SUPREME COURT OF QUEENSLAND

CITATION:	*Gribbin & Anor v Fingleton* [2002] QSC 390
PARTIES:	**BASIL JOHN GRIBBIN** **(first applicant)** **ANNE CECELIA THACKER** **(second applicant)** **v** **DIANE McGRATH FINGLETON** **(respondent)**
FILE NO:	8710 of 2002
DIVISION:	Trial Division
DELIVERED ON:	27 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	14-15 November 2002
JUDGE:	Mackenzie J
ORDER:	**1. I order that the decision of the Chief Magistrate made on 18 September 2002 that the first respondent show cause why he should remain in the position of a coordinating Magistrate be set aside.** **2. I order that the respondent pay the first applicant's costs of and incidental to his application to be assessed.** **3. I order that the second applicant's application be dismissed.** **4. I order that the respondent pay the second applicant's costs of and incidental to her application to be assessed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – notice to show cause why nomination as coordinating Magistrate should not be withdrawn – irrelevant considerations – whether swearing of affidavit critical of decision maker taken into account – protection of witnesses from detriment MAGISTRATES – JURISDICTION AND PROCEDURE GENERALLY – JURISDICTION, POWERS AND DUTIES – functions of coordinating Magistrate – withdrawal of nomination as coordinating Magistrate – perceived disloyalty *Crime and Misconduct Commission Act* 2001 (Qld), s 15 *Criminal Code Act* 1899 (Qld), s 8 *Criminal Code* (Qld), s 119, s 119B *Judicial Review Act* 1991 (Qld), s 5(e), s 8, s 20, s 23 *Magistrates Act* 1991 (Qld), Pt 4, s10(1), s10(2), s10(5),

s 10(8), s 10(9), s 10(10), s 10(11), s 18, s18(1A)

Attorney General v Butterworth [1963] 1 QB 696
European Asian Bank AG v Wentworth (1986) 5 NSWLR 445
Re Goldman (1968) 3 NSWR 325

COUNSEL: P McMurdo QC for the applicants
W Sofronoff QC, with G Newton, for the respondent

SOLICITORS: Boe & Callaghan for the applicants
McCullough Robertson for the respondent

[1] **MACKENZIE J:** On 18 September 2002 the respondent, who is the Chief Magistrate of Queensland, required the first applicant to show cause why he should remain in the position of a coordinating Magistrate. He seeks to review the decision to call upon him in that regard. The matter was argued on the basis that there was a decision of a kind that was reviewable (cf s 5(e) and s 8 *Judicial Review* Act 1991). The application refers to a second decision allegedly made on 19 September 2002, the basis being that a decision was made then that the first applicant no longer be a coordinating Magistrate. However, while the circumstances of that incident are part of the evidentiary framework of the contentions, it is not now relied on by the first applicant as a "decision" and accordingly no relief is sought.

[2] The second applicant also claims to be a "person aggrieved" because, at the time when the application was made, she had proceedings pending in the Judicial Committee established under Pt 4 of the *Magistrates Act* 1991 in respect of a determination that she be transferred. Those proceedings have already been determined by the Judicial Committee in her favour. Her involvement is now only in relation to costs.

[3] Section 10(1) makes the Chief Magistrate responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts. Section 10(2) provides that, subject to the Act and to such consultation with Magistrates as the Chief Magistrate considers appropriate and practicable, the Chief Magistrate has power to do all things necessary or convenient to be done for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Courts. A number of specific examples of things which may be done by the Chief Magistrate are set out. One of them is focused on in this application. Section 10(2)(d) describes one example of the power under s 10(2) to be:

> "(d) nominating a Magistrate to be a supervising Magistrate or a coordinating Magistrate for the purpose of allocation of the work of the Magistrates Court."

It is stated in s 10(3) that s 10(2) does not authorise the Chief Magistrate to promote a Magistrate. Section 18(1A) also provides that a Magistrate can only be promoted in accordance with a determination by the Governor in Council. Nevertheless, it is common ground that the nomination as coordinating Magistrate under s 10(2)(d) entitles the person nominated to an allowance of $2,000, by virtue

of a determination by the Governor in Council pursuant to s 18(1) of the Act on or about 1 October 1998.

[4] The first applicant was appointed by letter dated 8 March 2000 as supervising Magistrate at Beenleigh Magistrates Court as from 10 April 2000. (The designation "supervising Magistrate" has now been changed to "coordinating Magistrate". There are no Magistrates designated as supervising Magistrates at present). The period for which he was to sit at the Magistrates Court at Beenleigh was expressed to be 5 years (s 10(5)). It is implicit in that document that his nomination as supervising Magistrate was expected to be for a period of 5 years as well. In accordance with the requirements of s 10(5), the reason given for his transfer was that he had been at Brisbane Central Courts for a period of 9 years and that in line with Chief Magistrate's stated policy, Magistrates who have been in the centre for a considerable time can expect a transfer. The letter then proceeds:

> "Further and more importantly I consider that your experience and abilities as a Magistrate since 1987, suit you to the position of supervising Magistrate at Beenleigh."

The letter also stated that the transfer was subject to review at any time in accordance with s 10(2) of the Act.

[5] The phrase "for the purpose of the allocation of work of the Magistrates Court" should be given an ample scope. It was common ground that that is so. A list of duties in evidence listed the following for coordinating Magistrates:

- orderly disposition of court business at centre
- directing other Magistrates as to what courts they are to convene and where
- work allocation for those Magistrates
- Magisterial correspondence
- maintenance/upkeep of Magistrates' libraries at their centre
- liaison/local clerk of the court
- training of new Magistrates at centres

Carrying out the role of coordinating Magistrate involved limited direct contact with the Chief Magistrate throughout the year. The first applicant suggested about four times. It was put to him that it may have been as many as ten. In either event the actual contact was quite infrequent. (Regional coordinating Magistrates have additional duties relating to leave, relief and use of Government vehicles. They are coordinating Magistrates given those additional functions administratively by the Chief Magistrate).

[6] The Chief Magistrate had a practice of holding coordinating Magistrates' meetings twice a year, one in conjunction with the annual Magistrates' conference. The subjects raised at these meetings extended considerably beyond matters directly within the role of coordinating Magistrates. It is apparent that the Chief Magistrate's intention was to involve those who had been nominated as coordinating Magistrates in a wider role than that referred to in s 10(2)(d) because she wished to have the benefit of their expertise in an advisory capacity on a wide range of subjects. In that regard the persons in attendance were there because they

were coordinating Magistrates but were fulfilling an advisory role that could have been fulfilled by persons who were not necessarily coordinating Magistrates. In other words, the advisory functions could have been fulfilled by persons meeting any lawful criteria chosen by the Chief Magistrate.

[7] There has been some emphasis on this since the issue of what might legitimately be taken into account in deciding to terminate the nomination of a person as a coordinating Magistrate was a point at which the submissions of the first applicant and the respondent diverged. The argument on behalf of the first applicant was that, even allowing a wide operation to the notion of "the purpose of allocation of work of the Magistrates Court", the factors relied upon by the Chief Magistrate in this case fell outside the scope of the power to withdraw a coordinating Magistrate's nomination as such. On the other hand, it was submitted by the respondent that where there had been a serious breakdown in mutual respect between the Chief Magistrate and the coordinating Magistrate, it was a legitimate consideration in determining whether the nomination might be withdrawn.

Letter to Attorney-General, 26 October 2001

[8] The first signs of friction between the Chief Magistrate and the first applicant identifiable in the evidence occurred in about October 2001. A meeting of coordinating Magistrates attended by the first applicant and the respondent was held on 18 and 19 October 2001. Shortly after that meeting, by letter dated 26 October 2001, the Magistrates Association requested the Attorney-General, so far as is relevant for present purposes, to consider repealing ss 10(8),(9),(10) and (11) of the *Magistrates Act*, ie, the provisions relevant to discipline by way of reprimand by the Chief Magistrate. This was done without letting the Chief Magistrate know that it was being done.

[9] The Magistrates Association is an incorporated Association of which, it was said, about 65 of the 76 Magistrates are members. The Chief Magistrate had a perception that the Association took a very active role, which she also characterised as "unhealthy" in one affidavit, in the internal matters of the Magistracy. This had created tension between her and the Association and debate between her and its executive. By the time of the meeting of coordinating Magistrates on 19 September 2002 there was, as she put it, an accelerating tendency by the executive of the Association to take an active interest in the internal decision making by the Chief Magistrate when they had no statutory role. The first applicant was the only coordinating Magistrate who was a member of the executive of the Association.

[10] The first applicant described the purpose of sending the letter by stating that he was not aware of any Magistrate having received an actual reprimand from the current Chief Magistrate. However, he was aware of several instances where the threat of such a reprimand had been made in conjunction with a "direction" under the Act. He said that many of the "directions" appeared to go beyond the statutory limits which governed the power to give them. That was a matter that the committee of the Association thought necessary to seek to address.

[11] The thrust of the Association's letter, which used temperate language, was that the changes proposed were needed to recognise the position of Magistrates as independent judicial officers and to reflect the position of other judicial officers in Queensland and the Magistracy throughout Australia. (There is no similar power vested in heads of jurisdiction of superior courts in Queensland and there is no corresponding provision anywhere in Australia with regard to Magistrates, although the Chief Magistrate volunteered that she believed that Western Australia was considering whether to introduce such a provision). The fifth to the thirteenth paragraphs of the letter summarise briefly the legislative position in each of the other States and Territories. The third paragraph is as follows:

> "No other Chief Magistrate in Australia has such a power. No other head of jurisdiction of any Court in Queensland or any other State or Territory has such a power. The power of any head of jurisdiction to discipline another judicial officer is an affront to the important concept of judicial independence. The threat of reprimand should not be able to be held over the head of any Magistrate in any circumstance. The power of the Chief Magistrate to discipline by way of reprimand sets up a hierarchy more consistent with the management of public servants than the organisation of judicial officers."

[12] The fourth paragraph of the letter made a submission that the power to do all things necessary or convenient to be done to ensure the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Courts and the powers to suspend and remove Magistrates were sufficient. The letter submitted that the changes proposed would reflect the law applying to other judicial officers and that there was no need for the additional power to reprimand.

[13] By letter dated 12 December 2001 the Attorney-General replied that the Government considered that:

- it was "entirely appropriate" that a Magistrate be subject to disciplinary proceedings should their actions impair their ability to carry out the functions of their office;
- the Chief Magistrate being the most senior judicial officer in the Magistrates Court jurisdiction, and removed from the executive arm of Government, was the most appropriate to exercise the power to reprimand;
- where a Magistrate's conduct was not appropriate but not sufficiently grave to warrant suspension or removal from office, it was "fair and reasonable" that there be a procedure for reprimand.

[14] The letter concluded in the following terms:

> "… naturally the Government will continue to monitor the progress of the legislation and will introduce changes where necessary."

[15] In her evidence the Chief Magistrate said that sending the letter without her knowledge:

> "… was highly disrespectful of the office of Chief Magistrate and also, reading between the lines, there was perhaps a suggestion that I had been abusing the power and I had never reprimanded a

> Magistrate or had to in three years of being Chief, and I'm not being oversensitive there but why be agitating for its removal if it's really sort of a silent - just a silent power, and why I felt insulted was that I didn't know it was going on and it's a major issue to write to the Attorney-General to ask that a significant power be removed."

[16] Later in answer to a question why she had a particular perception that the letter reflected on her she said:

> "Because I'm the Chief Magistrate, because there was a suggestion it should be removed without having ever had it put to me why it should be. One possible reason is that people thought I may abuse it. That's a perception I had reading the letter, but I don't know because no-one ever discussed it with me and we had the perfect venue the week or so before this was sent where we could all have discussed at the coordinating Magistrates."

[17] In December 2001, after she had received a copy of the letter to the Attorney-General, she raised the matter with the first applicant in a telephone call. She said in her affidavit that she had been surprised by his disinclination, since he was both a member of the executive of the Magistrates Association and present at the coordinating Magistrates meeting in October 2001 to raise the matter at that meeting. She summarised the call in the following way:

> "Shortly before Christmas 2001, not long after I received a copy of the letter to the Attorney-General, together with the Attorney-General's reply, I raised the matter with Mr Gribbin in a telephone call. Principally, I asked Mr Gribbin why he chose not to discuss the matters the subject of the letter at the (then) recent meeting of co-ordinating magistrates prior to sending it. Mr Gribbin responded by telling me that he did not believe that he was obliged to discuss it with me."

[18] It also appears from her affidavit that she had raised, as an issue for the first applicant to consider, that there may be a conflict of interest between his membership of the executive of the Magistrates Association and his role as a coordinating Magistrate. The telephone call prompted the first applicant to write to her to the effect that what she had said in the call appeared to be an attempt to dictate the extent of his involvement in the Magistrates Association, or an implied threat to cause him detriment on account of his involvement. He invited her to set out in writing the concerns she had and what action she was asking of him, upon receipt of which he would respond. She responded to the effect that she would not put anything in writing about their conversation except to say that it was a request that he examine his conscience about what she considered to be a conflict, in relation to the letter to the Attorney, between his responsibilities as a coordinating Magistrate and as a member of the executive of the Association.

[19] The episode just described is not directly involved in the immediate events that led to the notice to show cause being given, but it is of some assistance in providing context in which to consider those events. In particular, the role of the Magistrates

Association continued to be an issue, as the controversy over placing that subject on the agenda for the meeting in September 2002 illustrates.

Issues relating to notice to show cause

[20] There is no evidence that the first applicant has performed his role as coordinating Magistrate at Beenleigh other than satisfactorily. Three areas were identified by his counsel as matters taken into account by the Chief Magistrate in deciding to give the notice to show cause. They may be conveniently described as the Ehrich matter, the affidavit in support of Magistrate Thacker, and the email concerning the inclusion of the item concerning the Magistrates Association on the agenda for the meeting ("the agenda issue").

The Ehrich matter

[21] On about 13 August 2002 the Chief Magistrate telephoned the first applicant to advise that she wanted to speak to Mr Ehrich, who was a Magistrate performing duty at Beenleigh, about whether he would be prepared to be transferred to Brisbane to create a vacancy to which Magistrate Cornack, who was then in dispute with the Chief Magistrate, could be appointed. Later that day the Chief Magistrate spoke to Magistrate Ehrich at Beenleigh Court. That discussion developed an intensity that ensured that anyone within earshot would know about it. On 15 August 2002, she emailed the first applicant advising him that Magistrate Ehrich would stay at Beenleigh and requesting that the discussion with Magistrate Ehrich be kept highly confidential because of the delicacy of negotiations with Magistrate Cornack. This email was copied to Magistrate Ehrich. On 9 September 2002 the Chief Magistrate wrote to Magistrate Ehrich alleging that there had been a serious breach of confidence because he had told Magistrate Cornack's solicitor on 4 September 2002 about the discussion.

[22] On 9 September 2002 the Chief Magistrate had also written to the first applicant advising that she was aware that Magistrate Ehrich had spoken to Magistrate Cornack's solicitor and inquired whether the subject had been discussed by him with Magistrate Cornack or her solicitor. On 12 September 2002 the first applicant wrote to the Chief Magistrate stating "I have no recall of any discussion with Ms Cornack or her legal representatives". The Chief Magistrate regarded this response as disingenuous. In the absence of any more definiteness than that, it is not surprising that her concerns were not allayed at that time.

[23] The first applicant explained in a subsequent affidavit in these proceedings that Magistrate Ehrich had told him that he had mentioned the conversation with the Chief Magistrate to several others and that Magistrate Cornack's solicitor had contacted him on 4 September 2002. The first applicant said he did not have any conversation with Magistrate Cornack's lawyers in respect of the issue until some time after 19 September 2002, the date upon which he retained the same solicitors in connection with the present matter. His recollection whether he spoke personally to Magistrate Cornack, who was at that time on leave, about it before 12 September was less clear because she occasionally initiated conversations with him by phone.

He had replied in the terms used in the letter of 12 September 2002 because he did not recall having told her of the conversation but could not be certain that he had not.

[24] On 18 September 2002 the Chief Magistrate acknowledged receipt of the letter of 12 September and asked the first applicant by email, in the first two paragraphs, if he had been aware that Magistrate Ehrich was going to discuss the matter with Magistrate Cornack's solicitors and if so, whether he had counselled him not to do so because of the confidential nature of the discussions. As this was the email in which the first applicant was called upon to show cause, that particular question remained unanswered until the affidavit filed in these proceedings elaborated upon his state of knowledge. It seems reasonably clear that the Chief Magistrate was troubled by the nature of the response and in the absence of the explanation that has come to light subsequently, was suspicious whether the first applicant played a part in information being conveyed to the legal representatives of Magistrate Cornack. The internal evidence of the email in which the first applicant was required to show cause, and the Chief Magistrate's final position in cross-examination, however, suggest that it was not treated as one of the matters showing lack of confidence in her which were the basis of the requirement to show cause, although para 15 of her affidavit sworn on 23 October 2002 shows that it and the issue of alleged conflict of interest were in her mind as evidence that the first applicant was working against her.

The affidavit in support of Magistrate Thacker

[25] One of the two matters in the email which, on a proper construction of it, were relied on included criticism of the way in which transfers were handled during her incumbency in the first applicant's affidavit on behalf of Magistrate Thacker in the Judicial Committee proceedings and, in particular, that in paragraph 27, which is in the following terms:

> "27. The present Chief Magistrate's approach in respect of this responsibility has been difficult to tie to a clear policy approach. There have been many forced transfers of magistrates. As a result magistrates generally feel that they are now effectively back in the position of unclassified clerks in the Public Service of 30 to 40 years ago and susceptible to arbitrary unadvertised, involuntary transfers, with the limited protection provided by a merits review to a Judicial Committee."

[26] With respect to this, the email says the following in the third and fourth paragraphs:

> "Could you also explain to me why you sought *(sic)* fit to supply an affidavit in the matter of Ms Thacker's Review of my decision to transfer her to Townsville. You were critical in it of both Mr Deer and myself in relation to transfer matters. Is this a matter which you feel should be discussed by you in an affidavit before the Judicial Committee, when you have never raised it with me personally or at a Co-ordinating Magistrate's meeting?

> In the circumstances, I feel that I do not have your confidence in my leadership abilities. No other magistrate, certainly not a co-ordinating magistrate has seen fit to enter into any such matters. In fact, in the matter of *Payne v. Deer*, I specifically refused to supply an affidavit to Ms Payne's Solicitors, because of the need to be seen not to be in dispute with the then Chief Magistrate."

[27] The Chief Magistrate's affidavit of 23 October 2002, para 15(iii), where she deposes to being concerned to read of the first applicant's unfavourable views of her for the first time in his affidavit of 12 August 2002 without them being raised with her in the hope of finding a solution confirms the centrality of the affidavit to the notice to show cause.

The agenda issue

[28] The second matter was circulation of the email to the coordinating Magistrates, but not to the Chief Magistrate or the Deputy Chief Magistrate, concerning inclusion of an item "role of the Association" on the agenda for the forthcoming meeting of coordinating Magistrates. This email was copied to the President of the Magistrates Association. The substance of her concern is stated in the following paragraphs (the fifth and sixth):

> "Further, you circulated all other co-ordinating magistrates (except Mr Hine and with no reference to myself), in relation to a proposed agenda item for the forthcoming co-ordinating magistrates meeting. The agenda is, in the end, a matter for my discretion, following consultation with the other Co-ordinating magistrates. No-one put to me that such an item should not be on the agenda. I consider that action on your part, again, to be disloyal to the leadership of the magistracy and disruptive of the morale of the magistracy.
>
> The position of Co-ordinating Magistrate in the Queensland Magistracy is a privileged position. I regularly meet with all Co-ordinating Magistrates who give input into the administration of the courts. Whilst constructive criticism will always be appreciated, there must be loyalty to the Chief Magistrate. As stated, you sought to agitate a view about an item on the agenda for the meeting beginning tomorrow, without my knowledge."

[29] The remaining two paragraphs are as follows:

> "This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause within seven days, as to why you should remain in the position.
>
> In the circumstances, it is not appropriate that you attend the Co-ordinating Magistrates meeting this Thursday and Friday at Central Courts."

[30] In the email of 18 September 2002, the Chief Magistrate, correctly in my view, identified that setting the agenda for the meeting was within her discretion. However, the communication from the first applicant and the Chief Magistrate's email expose a difference of definition of the role of coordinating Magistrate. No doubt it is sensible administrative practice, in a court where members are dispersed over a wide area of the State, for the Chief Magistrate to involve other members of the court in consideration of a wide range of issues that arise in the discharge of her statutory duty of ensuring the orderly and expeditious exercise of the jurisdiction and powers of the court (s 10(1)). No doubt it is also a sensible administrative practice to employ the collective wisdom and experience of those who have been nominated as coordinating Magistrates in that regard. Ordinarily, they will be experienced people with a range of views about the strengths and weaknesses of matters of many kinds concerning the system generally. By virtue of their position they will also have current knowledge of operational matters in the area for which they have responsibility of allocation of the work of the court which may invite attention by the Chief Magistrate (s 10(3)(d)).

[31] However, the involvement of coordinating Magistrates in a consultative role on matters falling outside a generous interpretation of the phrase "the purpose of allocation of the work of Magistrates Court" is not an automatic consequence of their nomination for that purpose. It is a consequence of the selection by the Chief Magistrate of that group to assist her in formulating views and positions on a wide range of things, some of which will clearly be concerned with issues within a generous interpretation of the notion of allocation of work of the court and some not clearly within that description. At what point a matter clearly ceases to have a nexus with the purpose of allocating the work of the Magistrates Court will be a difficult question in individual cases. For example, if there were a concern that the activities of the Magistrates Association was impacting in some way on the allocation of work of the Magistrates Court it would be a legitimate subject for discussion at a coordinating Magistrates meeting. If it could be demonstrated that there was no such nexus, it would fall into a category where it was not germane to a discussion of issues concerning coordinating Magistrates.

[32] It is only when a controversy like the present occurs that it is necessary to perform this kind of analysis. Otherwise it would be a sterile and pointless exercise. However, as I understand it, the thrust of the first applicant's email was essentially that he was concerned that the role of the Magistrates Association was not of any relevance to coordinating Magistrates in their capacity as coordinating Magistrates and that coordinating Magistrates should not be involved in any perceived conflict over wider issues that the Chief Magistrate may have with the Association. He also raised a more general concern that if views were expressed by the Chief Magistrate at coordinating Magistrates' meetings they might subsequently be represented as having been discussed with the Magistracy generally. He pointed out, correctly in my view, that coordinating Magistrates are not representatives of the general body of Magistrates.

[33] It is a corollary of what has been said above that it would be open to the Chief Magistrate to choose a consultative group using any lawful criteria she chose. For example if she wished to have meetings of coordinating Magistrates to discuss

issues relating to the allocation of work, she could. If she wished to use a differently constituted group to discuss wider issues, she could also do that. However, it has already been observed that for reasons of convenience and ease of identifying a group of Magistrates to perform a consultative role and for reasons relating to the best utilisation of expertise and experience available to her it was not surprising that coordinating Magistrates were chosen to perform both roles. But it is not clear that the distinction that the first applicant was seeking to draw was understood or, perhaps, accepted in the particular circumstances of the case by the Chief Magistrate. At the time of relevant events the two functions appear in practice to have been treated by her as if they were one. It was clear from her evidence at the hearing that she was prepared to accept that there were two roles which, in practice, coalesced into one. It is against that background that the allegation of disloyalty demonstrated by sending the email to other coordinating Magistrates was made.

[34] It is important to not become unduly analytical when an administrative decision to withdraw a person's nomination to a particular role is involved. As a general principle, if the person empowered to nominate and withdraw the nomination of a person to perform the role was satisfied that personal relations had been so affected by disloyalty to or criticism of or lack of confidence in the nominator that the nominee could not affectively carry out the role, the nominator could effectively withdraw the nomination, provided the process was defensible in administrative law terms.

[35] It may be accepted that the circulation of the email concerning the objection to including the role of the Magistrates Association on the agenda prompted the Chief Magistrate to act when she did. As she observed in her oral evidence "It was the agenda that really angered" her. The affidavit had been in her possession, she said, for about three weeks and was "cold". The agenda item was "hot". However, the view is open, from the email she sent, that it was the combination of the two matters, the criticism in the affidavit without prior discussion with her, and the email about the agenda in conjunction that, in her view, manifested a case of disloyalty and lack of confidence in her. Subsequent events only exacerbated the situation.

Events subsequent to notice to show cause

[36] When the first applicant received the email of 18 September 2002 he responded that it contained a "direct threat to cause (him) a detriment on account of (his) having supplied an affidavit in the matter of Magistrate Thacker's proceedings before the Judicial Committee". He said he considered her threatening behaviour towards a witness in those proceedings to be capable of constituting either a contempt of the Supreme Court or an attempt to pervert the course of justice. He said that her attempt to exclude him from attending the meeting of coordinating Magistrates could only compound the threat and that he intended to be present at the meeting. He advised that he would arrive late at the meeting.

[37] The Chief Magistrate replied that the suggestion that she was seeking to interfere with the proceedings before the Judicial Committee was "preposterous". She said that the reference to the affidavit in her email was to demonstrate no more than he had a lack of confidence in her. She reiterated that she wished him to show cause by 5pm on Wednesday 25 September 2002.

[38] On 19 September 2002 the first applicant made a complaint to the Crime and Misconduct Commission. The operative paragraphs are as follows:

> "It is my belief that I have been threatened by the Chief Magistrate over evidence sought to be provided by me in a judicial proceeding: section 119 of the *Criminal Code*. The threat includes sanctions, including my removal from the position of Co-ordinating Magistrate, Beenleigh.
>
> Before signing this letter I sought advice from Mr. Michael Byrne Q.C. who confirmed my own view of the potential applicability of Sections 127(1)(b) and 140 of the Criminal Code to conduct of this nature.
>
> Accordingly, I formally request your investigation of the actions of the Chief Magistrate."

More will be said of this later and of s 119B of the *Criminal Code* which is not referred to in the letter.

[39] At about 9.30am on 19 September 2002 the applicant arrived at the conference room where the coordinating Magistrates' meeting was being held. The door to the room was locked. The Deputy Chief Magistrate opened the door when he knocked. There were other coordinating Magistrates in the room. The Chief Magistrate came into the corridor and closed the door behind her. A conversation then occurred in which she told him he was excluded from the meeting. She drew his attention to the contents of the email. He was told that he was to be removed on the grounds of disloyalty and lack of trust. He said he disagreed with that. She then asked him if he supported her. He replied "No I do not support you but I do support the office of Chief Magistrate."

[40] After some further conversation which the first applicant described as "an unpleasant exchange" the Chief Magistrate said "I believe I am a good Chief Magistrate". The first respondent said "That's your opinion. I don't. I think you are an appalling Chief Magistrate". The Chief Magistrate then said "There. That proves your disloyalty. You have demonstrated that you are not fit to be a coordinating Magistrate. I do not want you as a coordinating Magistrate." The first applicant raised the statutory functions of a coordinating Magistrate. The Chief Magistrate replied "It's much more than that. I must have confidence in you. You are not welcome here. I must ask you to leave." He then left. The Chief Magistrate deposed that she did not recollect the conversation happening precisely in the words deposed to by the first respondent but did recollect him saying that he did not support her and in particular that she was "an appalling Chief Magistrate".

[41] On 1 October 2001 the Chief Magistrate swore an affidavit in the Judicial Committee proceedings containing the following subparagraph:

> "specifically in relation to Mr Gribbin's affidavit, it has never been my intention to discourage Mr Gribbin, or any other magistrate, from providing evidence to this Judicial Committee or in any other proceeding, or to in any way retaliate against him for having done so. I believe that the working relationship between the Chief Magistrate and Co-Ordinating Magistrates requires levels of trust, confidence and respect different from those which now appear to exist between myself and Mr Gribbin, based upon Mr Gribbin's self-evident lack of respect for me, and lack of confidence in me personally, as disclosed in his affidavit. My indications to Mr Gribbin that I was dissatisfied with him as a Co-Ordinating Magistrate were based only upon those considerations."

[42] She also denied categorically in evidence that in referring to the criticism of her transfer policies in the affidavit she had intended to interfere with the first applicant's ability to give evidence or to have him withdraw his affidavit. While there are other answers to that effect the following passage is typical of her evidence in this regard:

> "Ms Fingleton, I suggest that you sent him a show cause notice as you did because your purpose was to quell any criticism of you either in an affidavit or by the Magistrates Association or otherwise?-- I reject that inference out-of-hand."

[43] Proceedings under the *Judicial Review Act* do not involve a review on the merits of a decision made. A decision in those proceedings is to be reached after focusing on the principles set out in that Act, particularly in s 20 and s 23. It does not imply any conclusion on issues with a different focus.

[44] The Crime and Misconduct Commission is concerned with official misconduct, which includes conduct that could if proved be a criminal offence (s 15 *Crime and Misconduct Commission Act* 2001), committed by a person holding an appointment in a unit of public administration. A State Court or tribunal is by definition a "unit of public administration". As previously noted, the Crime and Misconduct Commission currently has before it the first applicant's complaint referred to in para [38]. The Commission's functions are different from those that must be performed in judicial review proceedings.

[45] Nevertheless, in determining whether irrelevant considerations have been taken into account by a decision maker regard may be had to what may appropriately be taken into account in making the decision. It is relevant to consider that kind of issue since a power to make a decision cannot be construed as permitting a decision maker to make a decision by taking into account something done by the person who will be adversely affected which has been for reasons of public policy, quarantined in a way which renders that person immune from adverse consequences of what the person did. Other areas of the law may be instructive in this regard.

[46] At common law, conduct tending to interfere with the administration of justice is subject to the law of contempt. The law of contempt's operation is not affected by the *Criminal Code* (s 8 *Criminal Code Act* 1899).

[47] Victimisation of a witness by way of reprisal or punishment for the role played by the witness in legal proceedings is within its protection. Self-evidently, such conduct while the proceedings have not concluded may interfere with the administration of justice. But even when the proceedings have concluded, such conduct tends to interfere with the administration of justice as a continuing process because of its tendency to deter the witness and anyone else who hears of what had happened to the witness from participating in proceedings in the future. (*Re Goldman* (1968) 3 NSWR 325; *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 450-451; *Attorney General v Butterworth* [1963] 1B 696).

[48] In this kind of case, it has been said that there must be some evidence that the action taken against the witness was motivated to some extent by a desire to punish the witness for reasons connected with participation in the proceedings. In *AG v Butterworth* at 722-723, Lord Denning MR said:

> "The law requires a guilty mind in these case of intimidation or victimisation of witnesses. It is easy to imagine cases where the dismissal of a witness from his employment, or his suspension or expulsion from a trade union, might well be done and justified for reasons quite apparent from the evidence he has given, and that clearly would not be a contempt of court.
>
> It seems to me that the intimidation of a witness is only a contempt of court if it is done with the purpose of deterring him from giving evidence or influencing him to give it in a sense different from that in which he would otherwise have given it, and the victimisation of a witness is only a contempt of court if it is done with the purpose of punishing him for having given evidence in the sense he did.
>
> But when the act is done with mixed motives, as indeed the acts here were done, what is the position? If it is done with the predominant motive of punishing a witness, there can be no doubt that it is a contempt of court. But even though it is not the predominant motive, yet nevertheless if it is an actuating motive influencing the step taken, it is, in my judgment, a contempt of court. I do not think the court is able to, or should enter into a nice assessment of the weight of the various motives which, mixed together, result in the victimisation of a witness. If one of the purposes actuating the step is the purpose of punishment, then it is a contempt of court in everyone so actuated."

[49] There is sometimes an overlap between specific offences relating to interference with the administration of justice created by statute and the law of contempt.

[50] Section 119B of the *Criminal Code* is a new provision, having come into force on 19 July 2002. It has distinct similarities to the common law concepts referred to above. It was in force at the time of the events upon which the notice to show cause is based. The relevant elements of the offence are the following:

1. That a person threatens to cause a detriment to another person.
2. That the threat is in retaliation for something lawfully done by a person appearing as a witness.
3. That what was done by the person was done in judicial proceedings.
4. That the threat to cause a detriment was made without reasonable cause.

[51] Revocation of a nomination as a coordinating Magistrate, with the consequential financial loss, would appear to be a detriment. The Judicial Committee was a tribunal which took evidence on oath (as to which see s 27 *Acts Interpretation* Act, 1954). Swearing an affidavit in such proceedings appears to be something lawfully done as a witness in such proceedings.

[52] The remaining three elements to be proved in such a case are:

- a "threat" to cause a detriment
- that the threat is in retaliation because of what the witness did, and
- that there was no reasonable cause.

In a particular case, proof beyond reasonable doubt would be necessary and would depend on facts peculiar to the case. It is not my function to express any view on those issues in this case.

Irrelevant Considerations?

[53] One possible reading of the opening words of the quotation of the email of 18 September 2002 in para [29] is that they linked the agenda issue and the issue of the affidavit in support of Magistrate Thacker together as events that, in conjunction, made it manifest that the first applicant had a clear lack of confidence in the Chief Magistrate. One possible reading of the paragraphs of it quoted in para [26] is that three manifestations of lack of confidence arising from the swearing of the affidavit were being relied on as part of the total picture of disloyalty and lack of confidence for which removal as coordinating Magistrate might be effected if the applicant did not show cause to the satisfaction of the Chief Magistrate.

[54] The three matters specifically referred to were:

- why the first applicant saw fit to supply an affidavit in the Judicial Committee proceedings;
- that the first applicant had been critical of her and a previous Chief Magistrate in the affidavit in relation to transfer matters; and
- that he had raised the matter in his affidavit without first raising it with her.

Paragraphs [41] and [42] set out the Chief Magistrate's explanation of her motivation. All of these factors need to be weighed in conjunction with one another

in considering the issues to be resolved in the present matter. The issue can be sharply focused by asking two questions:

- if the three matters set out above were the only basis, would they be relevant considerations in deciding to commence a process putting a person at risk of a detriment?

- does it make any difference that such process is based on a combination of factors which include the three matters?

[55] However, it is necessary to consider whether, having regard to the terms of the email and the analysis by the Chief Magistrate of the reason for raising the issue of the contents of the affidavit I should conclude that an irrelevant consideration has been taken into account in deciding to institute the process of calling on the first applicant to show cause. The first respondent alleges that in making the decision the respondent Chief Magistrate has taken into account, or alternatively in making the proposed decision is likely to take into account an irrelevant consideration, namely that the first applicant has assisted the second respondent in connection with the Judicial Committee proceedings by swearing the affidavit.

[56] I do not intend to say any more on the issue than is absolutely necessary for the purpose of deciding the present application. It is my conclusion that there is a sufficient basis to find, to the standard of proof required in these proceedings, that irrelevant considerations have been taken into account and are likely to be in the next phase, if the notice to show cause process were to proceed. This leads to the conclusion that the notice given to the first respondent that he show cause why he should not be removed as a coordinating Magistrate should be set aside.

[57] In my opinion the second aspect of the notice, the alleged disloyalty in challenging the contents of the agenda for the coordinating Magistrates meeting, is not severable in the circumstances of the case. The notice to show cause as a whole must be set aside.

[58] For reasons given earlier, I am not persuaded that a Chief Magistrate could not withdraw the nomination of a person as a coordinating Magistrate if there were grounds, defensible in administrative law terms, for concluding that a coordinating Magistrate's capacity to carry out the functions assigned by s 10(2)(d) was impaired. Without intending to exhaustively state in what circumstances that may occur and relating the conclusion to the facts of this particular case, I am not persuaded that the Chief Magistrate could not withdraw the nomination if the working relationship between the Chief Magistrate and the coordinating Magistrate had reached a point where they could not effectively function together in relation to the coordinating Magistrate's function of allocation of work of the Magistrate's Court to which he or she was assigned in the sense discussed earlier in these reasons.

[59] The decision of the Chief Magistrate made on 18 September 2002 that the first respondent show cause why he should remain in the position of a coordinating Magistrate must therefore be set aside with costs. With respect to the second respondent, her application, so far as it remains relevant, is based on the proposition that the decision to call on the first respondent to show cause on the ground of disloyalty had adversely affected or, alternatively, was likely to adversely affect the ability of the second applicant to conduct the review proceedings before the Judicial Committee in that the Chief Magistrate's actions had discouraged or were likely to discourage the first applicant and other Magistrates from assisting and further assisting the second applicant in connection with the review proceedings out of concern that if they did so, they would be perceived by the Chief Magistrate as being disloyal and be disciplined by her.

[60] At the time the present application was made, the proceedings in the Judicial Committee, in which the applicant was successful on the merits, were still pending. The present proceedings became unnecessary because of her success and the only issue remaining is costs. Rule 683(2) permits a court to make such order with respect to costs as the court considers to be just.

[61] There is no evidence that anyone was in fact deterred from giving evidence in the Judicial Committee proceedings. Nor, since oral evidence was not taken, was there any risk of a witness, during oral evidence, putting a blander emphasis or interpretation on what was in the affidavit to minimise the risk that they were appearing disloyal. Nevertheless, experience shows that by means of the ordinary processes that operate in a communal environment, the fact that the show cause notice was based, in part, on what had been said in the affidavit in the Judicial Committee proceedings would have become known very quickly. There is no evidence that anybody was in fact dissuaded from giving evidence but such knowledge would inevitably have a dampening effect on the willingness of people who might have been disposed to become involved from doing so on that occasion and on future occasions.

[62] Looking at the matter from the point of view of the second applicant at the time the proceedings were commenced and having regard to the outcome of the first applicant's proceedings, in my view the appropriate order is that the second applicant's application be dismissed but that the respondent pay the costs of and incidental to the second applicant's application.

[63] The orders are the following:

1. I order that the decision of the Chief Magistrate made on 18 September 2002 that the first respondent show cause why he should remain in the position of a coordinating Magistrate be set aside.
2. I order that the respondent pay the first applicant's costs of and incidental to his application to be assessed.
3. I order that the second applicant's application be dismissed.
4. I order that the respondent pay the second applicant's costs of and incidental to her application to be assessed.