JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	HEMMETT v MARKET DIRECT GROUP PTY LTD [No 2] [2018] WASC 310
CORAM	**:**	VAUGHAN J
HEARD	**:**	14 SEPTEMBER 2018 SUPPLEMENTARY SUBMISSIONS 21, 25 AND 26 SEPTEMBER 2018
DELIVERED	**:**	12 OCTOBER 2018
FILE NO/S	**:**	CIV 1222 of 2018
BETWEEN	**:**	STEVEN WAYNE HEMMETT Plaintiff AND MARKET DIRECT GROUP PTY LTD Defendant

Catchwords:

Practice and procedure - Application for review order - Final review order - Whether Principal Registrar of Magistrates Court kept an Inactive Cases List

Practice and procedure - Application for review order - Jurisdictional error

Costs - Application for certificate under *Suitors' Fund Act 1964* (WA)

Legislation:

Magistrates Court Act 2004 (WA), s 36

Magistrates Court (Civil Proceedings) Rules 2005 (WA), r 95A, r 95B, r 95C, r 95F
Suitors' Fund Act 1964 (WA), s 10(1), s 12A(2)

Result:

Final review order made under s 36 (4)(a) of the *Magistrates Court Act 2004* (WA)

Category: B

Representation:

Counsel:

Plaintiff	:	M Trainer
Defendant	:	C Breheny
Attorney General (as Intervenor)	:	B Nelson

Solicitors:

Plaintiff	:	Roe Legal Services
Defendant	:	Kott Gunning
Attorney General (as Intervenor)	:	State Solicitor's Office (WA)

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

Carltona Ltd v Commissioners of Works [1943] 2 All ER 560
Craig v The State of South Australia [1995] HCA 58; (1995) 184 CLR 163
Fourmi Pty Ltd v Commissioner for Consumer Protection [2017] WASCA 69
Hall v Hall [No 2] [2011] WASC 110
Hemmett v Market Direct Group Pty Ltd [2018] WASC 214
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
Pintarich v Deputy Commissioner of Taxation [2017] FCA 944
Ruby v Doric Constructions (Aust) Pty Ltd [2013] WASCA 94 (S)
West Australian Newspapers Ltd v Fairhead [2013] WASCA 151

VAUGHAN J:

Background and result

1 On 20 July 2018 I made a review order under s 36(1) of the *Magistrates Court Act 2004* (WA) in these proceedings. I did so for the written reasons that were published that day.[1]

2 I concluded that the plaintiff had reasonable prospects of establishing that the Principal Registrar of the Magistrates Court had acted beyond power, and thereby in jurisdictional error, in putting certain proceedings on the Inactive Cases List. Those proceedings were a case which the plaintiff had commenced against the defendant in the Magistrates Court at Karratha, known as Magistrates Court proceedings CTC/225/2014 (Proceedings).

3 Following the s 36(1) review order the plaintiff effected service on relevant officers of the Magistrates Court.

4 Neither the Principal Registrar nor the relevant Magistrate sought to be heard on the second stage of the s 36 review proceedings. However, the Attorney General of Western Australia sought leave to intervene. The parties did not oppose leave to intervene and on 10 September 2018 leave to intervene was granted.

5 Leave was appropriate because, as will be seen, the Attorney General's investigations resulted in relevant evidence being made available to the parties and the court. Before the Attorney General commenced his participation in the proceedings the common position of the parties was that the plaintiff's Proceedings in the Magistrates Court at Karratha had been put on the Inactive Cases List on 14 July 2017. That was the basis on which the first stage of the s 36 review proceedings had been conducted. However, the affidavit evidence assembled by the Attorney General required that the correctness of this premise be examined.

6 The Attorney General, in written submissions, suggested that based on the additional evidence it was open to conclude that:

- At the relevant time the Principal Registrar did not keep an Inactive Cases List as contemplated by r 95A and r 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

[1] ***Hemmett v Market Direct Group Pty Ltd*** [2018] WASC 214.

(If that was the position the Principal Registrar could not have put the Proceedings on the List as the List did not exist.)

- Alternatively, if there was in fact an Inactive Cases List, the steps taken by the Magistrates Court did not amount to putting the Proceedings on to the List.

7 At the hearing on 14 September 2018 the plaintiff embraced the Attorney General's evidence and contentions as a reason for the court to grant the substantive relief the plaintiff sought. That position was confirmed in supplementary submissions filed on 21 September 2018. More importantly, the defendant - being the person affected by the acts and orders of the Magistrates Court challenged in these review proceedings - effectively conceded the review proceedings.

8 Specifically, by par 1 of its supplementary submissions dated 25 September 2018 the defendant stated:

> Given the evidence and outline of submissions filed by the [Attorney General] in these proceedings, the defendant concedes that the Principal Registrar of the Magistrates Court of Western Australia could not or did not put the Magistrates Court of Western Australia at Karratha proceedings No. CTC/225/2014 … on the Inactive Cases List, and that the proceedings have not been dismissed pursuant to r 95F(1) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

9 For reasons I develop below the defendant's concession is properly made. At the relevant time the Principal Registrar did not keep an Inactive Cases List as contemplated by r 95A and r 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). As the Inactive Cases List did not exist the Proceedings were never put on the List and the Proceedings ought not to have been taken to be dismissed. The orders of the Magistrates Court at Karratha which proceed on a contrary premise will be set aside.

Incorporation of earlier reasons

10 I am presently concerned with the second stage of the review proceedings under s 36 of the *Magistrates Court Act 2004* (WA). Having determined in my earlier reasons that I should make an order under s 36(1) of the Act, these reasons deal with the further hearing as contemplated by the order made 20 July 2018 and s 36(4) of the Act. However, except for the Attorney General's additional affidavit evidence, the context in which this determination takes place is the same as that recounted in my earlier reasons.

11 Accordingly, I do not intend to recount the materials that are before me on the application. Nor do I intend to repeat the factual background and the relevant legal framework. That is all set out in my earlier reasons for decision. For the avoidance of doubt, the reasons that I now give should be read together with, and as if incorporating, what is stated in my earlier reasons.

12 In particular, I repeat and rely upon:

(1) the factual and procedural background as described at pars 1 to 2 and 6 to 26 of the earlier reasons;

(2) the legal framework as to review proceedings under s 36 of the *Magistrates Court Act 2004* (WA) as described at pars 27 to 49 of the earlier reasons; and

(3) the legal framework as to the operation of the Inactive Cases List in the Magistrates Court pursuant to Pt 16A of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) as described at pars 51 to 61 of the earlier reasons.

13 There are, however, two aspects of my earlier reasons that must be revisited. First, as already mentioned, the earlier reasons were premised on the parties' common assumption that the Proceedings had in fact been put on the Inactive Cases List.[2] Second, based on the apparent timing of events, I inferred 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.[3]

14 Those two conclusions must be reassessed having regard to the additional evidence adduced by the Attorney General. Accordingly, I now turn to that additional evidence.

Additional affidavit evidence

15 The Attorney General adduced affidavit evidence on two inter-related issues:

- Did the Principal Registrar, at the relevant time, keep a list as contemplated by r 95A and r 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) such that the Proceedings were capable of being put on the Inactive Cases List?

[2] ***Hemmett v Market Direct Group Pty Ltd*** [1] - [5], [14] - [15], [17] - [19].
[3] ***Hemmett v Market Direct Group Pty Ltd*** [16].

- Were the Proceedings in fact put on the Inactive Cases List pursuant to r 95C(1)(a) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA)?

16 The affidavit evidence comprised of an affidavit of Vicki Lubrig sworn 29 August 2018, an affidavit of Alana Morgan sworn 24 August 2018 and affidavits of Laura Sutton affirmed 23 August 2018 and 31 August 2018.

17 Ms Lubrig was the clerk of the Magistrates Court in Karratha in 2017. Ms Morgan is a customer service officer employed at the Magistrates Court, usually based in Armadale, but who relieved in the Karratha registry in July or August 2017. Ms Sutton is a registrar of the Magistrates Court and is presently acting as its Manager of Customer Services.

18 The affidavits identify, in considerable detail, two things. First, the ordinary practices of the Magistrates Court in 2017 in relation to the Inactive Cases List. Second, the material aspects of the case management of the Proceedings in 2017.

19 Registrar Sutton's evidence is that, as at July 2017, matters in the Magistrates Court's civil jurisdiction were identified as 'inactive' through an entirely automated process by the Court's Integrated Court Management System (ICMS). This occurred consistently with an Information Bulletin dated 8 December 2014 (Information Bulletin No 26 of 2014) as prepared by the Principal Registrar of the Magistrates Court. Registrar Sutton explained that the Information Bulletin was implemented in December 2014 in response to the insertion of Pt 16A into the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

20 The Information Bulletin (attachment 'LES-2') provided:

> The Inactive Cases process is managed through ICMS wherein the system identifies cases on which no activity has occurred for a period of 12 months (or greater) and changes the case status to 'Inactive'. Once inactive, an 'Inactive Notice' must be generated and posted to all parties to the action by the court at which the case was commenced.
>
> …
>
> Cases will be dismissed by ICMS 6 months from the date of the notice without any further notice. This is an automated process and no action is required from the court.

21 As programmed, on a daily basis the ICMS would identify matters where there had been no hearing within, or no document lodged for, a period of 12 months, and would automatically update the status of those matters within the ICMS as being 'inactive'. The process was entirely automated.

22 Court officers would use the ICMS to generate notices to the parties for matters that the ICMS had identified as 'inactive', informing the parties that the matter had been put on to the Inactive Cases List. The matters that the ICMS identified would not be a list of all matters that were marked by the system as 'inactive'. Rather, the ICMS was used to produce a list of matters where the ICMS had automatically updated the matter's status to 'inactive' but there was yet to be any notice generated directly to the parties.

23 Registrar Sutton also made mention of a possible reporting tool within the ICMS. The precise functionality of the reporting tool was not described in Registrar Sutton's evidence. No doubt that is because, as the registrar went on to depose, the Magistrates Court did not use that reporting tool to generate a printed Inactive Cases List in 2016 or 2017.

24 The various registries of the Magistrates Court adopted different practices as to how frequently inactive notices were generated.

25 A customer service officer would only generate inactive notices for matters before the particular registry of the Magistrates Court at which he or she was located. To generate notices the customer service officer would usually, in accordance with the Information Bulletin, click a button within the ICMS titled 'generate notice'. This had the effect of generating a pro forma notice. The notice would then be printed and sent by post to the parties.

26 The process would not necessarily involve a registrar of the Magistrates Court. In any case the process did not see matters coming before the Principal Registrar.

27 Critically, the Principal Registrar did not maintain a separate list of the cases the statuses of which the ICMS had marked as being 'inactive'. Registrar Sutton candidly deposed that:

> There was, in July 2017, no separate list of inactive cases maintained by the Principal Registrar of the Magistrates Court.

28 Registrar Sutton went on to explain that, as at January 2018, if the status of a matter within the ICMS remained 'inactive' for a period of six months, and six months had passed since the date on which the notice to the parties was generated, the ICMS would automatically change the status of the matter to 'dismissed'.

29 During 2016 and 2017 the ICMS did not contain a function allowing the Principal Registrar to assemble a list of matters taken by the ICMS to be 'inactive' and for which a notice had been sent to the parties.

30 The ICMS has been used in the Magistrates Court for some time. Registrar Sutton informed the court, by her evidence, that the ICMS operated to automatically mark a matter as 'inactive' before the introduction of Pt 16A of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). The function was not used for any particular purpose by the Magistrates Court at that time. The programming of the ICMS was not altered in any material way in 2014 when Pt 16A was introduced.

31 In her affidavit evidence Ms Lubrig referred to the defendant's solicitors' letter dated 4 July 2017 as mentioned at par 13 of my earlier reasons. Ms Lubrig recalled receiving that letter. However, Ms Lubrig did not generate the notice to the parties dated 14 July 2017 informing them that the Proceedings had been put on the Inactive Cases List.

32 By subsequent interrogation of the ICMS Ms Lubrig determined that the notice dated 14 July 2017 was generated by Ms Morgan.

33 Ms Lubrig became aware that the Proceedings had purportedly been put on the Inactive Cases List when preparing a response to the defendant's solicitors' letter. That response was the letter dated 1 September 2017 as mentioned in par 15 of my earlier reasons.

34 The letter dated 1 September 2017 (attachment 'VEL-5') stated:

> In relation to the issue of this matter being an inactive case, whilst it is acknowledged that there were no procedural steps or other documents filed for over 12 months from 15 September 2015, unfortunately due to court administrative issues the matter was not put on the Inactive Cases List and as such, no written notice of the fact was given to the parties.
>
> In actual fact the matter was put on the Inactive Cases List and notices issued on the 14 July 2017.

35 Ms Morgan confirmed relieving in the Karratha registry of the Magistrates Court for approximately one week in July or August 2017. While doing so, Ms Morgan performed her usual functions. These included the generation of inactive case notices. However, Ms Morgan had no recollection of generating the notice to the parties dated 14 July 2017 in the Proceedings.

Factual findings

36 The affidavit evidence adduced by the Attorney General satisfies me of the following.

37 First, the Proceedings were given the status of 'inactive' by operation of the automated processes of the ICMS. When precisely that occurred is irrelevant; it depends on the programming of the ICMS and the dates as inputted. It is likely, however, that the ICMS changed the status of the case to 'inactive' shortly after 15 September 2016. In this respect the letter dated 1 September 2017 did not reflect the automated process that occurs under the ICMS.

38 In any case, the notice to the parties was generated by Ms Morgan. Ms Morgan did so using the ICMS to identify those matters within the Karratha registry where the status had been automatically updated to 'inactive', but there had not yet been any notification as such generated and sent to the parties. That process was one of notification rather than putting the case on to the Inactive Cases List. The process was also in accordance with the Magistrates Court's usual practice rather than being prompted by the defendant's solicitors' letter dated 4 July 2017.

39 Second, the Principal Registrar of the Magistrates Court did not have any personal involvement in the actual process of designating the Proceedings as inactive or notifying the parties that this had occurred. That said, the Principal Registrar evidently approved the process that was followed. Approval is implicit in the Information Bulletin dated 8 December 2014 as signed by the Principal Registrar.

40 Third, as at 14 July 2017 the Principal Registrar did not maintain a *separate* list of the matters taken to be inactive for the purpose of r 95A and r 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). At the most, the Magistrates Court's records, through the ICMS, designated the status of certain matters as being 'inactive'. Designation that a matter was 'inactive' was entirely automated and occurred under the programming adopted in the ICMS.

41 Fourth, the ICMS's automated process to alter the status of a matter to 'inactive' was not designed by the Principal Registrar with specific reference to Pt 16A of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). That functionality within the ICMS pre-dated the insertion of Pt 16A.

Disposition

The requirement that the Principal Registrar keep an Inactive Cases List

42 Rule 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) contemplates that the Principal Registrar 'is to keep a list of cases that are taken to be inactive'. It is that list, as kept by the Principal Registrar under r 95B(4), that is defined to be the 'Inactive Cases List' (r 95A).

43 Having regard to the operation of Pt 16A,[4] the step of a case being 'put on the Inactive Cases List' under r 95C(1)(a) is of central importance to the case management regime introduced to deal with inactive cases. It is only when a case is put on the List that the consequences under r 95D arise and a party becomes exposed to the potential consequences under r 95F. That is why the parties are to be notified that the case has been put on the Inactive Cases List (r 95C(1)(b)). Being put on to the Inactive Cases List is a critical component of the regime created by Pt 16A.

44 In my earlier reasons I stated that:

> 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. 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.[5] (citations omitted)

45 This statement of principle is uncontroversial. Neither the plaintiff nor the defendant suggested otherwise at the hearing of the first stage of the review proceedings.

46 At that time counsel for the plaintiff, referring to ***Fourmi Pty Ltd v Commissioner for Consumer Protection***, submitted that the Inactive

[4] ***Hemmett v Market Direct Group Pty Ltd*** [51] - [61].
[5] ***Hemmett v Market Direct Group Pty Ltd*** [56].

Cases List was an actual list rather than a notional list.[6] Counsel for the defendant accepted that a matter being taken to be inactive and the Inactive Cases List were distinct concepts and being put on the latter did not automatically follow the former. Counsel for the defendant also said, referring to oral submissions made for the plaintiff, that a 'human person' had to take action to put an inactive case on the List.[7]

47 For reasons I will mention shortly, I consider that concession on the part of the defendant to go too far. A degree of electronic automation is permissible. But what is not permitted is the absence of *any* actual list that constitutes the Inactive Cases List. As was said in ***Fourmi Pty Ltd v Commissioner for Consumer Protection***:

> It is clear that the 'Inactive Cases List' is not a reference to a notional list of all cases in which no procedural step has been taken in a 12 month period but refers to an actual list kept by the Principal Registrar.[8]

48 The critical question is precisely what is required for there to be a '*list*' - and a list *kept* by the Principal Registrar - of those cases taken to be inactive.

49 In ***Hall v Hall [No 2]***, a 2011 decision, a question arose as to whether an Inactive Cases List was kept in this court. The ICMS is also used in this court and in ***Hall v Hall [No 2]*** entries in the ICMS designating a matter as having the status 'inactive' were relied on as showing that the action was on this court's Inactive Cases List. Simmonds J held that there was a List. In particular, his Honour considered that: (1) the ICMS entries designating a matter as 'inactive' as to its 'current matter status' constituted evidence that there was an Inactive Cases List as required by O 4A r 21 of the *Rules of the Supreme Court 1971* (WA); and (2) those entries themselves made up the List.[9]

50 In so holding Simmonds J construed the term 'list' as including any record of case names systematically assembled.[10]

51 I see no reason to doubt that construction. The real issue for the proper disposition of the review proceedings before me is whether there is such a list kept by the Principal Registrar in the Magistrates Court.

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[6] ts 11 - 12.
[7] ts 21.
[8] ***Fourmi Pty Ltd v Commissioner for Consumer Protection*** [2017] WASCA 69 [19].
[9] ***Hall v Hall [No 2]*** [2011] WASC 110 [26].
[10] ***Hall v Hall [No 2]*** [27].

52 In ***Hall v Hall [No 2]*** Simmonds J had regard to five matters. Based on those considerations his Honour applied the presumption that all things have been done rightly and regularly.[11] Simmonds J concluded that the presumption meant that the principal registrar of this court had duly authorised those who had programmed and maintained the ICMS to program the system to put cases on the Inactive Cases List (thereby, as mentioned, in substance holding that the List was comprised in the record of the matters as maintained on the ICMS) and that the program as authorised by the principal registrar had operated to put the case on the List.[12]

53 But, as Simmonds J noted[13] - and as was made plain in the subsequent Court of Appeal decision of ***West Australian Newspapers Ltd v Fairhead***[14] - the presumption relied on to find that the ICMS entries comprised the Inactive Cases List could be displaced by evidence to the contrary.

54 In ***West Australian Newspapers Ltd v Fairhead*** an issue again arose as to whether an action had been put on this court's Inactive Cases List.

55 The Court of Appeal requested that the then principal registrar of this court provide a written report concerning the operation of the Inactive Cases List. Among other things, the report as provided mentioned:[15]

- confusion in relation to the management and operation of the Inactive Cases List arising as a consequence of the status of 'inactive' being given to matters by operation of programming rules within the ICMS;

- the programming rules providing for the status of a matter as 'inactive' predating the creation of the Inactive Cases List and not necessarily involving the application of the criteria specified in the rules; and

- manual input into the ICMS being required for a case to be placed on the Inactive Cases List - that List being separate to

[11] ***Hall v Hall [No 2]*** [31].
[12] ***Hall v Hall [No 2]*** [31].
[13] ***Hall v Hall [No 2]*** [32].
[14] ***West Australian Newspapers Ltd v Fairhead*** [2013] WASCA 151 [25] - [26].
[15] ***West Australian Newspapers Ltd v Fairhead*** [18].

the list of cases which were automatically assigned the status of 'inactive' by the ICMS.

56 The Court of Appeal held that, on the basis of the principal registrar's report, there was no room for the operation of the presumption that had been relied on by Simmonds J in ***Hall v Hall [No 2]***.[16]

The Principal Registrar did not keep an Inactive Cases List

57 The Attorney General's written submissions observe that the circumstances in the present case are very similar to those outlined in the report provided by the then principal registrar of this court in ***West Australian Newspapers Ltd v Fairhead***. I agree. The use of the ICMS in the Magistrates Court designates the status of particular cases as 'inactive'. However, those programming rules employed by the ICMS predate the introduction of Pt 16A in to the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). Also, as will be seen, the programming rules do not - based on Registrar Sutton's evidence - reflect the criteria provided in Pt 16A.

58 Based on the additional evidence adduced by the Attorney General I have concluded that at the relevant time - July 2017 to January 2018 - the Principal Registrar did not keep an Inactive Cases List for the purposes and within the meaning of r 95A and r 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). Accordingly, the Proceedings were never put on the Inactive Cases List.

59 In terms of Simmonds J's construction of the term 'list', which I accept and adopt, there is no evidence that the ICMS as used by the Magistrates Court could systematically assemble a list of *all* cases taken to be inactive.

60 Indeed, the evidence is to the contrary. Registrar Sutton's uncontradicted evidence, which I accept, is that when the ICMS was used to generate notices the matters identified by the ICMS would not be a list of all matters marked as being 'inactive'. Rather, they were those where the status had become inactive and no inactive notice had been generated.[17] There was, in July 2017, no separate list of inactive cases maintained by the Principal Registrar.[18] The ICMS did not

[16] ***West Australian Newspapers Ltd v Fairhead*** [26].
[17] Affidavit of Laura Sutton affirmed 23 August 2018 par 27.
[18] Affidavit of Laura Sutton affirmed 23 August 2018 par 31.

contain a function which allowed assembly of a list of all matters the status of which had been changed to inactive.[19]

61 The most that the evidence confirms is that by the Information Bulletin the Principal Registrar directed officers of the Magistrates Court to use the ICMS to identify individual cases the *system* had designated as being inactive.

62 It must be appreciated, however, that the ICMS could not identify all cases taken to be inactive for the purpose of r 95B of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). It might also mistakenly identify some matters as inactive where they should not have been taken to be inactive. This is apparent from the programming rules deposed to in the additional evidence adduced by the Attorney General. Registrar Sutton's evidence is that the ICMS would, by an entirely automated process, identify matters where there had been no hearing and no document lodged for a period of 12 months. It is these matters that the ICMS would, on a daily basis, update their status and designate as inactive.[20]

63 The ICMS would thus have identified cases where no procedural step had been taken for 12 months (r 95B(1)). However, it would not, in designating cases as 'inactive', have identified all cases taken to be inactive. The programming rules deployed by the ICMS would not have permitted identification and designation of those cases taken to be inactive under r 95B(2) and (3). It is not only the effluxion of 12 months without procedural steps that may cause a case to be taken to be inactive. Under r 95B(2) and (3) a case may be taken to be inactive due to non-compliance with an order or direction providing for that result unless certain action is taken by a specified date. Conversely, the programming rules employed by the ICMS might also have resulted in false positives. A failure to take procedural steps for 12 months would not mean that the case was taken to be inactive where the Court had previously ordered otherwise (r 95B(1)). An example of how that might occur was provided in my earlier reasons.[21]

64 The apparent incongruity between the terms of Pt 16A and the programming rules under the ICMS is, I consider, explained by the circumstance that the process under the ICMS predated the introduction

[19] Affidavit of Laura Sutton affirmed 31 August 2018 par 4.
[20] Affidavit of Laura Sutton affirmed 23 August 2018 par 24.
[21] ***Hemmett v Market Direct Group Pty Ltd*** [102].

of Pt 16A. The ICMS programming rules and the algorithms it employs do not fully reflect the operation of Pt 16A.

65 The additional affidavit evidence adduced by the Attorney General establishes that the Principal Registrar did not maintain a separate list (either physical or electronic) of the matters taken to be inactive for the purpose of r 95A and r 95B(4) of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). Any Inactive Cases List for the purposes of Pt 16A could only arise from the circumstance that the Court's records, through the ICMS, designate the status of certain matters as inactive. There are two reasons why the ICMS designation cannot amount to the required 'list'. First, as a matter of fact the ICMS did not allow assembly - and consequently could not have been used to assemble - a list of all cases the status of which had been changed to inactive. Second, the programming rules employed by the ICMS were not adapted to identify all cases taken to be inactive within r 95B and could include, as inactive, cases that should not have been taken to be inactive.

66 In the present case, unlike in ***Hall v Hall [No 2]***, there is no place for application of the presumption of regularity. The evidentiary material adduced by the Attorney General establishes the process employed by the Magistrates Court through the application of the ICMS. The process does not amount to the keeping of a list of cases taken to be inactive as contemplated by r 95B of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

67 I should not be taken as suggesting that the ICMS could not be adapted for the purpose of establishing the Inactive Cases List within the Magistrates Court.

68 Nor, on a provisional basis, do I consider it to be essential that the Principal Registrar have personal day-to-day involvement in maintaining the List and putting cases on the List. The evidence suggests that there must be many cases which qualify as cases which are taken to be inactive. The Information Bulletin states that, as at 4 December 2014, there were some 48,332 such cases just in the Magistrates Court at Perth. The Principal Registrar could oversee the planning and implementation of a regime that satisfies the requirements under Pt 16A. Once that occurs the nature of the tasks required of the

Principal Registrar under Pt 16A are such that, prima facie, the Principal Registrar could act through duly authorised ***Carltona*** agents.[22]

69 Similarly, my provisional view is that the nature of the decision-making task in putting a case on the Inactive Cases List is such that a degree of automated decision-making - better described as 'technology-assisted decision-making'[23] - may be permissible. The principle in ***Carltona*** may be extended if the technology-assisted decision-making preserves accepted accountability structures.[24] Technology alters how decisions may be made; it ought to be accepted that aspects of decision-making may, in appropriate circumstances, occur independently of human mental input.[25]

70 Whether such an automated process is appropriate and how it might be achieved is a matter for the Principal Registrar rather than this court. It must, however, provide for an actual, not notional, Inactive Cases List. And any use of technology-assisted decision-making must be properly adapted to implement the regime required by Pt 16A of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).

Consequence of failure to keep an Inactive Cases List

71 For the reasons above I have concluded that the Principal Registrar did not keep an Inactive Cases List. It follows that the Proceedings were never put on the Inactive Cases List. It is thus unnecessary to consider the second issue raised by the Attorney General's submissions, namely, assuming that there was an Inactive Cases List, consideration of whether the steps taken amounted to putting the Proceedings on the List.

72 As the Proceedings were not put on the Inactive Cases List, the Proceedings cannot be taken to have been dismissed by operation of r 95F of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). The factual predicate in r 95F(1) was never satisfied.

73 The Attorney General's written submissions refer to a potential difficulty if it is accepted that the Proceedings were not put on the

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[22] Referring to ***Carltona Ltd v Commissioners of Works*** [1943] 2 All ER 560. In this respect see also the observations of Simmonds J in ***Hall v Hall [No 2]*** [31] (referring among other things to ***Lashansky v Legal Practice Board [No 2]*** [2010] WASC 159 [64]).

[23] See K Miller, 'The Application of Administrative Law Principles to Technology-Assisted Decision-Making' (2016) 86 *AIAL Forum* 20, 20.

[24] See K Miller, 'The Application of Administrative Law Principles to Technology-Assisted Decision-Making' (2016) 86 *AIAL Forum* 20, 22.

[25] See the discussion by Kerr J, dissenting, in ***Pintarich v Deputy Commissioner of Taxation*** [2017] FCA 944 [45] - [49].

Inactive Cases List. The Attorney General notes the requirements of s 36(1) of the *Magistrates Court Act 2004* (WA). It is questioned whether there is relevantly an 'act' for the purpose of s 36(1)(c). It is said, correctly, that unless one of the grounds listed in s 36(1) is established the power to grant relief in s 36(4) will not be enlivened.[26] The Attorney General's written submissions suggest that it is open to the court to conclude that the act of giving written notice under r 95C(1)(b) that the Proceedings had been put on the Inactive Cases List was an act done without jurisdiction or power.

74 The giving of such notice by the Principal Registrar is self-evidently an 'act'. However, I do not accept that it is an act that is susceptible to review under s 36 of the *Magistrates Court Act 2004* (WA). The giving of such notice is a mere administrative task that does not, in my view, involve performance of a function as a 'Court officer'. It is not a function delegated under s 28 of the Act - it is not relevantly an aspect of the Magistrates Court's jurisdiction and powers.[27]

75 Accordingly, it is necessary to look elsewhere within the factual circumstances and s 36(1) *Magistrates Court Act 2004* (WA).

76 In that regard it is not necessary that the matter by which the plaintiff is or would be aggrieved is an 'act' within s 36(1)(c). Section 36(1) is far wider. There might be an act, order or direction within s 36(1)(c). But the review power under s 36 also encompasses, under s 36(1)(a), relevant failures to do an act or make an order or direction. And s 36(1)(b) includes a relevant act, order or direction that a Court officer proposes to do or make.

77 At pars 17 to 20 of my earlier reasons I recounted how the plaintiff had made an application to have the Proceedings removed from the Inactive Cases List. That application was dismissed with costs. Magistrate de Vries dismissed the application to have the Proceedings removed from the Inactive Cases List and directed 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). Among other things it was said by the learned magistrate that he was 'bound to make an order that the

[26] See also ***Hemmett v Market Direct Group Pty Ltd*** [34].
[27] ***Hemmett v Market Direct Group Pty Ltd*** [79]. See more generally at [62] - [85].

application [referring to the application to have the case taken off the List] be dismissed'.

78 It is also evident from Magistrate de Vries' order dismissing the application that the Magistrates Court treats the Proceedings as being taken to be dismissed. That is implicit in the order that the plaintiff pay the defendant's costs of the application generally.

79 In concluding that the Proceedings had been automatically dismissed due to the operation of r 95F of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA), the learned magistrate disclaimed a continuing authority to adjudicate on and determine the dispute to be litigated in the Proceedings. Both the reasons given and the formal orders made his Honour manifested a conclusion that the Magistrates Court had completed its function and was precluded from further consideration of the claim in the Proceedings on its merits (or, indeed, such consideration of the application before the learned magistrate). An inferior court falls into jurisdictional error if it mistakenly denies the existence of jurisdiction.[28] In substance that is the present case.

80 Accordingly, in my opinion, the ground under s 36(1)(c) of the *Magistrates Court Act 2004* (WA) is made out. The orders of the Magistrates Court made on 22 January 2018 involve jurisdictional error - the mistaken denial of jurisdiction based on a misconception that the Proceedings are taken to have been dismissed. It is well established that certiorari is available for jurisdictional error.[29] Thus, as to the orders made 22 January 2018, the plaintiff is a person aggrieved on a ground that justifies an order of certiorari within s 36(1)(c)(ii) of the Act.

81 There are no material discretionary reasons which militate against the setting aside of the orders. To the contrary, in all the circumstances including the defendant's concession that the Proceedings have not been dismissed, and not being satisfied in accordance with the s 36(1) review order made 20 July 2018 that the orders of the Magistrates Court at Karratha on 22 January 2018 should not be set aside, it is just and appropriate that the orders be set aside.

[28] ***Craig v The State of South Australia*** [1995] HCA 58; (1995) 184 CLR 163, 177.
[29] ***Craig v The State of South Australia*** (175 - 176); ***Kirk v Industrial Court of New South Wales*** [2010] HCA 1; (2010) 239 CLR 531 [56].

82 Accordingly, I will make a final review order under s 36(4)(a) of the *Magistrates Court Act 2004* (WA) setting aside the orders of Magistrate de Vries made on 22 January 2018 in the Proceedings.

Costs

83 In supplementary submissions the plaintiff sought an order that the defendant pay its costs of the review proceedings. The plaintiff reminded me that it was the successful party and the usual order, grounded in reasons of fairness and policy, is that the successful party is entitled to an award of costs. The plaintiff submitted that no special circumstances arose in the case that would justify a departure from the usual order as to costs. It was asserted that in contesting the plaintiff's application the defendant had increased the defendant's costs.

84 The defendant opposed the costs order sought by the plaintiff. It was said that the plaintiff, although ultimately successful, was not successful on the merits of its application as originally prosecuted. The determination of the review proceedings in favour of the plaintiff was due to the additional evidence adduced by the Attorney General. The defendant reminded me that I had never determined the merits of the construction point that was originally advanced by the plaintiff as being the basis for the review proceedings. As to that it was said that the defendant had acted reasonably in maintaining an arguable position.

85 I acknowledge, as a starting point to the exercise of the costs discretion, that costs usually follow the event. The court will generally order that the successful party recover its costs. However, in my opinion, this is not the usual case.

86 The plaintiff is the successful party, but he does not succeed on the basis that he has made good the construction question that was advanced in obtaining the s 36(1) review order. That question has not been resolved. In that regard I reject the plaintiff's contention, in his reply supplementary submissions, that costs ought to be awarded in his favour as he was successful on the merits of his application at the first stage of the two-stage process. The relevant event for the determination of an award of costs is the ultimate disposition of the review proceedings as provided for under these reasons. As to that, the plaintiff succeeds because, on investigation, the Attorney General has brought to the attention of the parties and the court circumstances that were previously unknown. The additional factual matters that have been determinative were not matters which either the plaintiff or the

defendant might have been expected to have known of acting with reasonable diligence.

87 On being made aware of those additional factual matters the defendant has acted reasonably: it, in substance, conceded the review proceedings within a reasonable time after being provided with the Attorney General's additional affidavit evidence and submissions. It is also relevant that, in my opinion, the defendant acted reasonably in the first stage of the review proceedings. Appropriate concessions were made confining the issues for determination on the review proceedings.[30] As to the construction point, I accepted that the defendant's construction was supported by a plain and ordinary reading of the words of r 95B(1).[31] The defendant maintained an arguable position.

88 In all the circumstances the defendant acted reasonably in opposing the review proceedings and then - again acting reasonably - ceased opposition within a reasonable time of being informed of the outcome of the Attorney General's investigations.

89 This is not a case in which the usual order as to costs will result in a just outcome. The plaintiff is succeeding on a different basis to that which was originally litigated. The case as originally contended for the plaintiff has not been finally determined. In resisting that case the defendant acted reasonably. The necessity for the litigation is regrettable - but, most importantly, neither party is responsible for the difficulty that has proved determinative in this case. In the unusual circumstances of this case justice is best served, in my opinion, by an order that each party bear its own costs of the proceedings.

90 Separately, the plaintiff and the defendant have each applied for a certificate under the *Suitors' Fund Act 1964* (WA). The plaintiff relies on s 12A(2)(b) and the defendant relies on s 10(1).

91 I will not make an order in favour of the plaintiff under s 12A(2) and (3) the *Suitors' Fund Act 1964* (WA). Assuming all other matters are met the applicant must demonstrate that, in allowing the appeal, the court would have ordered that the costs of the appeal be paid by the respondent but for the provisions of some other Act or law. That is not this case. There is no Act or law that prevents an award of costs to be paid by the defendant. I have simply determined that such an order is

[30] See eg ***Hemmett v Market Direct Group Pty Ltd*** [49], [62], [110].
[31] ***Hemmett v Market Direct Group Pty Ltd*** [98]. See also at [99] and [100].

not justified in the exercise of discretion. To the extent the plaintiff suggests that Magistrate de Vries and the Principal Registrar are relevant respondents, the simple answer is that they have not been joined. In any case even if, as the plaintiff suggests, the general law would not permits costs orders against the court officers there is no such prohibition as against the respondent.

92 As to the defendant's application under s 10(1) of the *Suitors' Fund Act 1964* (WA), I have a discretion as to whether to grant an indemnity certificate. The discretion is unfettered but must be exercised judicially.[32] In that regard it is relevant that the question of law on which the review proceedings has succeeded is a question of general application.[33] I accept this may provide sufficient reason to grant the certificate.[34]

93 Ultimately, however, I am not persuaded that I should grant the certificate. There are two reasons. First, the large majority of the defendant's costs were incurred at the first stage of the review proceedings. It was not necessary for the defendant to participate at that stage. The defendant sought to participate and was joined. But insofar as it chose to participate those costs were avoidable. Second, the defendant has not negatived the exclusion under s 13(3) of the *Suitors' Fund Act 1964* (WA).

Conclusion and orders

94 For these reasons I am satisfied that a final review order should be made setting aside the orders made in the Magistrates Court at Karratha on 22 January 2018. I will make an order to that effect under s 36(4)(a) of the *Magistrates Court Act 2004* (WA). I also intend, by way of a consequential ancillary order under s 36(4)(c), to make a declaration confirming that the Proceedings have not been dismissed by operation of r 95F of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA). I consider such an order to be within power under s 36(4) and appropriate so that there is no doubt as to the ability of the plaintiff to continue to prosecute the Proceedings. The consequential declaration follows logically from the substantive order under s 36(4)(a) of the Act.

95 Subject to hearing from counsel as to the precise form of the orders, I will make orders to the following effect:

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[32] ***Ruby v Doric Constructions (Aust) Pty Ltd*** [2013] WASCA 94 (S) [16].
[33] ***Ruby v Doric Constructions (Aust) Pty Ltd*** [17].
[34] ***Ruby v Doric Constructions (Aust) Pty Ltd*** [17].

(1) Pursuant to s 36(4)(a) of the *Magistrates Court Act 2004* (WA) the court sets aside the orders of Magistrate de Vries made 22 January 2018 in the Magistrates Court at Karratha in proceedings CTC/225/2014 between the plaintiff and the defendant.

(2) The court declares that r 95F of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) did not operate to dismiss proceedings CTC/225/2014 in the Magistrates Court at Karratha on or about 14 January 2018 and that those proceedings remain on foot.

(3) Each party, ie the plaintiff, the defendant and the intervenor, bear its own costs of the proceedings.

(4) The plaintiff's application under s 12A(2) of the *Suitors' Fund Act 1964* (WA) is dismissed.

(5) The defendant's application under s 10(1) of the *Suitors' Fund Act 1964* (WA) is dismissed.

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

12 OCTOBER 2018