IN THE COURT OF APPEAL [1998] QCA 396

SUPREME COURT OF QUEENSLAND

Brisbane

C.A. No. 157 of 1998

[MacPherson v. Commissioner of Taxation]

BETWEEN:

GRAHAM JOHN MacPHERSON

(Defendant/Appellant) Appellant

AND:

COMMISSIONER OF TAXATION

by LEIGHTON DAVID EVANS

(Complainant/Respondent) Respondent

C.A. No. 153 of 1998

[MacPherson v. Commissioner of Taxation]

BETWEEN:

GRAHAM JOHN MacPHERSON

(Defendant/Appellant) Appellant

AND:

COMMISSIONER OF TAXATION

by KEVIN MARK THOMPSON

(Complainant/Respondent) Respondent

McMurdo P.

McPherson J.A.

Shepherdson J.

Judgment delivered 27 November 1998.

Separate reasons for judgment of each member of the Court; each concurring as to the orders made.

APPEALS DISMISSED WITH COSTS, INCLUDING RESERVED COSTS

CATCHWORDS: STATUTES - Inconsistent State and Commonwealth - Making false statement to Taxation Officer - understatement of income by failing to disclose gross income - Dismissal for want of prosecution - Magistrate refused to award costs to appellant - Whether s.8ZN *Taxation Administration Act* (Cth.) covered the field - Whether s.8ZN directly inconsistent with s.158A *Justices Act* (Qld.) - Commonwealth provision prevailed under s.109 Constitution - Exercise of general discretion under s.8ZN - Discussion of *Latoudis v. Casey* - Misconduct of appellant.

Section 109 Constitution (Cth); s.44 Criminal Code; ss.8P(a), 8ZN *Taxation Administration Act (1953)*; s.26(e) *Income Tax Assessment Act* 1936; ss.3, 157, 158(1), 158A *Justices Act (1886)* (Qld.); s.78B *Judiciary Act* 1903 (Cth); *R. v. MacPherson* [1996] 1 Qd.R. 656; *Latoudis v. Casey* (1990) 170 C.L.R. 534; *Barameda Enterprises Pty. Ltd. v. O'Connor* [1988] 1 Qd.R. 359; *Redl v. Toppin* (1993) (Butterworths Unrep. Jmts. B.C. 93 00621; *Nguyen v. Hoekstra* (1998) (Butterworths Unrep. Jmts. B.C. 98 00601); *Cheatle v. The Queen* (1993) 177 C.L.R 541.

Counsel: Mr J.S. Douglas Q.C., with him Mr M.K. Conrick, for the appellant

Mr D.J.S. Jackson Q.C., with him Mr D.N. Adsett, for the respondent

Solicitors: McDonald Brown for the appellant

Department of Public Prosecutions (Commonwealth) for the respondent

Hearing Date: 18 September 1998

REASONS FOR JUDGMENT - McMURDO P.

Judgment delivered 27 November 1998

1 I have read and agree with the reasons and orders proposed by McPherson J.A. and would only add the following brief comments.

2 Ordinarily, s. 68(2) of the *Judiciary Act 1903* (Cth) would cause to apply, in the absence of specific Commonwealth legislation, any relevant State legislation, such as s. 158A of the *Justices Act 1886*, to applications for costs on summary trials of Commonwealth offences. This position is altered by the enactment of s. 8ZN of the *Taxation Administration Act 1953* (Cth) which is directly inconsistent with s. 158A of the *Justices Act* for the reasons stated by McPherson J.A.

3 The finding that s. 8ZN of the *Taxation Administration Act 1953* (Cth) is directly inconsistent with s. 158A of the *Justices Act 1886* seems generally to accord with the approach taken by the High Court in *Cheatle v. The Queen*.[1] The Court there

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[1] (1993) 177 C.L.R. 541.

considered the different but in some ways analogous issue of whether s. 57 of the *Juries Act 1927* (S.A.) was inconsistent with s. 80 of the Constitution insofar as it purported to apply to trials of offences against Commonwealth law. Section 80 of the Constitution provides that "trial on indictment of any offence against any law of the Commonwealth shall be by jury ...". Section 27 of the *Juries Act 1927* (S.A.) authorised majority verdicts of 10 or 11 jurors, altering the common law requirement of a unanimous verdict of 12 jurors. The High Court found s. 27 of the *Juries Act 1927* (S.A.) was inconsistent with s. 80 of the Constitution and could not validly authorise the return of a majority verdict of guilty in a trial on indictment of an offence against Commonwealth law. The provisions of s. 27 of the *Juries Act 1927* (S.A.) were read down under s. 22(a)(1) of the *Acts Interpretation Act 1915* (S.A.) so as not to apply to trials on indictment of offences against Commonwealth law.[2] Just as s. 80 of the Constitution refers to trial ... by jury" which requires a common law unanimous, rather than the *Juries Act 1927* (S.A.) majority, jury verdict, s. 8ZN's reference to the court's

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[2] Section 22(a)(1) of the *Acts Interpretation Act 1915* (S.A.) required that South Australian legislation "be construed so as not to exceed the legislative power of the State".

discretionary power to award costs relates to the exercise of that discretion under the general law as explained in *Latoudis v. Casey*,[3] rather than under s. 158A of the *Justices Act 1886* and to the extent of that inconsistency is invalid.

4 The trial magistrate therefore acted wrongly in considering the matters set out in s. 158A of the *Justices Act 1886* instead of acting in accordance with the general principles set out in *Latoudis v. Casey*. It is then necessary for this Court to exercise its discretion afresh in deciding the appropriate order for costs under s. 8ZN of the *Taxation Administration Act 1953* (Cth) in accordance with the general law as explained in *Latoudis v. Casey*. I am satisfied this is one of those unusual cases where the appellant should not be awarded costs, despite his success at trial, for the reasons given by McPherson J.A.

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3 (1990) 170 C.L.R. 534.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 27 November 1998

1 The appellant was charged in the magistrates court at Southport under the *Taxation Administration Act 1953* (Cth) with three contraventions of s.8P(a) of that Act each consisting of making a statement to a taxation officer that was false in a material particular. In effect the offences charged were that he understated his income by failing to declare gross income received. After that complaint had been served, a second complaint, which has been described as an amended complaint, was issued in which the appellant was charged with omitting from his stated income the value of benefits received by him.

2 The hearing occupied several days. It ended in dismissal of the prosecution. A contest then followed over the question whether, as a successful defendant, the appellant should be awarded his costs. The magistrate took the view that he should not, and decided that none of the parties should receive their costs. On that issue an appeal was taken to a District Court judge. It was

dismissed, but was followed by an application for leave to appeal to this Court. That application was granted, and the appeal or appeals (for there are two) have now been brought here.

3 For present purposes it is not necessary to examine in much detail the facts of which there was evidence at the hearing. Suffice to say that a Mr & Mrs McCurry, or their company Simuse Pty. Ltd., had been looking for investment opportunities in Queensland. They engaged the appellant Graham MacPherson to come to Queensland and purchase for them or their company a butcher's shop at Lutwyche in Brisbane, which he then conducted on their or their company's behalf.

4 The terms of the appellant's engagement by the McCurrys became a matter of dispute between them and him in the court proceedings that followed. At the time these complaints were issued in 1996 and 1997, that dispute had already been aired in criminal proceedings against the appellant on a previous occasion. He was originally found guilty at a trial in the District Court in 1994 on an indictment charging him with false accounting with intent to defraud

contrary to s.441(b) of the Criminal Code. On appeal the conviction was quashed on the ground that Part III of the *Taxation Administration Act* (the Commonwealth Act) was an exhaustive statement of the law regulating the proscription and punishment of what was described as "conduct inimical to the implementation and enforcement of [Federal] tax legislation", with the consequence that it was held that s.441(b) of the Code had no valid operation in relation to the conduct of the appellant with which he had been charged and convicted. See *R. v. MacPherson* [1996] 1 Qd.R. 656, 660-661.

At the trial level in those proceedings, the jury specifically found that the intention of the appellant in each instance had not been to defraud the company Simuse Pty. Ltd., but to defraud the Commissioner of Taxation. It may have been that finding that prompted the institution of the proceedings with which we are now concerned. Some care was, it seems, taken to avoid charging for a second time particular transactions which had been the subject of the previous indictment and trial in the District Court. At the hearing of the subject complaints, however, another difficulty emerged in the prosecution case. The

obscurity associated with the terms of the appellant's engagement meant that several possibilities existed. One was that in his taxation returns or statements the appellant had misstated particulars of his income, in which event it might have been expected that he would be convicted of the offences charged. An alternative, however, was that the payments the subject of the alleged misstatements were not properly characterised as income but were "fringe benefits", and so exempt from income tax under s.26(e) of the *Income Tax Assessment Act 1936*, on which the tax would in consequence have been payable by his employer. A third possibility, which may be no more than a variation of one or both of the other two, was that the appellant and the McCurrys had jointly so arranged matters as to defeat the claims of the Commonwealth to be paid the tax in whatever form it might be due.

6 It was essentially on the latter basis that the complaints were dismissed by the magistrate. His worship said that payments that were the subject of the charges against the appellant "more readily fit the definition of fringe benefits than they do income". But, in any event, he did not "for a moment" accept the

evidence of the McCurrys, who controlled the company Simuse Pty. Ltd. and were the principal witnesses for the prosecution at the hearing. As to the appellant, the magistrate said he believed that the appellant "knew full well what he was doing, and that what he was doing was done in connivance with the McCurries". In the result, the magistrate concluded that there was not sufficient evidence to allow him to say that the charges were proved beyond reasonable doubt as to all the elements of the offence, and he accordingly found the appellant not guilty of all each of the charges against him.

7 Counsel for the appellant then applied for costs against the complainants. The proceedings before the magistrate had been initiated and conducted under the *Justices Act 1886* (Qld), which by virtue of provisions of the *Judiciary Act 1903* (Cth) was generally applicable to the conduct of the proceedings. Section 157 of the *Justices Act* begins by providing that the justices "may, in their discretion" order a defendant whom they have convicted to pay costs to the complainant. Section 158(1) proceeds to confer a corresponding discretion

("may") on dismissing a complaint, to order that the complainant pay costs to the defendant. It is then qualified by the following further provision in s.158A:

> "(1) Despite section 158(1), justices who dismiss a complaint may make an order for costs in favour of a defendant against a complainant who is a police officer or public officer only if the justices are satisfied that it is proper that the order for costs should be made.
>
> (2) In deciding whether it is proper to make the order for costs, the justices must take into account all relevant circumstances, including, for example –
>
> (a) whether the proceeding was brought and continued in good faith; and
>
> (b) whether there was a failure to take appropriate steps to investigate a matter coming to, or within, the knowledge of a person responsible for bringing or continuing the proceedings; and
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> (c) whether the investigation into the offence was conducted in an appropriate way; and
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> (d) whether the order of dismissal was made on technical grounds and not on a finding that there was insufficient evidence to convict or make an order against the defendant; and

(e) whether the defendant brought suspicion on himself for herself by conduct engaged in after the events constituting the commission of the offence; and

(f) whether the defendant unreasonably declined an opportunity before a charge was laid -

(i) to explain the defendant's version of the events; or

(ii) to produce evidence likely to exonerate the defendant; and the explanation or evidence could have avoided a prosecution; and

(iii) whether the defendant conducted the defence in a way that prolonged the proceeding unreasonably; and

(iv) whether the defendant was acquitted on a charge, but convicted on another."

8 In making his determination as to costs, the magistrate applied s.158A of the *Justices Act* (the Queensland Act). That section was enacted shortly after the decision of the High Court in *Latoudis v. Casey* (1990) 170 C.L.R. 534, in which their Honours reviewed the principles governing the discretion to award costs in respect of unsuccessful proceedings for an offence that was conducted summarily. On the appeal before us, s.158A was, on both sides, accepted as

being a direct and speedy legislative response by State Parliament to the decision of the majority of their Honours in that case. The object evidently was to replace the principles adopted in *Latoudis v. Casey* with a series of statutory provisions amounting to a virtual codification of the leading factors to be considered in deciding whether costs should be awarded against a police officer or a public officer whose complaint is dismissed by justices. The expression "public officer" in s.3 of the Queensland Act is defined in such a way as to include a Commonwealth officer like the complainants in the present matter.

9 The magistrate exercised his discretion by having regard to s.158A as the applicable provision governing the award of costs in the proceedings before him and, in doing so, he gave weight to the factors specified in s.158A(2) as being relevant to that process. In concluding that no costs should be awarded to the appellant, he explained his reasons as follows:

> "Now, on my view of the evidence that I have heard in this particular matter, I have come to the view, which I have already expressed, that there was some - if not collusion, then at least knowledge - common knowledge between the two parties here, that's the McCurries on the one hand, and the defendant on the

other hand, as to what was happening with respect to the income of this business. That's this butcher shop in Lutwyche.

I believe that both the McCurries, and MacPherson had formed this common intent to retain as much of the income of this business as they could, and in so doing to keep the Taxation Department from collecting income tax in what ever shape or form the Income Tax Department might have been able to do so.

Whether it have been by way of personal tax, or whether it be by way of a fringe benefit tax, or what other areas the Taxation Department might have decided that they could obtain some revenue here, I guess there is companies tax and all sorts of things which I am not familiar with, and which certainly are in question here.

But the defendant comes to this Court with dirty hands, he comes before the Court with - in my view - tainted evidence, he comes to this Court purely to avoid, again, paying tax on the moneys that he has received from this business. And there is no question that - in my view - that he has received benefits from this business, and that - at this point in time at least - no person has been required to pay tax on those moneys and they are clearly income which has been derived from the running of this butcher's shop. Now that is for the Taxation Department to consider down the line, but it is my view that I can, in the exercise of my discretion, take into consideration the bona fides of the defendant here.

And, as I say, he comes to me with dirty hands, he comes to me with tainted evidence, and in the exercise of my discretion I am not going to award him an order of costs as against the Taxation

> Department, when they seek to recover in the best way they can taxation which is not unreasonably due to them. He - in my view - should not be allowed to benefit to the extent that the cost of his defending his actions is awarded against the very people that are seeking to obtain what they are rightfully entitled to, and that is a tax dividend on the income of this business."

10 In the course of submissions on costs before the magistrate, reference was made by counsel to s.8ZN of the Commonwealth Act. Section 8ZN provides:

> "In a prosecution for a prescribed taxation offence, the court may award costs against any party."

It was, however, not suggested at first instance that s.8ZN represented the exclusive source of power or discretion to award costs in the proceedings which had concluded in dismissal of the complaint. Rather it seems to have been assumed that, while s.8ZN was a source of jurisdiction to award costs in proceedings for an offence under the Commonwealth Act, it was necessary and appropriate to return to s.158A to identify the factors or principles on which the discretion to award or refuse costs should be exercised. It was not until the matter first came to this Court that the appellant clearly raised the argument that

s.8ZN of the Commonwealth Act was inconsistent with s.158A of the Queensland Act, and so prevailed over it under s.109 of the Constitution. Before the appeals came to a hearing in this Court notices in conformity with s.78B of the *Judiciary Act* were duly given in which this question was raised.

11 In this Court, the appellant relied on s.109 of the Constitution as giving rise to constitutional inconsistency in one or both of two forms. It was said that the legislation as contained in Part III of the Commonwealth Act and entitled **Prosecutions and Offences**, of which s.8ZN forms one provision, was intended to cover the field of taxation prosecutions and costs associated with them, to the exclusion of purely local provisions as to costs such as those in s.158A of the Queensland Act. The decision in *R. v. MacPherson* [1996] 1 Qd.R. 656 was relied on in support of that conclusion. Without deciding whether or not it is correct to regard that decision or its ratio as extending to the provisions of s.8ZN as part of the field covered, I have reached the firm conclusion that there is here a direct inconsistency between s.8ZN and s.158A sufficient to attract the operation of s.109.

12 Legislation apart, there is no power in a court to award costs, which are always a creature of statute: *Re Birkman, ex p. Pickering* (1860) 1 Q.S.C.R. 14, 15. It is, as the respondent submitted, therefore true to say that s.8ZN performs the essential function of creating a jurisdiction, which apart from statute would not otherwise exist, to award costs in prosecutions for taxation offences like these. But that is not the only function of s.8ZN. At the same time as it creates a power to award costs, it also invests the court with a complete discretion in relation to the costs and the parties to or against whom costs are to be awarded. The discretion must, of course, be exercised judicially and not arbitrarily, but it remains a discretion which is unfettered except by dictates of sound judicial reasoning and good sense: see *Norton v. Morphett* (1995) 83 A.Crim.R. 90, 95-96; *Ottway v. Jones* [1955] 1 W.L.R. 706, 708; and also the discussion by Sachs L.J. in *Knight v. Clifton* [1971] Ch. 700. For reasons explained in *Barameda Enterprises Pty. Ltd. v. O'Connor* [1988] 1 Qd.R. 359, 391-392, it is necessary to use caution in applying some of the English decisions on costs; but the two which have been referred to sufficiently describe

both the width and the character of the discretion over costs that is conferred by provisions in the broad form of s.8ZN.

13 The contrast between the terms of that section and s.158A of the Queensland Act is at once apparent. The discretion over costs invested by s.8ZN of the Commonwealth Act is complete, even if it is exercisable in accordance with general considerations of the kind identified in judicial decisions on the subject. On the other hand, the discretion invested by s.158A to award costs to a successful defendant in summary proceedings is regulated by a series of statutory provisions which identify in some detail considerations that are relevant in exercising the discretion. Costs are to be ordered in favour of such a defendant specifically against a police officer or public officer "only" if the justices are satisfied that it is proper that the order should be made; and, in deciding whether it is proper to make the order, consideration "must" be given to a series of factors that are specified.

14 It is true that even under the provisions of s.158A(1) the question remains whether it is "proper" to make the order, and that the considerations

specified in the paragraphs of s.158A(2) are given only by way of "example", so leaving the justices with the general duty of taking into account "all relevant circumstances". To that extent, it might be said that the function to be performed in exercising the discretion under s.158A does not greatly differ from what it would be in exercising the unparticularised general discretion conferred by s.8ZN. But every judicial officer who has exercised a discretion is conscious of the differing impact on his or her judgment of provisions expressed in the contrasting terms of s.8ZN and s.158A. The latter is specific both as to the particular matters in which it is to apply (costs against a police officer or public officer whose complaint is dismissed), and the particular and defined circumstances which "must" be taken into account. It may be added that on one view (which was the view evidently adopted by counsel for the appellant before the magistrate in this case), the general power conferred by s.158(1) to award costs in favour of any defendant is required to form part of the "order of dismissal" itself, and not of a separate or subsequent order on the subject. In contrast, s.8ZN contains no hint of any such limitation.

15 For these reasons I have come to the conclusion that there is a direct inconsistency between s.8ZN of the Commonwealth Act and s.158A of the Queensland Act that attracts the operation of s.109 of the Constitution. The two provisions cannot stand together. Indeed, if they had appeared in the same statute, s.158A would inevitably have been read as a specific provision that qualified the generality of s.8ZN in much the same way as s.158A operates specifically to qualify the general terms of s.158(1) of the Queensland Act. As Sir Owen Dixon has said, "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid". See *Victoria v. The Commonwealth* (1937) 58 C.L.R. 618, 630. Here s.158A, if valid, would detract from the operation of s.8ZN. That conclusion cannot be avoided by adopting the submission of the respondent on this appeal that s.8ZN does not deal with the principles according to which the discretion is to be exercised but leaves that matter to the States. Section 158A prescribes particular factors by reference to which, if relevant, the

discretion must be exercised. Section 8ZN leaves the identity, as well as the application, of relevant factors to the discretion of the court.

16 This conclusion has several consequences for the present appeal. It means that, in so far as s.158A purports to apply to an order for costs to a defendant in a prosecution for a prescribed taxation offence within the meaning of the Commonwealth Act, it is invalid or inoperative. It also means that the magistrate erred in taking s.158A as the starting point for the exercise of his discretion over the costs of the proceedings. He ought instead to have exercised the general discretion conferred by s.8ZN free of whatever incubus may be imposed by s.158A. In short, he should have exercised his discretion by taking into account the principles governing the award of costs under the general law as laid down in *Latoudis v. Casey* (1990) 170 C.L.R. 534. His not having done so has the consequence that it is necessary for this Court now to perform that function.

17 There may not in the end be very much difference between the result that was reached in this matter by applying s.158A and applying the principles in

Latoudis v. Casey. On behalf of the appellant, however, Mr Douglas Q.C. submitted that a difference arose from the fact that in *Latoudis v. Casey* the High Court had laid down a rule that in circumstances like those that appeared here a successful defendant in summary proceedings ought not to be deprived of their costs. Reliance was placed particularly on a passage in the reasons for judgment of McHugh J., with which it was submitted Mason C.J. in that case had agreed (170 C.L.R. 534, 544). The passage in question, which follows (170 C.L.R. 534, 569-570), must be set out at length:

> "Likewise, a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for the payment of his or her costs because it is just and reasonable that the informant should reimburse him or her for liability for costs which have been incurred in defending the prosecution. Consequently, a magistrate ought not to exercise his or her discretion against a successful defendant on grounds unconnected with the charge or the conduct of the litigation. The fact that the informant has acted in good faith in the public interest or may have to meet the costs out of his or her own pocket is not a ground for depriving the defendant of his or her costs. Speaking generally, before a court deprives a successful defendant in summary proceedings of his or her costs, it will be necessary for the informant to establish that the defendant unreasonably induced the informant to think that a charge could be successfully brought against the defendant or that

> the conduct of the defendant occasioned unnecessary expense in the institution or conduct of the proceedings. Cf. *Ritter v. Godfrey* ([1920] 2 K.B. 47 at 53, 54-60, 66); *Sunday Times Newspaper Co. Ltd. v. McIntosh* ((1933) 33 S.R. (N.S.W.) 371, at 377); *Redden v. Chapman* ((1949) 50 S.R. (N.S.W.) 24, at 25)); *Schaftenaar* ((1975) 11 S.A.S.R., at 274, 275); see also *McEwen v. Siely* ((1972) 21 F.L.R. 131, at 136). Thus, non-disclosure to investigatory police of a tape recording later successfully used in cross-examination of the informant's witnesses may be a relevant matter to be taken into account in determining whether the defendant should be awarded costs: cf. *Reg v. Dainer*; *Ex parte Milevich*((1988) 91 F.L.R. 33). A successful defendant cannot be deprived of his or her costs, however, because the charge is brought in the public interest or by a public official, because the charge is serious or because the informant acted reasonably in instituting the proceedings or might be deterred from laying charges in the future if he or she was ordered to pay costs. Nor can the successful defendant be deprived of his or her costs because the conduct of the defendant gave rise to a suspicion or probability that he or she was guilty of the offence the subject of the prosecution. Hence, in most cases, the successful defendant in summary proceedings, like the successful party in civil proceedings, should obtain an order for costs in respect of those issues on which the defendant succeeds."

18 For my part, I find it impossible to read what was said by McHugh J. as laying down a general prohibition, in circumstances like those here, against exercising the discretion so as to deprive a successful defendant in summary

proceedings of his or her costs; or as amounting to an exhaustive specification of the circumstances in which such costs may properly be refused. In referring to cases of that kind, his Honour was careful to preface his remarks with the qualifying phrase "Speaking generally ...". Earlier in the same passage, he had said that the discretion ought not to be exercised against a successful defendant "on grounds unconnected with the charge ...". In considering the same question Mason C.J. said (170 C.L.R. 534, 544):

> "Nevertheless, I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor"

It is not, in my opinion, possible in pursuit of the absolute rule contended for by the appellant to ignore the reference in this passage to "ordinary circumstances" and "for example". Again, in the reasons of Toohey J., who was the third

member of the majority in *Latoudis v. Casey*, his Honour is reported as saying (170 C.L.R. 534, 565-566):

> "These illustrations are in no way exhaustive but what they point up is that refusal of costs to a successful defendant will ordinarily be based upon the conduct of the defendant in relation to the proceedings brought against him or her."

Some emphasis ought properly be given to the word "ordinarily" in this context.

19 The notion that the decision in *Latoudis v. Casey* imposed a complete embargo on the exercise of the discretion to deprive a successful defendant in summary proceedings of costs apart from the examples referred to by their Honours is not borne out by any of the foregoing passages in the reasons of the majority in that case. It is, moreover, directly opposed to what was said by Brooking J. in the Full Court in Victoria in *Redl v. Toppin* (1993), which has since then been referred to with approval in the Victorian Court of Appeal by Ormiston, Phillips, and Charles JJ.A. in *Nguyen v. Hoekstra* (1998) (Butterworths Unrep. Jmts. B.C. 98 00601. What Brooking J. said in *Redl v. Toppin* (1993) (Butterworths Unrep. Jmts. B.C. 93 00621, 3) was:

> "What I shall for want of a better word call misconduct may, it seems to me, justify the refusal of an award of costs to a successful defendant in summary criminal proceedings provided that it is sufficiently connected with the subject of the charge. Compare *Ritter v. Godfrey* ([1920] 2 K.B. 47 at 60-61). I am here not concerned with conduct by which the defendant may be said to have brought the prosecution upon himself, in the sense in which this must be understood in the light of the decision of the High Court. Nor am I concerned with conduct which prolongs the proceedings unreasonably. I am speaking of conduct might be said to be so reprehensible (I use a vague term advisedly) that it would not be just to allow costs to follow the event."

The result, in my respectful opinion, is that, more or less as one would expect, occasions on which a successful defendant in summary proceedings will, under a provision like s.8ZN conferring a general discretion over costs, be refused costs will not be common; but one circumstance in which such a course may be justified is where there has been misconduct on the part of the defendant that is sufficiently connected with the subject of the charge. Contrary to the submission by Mr Douglas Q.C., I do not consider that in this context misconduct is confined to misconduct arising only when or after the prosecution has been instituted.

20 Approached with this in mind, the findings of the magistrate in the present proceedings were and are clearly relevant to the exercise of the discretion to award or refrain from awarding costs in favour of the appellant and against the complainants. The magistrate concluded that he was unable to accept the evidence of the McCurrys, who were the principal prosecution witnesses. Having done so, he was no doubt bound to find the appellant not guilty and to dismiss the proceedings against him. It was said that, because the earlier prosecution in the District Court had already suffered a similar fate, the Taxation Department or its officers should have been aware of the perils of relying on the evidence of the McCurrys; but the jury verdicts in that matter reveal no more than that it was the Commissioner of Taxation, rather than the McCurrys, who had been the target of the appellant's intention to defraud. It is not possible from that inscrutable source to say on what basis, whether of fact, law, or credibility, the verdict was arrived at that it was not the McCurrys who were defrauded.

21 What is more important for present purposes is that the magistrate in arriving at his decision to dismiss the prosecution in this case found that the

appellant "knew full well what he was doing, and that what he was doing was done in connivance with the McCurrys". In his reasons with respect to costs, those findings were further elucidated by the magistrate. He found that the appellant and the McCurrys had formed the intention of retaining as much of the income of the business as they could, "and, in so doing, to keep the Taxation Department from collecting income tax in whatever shape or form the Income Tax Department might have been able to do so". Of course, it is a truism of orthodox views on income tax law that it is not the duty of taxpayers to arrange their affairs so as to attract the maximum amount of tax. What, however, I understand the magistrate to have been saying here, and in his other remarks on the subject, is that the appellant and the McCurrys had so disarranged their affairs that it would not be, and was not, possible to tell whether any and which of the payments made by the McCurrys or their company Simuse Pty. Ltd. to or on behalf of the appellant were, properly speaking, income and taxable as such in the hands of the appellant, or fringe benefits on which tax was payable by the employer company. It was because of that difficulty in the proof against him, for

the creation of which the appellant himself was at least partly responsible that the complaints were ultimately dismissed.

22 It is not to be thought that, because it is sometimes difficult for tax authorities to say where the truth lies, they are entitled to escape an order for costs under s.8ZN in favour of a successful defendant whenever a prosecution under the Commonwealth ends in failure. Problems of proof are more or less inevitable in tax prosecutions, given that establishing the offence often depends at least to some extent on evidence of "outside" witnesses. Charles Lamb's remark that it is difficult for anyone to feel sympathy for an abstraction like the revenue may well be accurate; but, even accepting that taxation in all its forms has long been viewed by many as the common enemy of mankind, the present case is one in which the findings resulting in dismissal of the prosecution go beyond any mere failure of the proof offered in support of it. What the magistrate found was in substance a state of common knowledge on the part of those concerned, both the appellant and the McCurrys, that the obscurity of their arrangements would in fact prevent tax from being assessed or collected in

whatever form it might be legally due. The prosecution was not bound to anticipate that such a state of affairs would emerge from the evidence it was intended to adduce. Such a finding is, it may be hoped, one that would not often be justified or appropriate; but it was not sought to challenge it before us and, accepting it as it stands, it seems to me that it fairly attracts the description of misconduct, and is properly to be characterised, within the meaning of the authorities previously referred to, as connected with the subject of the charge.

23 In the circumstances of this matter, a discretion to deprive the appellant of his costs therefore exists. In my opinion, that discretion with respect to the costs in the magistrates court at Southport of proceedings in relation to the two complaints, which it now falls to this Court to re-exercise, should be given effect by not awarding the appellant his costs of those proceedings. The consequence is that the appeals before this Court should be dismissed with costs including reserved costs, if any. **Shepherdson J.** has authorised me to say that he agrees with that order and with these reasons.