
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : HEMMETT v MARKET DIRECT GROUP PTY LTD
[2018] WASC 214

CORAM : VAUGHAN J

HEARD : 28 JUNE 2018

DELIVERED : 20 JULY 2018

FILE NO/S : CIV 1222 of 2018

MATTER : Application under the *Magistrates Court Act 2004*
(WA) s 36 for a review order against Michael Herbert
Johnson, the Principal Registrar of the Magistrates
Court of Western Australia

BETWEEN : STEVEN WAYNE HEMMETT
Plaintiff

MARKET DIRECT GROUP PTY LTD
Defendant

Catchwords:

Practice and procedure - Application for review order - Case management -
Whether action validly put on the Inactive Cases List in Magistrates Court

Legislation:

Civil Judgments Enforcement Act 2004 (WA), s 15
Magistrates Court (Civil Proceedings) Rules 2005 (WA), r 95B, r 95C, r 95D,
r 95F
Magistrates Court (General) Rules 2005 (WA), r 24(1)

Magistrates Court Act 2004 (WA), s 28, s 36
Rules of the Supreme Court 1971 (WA), O 56A

Result:

Review order made under s 36(1) *Magistrates Court Act 2004 (WA)*

Category: B

Representation:

Counsel:

Plaintiff : Mr C J Terren
Defendant : Mr C Breheny

Solicitors:

Plaintiff : Roe Legal Services
Defendant : Kott Gunning

Case(s) referred to in decision(s):

Avwest Aircraft Pty Ltd v Clayton Utz [2018] WASC 167
Bizuneh v Minister for Immigration and Multicultural and Indigenous Affairs
[2003] FCAFC 42; (2003) 128 FCR 353
Blum v Boothman [2014] WASC 452
Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163
Croker v Deputy Registrar of the High Court of Australia [2003] FCA 34
Fourmi Pty Ltd v Commissioner for Consumer Protection [2017] WASCA 69
Hall v Hall [No 2] [2011] WASC 110
Harris v Caladine [1991] HCA 9; (1991) 172 CLR 84
Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239
CLR 531
Lashansky v Legal Practice Board [No 2] [2010] WASC 159
Legal Aid Commission of Western Australia v Edwards (1982) 4 ALD 598
Leighton v Garnham [No 4] [2016] WASC 134
Nyoni v Murphy [2018] FCAFC 75
Parsons v Martin [1984] FCA 408; (1984) 5 FCR 235
Rayney v AW [2009] WASCA 203
Re Bertini; Ex parte Bertini [2010] WASC 34

Re Carey; Ex parte Exclude Holdings Pty Ltd [2006] WASCA 219; (2006) 32
WAR 501
Re Gluestein; Ex parte Anthony [2014] WASC 381
Re Greg Cockram Magistrate of the Magistrates Court at Perth; Ex parte Miller
[2009] WASC 350
Re Magistrate D Temby; Ex parte Stanton [2015] WASC 357
Re Magistrate P Roth; Ex parte Yahiya [2016] WASC 284
Re Magistrate R Bromfield; Ex parte Caratti [2016] WASC 147
Re Michelides; Ex parte Chin [2008] WASC 256
Re Young; Ex parte Binzer [2015] WASC 264
Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission
of NSW [2007] NSWCA 149
Rowe v Stoltze [2013] WASCA 92; (2013) 45 WAR 116
Ryan v Manor Home Builders Pty Ltd [2016] WADC 62
Saldanha v Fujitsu Australia Ltd [2010] WASC 105
Saldanha v Fujitsu Australia Ltd [No 2] [2011] WASC 360
Snook v Lawrence [2007] WASC 111
Thorpe v Schulz [2015] WADC 149
Thorpe v Schulz [2017] WASCA 199
Woodley v Minister for Indigenous Affairs [2009] WASC 251

VAUGHAN J:

1. Summary

1 In August 2014 the plaintiff, Stephen Hemmett, commenced proceedings against the defendant in the Magistrates Court of Western Australia at Karratha. On 14 July 2017 the Principal Registrar of the Magistrates Court put the proceedings on the Inactive Cases List. The proceedings were taken to be dismissed six months after that date by operation of r 95F(1) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

2 Mr Hemmett applied to this court for, among other things, a review order under s 36 of the *Magistrates Court Act 2004* (WA) as to the Principal Registrar’s decision to put the proceedings on the Inactive Cases List. Various other review orders applied for, as well as a suspension order, were dependent on the plaintiff obtaining a review order as to the Principal Registrar putting the proceedings on the Inactive Cases List.

3 The application raised the question of whether the Principal Registrar acted beyond jurisdiction or power, or in jurisdictional error, in putting the proceedings on the Inactive Cases List on 14 July 2017.

4 The application also raised the question of whether in putting the case on the Inactive Cases List the Principal Registrar was a 'Court officer' for the purpose of s 36 of the *Magistrates Court Act 2004* (WA) as read with s 3 and s 28 of the Act.

5 For the reasons I develop the act of the Principal Registrar in putting the proceedings on the Inactive Cases List was the act of a Court officer within the purview of s 36. The plaintiff also has reasonable prospects of establishing that the Principal Registrar acted beyond power, and thereby in jurisdictional error, in putting the proceedings on the Inactive Cases List. A review order will be made under s 36(1)(c) of the *Magistrates Court Act 2004* (WA).

2. Background facts

6 In 2013 Mr Hemmett purchased a camper trailer from the defendant, Market Direct Group Pty Ltd (then VH & MG Imports Pty Ltd trading as Market Direct Campers), for \$23,960.

7 Market Direct Group Pty Ltd is an interested party in these proceedings. Before the hearing it had filed written submissions. At

the hearing it sought to be heard by counsel. There was no opposition to that by the plaintiff. Accordingly, insofar as the court has a discretion to allow a person who may be affected by a review order to appear and be heard on the application for the order,¹ it was appropriate that Market Direct Group Pty Ltd be permitted to participate in the hearing. To formalise its participation, at the hearing I made orders joining Market Direct Group Pty Ltd as a defendant to the action.

8 The plaintiff commenced proceedings in the Magistrates Court of Western Australia in 2014 claiming that the camper trailer was defective. The proceedings sought damages in the amount of \$26,635.23 plus interest and costs. The defendant denied that the camper trailer was defective.

9 The pleadings in the Magistrates Court proceedings were closed on about 15 September 2015 when the plaintiff filed a reply to the defendant's defence.

10 During the period 15 September 2015 to 20 May 2016 the parties corresponded in an attempt to resolve the matter. They were unsuccessful in that endeavour.

11 During the period 15 September 2015 to 27 April 2017 no court documents were filed in the Magistrates Court proceedings. But on 28 April 2017 the plaintiff filed a Listing Conference Memorandum.

12 The Listing Conference Memorandum is an 80 page document. It notes that it is filed in accordance with an order of a Registrar of the Magistrates Court. The document sets out a statement of the issues of fact and law to be determined at trial as well as how the allegations of fact are to be proved. Attached to the Listing Conference Memorandum was the documentary evidence the plaintiff would have sought to tender at trial, including photographs, as well as the witness statement of an intended witness.

13 On 4 July 2017 the defendant's solicitors wrote to the Magistrates Court enquiring whether the proceedings had been placed on the Inactive Cases List. That letter referred to the fact that the Listing Conference Memorandum had been filed on 28 April 2017.

14 By a letter dated 14 July 2017 the Magistrates Court notified the plaintiff that the Principal Registrar had put the proceedings on the

¹ *Saldanha v Fujitsu Australia Ltd [No 2]* [2011] WASC 360 [16].

Inactive Cases List pursuant to r 95C of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

15 By a letter dated 1 September 2017 the Magistrates Court informed the solicitors for the defendant that the proceedings should have been put on the Inactive Cases List around September 2016. However, due to an administrative error the proceedings were not put on the Inactive Cases List until 14 July 2017. The letter went on to mention that the plaintiff would be permitted to apply to have the proceedings removed from the Inactive Cases List within six months of 14 July 2017, otherwise the proceedings would be dismissed. A copy of the letter was sent to the plaintiff.

16 I infer that the Principal Registrar's act of putting the proceedings on the Inactive Cases List was prompted by the defendant's solicitors' letter dated 4 July 2017.

17 On 19 December 2017 the plaintiff filed an application to have the proceedings removed from the Inactive Cases List. A hearing on that application was listed before Magistrate de Vries in Karratha on 22 January 2018.

18 At the hearing on 22 January 2018 Magistrate de Vries made orders dismissing the application to have the proceedings removed from the Inactive Cases List and directing the plaintiff to pay the defendant's costs of the application and the proceedings generally. His Honour considered that the proceedings were automatically dismissed on 14 January 2018, that being the date six months after 14 July 2017, pursuant to r 95F of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). At the hearing before me all parties accepted that the learned magistrate was correct in so holding if in fact the proceedings were correctly put on the Inactive Cases List on 14 July 2017.

19 It is apparent, however, that but for the operation of the Rules the learned magistrate would have granted Mr Hemmett's application and made an order that the case be taken off the Inactive Cases List. In the course of the hearing before the learned magistrate his Honour stated:

... the matter was placed on the Inactive Cases List ... on 14 July 2017. To that effect the claimant had until 14 January 2017 [sic - meaning 2018] to have the matter determined. Unfortunately, that did not transpire. And in light of the authority of *Ryan v Manor Home Buildings Pty Ltd* I'm bound to make an order that the application [to have the case taken off the Inactive Cases List] be dismissed.

Clearly if I had a discretion to extend the time within which to hear the application, I would have done so. There are various things that have happened on this file, in my view, that have, to some extent, prejudiced the claimant. However, I'm bound by authority.

20 In a further exchange with Mr Hemmett the learned magistrate stated:

... I sympathise with you.

...

Well, if it - if it's any benefit to you, had it not been for that authority [referring to *Ryan v Manor Home Builders Pty Ltd*] - which is very recent - I would have found in your favour.

21 On 12 February 2018 the plaintiff applied to this court for a stay of enforcement of the orders made by Magistrate de Vries and a review order requiring the Principal Registrar and any other person affected by the order to satisfy this court that the decision to put the proceedings on the Inactive Cases List should not be set aside. Consequential orders were sought with the object of setting aside the costs orders of the learned magistrate and reinstatement of the proceedings in the Magistrates Court.

22 By his originating motion the plaintiff identified the Principal Registrar as a Vicki Lubrig. Ms Lubrig was referred to as the 'Principal Registrar of the Magistrates Court of Western Australia at Karratha'. It was evident from the papers, however, that Ms Lubrig was in fact the registrar based in Karratha, not the Principal Registrar of the Magistrates Court. At the hearing I asked that the parties inform me of the name of the Principal Registrar so that the materials as filed could be regularised. Initially the plaintiff's inquiries suggested that no Principal Registrar had been appointed at the relevant time. If correct, that might have seen an additional ground for the seeking of a review order. Accordingly, it was necessary to defer preparation of these reasons. But on 11 July 2018, after receiving information from the State Solicitor's Office, it was confirmed that a Michael Johnson was the Principal Registrar of the Magistrates Court of Western Australia and that Mr Johnson had occupied that office since 5 November 2007.

23 Leave will be granted to amend the originating motion to correct the misnomer.²

² See the requirements in O 56A r 2 of the *Rules of the Supreme Court 1971* (WA).

24 The plaintiff contends that while the Principal Registrar had jurisdiction to put the proceedings on the Inactive Cases List from 16 September 2016 to 27 April 2018, the Principal Registrar did not have that jurisdiction from 28 April 2017 by reason of the plaintiff having filed a Listing Conference Memorandum on that date. Although the plaintiff puts the case in terms of 'jurisdiction', it is probably better considered as a question of power.

25 The defendant submits that the Principal Registrar's jurisdiction to put the proceedings on the Inactive Cases list was enlivened on 16 September 2016, subsequent to which only an order of the Magistrates Court could cause the proceedings to become active again. For that reason the defendant contends that the Principal Registrar acted within jurisdiction in putting the proceedings on the Inactive Cases List on 14 July 2017 despite the filing of the Listing Conference Memorandum on 28 April 2017.

26 Accordingly, the central issue in these proceedings is whether the Principal Registrar acted within power in putting the proceedings on the Inactive Cases List on 14 July 2017.

3. Statutory framework: *Magistrates Court Act 2004* (WA) review orders

27 Mr Hemmett seeks a review order in this court pursuant to s 36 of the *Magistrates Court Act 2004* (WA). Section 36 reads:

36. Supreme Court's powers to control Court

(1) If a person is or would be aggrieved by one or more of the following:

...

(c) an act, order or direction done or made by a Court officer:

(i) on the ground that it was done or made without jurisdiction or power or is an abuse of process; or

(ii) on any ground that might have justified an order of certiorari,

the person may apply to the Supreme Court for an order (a ***review order***) that requires the Court officer and any person who will be affected by the act, order or direction to satisfy the Supreme Court at a hearing that the act, order or direction

should or should not be done or made or set aside, as the case requires.

28 The power conferred on this court by s 36 is a judicial review power. Section 36 replaces and provides a statutory alternative to common law judicial review, freeing the court from the technical requirements associated with the prerogative writs of mandamus, prohibition and certiorari.³

29 On an application for a review order the Supreme Court may make any review order that is just, regardless of whether it has been applied for.⁴ If at the hearing required by the review order the Supreme Court is not satisfied in accordance with the review order, or if it is just to do so, it may order that the impugned act, order or direction be set aside, grant any relief or remedy that could be granted by way of a writ of mandamus, prohibition or certiorari, and make any necessary consequential orders.⁵

30 For the purpose of s 36, a 'Court officer' is defined as a magistrate, a Justice of the Peace when constituting the Magistrates Court, or a registrar when performing functions delegated to a registrar under s 28.⁶ Section 28 provides that the rules of the Magistrates Court may delegate to a registrar any or all of the Court's jurisdiction and powers, with certain exceptions.

31 This raises the question of whether, in putting a case on the Inactive Cases List in accordance with r 95C(1)(a), the Principal Registrar is a 'Court officer' within the meaning and for the purpose of that term in s 36.

32 In their written submissions filed before the hearing both parties assumed that in putting the plaintiff's case on the Inactive Cases List the Principal Registrar was a 'Court officer' and the act was within the purview of s 36. In reviewing the papers before the hearing it was apparent that this was an issue on which further submissions were required. Accordingly, the parties were invited to provide supplementary submissions on this question.

³ *Rayney v AW* [2009] WASCA 203 [27].

⁴ *Magistrates Court Act 2004* (WA) s 36(3).

⁵ *Magistrates Court Act 2004* (WA) s 36(4)(a) - (c).

⁶ *Magistrates Court Act 2004* (WA) s 3.

33 I deal with this issue below. Before doing so it is necessary to continue with the exposition of the various authorities in this court that have considered the operation of s 36.

34 In *Re Gluestein; Ex parte Anthony Beech* J (as his Honour then was) set out the proper construction and operation of s 36 by reference to the Court of Appeal's decision in *Rayney v AW*.⁷ I respectfully adopt his Honour's statement of the following principles. Relevantly:

- (1) the words 'if it is just to do so' in s 36(4) do not give this court the power to grant final relief at large;
- (2) the power to grant relief in s 36(4) is only enlivened if one or more of the grounds listed in s 36(1)(a), (b) or (c) has been established;
- (3) a review order can only be made if the threshold for an error of the kind in s 36(1)(a), (b) or (c) is satisfied; and
- (4) the power to make any necessary consequential orders is a reference to an order consequential to a substantive order made under paragraph (a) or (b) of s 36(4). It must follow logically or of necessity from a prior substantive order.

35 Demonstration of an error of law is not sufficient to make out an error of a type identified in s 36(1)(a), (b) or (c) unless the error of law is on the face of the record. Generally, the record does not include reasons for decision.⁸ However, it will suffice if the applicant demonstrates jurisdictional error.⁹

36 Applications for review orders heard in this court pursuant to s 36 of the *Magistrates Court Act 2004* (WA) are governed by O 56A of the *Rules of the Supreme Court 1971* (WA).

37 Order 56A sets out a two-stage process for the determination of an application for a review order:¹⁰

- (1) First, the application is to be listed before a judge in chambers. The judge may then make a review order if the applicant meets

⁷ *Re Gluestein; Ex parte Anthony* [2014] WASC 381 [27].

⁸ *Re Magistrate D Temby; Ex parte Stanton* [2015] WASC 357 [39], [45], [47].

⁹ *Re Magistrate D Temby; Ex parte Stanton* [51], [53].

¹⁰ *Re Magistrate R Bromfield; Ex parte Caratti* [2016] WASC 147 [17]; *Re Magistrate P Roth; Ex parte Yahiya* [2016] WASC 284 [45].

the threshold for an error falling within one of the grounds in s 36(1)(a), (b) or (c).

- (2) Second, if so ordered at the first stage, the review is to be heard by a judge or the Court of Appeal and relief may be granted in the forms set out in s 36(4)(a) - (c) if satisfied that that one or more of the grounds in s 36(1) has been established.

38 The two stages may be combined so that the application for a review order and for relief under s 36(4) are heard together.¹¹ But, as a matter of procedural fairness, before that is done the court would ordinarily make orders giving all interested parties sufficient notice that it was intended to proceed in that way. That was not the case in the proceedings before me - although manifestly this was a case in which it would otherwise have been appropriate to combine the two stages. Accordingly, I proceeded to hear only the first stage of the application under s 36.

39 At the first stage the applicant for the review order must establish, at least, an arguable case that an error of a type capable of grounding a review order under s 36 has been made.¹² Moreover, that 'arguable case' must be one that has reasonable prospects of success.¹³

40 In *Saldanha v Fujitsu Australia Ltd [No 2]* Corboy J drew an analogy between the relevant test and the test for an order nisi.¹⁴ In the context of an application pursuant to s 36 his Honour applied Martin CJ's formulation of the test for an order nisi:

[P]erhaps it would be preferable to formulate the test in terms of, firstly, the applicant satisfying the court that there is an arguable case and, secondly, advancing the proposition that if that case had no reasonable prospect of success it would be inappropriate to grant relief even though there was an arguable case.¹⁵

41 An application for a review order may be refused on discretionary grounds.¹⁶ So too may the making of any final order

¹¹ *Re Magistrate R Bromfield; Ex parte Caratti* [17].

¹² See eg *Re Magistrate R Bromfield; Ex parte Caratti* [17]; *Re Magistrate P Roth; Ex parte Yahiya* [48].

¹³ *Snook v Lawrence* [2007] WASC 111 [50]; *Re Greg Cockram Magistrate of the Magistrates Court at Perth; Ex parte Miller* [2009] WASC 350 [10] - [11]; *Saldanha v Fujitsu Australia Ltd [No 2]* [61]; *Re Magistrate D Temby; Ex parte Stanton* [36].

¹⁴ *Saldanha v Fujitsu Australia Ltd (No 2)* [61].

¹⁵ *Woodley v Minister for Indigenous Affairs* [2009] WASC 251 [37].

¹⁶ *Rayney v AW* [31]; *Saldanha v Fujitsu Australia Ltd [No 2]* [116]; *Blum v Boothman* [2014] WASC 452 [17] - [20]; *Re Magistrate D Temby; Ex parte Stanton* [57].

under s 36(4).¹⁷ For example, an application might be refused on the ground of proportionality,¹⁸ where the order would lack any utility¹⁹ or because there are available appeal avenues.²⁰ So too where there has been delay (although there is no time limit on the making of an application for a review order)²¹ or the review order may fragment criminal proceedings.²² However, discretionary reasons will only justify refusal of a review order in an 'exceptional' case.²³

42 The plaintiff also seeks a stay of the costs order made by Magistrate de Vries on 22 January 2018.

43 The stay was sought in terms of a suspension order pursuant to s 15 of the *Civil Judgments Enforcement Act 2004* (WA). Section 15 is unavailable. It only permits application to the court that gave the judgment (here the Magistrates Court) or a court dealing with an appeal against the judgment. I am not dealing with an 'appeal' but rather with an application for a review order. But where a review order is made O 56A r 3(3)(d) of the *Rules of the Supreme Court 1971* (WA) permits the making of an order that the review order operate as a stay of the proceedings in question until the court specifies otherwise.

44 The test for a stay in proceedings brought pursuant to s 36 is the same as that for an order nisi in relation to prerogative writs. That test is whether the applicant has demonstrated that there are 'special circumstances sufficient to satisfy the court that it is just and reasonable to order a stay so as to preserve the subject matter and integrity of the litigation'.²⁴

4. What is a 'jurisdictional error' within the purview of s 36?

45 The plaintiff contends that the act of the Principal Registrar in putting the proceedings on the Inactive Cases List was done without jurisdiction or power (invoking s 36(1)(c)(i) of the *Magistrates Court Act 2004* (WA)). He also relies on s 36(1)(c)(ii). The plaintiff says

¹⁷ *Saldanha v Fujitsu Australia Ltd [No 2]* [115].

¹⁸ Cf *Saldanha v Fujitsu Australia Ltd [No 2]* [122].

¹⁹ *Blum v Boothman* [8], [18], [20].

²⁰ *Re Michelides; Ex parte Chin* [2008] WASC 256 [74] - [76], [96], [110], [146] - [147]; *Saldanha v Fujitsu Australia Ltd* [2010] WASC 105 [18] - [19], [33], [35]. But cf *Saldanha v Fujitsu Australia Ltd [No 2]* [118].

²¹ *Re Bertini; Ex parte Bertini* [2010] WASC 34 [22].

²² *Re Magistrate D Temby; Ex parte Stanton* [57] - [58].

²³ *Re Magistrate D Temby; Ex parte Stanton* [59].

²⁴ *Re Greg Cockram Magistrate of the Magistrates Court at Perth; Ex parte Miller* [14]; *Re Magistrate P Roth; Ex parte Yahiya* [81] - [82].

that, so far as jurisdictional error is a ground that justifies certiorari,²⁵ the act of the Principal Registrar in putting the proceedings on the Inactive Cases List was infected by jurisdictional error.

46 The plaintiff bears the onus of establishing jurisdictional error on the part of the Principal Registrar.²⁶

47 A decision-maker commits a jurisdictional error if he or she makes a decision that exceeds the limits of the functions and powers conferred on the decision-maker or if he or she does something that he or she lacks the power to do.²⁷ While the categories are not closed, there are five well-established categories of jurisdictional error made by inferior courts:²⁸

- (1) A mistaken assertion or denial of jurisdiction.
- (2) Where the inferior court correctly recognises that it has jurisdiction, a misapprehension of or disregard for the nature or limits of the court's functions or powers in a case.
- (3) If it is an essential condition of the exercise of jurisdiction that a certain precondition has occurred or been satisfied, an inferior court makes a jurisdictional error if it purports to act where that precondition has not occurred or been satisfied.
- (4) The disregard or taking account of a matter in circumstances where the statute establishing the inferior court and conferring its jurisdiction requires that the particular matter be taken into account or ignored.
- (5) The misconstruction of the statute establishing the inferior court, resulting in a misconception concerning the nature or the function which the court is performing or the extent of its powers in the circumstances.

48 The plaintiff puts his case in terms of the second and third categories. It is said that a decision to put a case on the Inactive Cases List requires the objective existence of a jurisdictional fact, namely, that the case 'is taken to be inactive'. The plaintiff says that on a proper

²⁵ *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 175.

²⁶ *Re Young; Ex parte Binzer* [2015] WASC 264 [20].

²⁷ *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 [66]; *Re Young; Ex parte Binzer* [18].

²⁸ *Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219; (2006) 32 WAR 501 [181]; *Craig v South Australia* (177 - 178).

construction of the relevant rule, being r 95B(1) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) as read with r 95C(1), on the undisputed facts that prevailed as at 14 July 2017 the case was not one that 'is taken to be inactive'. Accordingly, on the plaintiff's case, by reason of a misapprehension as to the limit of his powers (having necessarily misconstrued the relevant rule) the Principal Registrar was mistaken as to the existence of a condition precedent to validly putting the case on the Inactive Cases List. For the same reason the plaintiff says that the Principal Registrar acted beyond power.

49 The defendant accepted that if the plaintiff's case was put on the Inactive Cases List despite not being a case that 'is taken to be inactive', the Principal Registrar's decision to do so and all that then followed - the automatic dismissal of the proceedings and the adverse costs order - must fall away.²⁹ The defendant also accepted that whether the case 'is taken to be inactive' is a jurisdictional fact.³⁰ But on the defendant's construction of r 95B(1) the case was one that 'is taken to be inactive'.

50 Before assessing the parties' competing constructions it is necessary to consider the rules establishing the Inactive Cases List.

5. Statutory framework: *Magistrates Court (Civil Proceedings) Rules 2005* (WA) - Inactive Cases List

51 Part 16A of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) establishes the Magistrate Court's procedures with respect to inactive civil cases. It sets out when cases are taken to be inactive (r 95B), when and how parties are to be notified of a case being on the Inactive Cases List (r 95C), the consequences of a case being on the Inactive Cases List (r 95D), how a case may be removed from the Inactive Cases List (r 95E) and when an inactive case will be taken to be dismissed (r 95F).

52 By r 95A, 'Inactive Cases List' is defined as 'the list kept by the Principal Registrar under rule 95B(4)'. Rule 95B(4) simply provides that the Principal Registrar is to keep a list of cases taken to be inactive.

²⁹ ts 22.

³⁰ ts 22.

53 Rule 95B explains when a case will be taken to be inactive:

95B. Case taken to be inactive

- (1) If no procedural step is taken in a case for 12 months by a party to a case, the case *is taken to be inactive* unless the Court orders otherwise.
- (2) A magistrate or registrar making an order or direction in exercise of a case management power may direct that, unless the order or direction in exercise of the case management power is complied with by a specified date, the case is to be taken to be inactive. (emphasis added)

54 As mentioned previously, it is r 95B(1) that is the relevant sub-rule for the purpose of the present application.

55 The Principal Registrar's obligation and concomitant power to put cases on the Inactive Cases List arises under 95C(1). Rule 95C(1) provides:

95C. Parties to be notified of case being on Inactive Cases List

- (1) When a case is taken to be inactive under rule 95B, the Principal Registrar is to:
 - (a) put the case on the Inactive Cases List; and
 - (b) give all parties to the case written notice of:
 - (i) the fact that the case is on the Inactive Cases List and why; and
 - (ii) the effect of rule 95D.

56 In *Fourmi Pty Ltd v Commissioner for Consumer Protection*, a case that concerned like provisions to Pt 16A that apply in this court, the Court of Appeal held that the Inactive Cases List is not a reference to a notional list of cases taken to be inactive; it refers to an actual list kept by the Principal Registrar.³¹ By virtue of r 95A, r 95B(4) and r 95C(1)(a) that is also the position in the Magistrates Court. Even if inactive, a case is not on the Inactive Cases List until put on the actual List by the Principal Registrar.³²

57 The initial consequence of being put on the Inactive Cases List is the restriction of the documents that may be lodged in the Magistrates

³¹ *Fourmi Pty Ltd v Commissioner for Consumer Protection* [2017] WASCA 69 [19].

³² *Fourmi Pty Ltd v Commissioner for Consumer Protection* [19].

Court in relation to the case (r 95C). Permitted documents include an application for an order under r 95E to remove the case from the Inactive Cases List. The Magistrates Court may order that a case be taken off the Inactive Cases List if it is satisfied that the case will be conducted in a timely way or for any other good reason (r 95E(2)).

58 Rule 95F provides for the automatic dismissal of cases that are on the Inactive Cases List for six months. It reads:

95C. Certain inactive cases taken to be dismissed

- (1) A case that is on the Inactive Cases List for 6 continuous months is taken to be dismissed.
- (2) If no procedural step is taken in the 6 months after the date on which a case is ordered to be taken off the Inactive Cases List, the case is taken to be dismissed.
- (3) If the case is taken to be dismissed under subrule (1) or (2), the Principal Registrar is to take it off the Inactive Cases List.
- (4) If a case is taken to have been dismissed under subrule (1) or (2):
 - (a) a party to the case may apply for an order for costs; and
 - (b) the Court may make an order for costs.

59 There are a number of authorities dealing with the construction of Pt 16A and similar regimes to Pt 16A that apply in other Western Australian courts. In particular, in this court Pt 16A is substantially mirrored by O 4A r 21 and r 24 - r 28 of the *Rules of the Supreme Court 1971* (WA) within O 4A div 5. And in the District Court see subdiv 6 of div 3 of Pt 4 of the *District Court Rules 2005* (WA) (although in the District Court r 44G(5) may ameliorate against the automatic dismissal of a case on the Inactive Cases List).

60 The following principles arise from the authorities:

- (1) Pt 16A arises from case management reforms that encourage courts to be pro-active in the management of litigation.³³ Nevertheless, the Inactive Cases List is a case management tool; it is not punitive.³⁴

³³ *Thorpe v Schulz* [2015] WADC 149 [30].

³⁴ *Thorpe v Schulz* [31].

- (2) A case is not automatically added to the Inactive Cases List simply because no procedural step has been taken for 12 continuous months. Rule 95C requires that the Principal Registrar put the case on the actual list. If that is not done, a case is not on the Inactive Cases List and there can be no automatic dismissal.³⁵
- (3) The giving of notice by the Principal Registrar that a case is on the Inactive Cases List is not a condition precedent to a case being put on that list. A case may be put on the Inactive Cases List even though the plaintiff is unaware that it has been put on the List.³⁶
- (4) However, the giving of notice by the Principal Registrar, as required under r 95C, is a condition precedent to the case being taken to be dismissed under r 95F.³⁷
- (5) Rule 95F(1) does not require any further action by the parties or the court; it operates automatically at the expiry of the six month term.³⁸ Once six months has elapsed from the date of a case being put on the Inactive Cases List it is beyond the power of the Magistrates Court to remove the case from the List.³⁹
- (6) The responsibility to have a case removed from the Inactive Cases List prior to the expiration of the six month period lies with the plaintiff.⁴⁰ A plaintiff cannot rely on advice of court staff that might provide otherwise.⁴¹ It will generally be appropriate for the plaintiff to make an application for an expedited hearing of an application to remove a case from the Inactive Cases List or at least to bring the urgency of the matter to the attention of the Registry.⁴²

61 Being put on the Inactive Cases List has immediate consequences for a plaintiff. The steps he or she can take in the proceedings are circumscribed. More critically, if the action is not removed from the

³⁵ *Fourmi Pty Ltd v Commissioner for Consumer Protection* [18] - [19].

³⁶ *Leighton v Garnham [No 4]* [2016] WASC 134 [38]; *Hall v Hall [No 2]* [2011] WASC 110 [33].

³⁷ *Leighton v Garnham [No 4]* [29], [43] - [44]. But cf *Thorpe v Schulz* [2017] WASCA 199 [68], [77].

³⁸ *Lashansky v Legal Practice Board [No 2]* [2010] WASC 159 [61], [73]; *Ryan v Manor Home Builders Pty Ltd* [2016] WADC 62 [41] - [43]; *Rowe v Stoltze* [2013] WASCA 92; (2013) 45 WAR 116 [25], [31] - [33].

³⁹ *Ryan v Manor Home Builders Pty Ltd* [43].

⁴⁰ *Ryan v Manor Home Builders Pty Ltd* [53].

⁴¹ *Ryan v Manor Home Builders Pty Ltd* [53].

⁴² *Ryan v Manor Home Builders Pty Ltd* [54].

Inactive Cases List within six months the action is at an end and cannot be revived. These adverse consequences arise from being put on the Inactive Cases List, and remaining on the Inactive Cases List, rather than just being taken to be inactive. The only consequence of an action being taken to be inactive is that it is liable to be put on the Inactive Cases List. All normal procedural steps can still be taken in a case if the action is taken to be inactive but is yet to be put on the Inactive Cases List.

6. Disposition

(1) The Principal Registrar was a 'Court officer' for the purpose of s 36

62 It was common ground between the plaintiff and the defendant that in putting the proceedings on the Inactive Cases List the Principal Registrar was a 'Court officer' within the meaning and for the purpose of that term in s 36 of the *Magistrates Court Act 2004* (WA). No review order can be made unless that is the case. Accordingly, it is necessary to examine whether the parties are correct in accepting that the Principal Registrar's act was that of a 'Court officer'.

63 The subject matter of a review application must always be an act, order or direction made, proposed to be made or omitted to be made by a Court officer. It is not the case that all staff within the Magistrates Court are 'Court officers' for the purpose of s 36. Only a magistrate, a Justice of the Peace when constituting the Magistrates Court, or a registrar when performing functions delegated to a registrar under s 28 are Court officers.⁴³ So, for example, the acceptance by a clerk in the registry of a document is not an act, order or direction of a Court officer within the purview of s 36.⁴⁴

64 The office of the Principal Registrar is established under s 26 of the *Magistrates Court Act 2004* (WA). The Principal Registrar is one of the Magistrates Court's 'administrative staff'. However, as with all registrars, on many occasions the Principal Registrar will be exercising jurisdiction and powers that might otherwise be exercised by a magistrate. Section 28 provides:

⁴³ *Magistrates Court Act 2004* (WA) s 3.

⁴⁴ *Re Bertini; Ex parte Bertini* [9].

28. Court may delegate to registrars

- (1) Subject to section 40(3), the rules of court may delegate to a registrar any or all of the Court's jurisdiction and powers other than the power:
- (a) in the exercise of the Court's criminal jurisdiction:
 - (i) to find a person guilty or not guilty of an offence;
 - (ii) to commit a person for trial or sentence to another court; or
 - (b) in the exercise of the Court's civil jurisdiction, to enter a final judgment on a case after trial; or
 - (c) to find a person guilty of contempt of the Court.
- (2) The rules of court must not delegate to a deputy registrar appointed under section 26(5) the power to constitute the Court for any purpose except to adjourn a case where it is not practicable for the Court to be constituted in accordance with section 7.

65 Section 40(3) is not presently relevant.

66 Section 29 establishes a right of appeal from decisions of registrars. A person dissatisfied by a decision made by a registrar in the exercise of the Magistrates Court's jurisdiction or powers delegated to a registrar may appeal to a magistrate.

67 In other contexts it has been necessary to distinguish between the administrative and judicial functions of a registrar. What is administrative and what is judicial is not amenable to a comprehensive satisfactory definition; often the question of what is ancillary or subservient to the adjudication of a court is difficult.⁴⁵ The function is likely to be administrative if the purpose is to maintain the efficient operation of the registry⁴⁶ and there is no application and no requirement for a party to be heard.⁴⁷ So too if the act is not made at the direction of the court and is not conclusive in the sense of binding a party or making a determination as to his or her rights.⁴⁸ But a registrar

⁴⁵ *Croker v Deputy Registrar of the High Court of Australia* [2003] FCA 34 [38] - [39].

⁴⁶ *Bizuneh v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 42; (2003) 128 FCR 353 [15] - [16].

⁴⁷ *Bizuneh v Minister for Immigration and Multicultural and Indigenous Affairs* [17].

⁴⁸ *Legal Aid Commission of Western Australia v Edwards* (1982) 4 ALD 598, 601 - 602; *Bizuneh v Minister for Immigration and Multicultural and Indigenous Affairs* [16] - [17].

may be making a decision of a judicial character if engaged in finally determining the legal rights and duties of parties.⁴⁹

68 Compliance with rules as to practice and procedure is usually adjudicated rather than dealt with administratively. However, some aspects of procedural law are carried out administratively without any judicial determination.⁵⁰

69 The task of putting a case on the Inactive Cases List has aspects that are administrative in nature and aspects that are seemingly judicial. There is no application, no party is heard and - while the act may ultimately affect legal rights - the immediate consequence is only procedural, rather than being determinative of substantive rights. It cannot be said, however, that the object of the task is merely an aspect of the efficient operation of the registry. Rather, it is to trigger the operation of Pt 16A so far as the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) establish consequences for a case being taken to be inactive. In this respect the Principal Registrar must inquire into and determine the facts as they are and apply r 95C to the facts as determined.

70 Whether the decision to put a case on the Inactive Cases List is properly characterised as administrative or judicial is, however, not determinative of whether in so doing the Principal Registrar was a Court officer for the purpose of s 36 of the *Magistrates Court Act 2004* (WA). That question depends on whether, in determining to put the case on the Inactive Cases List, the Principal Registrar was performing a function delegated to him under s 28, ie does r 95C constitute a delegation of part of the Magistrates Court's jurisdiction and powers? Nevertheless, the characterisation of the task as administrative or judicial assists in informing whether, for the purpose of s 28, the task under r 95C is a delegation of the Magistrates Court's jurisdiction and powers.

71 The Magistrates Court is established by s 4 of the *Magistrates Court Act 2004* (WA). Section 4 of the Act provides for the functions of the magistrates. It is plainly a judicial office. A magistrate must not be appointed to an office that does not include any judicial functions without his or her consent (s 6(4)).

⁴⁹ See eg *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW* [2007] NSWCA 149 [108] - [111].

⁵⁰ *Nyoni v Murphy* [2018] FCAFC 75 [33].

72 The jurisdiction and powers of the Magistrates Court are provided for by Pt 3 of the *Magistrates Court Act 2004* (WA). The Magistrates Court has both civil jurisdiction, as set out in the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (s 10), and criminal jurisdiction (s 11). The Magistrates Court has powers to deal with contempt (s 16) and various other enumerated powers (s 17 - s 23 in div 2 of Pt 3). It should not be thought that the powers in s 17 to s 23 of the *Magistrates Court Act 2004* (WA) are exhaustive. The Magistrates Court will also have powers as impliedly conferred by the legislation establishing its jurisdiction as well as such other powers as are incidental and necessary to the exercise of the jurisdiction and express powers as so conferred.⁵¹

73 Section 40 deals with the content of the rules of the court. The rules may deal with any matter required or permitted by the Act (s 40(1)(a)) or that is necessary or expedient for the Magistrates Court to operate efficiently, economically and expeditiously (s 40(1)(b)). Part 16A fits within the latter category, although it appears that the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) are made under the rule-making power in the *Magistrates Court (Civil Proceedings) Act 2004* (WA) rather than the *Magistrates Court Act 2004* (WA). Among other things, the rules may regulate the practice and procedure to be followed in the Magistrates Court (s 40(2)(c)).

74 As mentioned, the Magistrates Court's civil jurisdiction is provided for under the *Magistrates Court (Civil Proceedings) Act 2004* (WA), in particular in Pt 2 of the Act. Part 3 of that Act then deals with 'General Procedures' and sets out a number of specific powers. Within Pt 3, s 13 provides:

13. Court's duties in dealing with cases and making rules

- (1) In dealing with cases and making rules of court the Court is to ensure that cases are dealt with justly.
- (2) Ensuring that cases are dealt with justly includes ensuring:
 - (a) that cases are dealt with efficiently, economically and expeditiously; and
 - (b) so far as is practicable, that the parties are on an equal footing; and

⁵¹ *Parsons v Martin* [1984] FCA 408; (1984) 5 FCR 235, 241.

- (c) that the Court's judicial and administrative resources are used as efficiently as possible.

75 Otherwise, under s 14 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA), the rules of the court are to set out the procedure to be followed in a case. Particular powers are described, including the Magistrates Court's powers to control and manage cases (s 16), strike out proceedings (s 17) and give summary judgment (s 18). There is also a specific power to deal with default by a party (s 19). Rules of the Court for the purpose of the Act are made in accordance with the general rule-making power under s 39 of the *Magistrates Court Act 2004* (WA). The rules may regulate the practice and procedure to be followed in the Court and its registries (s 40(1)).

76 Part 3 of the *Magistrates Court (General) Rules 2005* (WA) deals with the delegated jurisdiction of the registrars. Rule 24(1) provides that in a civil case a registrar has the jurisdiction conferred on a registrar by the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) in addition to the jurisdiction elsewhere conferred in the Rules. There is no general delegation in the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). However, r 3 provides that the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) are to be read with the *Magistrates Court (General) Rules 2005* (WA), thus, in substance, incorporating r 24 of the *Magistrates Court (General) Rules 2005* (WA).

77 Numerous specific matters are delegated to the registrars; for example, giving default judgment (r 21 - r 23), making consent orders or judgments (r 54), judgment on admissions (r 29A and r 29B), disclosure of documents (r 30A - r 31), answers to interrogatories (r 36) and the exercise of various case management powers at a pre-trial conference (r 40). Where a registrar exercises any jurisdiction of the Magistrates Court the decision of the registrar is taken to be a decision of the Court (r 80).

78 I do not accept that in putting the plaintiff's case on the Inactive Cases List the Principal Registrar was performing a function delegated under s 28 simply because the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) provided that the Principal Registrar was the person who was to perform that task. That, in substance, was the submission of counsel for the plaintiff.⁵² If that submission was accepted every task specifically allocated to a registrar by the rules would be a

⁵² ts 19.

delegation within s 28 of the *Magistrates Court Act 2004* (WA). That would be a nonsense.

79 For example, under r 76 of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) a registrar may, in some circumstances, dispose of exhibits after trial as the registrar thinks fit. And in another example, one closer to the present case, the Principal Registrar is to keep a list of all cases taken to be inactive (r 95B(4)). Similarly the Principal Registrar must write to the parties giving notice in terms of r 95C(1)(b). Those things are purely administrative tasks, the first two concerned with the operation of the registry. Although tasks provided for under the Rules they are not a delegation of the Magistrates Court's jurisdiction and powers.

80 In order to be susceptible to a review order under s 36 of the *Magistrates Court Act 2004* (WA) it is not sufficient that a nominated task be allocated to a registrar - here the Principal Registrar - under a rule of the Magistrates Court. It must also be part of the 'Court's jurisdiction and powers' within the meaning and for the purpose of s 28 of the Act. That phrase takes its meaning from Pt 3 of the Act as amplified in Pt 2 and Pt 3 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA); it is, however, concerned with concepts that have an established legal usage.⁵³ In the present civil context it is concerned with the Magistrates Court's authority to adjudicate on and determine the disputes that can be litigated before it (jurisdiction) and the means the Court may employ in doing so (powers).

81 Automatic dismissal following the effluxion of time after a case is put on the Inactive Cases List is one of the ways in which the Magistrates Court adjudicates on civil cases within its jurisdiction. Determination in this way only arises where the case is first put on the Inactive Cases List by the Principal Registrar. There are two ways in which a case will be come to be put on the List. First, because the case is taken to be inactive as no procedural step has been taken for 12 months (unless the Court otherwise orders). Second, non-compliance with a case management order or direction in circumstances where a direction is made that the case is to be taken to be inactive unless the order or direction is complied with by a specified date.

82 In either situation an assessment must be made whether the case is taken to be inactive. It is for the Principal Registrar to make that assessment before putting the case on the Inactive Cases List. In many

⁵³ See eg *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84, 136.

cases - indeed every case where there is no application for an order that the case be taken off the Inactive Cases List - the Principal Registrar's assessment will be the only actual consideration of the matter by an officer of the Magistrates Court in the exercise of the Court's jurisdiction in bringing the case to a conclusion by its automatic dismissal.

83 Viewed in this way the Principal Registrar is, in assessing that a case is liable to and must be put on the Inactive Cases List - and then acting accordingly, performing a function that is part of the Magistrates Court's jurisdiction and powers. It not simply an administrative function; it is judicial in as much as it requires the determination of facts and the application of r 95C to the facts as determined. It is an assessment that, without more than the passage of time, may result in the determination of the proceedings in the exercise of the Court's civil jurisdiction.

84 There is no delegation in the sense that the task is one that may be performed by a magistrate but instead the rules make provision for the function to also be exercisable by the Principal Registrar. But neither the definition of 'Court officer' in s 3 nor the terms of s 28 require that form of a delegation. What is required is that the Principal Registrar be performing a function that is properly characterised as part of the Magistrates Court's jurisdiction and powers as delegated to the Principal Registrar (in the sense of entrusted to, assigned to or given to) by a rule of the Court. In my opinion, for the reasons given, that requirement is satisfied.

85 I do not accept the plaintiff's argument for contending that the Principal Registrar's act in putting the case on the Inactive Cases List was the act of a 'Court officer' within the purview of s 36. It is not enough that the task was allocated to the Principal Registrar under r 95C of the *Magistrates Court (Civil Proceedings) Act 2004* (WA). However, for the reasons developed above, I consider that r 95C constituted a delegation of part of the Court's jurisdiction and powers and it thus follows that the Principal Registrar was performing a function delegated under s 28 of the *Magistrates Court Act 2004* (WA). Accordingly, in putting the case on the Inactive Cases List the Principal Registrar was a 'Court officer' for the purpose of s 36 of the Act as read with s 3 and s 28 of the Act.

(2) There are reasonable prospects of establishing jurisdictional error

86 The plaintiff's contention that the Principal Registrar had acted beyond power, and in jurisdictional error, in putting the case on the Inactive Cases List on 14 July 2017 relied on the construction he placed on r 95B and r 95C of the *Magistrates Court (Civil Proceedings) Act 2004* (WA).

87 It will be recalled that r 95C requires the Principal Registrar to put a case on the Inactive Cases List '[w]hen it is taken to be inactive under rule 95B'. There are two circumstances in which a case is taken to be inactive. Here the only circumstance that is relevant is that provided for in r 95B(1):

If no procedural step is taken in a case for 12 months by a party to a case, the case is taken to be inactive unless the Court orders otherwise.

88 The plaintiff contended that, on their proper construction, reading r 95C(1) with r 95B(1), the Principal Registrar had to consider whether the case was taken to be inactive *at the time of proposed placement* on the Inactive Cases List because no procedural step had been taken in the prior 12 months.⁵⁴ Counsel for the plaintiff submitted that there was temporal significance in the use of the word 'when' in r 95C.⁵⁵ It was also submitted, in particular by reference to *Fourmi Pty Ltd v Commissioner for Consumer Protection*, that the critical concept within the regime was being put on the Inactive Cases List. It was only when a case was put on the List that it became subject to any procedural fetters. Until that time procedural steps could be taken meaning that the case was no longer inactive.⁵⁶

89 The significance of the plaintiff's construction was that a case might have been taken to be inactive but - due to its inactivity escaping attention - not been placed on the Inactive Cases List. In such a case it would remain permissible for the claimant to continue to take procedural steps. Once a procedural step was taken, on the plaintiff's construction, the case would no longer be taken to be inactive.

90 The defendant accepted that Mr Hemmett had taken a further procedural step on 28 April 2017 by filing the Listing Conference Memorandum.⁵⁷ But on the defendant's construction of r 95B(1) and

⁵⁴ ts 10, 13.

⁵⁵ ts 13 - 14, 18.

⁵⁶ ts 11 - 13.

⁵⁷ ts 22.

r 95C that was of no account. On the defendant's construction of the rules the case had already been deemed to be inactive by the operation of r 95B(1) and thereafter remained inactive unless and until the Magistrates Court ordered otherwise in terms of r 95B(1).⁵⁸ According to the defendant's construction there are two possibilities whenever no procedural step is taken for 12 months: either (1) the case is taken to be inactive; unless (2) the Court ordered otherwise.⁵⁹

91 On the defendant's construction the concept of a case being taken to be inactive due to the operation of r 95B(1) was a once and forever position subject only to the Magistrates Court ordering otherwise.

92 In support of that construction counsel for the defendant submitted that on a plain, ordinary and natural reading of its words r 95B(1) was self-executing.⁶⁰ Counsel also rejected the suggestion that the word 'when' in r 95B(1) had a temporal significance, arguing that in context it connoted a condition, much like 'if', and referred to a state of things.⁶¹ Counsel for the defendant also pointed to the obligatory nature of r 95C and the fact that it simply directed attention to whether the case is taken to be inactive under r 9B. In counsel's submission r 95B deemed when a case is taken to be inactive; and if it was the case that no procedural step had been taken for 12 months then the case was taken to be inactive irrespective of what later occurred.⁶²

93 The question of construction for determination is whether, reading r 95C(1) with r 95B(1), assessment of whether a case is taken to be inactive because no procedural step has been taken in the case for 12 months is determined as at the time the Principal Registrar is considering putting the case on the Inactive Cases List (the plaintiff's construction) or at any time unless the Magistrates Court orders otherwise (the defendant's construction).

94 For the purpose of the present application I am not to finally determine that construction question. This is only the first stage of the two-stage process under s 36 of the *Magistrates Court Act 2004* (WA). Accordingly, the question for me is whether there is an arguable case, one with reasonable prospects of success, that the construction contended for by the plaintiff will succeed.

⁵⁸ ts 23 - 24.

⁵⁹ ts 23 - 24.

⁶⁰ ts 23.

⁶¹ ts 26 - 27.

⁶² ts 27.

95 I consider that the construction contended for by the plaintiff, reading r 95C(1) with r 95B(1), is arguable and has reasonable prospects of success.

96 It is necessary that I explain why I consider the plaintiff's construction to be arguable and to have reasonable prospects of success. However, I do not intend to develop my reasons for this conclusion at length. The task at present is to reach a preliminary view as to whether the plaintiff's case meets a particular threshold. I am not making a final conclusion as to which of the constructions contended for is correct. That is a matter for the second stage of the two-stage process under s 36 of the *Magistrates Court Act 2004* (WA). Accordingly, it is inappropriate that I offer any concluded view as to the way in which the issue is likely to be resolved and why.

97 In the circumstances it is unnecessary to set out the principles applicable to the task of statutory construction. In any case I have described my understanding of those principles elsewhere.⁶³ I adopt and apply those principles in what follows.

98 I accept that the defendant's construction is supported by a plain and ordinary reading of the words of r 95B(1).

99 There is also some support for the defendant's construction when regard is had to r 95B(2) - (3). This provides for the other circumstance in which a case is taken to be inactive. A case management order or direction may be made coupled with a direction that the case is taken to be inactive unless the order or direction is complied with by a specified date. The direction takes effect according to its terms. Self-evidently this operates once and forever; it is thus conformable with the construction that the defendant contends for r 95B(1).

100 Against that, I accept that the plaintiff's construction is open on the words of r 95B(1) and r 95C(1). Moreover, the plaintiff's preferred construction has the benefit of reading the two rules together and thus in context. The defendant's construction operates more mechanically by looking to r 95B(1) on a stand-alone basis. And, in my view, there is force in the plaintiff's submissions that there is a temporal aspect to the assessment under r 95C(1). Some meaning must be ascribed to the rule-maker's use of the word 'when' in r 95C(1) as opposed to the use of the word 'if' in r 95B(1).

⁶³ *Avwest Aircraft Pty Ltd v Clayton Utz* [2018] WASC 167 [49] - [53].

101 Implicit in the defendant's construction was that r 95B(1) established a state of affairs (that the case is taken to be inactive), doing so once and forever, unless the Magistrates Court ordered otherwise. It was said that a case was taken to be inactive unless the Court so ordered; and this was the only means by which a case that had been taken to be inactive could avoid being put on the Inactive Cases List. A case could not become 'not taken to be inactive' unless the Court excused the procedural lapses. And that oversight by the Court was the purpose of the power to make the sort of order contemplated by r 95B(1) - it providing the only avenue to avoid being put on the Inactive Cases List.

102 So reading r 95B(1) suggested that the Magistrates Court's power to otherwise order was only to reactivate a case taken to be inactive. I accept that is one of the circumstances in which the power may be exercised. But it is not the only circumstance. The power to otherwise order might be used prospectively, ie before a case is taken to become inactive so as to excuse and avoid the adverse consequences of what might occur if it is apparent that circumstances mean that no procedural step may be taken in a case for 12 months. For example, if the Magistrates Court was to order that civil proceedings were to be temporarily stayed pending the determination of related criminal proceedings a prudent counsel might seek an order that the case not be taken to be inactive despite the omission to take any procedural step for a period of 12 months.

103 Accordingly, I do not accept that r 95B(1) evinces an intention that the Magistrates Court ordering otherwise is to bring about reactivation of a case that is taken to be inactive.

104 A number of inconvenient and improbable results might occur under the defendant's preferred construction.

105 Counsel for the plaintiff posited a scenario⁶⁴ where a claimant did not serve an originating process until just before the expiry of the 12 month period in which it could do so. The defendant would then have 10 days to enter an appearance. Assuming that period was used there would have been no procedural step taken for 12 months. But it might be that the case was not put on the Inactive Cases List and then proceeded in a timely way. Assuming that the matter was then ready for trial, but on examination the 12 month period where no procedural steps had been taken objectively existed, would r 95B(1) and r 95C(1)

⁶⁴ ts 15. See also at ts 29 - 30.

have the result that the Principal Registrar must put the case on the Inactive Cases List with its concomitant procedural bars and necessity for an application to remove the case for the Inactive Cases List? On the defendant's construction the answer was yes.

106 A further example was raised in discussion between myself and counsel for the defendant.⁶⁵ This assumed that a case was taken to be inactive and had been put on the Inactive Cases List. An application was then made, successfully, that the case be taken off the Inactive Cases List. But no order otherwise was sought or made under r 95B(1) that the case was not taken to be inactive. Counsel for the defendant accepted, after some debate, that such an order might have to be made and if not made, on the defendant's construction, the case was liable to be put back on the Inactive Cases List (indeed the Principal Registrar would have no discretion but should immediately do so). If that happened there would then need to be a further application for removal.

107 The inconvenience and improbability of those results tells against the defendant's construction and supports the construction advanced by the plaintiff. Inconvenience or improbability of result may assist the court in preferring a construction other than a literal interpretation which is reasonably open and more closely conforms to the legislative intent.⁶⁶

108 The competing constructions must also be considered in the context of s 13 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The Magistrates Court is to ensure that cases are dealt with justly. That obligation extends to rule-making. Among other things, ensuring that cases are dealt with justly includes that cases are dealt with efficiently, economically and expeditiously and that the Court's judicial and administrative resources are used as efficiently as possible. As the examples posited above demonstrate, the defendant's preferred construction will, in examples that are not far-fetched or fanciful, operate antithetically to those objects. By contrast, the plaintiff's construction supports the objects. If, at the time of assessment, no procedural steps have been taken for 12 months the case will be inactive and will be put on the Inactive Cases List; that is not required where the inactivity is stale and procedural steps have been taken in the preceding 12 months.

⁶⁵ ts 24 - 26.

⁶⁶ *Avwest Aircraft Pty Ltd v Clayton Utz* [50(7)].

109 For these reasons I accept that the plaintiff's construction of r 95C(1) with r 95B(1) is arguable and has reasonable prospects of success. The construction is open. It is supported by the apparent temporal aspect of the word 'when' in r 95C(1). It reads the two rules together, in context, in contrast to the defendant's approach - which is to read r 95C(1) and then read r 95B(1). Importantly, the plaintiff's preferred construction avoids inconvenient and improbable results that might occur under the defendant's construction; and, in that respect, better achieves the object that cases be dealt with justly in a manner that is efficient and economical, as enshrined in s 13 of the *Magistrates Court (Civil Proceedings) Act 2004* (WA).

110 Counsel for the defendant accepted, with respect correctly, that the construction question was determinative of whether the Principal Registrar had acted beyond power or in jurisdictional error.⁶⁷ Accordingly, subject to any discretionary factors, the plaintiff has established a proper basis for a review order under s 36(1) of the *Magistrates Court Act 2004* (WA).

(3) Discretionary factors

111 There are two possible discretionary factors militating against the making of a review order: (1) delay; and (2) the possibility of an appeal under s 29 of the *Magistrates Court Act 2004* (WA).

112 The Principal Registrar's act of putting the proceedings on the Inactive Cases List occurred on 14 July 2017. The application for a review order was commenced on 12 February 2018. Accordingly, there is a notional delay of some seven months.

113 I accept that the delay is explained and ought not preclude the making of a review order.

114 The plaintiff consulted solicitors upon receiving the notification that the proceedings had been put on the Inactive Cases List. Thereafter an application was made to remove the case from the List. I infer that application was the result of legal advice. Making application for removal from the Inactive Cases List was the more obvious step to be taken in all the circumstances. Indeed, as the learned magistrate's comments on the hearing of the application demonstrated, that action would in all probability have resulted in the case being taken off the

⁶⁷ ts 21 - 22, 27 - 28.

Inactive Cases List but for the six months expiring before the application came on for hearing before the magistrate.

115 The application for a review order was brought in a timely fashion after the difficulties confronting the plaintiff were exposed at the hearing before Magistrate de Vries on 22 January 2018.

116 Accordingly, while there has been delay in making the application for the review order, that delay is explained. And in any case it is not asserted that the delay has caused any prejudice to the defendant.

117 Section 29(1) of the *Magistrates Court Act 2004* (WA) permits an appeal to a magistrate where a person is dissatisfied by a decision made by a registrar in the exercise of any of the Magistrates Court's jurisdiction or powers delegated to a registrar under s 28. Having concluded that putting the proceedings on to the Inactive Cases List was an act done by a Court officer, ie by the Principal Registrar in performing functions delegated under s 28, s 29 was (and still is) prima facie an available avenue for the plaintiff to pursue. While an appeal must ordinarily be commenced within 21 days (s 29(2)) that period may be extended even if the 21 days has elapsed (s 29(3)).

118 Little would be achieved by declining to make a review order, on discretionary grounds, because of the possibility of an appeal under s 29.

119 Whether the appeal will be heard is unknown; there will need to be an application to extend time. And even if time is extended the magistrate hearing the appeal will have to determine the same point of statutory construction that will be before me following a review order. (As will be seen, for reasons discussed below, my prima facie view is that I should determine the 'second stage' that will follow any review order.) The Magistrates Court is a very busy court. There is, in my view, no merit in declining to make a review order so as to - in effect - potentially require another judicial officer in the Magistrates Court to determine finally a question of statutory construction on which I have heard argument. To do so would be to promote an inefficient use of the State's judicial resources.

120 Accordingly, the discretionary factors I have identified do not result in me concluding that I should decline to make a review order in the exercise of my discretion.

(4) Stay of proceedings as to enforcement of the costs order

121 I am not persuaded that it is appropriate to make a stay order. It cannot be said that a stay is necessary to preserve the subject matter and integrity of the litigation. All that is pointed to is the potential costs of enforcement of the costs order. There is nothing to suggest - and it is not submitted on behalf of the plaintiff - that there is a perceived risk that the defendant may be unable to repay any costs recovered against the plaintiff. This is not a case where the review proceedings will be rendered nugatory in the absence of a stay order. The application for a stay order will be dismissed.

7. Conclusion

122 I am satisfied that I should make a review order under s 36(1) of the *Magistrates Court Act 2004* (WA). Subject to hearing from counsel as to the precise form of the orders, I will make orders to the effect that:

- (1) Pursuant to s 36(1)(c) of the *Magistrates Court Act 2004* (WA) the following persons and the defendant (as a person affected by the acts and orders) satisfy a judge of the Supreme Court at a hearing that the following acts and orders should not be set aside, namely:
 - (a) the act of the Principal Registrar of the Magistrates Court of Western Australia on 14 July 2017 to put proceedings CTC/225/2014 between the plaintiff and the defendant on the Inactive Cases List; and
 - (b) the orders of Magistrate de Vries in the Magistrates Court at Karratha in proceedings CTC/225/2014 on 22 January 2018;

together with consequential orders that:

- (i) declare that r 95F of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) did not operate to dismiss proceedings CTC/225/2014 on 14 January 2018; and
- (ii) require that, if and to the extent that proceedings CTC/225/2014 remain on the Inactive Cases List, the Principal Registrar of the Magistrates Court of Western Australia forthwith remove the proceedings from the Inactive Cases List.

- (2) The plaintiff serve these orders on the persons mentioned in par 1 within 14 days after the date of these orders.
- (3) The plaintiff enter for hearing the hearing contemplated by par 1 within 21 days after effecting service in accordance with par 2.
- (4) The application to stay the enforcement of par 2 of the orders of Magistrate de Vries in the Magistrates Court at Karratha in proceedings CTC/225/2014 on 22 January 2018 is dismissed.
- (5) The costs of the application for a review order under s 36(1) of the *Magistrates Court Act 2004* (WA) are reserved to the judge who determines the hearing contemplated by par 1.

123 At the hearing before me the parties stated that, if a review order was to issue, they would be content if I were to determine the second stage of the proceedings on the papers. Essentially the intention was that I would finally determine the merits of the statutory construction point based on the submissions that had already been made. In doing so I would not be considering whether the plaintiff's construction was arguable, with reasonable prospects, but rather, on a final basis, whether it was correct.

124 The parties are to be commended for suggesting this course. Subject to any views to the contrary from persons not yet before the court, it is the course that will be followed.

125 If, however, following service of the review order any party wishes to be heard - or the Attorney-General wishes to make submissions as amicus curiae as sometimes happens in these matters - it will be necessary for there to be a further hearing as contemplated by the review order and s 36(4) of the *Magistrates Court Act 2004* (WA).

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

AD
ASSOCIATE TO THE HONOURABLE JUSTICE VAUGHAN

20 JULY 2018