SUPREME COURT OF QUEENSLAND

CITATION:	*Globex Shipping S.A. v Magistrate Mack & Anor* [2018] QSC 138
PARTIES:	**GLOBEX SHIPPING S.A.** (applicant) **v** **MAGISTRATE MACK** (first respondent) **MATTHEW JOSEPH SLATCHER** (second respondent)
FILE NO/S:	No 8772 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2018
JUDGE:	Davis J
ORDER:	**1. IT IS DECLARED THAT:** **a. The complaint and summons has not been lawfully served upon the applicant in accordance with s 29A of the *Protection of the Sea (Prevention of Pollution) Act* 1983 (Cth) or otherwise.** **b. There has been no waiver of the requirement for service.** **c. In the absence of service of the complaint and summons and in the absence of waiver of the requirement for service, the Magistrates Court has no jurisdiction to proceed with an examination of witnesses.** **2. Each party is to deliver written submissions on costs by 28 June 2018 and the question of costs will be determined without oral hearing unless either party, in their written submissions on costs, contends that there should be an oral hearing.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – POLLUTION – WATER POLLUTION – OFFENCES – JURISDICTION,

PROCEDURE AND EVIDENCE – PROCEDURE – OTHER MATTERS – where the applicant was charged with offences pursuant to the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) – where the relevant Act provides for service on "the agent of the ship" – whether service was effected on "the agent of the ship"

MAGISTRATES – OTHER PRE-HEARING PROCEDURES – NOTICE TO ACCUSED OF COURT APPEARANCE – OTHER MATTERS RELATING TO VALIDITY – where the applicant was charged with offences pursuant to the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) – where the applicant had been purportedly served with the complaint and summons – where the applicant challenged the purported service in the Magistrates Court – whether service was properly effected – whether service was required for the Magistrates Court to have jurisdiction to proceed with an examination of witnesses

Acts Interpretation Act 1901 (Cth) s 15AA
Acts Interpretation Act 1954 (Qld) s 32
Judicial Review Act 1991 (Qld) s 43
Justices Act 1886 (Qld) s 4, s 42, s 53, s 54, s 55, s 56, s 103, s 104, s 113A, s 141, s 142, s 142A, s 143
Magistrates Court Act 1989 (Vic) s 34, s 41
Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth) s 3, s 9, s 29A

Anderson v Attorney-General (NSW) (1987) 10 NSWLR 198, cited
Capper v Thorpe (1998) 194 CLR 342, distinguished
FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd & Anor [2017] QSC 322, followed
Goodes v James Patrick & Co Ltd [1963] VR 334, distinguished
Guss v Commissioner of Taxation [2015] VSC 259, distinguished
Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531, cited
Lamb v Moss (1983) 49 ALR 533, cited
Nitz v Evans (1993) 19 MVR 55, applied
Pino v Prosser & Hassan [1967] VR 835, distinguished
Plenty v Dillon (1991) 171 CLR 635, distinguished
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13, cited
R v Ampol Refineries Ltd [1978] Qd R 378, considered
R v Chardon [2017] 1 Qd R 148, cited
Sankey v Whitlam (1978) 142 CLR 1, cited
Sinclair v Magistrates' Court of Victoria at Ringwood [1998] VSC 170, applied
Warren v Legal Services Commissioner [2014] QCA 150,

distinguished

COUNSEL: J R Hunter QC for the applicant
J Agius SC and K Gover for the second respondent

SOLICITORS: Thynne & Macartney for the applicant
Crown Solicitor for the first respondent
Commonwealth Department of Public Prosecutions for the second respondent

[1] On 2 August 2017, the first respondent, a stipendiary magistrate sitting in the Magistrates Court at Townsville, made a ruling in relation to complaints made under the *Justices Act* 1886 (Qld) (the *Justices Act*) which alleged that the present applicant (the applicant) had committed offences against s 9(1B) of the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth) (the *POTS Act*). Charges against s 9(1B) are heard on indictment. The applicant challenges the ruling by application brought under Chapter 3 or alternatively Chapter 5 of the *Judicial Review Act* 1991 (Qld). The master of the ship, Kuk Hyun Jang (Jang) was also charged under s 9(1B), but upon a separate complaint. He does not challenge the ruling of the first respondent.

[2] The first respondent's ruling obviously requires careful analysis. However, the point taken by the applicant before the first respondent was that the summons issued on the complaint had not been served and therefore the Magistrates Court had no jurisdiction to hear an examination of witnesses in relation to the offences. The first respondent ruled against the applicant and adjourned the further hearing of the complaints. It seems that further hearing of the complaints has been delayed pending the determination of this application.

[3] By the application the applicant seeks the following orders:

Under Chapter 3:

(i) A declaration that the order[1] is void and of no effect;

(ii) An order quashing or setting aside the decision; and

[1] The Magistrate's ruling.

(iii) An order that the first respondent refrain from further hearing the matter until such time as service has been properly effected;[2]

Or alternatively, under Chapter 5:

(i) an order in the nature of certiorari quashing the decision;

(ii) an order in the nature of prohibition, directing the Magistrate to refrain from further hearing the matter until such time as service has been properly effected.[3]

[4] The first respondent has made a submitting appearance pursuant to the principles explained in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*.[4] There are no allegations of misconduct or bias against the first respondent and no application for costs against him.[5] The first respondent did not appear on the application before me. That was the appropriate course.

The charges

[5] The applicant was charged on the complaint of the second respondent that:

> "1. on or about the sixteenth day of July 2015 in the waters near Pakhoi Bank off the coast of Queensland, GLOBEX SHIPPING S.A. did commit an offence contrary to section 9(1B) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 as amended in that it was the owner of the ship, Regina, when oil was discharged from the said ship into the sea in the exclusive economic zone
>
> 2. on or about the sixteenth day of July 2015 in the waters near Pakhoi Bank off the coast of Queensland, GLOBEX SHIPPING S.A. did commit an offence contrary to section 9(1B) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 as amended in that it was the owner of the ship, Regina, when oil was discharged from the said ship into the outer territorial sea"

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2 Costs are also sought.
3 Costs are also sought.
4 (1980) 144 CLR 13 at 35–36; First Respondent's Outline of Argument, filed 14 September 2017, CFI 3.
5 Consistently with *Ex parte Blume; Re Osborn* [1958] SR (NSW) 334 at 339.

[6] Section 9 of the *POTS Act* creates the offence, makes the offence a "strict liability offence"[6] and provides limited defences.[7] It is subsection 9(1B) which creates the offence. That subsection is as follows:

> "**9 Prohibition of discharge of oil or oily mixtures into sea**
>
> (1B) Subject to subsections (2) and (4), if:
>
> (a) oil or an oily mixture is discharged from a ship into the sea; and
>
> (b) one of the following subparagraphs applies:
>
> (i) the discharge occurs into the sea near a State, the Jervis Bay Territory or an external Territory and there is no law of that State or Territory that makes provision giving effect to Regulations 9 and 11 of Annex I to the Convention in relation to that sea;
>
> (ii) the discharge occurs into the sea in the exclusive economic zone;
>
> (iii) the discharge occurs into the sea beyond the exclusive economic zone and the ship is an Australian ship;
>
> the master and the owner of the ship each commit an offence punishable, on conviction, by a fine not exceeding 500 penalty units."

[7] Both charges allege that the applicant was, at the relevant time, the owner of the ship "Regina". The two charges against Jang (not directly relevant to the present application) allege him to be the master of the ship.

[8] Charge 1 against the applicant alleges a discharge of oil into the "exclusive economic zone" and charge 2 alleges a discharge of oil into the "outer territorial sea". The *POTS Act* defines "outer territorial sea" as part of the "territorial sea".[8] Both the exclusive economic zone and the territorial sea are areas of the seas off the shores of Australia and recognized in the *Sea and Submerged Lands Act* 1973 (Cth).[9] Nothing on this

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6 *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 s 9(1C); *Criminal Code Act* 1995 (Cth) s 6.1.

7 Section 9(2) as modified by s 9(3), (3A), (4) and (5).

8 *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 s 3(1D).

9 See Part 2.

application turns on either the identification of, or the distinction between, these two areas of the sea.

Background facts

[9] The "Regina"[10] is a ship which is registered in Panama. On 17 June 2011 the ship arrived in the port of Bunbury, Western Australia, and left shortly thereafter. At that point the ship's owner was the applicant; the operator was a charterer, Samsun Logix Corporation.[11] That seems to be the only occasion the ship has berthed at a port in Australia. On that occasion, "Monson Agencies Bunbury" (Monson) was the local ship's agent for the ship. Monson is the last agent for the ship recorded on the Australian Border Force data base.[12]

[10] On 16 July 2015, a little over four years after the ship had docked in Bunbury, the ship passed through waters near the east coast of Australia on its way to New Zealand. It is alleged that at this time the applicant was the ship's owner and Jang was the ship's master. During this journey, the ship allegedly discharged oil into the exclusive economic zone and the outer territorial sea (the alleged oil spill). This was the occasion of the alleged offences.

[11] By 24 July 2015, oil had begun to wash ashore on various islands and parts of the coastline in what can be broadly described as the Townsville area.[13]

[12] After the alleged oil spill, Maritime Safety Queensland (a Queensland Government authority; "MSQ") and the Great Barrier Reef Marine Park Authority (a Commonwealth Government agency) jointly set up an investigation.[14] On 16 June 2016, MSQ wrote to Thynne & Macartney. Thynne & Macartney are solicitors practising in Brisbane and who acted for the applicant both before the Magistrates Court in Townsville and in the application before me. Their involvement in the matter is of critical importance to the second respondent's submissions on the application.

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10 Which is now renamed as the M V Kamenitza.
11 Affidavit of Matthew Troy Hockaday, filed 27 September 2017, CFI 4, exhibit MTH-8 at 101 ("Hockaday affidavit").
12 At 97–98.
13 At 94.
14 At 94.

[13] In the letter of 16 June 2016, written to Thynne & Macartney some 11 months after the alleged oil spill, MSQ said this:

> "On 17 July 2015 Australian Authorities were informed of an oil spill within waters of the central Great Barrier Reef, off Cape Upstart, Queensland, Australia. On 24 July 2015 oil began to wash ashore on the Islands and the mainland areas of Hinchinbrook Island, the Palm Isle Group, and Halifax; and nearby coastal areas between Townsville & Lucinda. Authorities conducted a significant clean-up and sampling operation over several days as a consequence of the oil spill.
>
> The joint agency investigation team comprising of investigators from Maritime Safety Queensland and the Great Barrier Reef Marine Park Authority have conducted an investigation; and believe it has sufficient evidence to identify the Panama flagged cargo ship *M V Regina IMO 9575527* (the ship) as responsible for the oil discharge.
>
> The investigation has determined that Globex Shipping S.A. was the owner of the Ship and *SAMSUN LOGIX CORPORATION* was the operator of the ship at the time of the incident. Both the owner and operator of the ship are corporations registered in South Korea. We understand that the ship is now named *M V Kamenitza* and that ownership has changed.
>
> It is also our understanding that the P & I Club representing the owner of the ship at the time of the incident was Steamship Mutual U/W (Bermuda) and that your firm is their local legal representative."[15]

[14] And later in the letter:

> "Can you please advise if your firm acts on behalf of the P & I Club, Steamship Mutual U/W (Bermuda) and/or for the Ship owner Globex Shipping S.A>[16] and the Ship Operator Samsun Logix Corporation. Should you advise that you in fact represent all or some of the abovementioned, I will be in a position to provide you with more information." [17]

[15] MSQ asserted in the letter that since the alleged oil spill the ship's name had been changed to "M V Kamenitza" and ownership of the ship had passed from the applicant to a Korean corporation. The parties before me accepted that as true.

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15 At 94.
16 Presumably this should read "S.A.".
17 At 95.

[16] The reference to the "P & I Club" is explained by a statement of Paul Christopher Campbell.[18] What this evidence shows is:

(i) Steamship Mutual was, as at June 2015, the underwriter for the P & I Club to which the applicant belonged.

It is not necessary to delve into the legal position of P & I Clubs or their place in maritime commerce. For present purposes, Steamship Mutual can be regarded as the applicant's insurer against liability for oil spills.[19]

(ii) Steamship Mutual on its website in June 2015 named Thynne & Macartney as a firm to whom members of the P & I Club underwritten through Steamship Mutual could seek assistance.

[17] The website page of Steamship Mutual states, relevantly:

> "**Correspondents**
>
> **Prompt notice of any claim, AND OF ANY EVENT WHICH IS LIKELY TO LEAD TO A CLAIM, should be provided to the Managers and Members are reminded of their obligations under Rules 28 and 31.**
>
> The correspondent, although listed and named by the Association, acts for the shipowner/charterer whose vessel is entered with the Association, Where possible the Club requests that all correspondence, including survey reports and letters are sent to the Club by email. Unless a case handler requests otherwise, the Club will not need to be sent physical copies of any exchanges by post.
>
> The Club's preferred method of invoicing is www.igfeesable.net and if possible, all service providers are requested to invoice by this method. For information regarding VAT on invoices please view our Club Circular or alternatively contact our finance department. The Club does not appoint Agents but when difficulties arise at or near any of the places listed below, Members or their Masters are recommended to apply to any of the following firms for assistance.
>
> Lawyers are marked thus *"[20]

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[18] At 130.

[19] Governed by *International Convention on Civil Liability for Bunker Oil Pollution Damage*, implemented in Australia by the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act* 2008 (Cth); *Convention on Limitation of Liability for Maritime Claims*, implemented in Australia by the *Limitation of Liability for Maritime Claims Act* 1989 (Cth); *International Convention on Civil Liability for Oil Pollution Damage*, implemented in Australia by the *Protection of the Sea (Civil Liability) Act* 1981 (Cth).

[20] Hockaday affidavit, exhibit MTH-8 at 142.

[18] Various firms are then mentioned including:

> "**Brisbane Thynne & Macartney Solicitors ***
>
> Level 19, Central Plaza Two, 66 Eagle Street, Brisbane, Queensland 4000, Australia
>
> Telephone: (61 7) 32318888
>
> Telefax: (61 7) 32290855
>
> Email: transport@thymac.com.au
>
> Website: www.thymac.com.au
>
> AOH: Michael Fisher (61 7) 38440964, Mobile (61 408) 735653
>
> Matthew Hockaday (61 7) 33974290, Mobile (61 422) 318678"[21]

[19] On 14 July 2016, Thynne & Macartney responded by email to MSQ's letter of 16 June:

> "We have received instructions on behalf of the owners of the vessel "Regina" in relation to your letter to our office of 16 June 2016. Owners decline the request to participate in a recorded interview concerning the matter.
>
> We also note the Department's comments that it is believed owners have committed an offence against various Acts for the oil spill, and we invite the Department to provide details of the alleged offences and evidence obtained in this respect."[22]

[20] Of significance to the respondent's submission is the statement in the email that Thynne & Macartney have received instructions on behalf of the owners of the ship.

[21] The case was apparently then referred to the Commonwealth Director of Public Prosecutions (CDPP), who wrote to Thynne & Macartney on 22 December 2016. That letter advised Thynne & Macartney that a brief of evidence had been received concerning the alleged oil spill and complaints alleging offences against each of the applicant, Jang and Samsun Logix Corporation (the operator) would soon be made. Then the letter said this:

> "Can you please advise if you act for any of the parties referred to above, and, if so, whether you hold instructions to accept service of the complaints and summonses?"[23]

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[21] At 143.
[22] At 96.
[23] Hockaday affidavit, exhibit MTH-7 at 83.

[22] No response was received to that letter by the CDPP from Thynne & Macartney so a further email was sent on 1 February 2017, referring to the letter of 22 December 2016 and asking:

> "Are you in a position to advise whether you act for any of the parties, and if so, whether you hold instructions to accept service of the complaints and summonses?"[24]

[23] On 2 February 2017 Thynne & Macartney responded to the CDPP in terms:

> "We don't have any instructions in relation to your letter."[25]

[24] On 21 March 2017 the complaint and summons against the applicant, together with the complaint and summons alleging offences against Jang were purportedly served upon Thynne & Macartney and also Monson Agencies. Thynne & Macartney obviously physically received the complaints and summonses and then sent two letters. The first, dated 26 April 2017, was directed to the CDPP. That letter referred to a telephone conversation with an employee of the CDPP and then advised:

> "We understand the attached Complaint and Summonses to Globex Shipping S.A and Kuk Hyun Jang were sent to our office purportedly by way of service on each defendant.
>
> We do not hold any instructions to accept service of the charges against the defendants and our firm is also not an agent of the ship as contemplated by the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983. We therefore return each Complaint and Summons to you."[26]

[25] The second letter, dated 18 May 2017, was directed by Thynne & Macartney to the Registrar of the Townsville Magistrates Court. That letter said as follows:

> "We are instructed to appear in relation to a Complaint and Summons made against Globex Shipping SA by Matthew Joseph Slatcher.
>
> The Complaint, together with a similar Complaint and Summons against Kuk Hyun Jang, is returnable in the Townsville Magistrates Court on Monday, 22 May 2017 at 9:30am.
>
> The Commonwealth Director of Public Prosecutions has purported to serve the Complaints on Globex Shipping SA and Capt Kuk Hyun Jang by serving the Complaints on our firm.

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[24] At 84.
[25] At 85.
[26] At 86.

> We advise we do not have instructions to accept service of the Complaints on behalf of either Globex Shipping or Capt Kuk Hyun Jang.
>
> We understand the CDPP has also purported to serve the Complaints on Monson Agencies Australia. We are informed by Monson Agencies Australia that they were appointed by a charterer of the vessel on a single occasion in 2011.
>
> It is our client's position that the Complaints have not been properly served on either Globex Shipping SA or Capt Kuk Hyun Jang, and we wish to be heard in this regard at the upcoming mention hearing subject to the proviso that our appearance should not be taken as any waiver of defective service or as a submission to the jurisdiction of the court."[27]

[26] Ultimately, the issue of the validity of the service of the complaint and summons against the applicant came before the Magistrates Court on 2 August 2017 and argument was heard by the first respondent, who found that service had been effected and the court's jurisdiction to proceed had been engaged.

The relevant provisions of the *Justices Act* 1886

[27] In Queensland, criminal offences are categorised into simple offences (which include offences of a breach of duty) and indicatable offences. Simple offences are heard by a magistrate sitting alone and indictable offences are heard on indictment by judge and jury in either this Court or the District Court, unless there is a statutory provision authorising the Magistrates Court to hear the offence summarily. The *Justices Act* therefore contemplates that magistrates will hear offences summarily but will also hear committal proceedings (referred to in the *Justices Act* as an examination of witnesses[28]) in relation to offences which are ultimately heard on indictment in the higher courts.

[28] The *Justices Act*, critically here, contains Parts 4, 5 and 6. Part 4 deals with "General procedure",[29] including the making of complaints and the issue of summonses and warrants. The sections in this part concern procedure relevant to the prosecution of offences ultimately heard summarily, and offences the subject of committal proceedings.

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27 At 87.
28 *Justices Act* 1886 (Qld) s 104.
29 This is the heading of Part 4.

[29] Part 5 of the *Justices Act* contains provisions relevant to "Proceedings in case of indictable offences".[30] Part 6 contains provisions relevant to "Proceedings in case of simple offences and breach of duty".[31].

Relevant Part 4 provisions

[30] Section 42 concerns the commencement of proceedings. It provides as follows:

> "**42 Commencement of proceedings**
>
> (1) Except where otherwise expressly provided or where the defendant has been arrested without warrant, all proceedings under this Act shall be commenced by a complaint in writing, which may be made by the complainant in person or by the complainant's lawyer or other person authorised in that behalf.
>
> (1A) However, where a defendant is present at a proceeding and does not object, a further charge or an amended charge may be made against the defendant and be proceeded with although no complaint in writing has been made in respect thereof.
>
> (2) Where a defendant has been arrested on any charge and no complaint in writing has been made and in a case to which subsection (1A) applies particulars of the charge against the defendant shall be entered on the bench charge sheet."

[31] There are ways in which proceedings can be commenced other than by complaint and some of these are expressly referenced in s 42.[32] The *Police Powers and Responsibilities Act* 2000 (Qld) provides yet another procedure where criminal proceedings can be commenced, namely by service on a defendant of a notice to appear.[33]

[32] Sections 43 to 51 deal with various procedural issues concerning complaints which are not relevant hear. Section 52 provides for a time limitation upon commencing proceedings for a simple offence. That is also not relevant here.

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30 This is the heading of Part 5.
31 This is the heading of Part 6.
32 Presence of the defendant on another charge; arrest.
33 *Police Powers and Responsibilities Act* 2000 (Qld) s 382.

[33] Section 53 then provides that a justice may issue a summons upon a complaint. Section 53 is, relevantly, in these terms:

> "**53 When justice may issue summons**
>
> (1) When a complaint is made before a justice that any person is guilty of or is suspected of having committed any indictable offence, simple offence, or breach of duty, within the jurisdiction of such justice, then such justice may issue the justice's summons… (emphasis added)

[34] Sections 53A and 53B deal with mediation and are not relevant here. Section 54, which is critical here, provides, relevantly, as follows:

> "**54 Form of summons and filing of complaint and summons**
>
> (1) Every summons shall be directed to the defendant and shall require the defendant to appear at a certain time and place before the Magistrates Court, or, as the case may require, before justices taking an examination of witnesses in relation to an indictable offence, to answer the complaint and to be further dealt with according to law.
>
> (1A) Every summons shall be served in accordance with this Act, and, where the summons has been issued on a complaint in writing, other than an entry of a charge on a bench charge sheet, a copy of such complaint shall be served with and in the same manner as the summons.
>
> (2) Every summons and, where the summons has been issued on a complaint in writing, other than an entry of a charge on a bench charge sheet, such complaint, shall, before the hearing is proceeded with, be filed, within 3 days of the summons being issued, with the clerk of the court at the place at which the defendant is required by the summons to appear, to be by such clerk kept and preserved.
>
> (3) Where a summons has not been served upon a defendant prior to the time at which the defendant is thereunder required to appear before a Magistrates Court, or, as the case may be, before justices taking an examination of witnesses in relation to an indictable offence, the clerk of the court at the place where the defendant is required by the summons to appear, being a justice, or other justice at such place authorised by such clerk, whether or not such clerk is a justice, may, from time to time and before, at or after the time appointed by the summons for the appearance of the defendant in accordance with the summons, extend the time so appointed…" (emphasis added)

[35] Section 55 is of some importance to the second respondent's submissions. It provides as follows:

> "**55 Ex parte proceedings**
>
> Nothing herein contained shall oblige any justice to issue a summons in any case where the application for an order of justices is by law to be made ex parte."

[36] Section 56 concerns the service of summonses and it provides:

> "**56 Service of summonses**
>
> (1) A summons shall be properly served upon the person to whom it is directed if it is served in accordance with this subsection, that is to say—
>
> (a) in the case of a summons directed to a person to appear to answer a complaint of a simple offence or breach of duty—by posting (by means of registered post) a copy thereof addressed to the person at the person's place of business or residence last known to the complainant at least 21 days before the date on which the defendant is, by the summons, required to appear; or
>
> (b) in all cases (including the case referred to in paragraph (a))—by delivering a copy thereof to the person personally or, if the person cannot reasonably be found, by leaving a copy thereof with some person for the person at the person's usual place of business or residence or place of business or residence last known to the person who serves the summons.
>
> (2) Save where it appears that the person to whom a copy of a summons was posted addressed to the person at an address in this subsection specified was not, to the knowledge of the complainant, at the time of posting, residing or carrying on business at such address, it shall be sufficient compliance with subsection (1)(a) if the copy summons is addressed to an address as follows—
>
> (a) in the case of an offence arising out of the driving or use of a motor vehicle or an attempt so to do—the address appearing as the address of the person on a driver licence produced by the person at or about the time of the alleged offence or upon the investigation thereof;
>
> (b) in the case of an offence alleged against a person as owner of a motor vehicle—the address

appearing in the current certificate of registration of the motor vehicle under the *Transport Operations (Road Use Management) Act 1995*, as the address of that person;

(c) in the case of any other offence or breach of duty—the address appearing as the address of the person in any licence or registration for the time being in force pertaining to such person or to any property of which the person appears to be the owner or occupier and which licence or registration such person holds or has effected under the Act against or under a provision of which the offence or breach is alleged to have been committed.

(3) The person who serves a summons shall either—

(a) attend personally before the Magistrates Court, or, as the case may be, the justices taking the examination of witnesses in relation to an indictable offence, at the place and time for hearing mentioned in the summons and, if necessary, at any extended time therefore, to depose, if necessary, to the service thereof; or

(b) attend before any justice of the peace having jurisdiction in the State or part of the State or part of the Commonwealth in which such summons was served and depose, on oath and in writing endorsed on a copy of the summons, to the service thereof.

(4) Where a summons is served as prescribed by subsection (1)(a)—

(a) the person who serves the summons shall, in the person's deposition as to service endorsed on a copy of the summons under subsection (3), state the time and place at which the person posted the copy of the summons; and

(b) the complainant shall depose, on oath and in writing endorsed on the copy of the summons endorsed under subsection (3), that the address to which a copy of the summons was posted is (if such be the case) the defendant's address last known to the person and as to the person's means of knowledge.

(5) Every such deposition shall, upon production to the Magistrates Court by which or to the magistrate by whom the complaint upon which the summons issued, is heard, or, as the case may be, to the justices who take the

examination of witnesses in relation to an indictable offence in respect of that complaint, be evidence of the matters contained therein and be sufficient proof of the service of the summons on the defendant.

(6) Where proof is required in any proceeding of the service of a document which—

(a) pursuant to any enactment or rule of law may be served in the same manner as a summons may be served under this Act; or

(b) is served at the same time as, and in connection with, a summons served under this Act;

the provisions of subsection (1) shall apply and be construed as if a reference in that subsection to a summons were a reference to such a document.

(7) The person who serves the document may attend before any justice having jurisdiction in the State or part of the State or part of the Commonwealth in which such document was served and depose on oath and in writing endorsed on the document to the service thereof.

(8) The deposition made under subsection (7) is, on production to the Magistrates Court or justices—

(a) evidence of the matters contained in the deposition; and

(b) sufficient proof of the service of the document on the defendant.

(9) In this section—

motor vehicle see the *Transport Operations (Road Use Management) Act 1995*." (emphasis added)

[37] Section 56A also concerns the service of summonses, but only in respect of the right of persons to enter premises for the purposes of service. That section is not relevant here. Division 6 of Part 4 "Warrants and arrest without warrant" is not relevant to the present argument and neither are the remaining provisions of Part 4.

Relevant Part 5 provisions

[38] Part 5 contains many provisions relevant to private complaints. The second respondent is not, relevantly to the *Justices Act*, a private complainant[34] and those provisions can be ignored. Section 103 provides as follows:

[34] Definition of "private complaint": *Justices Act* 1886 (Qld) s 4.

"**103 Disobedience of summons**

(1) This section applies if—

(a) a defendant is charged with an indictable offence; and

(b) a summons is issued against the defendant; and

(c) the defendant does not appear before the justices at the time and place mentioned in the summons when called.

(2) However, this section does not apply if—

(a) the defendant is charged on a private complaint; and

(b) the charge—

(i) can not be dealt with summarily; or

(ii) can be dealt with summarily without the defendant's consent.

(3) If the justices—

(a) are satisfied, on oath or by deposition as provided in section 56, that the summons was properly served on the defendant a reasonable time before the time appointed for the defendant's appearance; and

(b) are satisfied, from information given on oath, that the matter of complaint is substantiated;

the justices may issue their warrant to apprehend the defendant and to bring the defendant before justices to answer the complaint and to be further dealt with according to law." (emphasis added)

[39] Section 104 and following are various provisions concerning committal proceedings. It is necessary to refer only to s 104 and s 113A. They are as follows:

"**104 Proceedings upon an examination of witnesses in relation to an indictable offence**

(1) The examination of witnesses in relation to an indictable offence—

(a) may be conducted by a single justice; and

(b) subject to the provisions of section 40, shall be conducted in the presence and hearing of the defendant, if the defendant is required to be present, and of the defendant's lawyer (if any).

(2) When, upon such an examination all the evidence to be offered on the part of the prosecution has been adduced and the evidence, in the opinion of the justices then present, is not sufficient to put the defendant upon trial for any indictable offence, the justices shall order the defendant, if the defendant is in custody, to be discharged as to the charge the subject of that examination, but if in the opinion of such justices (or if there be more justices than 1 then present, in the opinion of any 1 of such justices) the evidence is sufficient to put the defendant upon trial for an indictable offence then the justices or 1 of them shall—

(a) save, with respect to a particular defendant, in relation to evidence given during the absence of that defendant pursuant to the provisions of section 104A, cause to be read to the defendant the deposition of the witnesses who may have given evidence at the examination in the defendant's absence; and

(b) address to the defendant the following words or words to like effect—

'You will have an opportunity to give evidence on oath before us and to call witnesses for the defence. But first I am going to ask you whether you wish to say anything in answer to the charge. You need not say anything unless you wish to do so and you are not obliged to enter any plea; and you have nothing to hope from any promise, and nothing to fear from any threat that may have been held out to induce you to make any admission or confession of guilt. Anything you say will be taken down and may be given in evidence at your trial. Do you wish to say anything in answer to the charge or enter any plea?'.

(3) Whatever the defendant may say in answer to the words addressed to the defendant pursuant to subsection (2) shall be reduced to writing and read to the defendant and shall thereupon be signed by the justices and by the defendant, if the defendant so desires, and shall be kept with the depositions of the witnesses and shall, if the defendant is committed to be tried or for sentence, be transmitted with such depositions in accordance with the provisions of section 126.

(4) If the defendant desires to offer evidence with respect to the charge the subject of the examination the justices shall hear and receive all admissible evidence tendered on

behalf of the defendant which tends to show whether or not the defendant is guilty of the offence with which the defendant is charged.

(5) Where upon the examination the defendant is committed for trial, the justices shall warn the defendant that the defendant may not be permitted at that trial to give evidence of an alibi or to call witnesses in support of an alibi unless the defendant gives to the director of public prosecutions written notice in the prescribed form of that alibi and of those witnesses within the time prescribed by the *Criminal Code*, section 590A." (emphasis added)

"**113A Committal proceedings where defendant is a corporation**

(1) Where a corporation is charged with an indictable offence, it may appear before the justices by a representative at the time and place mentioned in the summons issued against it.

(2) A representative may on behalf of a corporation do either or both of the following—

(a) make a statement before the justices in answer to the charge;

(b) enter a plea to the charge;

and any statement so made or plea so entered shall for all purposes be taken to be a statement made or plea entered by the corporation.

(3) Where a representative appears, any requirement of this Act that anything shall be done in the presence of the defendant, or shall be read or said to the defendant, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or said to the representative.

(4) Where a representative does not appear—

(a) any requirement referred to in subsection (3) shall not apply; and

(b) the justices may nevertheless, if upon a consideration of all the evidence adduced upon an examination of witnesses in relation to the offence they are of the opinion that the evidence is sufficient to put the corporation upon its trial for an indictable offence, order the corporation to be committed to be tried for the offence before a court of competent jurisdiction.

(5) Justices may commit a corporation for trial or for sentence notwithstanding their inability to exercise their powers of

committal to prison or granting bail following such committal.

(6) Where a representative does not appear and justices order the corporation to be committed for trial, the clerk of the court at which the corporation has been so committed shall forthwith give to the corporation a notice in writing of such committal containing particulars in relation thereto.

(6A) The notice may be given to the corporation by leaving it at or sending it by post to the registered office of the corporation or to any place at which it trades or carries on business.

(7) In this section—

representative means a person appointed by the corporation to represent it for the purposes of this section, but a person so appointed is not, by virtue only of being so appointed, qualified to act on behalf of the corporation before justices for any other purpose.

(8) A representative need not be appointed under the seal of the corporation, and a statement in writing purporting to be signed by a managing director of the corporation or by any other person (by whatever name called) having, or being 1 of the persons having, the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section shall be admissible without further proof as prima facie evidence that that person has been so appointed." (emphasis added)

[40] It is well settled that when a magistrate conducts an examination of witnesses he is exercising executive not judicial power. An exercise of that power may lead to committal for trial under s 104.

Relevant Part 6 provisions

[41] Division 2 of Part 6 contains provisions relevant to "Default by complainant or defendant".[35] Sections 141 to 143 provide, relevantly, as follows:

"**141 Dismissal or adjournment in absence of complainant**

If upon the day and at the place appointed by the summons for hearing and determining a complaint of a simple offence or breach of duty the defendant attends voluntarily

[35] This is the heading of Part 6 Division 2.

in obedience to the summons, or is brought before the justices by virtue of a warrant, and the complainant (having had notice of such day and place) does not appear personally or by lawyer, the justices shall dismiss the complaint, unless for some reason they think proper to adjourn the hearing of the same to some other day, in which case they may adjourn the hearing accordingly, upon such terms as they think fit, and may commit the defendant in the meantime or may grant the defendant bail.

142 Proceedings in absence of defendant

(1) If at the time and place so appointed the defendant does not appear when called and the justices are satisfied, on oath or by deposition as provided in section 56, that the summons was properly served on the defendant a reasonable time before the time appointed for the defendant's appearance, the justices may—

(a) proceed ex parte to hear and determine the case as fully and effectually to all intents and purposes as if the defendant had personally appeared before them in obedience to the said summons; or

(b) if satisfied, from information given on oath, that the matter of the complaint is substantiated, issue their warrant to apprehend the defendant and to bring the defendant before justices to answer the complaint and to be further dealt with according to law; or …" (emphasis added)

"142A Permissible procedure in absence of defendant in certain cases

(1) Notwithstanding the provisions of this Act or any other Act it shall be lawful to adopt in respect of a complaint of a simple offence or breach of duty made by a public officer or a police officer the procedure prescribed by this section.

(2) Every step or proceeding to be taken in carrying out such procedure and the making of any order in the course thereof shall be subject to the provisions of this Act (other than of this section) other than so far as this section is inconsistent with the other provisions of this Act.

(4) Where—

(a) a complaint of a simple offence or breach of duty is made by a public officer or a police officer; and

(b) the defendant is required to appear at a time and place fixed for the hearing of the complaint—

(i) by a summons issued on the complaint and served at least 14 days before the date on which the defendant is required by the summons to appear; or

(ii) under a condition of the defendant's bail or by a notice given to the defendant under the *Bail Act 1980*; or

(iii) by a notice of adjournment given to the defendant a reasonable time before the date previously fixed for the hearing of the complaint; and

(c) the defendant does not appear at the time and place fixed for the hearing of the complaint;

the court before which the complaint comes for hearing, whether on the return date or an adjourned date, may, if it is satisfied that the facts as alleged in or annexed to or served with the complaint or summons or as stated by the complainant according to law constitute such a simple offence or breach of duty and that reasonably sufficient particulars thereof are set out in or annexed to or served with the complaint or summons or are stated by the complainant, deal with and determine the matter of the complaint as fully and effectually to all intents and purposes as if the said facts and particulars had been established by evidence under oath before it and as if the defendant had personally appeared at the time and place fixed for the hearing of the complaint…" (emphasis added)

"143 Adjournment of hearing if warrant to apprehend defendant issued

(1) When the justices upon the non-appearance of the defendant issue their warrant, they shall adjourn the hearing of the complaint until the defendant is apprehended, and if the defendant is afterwards apprehended under such warrant, the defendant shall be detained in safe custody and shall be brought, as soon as practicable, before a court to be dealt with according to law.

(2) The complainant shall be given reasonable notice of the time and place at which the defendant will be brought before such court."

[42] Other provisions in Part 6 concern the conduct of a summary hearing and are not relevant here.

The hearing in the Magistrates Court

[43] Before the Magistrates Court, the applicant contended that:

(i) The complaint and summons had not been served in accordance with s 54(1A) and s 56 of the *Justices Act*.

(ii) The complaint and summons had not been served pursuant to s 29A of the *POTS Act* which was an alternative basis of service relied upon by the second respondent.

(iii) There was no waiver by or on behalf of the applicant of the right to assert the absence of jurisdiction arising from a want of proper service.

[44] The second respondent submitted to the Magistrates Court that:

(i) the complaint and summons had been served pursuant to s 29A of the *POTS Act*.

Alternatively:

(ii) the applicant was "before the Court" in any event, so service was not an issue.

[45] The submissions made to the Magistrates Court on behalf of the second respondent[36] were confusing and internally inconsistent at least on the point that service pursuant to the *Justices Act* was not necessary, but I will return to those issues.

[46] Section 29A of the *POTS Act* is in these terms:

> "**29A Service on master or owner of ship**
>
> (1) A document to be served on the master or any other member of the crew of a ship, or on the owner of a ship, in respect of an offence against this Act may be served on the agent of the ship instead.

[36] By counsel other than Mr Agius SC and Ms Gover who appeared before me.

> (2) A document served on the agent of a ship under subsection (1) is taken to have been served on the master or other member of the crew of the ship, or on the owner of the ship, as the case requires."

[47] Both parties, both before the Magistrates Court and before me, regarded s 29A of the *POTS Act* as an additional method by which service of the complaint and summons issued under the *Justices Act* could be served. Neither party suggested that s 29A was inconsistent with any provision of the *Justices Act* so as to raise consideration of s 109 of the Commonwealth Constitution or to require the issue of notices under s 78B of the *Judiciary Act* 1903 (Cth). I accept that no constitutional issue arises.

[48] The second respondent's alternative argument that service was not necessary because the applicant was before the court was, it seems, ultimately accepted by the first respondent. In the written outline of submissions for the second respondent before the Magistrates Court:

(i) Reference was made to s 29A of the *POTS Act* as a section which "extends the ways in which service can be affected[37] of a complaint and summons for an alleged offence against the *POTS Act*".[38]

(ii) Then the outline made argument that Thynne & Macartney and Monson were "the agent of the ship" for the purpose of s 29A.[39]

(iii) Then came the argument that the applicant was "before the court". It is necessary to set that submission out in full. It is in these terms:

> "43. There is nothing in *Justices Act* 1881[40] (Qld) (JA) that makes service of the summons an essential precondition to a case proceeding where a defendant who is a natural person is aware of a proceeding and is before the court. In the case of a corporate defendant the same can be said when the corporate defendant is aware of a proceeding and is represented before the court.
>
> 44. A criminal proceeding is commenced by the making of a written complaint pursuant to section 42 of the JA. Section

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[37] This plainly should read "effected".
[38] Complainant's outline at [7]: Hockaday affidavit, exhibit MTH-5, 53 at 54.
[39] Complainant's outline at [12]–[42]: Hockaday affidavit, exhibit MTH-5, 53 at 55–61.
[40] Clearly intended as a reference to *Justices Act* 1886 (Qld).

> 53 of the JA permits but does not require the issue of a summons. In this way, the JA contemplates that a proceeding can properly continue without service of a summons. The quintessential situation in which that would occur is where a defendant is actually aware of the charge and is before the court.
>
> 45. This is supported by an analysis of section 42(1A) of the JA, which permits a new charge that is not in writing from being made against a defendant who is present unless the defendant does not object.[41] By necessary implication, it permits a charge in writing to be made against a defendant who is present regardless of consent and, for obvious reasons, without the need for a summons to issue and to be formally served.
>
> 46. Globex Shipping S.A. is a corporate defendant. Because a corporate defendant cannot be detained or arrested and does not have a physical manifestation, a case can proceed against it in its absence (see section 113A of the JA).
>
> 47. The defendant's position that it appears by its solicitors and counsel only to contest service is meaningless. The evidence before the court overwhelmingly demonstrates that the defendant company is aware of the proceedings and is represented in respect of the underlying allegation. The court can be absolutely confident that to proceed to a committal hearing would cause the company no injustice.
>
> 48. The service of a summons is not an end in itself and the issue of service of a summons is not a precondition to a case proceeding. The statutory purpose of a summons is to compel a defendant to appear before the court. However, where a corporate defendant is, in effect, already before a court, to insist that a summons still be served has an absurd quality."[42]

[49] What seems to have been submitted on behalf of the second respondent, at least in writing, is that there are two preconditions to the power of the Magistrate to proceed to hear the complaints by way of examination of witnesses:

(i) Knowledge by the defendant (here, the applicant) of the proceedings;

(ii) That the corporate applicant is "before the Court".[43]

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41 This plainly should read "unless the defendant objects".
42 Complainant's outline at [43]–[48]: Hockaday affidavit, exhibit MTH-5 at 61–62.
43 Complainant's outline at [43]: Hockaday affidavit, exhibit MTH-5 at 61.

[50] The submission made at [46] of the outline is quite extraordinary. While it is true that s 113A of the *Justices Act* provides that the Magistrates Court may proceed in the absence of an appearance by a corporate defendant, the section must be understood in the context of other provisions. Section 42 provides for the swearing of a complaint; s 53 provides for the issue of a summons on the complaint; s 54(1A) provides that a summons "shall be served in accordance with [the *Justices Act*]"; and s 56 provides how service is effected. Section 113A provides that a corporation may appear "by a representative at the time and place mentioned in the summons issued against it", clearly being the summons served pursuant to ss 54(1A) and 56. A case does not proceed against a corporation in its absence "[b]ecause a corporate defendant cannot be detained or arrested and does not have a physical manifestation…".[44] It does have "physical manifestation" through its representative. That is what s 113A provides. It is obvious that a case proceeds in the absence of a corporate defendant when the corporate defendant fails to appear in answer to a summons which has been served upon it.

[51] The legislative history of s 113A is of some significance. In *R v Ampol Refineries Ltd*,[45] Kelly J held that, as the law then stood, there were obstacles to trying a corporation on indictment, as there were no provisions regulating how the corporation could appear before the court of trial. His Honour thought that legislative amendment of the *Criminal Code* was necessary.[46] His Honour also mentioned that it would be desirable to make amendment to the *Justices Act*.[47] This occurred through the *Justices Act and The Criminal Code Amendment Act* 1978 (Qld), which was enacted in response to the judgment in *Ampol*.[48] It has therefore been clear for the last 40 years how a corporation can make a valid appearance to a summons issued and served under the *Justices Act*.

[52] At least on the face of the written submissions of the second respondent below, the presence of the applicant before the Magistrates Court cured any point of lack of service. That submission was made despite the fact that the applicant, both through its solicitors Thynne & Macartney and its counsel, had gone to great lengths to make clear that the applicant's appearance before the Magistrates Court should not be taken as a

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44 Complainant outline at [46]: Hockaday affidavit, exhibit MTH-5 at 62.
45 [1978] Qd R 378 ("*Ampol*").
46 At 381–382; now see *Criminal Code* (Qld) s 594A.
47 *Ampol* at 381–382.
48 Parliament of Queensland, *Record of the Legislative Acts Passed by the Forty-Second Parliament of Queensland during its First Session 1978–1979*, 234 at 235.

waiver of the applicant's right to due service of the complaint and summons. The second respondent's written submission was also made completely ignoring the well-established principle that if service of a summons is a necessary requirement of the relevant provisions, an appearance can be made, without waiver of the necessity for service, in order to challenge the validity of any purported service.[49]

[53] In the course of argument before the Magistrates Court, counsel then appearing for the applicant was obviously concerned that it was being raised against the applicant that the appearance before the Magistrates Court waived any requirement for service. He then turned to address the Magistrate on that point. The following exchange occurred:

> "COUNSEL THEN FOR THE PRESENT APPLICANT: Thank you, your Honour. Now, did your Honour wish to hear me in respect of the arguments about the appearance by Thynne & Macartney being some waiver of the issue of service? That is by ---
>
> COUNSEL THEN FOR THE SECOND RESPONDENT: I don't suggest they constitute a waiver, your Honour. If that wasn't clear in my submissions, I make it clear now. My friend doesn't need to address that.
>
> BENCH: It doesn't become an issue.
>
> COUNSEL THEN FOR THE SECOND RESPONDENT: No.
>
> COUNSEL THEN FOR THE PRESENT APPLICANT: Thank you, your Honour."[50]

[54] It is difficult to reconcile that concession with the written submissions of the second respondent. Before me, the second respondent accepted that there had been no waiver by the applicant of any requirement for service of the summons and that the appearance before the Magistrates Court, of itself, was not relied upon.[51] The respondent submitted that all that was necessary was knowledge of the proceedings and the applicant had the requisite knowledge.

[55] After hearing extensive argument, the learned magistrate delivered a short ex tempore judgment in these terms:

> BENCH: This is a decision with respect to the contest as to whether or not Globex Shipping has been served with the summons and [indistinct] in the proceedings today. The short answer is, in my view, that they have been

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[49] *Nitz v Evans* (1993) 19 MVR 55 at 59, and the cases cited there.
[50] Transcript before the Magistrates Court at 1-40 to 1-41: Hockaday affidavit, exhibit MTH-4 at 48–49.
[51] Transcript of the present application at 1-26 to 1-27.

and the reasons for that are, briefly, as follows – or the logic behind it is, briefly, as follows.

The purpose of the service of – or the requirement for service of the – of a complaint in matters such as this, being an indictable offence – but the same is true for all, even simple offences – is to put the defendant, who is alleged to have committed some act punishable, with what he has been – he or she or it has been charged with. It would be impossible to administer justice without having defendants know what they are being charged with and then, consequently, having sufficient notice as to what is being alleged.

Now, it is clear, and it is – and no argument has sensibly been made, I do not think, that the defendant Globex is anything but acutely aware of the proceedings against it and it is on that basis alone that one might think that service has been effected. There is no other reason to – no other explanation for their appearances today, nor is there any explanation for the interaction that – Mr Hockaday from the instructing solicitors' interaction with a variety of witnesses in relation to the matter. So on that basis, it is clear, just on the face of it, that they have been served.

Now, that, I suspect, should or would, conveniently for me, conclude the matter, but there needs to be some reasons for coming to that conclusion, I suppose, other than the obvious fact that they are here and they are aware of it. Now, how were they served? Were they served by virtue of the presentation of the complaint and summons to Thynne + Macartney? It is clear at the point that they were delivered to that firm that some instructions had been taken by that firm in relation to the matter. That is why Mr Hockaday had been appraised of the factual surroundings of the allegations, that being the oil spill, and from when – the vessel from which the oil had come. So on that basis, he was – his capacity as a representative of Globex, aware of it, and consequently, Globex were aware of it. So that is – on one view, would be regarded as being service on the basis that, at the time, Mr Hockaday or his firm were acting as agents for the company.

Now, if I am wrong in that regard, the issue then turns to whether or not Globex was served by the – on – by service on Monson. And again, I agree with the submissions made that, given that Monson were the last known agent of the vessel, the company, when it was last in Australia, that – that situation relating to service on them on behalf of the company persisted until it is terminated. And notwithstanding there is limited scope for termination of that sort of agency, if that is what it – well, in terms of the Act – I think, until someone else is appointed as agent for the ship, that agency persists and it is on that basis I would fine,[52] if I am incorrect in assessing that Thynne + Macartney were agents at the time of service, then Monson certainly were.

But all this needs to be, at the risk of labouring the point and at the risk of trying to come across as some – as the only possessor any commonsense about it – is that they know it has been served. They know what the

[52] Presumably "find".

> complaint is and, clearly, they have been served and that is the, perhaps, the justification for the – as well as the reason – for the decision I made."[53]

[56] In the reasons, the first respondent does not refer expressly to s 29A of the *POTS Act*. It is not completely clear how each of the rival contentions of the parties were dealt with. There is clearly reliance though on the presence of the applicant in the sense of its "appearance" before the Magistrates Court. That approach flies in the face of the express concession that the applicant had not waived any requirement for service. The first respondent's confusion, though, is probably attributable to the written submissions of the second respondent. Ultimately though, it seems that the first respondent was satisfied that the applicant knew of the proceedings against it so service either was not necessary or, because of that knowledge, the applicant "[had] been served" or alternatively Thynne & Macartney and Monson were the applicant's agents and service had been effected upon them. While s 29A of the *POTS Act* was not mentioned in that context, it is relatively clear that the first respondent has held that Thynne & Macartney and Monson are each "the ship's agent" for the purposes of that section.

The hearing before me

[57] Mr Hunter QC for the applicant submitted:

(i) To vest jurisdiction in the Magistrates Court to conduct an examination of witnesses there must be service of the complaint and summons on the applicant;

(ii) There has been no service of the complaint and summons in compliance with s 56 of the Justices Act or s 29A of the *POTS Act*;

(iii) Appearance under protest does not constitute a waiver of the requirement of service;

(iv) Thynne & Macartney are not "the agent of the ship" for the purpose of s 29A of the *POTS Act*;

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[53] First respondent's reasons, 2 August 2017 at 2–3: Hockaday affidavit, exhibit MTH-1 at 2–3.

(v) Monson may have been "the agent of the ship" in 2011 but was not "the agent of the ship" in March 2017 when the complaint and summons was purported to be served.

[58] Mr Agius SC for the second respondent submitted:

(i) The applicant is aware of the complaints and that vests jurisdiction in the Magistrates Court.

(ii) Alternatively, Thynne & Macartney were "the agent of the ship" at the time of service of the complaint and summons.

(iii) Alternatively, Monson was "the agent of the ship" at the time of service of the complaint and summons.

[59] As far as the arguments between the parties concern s 29A of the *POTS Act*, there seems to be agreement that the relevant issue is whether Thynne & Macartney or Monson were "the agent of the ship" not at the time of the alleged oil spill, but at the time of the purported service of the complaint and summons.[54] For reasons which appear later, that might not be correct

[60] Mr Agius SC does not submit that there was service of the complaint and summons in the manner prescribed by s 56 of the *Justices Act* or any other provision (other than s 29A of the *POTS Act*) providing for service of proceedings. Critical to Mr Agius SC's argument is the finding by the first respondent that the applicant was "acutely aware" of the proceedings.[55]

[61] There was no contest by the applicant to that finding by the first respondent, though there was of course argument as to the legal consequences of the finding. Not only was such a finding open to the first respondent, it was inevitable that such a finding would be made. Thynne & Macartney were engaged in correspondence with MSQ and the CDPP before the complaint was sworn and the summons was issued and they

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[54] Outline of submissions for the applicant, filed 15 November 2017, CFI 7 at [41] ("Applicant's outline"); Outline of submissions for the second respondent, filed 1 December 2017, CFI 8 [47] ("Second respondent's outline").

[55] First respondent's reasons at 2 line 16: Hockaday affidavit, exhibit MTH-1 at 2.

subsequently received a copy of the complaint and summons. Obviously Thynne & Macartney, through Mr Hockaday, has sought and received instructions to challenge the jurisdiction of the Magistrates Court to proceed in the absence of proper service.

[62] The concession made on behalf of the second respondent before the Magistrates Court and repeated by Mr Agius SC before me, that there had been no waiver of any requirement for service, was clearly properly made. Neither the letters and emails to the CDPP of 2 February 2017[56] and 26 April 2017,[57] nor the correspondence with MSQ[58] constituted a waiver of any requirement for proper service. Mr Hockaday's letter to the Registrar of the Magistrates Court[59] makes it very clear that the right to object to an absence of proper service was being preserved.

[63] In the Magistrates Court, submissions were made on behalf of the second respondent that "jurisdiction" was vested in the Magistrates Court upon the swearing of the complaint and that service was not a necessary precondition to "jurisdiction".[60] For the reasons I will explain, such an approach shrouds rather than illuminates the real question.

[64] During argument before me, Mr Agius SC identified the correct question during the following exchange:

> "MR AGIUS: Well, because here we have – the provisions in relation to service are not mandatory. The provisions in relation to service are procedural. They're not mandatory. One doesn't have to serve a summons the way in which the Justices Act indicates that you can serve a summons."[61]

[65] The issue, correctly there identified, is whether service is a mandatory precondition to the Magistrates Court proceeding to hear the examination of witnesses.

[66] Mr Agius SC then later submitted:

> "MR AGIUS: But the point I'm making is that it doesn't matter how the person comes to be before the court and – so whether they're arrested,

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56 Hockaday affidavit, exhibit MTH-7 at 85.
57 At 86.
58 Hockaday affidavit, exhibit MTH-8 at 96.
59 Hockaday affidavit, exhibit MTH-7 at 87.
60 Hockaday affidavit, exhibit MTH-2 at 12.
61 Transcript of the present application at 1-32 ll 18–22.

> whether they answer a summons – and the reason I'm making this point is that our fundamental argument is that you don't need the issue of the summons and the response to a summons before a magistrate can start hearing the evidence."[62]

[67] That last passage seemed to still be on the theme that service was not a precondition but notice was. Then, Mr Agius SC made this submission:

> "Because to hear the evidence doesn't create any prejudice so far as the prospective defendant is concerned. The issue might be different at the end of the hearing of the evidence when the magistrate comes to make a decision to commit somebody for trial, but for the purpose of hearing the evidence the magistrate has jurisdiction, providing a complaint has been taken out."[63]

[68] That submission seemed to be that, provided a complaint was made, a Magistrates Court could proceed with an examination of witnesses ex parte in the absence of service upon, or notice to, the defendant. I reject that submission. Nothing in the *Justices Act* supports it.

[69] For the reasons I explain, the issue is whether the Magistrates Court had power ("jurisdiction" in one sense) to hear an examination of witnesses if the summons had not been served in accordance with the *Justices Act*, and where the requirement for service was not otherwise waived. The question is not whether the Magistrates Court is seized of jurisdiction in the matter of the complaint. The question is whether there is power to hear the complaint in the sense of conducting an examination of witnesses. That issue properly identified (at least initially) by Mr Agius SC is determined by a question of construction of the *Justices Act* to determine whether service of the summons is mandatory. Therefore the three issues for consideration are:

(i) In the absence of waiver of the necessity for service, was service of the summons a precondition to the exercise of the power to proceed on the complaint? (the necessity for service issue)

(ii) Was Thynne & Macartney "the agent of the ship" for the purposes of s 29A of the *POTS Act*?

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62 At 1-33 l 45 to 1-34 l 2.
63 At 1-34 ll 4–9.

(iii) Was Monson an "agent of the ship" for the purposes of s 29A of the *POTS Act*?

The necessity for service issue

[70] In *Nitz v Evans*,[64] Hayne J (then a judge of the Supreme Court of Victoria) heard an appeal from the decision of a magistrate convicting a defendant of a summary offence. Section 34(1)(b) of the *Magistrates Court Act* 1989 (Vic) provided as follows:

> "**34 Service of summons to answer to a charge**
>
> (1) Every summons to answer to a charge, except where otherwise expressly enacted—
>
> (a) must be served at least 14 days before the mention date; and
>
> (b) must be served on the defendant by:
>
> (i) delivering a true copy of the summons to the defendant personally; or
>
> (ii) leaving a true copy of the summons for the defendant at the defendant's last or most usual place of residence or of business with a person who apparently resides or works there and who apparently is not less than 16 years of age."

[71] The document which was served upon the defendant did not comply with s 34(1)(b) of the Victorian legislation as it was not "a true copy" of the summons. The copy that was served did not indicate that it had been signed by the Registrar. When the matter came before the Magistrates Court, the defendant appeared in order to argue that he had not been properly served. He did not waive the right to proper service. The Magistrate found against the defendant on that point and the defendant then withdrew. The Magistrate convicted the defendant in reliance upon s 41 of the Victorian legislation which was in these terms:

> "**41 Non-appearance of defendant**
>
> (1) If a defendant does not attend in answer to a summons to answer to a charge for an indictable offence which has

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64 (1993) 19 MVR 55.

been served in accordance with this Act, the Court may issue a warrant to arrest the defendant.

(2) If a defendant does not appear in answer to a summons to answer to a charge for a summary offence, the Court may:

(a) issue a warrant to arrest the defendant; or

(b) proceed to hear and determine the charge in the defendant's absence in accordance with Schedule 2; or

(c) adjourn the proceeding on any terms that it thinks fit."

[72] Hayne J identified the real issue in the case in these terms:

> "Much of the argument on the appeal was couched in terms of whether in the events that had happened the court below had jurisdiction. In the end I doubt that it is useful to speak in terms of presence or absence of jurisdiction in the court below at least without going on to identify the sense in which the expression is used: see *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369. As I have said, there is no doubt that a criminal proceeding had been validly commenced and a summons had been regularly issued. It may be, then, that analogies can be drawn between the charge and summons on the one hand and the information and process spoken of in *R v Hughes* (1879) 4 QBD 614 on the other. In that case Hawkins J said at 625:
>
> > The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid, that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place, unless under special statutory enactment.
>
> The question at issue in the present matter is whether the defects in service were such as to preclude the court from proceeding to hear and determine the charge. In my view it is not necessary to decide whether the difficulties about service go to the jurisdiction of the court or go only to the question of whether a "hearing in the nature of a trial could take place" (to adopt the words of Hawkins J).
>
> Section 34 is cast in mandatory terms. It says that "Except where otherwise expressly enacted" every summons to answer to a charge "must be served" before a particular time and "must be served on the defendant" by one of two prescribed methods, each of which requires the delivery or leaving of a true copy of the summons."[65]

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[65] *Nitz v Evans* (1993) 9 MVR 55 at 58.

[73] So it can be seen that in *Nitz v Evans* it was not to the point whether the court was vested with jurisdiction in relation to the complaint generally. The question was whether or not s 34(1) mandated a condition precedent (service of the summons) to the exercise of the Magistrates Court's power to proceed to hear the complaint. This is the issue here.

[74] After finding that s 34 of the Victorian legislation mandated the service of the summons, Hayne J then turned his attention to s 41. His Honour ruled as follows:

> The informant submitted that if what was served was not a sufficient compliance with the requirement to serve a true copy of the summons, then s 41 provided an exception to the otherwise mandatory requirement of s 34. At first sight the omission of the words "which has been served in accordance with this Act" from s 41(2) dealing with non-appearance in answer to a summons to answer to a charge for a summary offence would suggest that a court dealing with such a charge may exercise its powers in different circumstances from those that govern the case of a summons to answer to a charge for an indictable offence. If this is not so, why include the words "which has been served in accordance with this Act" in s 41(1) but omit them in s 41(2)? Yet it is clear that the powers conferred by s 41(2) are to be exercised only "if a defendant does not appear in answer" to a summons. It would be unthinkable that parliament should intend that there should be power to hear and determine a criminal charge in a case where a summons has been regularly issued but never served and never brought to the attention of the defendant. Thus the bare facts that a summons has been regularly issued and that a defendant does not appear cannot, without more, ground the exercise of the powers conferred by s 41(2). In my view it is implicit in the expression "if a defendant does not appear to answer to a summons" that the defendant has been afforded the opportunity to appear. Clearly the defendant has been afforded that opportunity if the summons has been served in accordance with the Act. Moreover I do not consider that it can be said "that a defendant does not appear in answer to a summons" if there has been no service in accordance with the Act but the defendant is, by some means or other, aware of the fact that a summons has been, or may have been, issued. To read s 41(2) as permitting a court to proceed in such a case would be to avoid the otherwise mandatory requirements of s 34 and I do not consider that s 41(2) is to be read in this way. In particular I do not consider that it is to be read as an "other express enactment" of the kind contemplated by the excepting words of s 34(1). Thus in my view it cannot be said that "a defendant does not appear in answer to a summons" for the purposes of s 41(2) unless the defendant has been served with that summons in accordance with the Act."[66]

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[66] At 58–59.

[75] *Nitz v Evans* was followed by Warren J (as her Honour then was) in *Sinclair v Magistrates' Court of Victoria at Ringwood.*[67] That also was a case concerning the provisions of the *Magistrates Court Act* 1989 (Vic) and whether service under s 34(1) was mandatory. After referring to *Nitz v Evans* and another case, *Kerr v Hannon*[68] her Honour, relevantly here, said as follows:

> "The principle to be extracted from each of these cases is that the procedural requirements of the legislation governing the laying of charges and the service of summons must be strictly complied with, indeed, such provisions are mandatory. Sections 33 and 34 of the Magistrates' Court Act are interrelated in that s.34 provides that every summons to answer a charge must be served at least 14 days before the mention date and must be served on the defendant by defined means. It is this provision that Hayne J in Nitz considered to be mandatory and must be strictly complied with. Section 26 of the Act sets out the way in which a criminal proceeding is commenced and provides in sub-s.(4) that a proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed except where otherwise provided by or under any other Act. The latter is the equivalent provision of s.165 of the previous Magistrates' (Summary Proceedings) Act considered by Nathan J in Kerr. Similarly, the learned judge held that the provision must be strictly complied with. The authorities and the circumstances of this matter lead me to conclude that there can be no certainty that the requirements of s.33 were strictly complied with by the informant in the course of attempting to extend the time of the summons. The requirements of s.33 are couched in mandatory terms. The whole procedural scheme enshrined in Division 2 of Part 4 of the Act is to ensure that proceedings are commenced in a precise and formal way and that the defendant to a summons has reasonable notice of the return date of the mention hearing specified in the summons."[69]

[76] The provisions of the *Justices Act* are, in relevant terms, much like the provisions considered in *Nitz v Evans* and *Sinclair v Magistrates Court of Victoria at Ringwood*. Both the *Justices Act* and the Victorian legislation provide for summonses to be issued upon complaint. Section 54(1A) performs the same function as s 34(1) of the Victorian legislation. Section 54(1A) is couched in mandatory terms: the summons "shall be served in accordance with this Act". Section 56 then prescribes how the service shall be effected.

[77] Section 103 of the *Justices Act* performs the same function as s 41 of the Victorian legislation and, like s 41, it must be that the failure to appear as envisaged by s 103 is a

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[67] [1998] VSC 170.
[68] [1992] 1 VR 43.
[69] *Sinclair v Magistrates' Court of Victoria at Ringwood* [1998] VSC 170 at [12].

failure to appear upon valid service of the summons. Section 113A of the *Justices Act* specifically deals with proceedings were the defendant is a corporation. Section 113A(1) provides that a corporation may appear "by a representative at the time and place mentioned in the summons issued against it". In context, that must mean "the summons issued against it and served upon it".

[78] Parts 4 and 5 of the *Justices* Act provide different procedures upon default of appearance by a defendant. However, both Part 5 and 6 contemplate service of a summons pursuant to s 56 before power to proceed to hear the complaint arises. Section 56, as it presently appears in the *Justices Act* is not its original form. The original form of s 56 is as follows:

> "*Service, Endorsement and Proof of Service*
>
> **56.** A summons must be served upon the person to whom it is directed by delivering a copy thereof to him personally or, if he cannot be found, by leaving it with some person for him at his last known place of abode.
>
> The person who serves a summons must within three days after service endorse on the summons the day and place of the service thereof, and his signature, and must, unless the summons has been served on the defendant personally attend before the justices at the time and place mentioned in the summons, to depose, if necessary, to the service thereof.
>
> If the summons has been served on the defendant personally the person by whom it was served may attend before any justice and depose in writing, on oath, to the service thereof. Such deposition shall he endorsed on the summons, and on production to the justices before whom the complaint is heard, shall be sufficient proof of the service of the summons on the defendant"

[79] The section was amended in each of 1964,[70] 1968,[71] 1973,[72] 1992,[73] 1999,[74] 2000,[75] and 2010.[76] However, it was the *Justices Act and Other Acts Amendment Act* 1968[77] which

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[70] *Justices Acts Amendment Act* 1964, No 32 of 1964 (Qld) s 27.
[71] *Justices Acts and Other Acts Amendment Act* 1968, No 14 of 1968 (Qld) s 5.
[72] *Justices Act Amendment Act* 1973, No 22 of 1973 (Qld) s 4.
[73] *Justice Legislation (Miscellaneous Provisions) Act* 1992, No 40 of 1992 (Qld) s 31.
[74] *Road Transport Reform Act* 1999, No 42 of 1999 (Qld) s 54(3), Schedule Part 3.
[75] *Statute Law (Miscellaneous Provisions) Act* 2000, No 46 of 2000 (Qld) s 3, Schedule.
[76] *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010, No 26 of 2010 (Qld) s 77; *Justice and Other Legislation Amendment Act 2010*, No 42 of 2010 (Qld) s 120, Schedule.
[77] *Justices Acts and Other Acts Amendment Act* 1968 (Qld).

enacted the section in its current form as relevant here. When the Bill was read for the second time in the 38th Parliament of Queensland, the Member for Bowen and Minister for Justice, the Honourable P R Delamothe, described the amendment as enabling complaints and summonses for simple offences and offences of breaches of duty to be served by registered mail.[78] There was nothing in any of the speeches in Parliament relevant to the Bill which is of assistance in the construction of s 56 in its present form.

[80] Section 56 as originally enacted is mandatory in its requirement of personal service. Section 56 in its current form draws a distinction between summonses for complaints of a simple offence or for an offence of breach of duty on the one hand and summonses for complaints of indictable offences on the other. It then provides a different mode of service for each of the two categories of summonses. Section 56 then provides "a summons shall be properly served upon the person to whom it is directed if it is served in accordance with this subsection". That does not admit of the possibility of service other than pursuant to the subsection. On a proper construction, the section means that proper service will be made of a summons for a complaint of a simple offence or breach of duty if s 56(1)(a) is complied with and service of a summons on a complaint of an indictable offence will be validly made if the procedure provided by s 56(1)(b) is complied with.

[81] Section 56 in its current form begins "A summons shall be properly served upon the person…" Section 56 does not mention the service of summonses upon corporations. The section refers to service "upon the person". Section 32D of the *Acts Interpretation Act* 1954 (Qld) provides that reference to "a person" shall include reference to "a corporation". Section 56 authorises service of a summons on a complaint of an indictable offence to be made by leaving the complaint and summons at the person's (company's) usual place of business. Kennedy Allen,[79] as long ago as 1956, recognised that service upon a corporation of a complaint and summons under the *Justices Act* could be effected by compliance with provisions in other legislation which dealt with service upon corporations.[80]

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78 Queensland, *Parliamentary Debates*, vol 248 at 2840.
79 Kennedy Allen, *The Justices Act (Queensland)* (3rd ed, Law Book Co Ltd, 1956).
80 At 160–161; *Companies Act* 1931 (Qld) s 380 (as amended).

[82] It is clear from the *Justices Act* considered as a whole that where a complainant relies upon a summons to bring a defendant to court (as opposed to arrest, or notice to appear), the summons must be served. In particular:

(i) Section 54(1A) says so expressly.

(ii) Section 54(3) requires the date for the return of the summons to be extended where "a summons has not been served upon a defendant".

(iii) Section 56 provides a specific procedure for service of a complaint and summons for a simple offence or one of breach of duty,[81] then provides a specific procedure for service of a complaint and summons for an indictable offence.[82]

(iv) Section 56 provides a specific procedure for proof of service of a complaint and summons.[83]

(v) Section 103 provides for a procedure where there is default in a defendant appearing pursuant to a summons. Powers arise upon proof that the summons "was properly served on the defendant".[84]

(vi) Section 113A contemplates that a corporation may appear by its representative "at the time and place mentioned in the summons"; obviously, the summons served pursuant to s 56.

(vii) Section 141 appears in Part 6, which concerns proceedings in relation to simple offences and breaches of duty. However, proceedings under Part 6 follow from the operation of Part 4.

(viii) Section 142 refers to the defendant appearing "in obedience to the summons"; obviously, a summons served pursuant to s 56.

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81 Section 56(1)(a).
82 Section 56(1)(b).
83 Section 56(3).
84 Section 103(3).

(ix) Section 142(1) provides for a procedure where there is no appearance by a defendant and there is proof that "the summons was properly served".

(x) Any adjournment under s 142 must be notified to the defendant and that notification is given in a particular way.[85]

(xi) Section 142A also concerns procedures where there is a failure by a defendant to appear pursuant to a "summons issued on the complaint and served…"[86]

(xii) If the proceedings are adjourned under s 142A from the date in the summons, then notice must be given in a particular way.[87]

[83] In argument the second respondent referred to various authorities, submitting that they suggested that service of the complaint and summons was not mandatory.

[84] *Plenty v Dillon*[88] was cited in the second respondent's outline of argument before me in the following passage:

> "67. Section 53(1) of the JA provides that when a complaint is made a justice may issue a summons. In this way, the JA contemplates that a proceeding can properly continue without the issue of a summons and - by necessary implication - the service of a summons.
>
> 68. This highlights the point that service of process in a criminal case is not an end in itself. The purpose is procedural fairness by ensuring that a person is aware of charges laid against him or her and how and when it is intended that they proceed.
>
> 69. Support for that proposition can be found in *Plenty v Dillon* ((1991) 171 CLR 635, as extracted in Outline of Submissions (applicant) dated 8 November 2017, [39],) where Mason CJ, Brennan and Toohey JJ said 'the essential nature of a summons as the means of according natural justice has been established by long practice.' ((1991) 171 CLR 635, 641)."[89]

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85 Section 142(3).
86 Section 142A(4)(b)(i).
87 Section 142A(7).
88 (1991) 171 CLR 635.
89 Second respondent's outline at [67].

[85] The terms of s 53(1) and the discretionary nature of the power to issue a summons[90] does not justify the conclusion that there is a power in the Magistrates Court to hear a complaint which has not been served. Section 53(1) just recognises that the justice to whom the complaint is made may exercise a discretion not to issue a summons. In certain circumstances specifically provided by the *Justices Act* the Court may proceed even though no summons has been issued. This is the point of s 55. It is not the case that the presence of a discretion in s 53 leads to a conclusion that the Magistrate Court has a general power to proceed to a hearing of the complaint (if a simple offence or a breach of duty) or to an examination of witnesses (where the complaint alleges an indictable offence) in the absence of the issue and service of a summons. Such a conclusion would be inconsistent with ss 54(1A), 54(3) and (4), 56, 103, 113A, 141, 142 and 142A.

[86] As to the quote in the second respondent's outline from *Plenty v Dillon*, it is best to refer to the passage from which that quote comes. It is as follows:

> "A summons to appear before a court of summary jurisdiction to answer an information or complaint does not itself compel a defendant to appear. Its primary purpose is to ensure that natural justice is accorded to a defendant by giving the defendant notice of the subject of the complaint and an opportunity to be heard. Service of a summons, unlike the execution of a warrant of arrest, does not coerce a defendant to appear, though a failure to appear in answer to the summons may lead to the issue of a warrant (see Jervis' Act - *the Summary Jurisdiction Act* 1848 (U.K.) (11 and 12 Vict. c.43). <u>The essential nature of a summons as the means of according natural justice has been established by long practice</u>."[91] (the passage relied upon by the second respondent is emphasised).

[87] In *Plenty v Dillon,* the appellant sued the two respondents, who were police officers, for trespass when they entered onto his property to serve a complaint and summons upon the appellant's daughter pursuant to the provisions of the *Juvenile Courts Act* 1971 (SA). The High Court considered the nature of a summons to appear before a Court of Summary Jurisdiction in the context of a consideration of the common law rights of persons executing process to enter upon land. *Plenty v Dillon* is not authority for a proposition that the only purpose of a summons is to accord natural justice. *Plenty v Dillon* is not authority for a proposition that a statute (here the *Justices Act*) might not

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90 At [67].
91 *Plenty v Dillon* (1991) 171 CLR 635 at 641.

impose service as a precondition to the hearing of a complaint. *Plenty v Dillon* casts no light, relevantly here, on the construction of the *Justices Act*.

[88] The second respondent relies upon two statements made by Cavanough J in *Guss v Commissioner of Taxation.*[92] Those two statements are "… illegality attaching to the process by which the accused comes before the Court does not have any effect on the jurisdiction of the Court to deal with the matter"[93] and "…however a person is brought before a court, that person is liable to answer any charge or information then and there brought against him".[94]

[89] In *Guss,* the defendant had been arrested and then bailed pursuant to s 13 of the *Criminal Procedure Act* 2009 (Vic). That section provides for certain documents to be provided to a defendant who is either arrested on warrant or served with a summons to appear. The defendant appeared pursuant to the bail order and sought to argue that he had been improperly arrested. Against that background, his Honour said this:

> "Section 13 of the CPA does not on its face impose any conditions or qualifications on the jurisdiction or power of a court to hear and determine a criminal charge. It may, however, have significant work to do if it is capable of bearing on the validity of the service of a summons on an accused, because a court generally cannot proceed against an accused who is not physically before it, unless the accused has been properly served with the process of the Court. On the other hand, there seems to be less scope for s 13 to have relevant operation with respect to the hearing and determination of charges where the accused is physically before the Court, even if the accused has been brought there by irregular means. Generally speaking, illegality attaching to the process by which the accused comes before the Court does not have any effect on the jurisdiction of the Court to deal with the matter. [*R v Hughes* (1879) 4 QBD 614, 622; *Director of Public Prosecutions v Carter; Director of Public Prosecutions v Kenny* [2015] IESC 20 (Supreme Court of Ireland), [32]-[36].]"[95] (emphasis added)

[90] In context, his Honour is saying that where the defendant is not before the Court due service of a summons may be a precondition to the Court's power to hear the complaint. That of course depends upon the construction of the relevant statute. Here, the applicant is, relevantly, not before the Court. It has appeared by a representative but for the

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92 [2015] VSC 259.
93 At [38].
94 At [39].
95 At [38].

limited purpose of raising the objection to service. As has been conceded by the second respondent, the right to due service has not been waived.

[91] Cavanough J went on in *Guss* to discuss *Nitz v Evans*. His Honour observed:

> For the reasons given by Magistrate Lambden, I agree that *Nitz v Evans* is a case which favours the Commissioner, not the plaintiff. In that case, it appears that Mr Nitz did not at any stage attend physically before the Court. The summons not having been properly served, the Court was deprived of power to deal with Mr Nitz by virtue of s 41 of the Magistrates' Court Act 1989, as Hayne J explained. The situation could not be rectified because the time for any extension of the date for return of the summons had long since passed. That is why the relevant charge was dismissed. The case is thus distinguishable on numerous grounds from the present case.[96]

[92] The position of the applicant is analogous to that of Mr Nitz. The only appearance before the Magistrates Court was for the purpose of taking the point of lack ofservice of the summons.

[93] In *Capper v Thorpe*,[97] a question which arose was as to how a notice could be "served" under s 6(1) of the *Sale of Land Act* 1970 (WA). The case is of no assistance to the construction of the provisions of the *Justices Act*. In the joint judgment of the Court, it is recognised that the meaning of the term "served" in the *Sale of Land Act* will be discerned from its statutory context.[98] The task here is to construe the relevant provisions of the *Justices Act*. Similarly, the decision of Fraser JA[99] in *Warren v Legal Services Commissioner*[100] turned upon the construction of various provisions of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) and laid down no general principle relevant here to the construction of the provisions of the *Justices Act*.

[94] In *FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd & Anor*,[101] there was a requirement under s 421 of the *Environmental Protection Act* 1994 (Qld) to give notice to a buyer of the land of information relevant to contamination. Questions arose as to how that notice ought to be given. Perhaps obviously, with respect, Jackson J

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96 At [44].
97 (1998) 194 CLR 342.
98 At 351–352.
99 With whom Morrison JA and Phillipides J (as her Honour then was) concurred.
100 [2014] QCA 150.
101 [2017] QSC 322.

observed that the answer was to be found in the proper construction of the subsection.[102] Nothing in his Honour's judgment assists in the construction of the *Justices Act*.

[95] Young J in *Howship Holdings Pty Ltd v Leslie & Anor*[103] considered s 109Y of the *Corporations Law* and s 160 of the *Evidence Act* 1995 (NSW) in determining whether a statutory demand delivered to a document exchange box constituted valid service. His Honour construed the statutory provisions which provided for service by post and determined that service via a document exchange box was not valid service pursuant to those provisions. Ultimately, though, his Honour accepted evidence that the statutory demand had in fact physically been received by the company and held that, in those circumstances, service had been effected. In the course of giving judgment, his Honour cited the observation of Justice McInerney in *Pino v Prosser & Hassan*[104] who said:

> "[It would be] remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ … should be held not to have been served."[105]

[96] However, it is well recognised that a respondent to process may have physically received the process, but where, on a proper construction of the relevant statute, service is mandatory, an appearance may be made challenging the service without waiver of the right to do so.[106] This is what has occurred here.

[97] It was submitted by the second respondent that there may be some significance in the fact that the complaint is one alleging the commission of an indictable offence and so the magistrate is not determining guilt. The Magistrate would exercise executive power and simply determine whether the applicant ought to be put on trial.[107] However, Part 4 of the *Justices Act,* where the relevant provisions are contained,[108] apply to both complaints for simple offences and complaints for indictable offences. Section 56 makes service mandatory and Parts 5 and 6 provide serious consequences where no appearance is made in response to the summons.

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[102] At [53].
[103] (1996) 41 NSWLR 542.
[104] [1967] VR 835.
[105] At 837.
[106] *Nitz v Evans* (1993) 19 MVR 55 at 59, and the cases there cited.
[107] Second respondent's outline at [81].
[108] *Justices Act* ss 45, 54 and 56.

[98] In the absence of service under s 56 of the *Justices Act* or some other statutory provision whereby documents might be served,[109] the Magistrates Court has no power to proceed and hear an examination of witnesses.

Section 29A of the *POTS Act*: "agent of the ship"

[99] As already observed, the second respondent submits that each of Thynne & Macartney and Monson were "the agent of the ship" for the purposes of s 29A of the *POTS Act* and therefore service upon them was service upon the applicant. Before turning to the details of each of those claims, it is necessary to consider generally the term "agent of the ship" as used in s 29A of the *POTS Act*.

[100] The applicant submits that "the agent of the ship" is a reference to a "shipping agent" which "is a well understood expression in the maritime industry referring to an agent who undertakes business on behalf of a ship whilst it is in port, including arranging for such things as pilotage, bunkering and berthing".[110] The applicant seeks to rely on the judgment of Adam J in *Goodes v James Patrick & Co Ltd*,[111] where his Honour considers the expression "agent of the ship" as it appeared in the *Navigable Waters (Oil Pollution) Act* 1960 (Vic).[112] I shall return to that decision.

[101] The second respondent submits that there are two possible interpretations of the phrase as it is used in s 29A of *POTS Act*:

> "(a) a narrow interpretation limited by a contractual relationship in the nature of the traditional ships agency function, whereby a local company arranges the necessary paperwork for a ship to berth in an Australian port; or
>
> (b) a broader interpretation, which captures a person or entity in Australia authorised to act to facilitate a ship's activities in Australia or otherwise authorised to represent the owner of the ship in respect of the ship."[113]

[102] Reliance is made by the second respondent upon s 15AA of the *Acts Interpretation Act* 1901 (Cth), which is in these terms:

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[109] Such as s 29A of the *POTS Act*.
[110] Applicant's outline at [42].
[111] [1963] VR 334.
[112] Applicant's outline at [42].
[113] Second respondent's outline at [32].

15AA Interpretation best achieving Act's purpose or object

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."

[103] The purpose can be discerned, so submits the second respondent, not only from a consideration of the *POTS Act* as a whole but also by reference to an extrinsic aid, being the explanatory memorandum to the bill which became the *Transport Legislation Amendment Act* 1991 (Cth), which inserted s 29A into the *POTS Act*. The explanatory memorandum provided relevantly as follows:

> "47. At present there is no provision in the Principal Act for service of process. Originally the Principal Act was intended to apply only to Australian ships on the high seas, and the Convention was to be applied within State and Territory waters under complementary State and Territory legislation. So far only New South Wales, Tasmania and South Australia have enacted appropriate complementary legislation. In addition, the seaward limit of the Australian territorial sea has recently been extended to 12 nautical miles from the coast to baseline, without any corresponding extension of State and Territory jurisdiction. The Principal Act will therefore now cover both overseas and Australian ships in respect of pollution incidents committed within the territorial sea but outside State and Territory jurisdiction. It is therefore appropriate to provide for the service of summonses or other documents under the Principal Act. In respect of Australian ships such documents can always be served on the ship's master or owners, but service of documents on the master or owners of an overseas ship may not be possible, since the ship may have left Australian waters before the incident is discovered.
>
> 48. Clause 23 will therefore insert a new section 29A providing that documents in respect of offences against the Principal Act may be served on the ship's agent in Australia rather than on the master or owner of the ship directly. This will facilitate service on overseas ships which have left Australian waters."

[104] I strongly suspect that the term "agent of the ship" has a meaning in the maritime industry gained from common usage.[114] The term appears in various documents considered in reported cases and also appears in various statutes, some now repealed.[115]

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[114] Like in *Fabre v Ley* (1972) 127 CLR 665, where the High Court held that the term "bank cheque" had an accepted meaning.

[115] *The Australian United Steam Navigation Co Ltd v Hiskens* (1914) 18 CLR 646; *Seas Sapfor Ltd & Anor v Far Eastern Shipping Co* (1995) 39 NSWLR 435; *Maritime Union of Australia v Minister for Transport and Regional Services* (Honourable John Anderson) (2000) 100 FCR 58; *The Ship "SOCOFL Stream" v CMC (Australia) Pty Ltd* [2001] FCA 961; *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR

Interestingly, in the cases and statutes, the term "agent of the ship" usually appears as part of a composite expression including the "owner of the ship" and the "master of the ship". However, the meaning of s 29A must be discerned from a consideration of the statutory text in its context which includes the legislative history and intrinsic materials and obviously the specific principles of construction prescribed by the *Acts Interpretation Act*.[116]

[105] The term "agent of the ship" appears but once in the *POTS Act*: in s 29A. The term "owner of the ship" appears regularly in the *POTS Act*.[117] The term "owner of the ship" often appears as part of the term "the master and the owner of the ship" where that term is clearly intended to refer to two separate entities, namely "the master of a ship" and "the owner of a ship", not a person who is both "the master and the owner of a ship".[118] The term "charterer" also appears.[119] The term "manager or operator of the ship" appears in s 22.

[106] The term "owner" is not defined. The term "charterer" is not defined, neither are the terms "manager" or "operator". There is no definition of the term "agent of the ship". Many sections create offences which may be committed by the "master" or by "the charterer" or by "the owner of the ship" and s 9 is an example. The term "master" is defined as follows:

> "***master***, in relation to a ship, means the person having command or charge of the ship."[120]

[107] Sections of the *POTS Act* refer to the agent of the owner of a ship as opposed to "the agent of the ship".[121] Section 14 is such a section. It concerns the keeping of an oil

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36; *Vlasons Shipping Inc v Swiss General Insurance Co Ltd* [1998] VSC 91; *Mentink v Registrar the Australian Register of Ships* (2012) 227 FLR 248. As to legislation, see *Sea-Carriage of Goods Act* 1904 (Cth); *Navigation Act* 1912 (Cth) s 286, s 288; *Navigation (Loading and Unloading) Regulations* 1925 (Cth) reg 55 made under the *Navigation Act* 1912 (Cth), *Melbourne Harbour Trust Act* 1958 (Vic), *Navigable Waters (Oil Pollution) Act* 1960 (Vic).

116 *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22]; *SZTAL v Minister for Immigration and Water Protection* (2017) 91 ALJR 936 at [14], [35]-[40], [81] and [92].

117 For example, s 9, s 10A, s10B, s 11(3), s 11D, s 12, s 14, s 14A, s 21, s 21A, s 26, s 26B, s 26BC, s 26BCC, s 26DAA, s 26F, s 26FA, s 26FB, s 26FC, s 26FD, s 26FE, s 26FEG, s 26FEH, s 26EEJ, s 26FEN, s 26FEQ, s 26FER, s 26FET, s 26FEV, s 26FEW, s 27A, s 29A.

118 Many of the sections noted in the previous footnote but for example s 10B, s 12, s 14.

119 For example, s 9, s 22.

120 *POTS Act* s 3.

121 For example, ss 14, 22, 25, 26B, 26FB and 26FEV.

record book. Section 14 only casts obligations upon certain Australian ships. Section 14 is as follows:

"**14 Oil record book to be retained**

(1) An oil record book of a ship to which section 12 applies shall be retained in the ship until the expiration of a period of one year after the day on which the last entry was made in the book and shall be readily available for inspection at all reasonable times.

(2) Where an oil record book is not retained in a ship in accordance with subsection (1), the master and the owner of the ship each commit an offence punishable, upon conviction, by a fine not exceeding 200 penalty units.

(2A) An offence under subsection (2) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the Criminal Code.

(3) The owner of a ship to which section 12 applies shall cause each of the ship's oil record books to be retained:

(a) in the ship; or

(b) at the registered office of the owner; [122]

until the expiration of the period of 2 years next following the expiration of the period during which the book is required to be retained in the ship by virtue of subsection (1) and shall be readily available for inspection at all reasonable times.

Penalty: 200 penalty units.

(5) The owner of a ship to which section 12 applies who resides in Australia, or has an office or agent in Australia, may from time to time furnish to a prescribed officer notice, in writing, of an address, being the address of:

(a) the place at which he or she so resides;

(b) his or her office in Australia or, if he or she has more than one office in Australia, his or her principal office in Australia; or

(c) the office or place of residence of his or her agent or, if his or her agent has more than one office in Australia, the principal office in Australia of his or her agent;

[122] An Australian ship must have a "registered office".

> and the place or office of which an address is furnished for the time being under this subsection is the registered office of the owner of the ship for the purposes of subsection (3).
>
> (6) Where the owner of a ship to which section 12 applies does not reside in Australia and does not have an office or agent in Australia, the owner may deposit an oil record book of the ship with a prescribed officer and, while the book is so deposited, the book shall, for the purposes of subsection (3), be deemed to be retained at the registered office of the owner." (emphasis added)

[108] It can be seen that in both s 14(5) and (6) appears the notion of "the owner of the ship" who "has an office or agent in Australia". A similar concept appears in s 25, s 26FB, and s 26FEV. Section 22, s 26B and s 26FEV provide that "an agent of the owner" may give notice as required by the section of various things. The notion of an agent of the owner in the context of a specific act to be done by the agent can be clearly understood as an agent of the owner with authority to perform that act.

[109] The question arises though as to whether the term "the owner's agent" which clearly enough in sections like s 14 means a representative of the owner in Australia is synonymous with the term "agent of the ship". It might be thought to be significant that the parliament has sought to use a different term, namely, "agent of the ship" in the section which deals with service of documents relating to offences.

[110] Even in sections like s 14, the mention of an owner's agent has a certain formality about it. It assumes the agent is a person who has a residence in Australia and an "office" and presumably a business as an agent.[123] The notion of an agent of the owner as used in these sections would not be wide enough to include any person who in Australia does anything for the owner under the owner's authority.

[111] Both the applicant and the second respondent see a difficulty with the term "agent of the ship" as an agent surely acts on behalf of the owner not the ship. The second respondent expressed the issue in this way:

> "The phrase 'agent of the ship', as a matter of literal meaning, is difficult. A person cannot be authorised *by a ship*, nor can a person act *for a ship.* The phrase must be directed to an entitlement to act in some way *with respect to*

[123] An Australian ship must have a registered agent, who may be, in some circumstances, "the agent of the ship": *Shipping Registration Act* 1981 (Cth) s 64.

> a particular ship. That entitlement could only be conferred by, or on behalf of, a ship's owner. It is reasonable on that basis to read the phrase 'agent of the ship' as including a person who is an agent of the ship's owner with respect to the ship."[124]

[112] The *POTS Act* encompasses the notion of "owner of the ship" and "master of the ship" and, in s 29A "agent of the ship". The term "agent of the ship" must mean a person who has authority in relation to the ship. That follows because s 29A concerns service of documents in relation to offences and the *POTS Act* creates offences committed by "the master and owner" in relation to the operation and management etc. of a particular ship.

[113] In *Goodes v James Patrick & Co Pty Ltd*,[125] a case concerning criminal liability for an oil spill, Adam J had to consider the meaning of the term "the agent … of the ship" contained in s 6(a) of the *Navigable Waters (Oil Pollution Act)* 1960 which created an offence against "the owner, the agent and the master of the ship severally" in relation to discharge of oil. Section 6(a) relevantly read as follows:

> "If any discharge of oil or of any mixture containing oil into any waters within the jurisdiction occurs from any ship or from any place on land or from any apparatus used for transferring oil from or to any ship...then subject to the provisions of this Act--(a) if the discharge is from a ship, the owner, the agent and the master of the ship severally; or (b) if the discharge is from a place on land, the occupier of that place; or (c) if the discharge is from apparatus used for transferring oil from or to a ship, the person in charge of the apparatus--shall be guilty of an offence against this Act and liable to a penalty of not more than One thousand pounds."[126]

[114] The defendant was a shipping agent who had the authority to arrange the berthing of the relevant ship and matters concerning cargo. A magistrate held that the term "agent of the ship" meant a general agent and that the defendant was not, relevantly, "the agent of the ship". Adam J considered the term in the context of the section which, importantly, created an offence against "the agent of the ship" for the oil spill. In the course of upholding the magistrate's decision, although based upon different reasoning to that of the magistrate, his Honour said:

> The expression "the agent of the ship" does not seem to be a term of art, so that when one sees it in a statute one can immediately attach a definite meaning to it. This being so, I think the expression has to find its meaning

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[124] Second respondent's outline at [31].
[125] [1963] VR 334.
[126] This is the text of s 6(a) taken from the report of the case.

> from the context in which it is used. As Mr. Bergere points out, it is the agent of the ship that is referred to, not any agent of the ship, so my task is to interpret the words "the agent of a ship" for the purposes of this Act. In arriving at the interpretation, I think it is helpful, indeed imperative, to look at other sections of the Act. First, it is noted that there is no definition section to relieve me and I have to construe it, as I may, from other sections of the Act, and, I think, from the general nature of things. It will be noticed that those liable for the offence of the discharge of oil from a ship are "the owner", "the agent" and "the master". As to two of them, the owner and the master, either in law or in fact they are persons having control over the ship, including whatever could result in the discharge of oil from the ship to the harbour. "The agent", which is sandwiched between "owner" and "master", is, of course, the word for interpretation, but one is predisposed to reading the word "agent" as of like import to "owner and master"--that is as one having some charge or authority which would enable that person to prevent an offence being committed.
>
> … It seems a very unreasonable interpretation of that, that "the agent" should include someone who is in no way concerned, having regard to his authority, with the occurrence of the discharge of oil.
>
> …
>
> The result then is, just on the mere construction of the Act and in the absence of any technical meaning of "agent of the ship", I would construe it as indicating a person having similar authority to the owner or master so far as the control, discharge and management of the ship in relevant respects. The magistrate has found for the defendant on the broad ground that "the agent of the ship" means a general agent, and that it is an answer that there is any limitation on this authority. I would, myself, think that was going too far, but without attempting a complete definition, the relevant point is that "the agent" is not one within whose authority it is to control the ship so as to avoid the commission of the offence charged."[127]

[115] Here, s 29A does not impose criminal liability upon "the agent of the ship". The considerations which were clearly relevant to the judgment of Adam J in *Goodes* do not pertain here. There is no reason to think that "the agent of the ship" referred to in s 29A is necessarily a person with the same authority over the control of the ship as the owner or master.

[116] However, the term used in s 29A importantly identifies the agent as one "of the ship". While "the agent of the ship" will likely also be the agent of the owner for some purposes, the term identifies a particular connection to the ship. What the section contemplates is, at least, the classic shipping agent, namely an agent of the owner within the jurisdiction making arrangements to accommodate and manage the ship on its

[127] *Goodes v James Patrick & Co Pty Ltd* [1963] VR 334 at 337–8.

voyage through Australian ports. It is very difficult to see how a ship which doesn't dock at Australian ports can have the need for an Australian "agent". I consider later the concept of a ship travelling past (but not into) Australia ports, but previously having an agent as a result of a prior visit to Australia.

Are Thynne & Macartney agents of the ship?

[117] Thynne & Macartney are not shipping agents and played no part in the management of the ship in 2015 when the ship passed through Australian waters or when it berthed in Australia in 2011. Thynne & Macartney are solicitors. The correspondence entered into by Thynne & Macartney with MSQ and the CDPP in 2016 and 2017 was done by Thynne & Macartney in their capacity as legal advisers to the owners, i.e. the applicant.

[118] As already observed,[128] Thynne & Macartney is associated with the ship's P & I Club. Often, when an oil spill occurs from a ship, the ship is seized and detained.[129] Security might be posted through the P & I Club to allow its release. Similarly, insurance (through a P & I Club) must be held by ships to indemnify against the limited liability for pollution damage under the scheme implemented in Australia by the *Protection of the Sea (Civil Liability) Act* 1981 (Cth), which enacts the *International Convention on Civil Liability for Oil Pollution Damage*. By the *Admiralty Act* 1988 (Cth)[130] and the *Admirality Rules* 1988 (Cth),[131] proceedings in rem are commenced against the ship itself. In one sense then, solicitors instructed in such a proceeding would be acting for the ship. That would though not make the lawyers an "agent of the ship" for the purposes of s 29A of the *POTS Act*. The solicitors are not involved in the management of the ship. They are simply providing legal services.

[119] However, none of this matters. There is no evidence that Thynne & Macartney were retained in 2015 by or through the P & I Club. The fact that the ship is part of the Steamship Mutual P & I Club and Steamship Mutual directs members of the club who fall into difficulty near Brisbane, to Thynne & Macartney does not make Thynne & Macartney "the agent of the ship" as at 2015 when the spill allegedly occurred. Thynne & Macartney's only involvement since then has been as lawyers representing the

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[128] At [16] and [17] of these reasons.
[129] Pursuant to *POTS Act* s 27A.
[130] Section 3(2).
[131] Rule 19.

applicant in connection with the criminal allegations. That involvement does not render Thynne & Macartney "the agent of the ship".

Is Monson an "agent of the ship"?

[120] For the reasons I have explained, a shipping agent may be "the agent of the ship". Monson was, then, the agent of the ship in 2011. The obvious purpose of s 29A is fulfilled where a ship has such an agent in Australia, the ship pollutes the sea, leaves Australian waters and the shipping agent can then be served with the proceedings on behalf of the owner and master.

[121] The real question is as to when a shipping agent becomes "the agent of the ship" and when a shipping agent ceases to be "the agent of the ship". Mr Agius SC submits that it would defeat the purpose of s 29A of the *POTS Act* if the agency could be determined as the ship leaves Australian waters. There is, I think, some substance in that submission. It may be that on a proper construction of s 29A, if a shipping agent is "the agent of the ship" for the purpose of a particular voyage to Australia, and an offence is committed on that voyage, then the shipping agent remains "the agent of the ship", for the purpose of s 29A, notwithstanding that agency may later be contractually terminated. It might be, in some cases, that the evidence shows some enduring agency, so if a ship regularly comes to Australia and there is a continuing arrangement with an agent, then that agent is "the agent of the ship".

[122] However, I reject the submission that if Monson was "the agent of the ship" for a voyage in 2011, then Monson is "the agent of the ship" for subsequent voyages in the absence of evidence of the agency.[132] Here, the only evidence is that Monson was the shipping agent (and therefore "the agent of the ship") for a voyage in 2011. No relevant oil spill occurred in 2011. There is no evidence that Monson was "the agent of the ship" at the time of the oil spill in 2015 and no evidence that Monson was "the agent of the ship" at the time of the service of the complaint and summons.

[123] The parties, perhaps wrongly, have assumed for the purposes of s 29A, that Monson must be "the agent of the ship" at the date of service. If, though, they are right about that

[132] This is the effect of the submission in the second respondent's outline at [47]–[50].

(which I need not decide) then it is even less likely that Monson was "the agent of the ship" at the date of service of the complaint and summons. As already observed, between the time of the alleged spill and the service of the complaint and summonses ownership of the ship had changed.

[124] Relevantly to the service of the complaint and summons, Monson was not "the agent of the ship".

The appropriate relief

[125] I have concluded that:

1. The Magistrate has no power to proceed to a hearing of an examination of witnesses unless:

    a. the complaint and summons has been served pursuant to the *Justices Act*,[133] or some other legislation which authorises service upon the applicant, such as s 29A of the *POTS Act*; or

    b. there has been waiver of the requirement for service.

2. Service has not been effected pursuant to s 56 of the *Justices Act*.

3. Service has not been effected pursuant to s 29A of the *POTS Act*.

4. There has been no waiver of the requirement for service.

5. Therefore the Magistrate has no power to proceed.

[126] Questions arise as to whether Chapter 3 of the *Judicial Review Act* is engaged and as to whether the decision of the first respondent was a "decision under an enactment". The decision of the first respondent to proceed on the complaints when he had no power to do so in the absence of service is clearly jurisdictional error,[134] so orders of a nature of

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[133] Sections 54(1) and 56.

[134] Service is a "condition of the jurisdiction" to conduct the examination of witnesses: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [72].

certiorari (quashing the first respondent's decision) and prohibition (restraining the further proceeding on the complaint in the absence of service) can be made under Chapter 5 of the *Judicial Review Act*.[135]

[127] There is no doubt that this Court also has jurisdiction to make declaratory orders regulating criminal proceedings, including committal proceedings, in inferior courts independently of the *Judicial Review Act*.[136] The jurisdiction is often not exercised as it is undesirable to fragment the criminal process.[137]

[128] Here, however, the proceedings are at a very early stage. A question has arisen as to whether the Magistrates Court has jurisdiction to embark upon a further hearing. The first respondent has submitted to any ruling and there is therefore no need to make any order setting aside rulings the first respondent has already made and nor is there any need to make an order of a nature of prohibition. Declarations therefore appear to be the most convenient and appropriate remedy.

[129] I declare:

1. That the complaint and summons has not been lawfully served upon the applicant in accordance with s 29A of the *Protection of the Sea (Prevention of Pollution) Act* 1983 (Cth) or otherwise.

2. There has been no waiver of the requirement for service.

3. In the absence of service of the complaint and summons and in the absence of waiver of the requirement for service, the Magistrates Court has no jurisdiction to proceed with an examination of witnesses.

[130] At the end of the hearing, I enquired as to the parties' position in relation to submissions as to costs. The parties both submitted that an appropriate order would be to allow written submissions on costs. I will order each party to deliver written submissions on costs by 28 June 2018 and will determine the question of costs without oral hearing

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[135] Section 43.
[136] *Sankey v Whitlam* (1978) 142 CLR 1, 20–27, 78–81, 81–82; *Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198; *R v Chardon* [2017] 1 Qd R 148 at [2] and [19]–[21].
[137] *Lamb v Moss* (1983) 49 ALR 533, 542–546.

unless either party, in their written submissions on costs, contends that there should be an oral hearing.

[131] THE ORDER OF THE COURT IS THAT:

1. IT IS DECLARED THAT:

   a. The complaint and summons has not been lawfully served upon the applicant in accordance with s 29A of the Protection of the Sea (Prevention of Pollution) Act 1983 (Cth) or otherwise.

   b. There has been no waiver of the requirement for service.

   c. In the absence of service of the complaint and summons and in the absence of waiver of the requirement for service, the Magistrates Court has no jurisdiction to proceed with an examination of witnesses.

2. Each party is to deliver written submissions on costs by 28 June 2018 and the question of costs will be determined without oral hearing unless either party, in their written submissions on costs, contends that there should be an oral hearing.