspondence must nominate a time of not less than seven days within which the prosecution should respond. Secondly, a prosecution response must be received, or if not received, the nominated time for its receipt must have passed. Thirdly, the abovementioned correspondence and any response must be filed with the application.

Section 110B(7) provides:

> "An application for a direction under s 83A(5AA) must be filed and served on the other party or parties before the date set by the Court or by practice direction, and in any event, if the Court sets a date for the commencement of the hearing of evidence in the committal proceeding, not later than that date."

Magistrates Court Practice Direction 9 of 2010 refers inter alia to a process referred to as "case conferencing". It stipulates at paragraph 5 that case conferencing must take place between the Prosecution and the defendant's legal representatives prior to the "committal callover".

As to the committal callover, Practice Direction 10 of 2010 at paragraph 10.2 provides that at the so-called committal callover:

> "If the Court is not advised that the matter is to proceed by way of ex officio indictment or by way of consent committal for sentence then a Full Brief of evidence is to be prepared and delivered within 35 days and the matter is to be adjourned for a committal mention to a date no earlier then [sic] 49 days."

Paragraph 11 of that practice direction contemplates that, if sufficient reason exists, the court may allow for multiple further committal mentions. Examples of circumstances in which that might occur include delays in the acquisition of relevant evidence and delays in the assessment of an application for Legal Aid. The practice directions contemplate the "committal callover" is the event at which events crystallise and, if the matter is not to resolve by way of ex officio proceeding or a consent committal, a full brief will have to be prepared. Thereafter, the process is monitored at a "committal mention" or mentions, leading ultimately to the committal proceeding occurring in one form or another.

As to the form which it might take, Practice Direction 12 of 2010 provides at paragraph 6:

> "If at the Committal Mention the Court is not advised there is to be an Application to have a witness attend and give evidence at the committal hearing, the matter is to proceed that day as a s 110A committal"

Paragraph 7 of the direction contemplates that, if there is to be such an application, the matter is to be adjourned for the application to be heard on a date no earlier than 21 days time, and that in the interim the defence will serve upon the prosecution the relevant correspondence under s 110B(3)(a) within seven days of the committal mention, giving the prosecution 7 days to respond pursuant to s 110(3)(b).

It also provides at 7.3:

> "The Defence is to file an application under s 110B(7) and s 83A in the form set out in Annexure A to this Practice Direction within five days of the last date for the Prosecution response."

The balance of the practice direction in effect provides that if the application succeeds, then the matter will be adjourned to a date no earlier than 28 days for committal hearing. If it is unsuccessful, then the matter will immediately proceed as a s 110A committal.

The reference to a s 110A committal in the context of Practice Direction number 12 is to what has long been known as a full hand-up committal, that is to say, committal proceedings in which statements of witnesses and exhibits are tendered and admitted, but no oral testimony is given.

Background

The applicant is charged with one count of trafficking in cannabis, one of possessing money obtained from trafficking, two counts of possession of cannabis with a circumstance of aggravation, two counts of supply cannabis, two counts of possession of cannabis, one count of possession of cocaine and one count of possession of THC. The date range in respect of the trafficking charge is 1 June 2012 to 31 January 2013. The dates for the rest of the charges fall towards the end of that time span.

The applicant's first appearance before the Magistrates Court in respect of these charges was on 31 January 2013. The second appearance was on 26 April 2013, at which time the matter was adjourned to a committal callover to occur on 22 May 2013. On 3 May 2013, Mr Graham's solicitor contacted police prosecutions for the purpose of a case conference and it was confirmed the matter would not resolve.

The committal callover to which Magistrates Court Practice Direction 10 of 2010 refers then proceeded on 22 May 2013. The respondent ordered that the brief of evidence be provided by 10 July 2013 and the defence correspondence seeking consent to cross-examine witnesses be sent to police prosecutions by 17 July 2013. The matter was listed for committal mention on 17 July 2013.

In referring to the subsequent appearances as committal mentions, I do so in accordance with the language of the practice direction scheme. The description of the subsequent appearances in the affidavit material before me does not always adopt that phraseology.

The first committal mention ensued on 17 July 2013. The court was informed the brief of evidence had still not been provided and the respondent ordered the investigating officer to file and serve an affidavit explaining the non-compliance with the direction of 22 May.

On 23 July 2013 a partial brief of evidence was provided by police to the applicant's solicitor. It consisted of 33 witness statements and 81 exhibits. On 5 August 2013, the applicant's solicitor received the affidavit of the investigating officer. It is in evidence in this application. It contains a lengthy account of the complexity of the matter and the abundance of additional evidence gathering that was still underway.

The second committal mention occurred on 7 August 2013. The matter was adjourned, pending provision of material, to 30 October 2013. On 24 October 2013, the applicant's solicitor, against a background of other correspondence I have not detailed, again corresponded by facsimile transmission with police prosecutions, requesting disclosure of the details of the outstanding materials and the time frame for its delivery.

The third committal mention occurred on 30 October 2013. Police prosecutions told the respondent there were still five folders of new material to be disclosed, financial analysis documents to be disclosed and there were issues lingering in respect of the indemnifying of witnesses. The matter was adjourned to 22 January 2014. On 16 January 2014, an email from police prosecutions to the applicant's solicitor advised further prosecution material was available for collection, saying "the material is voluminous (four arch lever folders), therefore you may need assistance to collect it". On 21 January 2014, the applicant's solicitors emailed police prosecutions, requesting receipt of material listed in the completed index to brief that had not been received, namely eight witness statements and 15 exhibits.

Committal mention number 4 occurred on 22 January 2014. The respondent declined the prosecution's request for a further six month adjournment in order to provide other statements and exhibits and ordered all supplementary material and financial analysis documents be provided within 10 days. The matter was adjourned for further mention on 12 February 2014. On 30 January 2014 the applicant's solicitors were advised supplementary material was available for collection from police prosecutions but no financial analysis material would be forthcoming.

Committal mention number 5 occurred on 12 February 2014. The respondent ordered the investigating officer to file an affidavit, outlining the reasons for the delay in providing the financial analysis material and the matter was made returnable on 26 February 2014.

Committal mention number 6 occurred on that date. The respondent further adjourned the matter to 26 March 2014, because the brief of evidence still remained incomplete. The size of the brief was such that the applicant's solicitors engaged a printing business to compile and copy the brief. That process involved some delay, but not materially so. On 20 March 2014, the applicant's solicitors by facsimile correspondence to police prosecutions sought their consent to an extension of four weeks beyond the time frame allowed by the practice direction, with a view to seeking the prosecution's consent in respect of the cross-examination of witnesses. The correspondence implicitly was referring to the defendant's communication time frame stipulated under Practice Direction 12, paragraph 7.2, namely seven days after the relevant committal mention.

It was a completely unremarkable request to make. Indeed, it is likely to often be the case that the seven days contemplated by the practice direction will be insufficient for the defence to properly examine the brief of evidence provided, seek and provide legal advice,

make a decision as to whether or not the circumstances warrant the making of an application for leave to cross-examine and compile correspondence of the kind contemplated by s 110B(3)(a), correspondence which must, in effect, articulate, at least in summary form, the argument that in due course will be advanced before the court in support of the application. In any event, in this case I have no difficulty in accepting that seven days would have been nowhere near enough for the defence legal representatives to fulfil their professional obligations to their client.

It ought be appreciated that up to this time, the prosecution had had the benefit of whatever period of time it elected to give itself to prepare the case before it decided to charge the applicant, along with the better part of a year or so as the matter wallowed in the Magistrates Court while the court and the defence waited for the prosecution to do that which should have been done long before.

Against that background, it is unsurprising that on 21 March 2014 police prosecutions notified the applicant's solicitor by email that they did not object to the request for an extension of time for the correspondence pursuant to s 110B(3)(a) to be sent. Indeed, they foreshadowed that they would seek a longer time than was ordinarily allowed under the practice direction. Their explanation expressly identified the reason being "the size of the brief".

Significantly, also on 21 March 2014, the applicant's solicitors obtained a disc containing the financial analysis from police prosecutions. So it was that finally the brief had been completely provided. At this time about a year and two months had gone by since the first appearance and 10 months had gone by since the committal callover had ordered that the brief be provided.

On 24 March 2014, the printing business commissioned by the applicant's solicitors provided the applicant's solicitors with copies of the brief. Two days later, on 26 March, only five days since completion of receipt of the full brief, the seventh committal mention came before the respondent.

Committal Mention of 26 March

Events at the committal mention of 26 March unfolded as follows:

> *"Defence: ... Your Honour, in respect of Mr Graham's matter, which is extremely voluminous, we received a financial analysis last Friday. That's been the primary outstanding item. ... So far, your Honour, we've printed full bound folders in respect of that annexure and that's up to annexure C. It goes as far as annexure F, so we don't know how big it's going to be. We're printing it as we speak. The brief of evidence itself is at least 10 full bound folders. ... We've spoken to the prosecution in respect of the voluminous size of this material they've provided and we sought their attitude to seeking an extension of time to make application for consent to cross-examine. We are more than happy to extend the same largesse to our friends if your Honour is minded to grant us an adjournment for six weeks to get all this material printed and analysed so that we can then take advice from our client.*
>
> *Prosecution: That's not opposed, your Honour. In terms of prosecution's reply to the application to cross, we certainly would also require extension on the basis that ---*

> *Bench: Well, they need to file it first, so that's the starting point.*
>
> *Defence: Well, what we're seeking is six weeks to file it, your Honour.*
>
> *Bench: If it's necessary.*
>
> *Defence: Yes.*
>
> *Bench: Direct any application for leave to cross-examine witnesses be filed on or before 7 May 2014, and the charges are all remanded to 7 May for committal mention and his bail is enlarged and his further appearance is excused."* (transcription errors corrected)

The above interchange obviously involves misunderstandings on the part of all players; misunderstandings driven by lack of precision in the use of words referring to the procedural requirements. For instance, the applicant's solicitor said "and we sought their attitude to seeking an extension of time to make application for consent to cross-examine". What was there being referred to was the defence seeking out the attitude of police prosecutions to an extension of time within which the correspondence pursuant to s 110B(3)(a) ("the defendant's communication") was to be sent to police prosecutions. The defendant's communication is not an "application".

It is readily apparent that the reference of the defendant's solicitor to "seeking an extension of time to make application for consent to cross-examine" was a reference to the defendant's communication, and not to a s 83A(5AA) application, because he went on to explain that time was needed to have all material printed and analysed "so that we can then take advice from our client". This heralds a process well known to practitioners in any form of litigation that the evidentiary materials need to be reviewed and considered, and the client then consulted, before a decision is taken as to the course the litigation should take. In effect, as at this time, the defence were in no position to know whether or not an application seeking leave to cross-examine witnesses pursuant to s 83A(5AA) should or should not be made. Such applications are not made lightly. Lawyers should be given time to properly consider the making of such applications. That is in everyone's interests, including the court, so that the court is not bothered by unnecessary applications and applications which are advanced are those which are properly considered to have reasonable prospects of success by the practitioners advancing them.

A further example of lack of precision and consequent misunderstanding occurred when the prosecutor said, "In terms of prosecution's reply to the application to cross". The prosecution was not speaking, in fact, of any reply to an "application". It was speaking of its response ("the prosecution's response") pursuant to s 110B (3)(b). That is not a response to an application. It is a response to the defendant's communication which takes the form of correspondence, whether by a letter, email, or some other electronic form of written communication pursuant to s 110B (3)(a).

The prosecutor went on to say, "we certainly would also require an extension". That appears to be a reference to the need to have a longer nominated time than ordinarily would be the case pursuant to s 110B(4).

Thereafter, the respondent said, "Well, they need to file it, first, so that's the starting point." In point of fact, filing an application is not the starting point. The starting point in the context that was then under discussion was the starting point that the defence solicitor

was endeavouring to refer to in making reference to the need for an "extension of time to make application for consent to cross-examine". As already discussed, what he there actually meant was an extension of time within which to make the defendant's communication, as it is described in s 110B (3)(a).

Continuing this chain of unwitting error as between defence, prosecution and bench, the defendant's solicitor then went on to indicate that the defence was seeking "six weeks to file it, your Honour". It is true that the defendant's communication is ultimately filed with the court as an annexure to the application for leave to cross-examine, but that is not what the defence solicitor meant. He was plainly referring to needing six weeks before sending the defendant's communication to police prosecutions. His Honour's response, "If it is necessary", was obviously a reference to the question of whether or not an application would be necessary. But, the defence solicitor was referring to the question of whether or not a defendant's communication would be necessary. Against that remarkable chain of misunderstanding, there then followed the direction from the bench that any application for leave to cross-examine witnesses be filed on or before 7 May.

This direction seems to be at odds with the language of practice direction 12. It contemplates after the committal mention at which the court sets the timeframe within which an application for leave to cross-examine witnesses is filed that at the next appearance date, if an application has been filed, it will be heard and, if successful, the matter will be further adjourned, and if it is unsuccessful, the matter will there and then proceed as a s 110A committal. However, laborious compliance with the practice direction will not always produce a just result. It seems likely his Honour, given the history of this case, thought it wise to build in some flexibility as to what might occur on the later date, namely 7 May, at least to the extent of knowing on that date whether the matter ought then be listed on some subsequent date for either a full hand-up committal or for argument on an application for leave to cross-examine if such an application were filed.

In any event, it is plain on the material before me that the defence understood, following this appearance, that the timeframe set was a timeframe relating to the period within which the defendant's communication needed to be sent, not a timeframe within which the application seeking leave to cross-examine witnesses needed to be filed. That view was consistent with the obvious misunderstanding that is apparent from the transcript extracts to which I have referred. It is supported by a file note of the firm of solicitors acting for the applicant.

On 2 May 2014, the defendant's communication pursuant to s 110B (3) (a) was emailed to the prosecution. This was actually five days earlier than the deadline that the defence thought they were meeting according to the court order.

Committal Mention of 7 May

The eighth committal mention was back before the court on 7 May. The relevant transcript passages of what then transpired are as follows:

> *"Defence: ... Defence communication was sent to my friend's office on the 2nd of May and I was awaiting a response on that.*
>
> *Prosecution: ... I can confirm receipt of that – the response for the request will be provided by – within the seven days, namely, this Friday the 9th, your Honour.*

> *Bench: … hang on, when was the financial material supplied? That was what was outstanding.*
>
> *Defence: I can confirm that has been supplied. …*
>
> *Bench: But there was a direction about all of that occurring before now, and any application to be filed before today. …*
>
> *Prosecution: The application for what, sorry, your Honour?*
>
> *Bench: The application for leave to cross-examine.*
>
> *Defence: We filed our Defence communication – or we provided it to the file on the 2nd of May.*
>
> *Bench: … But there was an order made requiring the application for leave to be filed on or before today, it being the case that timetable had long since passed. … So when was all this material supplied?"*

The matter was then stood down for inquiries to be made by the parties who apparently did not predict the need to have their file ready to answer questions of this kind, consistent with their mutual misunderstanding of earlier events. The matter later resumed:

> *"Bench: Yep. So when did you get the brief?*
>
> *Defence: The financial analysis was received in electronic format on the 21st of March. At the time of the last mention … , on the 26th of March, six folders of that financial analysis had been printed.*
>
> *Bench: Yeah. No. He told me all of that. … I gave him the very significant indulgence of – how many weeks is that? Six weeks. Six weeks? … And directed any application for leave to cross-examine be filed on or before the 7th of May.*
>
> *Defence: So our understanding was that the Defence communication was to be provided by today.*
>
> *Bench: No. The application. Okay. So he's off for a hand-up committal. Can you tell me what date we get a 9 o'clock spot for the [indistinct]? [indistinct]. Yep. That'll be fine. That is remanded to 9 o'clock on the 14th of May 2014 for a hand-up committal. His bail is enlarged and then his personal appearance is required. Thank you."*

Following that mention, the defence corresponded with the court, with police prosecution's consent, on 9 May 2014 seeking a mention of the matter "with a view to remedying the error". The coordinating Magistrate referred the correspondence to the respondent and the parties were subsequently emailed by the court that the respondent advised the matter shall "remain listed as it is". In the face of this series of events, the present application was filed.

On one view, the applicant could have proceeded to file an application seeking leave to cross-examine witnesses. The difficulty presenting itself with that course, though, was the inherent uncertainty in where it stood as to the then status of the matter. It would not have

been the only party in a state of uncertainty. Its opponent, police prosecutions, would have confronted a difficulty in knowing whether or not the regime contemplated by s 110B(3) was still operative in the light of the listing of the matter for a full hand-up committal.

Legal Error?

The present application advances a variety of grounds. It contends, through its ground's 2 through 6 in various ways, that the order was, in essence, the product of legal error in that it was beyond the power of the magistrate to make it.

The essence of that argument is embodied in paragraph 19 of the grounds:

> "It is apparent from the scheme of the legislation that before an applicant can file an application to cross-examine witnesses at committal, he must first deliver a defence communication and then have received a prosecution response within timeframes specified for that response. In the event that the prosecution agree with the request set out in the defence communication, the court has no power to order that an application need be made. It is only if the prosecution do not respond within the specified period, or a reasonable agreed time, that the application can be filed."

The order of the Court on the 7th of May in setting the matter down for "hand-up committal" was likely meant to mean, and was understood by the applicant to mean, that the committal proceeding would occur on 14 May under s 110A with statements of witnesses simply being tendered without witnesses being called to give evidence under cross-examination. In effect, the order purported to stipulate the form the proceedings would take, that is, that no witnesses would give oral evidence.

It is true that the court cannot order the defence to file an application for leave to cross-examine, however it most certainly can impose a timetable within which such an application must be filed, if it is to be filed. That power to manage the timetabling of cases is an inevitable incident of a court's power to control its own processes and prevent an abuse of process. It would, for example, be an abuse of process for a party to postpone the inevitable by flagging an intention to make an application but forever delay in actually making it. A court has the power, in any event, pursuant to s 110B(7), to require an application seeking leave to cross-examine witnesses to be filed by a certain date and when that occurs the application "must" be filed by then, if it is to be filed at all.

In the circumstances as understood by the Magistrate, an application had to have been but was not filed by 7 May. On the face of it then, he was entitled to proceed to list the matter as one in which an application had not been filed, that is for a committal proceeding without witnesses being cross-examined, and that is what he did.

His order was not beyond power. However, the unfairness inherent in what transpired is self-evident.

Procedural Fairness?

This brings me to ground 1 of the application, which is that a breach of the rules of natural justice happened in relation to the making of the decision. It is submitted as part of that ground that a breach of the rules of natural justice occurred by reason of the respondent

failing to afford procedural fairness to the applicant by denying him the right to pursue an application to cross-examine witnesses at committals. It is also contended that in directing a hand-up committal in the absence of a prosecution response to the defence communication, the respondent failed to afford procedural fairness to the prosecution in that he did not permit them to indicate agreement or otherwise with the defence communication.

In *Reed v Director of Public Prosecutions* (QLD) [2008] QCA 123 at [38] Keane JA observed:

> "The entitlement to procedural fairness is concerned with ensuring the opportunity to be heard…"

The timetabling of committal proceedings, in whatever form they may ultimately take, inevitably involves a need for the parties to be heard. If that does not occur, how can the court possibly know of what timeframes are appropriate, having regard to the circumstances of the case? Those circumstances include not only the prosecution's state of readiness but also the defence's. The parties' state of readiness invariably will be affected by a multitude of variables the court will be unaware of in the absence of submissions.

In *Kioa v West* (1985) 159 CLR 550 at 584-585, Mason J observed:

> "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute… What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting."

The statutory framework and the practice directions to which I have referred set the tone in which considerations of procedural fairness fall to be considered in the present case.

The prosecution had taken an unacceptably long time to provide the full brief of evidence. The inordinate delay was no fault of the defence's. Against a background where the brief, in final form, was not provided until 21 March 2014 about eight months or so after the Court directed that to occur, and in circumstances where the brief was voluminous, it is entirely uncontroversial that the defence should have been afforded the period of time they sought before having to decide whether they would be making an application for leave to cross-examine and set in train that process by writing and sending the defendant's communication, pursuant to s 110B (3).

When this matter came before the learned presiding magistrate on 7 May, he was told of the defence understanding that by that date the defence were required to have sent their defendant's communication to police prosecutions, not required to have filed an application seeking leave to cross-examine. His Honour referred, of course, to the order he had previously made, which, on the face of it, was an order requiring the filing of the application by then.

What his Honour did not do was give any apparent consideration at all to what he was being informed by an officer of the court about the misunderstanding which had given rise to that order. A moment's consideration of what was being said would have revealed the force in the explanation being given. This was not a case in which the defence had, at any

stage, delayed the court's processes. They believed they had forwarded the defendant's correspondence in time. The defence were entitled to a fair and reasonable consideration of the substance and bona fides of what they were explaining to the Court. Had they been accorded that courtesy, the mutual misunderstanding of 26 March 2014 and the unjust consequence of ignoring it would have been appreciated.

Committal mentions are undoubtedly a frequent event in the Magistrates Court calendar but their frequency ought not cause the court to overlook the need to give proper consideration to what it is being informed of.

In this instance, the defence were, in effect, seeking to avoid a very significant adverse outcome by explaining what had occurred. No weight appears to have been given to the significance of that adverse outcome. A citizen was charged with serious criminal offences. The State took an inordinate amount of time to provide the brief of evidence against the charged citizen. The charged citizen was given a relatively short timeframe in order for his lawyers to properly consider the full brief and determine whether they would advise the citizen to pursue his undoubted right to argue that leave should be given to cross-examine witnesses and forward the defendant's communication to police. His lawyers mistakenly believed they were complying with that time frame. The unjust consequence of visiting that mistake upon the charged citizen was not considered.

The occasion may only have been a "committal mention", but from the perspective of the charged citizen, it was a very significant event, and his legal representative ought have been properly heard as to the substance and bona fides of what was a mere misunderstanding before the charged citizen's rights as regulated by the procedure mandated by s 110B were overridden by an order for a full-hand up committal.

In all of the circumstances, the ground of the application that the applicant was not afforded procedural fairness, that is, that a breach of the rules of natural justice occurred, has clearly been established and the application must succeed. The appropriate course is the matter continue to be heard according to law in the Magistrates Court but that the order of the respondent of 7 May 2014 be set aside.

Orders

My orders are:

(1) the decision of the respondent of 7 May 2014 be set aside.

(2) the matter next be mentioned in the Cairns Magistrates Court on a date to be fixed by the coordinating magistrate at Cairns and proceed thereafter according to law.

I will hear the parties as to costs.

(The decision as to costs was delivered ex tempore the following day)

Costs

The orders sought by the applicant in this matter included an order that the respondent pay the applicant's costs of and incidental to the application to be assessed on a standard basis. The court's power to make such an order was submitted to derive from s 49 of the *Judicial Review Act* but in any event it derives from part 2 of chapter 17A of the *Uniform Civil Procedure Rules* relating to costs of a proceeding.

The order sought is not in terms an order under s 49, although the respondent did not submit its provisions ought be disregarded. Section 49(2) identifies various considerations the court is to have regard to in considering such an application. Of those considerations, that most obviously in the applicant's favour is that there was a reasonable basis for the application. That is beyond doubt. The application succeeded. The success of the application is, in any event, relevant by virtue of r 681 of the *Uniform Civil Procedure Rules*, to which I will soon come.

Another consideration in s 49(2) emphasised by the applicant is the affect of the proceeding on the public interest. Without any way diminishing the importance of the rights of a charged citizen, this case related to a listing decision and does not involve issues of fact or law of any significant affect upon the public interest. The applicant's financial resources are also a consideration under section 49(2). The applicant submits he was a private citizen having to bear substantial costs in this case, but there was no material before me of any substance as to his financial resources.

The applicant placed particular reliance on r 681, and the general rule embodied in it that costs should ordinarily follow the event. However, this is hardly an ordinary case. Its unusual features are features of obvious relevance to the exercise of the discretion to award costs.

The starting point is that the respondent played no active role as a party in the review. In *The Queen v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, at 35-36, the High Court explained the rationale behind the convention that in a case such as the present, the tribunal which made the decision under review does not actively participate in the proceedings:

> In cases of this kind, the usual course is for a Tribunal to submit to such order as the court may make … If a Tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted.

The respondent complied with that convention.

In substance, the aspect of the respondent's position which attracts the applicant's argument that the respondent should pay his costs is that the respondent's wrong decision put the applicant to the cost of the review of that decision in order to put matters right.

There are strong discretionary considerations weighing against costs ordinarily being awarded against a Magistrate in such a situation. They include the need for the Magistrate's independent decision-making not to be eroded by fear of the pursuit of costs orders against the Magistrate. It is true, the decision-making below was administrative rather than judicial in character. However, while the Magistrate was exercising an administrative function, s 51 of the *Magistrates Act* 1991 (Qld) provides that in doing so, he had the same protection and immunity as a Magistrate in a judicial proceeding in

a Magistrates Court. The respondent did not go so far as to submit s 51 as a matter of law precluded the inclusion of the respondent as a party or precluded the making of a costs order against him (making it unnecessary for me to analyse the tension between section 51 of the *Magistrates Act* 1991 and the appropriateness of the joinder of a Magistrate as a party in judicial review proceedings, a subject not without potential difficulty - see, for example, *Fingleton v The Queen* (2005) 227 CLR 166). Rather, he in effect submitted s 51 informed the discretion and supported the submission that a costs order ought only be made against the judicial officer presiding below in the most exceptional of circumstances, regardless of whether the decision in controversy was administrative or judicial in character.

The nature of those exceptional circumstances were identified in an oft-quoted passage in *Ex parte Blume; re Osborn* (1958) 58 SR (NSW) 334 (cited by Mullins J in *Kingham v Yorkston* [2002] Qd R 595) as being where the Magistrate has been guilty of serious misconduct, corruption, gross ignorance, or has been perverse.

In the present case, there is no suggestion of serious misconduct, corruption, or perversity. The presiding Magistrate had made an order which was the product of a mutual mistake. He erred in later standing by that order and not properly hearing the parties when the mistake was sought to be explained, in circumstances where his summary adherence to the earlier order unfairly deprived the charged citizen of an important procedural safeguard in the committal process and where to have ordered as was sought would not have materially inconvenienced the Court or occasioned material delay in the proceedings.

As to gross negligence, it was considered in a detailed analysis of authorities by Brooking JA in *The Magistrates Court of Victoria at Heidelberg v Robinson & Anor* (2000) 2 VR 233. His Honour's analysis warned that traditional principles may provide less protection to Magistrates where there is a failure to have regard to the fundamental rules of natural justice. His Honour observed at 239-240:

> "In my view, the notion of serious misconduct or serious impropriety may be said to underlie the order of costs against inferior courts provided that it is understood that there may be misconduct or impropriety notwithstanding the absence of any *knowing* departure from elementary principles. By this, I mean that the person or persons constituting the court may be said to be guilty of serious misconduct or serious impropriety if they failed to observe some fundamental principle of justice, notwithstanding that they were ignorant of that principle. Some principles are so fundamental that it may be regarded as misconduct or impropriety in the necessary sense for an inferior Court not to observe them notwithstanding that the court is unaware of them. There is, I think, here to be drawn a distinction between rules of substantive law and the fundamental rules of natural justice. The superior court may be prepared to regard, even "an astounding blunder" in a matter of substantive law as not exhibiting "gross ignorance" in a necessary sense and, in the absence of "perversity", may decline to make an order for costs against the inferior Court, although a stage might be reached at which the rule of substantive law that had, albeit through ignorance, not been applied was so fundamental as to require the case to be viewed as one of misconduct or impropriety and so as to make an award of costs appropriate … In considering the suggestion of "gross ignorance", and what is to be excused, one cannot overlook the fact

> that the lay and honorary justice has given way to the legally qualified professional Magistrate. But in saying this I do not wish to suggest that a mere blunder should attract an award of costs: the approach should still be benign, or reasonably so, or a bona fide mistake has been made."

The denial of procedural fairness here, of course, resulted in a successful review. However, it would be inaccurate and unfair to his Honour to badge that breach of the fundamental rules of natural justice as involving gross ignorance in circumstances where the initial source for the error lay in the earlier appearance and the bona fide mutual mistake in which all players share blame.

There was nothing so exceptional in this unfortunate series of events as to warrant a conclusion that the respondent's conduct involved a quality so adverse as to bring it within the exceptional circumstances that would ordinarily justify an exercise of the discretion to order costs against a Magistrate in a proceeding of this kind.

The conclusion that there should be no order as to costs has the unfortunate consequence that the charged citizen, who has had to incur costs to correct procedural unfairness by the court, must bear his own costs. The unfairness of that result in situations like this has long been the subject of comment in other cases, see for example *Cummins v Mackenzie and Anor* (1979) 2 NSWLR 803 at 811. However, ultimately, costs being a creature of statute, that is a matter for the attention of the legislature.

My order is: No order as to costs.