Supreme Court of Western Australia - Court of Appeal

THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA -v- AM [2010] WASCA 163 (4 August 2010)

Last Updated: 22 November 2010

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

CITATION : THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA -v- AM [2010] WASCA 163

CORAM : PULLIN J

BUSS J

LE MIERE J

HEARD : 14 JUNE 2010

DELIVERED : 4 AUGUST 2010

FILE NO/S : IAC 2 of 2010

BETWEEN : THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA

Appellant

AND

AM

Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Coram : BEECH CC

HARRISON C

MAYMAN C

Citation : AM v COMMISSIONER OF POLICE [2010] WAIRC 174

File No : APPL 8 of 2008

Catchwords:
Industrial Appeal Court - Right of appeal restricted - Grounds of appeal must conform to s 90 *Industrial Appeals Act 1979* (WA) - No jurisdiction to determine nonconforming grounds of appeal

Legislation:
Nil

Result:
Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr G T W Tannin SC & Mr R J Andretich

Respondent : Ms K A Vernon & Ms C E Adams

Solicitors:

Appellant : State Solicitor for Western Australia

Respondent : Carol Adams Barristers and Solicitors

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

AM v Commissioner of Police [2009] WAIRC 1285

AM v Commissioner of Police [2010] WAIRC 61

AM v The State of Western Australia [2008] WASCA 196

1 **PULLIN J**: This is an appeal pursuant to s 90 of the *Industrial Relations Act 1979* (WA), read with s 33S of the *Police Act 1892* (WA), against orders of the Western Australian Industrial Relation Commission that:

(a) pursuant to s 33U(1) of the *Police Act*, the appellant's decision to remove the respondent from office was harsh, oppressive or unfair; and

(b) pursuant to s 33U(2) of the *Police Act* the respondent's removal from office is and is to be taken to have always been of no effect from 12 October 2008.

2 The right to appeal under s 90 of the Act is restricted. None of the grounds of appeal are grounds permitted by s 90. This court therefore has no jurisdiction to entertain them and as a result, the appeal must be dismissed for the reasons which are set out below.

3 Early in 2005, the respondent joined the WA Police Service. In 2005, the Police Force came into possession of information alleging that the respondent had sexually penetrated a girl without her consent in circumstances of aggravation, in that at the time she was over the age of 13 years and under the age of 16 years contrary to s 326 of the *Criminal Code* (WA). The Police Internal Investigation Unit carried out an investigation and in due course prepared a loss of confidence report dated 10 May 2006, recommending that the appellant issue the respondent with a Notice of Intention to Remove the respondent from the Police Force of Western Australia pursuant to s 33L(1) of the *Police Act*. This report contained a summary of investigation by an investigating officer dated 4 May 2006. On 15 May 2006, the appellant issued a Notice of Intention to Remove the respondent pursuant to s 33L(1).

4 On 7 June 2006 the respondent provided a written response and requested that his removal be deferred pending the outcome of a criminal trial, the respondent having been charged with aggravated sexual penetration on 28 March 2006.

5 As a result, the appellant deferred removal action pending the outcome of the trial. On 12 February 2008, the respondent was convicted of the charge following a trial by judge alone. On the same day the appellant issued a Notice of Removal from the Police Force. On 19 March 2008 the respondent appealed against the conviction and on 6 March 2008 the respondent appealed against the removal to the Full Bench of the commission.

6 On 26 September 2008, the Court of Appeal allowed the appeal against conviction, quashed the conviction and ordered a retrial. On 5 February 2009, the DPP filed a notice of discontinuance of the charge. On 12 August 2009, the commission granted leave to the respondent to tender new evidence, namely the Court of Appeal's reasons for decision in ***AM v The State of Western Australia*** [2008] WASCA 196 and the evidence of the discontinuance of the charge. On 11 September 2009, the appellant filed reformulated reasons for removal as permitted pursuant to s 33R(8)(a) of the *Police Act*. The respondent then filed amended grounds of appeal.

7 On 4 December 2009, the commission found that the removal was harsh, oppressive and unfair: see ***AM v Commissioner of Police*** [2009] WAIRC 1285. Subsequently, on 11 February 2010, the commission found that it was not impracticable to order that the respondent's removal is to be taken to have always been of no effect: ***AM v Commissioner of Police*** [2010] WAIRC 61. On 1 April 2010, the orders referred to at the beginning of these reasons were made.

8 On 8 April 2010, the appellant filed a notice of appeal. The grounds of appeal read:

1. The Commission erred in law in construing Division 2 of Part IIB of the Police Act 1892 by having no or insufficient proper regard to the effect of Section 33W of the Police Act.
2. The Commission erred in law in failing to properly consider the reasons to remove the

Respondent in accordance with Section 33Q(1) of the Police Act 1892.

3. The Commission erred in law in construing section 33Q(1) of the Police Act 1892 by determining the decision to remove the Respondent from the Police Force was unfair.
4. The Commission erred in law in construing section 33Q(4) of the Police Act 1892 by:

> (a) giving excessive weight to the interests of the Respondent in considering the public interest in determining the appeal;
>
> (b) failing to have sufficient regard to the interests of the Appellant;
>
> (c) failing to have proper regard to the special nature of the relationship between the Appellant and the Respondent.
>
> (d) incorrectly determining the use that could be made by the Commissioner of the Trial Judge's comments after the Respondent's conviction was quashed.

1. The Commission erred in law in finding that the Appellant could not in accordance with the requirements of Division 2 of Part IIB of the Police Act 1892 reasonably and fairly conclude on the evidence available and considered by him that he had lost confidence in the Respondent.
2. The Commission erred in law in construing section 33U of the Police Act 1892 by concluding that the Appellant could not on the evidence available and considered by him retain a lack of confidence in the Respondent that made reinstatement impracticable because of the presumption of innocence.

9 The appellant informed the court that grounds 2 to 5 were an elaboration of ground 1 and that if ground 1 failed, then grounds 2 to 5 must also fail.

10 Ground 1 and grounds 2 to 5 relate to the commission's reasons in ***AM v The Commissioner of Police*** [2009] WAIRC 1285 and ground 6 relates to the reasons in ***AM v Commissioner of Police*** [2010] WAIRC 61.

The right of appeal

11 Section 90 of the *Industrial Relations Act* when read together with s 33S of the *Police Act* confers a limited right of appeal to the Western Australian Industrial Appeal Court from a decision of the commission. As modified, s 90 reads:

> (1) Subject to this section, an appeal lies to the Court in the manner prescribed from a decision of the Commission under s 33U of the *Police Act 1892* -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,

but upon no other ground.

> (2) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted -

(a) by any party to the proceedings wherein the decision was made; or

(b) by any other person who was an intervener in those proceedings.

(3) On the hearing of the appeal the Court may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of appeal and may remit the matter to the President, the

Full Bench, or the Commission in Court Session, as the case requires, for further hearing and determination according to law.

(3a) If any ground of the appeal is made out but the Court is satisfied that no injustice has been suffered by the appellant or a person who is a member of or represented by the appellant, the Court shall confirm the decision the subject of appeal unless it considers that there is good reason not to do so.

(4) The Court may at any time, if it considers that to do so will not prejudice any party to an appeal under this section -

(a) correct clerical mistakes in its judgments or orders, or errors arising in its judgments or orders from accidental slips or omissions; and

(b) generally correct any minor irregularities in its proceedings.

12 The appellant did not argue that s 90(1)(a) or (c) applies. The appellant contended that s 90(1)(b) applied and that the grounds of appeal were permitted by that provision. The task of the appellant was therefore to establish that the decision of the commission was erroneous in law 'in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against'. The word 'decision' is defined in s 7(1) as including 'award, order, declaration or finding'.

Ground 1

13 The relevant decision in relation to this ground was the order made by the commission that the appellant's removal of the respondent from office was harsh, oppressive or unfair. The Act which the appellant contended was misconstrued was the *Police Act*.

14 In the course of reasons for decision, at [47], Chief Commissioner Beech (Harrison C & Mayman C agreeing) referred to a submission made on behalf of the appellant that the appellant did not have before him the material contained in the summary of investigation. After first observing, at [47], that it was 'not clear' that the Commissioner of Police relied upon this material, Beech CC said [48]:

The Commissioner of Police may not have relied upon this material due to the second difficulty which is that prior to AM's conviction, the Commissioner of Police recognised that the material contained in the Summary of Investigation was untested. It was, as Mr Andretich stated, a suspicion and therefore, properly in my view, the Commissioner of Police decided not to take removal action pending the outcome of the criminal trial in relation to the charges preferred against AM under s 326 of the Criminal Code (Tab 2). The fact is that the material contained in the Summary of Investigation remains untested. The reformulated reasons at [25] states that the Commissioner of Police relies upon the Summary of Facts in his response of 30 June 2009, however to the extent that the Summary of Facts states as fact the allegation made against AM (particularly [3] to [6]), the Commissioner of Police is not able to fairly rely upon the Summary at all: the allegation still remains an allegation and it has not been established as a fact. Therefore the earlier decision of the Commissioner of Police not to take removal action pending the

> outcome of the criminal trial in relation to the charges remains. I find Ground 3 is made out.

15 If the appellant had an unrestricted right of appeal, it may have been arguable that the commission erred in excluding from consideration the summary of facts, or at least the evidence led in relation to the asserted facts, but the appellant does not have such a right. The court only has jurisdiction to entertain appeals against a decision which is erroneous in law 'in that' there has been an error in the construction or interpretation of an Act, regulation, award, industrial agreement or order 'in the course of' making the decision appealed against: s 90(1)(b) *Industrial Relations Act*.

16 The appellant submitted that the commission paid no regard or no sufficient regard to s 33W of the *Police Act*. There are two difficulties with that submission. The first is that it is quite clear that the commission did have regard to s 33W. At [13], the commission noted that the appellant referred to s 33W of the *Police Act* which Beech CC set out in full.

17 When referring to ground 2, Beech CC said:

> [I]t is argued on behalf of AM, that although s 33W means that the Commissioner of Police is not precluded from acting to remove AM, he had decided to wait for the outcome of the criminal trial in relation to the charges preferred against AM [18].

18 At [29] Beech CC referred to the respondent's submission that at the date of his removal, the disposition of the criminal charge against him had not been finally determined and then said:

> In response, the Commissioner of Police submits that there is no obligation upon him to wait for that appeal period to expire. I agree with this submission in part, because of the terms of s 33W which I have set out earlier in these reasons.

19 Finally, the commission concluded that it was unfair to remove AM from the Police Force, stating:

> It was unfair because notwithstanding s 33W, the Commissioner of Police had decided not to take removal action pending the outcome of the criminal trial [56].

These extracts from Beech CC's reasons show that regard was had to s 33W. The second difficulty for the appellant is the fact that as appears from the quoted paragraphs, the commission properly understood and construed s 33W. As a result, ground 1 should be dismissed. It follows that grounds 2 to 5 must also be dismissed.

Ground 6

20 As stated above, this ground relates to the commission's decision in [2010] WAIRC 61. These reasons were published after submissions were received about whether it was appropriate to invoke s 33U(3) of the *Police Act*. Section 33U(1) states that the section applies if the commission decides on an appeal that the decision to take removal action relating to the appellant was harsh, oppressive or unfair. The commission had made such a decision. Section 33U(2) states that if the section applies, and unless an order is made under s 33U(3), the commission may order that the appellant's removal from office is, and is to be taken to have always been of no effect. Section 33U(3) provides that:

> If, and only if, the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, the Commission may instead of making an order under subsection (2), subject to subsections (5) and (6), order the Commissioner of Police to pay the appellant an amount of compensation for loss or injury caused by the removal.

21 The appellant submitted that it was impracticable for an order to be made under s 33U(2). In

making that decision, the commission had to consider the matters set out in s 33U(4) which reads:

> In considering whether or not it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect it is relevant to consider -
>
> (a) whether the position occupied by the appellant at the time of his or her removal is vacant; and
>
> (b) whether there is another suitable vacant position in the Police Force.

22 An issue arose in the commission about whether in considering the question of impracticability, the two factors referred to in s 33U(4)(a) and (b) were the only factors which could be taken into account. The appellant submitted they were not the only factors which could be taken into account and the commission agreed with that submission.

23 There is no dispute that the appellant took into account the two relevant considerations referred to in s 33U(4). Ground 6 asserts that the commission erred in law 'by concluding that the appellant could not on the evidence available, and considered by him, retain a lack of confidence in the respondent that made reinstatement impracticable because of the presumption of innocence'. Even if the commission erred in that respect, the error is not an error in the construction or interpretation of s 33U.

24 As a result, this court has no jurisdiction to entertain any of the grounds of appeal. The appeal must be dismissed for that reason.

25 **BUSS J**: I agree with Pullin J.

26 **LE MIERE J**: I agree with Pullin J.

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

CITATION : THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA -v- AM [2010] WASCA 163 (S)

CORAM : PULLIN J

BUSS J

LE MIERE J

HEARD : 14 JUNE 2010 AND ON THE PAPERS

DELIVERED : 4 AUGUST 2010

SUPPLEMENTARY

DECISION : 22 NOVEMBER 2010

FILE NO/S : IAC 2 of 2010

BETWEEN : THE COMMISSIONER OF POLICE OF WESTERN AUSTRALIA

Appellant

AND

AM

Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Coram : BEECH CC

HARRISON C

MAYMAN C

Citation : AM v COMMISSIONER OF POLICE [2010] WAIRC 174

File No : APPL 8 of 2008

Catchwords:
Costs - Whether proceedings initiated frivolously or vexatiously

Legislation:
Industrial Relations Act 1979 (WA), s 83(2)

Result:
Application for costs dismissed

Category: A

Representation:

Counsel:

Appellant : Mr G T W Tannin SC & Mr R J Andretich

Respondent : Ms K A Vernon & Ms C E Adams

Solicitors:

Appellant : State Solicitor for Western Australia

Respondent : Carol Adams Barristers and Solicitors

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

Attorney-General v Wentworth (1988) 14 NSWLR 481

General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125

Hatchett v Bowater Tutt Industries Pty Ltd (No 2) [1991] FCA 188; (1991) 28 FCR 324

Heidt v Chrysler Australia Ltd (1976) 26 FLR 257

Hutchison v Bienvenu (Unreported, HCA, 19 October 1971)

Jones v Skyring [1992] HCA 39; (1992) 109 ALR 303

Matthews v Cool or Cosy Pty Ltd [2003] WASCA 136

Mudie v Gainriver Pty Ltd (No 2) [2002] QCA 546; [2003] 2 Qd R 271

Re Vernazza [1960] 1 QB 197

Re Williams and Australian Electoral Commission [1995] AATA 160; (1995) 21 AAR 467

The Commissioner of Police of Western Australia v AM [2010] WASCA 163

Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22

Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark (1995) 62 IR 334

1 **PULLIN J**: On 4 August 2010, this court dismissed an appeal by the appellant against a decision of the Western Australian Industrial Relations Commission. The respondent sought an order that the appellant pay the respondent's costs of the appeal. The appellant opposed this order. The court called for written submissions from the parties with a decision on costs to be made on the papers.

2 Section 86(2) of the *Industrial Relations Act 1979* (WA) (the Act) provides this court with the power to award costs:

> In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

3 The operation of s 86(2) was explained by this court in ***Matthews v Cool or Cosy Pty Ltd*** [2003] WASCA 136 [9]:

> It is clear that the policy envisaged by s 86(2) is that it will be on very rare occasions that a costs order will be made. Proceedings will have been 'frivolously or vexatiously' instituted where it can be said that the matter was 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; that it 'discloses a case which the court is satisfied cannot succeed'; or that 'under no possibility can there be a good cause of action'. See ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22 at 26-27.

4 I am grateful to Buss J for his thorough review of other cases and his conclusions about the meaning of the words 'frivolous' and 'vexatious'. I adopt what his Honour has said on the subject.

5 The respondent submits that the proceedings were frivolously or vexatiously instituted because the grounds of appeal did not conform to s 90 of the Act which specifies the permitted grounds for an appeal to this court.

6 The appellant submits that the proceedings were not frivolous or vexatious. The appellant contends that the appeal raised:

(a) 'serious matters' concerning the 'special relationship' between the Commissioner of Police and a police officer where the officer's conviction is set aside and reinstatement where the Commissioner retains a lack of confidence in the officer despite the commission determining his or her removal was unfair; and

(b) the proper application of s 33W of the *Police Act 1892* (WA).

7 The appellant submitted that these matters were 'in the public interest and of concern to the Commissioner having regard to his powers and duties under the Police Act in maintaining public confidence in the Police Force'. The appellant also submitted that the appeal 'tested the limits' of this court's jurisdiction under s 90(1)(b), was 'clearly arguable' and that simply because the appeal failed for lack of jurisdiction did not make it frivolous or vexatious, especially where this court did not suggest the appeal was instituted or argued frivolously or vexatiously.

8 The appellant's submissions should be rejected. The appellant had six grounds of appeal but conceded that grounds 2 to 5 simply elaborated on ground 1 and that if ground 1 failed, then grounds 2 to 5 must also fail.

9 The appellant's first ground of appeal read:

> The Commission erred in law in construing Division 2 of Part IIB of the Police Act 1892 by having no or insufficient proper regard to the effect of Section 33W of the Police Act.

10 This court found that it was 'quite clear' that the commission did have regard to s 33W. The ground as formulated had no merit because such an appeal ground was not permitted under s 90(1)(b). Even if the ground had been permitted it must have been dismissed because, as this court found, it was self-evident from the commission's reasons that the commission properly considered and construed the section [19].

11 Grounds 2 to 5 therefore fell away.

12 The appellant's sixth ground of appeal read:

> The Commission erred in law in construing section 33U of the Police Act 1892 by concluding that the Appellant could not on the evidence available and considered by him retain a lack of confidence in the Respondent that made reinstatement impracticable because of the presumption of innocence.

13 This court found that even if the error asserted in ground 6 was made out, it was not an error of construction or interpretation and thus did not fall within s 90(1)(b).

14 As a result, the appeal was dismissed because the court had no jurisdiction to entertain any of the appellant's grounds of appeal under s 90. In my opinion, the appeal was at all material times so obviously untenable that it could not possibly succeed, it was manifestly groundless, and the court was satisfied that none of the grounds could succeed. It will not always follow that an appeal will be held to have been frivolously instituted merely because the grounds are grounds which the court holds it has no jurisdiction to entertain. However, this was a very plain case involving a well-resourced appellant represented by the State Solicitor and it should have been apparent when the proceedings were instituted that none of the grounds were permitted under s 90 and that they could not succeed. Consequently, the proceedings were frivolously instituted. In my opinion, this is one of the rare cases where the appellant must pay the respondent's costs of the appeal.

15 The respondent sought an order that costs be fixed at $3,500. The appellant made no submissions about quantum. The amount sought is reasonable.

16 The order should be that the appellant pay the respondent's costs of the appeal fixed in the sum of $3,500.

17 **BUSS J**: On 4 August 2010, this court dismissed the appellant's appeal under s 90 of the *Industrial Relations Act 1979* (WA) (the Act), read with s 33S of the *Police Act 1892* (WA), against orders of the Western Australian Industrial Relations Commission that:

(a) pursuant to s 33U(1) of the *Police Act*, the appellant's decision to remove the respondent from office was harsh, oppressive or unfair; and

(b) pursuant to s 33U(2) of the *Police Act*, the respondent's removal from office is, and is to be taken to have always been, of no effect from 12 October 2008.

18 Section 90 of the Act confers a limited right of appeal to this court from, relevantly, any decision of the Commission. By s 90(1) an appeal lies:

> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act,

regulation, award, industrial agreement or order in the course of making the decision appealed against; or

> (c) on the ground that the appellant has been denied the right to be heard,

but upon no other ground.

19 The appellant sought to base his alleged right of appeal on s 90(1)(b). His grounds of appeal read:

1. The Commission erred in law in construing Division 2 of Part IIB of the Police Act 1892 by having no or insufficient proper regard to the effect of Section 33W of the Police Act.

2. The Commission erred in law in failing to properly consider the reasons to remove the Respondent in accordance with Section 33Q(1) of the Police Act 1892.
3. The Commission erred in law in construing section 33Q(1) of the Police Act 1892 by determining the decision to remove the Respondent from the Police Force was unfair.
4. The Commission erred in law in construing section 33Q(4) of the Police Act 1892 by:

    (a) giving excessive weight to the interests of the Respondent in considering the public interest in determining the appeal;

    (b) failing to have sufficient regard to the interests of the Appellant;

    (c) failing to have proper regard to the special nature of the relationship between the Appellant and the Respondent.

    (d) incorrectly determining the use that could be made by the Commissioner of the Trial Judge's comments after the Respondent's conviction was quashed.

1. The Commission erred in law in finding that the Appellant could not in accordance with the requirements of Div 2 of Pt IIB of the Police Act 1892 reasonably and fairly conclude on the evidence available and considered by him that he had lost confidence in the Respondent.
2. The Commission erred in law in construing section 33U of the Police Act 1892 by concluding that the Appellant could not on the evidence available and considered by him retain a lack of confidence in the Respondent that made reinstatement impracticable because of the presumption of innocence.

20 At the hearing of the appeal, counsel for the appellant put his case on the basis that grounds 2 - 5 were an elaboration of ground 1. He conceded that if ground 1 failed then grounds 2 - 5 must also fail.

21 This court held that it had no jurisdiction to entertain any of the grounds of appeal and, for that reason, the appeal was dismissed. See ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163.

22 When this court published its reasons for decision and made an order dismissing the appeal, counsel for the respondent applied for an order that the appellant pay the respondent's costs of the appeal, being for the services of his counsel and solicitors, fixed in the sum of $3,500. The appellant opposed the application.

23 This court's jurisdiction with respect to costs is set out in s 86(2) of the Act, which provides:

> In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

24 Three general observations may be made about this court's power under s 86(2) to order the unsuccessful party to an appeal to pay the costs of any other party for the services of, relevantly, any legal practitioner of that party.

25 First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful

party.

26 Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. See ***Heidt v Chrysler Australia Ltd*** (1976) 26 FLR 257, 275 (Northrop J); ***Hatchett v Bowater Tutt Industries Pty Ltd (No 2)*** [1991] FCA 188; (1991) 28 FCR 324, 326 (von Doussa J).

27 Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. See ***Re Vernazza*** [1960] 1 QB 197, 208 (Ormerod LJ); ***Hutchison v Bienvenu*** (Unreported, HCA, 19 October 1971) 11 (Walsh J); ***Jones v Skyring*** [1992] HCA 39; (1992) 109 ALR 303, 309 - 310 (Toohey J).

28 The words 'frivolously' and 'vexatiously', in the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), are adverbs. They relate to the verbs 'instituted' or 'defended'. The Act does not define 'frivolously' or 'vexatiously'.

29 The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. See the *Shorter Oxford English Dictionary*, (5th ed) 1038, 3529; ***Mudie v Gainriver Pty Ltd (No 2)*** [2002] QCA 546; [2003] 2 Qd R 271 [35] - [37] (McMurdo P & Atkinson J), [59] - [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.

30 The words 'frivolous' and 'vexatious' have been considered extensively in the context of the exercise by the courts of their summary powers to strike out a pleading, or an action or defence, on the ground that the pleading, action or defence is frivolous or vexatious. The word 'vexatious' has also received consideration on numerous occasions in the context of proceedings to restrain vexatious litigants.

31 In ***General Steel Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125, the defendants sought to set aside the plaintiff's writ and statement of claim or, alternatively, to stay further proceedings thereon, upon the ground that the plaintiff had '*no viable cause of action against them or any of them*' (126) (emphasis added). Barwick CJ considered the circumstances in which an action may be summarily dismissed by a court under counterpart rules to O 26 r 18 of the *High Court Rules 1952* which, at the material time, provided:

> (1) The Court or a Justice may order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action or answer.
>
> (2) In that case, or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Justice may order the action to be stayed or dismissed, or judgment to be entered accordingly, as is just.

His Honour also referred to cases where the inherent jurisdiction of the court had been invoked.

32 Barwick CJ said:

> The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I have examined the case law on the subject, to some of which I was referred in argument and to which I append a list of references. There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, *unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated*. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
>
> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'.
>
> As I have said, some of these expressions occur in cases in which the inherent jurisdiction was invoked and others in cases founded on statutory rules of court but although the material available to the court in either type of case may be different the need for exceptional caution in exercising the power whether it be inherent or under statutory rules is the same (128 - 129). (emphasis added)

33 As I have mentioned, the word 'vexatious', in its ordinary meaning, has a broader connotation than the word 'frivolous'. This is reflected in the authorities concerned with the summary termination of pending proceedings. In ***Re Williams and Australian Electoral Commission*** [1995] AATA 160; (1995) 21 AAR 467, the Administrative Appeals Tribunal (Mathews J (President), Hill & Beaumont JJ (Presidential Members)) said that the test to be applied in determining whether pending proceedings are vexatious can be expressed either subjectively or objectively, depending upon the head of 'vexatiousness' under consideration (474 - 475). Their Honours referred to this statement of Roden J in ***Attorney-General v Wentworth*** (1988) 14 NSWLR 481:

> It seems then that litigation may properly be regarded as vexatious for
>
> present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless (491).

34 In ***Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22, ***Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark*** (1995) 62 IR 334 and ***Matthews v Cool or Cosy Pty Ltd*** [2003] WASCA 136, this court adopted, in relation to the expression 'the proceedings have been frivolously or vexatiously

instituted or defended' in s 86(2), the various expressions of the test referred to by Barwick CJ in ***General Steel Industries*** for deciding whether a claim or defence in pending proceedings should be summarily terminated on the ground that it does not disclose a reasonable cause of action or defence. It was

unnecessary in those cases for this court to consider the broader connotation of 'vexatiously' compared with 'frivolously'.

35 As Kennedy, Rowland & Nicholson JJ noted in ***Tip Top Bakeries***, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In ***Clark***, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).

36 It is plain from the earlier decisions of this court to which I have referred that something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. So, relevantly to the present case, not every appeal which is determined to be without merit, either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

37 In the present case, the respondent did not suggest (and it could not properly have been suggested) that the appeal was instituted with the intention of annoying or embarrassing the respondent or for an impermissible collateral purpose. Rather, the respondent contended, in essence, that, viewed objectively, the appeal was at all material times so obviously untenable or manifestly groundless as to be utterly hopeless.

38 Although the appellant failed because, on analysis, none of his grounds of appeal was a ground in respect of which an appeal lies under the limited right of appeal conferred by s 90, this appeal was not one of those very rare occasions on which the costs of a legal practitioner should be awarded. I would not characterise the appellant's grounds of appeal as being 'so obviously untenable that they cannot possibly succeed', 'manifestly groundless' or 'so manifestly faulty that they do not admit of argument'. Accordingly, the appeal was not instituted frivolously or vexatiously. The respondent's application for costs should be dismissed.

39 **LE MIERE J**: I agree with Buss J that the respondent's application for costs should be dismissed for the reasons stated by his Honour.