SOUTH AUSTRALIA

THIRTY-FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE ENACTMENT OF AN APPEAL COSTS FUND ACT

1974

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

B. R. COX, Q.C., S.-G.

R. G. MATHESON, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

THIRTY-FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE ENACTMENT OF AN APPEAL COSTS FUND ACT

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You referred to us for consideration the question of the enactment of legislation to provide an indemnity out of funds provided for that purpose to compensate litigants who have succeeded at first instance but whose judgment has been reversed on appeal because the court of first instance mis-stated or wrongly applied the law and you were good enough to supply us with a copy of the relevant legislation in force in New South Wales.

On considering the question, we were of the opinion that the reference, in order to cover all cases of hardship where the problem arose, could not be confined precisely to questions of appeal and we have therefore used as a basis the Appeal Costs Fund Act, No. 57 of 1968 of the Parliament of Tasmania which appeared to us to cover adequately all the matters which ought to be considered by you and then by Parliament in enacting such legislation. A copy of the Tasmanian Act accompanies this report.

We have no doubt of the justice of such legislation and have no hesitation in recommending the reform of the law to give effect to it.

We do not know whether you desire the proposed legislation to apply when a court is sitting in the exercise of conferred federal jurisdiction and we draw attention to this problem. In New South Wales the Act does cover matters arising in conferred federal jurisdiction: see *Hyam* v. *Hyam* 1969 (2) *N.S.W.R.* 513.

Turning now to a consideration of the provisions of the Tasmanian Act we advise as follows:—

1. *Long and Short Title and Section* 1:

   We agree that this is the type of legislation which ought to come into force on proclamation.

2. *Definitions*:

   "appeal"—delete from the fourth line the words "in the form of a special case" because of the form of Section 49 of our Supreme Court Act and insert a new sentence "and a question of law reserved by a lower court for the opinion of a superior court, whether by way of special case or otherwise".

   "Court of summary jurisdiction"—amend the reference to read the "Justices Act, 1921-1972".

   "proper officer"—this will need to be redrawn to cover the requisite officers in the Supreme Court, the Industrial Court, a Local Court and a Court of summary jurisdiction.

"question of law"—insert a new definition reading:—"question of law includes a mixed question of law and fact and applies to a case where a substantial ground on which the appeal was allowed is a question of law".

The necessity of this definition is that very few cases involve a pure question of law in isolation except in the rare cases decided on demurrer under Order 25 Rules 2 and 3. In fact the Suitors Fund Acts in the other States have been usually applied in practice as if the definition given above were included in their Acts but it seemed better to spell it out in the definition clause, as there have been exceptional cases such as *Acquilina* v. *Dairy Farmers Co-operative Milk Limited* 82 *W.N. N.S.W.* (1) 531.

3. *The Fund*:

We would doubt whether the sources of income in the Tasmanian Act would suffice to cover all claims on the fund and it may be necessary to provide for some appropriation of revenue for this purpose. This is a question of policy for the Government but we felt it our duty to draw attention to it. The Tasmanian solution is to pay ratably under Section 7 (4) and 7 (5) which read:—

> "(4) If in any financial year payable claims on the Fund exceed the amount thereof they shall be paid ratably to the full extent of the Fund.
>
> (5) If at the end of a financial year the amount of the Fund exceeds the payable claims thereon for that year, the excess shall be used to pay ratably all unsatisfied claims, if any, payable in the last preceding five financial years."

4. *Audit*:

Alter the reference to the Audit Act, 1921-1966.

5. *Additional fees*:

The amount of these is of course a question of policy, as is the question whether it covers all forms of originating procedure.

Subsection (1) (*b*) will have to be altered to cover the Industrial Court, a Local Court and a Court of summary jurisdiction. The reference to the Justices Act will be altered as before and the relevant section of our Act relating to costs is Section 77.

6. and 7. *Quarterly returns and payments out*:

These do not require any comment, except that already referred to under Section 3.

8. *Grant of Indemnity Certificate*:

In subsection (1) (*a*) (ii) delete "in the form of a special case" as before.

Add a new subsection (3) reading:—

> "(3) For the purposes of subsection (1) (*b*) of this Section 'appeal' includes a case stated or a point or points reserved under Section 49 of the Supreme Court Act, 1935-1972, or any other Act or any matter or any special case referred to the Full Court under any Act or under Rules of Court."

Do you wish the rights given by this Act to apply in the case of appeals to the Full Industrial Court in workmen's compensation cases and from inferior industrial tribunals? If so the section should be altered accordingly.

We referred this matter to Mr. Justice Bleby who writes:—

"I entirely agree with your Committee's recommendation that legislation should be introduced along the lines to which the Report refers.

The appeal situation with which the Industrial Court of South Australia is faced is a somewhat complex one and will require special attention in the drafting of any proposed legislation. It may be summarized as follows:—

Industrial Jurisdiction (references are to Industrial Conciliation and Arbitration Act, 1972 except where otherwise stated):

Appeals:

1. From Industrial Commission to Full Commission (section 96).
2. From Industrial Magistrate to Court (section 94).
3. From single Judge to Full Court (section 93).
4. From Registrar to Full Commission (section 104).
5. From a court of summary jurisdiction to the Court (Justices Act, 1921-1972 section 163 (1aa)).

Cases Stated on Questions of Law:

1. By Industrial Commision to Court (section 102).
2. By Conciliation Committee to Court (section 102).
3. By Court to Full Court (section 17 (5)).

Matters Akin to Appeals:

1. Interpretation of awards or industrial agreements (section 15 (1) (*a*)).
2. Questions as to jurisdictional or other validity of awards or orders (section 15 (1) (*c*)).

Workmen's Compensation Jurisdiction (references are to Workmen's Compensation Act, 1971):

Appeals:

1. From Industrial Magistrate to Court (section 23).
2. From Court to Full Court (section 45).
3. From Registrar to Court (section 35).
4. From Silicosis Committee to Court (section 107).

Conferred Federal Jurisdiction:

Appeal:

1. From determination of Commissioner for Employees' Compensation to the Court (Compensation (Commonwealth Employees) Act, 1971-72 section 90).

It will be seen that appeals, cases stated and matters akin to appeals may in some instances originate from and/or be addressed to bodies or persons which or who are not themselves courts or judicial officers, but in principle there would seem to be no reason why the proposed legislation should not be expressed to apply in such cases."

On the reference point see *Gallen* v. *Strathfield Municipal Council* 1971 (1) *N.S.W.L.R.* 122 *at* 129.

9. *Effect of Indemnity Certificate*:

We would think that the limit of two thousand dollars, although it was only imposed about five years ago, is already substantially too low but this is a matter for consideration by the Government: compare the New South Wales amendment of 1970 to $3 000 in the Supreme Court of New South Wales, $5 000 in the High Court of Australia and $7 000 in the Privy Council.

Having regard to the decision of the Supreme Court of Victoria in *Re Pennington* 1972 *V.R.* 869 it may be prudent to add a new subsection (3) to provide that the grant or refusal of a certificate shall not affect any order which a court might otherwise have made in disposing of the proceedings in the action in which the indemnity certificate is sought. The Chief Justice in his comments on the paper says:—

> "I think that it should be considered as a matter of policy whether it is desired that the costs of parties to a successful appeal where the costs of all parties would normally come out of some fund, whether the residue of the estate of a deceased person or otherwise, should be covered by the Act. Anomalies would be created if the unsuccessful respondent were able to get an indemnity certificate under the Act if the successful appellant got an order for costs against him, but not if the order was that the costs of all parties be paid out of a fund. The burden of the costs in the latter event is still going to fall on someone."

It was held in *Jones* v. *Skelton* 9 F.L.R. 318 that the right to a suitor's fund certificate is "property" transmissible to the Official Receiver in Bankruptcy. This seems to be contrary to the purposes of such a fund and we recommend that the transmissibility be negatived in this Act.

The machinery provisions in this State should be operable on a direction of a Master subject in the usual way to review by a Judge in Chambers.

10. *Appeal from Court of summary jurisdiction where respondent does not appear either in the lower court or on appeal*:

This is a somewhat special, and we would think rare, case but we assume it must have happened somewhere to be covered in the Tasmanian Act. It does not cover the point which arose in *Ex parte Neville*, re *Suitors Fund Act* 85 *W.N. N.S.W.* (1) 372 where the Court of summary jurisdiction stated a case before giving a final decision and this was held to be outside the legislation. We would think this a much more likely event than the one envisaged in Section 10, and that it ought to be provided for in our legislation.

11. *Effect of Indemnity Certificate*:

Here again we query the adequacy of a limit of one hundred and twenty dollars in present day values of currency.

12. *Indemnity Certificate to be vacated if the judgment of the trial Court is restored on a second appeal*:

No comment.

13. *Indemnity Certificate not to have effect while appeal remedies not exhausted*:

This section deals with leave to appeal but not special leave to appeal. As the considerations applicable to the two classes of leave are quite different we think they should both be covered in our legislation.

14. *Grant or refusal in discretion of court*:

No comment.

15. *Abortive proceedings*:

These cover: illness of the Judge, disagreement by a jury, new trial after appeal from conviction and discontinuance of the proceedings due to some happening outside the control of the applicant, e.g. that a proposed witness is personally known to the trial Judge who thereupon becomes ineligible to hear the matter.

This section does not cover the case where an accused person's conviction is quashed on appeal on a question of law and the court does not think fit to order a new trial. We think this case, which is not uncommon, should be covered in the proposed legislation—see Victorian Section 14C inserted in 1971.

We are not convinced that an accused person should get costs if the jury disagree and a majority of ten or more cannot be obtained after four hours in deliberation. This may arise from a variety of causes and as the policy of the law prevents an inquiry as to what transpired in the jury room, it would be almost impossible to determine such an application satisfactorily and we recommend its excision from our Act.

"Indictment" in this Section should of course cover a minor indictable offence.

16. *New trial where damages excessive or inadequate*:

No comment.

17. *Refusal to sanction compromise on behalf of infant where the infant ultimately receives less than the amount offered and has to pay costs*:

This is new but we think it is valuable and should be included.

18. *Payment to solicitor to be sufficient discharge*:

No comment.

19. *Act not to be retrospective*:

No comment.

20. *Regulation making power*:

> We think that this should be a rule making power and that it should include rules as to the form of application, and the nature of the evidence required in support of the application.

The Chief Justice in his comments refers to the position where the parties or one or more of them is or are under Law Society assignment.

He says:—

> "Very often a certificate will be granted under this Act to cover the costs of a party who has received assistance from the Law Society. I think there should be machinery for the proper application of the moneys due under the certificate in such cases. No doubt when a solicitor or counsel has acted for nothing, the money should go to him direct and not pass through the party's hands at all. But what about cases where the party has paid something but less, it may be considerably less, than the full amount for which the bill could be taxed? There is, of course, a maximum imposed on the amount payable out of this fund. I can foresee the possibility of difficult questions of priority, apportionment, abatement and the like. I would suggest that consideration be given to the resolution of such questions".

There have been two decisions of the Supreme Court of Tasmania on the Tasmanian Act: *Barry* v. *Shoobridge*, a judgment of Burbury C. J., delivered on 28th September, 1971, and *Tasmanian Pulp and Forest Holdings Ltd.* v. *Woodhall Ltd.* Full Court 5th May, 1972. Copies of each decision accompany this report and the Committee expresses its appreciation to the Honourable Mr. Justice Neasey, the Chairman of the Tasmanian Law Reform Committee, for his kindness in making copies of each judgment available to us.

We also thank the Honourable the Chief Justice Dr. J. J. Bray and the Honourable Mr. Justice Bleby for their helpful comments on the report.

We have the honour to be

HOWARD ZELLING

R. G. MATHESON

The Law Reform Committee of South Australia

Dated the 18th day of January, 1974.

Mr. J. F. Keeler was overseas at the time of the signing of this report but he concurred in the report.

TASMANIA
APPEAL COSTS FUND

No. 57 of 1968

AN ACT to make provision with respect to liability for the costs of certain litigation, to establish a Fund to meet that liability, and to provide for matters incidental thereto. [5 *December* 1968]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

1. (1) This Act may be cited as the *Appeal Costs Fund Act* 1968.

(2) This Act shall commence on a day to be fixed by proclamation.

2. In this Act, unless the contrary intention appears—

"appeal" includes a motion to review, a case stated for the opinion or determination of a superior court on a question of law, a question of law reserved in the form of a special case for the opinion of a superior court, a motion for a new trial, and any other proceeding in the nature of an appeal;

"appellant" includes the next friend of an infant or person under disability and the guardian *ad litem* of a person;

"costs", in relation to an appeal, includes the cost of an application for an indemnity certificate in respect of an appeal but, except where otherwise expressly provided in this Act, does not include costs incurred in a court of first instance;

"court of summary jurisdiction" has the meaning assigned to that expression by the *Justices Act* 1959;

"Fund" means the Appeal Costs Fund established under this Act;

"indemnity certificate" means an indemnity certificate granted under section eight or section ten;

"judicial officer" means a judge, a police magistrate, a commissioner of a court of requests, the chairman of a court of general sessions, or two or more justices in petty sessions, and includes the Master;

"Master" means the Master of the Supreme Court and includes a Deputy Master of the Supreme Court;

"proper officer", used in relation to a court, means—

(*a*) in the case of the Supreme Court, the Registrar of the Supreme Court;

(*b*) in the case of a court of requests or a court of general sessions, the registrar of that court; and

(*c*) in relation to a court of summary jurisdiction, the clerk of petty sessions for the district in which the court is held;

"respondent" includes the next friend of an infant or person under disability and the guardian *ad litem* of a person;

"sequence of appeals" means a sequence of appeals in which each appeal that follows next after another appeal in the sequence is an appeal against the decision in that other appeal.

3. (1) For the purpose of this Act, there shall be a fund to be known as the Appeals Costs Fund.

(2) The Fund shall consist of—

(*a*) money paid into the Fund pursuant to section six;

(*b*) moneys paid into the Fund by the Master as required by subsection (6) of section thirteen; and

(*c*) income derived from the investment of moneys forming part of the Fund.

(3) From the Fund there shall be paid the amounts referred to in sections nine, eleven, fifteen, sixteen, and seventeen.

(4) The Fund is vested in, and shall be managed by, the Master.

(5) The income of the Fund is not subject to any tax imposed by or under a law of the State.

(6) The Master may invest moneys standing to the credit of the Fund in any manner for the time being allowed by law for the investment of trust funds.

(7) Moneys standing to the credit of the Fund that are held uninvested may be lodged either at call or on fixed deposit, or partly at call and partly at fixed deposit, with the Treasurer or with the Commonwealth Trading Bank of Australia.

4. The accounts of the Fund are subject to audit under the provisions of the *Audit Act* 1918.

5. (1) On and after the date of the commencement of this Act, in addition to any fee payable in respect thereof under any other law, there is payable the appropriate fee specified hereunder, namely:—

(*a*) on the sealing of a writ of summons to be issued out of the Supreme Court—two dollars; and

(*b*) on the filing of a plaint in a court of requests or a court of general sessions—ten cents.

(2) Where by a conviction or order made on the hearing of a complaint under the *Justices Act* 1959 (other than a complaint in respect of an indictable offence, including an indictable offence triable summarily by virtue of that Act) a fine is imposed on a person or a person is ordered to pay a sum of money, either with or without costs or for costs alone, that person shall pay to the appropriate clerk of petty sessions a fee of ten cents in addition to the other fees (if any) ordered, pursuant to section one hundred and thirty-seven of that Act, to be paid by that person.

(3) A fee that is required to be paid by a person pursuant to subsection (2) of this section shall, for the purposes of recovery, be deemed to be costs ordered to be paid under section seventy-seven of the *Justices Act* 1959.

(4) The fee referred to in paragraph (*a*) or paragraph (*b*) of subsection (1) of this section is not payable on or in respect of the sealing of a writ of summons or the filing of a plaint in a case where, by virtue of a provision of, or by virtue of any direction or approval given under, any Act, rule of court, or rule of practice the writ or plaint may be sealed or filed without payment of a fee.

6. (1) On or before the last day of January, April, July, and October in each year, the proper officer of a court shall cause to be prepared and sent to the Master a statement in the prescribed form signed by the proper officer—

(*a*) setting forth the total amount paid to him during the preceding three months by way of fees under section five as appearing from the records in his custody or under his control; and

(*b*) containing such other information, if any, as may be prescribed,

and shall, with that statement, transmit to the Master the amount referred to in paragraph (*a*) of this subsection.

(2) The Master shall pay all amounts transmitted to him pursuant to subsection (1) of this section into the Fund.

(3) The regulations may require the proper officer of a court to keep such records for the purposes of this Act as may be prescribed and may generally regulate the keeping of those records and the preparation and sending to the Master of statements under subsection (1) of this section.

7. (1) No moneys shall be paid out of the Fund otherwise than on and in accordance with a certificate of the Master.

(2) The Master shall not issue a certificate for the payment of moneys out of the Fund unless he is satisfied that the payment is authorized by this Act to be made from the Fund and that the provisions of this Act in relation to a claim for the payment have been complied with.

(3) Payments out of the Fund shall be made at the end of each financial year.

(4) If in any financial year payable claims on the Fund exceed the amount thereof they shall be paid ratably to the full extent of the Fund.

(5) If at the end of a financial year the amount of the Fund exceeds the payable claims thereon for that year, the excess shall be used to pay ratably all unsatisfied claims, if any, payable in the last preceding five financial years.

8. (1) Where an appeal—

(*a*) to the Supreme Court from a decision of—

(i) some other court; or

(ii) a board or other body or person from whose decision there is an appeal to a superior court on a question of law or who may state a case for the opinion or determination of a superior court on a question of law or reserve any question of law in the form of a special case for the opinion of a superior court;

(*b*) to the Full Court of the Supreme Court from a decision of that Court held before a single judge or of a judge in chambers;

(*c*) to the High Court of Australia from a decision of the Supreme Court;

(*d*) to the Queen in Council from a decision of the High Court of Australia given in an appeal from a decision of the Supreme Court; or

(*e*) to the Queen in Council from a decision of the Supreme Court,

on a question of law succeeds, the Supreme Court may, on application made in that behalf, grant to the respondent to the appeal or to one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(2) Where an appeal is determined by the Queen in Council or the High Court of Australia, the power conferred on the Supreme Court by subsection (1) of this section may be exercised by a judge sitting in chambers.

9. (1) Subject to this Act, where a respondent to an appeal has been granted an indemnity certificate, the certificate entitles the respondent to be paid from the Fund—

(*a*) an amount equal to the appellant's costs—

(i) of the appeal in respect of which the certificate was granted; and

(ii) where that appeal is an appeal in a sequence of appeals, the appellant's taxed costs of any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

being costs ordered to be paid and actually paid by or on behalf of the respondent;

(*b*) an amount equal to the respondent's costs—

(i) of the appeal in respect of which the certificate was granted; and

(ii) where that appeal is an appeal in a sequence of appeals, the respondent's taxed costs of any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted,

not being costs that were ordered to be paid by any other party; and

(*c*) where the costs referred to in paragraph (*b*) of this subsection are taxed at the instance of the respondent, an amount equal to the costs incurred by him or on his behalf in having those costs taxed.

(2) Where an indemnity certificate has been granted as provided in section eight and the Master is satisfied that the respondent has unreasonably refused, or has neglected, or is unable through lack of means, to pay to the appellant the whole or any part of the costs referred to in paragraph (*a*) of subsection (1) of this section or that payment of those costs or of that part thereof would cause the respondent undue hardship, the Master may direct that an amount equal to those costs or to the part of those costs not already paid by or on behalf of the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant is entitled to payment from the Fund in accordance with the direction of the Master and the Fund is discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction.

(3) Notwithstanding anything to the contrary in the foregoing provisions of this section—

(*a*) the aggregate of the amounts payable from the Fund pursuant to paragraph (*b*) and paragraph (*c*) of subsection (1) of this section shall not exceed the amount payable from the Fund pursuant to paragraph (*a*) of that subsection; and

(*b*) the amount payable from the Fund to a respondent under any one indemnity certificate granted to him pursuant to section eight shall not in any case exceed the sum of two thousand dollars.

10. Where—

(*a*) there is an appeal from the decision of a court of summary jurisdiction to the Supreme Court on a question of law;

(*b*) the respondent does not appear either in the proceedings before the court of summary jurisdiction or on the appeal; and

(*c*) the appeal succeeds but the Supreme Court refuses to order the respondent to pay the appellant's costs of the appeal,

the Supreme Court may, on application made in that behalf, grant to the appellant in the appeal or to one or more of several appellants in the appeal an indemnity certificate in respect of the appeal.

11. (1) Subject to this Act, where an appellant in an appeal has been granted an indemnity certificate, the certificate entitles the appellant to be paid from the Fund—

(*a*) an amount equal to the appellant's taxed costs of the appeal in respect of which the certificate was granted; and

(*b*) an amount equal to the costs incurred by the appellant in having those costs taxed.

(2) Notwithstanding anything in subsection (1) of this section, the amount payable from the Fund to an appellant under any one indemnity certificate granted to him pursuant to section ten shall not in any case exceed the sum of one hundred and twenty dollars.

12. (1) An indemnity certificate granted to a respondent in respect of an appeal, being an appeal in a sequence of appeals, is vacated if—

(*a*) in a later appeal in the sequence the successful party is the one to whom the indemnity certificate is granted; or

(*b*) an indemnity certificate is granted in respect of a later appeal in the sequence and the respondent to the earlier appeal is a party to the later appeal.

(2) An indemnity certificate granted to an appellant in respect of an appeal to the Supreme Court is vacated if the appellant is a party to a successful appeal from the decision of the Supreme Court.

13. (1) An indemnity certificate granted to a respondent in respect of an appeal (in this subsection referred to as "the first appeal") has no effect —

(*a*) where a time is limited by law for appealing from the decision in the first appeal, during the time so limited;

(*b*) where an appeal lies from the decision in the first appeal but no time is so limited, until—

(i) an application for leave to appeal from that decision has been determined and, where leave is granted, the appeal from that decision is instituted; or

(ii) the respondent lodges with the Master an undertaking in writing by the respondent that the respondent will not appeal or seek leave to appeal from that decision,

whichever first happens; and

(*c*) notwithstanding anything in the foregoing provisions of this subsection, where the decision in the first appeal is the subject of an appeal, during the pendency of the last-mentioned appeal.

(2) An indemnity certificate granted to an appellant in respect of an appeal (in this subsection referred to as "the first appeal") has no effect —

(*a*) where a time is limited by law for appealing from the decision in the first appeal, during the time so limited;

(*b*) where an appeal lies from the decision in the first appeal but no time is so limited, until—

(i) an application for leave to appeal from that decision has been determined and, where leave is granted, the appeal from that decision is instituted; or

(ii) the expiration of a period of three months after the determination of the first appeal,

whichever first happens; and

(*c*) notwithstanding anything in the foregoing provisions of this subsection, where the decision in the first appeal is the subject of an appeal, during the pendency of the last-mentioned appeal.

(3) Where an appeal and a later appeal or later appeals form a sequence of appeals and the indemnity certificate has not been vacated under section twelve a reference in this section to the decision in the first appeal (within the meaning of subsection (1) or subsection (2) of this section) shall be construed as including a reference to the decision in the later appeal or in each of the later appeals, as the case may be, and a reference to the pendency of the first appeal shall be construed as including a reference to the pendency of the later appeal or of each of the later appeals, as the case may be.

(4) Where an amount is paid to an appellant or for or on behalf of an appellant by the Master in respect of an appeal to the Supreme Court and thereafter the appellant is a party in a successful appeal from the decision of the Supreme Court, the appellant shall, on demand made by the Master, pay to the Master any amount paid to him or on his behalf under the indemnity certificate and that amount may be recovered by the Master from the respondent as a debt due to the Master by action in a court of competent jurisdiction.

(5) Where an undertaking has been given by a respondent under the foregoing provisions of this section and thereafter he seeks leave to appeal or appeals from the decision to which the undertaking relates, the respondent shall, on demand made by the Master, pay to the Master any amount paid to him, or on his behalf, under the indemnity certificate and that amount may be recovered by the Master from the respondent as a debt due to the Master by action in a court of competent jurisdiction.

(6) An amount paid to or recovered by the Master under subsection (4) or subsection (5) of this section shall be paid into the Fund.

(7) Nothing in this section affects the operation of section twelve.

14. The grant or refusal of an indemnity certificate lies in the discretion of the court to which the application for the certificate is made, and no appeal lies from such a grant or refusal.

15. (1) Where after the commencement of this Act—

(*a*) any civil or criminal proceedings are rendered abortive by the death, retirement, or protracted illness of a judicial officer before whom the proceedings are heard or by disagreement on the part of the jury where the proceedings are with a jury;

(*b*) an appeal on a question of law from the conviction of a person (in this section referred to as "the appellant") convicted on indictment is upheld and a new trial is ordered; or

(*c*) the hearing of any civil or criminal proceedings is discontinued and a new trial ordered by a judicial officer before whom the proceedings are heard for a reason not attributable in any way to the act, neglect, or default, in the case of civil proceedings, of all or of any one or more of the parties thereto or their legal practitioners, or, in the case of criminal proceedings, of the accused or his legal practitioners, and the judicial officer grants a certificate—

(i) in the case of civil proceedings, to any party thereto stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to the act, neglect, or default of all or any one or more of the parties to the proceedings or of their legal practitioners; or

(ii) in the case of criminal proceedings, to the accused stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to the act, neglect, or default of the accused or of his legal practitioners,

any party to the civil proceedings or the accused in the criminal proceedings or the appellant, as the case may be, if he incurs additional costs, or if additional costs are incurred on his behalf, by reason of the new trial that is had as a consequence of the proceedings being so rendered abortive or as a consequence of the order for a new trial, as the case may be, is entitled to be paid from the Fund any costs incurred by him or on his behalf in the proceedings before they were

so rendered abortive or the conviction was quashed or the hearing of the proceedings was so discontinued, as the case may be, together with any costs incurred by him or on his behalf in the taxation of those costs at the instance of another party.

(2) A judicial officer presiding at the hearing of any proceedings referred to in subsection (1) of this section is, by force of this subsection, authorized to issue such certificate as is referred to in paragraph (*c*) of that subsection.

(3) For the purposes of this section, where a judicial officer presiding at the hearing of any criminal proceedings directs that those proceedings be discontinued with a view to other criminal proceedings based on the facts alleged against the accused being instituted, a new trial shall be deemed to have been ordered by the judicial officer.

16. (1) Subject to this section, where after the commencement of this Act a new trial is ordered in an action on the ground that the verdict of the jury was against the evidence or the weight of the evidence or that the damages awarded in the action were excessive or inadequate, the respondent to the motion for the new trial is entitled to be paid from the Fund—

(*a*) an amount equal to the costs (if any) of the appellant in the motion for, and upon, the new trial, being costs ordered to be paid and actually paid by or on behalf of the respondent;

(*b*) an amount equal to the respondent's taxed costs of the motion for, and upon, the new trial, being costs that are not ordered to be paid by any other party; and

(*c*) where the costs referred to in paragraph (*b*) of this subsection are taxed at the instance of the respondent, an amount equal to the costs incurred by him or on his behalf in having those costs taxed.

(2) Notwithstanding anything in subsection (1) of this section—

(*a*) where the Master is satisfied that the respondent has unreasonably refused, or has neglected, to pay the whole or any part of the costs referred to in paragraph (*a*) of that subsection or that payment of those costs or of any part thereof would cause the respondent undue hardship, the Master may direct in writing that an amount equal to those costs or to the part of those costs not already paid by or on behalf of the respondent be paid for and on behalf of the respondent to the appellant from the Fund, and thereupon the appellant is entitled to payment from the Fund in accordance with the direction and the Fund is discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction;

(*b*) where the respondent has been ordered to pay the appellant's costs in the motion for, and upon, the new trial, the aggregate of the amounts payable from the Fund pursuant to paragraph (*b*) and paragraph (*c*) of subsection (1) of this section shall not exceed the amount payable from the Fund pursuant to paragraph (*a*) of that subsection; and

(*c*) the amount payable from the Fund to any one respondent in respect of the motion for a new trial shall not in any case exceed the sum of two thousand dollars.

17. (1) Where a court refuses to sanction the compromise of an action brought by an infant plaintiff and on the trial of the action the amount of the judgment obtained by the plaintiff is an amount not greater than the amount that the defendant had agreed to pay under the compromise and the infant plaintiff or his next friend is ordered to pay the whole or any part of the defendant's costs of the action on any ground, including the payment of money into court by the defendant, the infant plaintiff or his next friend, as the case requires, is entitled to be paid from the Fund—

(*a*) an amount equal to the costs ordered to be paid by the infant plaintiff to the defendant and actually paid by or on behalf of the infant plaintiff or his next friend;

(*b*) an amount equal to the infant plaintiff's taxed costs of the action incurred, being costs that are not ordered to be paid by any other party; and

(*c*) where the costs referred to in paragraph (*b*) of this subsection are taxed at the instance of the infant plaintiff or his next friend an amount equal to the costs incurred by the infant or on his behalf in having those costs taxed.

(2) Notwithstanding anything in subsection (1) of this section—

(*a*) where the Master is satisfied that the infant plaintiff or his next friend has unreasonably refused, or has neglected, or is unable through lack of means, to pay the whole or any part of the costs referred to in paragraph (*a*) of that subsection or that payment of those costs or of that part thereof would cause the infant plaintiff or his next friend undue hardship, the Master may direct in writing that an amount equal to those costs or to the part of those costs not already paid by or on behalf of the infant plaintiff or his next friend be paid for and on behalf of the infant plaintiff or his next friend to the defendant from the Fund, and thereupon the defendant is entitled to payment from the Fund in accordance with the direction and the Fund is discharged from liability to the infant plaintiff or his next friend in respect of those costs to the extent of the amount paid in accordance with the direction;

(*b*) the aggregate of the amounts payable from the Fund pursuant to paragraph (*b*) and paragraph (*c*) of subsection (1) of this section shall not exceed the amount payable from the Fund pursuant to paragraph (*a*) of that subsection; and

(*c*) the amount payable from the Fund to any one infant plaintiff or his next friend shall not in any case exceed the sum of two thousand dollars.

18. An amount that is payable to a person from the Fund may, if the Master thinks fit, be paid to that person's solicitor, and on payment to his solicitor the Fund is discharged from liability to that person in respect of that amount.

19. (1) An indemnity certificate shall not be granted in respect of an appeal from proceedings begun in a court of first instance before the commencement of this Act.

(2) An indemnity certificate shall not be granted in favour of the Crown and no payment may be made to the Crown out of the Fund.

20. The Governor may make regulations for the purposes of this Act and, in particular and without limiting the generality of this section, may make regulations for or with respect to—

(*a*) the making of payments from the Fund;

(*b*) the taxation or assessment of costs for the purposes of this Act in circumstances not provided for under the rules of the appropriate court or where a party to an appeal refuses or neglects to tax his costs;

(*c*) prescribing officers by whom bills of costs may be taxed for the purposes of this Act in different courts or in different jurisdictions of a court; and

(*d*) regulating the preparation and service of bills of costs proposed to be taxed for the purposes of this Act.

Serial No. 81/1971
List "A"

BARRY *v.* SHOOBRIDGE

REASONS FOR JUDGMENT

BURBURY, C. J.
28th September, 1971.

Appeal Costs Fund Act 1968—*"succeed on question of law"—includes a case where an appeal is allowed by reason of erroneous exercise of discretion involving error other than error in fact alone.*

This is an application under s.8 of the Appeal Costs Fund Act 1968 for an indemnity certificate by the respondent in relation to the costs of a motion to review made to this Court by the applicant upon which the Court set aside an order made by a Stipendiary Magistrate dismissing two charges of stealing against the respondent under the Probation of Offenders Act 1934, and in lieu thereof convicted the respondent and imposed a fine of $100 on him.

Section 8 provides (*inter alia*) that "where an appeal to the Supreme Court from a decision of some other Court on a question of law succeeds the Supreme Court may . . . grant to the respondent to the appeal . . . an indemnity certificate in respect of the appeal."

"Appeal" is defined in s.2 as including a motion to review.
Section 14 provides that—

> "The grant or refusal of an indemnity certificate lies in the discretion of the court to which the application for the certificate is made, and no appeal lies from such a grant or refusal."

A preliminary question which arises is whether as the Supreme Court is now *functus officio* in relation to the appeal itself it has any jurisdiction to grant a certificate of indemnity.

I think that the Court has jurisdiction to entertain an application after the appeal has been determined and the Court has become *functus officio* in relation to the appeal itself. The Act gives an independent statutory right to make an application and imposes no time limit. The grant or refusal of an indemnity certificate is not part of the Court's judgment on the appeal itself, which becomes incapable of exercise after that judgment has become as of final record.

Then can it be said in this case that the motion to review "succeeded on a question of law"?

The motion to review was by way of appeal against the exercise of a discretionary judgment by the Stipendiary Magistrate and was subject to the well known limitations of such an appeal. Before it could succeed the applicant had to establish error vitiating the exercise of the discretion. It was not an appeal by way of rehearing *de novo* so that the Supreme Court could exercise an independent discretionary judgment. In such an appeal it would be impossible to say that the appeal, if successful, "succeeded on a question of law".

Error sufficient to vitiate the exercise of a discretionary judgment in determining the appropriate penalty to be imposed for an offence may be found in—

1. an error in a specific point of law;

2. an error in fact—either in misapprehending the facts, failing to take into account material facts, or taking into account irrelevant facts;

3. an error in the application of accepted principles of punishment;

4. a manifestly excessive or inadequate sentence disproportionate to the offence from which the Court infers innominate error.

A perusal of my reasons for judgment shows that the motion to review was allowed broadly on two grounds—

(1) that the Stipendiary Magistrate erred in failing to vindicate the law by giving proper effect to the principles of deterrent punishment (which I described as "part of the law");

(2) that the Stipendiary Magistrate erred in holding that it was a case where the power to dismiss a charge under the Probation of Offenders Act 1934 was exercisable—particularly in his apparent view that the respondent's alleged temporary state of emotional stress could be characterized as a "mental condition" within the meaning of s.3 (1) of that Act.

The expression "question of law" has been the subject of much judicial exegesis in varying statutory contexts and circumstances. The difficulties of interpretation are referred to by *Windeyer J.* in *Da Costa* v. *R.* 118 C.L.R. 186 at p. 194, and by the same learned Judge in *Australian Iron and Steel Pty. Ltd.* v. *Luna* 44 A.L.J.R. 52 at p. 58.

The expression "question of law" is capable of wider application than the expression "question of law alone". Section 401 of the Tasmanian Criminal Code gives a right of appeal to the Crown by leave of the Court against an acquittal "on a question of law alone". In *R.* v. *Jenkins* Serial No. 11/1970 (unreported) *Crisp* J. sitting as a member of the Court of Criminal Appeal said at pp. 2-3—

> ". . . It is plain that in this context the phrase "question of law alone", is different in content from "a question of law" simpliciter. The first in my opinion is effective to exclude questions of mixed fact and law (see *Da Costa* v. *R.* 42 A.L.J.R., 189) which insofar as they necessary (sic) involve questions of law (as well as questions of fact) have not always been excluded under statutes conferring rights of appeal on "a question of law". (*Lysaght* v. *Inland Revenue Commissioner* (1928) 13 T.R. 511; *Hayes* v. *Federal Commissioner of Taxation,* 96 C.L.R., 47; *Commissioner of Inland Revenue* v. *Walker* (1963) N.Z.L.R., 353).
>
> It follows in my opinion, that under the Tasmanian formula, though I do not attempt under present circumstances and exhaustive definition, there would seem to be great difficulties in the way of entertaining an appeal by the Crown against the exercise of a judicial discretion where the question involved is not so much the existence of a discretion but the question of its exercise in relation to the facts of a particular case. The Canadian cases or such of them as I have been able to consult would seem uniformly to take this view (Cf. *R.* v. *Mulvihill,* 18 D.L.R., 189; *R.* v. *Bordenink,* 45 D.L.R., 470; *R.* v. *The Ash-Temple Company Limited* (1949) O.R., 315; *Brosseau* v. *R.* (1969) 3 C.C.C., 129. A recent English decision in *Instrumatic Limited* v. *Supabrase Limited* (1969) 1

W.L.R., 519 which appears at first sight to be to the contrary, is really a decision on the question of a discretion being appealable where a right of appeal is conferred 'on a question of law' and has not the same force as the Tasmanian provision where the right of appeal is conferred 'on a question of law alone'."

In *Instrumatic Limited* v. *Supabrase Limited* (1969) 1 W.L.R., 519 the Court of Appeal was concerned with the question whether the alleged wrongful exercise of the discretion of an official referee could be characterized as a "point of law" within the meaning of R.S.C. Order 58 r.5 giving a right of appeal to the Court of Appeal from a decision of an official referee "on a point of law" Lord *Denning* M.R. said at p. 521—

> "There are many tribunals from which an appeal lies only on a 'point of law': and we always interpret the provision widely and liberally. In most of the cases the tribunal finds the primary facts (which cannot be challenged on appeal): and the question at issue is what is the proper inference from those facts. In such cases, if a tribunal draws an inference which cannot reasonably be drawn, it errs in point of law, and its decision can be reviewed by the courts. That was settled, once and for all, in *Edwards* (*Inspector of Taxes*) v. *Bairstow* (1956) A.C. 14. In other cases the question is whether, given the primary facts, the tribunal rightly exercised its discretion. In such cases, if the tribunal exercises its discretion in a way which is plainly wrong, it errs in point of law, and its decision can be reviewed by the courts."

No distinction can be drawn between "a point of law" and "a question of law". I would with respect adopt, with one qualification, Lord *Denning's* view that "if the tribunal exercises its discretion in a way which is plainly wrong, it errs in point of law". The qualification I would make is that if although the tribunal is plainly wrong the error is one of fact (in the sense I have used that expression above) then the error could not properly be characterized as one in point of law.

In the present case my reasons for judgment show that in my opinion the Stipendiary Magistrate was plainly wrong because he erred in a fundamental way in failing to give effect to an established dominant principle of punishment which should have governed the exercise of his discretion. Basic principles of punishment accepted and applied by the Courts form part of the law, and I think that where an appeal succeeds on the ground that such principles plainly have not been properly applied it can be said to succeed "on a question of law". The other ground on which the appeal succeeded—that the case was not one to which the Probation of Offenders Act 1934 was properly applicable can also be characterized as a question of law.

Then is the present case one in which I should exercise my discretion in favour of the respondent to the appeal?

The purpose of the Appeal Costs Fund Act 1968 is to relieve litigants from the legal costs incurred by them consequent upon errors of courts made upon a mistaken view of the law which have to be corrected by appellate courts. Where a litigant obtains a favourable decision by a court which is challenged on the ground of an error in law he is entitled in the appellate Court to defend the decision, and if he loses the appeal because through no fault of his the Court below is shown to have been wrong in law he has a *prima facie* entitlement to the exercise

of a favourable discretion to grant an indemnity certificate, (Cf. *Evatt* v. *N.S.W. Bar Association* (1968) 88 N.S.W. W.N. 343). The discretion falls to be exercised in a variety of circumstances, and I do not, of course, attempt to lay down specific principles. In the present case, as I have said, the Stipendiary Magistrate, in my opinion, was plainly wrong in not proceeding to conviction and imposing a substantial fine. He went wrong not so much in his assessment of the facts, but in misconceiving the application of established principles of punishment. It is not a case where he was led into error by untenable or misleading submissions by the respondent. Indeed, as appeared from his stated reasons, he had in previous cases of "shoplifting" failed to apply proper principles of punishment. It was this basic error that the prosecutor had to have corrected in this Court, and I think it a proper case where, in the light of the legislative purpose of the Appeal Costs Fund Act 1968 the respondent should not have to pay for correcting that error.

I do not wish to leave this case without emphasizing that it should not be taken as an open invitation to appellants who succeed on an appeal against the exercise of a discretionary judgment to apply for a certificate of indemnity. In the ordinary run of appeals against the exercise of a discretion it is seldom that a sufficiently distinguishable error appears of a kind which qualifies as a "question of law" justifying the granting of an indemnity certificate under the Appeal Costs Fund Act 1968 to relieve a party to the appeal of the costs of rectifying the error. The present case presents special features which in sum in my view justify the exercise of a favourable discretion under s.14.

I accordingly order that an indemnity certificate be granted to the respondent to the motion to review.

Serial No. 21/1972
List "A"

TASMANIAN PULP AND FOREST HOLDINGS LTD.
v. WOODHALL LTD.

FULL COURT

BURBURY, C. J.
CRAWFORD, J.
NEASEY, J.

ORDER:

Order that pursuant to s.8 of the Appeal Costs Fund Act 1968 an indemnity certificate in respect of the appeal to the Full Court against the judgment of *Nettlefold* J. be granted to the respondent.

Serial No. 21/1972
List "A"

TASMANIAN PULP AND FOREST HOLDINGS LTD.
v. WOODHALL LTD.
(No. 2)

BURBURY, C. J.
5th May, 1972.

Reasons for Judgment

I reserved this matter for the consideration of the Full Court, and invited the Honourable the Attorney-General to appear by Counsel as *amicus curiae,* because I thought that it was fairly arguable that upon its proper interpretation in the light of its legislative purpose s.8 of the Appeal Costs Fund Act 1968 confers a discretion on the Court to grant an indemnity certificate for costs to a respondent to an appeal which succeeds on a "question of law" only where he has lost the fruits of victory because it is held by the appellate court that the Court below, in giving judgment in his favour, proceeded on an erroneous view of some definitive rule of the general law applicable to the case.

The general purpose of the Statute no doubt is to cast the burden of legal costs incurred by an unsuccessful respondent to an appeal on to litigants generally (through the statutory levies made on their originating process) where through no fault of such a respondent the lower Court, in which he succeeded, has gone wrong in law and that error is corrected on appeal. The legislature has apparently adopted the view that this risk of litigation (i.e. the risk of a Judge or Magistrate erring in law) being a risk common to all litigants, it is just that the cost of correcting such errors in law (so far as the fund extends) should be borne by all litigants. As there is also a risk common to all litigants that a Court may err on questions of fact, it is perhaps anomalous that the provisions of the Act do not extend to all appeals. A layman might be forgiven for failing to understand why he should be indemnified against costs occasioned by mistakes made by Judges and Magistrates on questions of law but not on questions of fact. I refer to these policy considerations only to suggest that there is no reason to read down or restrict the meaning of the expression "question of law" in order to conform with the legislative purpose of the Statute.

In approaching the interpretation of s.6 to determine the scope of the jurisdiction to grant an indemnity certificate to an unsuccessful respondent in respect of his costs of an appeal it must steadily be borne in mind that the subject matter of the Statute is the *costs of appeals.* That no doubt is a truism, but I think it follows from it that the connotation of the expression "question of law" in this Statute must be the same as in Statutes conferring appellate jurisdiction. Appellate jurisdiction is, of course, only the creature of Statute, and where a Statute allows an appeal on a "question of law" *eo nomine* it would, I think, be impossible to contend that notwithstanding an appeal succeeds on a "question of law" within the meaning of that Statute, the expression "question of law" has some narrower connotation in the context of the Appeal Costs Fund Act 1968. Where (as in the case of most appeals from single Judges to the Full Court) there is a general right of appeal on law and fact there may be no need for the purposes of the Appeal itself to advert to the distinction between questions of law and questions of fact. But when it becomes necessary

for the purposes of the Appeal Costs Fund Act to determine whether a successful appeal has succeeded on a "question of law" that expression cannot be given a more limited interpretation than it would if the statutory right of appeal had been limited to an appeal on a question of law. An appeal can be said to succeed on a "question of law" for the purposes of appellate jurisdiction in any case where the appellate Court holds that the decision of the Court below is vitiated by reason of some error in law, as distinct from an error in fact alone. This is not to say that it may not be difficult to say whether the error found by the appellate Court should be characterized as one of law or fact. In the words of *Windeyer* J. in *Da Costa* v. *R.* 118 C.L.R. 186 at p. 194—

> "The distinction between questions of fact and questions of law, like the different but in some ways similar distinction between mistakes of fact and mistakes of law, has been productive of a multitude of cases and of numerous judicial statements which, especially in the field of taxation, are not all easily reconciled."

But it is at least clear that for the purpose of the exercise of appellate jurisdiction a "question of law" is not to be equated to a definitive rule of the general law. The present case does not call for a detailed examination of the cases where the distinction between questions of law and questions of fact have been considered. As an instance of the wide scope of statutory jurisdiction to entertain an appeal on a question of law I would cite a passage from the speech of Lord *Radcliffe* in *Edwards* (*Inspector of Taxes*) v. *Bairstow* (1956) A.C.14. That was a case where the House of Lords was concerned with the question whether a determination of the Income Tax Commissioners was reviewable as being "erroneous in point of law". Lord *Radcliffe* at p. 36 said—

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion, contradicts the determination. Rightly understood, each phrase propounds the same test."

Another example of the liberal approach of the Courts to statutory appellate jurisdiction restricted to points of law is the case of *Instrumatic Ltd.* v. *Suprabrase Ltd.* (1969) 1 W.L.R. 519 cited in my judgment in *Barry* v. *Shoobridge* Serial No. 81/1971. I took in that case a liberal view of the scope of the Court's jurisdiction under s.8. I did not then

have the advantage of reading the several Australian cases to which this Court has been referred, but there is nothing in them which persuades me to alter the view I expressed in that case. In summary, I think that in every case where in the exercise of the Court's appellate jurisdiction it can be said that for the purpose of that appellate jurisdiction the Court has allowed the appeal on the ground that the Court below has erred as a matter of law then it has jurisdiction under s.8 to grant an indemnity certificate. The same result would follow in the case of an order for a retrial consequent upon allowing an appeal against conviction on a question of law under s.15.

I have had the advantage of reading the judgment of *Crawford* J., in which he fully analyses the Australian cases. I agree with his conclusion that there is nothing in them which ought to persuade this Court to adopt a narrower interpretation of the expression "question of law" than its accepted broad meaning in the context of Statutes conferring appellate jurisdiction.

So, interpreting s.8, I think it is clear that the appeal in the present case may properly be characterized as an appeal which succeeded on a question of law. There remains the question whether the discretion to grant an indemnity certificate should be exercised in the respondent's favour. For the reasons expressed by *Crawford* J. I think it should, and I would so order.

Serial No. 21/1972.
List "A"

TASMANIAN PULP AND FOREST HOLDINGS LTD.
v. WOODHALL LIMITED (No. 2)

FULL COURT
(Crawford, J.)
5th May, 1972.

Reasons for Judgment

This is an application by an unsuccessful respondent to an appeal, Woodhall Limited, for an indemnity certificate pursuant to sub-s. (1) of s.8 of the Appeal Costs Fund Act 1968. The application came before *Burbury* C. J. who reserved the whole case for the consideration of the Full Court and invited the Honourable the Attorney-General to appear by counsel as *amicus curiae*. As a result of the invitation, Mr. Coatman made submissions on behalf of the Attorney-General.

The first question is whether the appeal to the Full Court from a decision of *Nettlefold* J. was a successful appeal from a decision on a question of law. *Nettlefold* J. heard an application under s.6 of the Arbitration Act 1892 to stay proceedings in the court. The relevant part of the subsection is "that the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission . . . may make an order staying the

proceedings". His Honour was satisfied that there was no sufficient reason and made an order staying the proceedings. An appeal to the Full Court was successful. The order of *Nettlefold* J. was set aside, and it was ordered by the Full Court that the application to stay the proceedings be dismissed. All the members of the court held that *Nettlefold* J. was exercising a discretionary jurisdiction. *Burbury* C. J. agreed generally with the reasons of *Neasey* J. but gave some independent reasons. He held that *Nettlefold* J. should have been persuaded that possible injustice to the appellant, if the stay were granted, was "a sufficiently cogent factor to displace the *prima facie* justice of the case in keeping the parties to their bargain" and that he would unhesitatingly "exercise a discretionary judgment refusing the stay". He must be taken to have held that *Nettlefold* J. was wrong in principle, on the facts of the case, in being satisfied that there was no sufficient reason why the matter should not be referred to arbitration.

Neasey J. held that *Nettlefold* J. erred in failing to examine sufficiently the relative weight of one factor and that an order should be made that the application for stay be refused. *Neasey* J., too, must be taken to have held that *Nettlefold* J. was wrong in being satisfied that there was no sufficient reason why the matter should not be referred to arbitration.

I held—"Before disturbing the exercise of the discretion, I must be satisfied that there was no sufficient reason why the matter should not be referred to arbitration . . ." I further held that his Honor had failed to examine facts going to the weight which should have been given to the principle that a multiplicity of proceedings was highly undesirable, and that, on the facts, there was sufficient reason to outweigh the principle that the parties should observe the contract to submit to arbitration. I, too, must be taken to have held that his Honor erred in being satisfied that there was no sufficient reason for not referring the matter to arbitration.

For the purposes of legislation providing that an appeal may lie to an appellate court on a point of law or a question of law, this, certainly, would have been an appeal on a point of law. An appeal from the exercise of a discretion to order a new trial "if he shall think just" is an appeal on a question of law: *Brown* v. *Dean* (1910) A.C. 373 at p. 375; *Murtagh* v. *Barry* (1890) 24 Q.B.D. 632; *Grimshaw* v. *Dunbar* (1953) 1 Q.B. 408, and so is an appeal from the exercise of a discretion to dismiss an action for want of prosecution: *Instrumatic Ltd.* v. *Supabrase Ltd.* (1969) 2 A.E.R. 131, although that was a case, as *Phillimore* L. J. pointed out at p. 134, where "There was absolutely no dispute as to the facts on which he had to exercise his discretion". In this case, too, there was no dispute as to the facts on which the orders of *Nettlefold* J. or of the Full Court turned. The meaning of "point of law" or "question of law" was well settled when the Act was passed. All the decisions on legislation similar to the Appeal Costs Fund Act 1968 are to the same effect, namely that an appeal from the exercise of a discretion is an appeal on a question of law: *Onions* v. *Government Insurance Office of New South Wales* (1956) 73 W.N. (N.S.W.) 279; *Evatt* v. *New South Wales Bar Association* (1968) 3 N.S.W.R. 573 at p. 574; *Jansen* v. *Dewhurst* (1969) V.R. 421 at p. 429; *Barry v. Shoobridge* an unreported decision of *Burbury* C. J. on this point, 28th September, 1971, Serial No. 81/1971.

I should refer to some authorities cited during argument. It was submitted that they decided that a "question of law" in this Act should be given a narrower meaning than was given to similar expressions in Acts limiting rights of appeal. One such case was *Acquilina* v. *Dairy Farmers Co-Operative Milk Co. Ltd.* (1965) 82 W.N. (Pt. 1) (N.S.W.) 531. This was a case where a certificate was sought in respect of an appeal to the Full Court and of another appeal from the Full Court to the High Court. It is clear that *Moffitt* J., at p. 532, held that both appeals succeeded on points of law (see also p. 536 as to the appeal to the Full Court succeeding on a question of law). The point was one of the unjustified rejection of evidence. The remainder of the reasons for judgment considers the manner of the exercise of the discretion given to the Court, and looks for some principle e.g. (at p. 533) "if an error of law occurs in a court of first instance or an inferior appellate court, such error may ordinarily be attributed to a fault in the administration of justice rather than of the parties" and "where at least, *prima facie*, it appeared that the unnecessary costs had been incurred by some error mischance or wrong decision for which it could be presumed no responsibility lay on the party to be helped by the grant of the certificate"; and (at p. 534) *Moffitt* J. held that the purpose of the Act was "the relief of a party who incurs or becomes liable for costs not through his own decision or conduct but because of some error of law of the tribunal". I emphasize that these matters are matters only going to the grounds for exercising the discretion and do not go towards deciding what is a question of law for the purposes of the legislation.

In *Pataky* v. *Utah Construction & Engineering Pty. Ltd.* (1966) 84 W.N. (Pt. 1) (N.S.W.) 201, it was plain that appeals on questions of law had succeeded. (See p. 202 and the last paragraph on p. 209.) The remainder of the reasons were taken up with a consideration of how the discretion should be exercised.

Richards v. *Faulls* (1971) W.A.R. 129 is a similar case. It is plain that an appeal on a question of law had succeeded—"in fact, there is no jurisdiction to entertain a question which is not a question of law, therefore, the facts conditioning the power to grant such a certificate have happened" (at p. 137). The reasons are concerned only with the manner of the exercise of the discretion.

In *Gurnett* v. *The Macquarie Stevedoring Company Proprietary Limited* (*No.* 2) (1956) 95 C.L.R. 106; *Dixon* C. J., who dissented, was the only member of the court to consider how the legislation should be applied. The appeal to the High Court had succeeded because the court held that the trial judge (and the Full Court which upheld him) was wrong in withdrawing the case from the jury on the basis that it was not open for the jury to draw an inference of negligence on the evidence. In my opinion, the successful appeal was from a decision on a question of law. *Dixon* C. J. said at pp. 113 and 114:—

> "The question remains whether in substance it is a proper case for the grant of such an indemnity certificate. Subsection (1) of s.6 grants a power which, as s.6 (5) shows, is to be exercised as a matter of discretion. It provides that the court determining the appeal may grant to the respondent thereto an indemnity certificate. The power arises only when an appeal against the decision of a court on a question of law succeeds. Very little light is to be obtained from the long title or the provisions of the Act as to

the considerations which should govern the exercise of the discretion to grant a certificate. But since it does not arise except in the case of a successful appeal against a decision upon a question of law, it would seem that the purpose of the legislature was to relieve litigants of the burden of costs that might be imposed upon them by reason of erroneous decisions upon questions of law. In the present case no question was involved as to any principle of law or any application of principle or as to the meaning or effect of any statutory provision. It is true that in the legal dichotomy between questions of fact and questions of law we place under the latter head a question whether there is sufficient evidence to submit to a jury in support of a cause of action. That is because it is a question for the court to decide and not for a tribunal of fact. In the present case no considerations of law affected the matter at all. It was simply a question whether the evidence adduced was enough to enable the jury to draw an inference of fact. *Further, the defendant is a limited company apparently not without assets.* All that we know concerning the finances of the defendant company is that its paid up capital is £84 000. *At the trial the defendant company's counsel advisedly sought to withdraw the case from the decision of the jury.* To take such a course involved an obvious risk. I cannot see why, because in the result it turned out badly, the defendant should have *a claim upon the discretion of the Court* to certify for the recoupment of the costs out of a public fund. *Indeed I can see no sound reason why the defendant company should be indemnified* for costs out of the Suitors' Fund. *In my opinion the discretion given by s.6 should in this case be exercised by refusing a certificate.* I would on that ground refuse the application of the defendant respondent."

The underlining is mine; and a perusal of the underlined passages makes it clear that his Honour was satisfied that an appeal on a question of law had succeeded and he was considering only the question of his exercise of the discretion. The order which he would have made was one of refusal to exercise the discretion to grant the certificate (p. 114).

None of these cases decide that a test narrower than that applied in determining what a question of law is for founding jurisdiction for an appeal is to be applied to cases under legislation similar to the Appeal Costs Fund Act 1968.

I hold, for the above reasons, that the appeal in this case, in so far as it was from a decision on a question of law, succeeded.

I turn to consider the manner of the exercise of the discretion. In terms, the discretion is unfettered. But, obviously, a discretion is to be exercised and it does not follow that, because an appeal on a question of law has succeeded, an applicant is entitled to a certificate as of right: *Reeve* v. *Fowler* (1965) N.S.W.R. 110 per *Walsh* J. at pp. 111 and 112. Speaking of the judgment of *Dixon* C. J. in *Gurnett* v. *The Macquarie Stevedoring Company Proprietary Limited* (No. 2) (cited, supra), the same judge in *Uren* v. *Australian Consilidated Press Ltd.* (1965) N.S.W.R. 371 said, at p. 397, "What his Honour said shows clearly that in case to which the section applies, this is where an appeal succeeds, the respondent is by no means entitled to a grant".

The court has before it no material upon which to consider the exercise of its discretion other than the reasons for judgment of

Nettlefold J. and of the members of the Full Court. From a perusal of the reasons, the inference can be drawn that the argument by the both parties before *Nettlefold* J. was essentially the same as that before the Full Court.

One matter submitted by the applicant at the hearing of the appeal was rejected, i.e. the question as to where the burden of proof lay. The point was taken for the applicant, both at the hearing before *Nettlefold* J. and at the hearing of the appeal, and considerable time was spent on it, at least, at the hearing of the appeal. But it is impossible to say that the applicant unreasonably raised the matter or recklessly occupied unnecessary time on it. As can be seen from the reasons for judgment of the members of the Full Court, the authorities were far from clear on this matter.

The applicant's submission before *Nettlefold* J. was primarily that his Honour should be satisfied that there was no sufficient reason why the matter should not be arbitrated and that the inferences to be drawn from the facts disclosed in the affidavits and in other matters put before his Honour by consent supported that submission. On the authorities, the *prima facie* position was that the applicant should have succeeded. The Full Court has held that the proper inferences from the facts and the weight to be given to the facts and inferences required the *prima facie* position to be reversed.

The reported cases concerning the manner of the exercise of the discretion depend on their own facts, but some observations of judges on the purpose of the Act and of what factors may be considered are useful. The dominant purpose of the Act is "to relieve unsuccessful respondents against what might be considered to be a real hardship which has fallen upon them, through no fault of their own but only through some miscarriage which has occurred in the decision below." *McLaughlin* v. *Utah Construction & Engineering Pty. Ltd.*, mentioned in *Pataky* v. *Utah Construction & Engineering Pty. Ltd.* (supra) at p. 203. The grant of such relief (i.e. of a certificate of indemnity), "it can be inferred, proceeds on the assumption that the law is known, so that if an error of law occurs in a court of first instance or an inferior appellate court, such error may ordinarily be attributed to a fault in the administration of justice rather than of the parties so that the costs of having the error rectified ought not ordinarily to lie on the unsuccessful respondent to the appeal but to be paid from a fund contributed to by all litigants": *Acquilina* v. *Dairy Farmers Co-Operative Milk Co. Ltd.* (supra) at p. 533. "I think that s.6" (the section corresponding to s.8 of the Tasmanian Act) " . . . has as its purpose the relief of a party who incurs or becomes liable for costs not through his own decision or conduct but because of some error of law of the tribunal": ibid., at p. 534. I observe that the facts of that case which caused *Moffitt* J. to refuse the application do not exist in this case (see pp. 539 and 540). In *Jansen* v. *Dewhurst* (supra), *Newton* J. granted an application because the stipendiary magistrate appealed from had some responsibility for the miscarriage of the hearing before him in that he had adopted an approach which was wrong in law and that although "for all that appears in the material before me, no attempt "was made by either party to help the stipendiary magistrate to ascertain what the relevant law was . . . neither does

it appear that he was positively misled as to the law by either party" (at pp. 429 and 430). *Winneke C. J.* and *Newton* J. in *McLennan* v. *McBroom* (1969) V.R. 566 at p. 572 granted an application "as the question of law upon which the appeal succeeded involved a difficulty concerning the application of" a former decision of the Court, and went on to say (as *obiter dictum*) "In cases in which the court from which the appeal is brought is induced into an error of law by a submission that is plainly without foundation, the discretion may well be exercised against a respondent and a certificate refused on the ground that to grant it would be contrary to the policy disclosed by the Act".

In *Richards* v. *Faull* (supra) the Full Court held, at p. 138, "the unsuccessful respondent to an appeal must show some ground calling for the exercise of the discretion in his favour and he does not do this merely by showing that the appeal has succeeded on a question of law: *Reeve* v. *Fowler* (1965) N.S.W.R. 110, per *Walsh* J. at p. 111. Of course the nature of the case may in itself show that a certificate should be granted and not infrequently the court is able to act without further evidence or argument." The court, speaking of the purpose of the Act said, at the same page, "it appears to us that in broad terms the Act is aimed at giving relief in cases where the decision turns on a question of law, as contrasted with the facts of the particular case, where that question of law might at least reasonably be resolved in different ways, so that in a sense the unsuccessful party may be thought to have suffered some 'misfortune' owing to a doubt about the correct rule of law to be applied." The court declined to grant the application. The Workers' Compensation Board had found that the action of a man in driving a motor vehicle in the course of his employment after consumption of sufficient alcohol to raise his blood alcohol level to between 0·11 and 0·12 per cent amounted to serious and wilful misconduct within the meaning of those words in the Workers' Compensation Act and that the man's injury by accident was attributable to the misconduct. All members of the Full Court held that the Board was wrong in respect of each matter. The real question was whether there was evidence before the Board which could sustain its conclusion that the man was guilty of serious and wilful misconduct (see at p. 131, per *Hale* J., p. 134 per *Burt* J. and at p. 135 per *Lavan* J.). This was a question of law (see p. 135). Speaking of the nature of the decision and the conduct of the case and the effect which these matters should have on the exercise of the discretion, the court said, at pp. 138 and 139:—

> "The decision in the present case did not turn upon the formulation of or upon the application to the facts of any general principle of substantive law, nor did it turn upon the proper construction to be placed upon any provision of the Workers' Compensation Act or upon the proper construction to be placed upon any other statutory provision. It turned upon a question of law in the sense in which the question whether a finding of fact is open on the evidence is said to be a question of law. Hence it was in every sense a particular question and it was a question which arose out of the way in which the respondent when before the Board chose to conduct its case. The choice then made was to persuade the Board to make findings of fact upon evidence which was incapable of sustaining them and this in a case in which this Court can itself see, as the respondent when before the Board should have been

able to see, that further evidence was available and that it should have been called, such evidence being from a person competent to give it and bearing upon the significance, for the purposes of the findings sought, of the percentage of alcohol in the blood of the deceased at the time of the injury."

The court referred to the comments of *Dixon* C. J. in *Gurnett* v. *Macquarie Stevedoring Company Proprietary Limited* (*No.* 2) (supra) at p. 113 (cited supra) and continued:—

"Where there is a general right of appeal, on fact as well as on law, this question of law is seldom likely to make an appearance at all: the appellant will say that the decision below was wrong on the facts, perhaps adding that probably there was no evidence at all to support it."

With respect I do not understand the relevance of this comment. In a case where an appeal lies on the facts as well as on the law, it is one matter to hold that as a matter of law there is *no evidence* to support a finding of fact (even if it is found as an inference) but it is quite another matter to say that there is evidence to support such a finding, but, as an appellate court allowing an appeal on a question of fact, to say that, the appellate court draws a different inference from that drawn by the tribunal of first instance. The court concluded:—

"Without saying that such a question of law could never support the granting of a certificate under s.10 (1) we are of opinion that this is not a case in which a certificate should be granted."

In *Di Battista* v. *Motton* (1971) V.R. 565 at p. 572, *Winneke* C. J. speaking for the Full Court, said:—

"In granting the certificate we think we should reiterate what the Court has said on other occasions; it must not be assumed that these certificates will be granted as of course. Where an appeal against the decision of a court on a question of law succeeds, and the error has been caused by a submission by a party which should not have been made, we thing it may not be right in all cases—having regard to the purpose and the objects of the Appeal Costs Fund Act—to allow the costs of the appeal to be thrown on the fund which, after all, is provided by litigants in general. In this case, however, having regard to the degree of novelty involved in the point of law on which the appeal has succeeded, and to the fact that the question of the relation of the incidence of tax to the dependency of the claimants was debated, and that the learned judge, notwithstanding the discussion that then occurred, permitted the re-direction to proceed on the basis that the jury were entitled to make the calculation on the basis put to them by plaintiff's counsel, we think the circumstances of this case justify the granting of the certificate."

Of course, an error in law by a court of first instance is usually caused by a party's submission which (as the appeal has shown) should not have been made. This mere fact was, in my opinion, not intended by Parliament to be taken into account, or very few applications would ever be granted. But, with respect, I think that the court in this case must have intended the meaning of "a submission which should not have been made" to be a relative matter depending on the sense of responsibility or the recklessness with which the submission was made.

In *Barry* v. *Shoobridge* (supra) *Burbury* C. J. said:—

> "The purpose of the Appeal Costs Fund Act 1968 is to relieve litigants from the legal costs incurred by them consequent upon errors of courts made upon a mistaken view of the law which have to be corrected by appellate courts. Where a litigant obtains a favourable decision by a court which is challenged on the ground of an error in law he is entitled in the appellate court to defend the decision, and if he loses the appeal because through no fault of his the court below is shown to have been wrong in law he has a *prima facie* entitlement to the exercise of a favourable discretion to grant an indemnity certificate, (Cf. *Evatt* v. *N.S.W. Bar Association* (1968) 88 N.S.W. W.N. 343). The discretion falls to be exercised in a variety of circumstances, and I do not, of course, attempt to lay down specific principles. In the present case, as I have said, the Stipendiary Magistrate, in my opinion, was plainly wrong in not proceeding to conviction and imposing a substantial fine. He went wrong not so much in his assessment of the facts, but in misconceiving the application of established principles of punishment. It is not a case where he was led into error by untenable or misleading submissions by the respondent. Indeed, as appeared from his stated reasons, he had in previous cases of 'shoplifting' failed to apply proper principles of punishment. It was this basic error that the prosecutor had to have corrected in this court, and I think it a proper case where, in the light of the legislative purpose of the Appeal Costs Fund Act 1968 the respondent should not have to pay for correcting that error. I do not wish to leave this case without emphasizing that it should not be taken as an open invitation to appellants who succeed on an appeal against the exercise of a discretionary judgment to apply for a certificate of indemnity. In the ordinary run of appeals against the exercise of a discretion it is seldom that a sufficiently distinguishable error appears of a kind which qualifies as a 'question of law' justifying the granting of an indemnity certificate under the Appeal Costs Fund Act 1968 to relieve a party to the appeal of the costs of rectifying the error. The present case presents special features which in sum in my view justify the exercise of a favourable discretion under s.14."

With respect, I have three comments to make. As I have already pointed out, in almost every case an applicant has lost an appeal through his own fault (in one sense of the word) in making the submissions which he did before the tribunal of first instance. "Fault" must be regarded as a word including infinite degrees of "fault". Secondly, I think it wrong to say that he has a *prima facie* entitlement in every case. A discretion is to be exercised depending on the facts of a particular case. My third comment is that I consider it dangerous to support the generalization that, in the ordinary run of appeals against the exercise of discretion, it would be seldom that a sufficiently distinguishable error will appear of a kind which would qualify as a "question of law" justifying the granting of a certificate. Each case must depend on its own facts, and it may be that in many cases of appeals from the exercise of a discretion, the court would be justified in granting a certificate.

Mr. Coatman suggested that one factor should be the means of the applicant. *Dixon* C. J. in *Gurnett* v. *The Macquarie Stevedoring*

Company Proprietary Limited (*No.* 2) (supra) at p.113, speaking of the applicant, said, "Further, the defendant is a limited company apparently not without assets. All that we know concerning the finances of the defendant company is that its paid up capital is £84 000". It is impossible to say what weight (if any) his Honour gave to this factor, but it is proper to infer that he thought that it was an appropriate factor to be considered. However, in no other reported case, have the means of the applicant been taken into account as a factor bearing on the exercise of the discretion. It is significant that the funds available to pay the costs are to be raised from litigants irrespective of their means: ss. 3 and 5, and that, in cases within s. 15, clearly the means of the litigant are irrelevant. These matters persuade me that in cases within s.8, it was not the purpose of the legislature to make the means of an applicant relevant to the exercise of the discretion; and, even if the purpose of the legislature, one way or the other, cannot be ascertained, it would not be proper to take means into account.

Another factor suggested by Mr. Coatman was whether the ruling of the Full Court on appeal "was of value", meaning, I think, whether it gave a ruling on a matter of common law, or an interpretation of a statute or of a piece of subordinate legislation, so as to make the law on the matter certain (unless and until overruled). This kind of factor, although not in these precise terms, was taken into account by *Dixon* C. J. in *Gurnett* v. *The Macquarie Stevedoring Company Proprietary Limited* (supra), by *Winneke* C. J. and *Newton* J. in *McLennan* v. *McBroom* (supra), by the Full Court in *Richards* v. *Faulls Pty. Ltd.* (supra) and by the Full Court in *Di Battista* v. *Motton* (supra). It would be wrong to say that the absence of this factor must be decisive in every case, because that would have the effect of narrowing the interpretation of what was a "question of law" in s.8 (1), but I am persuaded by those authorities that it is a factor which may be taken into account.

Another factor suggested by Mr. Coatman was whether the appeal should have been resisted by the applicant. If an appeal is unreasonably resisted by an applicant, he has unreasonably caused the incurring of some, if not most, of the costs in respect of which he may be indemnified (see sub-s. (1) of s. 9); and clearly this is a factor which may be taken into account.

Another factor suggested by Mr. Coatman was whether "it was a tactical move". The matter of whether a submission before the trial of first instance or the resisting of the appeal was for a tactical purpose, *e.g.*, delay, I think, comes within the factor of whether an applicant has caused costs, in the first instance or on appeal, to have been incurred unreasonably.

Having considered general matters, and possible factors, I turn again to the facts of this application. There is sufficient material available to the court, the reasons of *Nettlefold* J. and the reasons of the members of the Full Court, to allow an inference to be drawn that the case, as brought before *Nettlefold* J., was reasonably substantiated by evidence and that the submissions for the applicant were reasonably and not recklessly made. As I have held, the appeal succeeded on a question of law; but it did not succeed on a question which determined any principle of law or the meaning of any statutory provision. The members of the Full Court held that his Honour was wrong in law

in not being satisfied that there was sufficient reason for not referring the matter to arbitration and that this had been brought about by a failure to consider material facts. The primary facts themselves were not in dispute and there remained as questions of fact only the inferences to be drawn and the weight to be given to any facts or inferences. Legally, the case was a difficult one. The question of where the onus of proof lay presented a difficulty and many authorities on this point were referred to by counsel, both before *Nettlefold* J. and before the Full Court. More to the point, cases such as *Taunton-Collins* v. *Cromie* (1964) 1 W.L.R. 633; *W. Bruce Ltd.* v. *J. Strong* (1951) 2 K.B. 447; *Blackman & Co. S.A.* v. *Oliver Davey Glass Co. Pty. Ltd.* (1966) V.R. 570 and a passage in *Hudson's Building & Engineering Contracts* referring to the case of *City Centre Properties (I.T.C. Pensions) Ltd.* v. *Matthew Hall & Co. Ltd.* (1969) 1 W.L.R. 772 created difficutlies as to the proper weight (in the facts of this case) to be given to the circumstance that the applicant was only one of three defendants to the action sought to be stayed. These matters led his Honour to err. *Burbury* C. J. said in his reasons for allowing the appeal (p.4) that "he erred in adopting as a starting point that the appellant's disputes with the other parties should be treated as *res inter alios acta,* and was led into taking too narrow a view of the factors relevant to what is just as between the parties". I pointed out (at p.16) that *Nettlefold* J. had misunderstood the sense in which "confusion" had been put by counsel as a factor. His Honour referred to "confusion" before an arbitrator whereas the factor was "the confusion that may follow as a result of two or three tribunals trying the same issues with different results" (the sense in which "confusion" was used by *Pearson* L. J. in *Taunton-Collins* v. *Cromie* (supra) at p.637). I also pointed out that other matters mentioned by his Honour missed the point or did not go to the important factor to be weighed. *Neasey* J. (at p.13) observed that "his Honour appears to have guided himself principally upon the approaches taken by other courts in cases where similar considerations arose, but the facts were very different . . . his Honour seems to me to have treated the opposing arguments in a general way instead of relating them closely to the facts of this case", and (at pp.14 and 15) pointed out he did not think it right to say (as *Nettlefold* J. seemed to have thought) "that issues between the plaintiff and one defendant were *res inter alios acto* in relation to similar issues between the plaintiff and another defendant". These matters referred to by the members of the court show that consideration of cases where the facts were different from those of this case caused the judge to fail to give proper weight to the material facts of this case. In my view, the cases did give rise to legal difficulties and to his Honour being misled.

In my view, the reasons for judgment of the members of the Full Court have clarified the law relating to the weight to be given to the undesirability of a multiplicity of proceedings and, in particular, in a case, such as this one, where the proceedings might have been an arbitration between the plaintiff and one defendant, another arbitration with a different arbitrator or legal proceedings between the plaintiff and another defendant, and legal proceedings between the plaintiff and yet another defendant.

Having regard to all these circumstances I think that the court should exercise its discretion so as to grant the application.

Serial Number 21/1972
List "A"

TASMANIAN PULP AND FOREST HOLDINGS LTD. *v.* WOODHALL LTD.

FULL COURT
Neasey J.
5th May, 1972

Reasons for Judgment

I agree with the reasoning and conclusions of my brother *Crawford* in regard to this application. I would therefore grant an indemnity certificate in accordance with the application.