
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : APACHE NORTHWEST PTY LTD -v-
DEPARTMENT OF MINES AND PETROLEUM
[2012] WASCA 167

CORAM : MARTIN CJ
NEWNES JA
BEECH J

HEARD : 7 JUNE 2012

DELIVERED : 23 AUGUST 2012

FILE NO/S : CACV 141 of 2011

BETWEEN : APACHE NORTHWEST PTY LTD
Appellant

AND

DEPARTMENT OF MINES AND PETROLEUM
First Respondent

LANDER & ROGERS, LAWYERS
Second Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : EDELMAN J

Citation : APACHE NORTHWEST PTY LTD -v-
DEPARTMENT OF MINES AND PETROLEUM
[No 2] [2011] WASC 283

File No : GDA 1 of 2011

Catchwords:

Administrative law - *Freedom of Information Act 1992* (WA) - Approach to be taken to reasons for decision of administrative decision-maker - Standard to be applied to claim that document contains exempt matter - Whether standard of balance of probabilities erroneously applied - Whether primary judge should have found Information Commissioner misapplied cl 4(2)(b), 4(3)(c), 5(1)(e), 5(1)(f) and 5(1)(g) of sch 1 of Act

Practice and procedure - Appeal as to order for costs on chamber summons in proceedings - *Supreme Court Act 1935* (WA) s 60(1)(e) - Meaning of 'as to costs only' - Appeal against discrete costs order brought with substantive appeal - Leave required to appeal against costs order - No error by primary judge on order as to costs

Legislation:

Freedom of Information Act 1992 (WA), sch 1, cl 4(2)(b), 4(3)(c), 5(1)(e), 5(1)(f) and 5(1)(g)

Supreme Court Act 1935 (WA), s 60(1)(e)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr P J Hanks QC & Mr L Brown
First Respondent	:	No appearance
Second Respondent	:	Mr N J O'Bryan AM, SC & Mr B J Reilly

Solicitors:

Appellant	:	Middletons
First Respondent	:	No appearance
Second Respondent	:	Lander & Rogers

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

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2011] WASC 187
Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2] [2011] WASC 283
Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 3] [2011] WASC 314
Arena Management Pty Ltd v Campbell Street Theatre Pty Ltd [2011] NSWCA 128
Attorney-General's Department v Cockroft (1986) 10 FCR 180
C G Maloney Pty Ltd v Noon [2011] NSWCA 397
Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 456; (1993) 43 FCR 280
Dasreef Pty Ltd v Hawchar [2010] NSWCA 154
Etna v Arif [1999] VSCA 99; [1999] 2 VR 353
Franz v Allum (Unreported, WASC, Library No 960658, 29 October 1996)
Harris v Aaron (1877) 4 Ch D 749
House v The King [1936] HCA 40; (1936) 55 CLR 499
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Montarello v Berkman Capital Finance Pty Ltd T/as Flexirent (Unreported, WASCA, Library No 970105, 21 March 1997)
Police Force of Western Australia v Winterton (Unreported, WASC, Library No 97064, 27 November 1997)
Re Apache Northwest Pty Ltd and Department of Mines and Petroleum [2010] WAICmr 35
Re Golden Casket Art Union Office [1995] 2 Qd R 346
Re WA Newspapers Ltd and Salaries and Allowances Tribunal [2007] WAICmr 20
Road Chalets Pty Ltd v Thornton Motors Pty Ltd (1986) 47 SASR 532
Scherer v Counting Instruments Ltd [1986] 1 WLR 615; [1986] 2 All ER 529
Searle Australia Pty Ltd v Public Interest Advocacy Centre [1992] FCA 241; (1992) 36 FCR 111
Theophanous v Gillespie [2002] QCA 117
Thorne v Doug Wade Consultants Pty Ltd [1985] VR 433
Transport Accident Commission v O'Reilly [1998] VSCA 106; [1999] 2 VR 436
Tyco Australia Pty Ltd v Optus Networks Pty Ltd [2004] NSWCA 333
Wheeler v Somerfield [1966] 2 QB 94
Wolfe v Alsop (1886) 12 VLR 887

Zhang v Minister for Immigration and Multicultural & Indigenous Affairs
[2005] FCAFC 30

- 1 **MARTIN CJ:** This appeal should be dismissed for the reasons given by
Newnes JA, with which I agree.
- 2 **NEWNES JA:** This appeal concerns an application by the second
respondent (Lander and Rogers), pursuant to the *Freedom of Information
Act 1992* (WA) (the FOI Act), for access to certain documents held by the
first respondent. The relevant documents had been supplied to the first
respondent by the appellant (Apache). The first respondent initially
refused access but, following an internal review of that decision, it found
that Lander and Rogers was entitled to access to the documents. Apache
then sought a review of that decision. The Information Commissioner,
with certain limited exceptions, upheld the first respondent's decision: *Re
Apache Northwest Pty Ltd and Department of Mines and Petroleum*
[2010] WAICmr 35. An appeal by Apache against the decision of the
Information Commissioner was dismissed by Edelman J: *Apache
Northwest Pty Ltd v Department of Mines and Petroleum [No 2]* [2011]
WASC 283. Final orders dismissing Apache's appeal were made on
26 October 2011: see *Apache Northwest Pty Ltd v Department of Mines
and Petroleum [No 3]* [2011] WASC 314.
- 3 Apache now appeals against the decision of the primary judge. The
first respondent took no part in the appeal. (I should note that Lander and
Rogers has not yet had access to the documents.)
- 4 I would dismiss the appeal for the reasons which follow.

Statutory regime

- 5 It is convenient to outline at the outset the provisions of the statutory
regime regulating applications under the FOI Act, so far as they are
relevant.
- 6 The FOI Act creates a right of access to documents held by
government agencies: FOI Act s 10. An agency is defined in the FOI Act
to mean a Minister or a public body or office.
- 7 An agency may refuse access to a document if the document is an
exempt document: s 23(1)(a). An exempt document is defined in the FOI
Act as a 'document that contains exempt matter'. The term 'exempt matter'
is defined as 'matter that is exempt matter under Schedule 1'. (I will come
to sch 1 shortly.) Where a document contains exempt matter and it is
practicable for the agency to give access to a document from which the
exempt matter has been deleted, the agency must do so if it considers the
applicant would want access to an edited copy: s 24.

8 Where an application is made for access to documents which contain information of a commercial value to a third party or concerning the business or commercial affairs of a third party, an agency may not give access to an applicant until it has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the document contains exempt matter: s 33. If the third party objects to a decision of the agency to give access to a document the third party has a right to an internal review of the decision by another officer of the agency: s 39 - s 43. If the third party is aggrieved by the decision on the internal review it may seek a review of that decision by the Information Commissioner: s 65. An appeal lies to the Supreme Court on a question of law arising out of the decision of the Information Commissioner: s 85.

9 If a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made: s 102(2).

10 The relevant provisions of sch 1 of the FOI Act, dealing with 'exempt matter', are contained in cl 4 and cl 5. They are as follows:

4. Commercial or business information

(1) Matter is exempt matter if its disclosure would reveal trade secrets of a person.

(2) Matter is exempt matter if its disclosure -

(a) would reveal information (other than trade secrets) that has a commercial value to a person; and

(b) could reasonably be expected to destroy or diminish that commercial value.

(3) Matter is exempt matter if its disclosure -

(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

...

5. Law enforcement, public safety and property security

- (1) Matter is exempt matter if its disclosure could reasonably be expected to -

...

- (e) endanger the life or physical safety of any person;
- (f) endanger the security of any property;
- (g) prejudice the maintenance or enforcement of a lawful measure for protecting public safety.

Background

11 The background to the application under the FOI Act is not in dispute and the following description is taken from the reasons for decision of the primary judge.

12 Varanus Island is located 75 km off the coast of Western Australia. A number of joint ventures operate there producing oil, condensate and gas. Apache is the operator of the facilities on Varanus Island and in the surrounding off-shore area. It is also a participant in a joint venture on Varanus Island and is one of the licensees of the pipeline which serves the facilities there.

13 On 3 June 2008, a gas pipeline ruptured causing a large explosion. The explosion caused the Varanus Island plant to cease operation for approximately two months. That had drastic consequences for natural gas supplies in Western Australia, which were reduced by approximately 30% for that period.

14 Apache's operations and facilities on Varanus Island are regulated by a number of different Acts and Regulations. These include the *Petroleum Act 1967* (WA), the *Petroleum and Geothermal Energy Resources Act 1967* (WA), the *Petroleum (Submerged Lands) Act 1982* (WA), the *Petroleum Pipelines Act 1969* (WA), and regulations under those Acts (collectively referred to as 'the Regulatory Regime'). The Regulatory Regime is administered by the first respondent. The first respondent was established on 1 January 2009 after a departmental restructure. The predecessor of the first respondent was the Department of Industry and Resources. For convenience, I will refer to both simply as 'the Department'.

15 On 15 September 2008, Lander and Rogers made an application to the Department under the FOI Act seeking access to 28 documents, or categories of documents, relating to Apache or Apache's facilities on Varanus Island. A number of the documents which were relevant to the request had been supplied to the Department by Apache in accordance with the Regulatory Regime.

16 Only five of those documents were relevant to the appeal to the primary judge. The documents are numbered 1, 3, 4, 4A and 9 (I will refer to them collectively as the Documents).

17 The Documents are as follows:

- Document 1: Varanus Hub Safety Case, dated 27 September 2000 (171 pages);
- Document 3: Varanus Hub Safety Case, dated 5 July 2007 (1,954 pages);
- Document 4: Sales Gas Pipelines - 5 year Integrity Review, dated 30 May 2007 (19 pages);
- Document 4A: 31/05/06 PL 12 Renewal - Assessment Report, dated 31 May 2006 (214 pages);
- Document 9: Operational Pipeline Management Plan, dated 10 April 2008.

18 The Department wrote to Apache on 21 October 2008 seeking Apache's views on access to, among others, the Documents. Apache provided submissions to the Department on 30 October 2008. The Department subsequently determined, among other things, that access should be refused in respect of the Documents. Lander and Rogers sought an internal review of that decision.

19 On 22 December 2008, the decision-maker on the internal review reversed the Department's decision and decided that Lander and Rogers were entitled to access to the Documents. On 22 January 2009, Apache applied to the Information Commissioner for external review of that decision.

20 As part of the review by the Information Commissioner, both Apache and Lander and Rogers made submissions in writing. Apache

relied on its letter to the Department dated 30 October 2008, a letter to the former Acting Information Commissioner dated 22 January 2009, and letters to the Office of the Information Commissioner dated 5 June 2009 and 8 July 2009. Lander and Rogers provided written submissions on 5 August 2009.

21 On 16 April 2010, the Information Commissioner wrote to Apache, Lander and Rogers, and the Department, explaining his preliminary view. His preliminary view was that, apart from a small amount of information contained in the Documents, none of the Documents were exempt from production under the FOI Act. The Information Commissioner invited the parties to respond in writing by 14 May 2010.

22 Neither Lander and Rogers nor the Department made any further submissions to the Information Commissioner. But, on 25 June 2010, after extensions of time, Apache made further detailed submissions to the Information Commissioner in respect of cl 4(2), cl 4(3), cl 5(1)(e) and cl 5(1)(f) of sch 1. The Information Commissioner considered those submissions and obtained further information to assist him in his understanding of the matter.

23 On 30 December 2010, the Information Commissioner delivered his decision. He refused access to some small parts of the Documents but otherwise gave Lander and Rogers access to them.

24 Apache then appealed against the Information Commissioner's decision. As mentioned above, the primary judge dismissed the appeal. Apache now appeals against the decision of the primary judge.

The grounds of appeal

25 It is unnecessary to set out the grounds of appeal in full. Indeed, as they are framed they are of limited use in identifying the issues on the appeal. The substantive issues were summarised by Apache's counsel, in effect, as follows:

1. The primary judge erred in law in that he should have found the Commissioner misconstrued cl 5(1)(e) and cl 5(1)(f) of sch 1 - ground 1;
2. The primary judge erred in law in that he should have found the Commissioner misconstrued cl 5(1)(g) of sch 1 - ground 2;
3. The primary judge erred in law in that he should have found the Commissioner:

- (a) applied the wrong standard of persuasion; and
 - (b) misconstrued the phrase 'could reasonably be expected' in cl 4(2)(b), cl 4(3)(c), and cl 5(1)(g) of sch 1 - ground 3;
4. The primary judge erred in law when he took into account irrelevant considerations in deciding the issue of the costs of the second respondent's chamber summons of 2 August 2011 - grounds 4 and 5.

The disposition of the appeal

Ground 1: the proper construction of cl 5(1)(e) and cl 5(1)(f)

26 As set out above, matter is exempt under cl 5(1) if its disclosure 'could reasonably be expected to' endanger the life or physical safety of any person (cl 5(1)(e)) or endanger the security of any property (cl 5(1)(f)). I accept, as submitted by Apache, that 'endanger' in that context bears its ordinary meaning of 'to expose to danger': *The Macquarie Dictionary* (2009, 5th ed).

27 In his reasons for decision, after setting out the respective submissions of Apache and Lander and Rogers, the Commissioner said:

Documents 1, 3, 4, 4A and 9 will be exempt under clauses 5(1)(e) and 5(1)(f) if their disclosure could reasonably be expected to cause the harm described in those provisions. I accept [Lander and Rogers'] submission that, in the context of clause 5, whether disclosure of the documents in question could reasonably be expected to result in the harm claimed, is to be judged objectively in light of all relevant information.

...

I accept that there are inherent dangers in working on and around Varanus Island and that any accidents, sabotage or attack on the facilities could have potentially catastrophic consequences. However, the question for my consideration is whether those consequences to personnel and property could reasonably be expected from disclosure of Documents 1, 3, 4, 4A and 9 (IC [162] - [164]).

28 The Commissioner rejected a submission by Apache that all of the information in the Documents was exempt, concluding that some of it was publicly available. He went on:

It is possible that some of that published information could assist a terrorist attack. Consequently, it does not appear to me that the action of disclosing the same publicly available information as contained in the [Documents]

could reasonably be expected to have the effects claimed in clauses 5(1)(e) and 5(1)(f) (IC [167]).

29 The Commissioner accepted that it would be possible to use some of the information contained in the Documents to assist in formulating a sabotage plan (IC [168]). He concluded, therefore, that certain information in documents 1, 3, 4A and 9 (but not 4) was exempt. That information

could, if disclosed, reasonably be expected to endanger the life or physical safety of persons and the security of Apache's property ... If [the] information [listed in the appendix to the reasons] were to be made public, I consider that it would realistically be of interest to [persons of malicious intent] and, if disclosed, could reasonably be expected to have the effects set out in clauses 5(1)(e) and (f) (IC [169]).

30 The Commissioner then went on, at IC [170], to refer to a distinction he had drawn in reaching that conclusion between two categories of information in the Documents, expressing the view that only disclosure of information falling into the second category 'could reasonably be expected to endanger the life or physical safety of any person or the security of any property'.

31 There was no issue on this appeal about the material which the Commissioner had found in IC [169] to be exempt. But Apache took issue with the Commissioner's decision that the balance of the information in the Documents was not exempt under cl 5(1)(e) or cl 5(1)(f).

32 In that connection, Apache drew attention to the final sentence of IC [164] ('whether those consequences to personnel and property could reasonably be expected from disclosure of [the] Documents') as being a departure from the statutory test. The statutory test, it was submitted, did not connote that particular harm may result from disclosure, but rather that the *risk* of harm may result from disclosure; that is, the question is not whether catastrophic consequences could flow from the disclosure of the information, but whether disclosure could reasonably be expected to expose the life or physical safety of any person or the security of any property to a liability to harm or injury or to some risk or peril.

33 Apache argued it was clear that the Commissioner had not applied the statutory test. Instead, the Commissioner had wrongly applied a higher test by requiring Apache to satisfy him that particular harmful consequences for Apache's facilities would, or could reasonably be expected to, follow from disclosure. It was submitted that the primary judge had erred because he had failed to identify the Commissioner's error

and had incorrectly found that the Commissioner had not applied the wrong test.

34 It is necessary to turn to the findings of the primary judge. His Honour observed that the passage of the Commissioner's reasons relied upon by Apache had to be read in context [132]. His Honour continued:

That context includes the following matters.

- (a) The Information Commissioner began his discussion of these subclauses by setting out the submissions in relation to them. On numerous occasions he referred to the requirement that disclosure could reasonably be expected to '*endanger*' life or physical safety of any person or security of any property: [157], [160(c)], [160(d)].
- (b) The statement by the Information Commissioner in [162] to 'the harm described in those provisions' must be read together with the provisions to which he refers. Those provisions refer to the endangerment of any person's life or physical safety or endangerment of the security of any property. It is not an abuse of language to refer to this endangerment as a type of harm. In any event, there is no other harm described in those provisions.
- (c) At [167], the Information Commissioner referred to whether the publicly available information in the Documents 'could reasonably be expected to have the *effects* claimed in clauses 5(1)(e) and 5(1)(f)' (emphasis added). The Information Commissioner was here referring to 'effects' (ie of endangerment) interchangeably with his earlier reference to 'harm'. Any objection to the use of the word 'harm' in [162] must be read together with the reference to 'effects' here.
- (d) The passage to which Apache objects in [164] is prefaced by the words 'I accept that there are inherent *dangers*' (emphasis added).
- (e) The reference in [164] to 'potentially catastrophic consequences' uses the same language that Apache used in its submission of 25 June 2010 at par 1.68. It appears to be a reference to Apache's submission. In any event, Apache was correct to direct the Information Commissioner's attention to possible consequences of disclosure, since that information could be relevant to an assessment of whether disclosure could reasonably be expected to endanger life or physical safety of any person or endanger the security of any property.
- (f) At [169] the Information Commissioner concluded that some of the information in the Documents could, if disclosed, 'reasonably be expected to *endanger* the life or physical safety of persons and the

security of Apache's property' (emphasis added). Here, Apache did not dispute that the Information Commissioner was applying the correct test.

- (g) At [170], the Information Commissioner again referred to, and excluded from disclosure, information which 'could reasonably be expected to *endanger* the life or physical safety of any person or the security of any property' (emphasis added). Again, Apache does not dispute that this was a correct application of the test in cl 5(1)(e) and cl 5(1)(f) [132].

35 On this appeal, Apache submitted that, contrary to the view of the primary judge, the fact that in the course of his reasons the Commissioner had in other places used the correct statutory language for the test did not overcome the manifest error in IC [164]. Such usage did not demonstrate that in making his finding the Commissioner had applied the correct test. Apache further submitted that the reliance of the primary judge on IC [169] and IC [170] of the Commissioner's reasons was misplaced. It argued that the finding by the Commissioner in those paragraphs that some information in the Documents was exempt under cl 5(1)(e) and cl 5(1)(f) did not support a conclusion that the Commissioner had there applied the correct test, as opposed to being satisfied that the information was exempt under a higher standard. Much less then did the fact that the Commissioner had used the statutory language in IC [169] and IC [170] demonstrate that the correct test had been applied elsewhere. It was also submitted that it was not to the point that in IC [164] the Commissioner had adopted the language Apache had used in its submission to the Commissioner. The Commissioner was obliged to apply the statute.

36 In my view, there is no merit in this ground of appeal. As the primary judge observed, the passages relied upon by Apache must be read in context. And in reading the reasons for decision of the Commissioner, it must be borne in mind that they are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280, 287. The court should not be 'concerned with looseness in the language ... nor with unhappy phrasing': *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (287). As the High Court observed in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 272, the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

37 The primary judge correctly had regard to the Commissioner's reasons in their context and as a whole. While it can readily be accepted that the use of the statutory language in other parts of the reasons does not of itself establish that the correct test has been applied, when the part of the Commissioner's reasons relied upon by Apache is read in context, in my respectful view the primary judge was right to reject the contention that the Commissioner had failed to apply the statutory test. It is evident from his overall discussion of the application of cl 5(1)(e) and cl 5(1)(f) that the Commissioner was well aware of the correct test. In the circumstances, the words in IC [164] on which Apache placed such store are not reasonably to be construed as a momentary aberration or oversight of the correct test but are only explicable as looseness of language. No error has been shown.

38 I would dismiss this ground of appeal.

Ground 2: the proper construction of cl 5(1)(g)

39 Matter is exempt under cl 5(1)(g) if its disclosure 'could reasonably be expected to prejudice the maintenance or enforcement of a lawful measure for protecting public safety'.

40 Apache did not make separate submissions to the Commissioner in respect of the application of cl 5(1)(g). As the Commissioner noted at IC [172], Apache simply repeated the submissions it had made in respect of cl 5(1)(e) and cl 5(1)(f). Apache submitted that the 'lawful measure for protecting public safety' which would be prejudiced by disclosure of the Documents was Apache's ability to restrict access to Varanus Island and to material describing the facilities there (IC [172]).

41 The Commissioner found that the Documents were not exempt under this provision. The Commissioner concluded that cl 5(1)(g) 'is intended to safeguard lawful measures put in place to protect public safety from violations of the law or breaches of the peace' (IC [176]). He doubted whether Apache's ability to restrict access to the facilities and/or information about the facilities could be described as a lawful measure for protecting public safety (IC [177]). In any event, the Commissioner did not consider that the maintenance or enforcement of those measures 'would be prejudiced' by disclosure of the Documents because he concluded that 'those measures would remain in place' (IC [177]).

42 Apache contended that the Commissioner erred in four respects, which the primary judge had failed to identify. Those errors were said to be:

- first, confining 'public safety' in cl 5(1)(g) to 'safety from violations of the law or breaches of the peace', which was too narrow;
- secondly, failing to determine if Apache's ability to restrict access to the facilities and/or information about the facilities were 'lawful measures for protecting public safety';
- thirdly, finding that '[the] measures would remain in place' when it was unclear what was meant by that; and
- fourthly, asking himself the wrong question, namely, whether maintenance or enforcement of Apache's measures 'would be prejudiced' by disclosure of the Documents rather than whether disclosure 'could reasonably be expected to prejudice' their maintenance or enforcement.

43 Turning to the first two alleged errors, the primary judge considered that it was unnecessary to determine whether the Commissioner was correct in his conclusion as to the ambit of the expression 'public safety' in cl 5(1)(g) because the Commissioner's decision did not depend upon it [152] - [154]. The Commissioner had assumed for the purpose of his decision that the measure relied upon by Apache fell within a 'lawful measure for protecting public safety' [153]. For the same reason, his Honour found it was unnecessary for the Commissioner to determine whether the measure was a 'lawful measure for protecting public safety' [156]. Again, the Commissioner had assumed in Apache's favour that the measure relied upon by Apache (its ability to restrict access to the facilities at Varanus Island and/or information about the facilities) was a 'lawful measure for protecting public safety'. Apache had not failed under cl 5(1)(g) on those grounds but on other grounds.

44 In my view, his Honour's conclusions are, with respect, plainly correct. As the Commissioner had proceeded on the assumption that the measure Apache relied upon was a 'lawful measure for protecting public safety', his Honour's observations as to the meaning of that expression were beside the point.

45 In relation to the third alleged error, the primary judge did not find difficulty in understanding what the Commissioner meant by '[the] measures would remain in place' in IC [177]. His Honour considered it was a reference to the fact that, as a consequence of the Commissioner's decision under cl 5(1)(e) and cl 5(1)(f) not to allow access to certain information concerning Apache's measures, the disclosure of the balance of the information could not reasonably be expected to prejudice those

measures, which would then remain in place. His Honour considered that the Commissioner's conclusion followed as a matter of common sense [164].

46 Apache contended that the primary judge's explanation of the Commissioner's statement was not sustainable. It was submitted that it was a reconstruction of the Commissioner's reasoning and was flawed because the questions under each of cl 5(1)(e) and cl 5(1)(f) were different to the question under cl 5(1)(g). The question whether disclosure could reasonably be expected to endanger a person (cl 5(1)(e)) or property (cl 5(1)(f)) was different to whether disclosure could reasonably be expected to prejudice the maintenance or enforcement of measures for protecting public safety (cl 5(1)(g)).

47 Apache submitted that because cl 5(1)(e) and cl 5(1)(f) involve different questions to cl 5(1)(g), it was not plausible that the Commissioner had found that disclosure of the balance of the material in the Documents, after the exemptions which had been allowed under cl 5(1)(e) and cl 5(1)(f), could not reasonably be expected to prejudice the maintenance or enforcement of public safety measures under cl 5(1)(g) (ts 28). And the fact that certain information in the Documents was protected under cl 5(1)(e) and cl 5(1)(f) did not mean the Commissioner was not required to consider separately the application of cl 5(1)(g) to the Documents.

48 It is significant that Apache did not make separate submissions to the Commissioner in respect of the application of cl 5(1)(g) but simply repeated the submission it had made in respect of cl 5(1)(e) and cl 5(1)(f) (IC [172]). As the primary judge noted at IC [161], the reasonable expectation of prejudice relied upon by Apache in respect of its measures for protecting public safety arose from the same matters as it had relied upon - and which had been considered by the Commissioner - in respect of the exemptions sought under cl 5(1)(e) and cl 5(1)(f), namely matters such as individuals intent on causing harm, attacks on critical juncture points central to the operation of the facility, national security and transnational terrorism concerns. The Commissioner had accepted that some of the information in the Documents was not publicly accessible and that it could assist in aiding any planned attack on the facilities. He had concluded that that particular information in the Documents was exempt under cl 5(1)(e) and cl 5(1)(f).

49 As the primary judge observed, it was in that context that the Commissioner had come to consider the application of cl 5(1)(g). Having

regard to that context, I consider the view the primary judge took of the Commissioner's reasoning to be correct; that is, that the Commissioner concluded that as a result of the exemptions allowed under cl 5(1)(e) and cl 5(1)(f), Apache's public safety measures would remain in place and disclosure of the balance of the material in the Documents could not reasonably be expected to prejudice the maintenance or enforcement of those measures.

50 I do not consider that reasoning to be flawed. Indeed, in the circumstances it seems to me it would have been quite artificial for the Commissioner to approach the application of cl 5(1)(g) without regard to the exemptions granted under cl 5(1)(e) and cl 5(1)(f). In my view, it was open to the Commissioner to take the approach that he did and no error on the part of the primary judge has been made out.

51 In relation to Apache's complaint about the Commissioner's use in IC [177] of his reasons of the expression 'would be prejudiced', rather than 'could reasonably be expected to prejudice', the primary judge noted that this was the only occasion on which the Commissioner used 'would' in his reasoning on this issue and pointed out that what he described as 'this single inaccuracy' had to be read in context [75].

52 In rejecting Apache's contention that the Commissioner had used the wrong test, the reasoning of the primary judge was, in essence, as follows ([76] - [78]). First, Apache had not made separate submissions concerning cl 5(1)(g) but had simply relied upon its submissions on cl 5(1)(e) and cl 5(1)(f). The alleged flaws in the Commissioner's reasoning were therefore to be read in light of his approach to the latter provisions where he had applied the test of 'could reasonably be expected' (see IC [162], IC [169] and IC [170]). Secondly, the Commissioner had earlier at IC [95] emphasised that in cl 5(1)(e) and cl 5(1)(f) 'would' is not the same standard as 'could reasonably be expected'. Thirdly, in a number of places in the Commissioner's reasons he had discussed the phrase 'could reasonably be expected' in respect of clauses which included cl 5(1).

53 His Honour concluded that when so read it was plain that the Commissioner was under no misapprehension as to the proper test and did not apply an incorrect test [74] - [78], [140].

54 I do not consider the primary judge erred in so concluding. I have previously referred to the approach a court is to take to the analysis of the reasons for decision of an administrative decision-maker. A fine

toothcomb designed to detect any loose language or inapt phrasing is not a useful tool to bring to such a task. Nor, where the statutory test is elsewhere correctly expressed, can that context simply be dismissed as the incantation of statutory language. It is necessary to have regard to the overall sense and import of the reasons, read as a whole and without an eye attuned to the detection of error.

55 The primary judge has, in my respectful view, correctly identified the Commissioner's process of reasoning. The use of 'would be prejudiced' in IC [177] must be read in the context of the Commissioner's reasons as a whole. It would be an error to seize upon it in isolation. Having regard to the matters identified by the primary judge, it is properly to be regarded, as his Honour found, as simply a looseness of language and not as a momentary oversight of the correct test.

56 I would dismiss this ground of appeal.

Ground 3: the proper construction of 'could reasonably be expected' in cl 4(2)(b), cl 4(3)(b), and cl 5(1)

57 Under this ground, Apache contended, in effect, that the primary judge had erred in failing to find: first, that the Commissioner had wrongly concluded that Apache was required to satisfy him on 'the balance of probabilities' that the Documents were exempt under the FOI Act; and secondly, that the Commissioner had applied the wrong test in respect of each clause, applying a test of 'would' have adverse consequences instead of 'could reasonably be expected to' have adverse consequences.

58 In support of the contention that the Commissioner had erroneously considered that Apache had to satisfy him on the balance of probabilities, Apache referred to IC [93], where the Commissioner said:

I consider that clauses 4(2)(b), 4(3)(b), and 5(1) require a person to prove *on the balance of probabilities* that a certain outcome *could reasonably be expected*. (original emphasis)

59 Apache submitted that the Commissioner had misstated Apache's obligation under those provisions. The 'balance of probabilities' is a curial standard which is inappropriate when applied to an administrative decision of this nature: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (282 - 283). The Commissioner is an administrative decision-maker who stands in the shoes of the original departmental decision-maker: FOI Act s 76. Accordingly, it was the wrong standard

for the Commissioner to apply and the primary judge should have so found.

60 The proposition that the 'balance of probabilities' was not the applicable standard to be applied by the Commissioner was not resisted by Lander and Rogers. It was not in issue before the primary judge or on this appeal that the correct approach is set out in the decision of the Full Federal Court in *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180, 190. There the court had to consider the phrase 'could reasonably be expected to prejudice the future supply of information to the Commonwealth' in s 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth). The court said it was undesirable to consider the phrase 'could reasonably be expected to' in terms of probabilities or possibilities or the like; to do so was to put an unwarranted gloss on the plain meaning of the words. The effect of the provision was to 'require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous'; the enquiry is to be confined to 'whether the expectation claimed was reasonably based'. That approach was endorsed by a differently constituted Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241; (1992) 36 FCR 111, 123. It is, in my respectful view, the correct approach.

61 In the course of his reasons on this point, the Commissioner considered the decision in *Cockcroft* and, among others, two decisions in this State: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550; and *Police Force of Western Australia v Winterton* (Unreported, WASC, Library No 97064, 27 November 1997). The Commissioner referred (at IC [85]) to the following passage in the judgment of Owen J in *Manly* in relation to the standard to be applied in a claim for exemption under cl 4(3):

The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.

62 The Commissioner noted, however, that in *Winterton*, in considering a claim of exemption under cl 5(1)(b), Scott J had distinguished *Cockcroft* and concluded that the applicable standard was the balance of probabilities (IC [87] - [88]).

63 The Commissioner also referred to *Re WA Newspapers Ltd and Salaries and Allowances Tribunal* [2007] WAICmr 20, where the then

acting Information Commissioner had expressed the view that the standard in cl 4(1), cl 4(2) and cl 4(3) was the balance of probabilities, except in cl 4(2)(b) and cl 4(3)(b) where that standard did not apply (IC [89]).

64 The Commissioner said:

In other words, I consider that clauses 4(2)(b), 4(3)(b) and 5(1) require a person to prove *on the balance of probabilities* that a certain outcome *could reasonably be expected*. This is a less onerous task than requiring a person to prove on the balance of probabilities that the outcome *will occur*. I believe that the result of this interpretation is consistent with the analyses of Owen J in *Manly* and A/Commissioner Shanahan in *Re WA Newspapers Limited*. I believe it is also consistent with the reasoning of Scott J in *Winterton*, who noted in the context of clause 5(1)(b) that '*... the appellant has to establish that it is more likely than not that the documents come within the exemption*'. His Honour did not say that disclosure of the documents would reveal an investigation.

In view of this, I proceed on the basis that the most instructively expressed precedent is that of Owen J of the Supreme Court in *Manly*, who held that the correct standard of proof to apply in relation to the term 'could reasonably be expected' in clause 4(3) '*...does not have to amount to proof on the balance of probabilities*' but '*must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker*' (IC [93] - [94]). (original emphasis)

65 The primary judge did not accept that the Commissioner had applied the balance of probabilities. He found that when the reasons of the Commissioner on this point were read as a whole it was evident that he had applied the correct legal test. The primary judge referred, at [52], to a number of passages where the Commissioner had clearly stated the correct test. His Honour said that, considered in that light, the Commissioner's reasons did not disclose that he had applied the wrong test. His Honour continued:

Rather, the Information Commissioner started with the words of the legislation as the test of 'could reasonably be expected to'; he referred to the decision of *Cockcroft* with approval; immediately after his discussion of *Winterton* he explained that he was proceeding on the basis 'most instructively expressed' by Owen J in *Manly* (which, it was common ground in this appeal, was the correct approach); and he concluded by applying a test in terms of the words of the legislation.

The approach taken by the Information Commissioner to cl 4(2)(b) of sch 1 to the FOI Act was not in error. For the same reasons, the Information Commissioner did not err in his approach to cl 4(3)(b), and

cl 5(1) of sch 1, despite his references to those clauses in his discussion of the *Winterton* decision.

Finally, the correct test of 'could reasonably be expected to' was applied in relation to cl 4(3)(b) at [123] and [129]. The correct test of 'could reasonably be expected to' was applied in relation to cl 5(1)(e) and cl 5(1)(f) at [162], [169] and [170]. This further reinforces the conclusion that the Information Commissioner's discussion of the *Winterton* decision did not lead him to apply a test of balance of probabilities as ground 4.1 asserts, or lead him otherwise into an erroneous application of the statutory test [53] - [55].

66 It must be said, with respect, that the reasoning of the Commissioner on this topic lacks the degree of clarity which would have been desirable. It is evident that the Commissioner was at some pains to attempt to reconcile the decision in *Winterton*, where the balance of probabilities had been used, with the decisions in *Manly* and *Cockroft* where it had been disavowed. His endeavours to do so led him to attempt to break the 'standard of proof' down into two limbs, the first (to which the balance of probabilities applied) to be applied to the argument and reasoning, and the second to the outcome (to which it did not). The passage referred to in IC [93] occurred in the context of that analysis.

67 It might be thought that in attempting to reconcile the decisions the Commissioner was attempting the impossible. Be that as it may, what I think is apparent is that while the Commissioner sought to reconcile the authorities and engaged in some (it must respectfully be said, rather obscure) consideration of how that might be done, in the end he did not 'consider it desirable to attempt to quantify the standard of proof' (IC [92]). The approach he ultimately took appears from IC [94] of his reasons, where the Commissioner adopted the statement of Owen J in *Manly* as the applicable test.

68 Having regard to the context as a whole, I am satisfied that the primary judge correctly found that the Commissioner did not apply the balance of probabilities. I did not understand Apache to take issue with the approach in *Manly* and nor in my opinion could it. I do not consider that any error has been made out.

69 That takes me to the second issue under this ground. Apache contended that the primary judge should have found that the Commissioner had posed the wrong question in considering the application of each of cl 4(2)(b), cl 4(3)(b), cl 5(1)(g); that is, the Commissioner had considered whether disclosure 'would' have adverse consequences instead of whether it 'could reasonably be expected' to have

those consequences. The primary judge once again found that on a fair reading of the Commissioner's reasons as a whole, the Commissioner had not fallen into that error.

70 Apache submitted that in coming to that conclusion the primary judge had erred in relying on other passages in the Commissioner's reasons where the correct test had been stated. Counsel for Apache again relied on the uncontroversial proposition that the routine citation of statutory provisions does not of itself establish that the decision-maker has applied the correct test. That proposition can readily be accepted. But, equally, the significance of the inclusion in the Commissioner's reasons for decision of references to the relevant statutory provisions is not too readily to be dismissed as mere incantation. Whether the Commissioner fell into error can only be determined by a proper consideration of the Commissioner's reasoning as a whole.

71 I have dealt with this issue in relation to cl 5(1)(g) under ground 2 and for the reasons set out there I would reject Apache's contention in respect of cl 5(1)(g).

72 In relation to cl 4(2)(b), Apache had, in substance, submitted to the Commissioner that disclosure of the Documents would provide competitors and customers with a significant amount of information about Apache's business. That would give its competitors a competitive advantage by enabling its competitors to improve their own operations at reduced cost, it would reduce Apache's capacity for commercial negotiations, and it would enable its competitors to provide misinformation to the community about Apache's operations.

73 The Commissioner rejected those submissions. He found that much of the material was specific to the Varanus operations and its commercial value lay in the operation of that facility, not in any transferable processes, systems or strategies. He was not persuaded that a competitor would be able to make use of it. The Commissioner said:

In short, I consider that even if the relevant documents were disclosed to a competitor, their commercial value to Apache **would not be diminished** because such disclosure would not harm the Varanus Island operations (IC [99]). (emphasis added)

74 The Commissioner rejected Apache's submission that the material gave Apache a competitive advantage, such as by recruiting better staff, commenting that there was no information to that effect, only assertion. The Commissioner said:

I am not persuaded that on that account alone that the Information has a commercial value to Apache which disclosure could reasonably be expected to destroy or diminish (IC [101]).

75 The Commissioner said:

In my view, Apache's claim that the disclosure of the Information could reasonably be expected to destroy or diminish its commercial value because the detailed descriptions contained in [the Documents] could be adapted and adopted by its competitors to enhance their own operations is speculative. **I am not satisfied that those documents contain sufficient detail to enable competitors to enhance their own operations** (IC [102]). (emphasis added)

76 The Commissioner did not accept Apache's argument that its competitors could use information in the material to calculate throughput, capacity use and the limitations of the facility, saying that Apache had not identified any specific information which would enable that to be done (IC [103]). He rejected as speculative Apache's submission that the material could be used to spread misinformation (IC [104]). The Commissioner also rejected Apache's claim that its significant costs in creating the Documents would be lost if the information was disclosed and that disclosure would reduce its competitors' costs. He said:

I am not persuaded that disclosure could reasonably be expected to destroy or diminish any commercial value in [the Documents] since it seems to me that Apache would still use, for example, the SMS at each of its owned and operated facilities. Nor am I persuaded that there would be any significant reduction in the costs to its competitors of creating a similar set of documents for their own facilities because I consider that much of the information to be both general in nature and site specific (IC [105]).

77 On this appeal, Apache submitted that, in particular as appeared from the passages highlighted above in [99] and [102], the Commissioner had wrongly required Apache to satisfy him that disclosure of the information *would*, rather than 'could reasonably be expected to', diminish its commercial value to Apache. Apache argued that the primary judge had wrongly based his conclusion that there had been no error by the Commissioner on the fact that there were other instances where the Commissioner had used the correct test. Those instances were an inadequate basis for such a finding.

78 I do not accept that the primary judge erred in finding that the Commissioner had not used the wrong test. As his Honour noted, the Commissioner considered the application of this clause under the heading 'Clause 4(2)(b) - could disclosure reasonably be expected to destroy or

diminish the commercial value?' The Commissioner repeated that question in the next paragraph as being the relevant question for his consideration of the Documents and he reiterated it a number of times in the course of his reasons on this topic, as described by the primary judge at [52]. The primary judge pointed out at [62] that the Commissioner's reasoning was as follows:

- (a) He summarised the submissions as involving a claim that disclosure 'could reasonably be expected to destroy or diminish their commercial value': IC [54].
- (b) He introduced his discussion of the arguments by reference to the test of 'could reasonably be expected': IC [94].
- (c) He emphasised that cl 4(2)(b) uses the less onerous word 'could' in 'could reasonably be expected' than the word 'would' in cl 4(2)(a): IC [95].
- (d) He stated in relation to various of the arguments, the cl 4(2)(b) test of 'could reasonably be expected to': IC [101], IC [105].

79 In my view, having regard to the context, it is not to be supposed that the Commissioner overlooked the correct test, as contended by Apache. It would no doubt have been preferable for the Commissioner to have stated his conclusion in every instance in terms which expressly referred to the statutory test, even at the expense of some repetition. But when the relevant passages are read in context, it cannot reasonably be concluded that the explanation for the Commissioner's omission to do so in the passages relied on by Apache lay in an inexplicable oversight of the test he had elsewhere propounded rather than, as the primary judge found, the application of the correct test expressed in infelicitous language.

80 In relation to cl 4(3), the Commissioner noted that Apache had submitted that the Documents contained information about its business affairs, including the operation of its onshore and offshore facilities and the maintenance of an extensive pipeline system (IC [112]) and that disclosure 'could reasonably be expected to have an adverse effect on Apache's business affairs' in the various ways which he set out at IC [113]. At IC [113(b)], the Commissioner noted Apache's submission that disclosure 'has the potential to significantly impact upon Apache's competitive position'.

81 The Commissioner went on to observe that the onus was on Apache to establish that disclosure 'could reasonably be expected to have an

adverse effect on its business or commercial affairs' (IC [115]). Then, under the heading 'Could disclosure reasonably be expected to have an adverse effect on the business affairs of Apache', the Commissioner considered the application of cl 4(3). That consideration commenced at IC [117] where, in the context of a discussion of a submission by Lander and Rogers, the Commissioner again repeated the statutory test. The Commissioner concluded his consideration of the application of cl 4(3) as follows:

Apache submits that the disclosure of [the Documents] would have a significant adverse effect on its competitive position in the industry but has given me no information about its position *vis a vis* other competitors or how its competitive position **would be significantly impacted by the [Documents'] release**. Apache provided me with examples of the ways in which its business affairs **could be adversely affected** by the disclosure of the [Documents] but has not explained to me exactly how the disclosure of any particular information identified in the documents **would have the adverse effect claimed**. For example, it is not evident to me that information taken from the master table in document 3 could be extrapolated to a particular methodology or - in the event that could be demonstrated - that the 'methodology' could be used in such a way as to misinform or create speculation about Apache's business affairs.

On the information before me, I am not satisfied that the disclosure of [the Documents] or any particular information in [the Documents] could reasonably be expected to have the adverse effects claimed (IC [121] - [122]). (emphasis added)

82 Apache referred to the passages highlighted above in contending that the Commissioner had posed the wrong question, substituting 'would' for the correct test 'could reasonably be expected to'. It submitted that the use of the correct test in IC [122] did not overcome the confusion evidenced by the use of 'would' in IC [121].

83 The primary judge rejected Apache's submission. His Honour noted that Apache had used 'would' in its submissions and that the Commissioner's use of it was explicable simply as a response to that [71]. His Honour went on to reiterate that, in any event, the Commissioner's reasons had to be read as a whole [72]. In that connection, his Honour observed that earlier in his reasons, at IC [95], the Commissioner had expressly stated that cl 4(3) required a lower standard of 'could'. His Honour also referred to the heading above IC [117] and to the terms of IC [122], where the test is again correctly stated [72].

84 It was submitted by Apache that the primary judge had erred in failing to find that the Commissioner had confused the test. Once the

Commissioner's reasons disclosed legal error in his interpretation of the FOI Act the error could not be 'undone' by reciting the statutory language. Nor, it was submitted, was it relevant that the Commissioner had adopted language used by Apache in its submissions to him. The Commissioner's obligation was to apply the FOI Act.

85 I do not consider the primary judge erred. In light of the propinquity of the various references to the statutory test, it cannot be concluded that in IC [121] the Commissioner momentarily lost sight of the correct test. The statements in IC [121] are not reasonably explicable as such an aberration but only as a looseness of language. I do not consider the primary judge erred in concluding that the Commissioner had not used an incorrect test.

86 I would dismiss this ground of appeal.

Grounds 4 and 5 - the costs on the chamber summons

87 The chamber summons in question came to be filed as a result of a dispute between the parties concerning Lander and Rogers' access to an unredacted copy of Apache's written submissions, dated 25 June 2010, to the Information Commissioner (the submissions). Lander and Rogers had not been provided with a copy of the submissions, although Apache had referred to them in its written submissions on the appeal to the primary judge. On 12 May 2011, and on subsequent occasions, Lander and Rogers had asked Apache for a copy of the submissions. On 1 August 2011, Apache provided a redacted copy.

88 Lander and Rogers filed the chamber summons on 2 August 2011 seeking orders that Apache produce to each of the respondents an unredacted copy and that the further hearing of the appeal to the primary judge be adjourned to a date to be fixed.

89 The chamber summons came on for hearing before the primary judge on 4 August 2011. Apache resisted production of an unredacted copy of the submissions, relying upon s 90 of the FOI Act which requires the court to avoid the disclosure of exempt material in review proceedings. His Honour decided that to the extent information in the submissions revealed the content of potentially exempt matter, the submissions would not be disclosed at that stage. His Honour said he would inspect the unredacted version to determine whether they contained such matter: *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2011] WASC 187 [18].

90 Counsel for Apache conceded that some of the redactions in dispute could be provided. On 5 August 2011, the primary judge found that 'with the exception of some passages which [Apache] now accepts should be disclosed from those submissions', all of the material fell within one or other of two categories:

1. Information which is a verbatim reproduction of matter which is said to be exempt; or
2. Information which is a summary of material which is said to be exempt but which provides sufficient information about that potentially exempt matter that it could reveal the substance of the exempt matter.

91 In relation to the costs of the application, the primary judge said:

The decision I will make in relation to costs is that the costs of the chamber summons will be in this appeal, will be costs of the appeal. In my opinion, the summons was properly brought. Although the conclusions I reached in relation to section 90(1) were that exempt matter contained in the disputed submissions should be redacted to the extent that it fell within the two categories I mentioned, there was significant delay in bringing the chamber summons and that delay was not due to the conduct of the second respondents.

The other reason why it is appropriate to order costs of the chamber summons in the appeal is that the ultimate conclusion in relation to whether or not the material ought to be redacted in the disputed submissions will depend upon the ultimate conclusion of the appeal, which is whether or not the matter is exempt matter or not (ts 80 - 81).

92 In this court, Apache proceeded on the basis that leave to appeal against the decision on costs was not required because the appeal was not as to 'costs only', within the meaning of s 60(1)(e) of the *Supreme Court Act 1935* (WA). That, it was submitted, was because the grounds of appeal went not only to the costs decision but also to the substantive merits of the decision of the primary judge. Lander and Rogers, on the other hand, submitted that as the appeal on the costs question was unrelated to the outcome of the other grounds of appeal, leave was required.

93 Section 60(1)(e) provides as follows:

- (1) No appeal shall lie to the Court of Appeal -

...

- (e) without the leave of the judge or the master or of the Court of Appeal, from the order of a judge or a master ... as to costs only which by law are left to the discretion of the judge or the master.

94 The question of leave in this appeal turns on the meaning of 'as to costs only'.

95 A convenient starting point in a consideration of that question is the decision of the Court of Appeal in England in *Wheeler v Somerfield* [1966] 2 QB 94. In that case, the appellant had brought an action for libel against the respondent. In the course of the proceedings, the appellant amended his statement of claim to add a par 2(a). At the trial, the trial judge ordered that par 2(a) be withdrawn from the jury. The appellant was successful in the action and was awarded damages of £1,650. The appellant was awarded the costs of the action, except for the costs of the amendment to add par 2(a) to the statement of claim, which the appellant was ordered to pay to the respondent. The appellant appealed against the refusal of the trial judge to allow par 2(a) to go to the jury and to allow in evidence of his ill-health. He also appealed against the order that he pay the respondent's costs of the amendment to add par 2(a). In relation to the costs issue, the relevant legislation concerned was in all material respects identical to s 60(1)(e) of the Act. The appeal was dismissed on the substantive issues but allowed on the costs issue. Lord Denning MR (with whom Winn LJ agreed) said:

As I have always understood this section of the Judicature Act, it means this: If a person makes no complaint against the judgment below, except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. But if he makes a complaint, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on the other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine (106).

96 Harman LJ agreed and delivered reasons to a similar effect.

97 That decision has received a mixed reception in Australia. It has not been followed in South Australia where, in *Road Chalets Pty Ltd v Thornton Motors Pty Ltd* (1986) 47 SASR 532, Zelling ACJ (at 538) described it as being 'against the whole course of reported cases for a century', referring by way of example to *Harris v Aaron* (1877) 4 Ch D 749. Nor has the decision been followed in Queensland: *Re Golden*

Casket Art Union Office [1995] 2 Qd R 346; *Theophanous v Gillespie* [2002] QCA 117 [17].

98 In *Thorne v Doug Wade Consultants Pty Ltd* [1985] VR 433, the Full Court of the Supreme Court of Victoria noted (at 497) the decision in *Wheeler v Somerfield* but did not go on to consider it because the court did not regard itself as being at liberty to depart from an earlier decision of the Full Court to a contrary effect in *Wolfe v Alsop* (1886) 12 VLR 887. Subsequently, in *Etna v Arif* [1999] VSCA 99; [1999] 2 VR 353, Batt JA (with whom Charles & Callaway JJA agreed) having reviewed the authorities in that jurisdiction concluded that:

[T]he current of authority is to the effect that leave is required to appeal against an order as to costs even though the appeal relates also to the merits, at any rate where, as here, the challenge to the order as to costs goes beyond the mere consequence of success of an appeal on the merits. This does not, of course, derogate from the rule, applied almost daily, that leave is not necessary in order for the costs order below to be set aside when an appeal on the merits succeeds (378).

99 In New South Wales, the decision in *Wheeler v Somerfield* was followed in *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 [200] and *Dasreef Pty Ltd v Hawchar* [2010] NSWCA 154 [61], but, as the Court of Appeal observed in *Arena Management Pty Ltd v Campbell Street Theatre Pty Ltd* [2011] NSWCA 128 [129], in each case without the attention of the court having been drawn to decisions in other intermediate courts of appeal that had declined to follow it. See also *C G Maloney Pty Ltd v Noon* [2011] NSWCA 397 [104] - [106].

100 In Western Australia, *Wheeler v Somerfield* has been referred to in two cases. In *Franz v Allum* (Unreported, WASC, Library No 960658, 29 October 1996), Malcolm CJ noted that in *Re Golden Casket Art Union Office* the Full Court of Queensland had declined to follow *Wheeler v Somerfield*, but said that *Wheeler v Somerfield* had recently been applied in this court. His Honour did not, however, cite the case in which it had been applied and my own research has been unable to identify such a case. In the event, Malcolm CJ found it unnecessary to consider the question of leave to appeal but said that if the decision in which *Wheeler v Somerfield* had been applied was to be challenged it would need to be considered by a bench of five judges.

101 The point was raised again in *Montarello v Berkman Capital Finance Pty Ltd T/as Flexirent* (Unreported, WASCA, Library No 970105, 21 March 1997), which was an appeal from the decision of a

master setting aside the service of a writ. The respondent applied to strike out the appeal on the ground that the point was entirely academic as the defendants to the writ had since entered unconditional appearances and were therefore deemed to have been duly served. The appeal was struck out. In the course of his ex tempore reasons for judgment, Malcolm CJ (with whom Franklyn J agreed) referred to *Wheeler v Somerfield* as 'authority for the proposition that where the appellant appeals on a number of grounds as well as costs, the Court will deal with the issue of costs even if the appellant has failed on all other matters' (7 - 8). His Honour observed that on its face the appeal appeared to involve only the costs of the application before the master, but noted that the appellant had said it did not challenge the costs order in the event that the decision of the master was affirmed. Malcolm CJ concluded that the question of leave did not therefore need to be considered.

102 The statements in each of those cases on the application of *Wheeler v Somerfield* are clearly by way of obiter. While Malcolm CJ referred in *Franz v Allum* to an earlier decision in which *Wheeler v Somerfield* had been applied, as that earlier decision was not identified and cannot be found it would seem that his Honour may have been mistaken as to its existence.

103 In any event, *Wheeler v Somerfield* was a different case to the present case. In that case, the appellant had appealed against the order dismissing par 2(a) of the statement of claim and the costs order made against him as a consequence of par 2(a) being dismissed. The question there was whether, once the substantive appeal failed, the appellant required leave to appeal against the costs order. While the costs appeal did not depend upon the outcome of the substantive appeal, the appeals were related. In the present case, there is no appeal against the order of the primary judge on the chamber summons. The appeal is simply against the costs order on the chamber summons. The appeal against the costs order has no relevant connection with the substantive appeal; it is an altogether separate and unrelated issue.

104 Apache's contention that leave is not required in this case is unsustainable. It is inconsistent with the plain object of s 60(1)(e), which reflects a legislative intention to limit the opportunity for appeals against costs orders where the issue of costs is not consequential upon the outcome of a substantive appeal. The obvious intention is that ordinarily the exercise of the discretion as to costs of a judge at first instance will not be open to challenge; an appeal will lie only where a party can persuade the judge or this court that there are exceptional circumstances which

warrant leave to appeal. In my view, it could never have been intended that so long as a party appeals against a substantive final order in an action, it should have carte blanche to appeal, without leave, against any costs order made in the course of the proceedings. No purpose would be served by such an exception and it would significantly detract from the utility of s 60(1)(e).

105 In my view, leave to appeal is required whenever the challenge to the order as to costs goes beyond the mere consequence of the outcome of a substantive appeal on the merits. To the extent that *Wheeler v Somerfield* is authority to the contrary, I would not follow it.

106 In the event that leave was required, senior counsel for Apache sought such leave orally on the hearing of the appeal. Apache submitted that the primary judge had erred in ordering that the costs be costs in the appeal. It argued that the costs of the application were irrelevant to the outcome of the appeal and that as Apache had been the successful party on the application it should have had the costs of the application. I do not agree.

107 It is trite law that the court has a wide discretion as to costs, to be exercised judicially according to the demands of justice in the particular case. It is equally well-established that an appellate court will not readily interfere with the exercise of that discretion. It is not sufficient that the appellate court would have exercised the discretion differently. It must be established that the court below made an error of the kind described in *House v The King* [1936] HCA 40; (1936) 55 CLR 499.

108 No such error has been identified by Apache. I do not accept Apache's submission that the outcome of the appeal was irrelevant to the disposition of the issue of costs. As his Honour pointed out, whether Apache was in fact entitled to redact the material would ultimately depend on the outcome of the appeal. Nor do I accept that Apache was entitled to the costs because, so it is contended, it was substantially successful on the application. Whether or not Apache was substantially successful on the application (and it is not self-evident that it was), it is certainly not an inviolable rule that costs must follow the event. That is particularly so in

NEWNES JA
BEECH J

relation to an interlocutory application. On an interlocutory application, there are many circumstances where that would not be a just outcome and justice requires that the costs should be determined by the outcome of the action. It is therefore often appropriate that the costs of an application be made costs in the cause: *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615; [1986] 2 All ER 529, 536.

109 The primary judge set out the factors which had caused him to make the costs order he did. And as Ormiston JA observed in *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436:

[I]t is extraordinarily difficult to show that a court of first instance or a tribunal with wide discretionary powers has erred in the exercise of its powers to award costs, if there be some basis for making an order other than the conventional order in favour of the successful party (457).

110 Apache has not surmounted that hurdle. In the circumstances, an order that the costs be costs in the appeal was a course that was reasonably open to the primary judge, for the reasons his Honour gave. I would refuse leave to appeal and dismiss these grounds of appeal.

Conclusion

111 None of the grounds of appeal have been made out. I would dismiss the appeal.

112 **BEECH J:** The appellant's written and oral submissions focused primarily on seeking to establish error on the part of the Information Commissioner, rather than identifying error on the part of the primary judge. Given the nature of the appellant's complaints it was for the appellant to demonstrate error on the part of the primary judge as to the proper reading of the reasons of the Information Commissioner: *Zhang v Minister for Immigration and Multicultural & Indigenous Affairs* [2005] FCAFC 30 [17]. It failed to do so. To the contrary, in my view the primary judge was correct to dismiss the appeal to him, for the reasons that he gave.

113 I agree with Newnes JA that, for the reasons he gives, the appeal should be dismissed.