SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall & Ors* [2014] QCA 129
PARTIES:	**THIESS PTY LTD** ABN 87 010 221 486 (appellant) **v** **INDUSTRIAL MAGISTRATE ELIZABETH HALL** (first respondent) **THE PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND, PRESIDENT D R HALL** (second respondent) **ADAM JOHN LOW** (third respondent)
FILE NO/S:	Appeal No 5811 of 2013 SC No 11568 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2014
JUDGES:	Margaret McMurdo P and Holmes and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be dismissed.** **2. The parties' submissions on costs be received by the court within 14 days of judgment delivery.**
CATCHWORDS:	MAGISTRATES – GENERALLY – POWERS AND DUTIES – GENERALLY – where the third respondent filed a complaint alleging that the appellant had breached obligations imposed by the *Workplace Health and Safety Act* 1995 – where the complaint contained charges expressed in the alternative – where the third respondent had not appealed a trial division judge's earlier decision in the same proceedings that summary charges could not be brought in the alternative so that the complaint was not in a form authorised by s 43 of the *Justices Act* – whether the principle of finality of judgment should preclude this court from revisiting that conclusion MAGISTRATES – GENERALLY – POWERS AND DUTIES – GENERALLY – where the third respondent filed a complaint

alleging that the appellant had breached obligations imposed by the *Workplace Health and Safety Act* 1995 – where the complaint contained charges expressed in the alternative – where the primary judge held that an industrial magistrate had an implied power to strike out part of the complaint where it was necessary to enable the court to act effectively within its jurisdiction, such a power not being inconsistent with the express powers of election and amendment contained respectively in s 43 and s 48 of the *Justices Act* 1886 – whether the case was one of incorrect joinder under s 43 of the *Justices Act* so as to enliven the express power to require election contained in s 43(3)(a), with an implied power to strike out the count not proceeded on – where the appellant had conceded below that s 43(3)(a) was not applicable – whether the point should nonetheless be decided

Criminal Code 1899 (Qld), s 567(1), s 567(2), s 568(6)
Justices Act 1886 (Qld), s 43, s 48
Workplace Health and Safety Act 2011 (Qld), s 28

R v Bartlett [1972] Qd R 337, cited
Bastin v Davies [1950] 2 KB 579, cited
Broome v Chenoweth (1946) 73 CLR 583; [1946] HCA 53, cited
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317; [2003] HCA 51, cited
Edwards v Jones [1947] KB 659, cited
Hayes v Wilson; ex parte Hayes [1984] 2 Qd R 114, cited
In re Clayton [1983] 2 AC 473, cited
Klein v Minister for Education (2007) 81 ALJR 582; (2007) 232 ALR 306; [2007] HCA 2, cited
Lawrence v Same [1968] 2 QB 93, cited
O'Brien v Komesaroff (1982) 150 CLR 310; [1982] HCA 33, cited
Power v Heyward [2007] 2 Qd R 69; [2007] QSC 26, cited
R v Bellman [1989] 1 AC 836, cited
R v Collins; Ex parte Attorney-General [1996] 1 Qd R 631; [1994] QCA 467, cited
Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57, cited
Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall & Ors [2013] QSC 130, related
Thiess Pty Ltd v President of the Industrial Court of Queensland & Anor [2012] 2 Qd R 387; [2011] QSC 294, related

COUNSEL: P Flanagan QC, with G Del Villar, for the appellant
No appearance for the first and second respondents
M Byrne QC, with P Matthews, for the third respondent

SOLICITORS: Ashurst for the appellant
No appearance for the first and second respondents
Department of Justice and the Attorney-General, Workplace Health & Safety Queensland for the third respondents

[1] **MARGARET McMURDO P:** This appeal should be dismissed. I agree with Holmes JA's reasons for concluding that Magistrate Hall rightly dismissed the appellant's application to strike out the third respondent's amended complaint and summons; that President Hall rightly dismissed the appellant's appeal from that decision; and that Boddice J rightly dismissed the appellant's application for review of President Hall's decision. I agree with the orders proposed by Holmes JA.

[2] **HOLMES JA:** The appellant, Thiess Pty Ltd, appeals against a decision of Boddice J[1] made on an application for review of orders made by the first and second respondents, respectively an industrial magistrate, Ms Hall, and President Hall of the Industrial Court of Queensland. Those orders were based on a conclusion that an industrial magistrate had power, where the prosecutor had elected to proceed with one of two counts described as alternatives in a complaint, to strike out the other. The third respondent was the complainant (the term by which I shall refer to him) in the Industrial Magistrates Court.

[3] Boddice J noted that it was common ground that s 43 of the *Justices Act* 1886, which deals with joinder of charges in a complaint, had not been complied with, the result of which was that s 48 of the same Act did not authorise any amendment of the complaint. Nonetheless, he held that the industrial magistrate had an implied power to strike out part of the complaint where it was necessary to do so for the court to act effectively within its jurisdiction; such an implication of power was not inconsistent with the express powers contained in s 43 and s 48. Thiess contends that his Honour erred in implying such a power and in holding that it would be consistent with s 48 of the *Justices Act* to do so.

The legislation

[4] It is necessary to set out the relevant sections of the *Justices Act*. Section 43 prescribes what may be contained in a complaint:

> "**43 Matter of complaint**
>
> (1) Every complaint shall be for 1 matter only, and not for 2 or more matters, except—
>
> (a) in the case of indictable offences—if the matters of complaint are such that they may be charged in 1 indictment; or
>
> (b) in cases other than cases of indictable offences—if the matters of complaint—
>
> (i) are alleged to be constituted by the same act or omission on the part of the defendant; or
>
> (ii) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or
>
> (iii) are founded on substantially the same facts; or

---

1 *Thiess Pty Ltd v Industrial Magistrate Elizabeth Hall & Ors* [2013] QSC 130.

(iv) are, or form part of, a series of offences or matters of complaint of the same or a similar character; or

(c) when otherwise expressly provided.

(2) When 2 or more matters of complaint are joined in the 1 complaint each matter of complaint shall be set out in a separate paragraph.

(3) At the hearing of a complaint in which 2 or more matters of complaint have been joined but which does not comply with the provisions of this section—

(a) if an objection is taken to the complaint on the ground of such noncompliance—the court shall require the complainant to choose 1 matter of complaint on which to proceed at that hearing; or

(b) if no such objection is taken to the complaint—the court may proceed with the hearing and may determine the matters of complaint, and may convict or acquit the defendant in accordance with such determination.

(4) If, at the hearing of a complaint, it appears to the court that a defendant may be prejudiced or embarrassed in the defendant's defence because the complaint contains more than 1 matter of complaint or that for any other reason it is desirable that 1 or more matters of complaint should be heard separately, the court may order that such 1 or more matters of complaint be heard separately."

[5] Section 48 confers the power of amendment:

"**48 Amendment of complaint**

If at the hearing of a complaint, it appears to the justices that—

(a) there is a defect therein, in substance or in form, other than a noncompliance with the provisions of section 43; or

(b) there is a defect in any summons or warrant to apprehend a defendant issued upon such complaint; or

(c) there is a variance between such complaint, summons or warrant and the evidence adduced at the hearing in support thereof;

then—

(d) if an objection is taken for any such defect or variance—the justices shall; or

(e) if no such objection is taken—the justices may;

make such order for the amendment of the complaint, summons or warrant as appears to them to be necessary or desirable in the interests of justice."

The beginning of the proceeding in the Industrial Magistrates Court

[6] The complaint, as it was originally brought, contained three sets of charges, each relating to the death of or injury to a Thiess worker. The first set of charges was as follows:

> "[T]hat on the 1st day of December 2008, at Woolloongabba in the Magistrates Court District of Brisbane **THIESS PTY LTD** being the relevant person on whom a workplace health and safety obligation prescribed by section 28(1) of the *Workplace Health and Safety Act 1995* is imposed, failed to discharge that obligation contrary to section 24(1) of the *Workplace Health and Safety Act 1995* in that being a relevant person the said **THIESS PTY LTD** failed to ensure that the workplace health and safety of others was not affected by the conduct of its business or undertaking.
>
> **Particulars**
>
> | | |
> |---|---|
> | Business or undertaking: | Construction work on the Eastern Busway Project |
> | Place of work: | Construction site on the corner of O'Keefe Street and Ipswich Road, Woolloongabba |
> | Others: | Tom Joseph TAKURUA, Jason Donald ROGERS, Mark Evan COKER, Anthony John FAULKNER, Jason Peter SMITH and Ian Laurence BROWNE |
>
> **The risk is the risk of death or injury to others including the risk of –**
>
> **(a) fatal crush injuries to Tom Joseph TAKURUA, and**
> **(b) leg fracture injuries to Jason Donald ROGERS, and**
> **(c) soft tissue shoulder injuries to Mark Evan COKER.**
>
> **The source of the risk emanates from the system of work adopted for installing concrete outer beams on Span number 3 of a bridge structure forming part of the Eastern Busway Project at the place of work, and includes –**
>
> **(a) the failure to install restraining brackets to the outer beam; and/or**
> **(b) the system of work adopted when installing a temporary walkway structure to the outer beam; and/or**
> **(c) the failure to adequately manage the risk of a fall from height to others working on a temporary walkway attached to the outer beam.**
>
> AND IT IS ALLEGED that as a result of the failure to discharge the workplace health and safety obligation Tom Joseph TAKURUA sustained injuries proving fatal.
>
> **IN THE ALTERNATIVE**
>
> That on the 1st day of December 2008, at Woolloongabba in the Magistrates Court District of Brisbane **THIESS PTY LTD** being a Principal Contractor on whom a workplace health and safety obligation prescribed by section 31 of the *Workplace Health and*

Safety Act 1995 is imposed, failed to discharge that obligation contrary to section 24(1) of the *Workplace Health and Safety Act 1995*.

Particulars

Prescribed Construction Work:	Construction work on the Eastern Busway Project
Place of work:	Construction site on the corner of O'Keefe Street and Ipswich Road, Woolloongabba
Persons:	Tom Joseph TAKURUA, Jason Donald ROGERS, Mark Evan COKER, Anthony John FAULKNER, Jason Peter SMITH and Ian Laurence BROWNE

The risk is ….

[The previous charge's particulars of risk and its source and the allegation of the resulting death of Mr Takurua were repeated.]

[7] The remaining two sets of charges were in the same form, and similarly framed in the alternative, but respectively alleged, as the result of the breach, injuries to Mr Rogers and Mr Coker.

[8] Before Industrial Magistrate Lee, Thiess applied to have the charges struck out or, alternatively, an election made in respect of the first set of charges and the striking out of the second and third sets of charges. The complainant then chose to offer no evidence on the second and third sets of charges, instead particularising the injuries to Mr Rogers and Mr Coker in the remaining charges as resulting from the relevant breach of obligation. The industrial magistrate gave leave to amend the complaint by excising the words "in the alternative" so that two distinct charges remained, one alleging the breach of s 28 of the *Workplace Health and Safety Act*, the other of s 31. Magistrate Lee described the inclusion of the words "in the alternative" in the terms used by Dixon J in *Broome v Chenoweth*,[2] as a "slip or clumsiness".

The first Industrial Court appeal

[9] An appeal to the Industrial Court was dismissed. President Hall of that court accepted Thiess' argument that the charges were not alternatives: they had different elements, the relevant defences entailed different considerations and neither constituted a lesser charge to the other. However, he held, the words "in the alternative" had no legal effect; they were mere surplusage which could be removed by amendment. Thiess brought an application for review of that decision, seeking an order in the nature of certiorari against President Hall. That application was heard by Applegarth J.[3]

The decision of Applegarth J on review

[10] Applegarth J reasoned that the inclusion of the words "in the alternative" rendered the complaint defective. Those words had legal consequences: absent objection by Thiess, it was exposed to conviction on one of the two alternative charges, while if the point were taken the complainant would have to choose which matter would

---

2 (1946) 73 CLR 583.

3 *Thiess Pty Ltd v President of the Industrial Court of Queensland & Anor* [2011] QSC 294.

proceed. The complaint did not comply with s 43 because the two matters were charged as alternatives. The remedy in s 43(3)(a) was premised on matters having been "joined", and the inclusion of the words "in the alternative" meant that that was not the case.

[11] Applegarth J's conclusion that charges framed in the alternative rendered the complaint non-compliant with s 43 appears to have rested on acceptance of two submissions by Thiess: that charges brought alternatively could not be said to be "joined"; and that there was a principle, described by Macrossan J (as he was at that time) in *Hayes v Wilson; ex parte Hayes*,[4] that alternative charges could not be brought in summary proceedings. As to the latter, his Honour set out this passage from Macrossan J's judgment:

> "It is said that the reason why a conviction cannot be entered in summary proceedings for a lesser offence than the one charged is because, under the ordinary summary procedure, a respondent is never called upon to answer two charges at the same time. I am excluding what might be done by consent or within the narrow exceptions expressly permitted by s. 43. In support of this proposition reference may also be made to the judgment of Lord Parker C.J. in *Lawrence v. Same* [1968] 2 Q.B. 93 especially at 97–99. For myself I would add that it must follow that not only is a respondent not called upon in the one proceeding to meet two separate summary charges expressly stated but, in a similar way, he is not called upon to meet supplementary or alternative charges not stated but lurking or hidden under the cover of a charge expressly set out.
>
> In summary proceedings the rule is against charging separate offences in the alternative although in this context it is necessary to note some special categories which are really only apparent exceptions to the rule.
>
> ...
>
> None of these exceptional cases however obscures the main principle that in summary proceedings charges may not be brought in the alternative."

[12] Because the complaint did not comply with s 43, Applegarth J concluded, the power to amend under s 48 was not available and President Hall had erred in concluding that it was. However, that was not a jurisdictional error (in contrast with the decision of the industrial magistrate to permit amendment) and certiorari ought not therefore be granted. Instead, Applegarth J addressed what he regarded as the magistrate's jurisdictional error by declaring that s 43 of the *Justices Act* did not authorise two matters of complaint to be pleaded in the alternative and that s 48 did not authorise, by way of amendment, removal of the words "in the alternative".

The further decision of the Industrial Magistrates Court

[13] Following that decision, Thiess applied in the Industrial Magistrates Court, this time before Industrial Magistrate Hall, to have the complaint and summons struck out. Applegarth J had observed in the course of his reasons that he expected that the complainant would elect as to which charge he would proceed with and invite the

---

4 [1984] 2 Qd R 114 at 139-141.

industrial magistrate to strike out the other charge. The complainant adopted that course. However, Thiess argued that s 43(3)(a) did not apply because the charges were not "joined", a proposition with which, it seems, the complainant did not argue. Instead, his counsel contended that the Magistrates Court had an inherent power to control its procedures which would allow it to permit the complainant to offer no evidence on what had previously been the alternative charge and then strike it out.

[14] Magistrate Hall had regard to the decision of the Full Court in *R v Bartlett*.[5] In that case, the magistrate had characterised a single charge of false representation by "oral and written statements" as duplex, but regarded it as nonetheless within s 43(1)(b)(ii) and (iii) of the *Justices Act*. W B Campbell J (as he then was), delivering the leading judgment, observed that, assuming the magistrate was correct in holding that the complaint was duplex, it would not have complied with s 43(2). Section 43(3)(a) provided, in the event of non-compliance with s 43 and objection taken, for the court to require the complainant to elect. Such an election did not amount to amendment of the complaint, so that expiration of the limitation period was irrelevant. Once such an election was made, the magistrate would have jurisdiction to proceed with the hearing.

[15] Magistrate Hall concluded that s 43(3)(a) also applied in the present case: this was a complaint where two matters were joined but the provisions of the section had not been complied with. Once the objection was taken, the prosecutor was required to elect. Section 48 did not give a power to amend, because the complaint did not comply with the provisions of s 43. However, the terms of s 43(3)(b) and s 43(4) indicated that there was some discretion as to the procedure to be adopted. Under s 43(3)(b), where no objection was taken, the court could proceed with the hearing, notwithstanding non-compliance with the section, while s 43(4) permitted a court to order matters to be heard separately, without reference to whether the complaint conformed with s 43. Her Honour concluded that the proper course was to proceed under s 43(3)(a) by requiring the complainant to elect. Alternatively, the court could, acting under s 43(4), proceed with one charge separately and allow the complainant to offer no evidence on the other.

The second Industrial Court appeal

[16] Again, the decision was appealed to the Industrial Court. President Hall identified as fundamental to Applegarth J's decision the proposition that the charges were to be regarded as alternatives and were not properly joined. His Honour had also accepted the further proposition that neither the power of amendment under s 48 of the *Justices Act* nor the power to put the complainant to an election under s 43(3)(a) was available; an acceptance which President Hall regarded as necessary to the decision. However, Applegarth J had remitted the matter with the intimation that after the complainant nominated which charge he wished to proceed with, he could invite the industrial magistrate to strike out the other charge. That intimation ought to be given effect.

[17] President Hall did not regard s 43(4) as applicable; it was concerned with the instance in which charges were properly joined, but there were reasons that they should not be heard together. Nor was he convinced that there was an inherent jurisdiction to put a complainant to an election. However, the complainant had argued that there was an implied power in the Magistrates Court to act as was

---

5 [1972] Qd R 337.

necessary, subject to statute and rules of court, in regulating its procedure. President Hall relied on the decision in *R v Bartlett* to conclude that acting on a complainant's election by striking out the charge which was not to proceed did not amount to amending a complaint; there was no inconsistency with s 48 which would preclude implication of a power to permit the prosecutor to elect.

The decision of Boddice J on review

[18] President Hall's decision was the subject of an application for review, resulting in the decision under appeal here. Boddice J noted the conclusion of Byrne J in *Power v Heyward*[6] that the Magistrates Court had, by implication, powers reasonably necessary to enable it to act effectively within its jurisdiction. There was, Boddice J said, no reason why the industrial magistrate would not similarly have such implied powers. It was common ground, he noted, that the circumstances which would give rise to the express powers set out in s 43(3) and s 48 of the Act did not exist and that s 43(4) of the Act did not apply. But the Act was silent as to any power to strike out part of the complaint. To imply the existence of such a power in the Industrial Magistrates Court did not, then, run contrary to any express provision. Where a court had a jurisdiction it was reasonably necessary to ensure fairness and prevent abuse of process that the power to strike out be available to it. Such a power was, accordingly, reasonably necessary to enable the Industrial Magistrates Court to act effectively within its jurisdiction.

[19] Thiess had argued that an implied power to strike out part of the complaint would be inconsistent with the requirement of s 43 that a complaint not contain more than one matter, except in the specified cases. However, that did not, Boddice J considered, prevent the implication of such a power; it was not necessary to interpret s 43 as containing the only circumstance in which the court could act in relation to a complaint which did not comply with the section.

[20] Thiess had also referred to *Edwards v Jones*.[7] In that case, Lord Goddard CJ had referred to a procedure for election and observed that once an election had been made "the information should be amended by striking out the second offence charged";[8] indicating, it was submitted, that to strike out in those circumstances was to amend. Boddice J did not accept that proposition. He concluded that Thiess had failed to establish that President Hall erred in concluding that the Industrial Magistrates Court had an implied power to strike out the part of the complaint which the complainant had indicated he would not rely on.

Thiess' arguments in this court on implication of a power to require election

[21] Thiess' grounds of appeal were as follows:

> "1. The learned judge erred in holding that, by necessary implication, the Industrial Magistrates Court had power to strike out a charge in the amended complaint of the Third Respondent dated 27 November 2009 ('the amended complaint') in circumstances where:
>
> (i) The amended complaint did not conform to section 43 of the *Justices Act* 1886 (Qld) ('the Act') because the charges were expressed to be in the alternative;

---

6 [2007] 2 Qd R 69.
7 [1947] 1 KB 659.
8 At 662.

(ii) The provisions of subsections 43(3) and 43(4) of the Act did not apply; and

(iii) The amended complaint could not be amended under s 48 of the Act so as to remove the words 'in the alternative'

2. The learned judge erred in holding that it would be consistent with section 48 of the Act to imply a power to strike out a charge in the amended complaint."

[22] Thiess contended that it was not reasonably necessary for the Industrial Magistrates Court to possess a power to strike out a charge in the alternative where the complainant had elected not to proceed on it. Charges expressed to be in the alternative were not authorised under s 43, as Applegarth J had held. Apart from the mechanism for requiring the complainant to elect in s 43(3)(a) where matters were joined, no part of s 43 authorised a court to hear and determine a complaint that infringed the rule in s 43(1). The *Justices Act* having identified the circumstances in which the court could require an election, there was no necessity to imply a further power to cure non-compliance with s 43 by acting on the complainant's election and striking out the alternative charge.

[23] That conclusion was reinforced by s 48, which permitted amendment only for a defect in substance or in form other than non-compliance with the provisions of s 43. The ordinary and natural meaning of "amendment" was an alteration to the complaint, which would include striking out parts of it; Lord Goddard CJ's reference in *Edward v Jones* to amendment by striking out supported that view. Boddice J had erred by assuming that it was reasonably necessary to have the power to strike out a complaint in order to prevent abuse of process or ensure fairness and then considering whether it was positively precluded by s 43 or s 48. In any event, a power to strike out to prevent abuse of process or to ensure procedural fairness did not necessitate the implication of a power to strike out complaints on other bases.

[24] Consistently with the presumption that legislation would not encroach on common law rights and freedoms without clear language, the *Justices Act* should be construed against implying a power to allow a prosecution to continue notwithstanding that the charges were not authorised by s 43 and were not capable of amendment under s 48.

The starting point for the appeal

[25] When the appeal first came on for hearing, Thiess was invited to make submissions about the correctness of Applegarth J's construction of ss 43 and 48 of the *Justices Act*. Its primary position was that this court had no power to reopen his Honour's decision, and it would in any case be an abuse of process for the complainant to seek to re-litigate the declarations, having chosen not to appeal them and having proceeded in later litigation on the basis that they were correct. (The complainant did not advance any specific argument to counter that position.) Should its argument as to the finality of Applegarth J's decision not be accepted, Thiess maintained the correctness of the decision and orders, essentially reiterating his Honour's reasoning.

[26] In my view, Thiess' argument that this court cannot now act so as effectively to overturn Applegarth J's orders must be accepted. This court should deal with the appeal before it on the basis of those orders: that is to say, that the two matters of

complaint could not be pleaded in the alternative and that the words "in the alternative" could not be removed from the complaint. Having said that, however, I think it proper to record, with deep respect, my views, which differ from Applegarth J's conclusion that the complaint did not conform to the requirements of s 43.

[27] Thiess submitted, at all stages, that the charges were not alternatives. That seems correct: Thiess could, in theory, have been convicted on both charges, since they involved breaches of different obligations (although issues of double punishment might arise under s 16 of the *Criminal Code*). But if the charges were not alternatives, the use of the phrase "in the alternative" did not make them so. With respect, I agree with the President of the Industrial Court's characterisation of the words as "surplusage". Their inclusion might have amounted to a defect in the complaint, but it did not follow that the complaint was not in a form authorised by s 43. Section 43(1)(b) permits the joining of matters of complaint where they "are founded on substantially the same facts". That was the case here. Section 43(2) requires that when two or more matters are joined in one complaint, each is to be set out in a separate paragraph; that was done here.

[28] Applegarth J's reasoning as to why the complaint did not conform with s 43 depended heavily on the premise, derived from observations by Macrossan J (as he was at that time) in *Hayes v Wilson; ex parte Hayes*,[9] that alternative charges could not be joined in summary proceedings. *Hayes* was a case of amendment under s 48(c) for variance between the complaint and the evidence adduced. The issue was whether the substituted offence was sufficiently cognate with the original to make the alteration an amendment for variance, as opposed to the substitution of a completely new charge. Macrossan J's judgment was in dissent, and neither of the judges who formed the majority expressed any view as to the correctness or otherwise of his Honour's views of the availability of alternative charges in summary proceedings.

[29] Macrossan J relied on two English judgments, that of Lord Goddard CJ in *Edwards v Jones*[10] and that of Lord Parker CJ in *Lawrence v Same*[11] for the proposition that

> "the reason why a conviction cannot be entered in summary proceedings for a lesser offence than the one charged is because, under the ordinary summary procedure, a respondent is never called upon to answer two charges at the same time".[12]

On that reasoning, it was held in both those cases that convictions of alternative offences could not stand: in *Edwards v Jones*, a conviction of driving without due care and attention where dangerous driving was also charged in a single information (or charge), and in *Lawrence v Same*, common assault where unlawful wounding was charged. However, that rationale was comprehensively rejected in *In re Clayton.*[13] The House of Lords disapproved what it described as obiter observations of Lord Goddard CJ in *Edwards v Jones* that two informations could not be tried together without consent,[14] and overruled *Lawrence v Same* and other judgments based on a supposed principle to the same effect.

---

9 [1984] 2 Qd R 114.
10 [1947] KB 659.
11 [1968] 2 QB 93.
12 *Hayes* at 140.
13 [1983] 2 AC 473.
14 Cf *Director of Public Prosecutions v Shah* [1984] 1 WLR 886, in which the House of Lords described Lord Goddard's observations on the point as "an important part of the court's *ratio decidendi*" in *Edward v Jones* (and no longer good law).

[30] Lord Roskill, in whose opinion the other members of the House of Lords concurred, explained that the relevant rule,[15] which read:

> "*Information to be for one offence only*...a magistrates' court shall not proceed to the trial of an information that charges more than one offence."

and its earlier legislative counterparts were directed to preventing duplicity in charges and consequent uncertainty. Indeed, his Lordship remarked, the charges in *Edwards v Jones* (contained as they were in a single information) clearly were bad for duplicity. However, he went on to observe,

> "there is no such uncertainty where two or more informations are properly laid against an alleged offender. He knows that he is charged as stated in each information".[16]

[31] In light of the House of Lords' disapproval of the earlier English authorities, Macrossan J's obiter remarks in *Hayes* as to the unavailability of alternative charges because two charges could not be tried together cannot now be regarded as persuasive. There is nothing in s 43 itself which would prevent the bringing of alternative charges in summary proceedings, provided that they met the conditions in sub-paragraphs (1)(b) and (2) of the section. No question of duplicity or uncertainty arises from the mere fact of charges being brought in that form; although of course, those issues might arise were alternative charges to "lurk", as Macrossan J put it, under cover of a single charge.

[32] *Bastin v Davies*[17] (which Thiess cited in support of its argument that alternative charges were impermissible) was just such a case. The respondent was charged in a single information with selling sausages which were not "of the nature … substance or … quality" required. This was not a case of duplicity, the court said, but of

> "uncertainty [which] arises when two or more offences are so charged in the alternative or disjunctively, for obviously such a procedure leaves it quite uncertain with which of those offences the defendant is charged, and the conviction, which must follow the information, would also leave it in doubt of which offence the defendant had been found guilty."[18]

That uncertainty, of course, arose from the inclusion of three alternative offences in a single information or charge; the identified difficulties do not arise where distinct charges are brought in the alternative.

[33] Thiess contended that the existence of s 568(6) of the *Criminal Code*, as an instance where Parliament had expressly permitted alternative charges to be brought in one initiating document, indicated that s 43 of the *Justices Act*, containing no equivalent express language, did not contemplate the bringing of alternative charges. I do not think that is a compelling argument, because in my view the source of the general power to bring alternative charges lies elsewhere in the *Code*. Section 567(1) of the *Criminal Code* prohibits the charging of more than one offence in an indictment except as expressly provided. Section 567(2) permits joinder of charges if they

> "are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose";

---

15 Rule 12(1) of the *Magistrates' Courts Rules* 1981.

16 At 488.

17 [1950] 2 KB 579.

18 At 581.

terms, which, it may be seen, are very similar to those in s 43(1)(b). Section 568(6) extends, rather than defines, that power: it permits the joinder of entering or being in a dwelling and stealing, stealing, and receiving charges as alternative counts, whether or not they meet the requirements of s 567(2). But it leaves untrammelled the broad power of joinder, whether charges be alternative or cumulative, contained in s 567.

[34] In *R v Collins; ex parte Attorney-General*,[19] this court accepted that the purpose of s 567(2) was that explained in *R v Bellman*,[20] which concerned the effect of a cognate English provision on the joinder of mutually exclusive, or alternative, counts. It was to

> "allow the joinder of multiple counts in the one indictment in an appropriate case 'so that the whole of the facts can be adjudicated upon by one jury'".[21]

So, for example, s 567(2) permits receiving to be adjoined as an alternative count, not only to stealing, but also to a mutually exclusive count of arson,[22] provided the counts fall within one of the exceptions in the sub-section. Other instances of alternative counts which may on the facts fall within s 567(2) (but not s 568(6)) come to mind: attempted murder and malicious act with intent, for example. In sum, then, the creation of specific alternatives in s 568(6) provides no basis for supposing the legislature did not contemplate the joinder of alternatives elsewhere: under s 567(1) and (2) and under the very similar terms of s 43(1).

[35] However, as I have said, this court should proceed on the basis of Applegarth J's conclusion that the complaint did not conform with s 43 of the *Justices Act* because it purported to charge two matters in the alternative, so that s 48 did not permit amendment by the removal of the words "in the alternative". I do not consider that the binding effect, for present purposes, of Applegarth J's decision extends beyond those two matters. Indeed, counsel for Thiess conceded that what Applegarth J had said as to the applicability of s 43(3) was obiter.

The power to require election under s 43(3)(a)

[36] One should accept as established, then, the premises in paragraphs 1(i) and (iii) of Thiess' grounds of appeal. This court invited submissions on the premise in ground 1(ii), that s 43(3) of the *Justices Act* did not apply; that is to say, on whether there might not, in fact, be in the present case an express power, as Industrial Magistrate Hall found, to require the prosecutor to elect. Thiess' first argument was that the question had already been decided by President Hall, without any appeal in that respect, and that the principle of finality of judgment should preclude this court from revisiting it.

[37] The matter is not quite as simple as that. Applegarth J made this observation in his judgment,

> "Incidentally, the remedy under s 43(3)(a) is premised on two or more matters having been 'joined', and the inclusion of the words 'In the alternative' in the complaint meant that this was not the case."[23]

---

19 [1996] 1 Qd R 631.
20 [1989] 1 AC 836.
21 *R v Collins; ex parte Attorney-General* at 637, citing *Bellman* at 850.
22 *R v Collins; ex parte Attorney-General* at 637-638.
23 At [37].

President Hall noted that his Honour appeared to have accepted, as a "consequential proposition" to his conclusion that the charges could not be joined, that the industrial magistrate had no power to put the complainant to an election under s 43(3)(a). He rejected what seems to have been a submission that Applegarth J's remarks on the point were obiter, saying that he was unable to accept that his Honour's observations were unnecessary to the decision.[24] This seems to me not a binding decision on the point but an incorrect assumption that there existed a binding decision on the point.

[38] Thiess pointed out that the complainant did not bring any cross-application before Boddice J challenging what was said to be the decision that s 43(3)(a) did not apply. It seems improbable to me that the complainant could have established standing as a "person aggrieved" by a decision which was in his favour, so as to permit such an application. It is the case, however, that his counsel appears to have conceded before Boddice J that no express power to require election existed. In written submissions here, the complainant did not seek to resile from the concession made, and his counsel's oral submission, when the question of whether s 43(3) applied in cases of incorrect joinder was raised with him, went no higher than that he was not arguing against that proposition.

[39] As to the substantive argument on whether s 43(3) did apply, Thiess submitted that the reference in s 43(3) to a complaint "which does not comply with the provisions of this section" should be regarded as directed only to a complaint which charged separate, cumulative matters not falling within the exceptions in s 43(1)(b), or a complaint which did not set out the matters in separate paragraphs as s 43(2) requires. I do not think there is any warrant for confining the concept of non-compliance with the section in that way.

[40] If non-compliance with s 43(1) by bringing more than one matter in the form of cumulative charges can be cured by s 43(3), so can the bringing of more than one charge in the alternative. Thiess' argument rested on an assumption that any complaint charging alternatives, being for more than two matters and not contemplated by the exceptions in s 43(1)(b), was invalid and incapable of cure. That seems to me a step beyond Applegarth J's decision that such a complaint was not authorised by s 43. And s 43(3), in my view, is directed at correction of complaints charging more than one matter in a form not authorised by s 43.

[41] I respectfully disagree, too, with Thiess' argument that alternative charges cannot be regarded as "joined", so that the premise for the existence of a power under s 43(3)(a) does not exist (a proposition apparently accepted by the complainant). I would regard charges as joined which have been included in one complaint or indictment for the purpose of having them heard at the same time. Indeed, s 568(6), which permits the alternative charges of entering and stealing, stealing, and receiving to be brought together, refers to them as being 'joined'.

[42] Accepting for present purposes that the charges should be considered as alternatives and that the complaint did not comply with s 43, it was, nonetheless, one in which two or more matters had been joined, albeit incorrectly, so as to make s 43(3) applicable once an objection was taken. The Industrial Magistrates Court had the power to require the complainant to choose one matter of complaint on which to proceed.

---

[24] At [5].

[43] The result of that conclusion would be, of course, that the complainant's submission that it is reasonably necessary to imply a power to permit him to elect must be rejected. There is, patently, no need to imply a power which exists in express terms. It would, however, be proper to imply a strike-out power as a corollary of the express power to require election under s 43(3)(a); in other words, having required the complainant to choose one matter of complaint, it is reasonably necessary that there be implied a power to dispose of the remaining matter.

The finality argument

[44] The question remains, however, as to whether this court should allow the appeal on the basis that Thiess has established that no power to require an election ought to be implied. My reason for reaching that view (the existence of an express power) is, of course, entirely at odds with Thiess' argument. But given the concessions to the contrary consistently made by the complainant and the fact that the issue was first raised by the court itself on this appeal, should that view be given effect?

[45] In *O'Brien v Komesaroff*[25] Mason J observed:

> "In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided."[26] (citations omitted)

[46] This seems to me a case in which the interests of justice militate in favour of determining the s 43(3) point, notwithstanding the lack of prior argument. The question is purely one of statutory construction, upon which Thiess has had a proper opportunity to argue, with no associated factual issue. As to the complainant's stance, I note and apply Kirby J's often-repeated observation that a court is not bound to give effect to an erroneous legal concession:[27]

> "No party, by its process or arguments can impose on this court an incorrect application of the law. Each judge has a right to adopt a construction of legislation that has not been advanced by the parties or put in issue by the pleadings in the record if that course appears necessary to resolving the matter in contest in accordance with law. Subject to considerations of procedural fairness and disqualification by the parties' conduct, Lord Wilberforce's dictum in *Saif Ali v Sydney Mitchell & Co* is correct:
>
> > Judges are more than mere selectors between rival views – they are entitled to and do think for themselves."[28]
>
> (Citations omitted.)

Conclusion

[47] Because I regard as correct Magistrate Hall's decision that she could call on the prosecution under s 43(3)(a) to elect on which charge it would proceed, and as correspondingly appropriate the respective orders for dismissal of the appeal to the

---

25 (1982) 150 CLR 310.

26 At 319.

27 *Klein v Minister for Education* (2007) 232 ALR 306; *Roberts v Bass* (2002) 212 CLR 1 at 54-55; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317.

28 *Klein v Minister for Education* at 315.

Industrial Court and the application for review in the Supreme Court, I would dismiss this appeal. However, given the tortuous path which has led to this result, the court should receive the parties' submissions as to costs, to be provided within 14 days of this judgment being delivered.

[48] **MORRISON JA:** I have had the considerable advantage of reading the reasons prepared by Holmes JA. I agree with the reasons of her Honour, and the orders she proposes.