# New South Wales Supreme Court

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| **CITATION :** | **DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES v. DESSERTAINE & ORS [2003] NSWSC 972** |
| **HEARING DATE(S) :** | Friday 10 October 2003 |
| **JUDGMENT DATE :** | 10 October 2003 |
| **JURISDICTION:** | Civil |
| **JUDGMENT OF :** | Greg James J at 1 |
| **DECISION :** | Dismiss the summons. The plaintiff is to pay the first and fourth defendants' costs. As to the other defendants, no order as to costs. |

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| **CATCHWORDS :** | Children's Court - care orders - whether necessary for magistrate to determine existence of all reasons asserted for an order - whether Act prevents an undetermined reason being later considered on mkaing of final order - whether insufficient reasons given. |
| **LEGISLATION CITED :** | Children & Young Persons (Care & Protection) Act 1998<br>Supreme Court Act 1970<br>Evidence Act 1995 |
| **CASES CITED :** | N/A |
| **PARTIES :** | DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES v.<br>DESSERTAINE, Marie-Christine & ORS |

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| **FILE NUMBER(S) :** | **SC** No. 12093/03 |
| **COUNSEL :** | Plaintiff: P.J. Saidi<br>First Defendant: A. Moen<br>Second Defendant: In person<br>Third Defendant: ---<br>Fourth Defendant: Ms. Falloon |
| **SOLICITORS :** | Plaintiff: I.V. Knight<br>First Defendant: Peter R. Murphy & Co.<br>Second Defendant: In person<br>Third Defendant: I.V. Knight<br>Fourth Defendant: Bowring Macaulay & Barrett |

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**IN THE SUPREME COURT**
**OF NEW SOUTH WALES**
**COMMON LAW DIVISION**

**GREG JAMES, J.**

**FRIDAY 10 OCTOBER 2003**

**No. 12093 of 2003**

**DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITY SERVICES v. DESSERTAINE & ORS**

**JUDGMENT**

1 **HIS HONOUR**: This is an application brought by the Director General of the Department of Community Services against the first defendant, the

mother of a child known to these proceedings by reason of a suppression order as Irene (that is not her real name), the second defendant the child's father, the third defendant the Children's Court of New South Wales and the fourth defendant, Miss Rachel Ward, the child's personal representative in proceedings in the Children's Court of New South Wales who I had directed be joined in the proceedings. The first and fourth defendants opposed the application; the second defendant supported the application but made no separate submissions to those of the plaintiff; the third defendant had notified the court in its appearance that it submitted to such orders as the court might make, except as to costs.

**The orders sought**

2 The proceedings are brought by further amended summons, which I gave leave to file in court today. The orders sought in the further amended summons are, firstly, for a declaration that a magistrate sitting as the Children's Court erred in law in determining an application made for a care order by the plaintiff in respect of the child (under the Children and Young Persons (Care and Protection) Act 1998), on various grounds including that the magistrate declined to determine or refused to determine a ground for the order made on the application by the plaintiff in that court that under s.71(1)(c) the child had been or was likely to be physically ill-treated, also that he failed to satisfy himself on full evidence that the child was in need of care and protection pursuant to the provisions of s.71 and s.72 of the Act, and failed to make findings of fact and provide sufficient reasons as to why the court was satisfied that the child or young person was in need of care and protection.

3 The plaintiff also claims an orders pursuant to s.65 of the Supreme Court Act that the learned magistrate failed to determine according to law the plaintiff's application that the subject child is, for the purpose of s.72, a child in need of care and protection on the basis of the grounds referred to in s.71(1)(c) and s.71(1)(e) of the Act. Section 71(1)(e) provides as one of the reasons which might support the magistrate's holding that the child is in need of care and protection to be that the child is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living.

4 There is also sought in the summons, further and in the alternative to order 2, an order in the nature of mandamus, which seeks that the learned magistrate might be ordered to deal with the application "according to law".

5 In the written submissions filed by the Director General and made orally before me, it has become apparent that the complaint is that the magistrate failed to make findings of fact sufficient to support the reasons referred to in s.71(1)(c) and s.71(1)(e) of the Act and failed, so it is said, to give sufficient reasons for what he did do, which was to decide that the child was in need of care and protection within the terms of the Act, but only expressly enunciated the matters to which s.71(1)(e) refers as the basis of the

decisions.

6 Order four seeks certiorari to remove into this court the record of the Children’s Court proceedings and to quash the order made by the magistrate.

7 Order five seeks that the matter be remitted to the Children’s Court thereafter for determination according to law.

8 The orders sought reflect in various ways the Director’s primary contention that it was legally incumbent on the magistrate to determine all the bases proffered for making a care order regardless of the basis on which the order was made being itself sufficient to support the making of the order. It is submitted this asserted duty arises under the Act.

**The statutory context**

9 It is necessary to examine the statutory context.

10 Central to the submission is s.71 of the Act which provides as follows:-

> “1. The Children's Court may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any of the following reasons:-
> (a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,
> (b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,
> (c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,
> (d) subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents,
> (e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,
> (f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,
> (g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,
> (h) s.171(1) applies in respect of the child or young person.
> 2. The Children's Court cannot conclude that the basic needs

of a child or young person are likely not to be met only because of:-
(a) a parent's disability, or
(b) poverty.
Note - The Children's Court cannot make a care order in circumstances to which s.75(2) applies.”

11 Section 72 also provides:-

“1. A care order in relation to a child or young person may be made only if the Children's Court is satisfied, on the balance of probabilities, that the child or young person is in need of care and protection or that even though the child or young person is not then in need of care and protection:-
(a) the child or young person was in need of care and protection when the circumstances that gave rise to the care application occurred or existed, and
(b) the child or young person would be in need of care and protection but for the existence of arrangements for the care and protection of the child or young person made under section 49 (Care of child or young person pending care proceedings), section 69 (Interim care orders) or section 70 (Other interim orders).
2. If the Children's Court is not so satisfied, it may make an order dismissing the application. “

12 It is apparent that s.71 only permits the Children’s Court to make a care order in the event that the magistrate is satisfied of the matters set out in s.71(a)-(h). Those are the reasons under the Act which permit the Children’s Court to make the court orders.

13 Under s.71, notwithstanding that any or all of the relevant reasons are made out, it remains open to the magistrate sitting as the court to exercise a discretion whether to make an order which discretion must be exercised in accordance with proper judicial principles. This may mean, of course, that the conduct, which might constitute the matters referred to in each of the numbered sub-paragraphs, is such that, on a proper exercise of discretion and principle, an order must be made so that the court acts in accordance with the law.

14 I turn to the more general scheme of the Act which provides, when dealing with care applications, the regime in Chapter 5 Part 3 for emergency protection and assessment including removal of children by the Director-General or a police officer without warrant in limited circumstances. The circumstances in each case envisage the immediate risk of serious harm, the need for care and protection or the need for care and protection and certain additional circumstances as prescribed by the subsections of s.43. A procedure to have the matter brought before the Children’s Court is then provided for by the Act. That procedure includes the making of assessment orders under s.53.

15 The provision allowing application to the court for the making of an assessment order is s.55. That order may be made if a care application has been made, and it may be made whether or not an application has been made for any other order including an emergency care and protection order.

16 Care applications are provided for by Part 2. A care application, by reason of s.61(2) must specify the particular care order sought and the grounds on which it is sought. Section 61(3) provides that the orders sought may be varied but only with the leave of the Children’s Court. A care order is defined by s.60 to be an order under Chapter Five for or with respect to the care and protection of a child or a young person and includes a contact order under s.86.

17 Section 62 provides that an order for the care and protection of a child or a young person may be an interim or a final order “except as provided by this Part”. The closing words of s.62 refer, in my view, to a number of provisions of the Act, such as ss.72, 74, 75 and 76, which make specific provision for particular care orders that may be made under the Act.

18 Section 67 provides that the making of a care application for a particular care order does not prevent the Children’s Court from making a care order at that time, different from, in addition to or in substitution for the order for which the application was made, provided all prerequisites to the making of the order are satisfied.

19 Section 68 provides that a party to proceedings may file further evidence and may amend a care application but requires the leave of the Children’s Court to do so.

20 Section 69 provides for interim care orders. An interim order may be made on the application of the Director General but only when the Director General had satisfied the onus of establishing that:-

> “It is not in the best interests of the safety, welfare and wellbeing of the child ... that he or she should remain with his or her parents or other persons having parental responsibility.”

21 Section 70 provides that the Children’s Court may make other care orders as it considers appropriate for the:-

> “safety, welfare and wellbeing of a child ... before it pending the conclusion of the proceedings.”

22 Section 70A provides that an interim care order should not be made unless the court is satisfied that the making of the order is necessary in the interests of the child and is preferable to the making of a final order or an order dismissing the proceedings.

23 Section 71 sets out the discretion and reasons for its exercise in relation to the making of a care order, to which I have referred.

24 Section 78 requires the Director General must present a care plan, which must make provision for the matters referred to in s.78(2) including, among

other things, parental responsibility, placement and contact. Section 78(3) importantly requires that the care plan be made as far as possible with the agreement of the parents. It is apparent that particular proposals might well be considered in the light of the particular circumstances relating to the individual child and that child's relationship with its parents or carers who will need to be consulted and will plainly need to be party to any proposed arrangement.

25 Section 78A provides for permanency planning, that is the making of a plan that aims to provide a child with a long term secure and stable placement meeting a long term need.

26 Section 79 deals with parental responsibility when a court finds a young person is in need of care and protection and, particularly, deals with the care having regard to the criteria set out in s.79(2).

27 Section 80 provides that:-

> "The Children's Court must not make a final order: -
> (a) for the removal of a child from the care and protection of his or her parents, or
> (b) for the allocation of parental responsibility in respect of the child,
> unless it has considered a care plan presented to it by the Director-General."

28 The Act seems to envisage that the provision of the care plan and of any assessment to the court will precede the making of a final order. The final order is, however, not necessarily permanent, unchanging and irrevocable. It may be rescinded or varied, see s.90. Its operation is to be monitored under s.82.

29 A permanent plan, which is referred to not only in s.78A but ss.83, 84, 85 and 85A, itself may be varied.

30 A right of appeal is provided to the parties including the Director General but not in the case of an interim order. An appeal is to be by way of a new hearing and fresh evidence. A transcript might be admitted. Appeal is to the District Court.

31 Chapter Six provides that the procedure before the Children's Court. Proceedings are not to be adversarial. This, at least, suggests to me that it is not incumbent on the court to make positive rulings for or against all matters advanced by one party or the other in evidence, particularly since the proceedings are to be conducted with as little formality and as little technicality as the circumstances permit and the court is not to be bound by the rules of evidence unless it determines that those rules, or such of them as are to apply, should apply to the proceedings. The matters are to proceed expeditiously and proceed in some such way as will enable them to be explained to the child.

32 Section 247 provides that nothing in the Act limits the jurisdiction of the Supreme Court. Thus, this court retains its jurisdiction to review the actions

and decisions of the Director and the Department, the proceedings and orders of the Children's Court. That is the jurisdiction that has been invoked by the plaintiff here.

### The hearing before the magistrate

33 At the hearing, three reasons were advanced for the making of the order: one on which the order was made; one which the plaintiff says the magistrate should also have found and a further reason, initially advanced, that the child's basic physical psychological or educational needs were not being met or were not likely to be met by his parents, under s.71(1)(d).

34 The Departmental representative at the hearing did not persevere with the assertion that the further reason might be made out in the light of the concession that was made on behalf of the mother of the child, who withdrew her opposition to the order being made, in addition conceding (without admissions) the matters referred to in s.71(1)(e), the first reason, but who did not expressly and positively concede the second reason.

35 The proceedings before the magistrate were recorded on a transcript, which is contained in some 17 pages and which is annexed to the affidavit of Leslie van Stellingwerff and marked Annexure A. That affidavit has been read in support of the Director General's application. In paragraph 6 of that affidavit, there is an expression of a view held by the deponent as to what the transcript says was said by counsel appearing for the mother. The contention appears to be, by the deponent, that counsel for the mother said that:-

> "if an issue is not found on the finding, it cannot thereafter be addressed in further proceedings of the matter so therefore the moment your Worship makes that finding it cannot be addressed."

36 However, when I turned to that passage in the transcript, which appears at page 11 line 40, I was informed by counsel for the plaintiff that the attribution of that statement to counsel for the mother was incorrect. I am informed that a number of errors had crept into the transcript and that that passage does not read as the deponent, apparently, thought it did. It was not, in fact, counsel for the mother, but counsel for the Director that made this assertion. That fact deprives the submission that it was necessary to make a finding on each and every ground as there would be opposition to any further finding in the absence of a finding made at the hearing of a great deal of its significance.

37 That submission is further deprived of significance by the concessions made today by counsel for the mother and counsel on behalf of the children's representative, that the assessment the learned magistrate ordered was to proceed upon the basis of the withdrawal of opposition, the mother's concession and all the factual material before him, notwithstanding to what reason under s.71(1) that material might relate so that a care plan could properly be considered on the basis of the full breadth

of that material. So that nothing is being offered in opposition to the suggestion that all proper factual conclusions which might be drawn by those preparing the care plan were open to them for the preparation of a proper care plan.

38 I find no assistance is provided by paragraph eight of that affidavit which seems to relate what other persons, those engaged in the conduct of care proceedings in other matters, believe might be an issue in other proceedings as a basis for asserting the magistrate erred in this case, but I understand that this affidavit was prepared primarily for the purposes of seeking expedition. I bear that in mind when considering what it contains. It does seem to exemplify what I have been told by Mr. Saidi of counsel for the plaintiff that there apparently is a view about, in New South Wales, notwithstanding there is nothing to this effect that I have been able to find in the Act or in the New South Wales case law, that in the event that the magistrate does not, at the time of determining whether a child is in need of care and protection, determine all specific reasons that might be available under s.71(1) for such a conclusion it would not be proper or indeed it might be legally impermissible at a further stage of the proceedings to determine such a reason existed or to proceed even to consider it. I appreciate that such a view underlies the application before me.

39 I see no basis to conclude that the magistrate has fallen into legal error as failing to give accord to that view or so far as it is said that that view might be a lawful view by failing to act in accord with it. I do not consider that view is supported by my reading of the Act, notwithstanding I was referred to cases here and in the United Kingdom.

40 In this case I do not see that such a view would have had relevant operation in any event since, when I look to what happened before the magistrate, and this is a view of what occurred which is espoused by both counsel for the mother and counsel for the child’s representative, it is clear that the mother withdrew her opposition to the conclusion that the child was in need of care and protection. That withdrawal was not qualified or limited. Further, the magistrate had read all the documentary evidence and affidavits provided by both sides, and took into account not only that the mother had withdrawn her opposition but, in addition, the mother conceded the reason referred to in s.71(1)(e) albeit “without admissions”

41 The magistrate expressed the view that the further progress of the matter should not be impeded by the assessment he was ordering being restricted to that reason alone.

42 The matter has plainly proceeded upon the basis that the mother offered no contest to the magistrate’s being persuaded by the material before him of those other matters which after the withdrawal of the reliance on the matter in s.71(1)(d) still remained before him and he being content to make the order on at least the conceded basis in the absence of opposition. Not only that, the application to have the orders made on that basis seems to have been supported by the child’s father, who appeared on that occasion,

and by the representatives of the child.

### The asserted failures of the magistrate

43 It is somewhat incongruous that the Department, that moved for the care order, obtained the care order and obtained the finding necessary to support the care order has come to this court seeking to have the care order set aside on the basis that it wants the magistrate to make express determinations and record reasons not only for what he did in acceding to the application but also to go further and to determine more than the Act says is necessary to make the order.

44 This position is taken, notwithstanding that, the magistrate had, it is conceded by counsel for the Department, considered all the evidence and taken into account the withdrawal of opposition and the concession made by the mother and did make the order for one of the reasons the Department had advanced, to wit, that in s.71(1)(e).

45 As to the contention that the magistrate had failed to give any or sufficient reasons why he was satisfied and hence had failed to find the second reason, on my reading of the transcript, he did. He gave his reasons for his satisfaction, they included his reference to all the material he had read, that opposition to the order had been withdrawn and that the specific concession I have referred to had been made. Those reasons were, in the circumstances, entirely sufficient.

46 It was also contended that the magistrate erred in his interpretation of s.67, although no reason was given by way of grounds for that contention.

47 Section 67, as I have said, provides that the making of the care application in a particular care order did not prevent the Children’s Court from making a different care order. I fail to see how s.67 could possibly be said to have somehow converted the order that the magistrate made from being the order the Department sought. True it is that he may not have accepted all the arguments that were advanced to him but he at least accepted one of the reasons and in my view, both.

### The submissions

48 Extensive written submissions have been filed in support of the Department’s position. I have read and considered them. Oral submissions were also made. In consequence, I will deal with them and give a more detailed basis for the views I have already expressed.

49 It is entirely to be regretted that notwithstanding the asserted urgency of this matter and that an order for expedition was obtained, those written submissions were not provided to the court until the day prior to the matter coming on for hearing and were not provided to counsel for the mother and counsel for the children’s representatives until the day prior to the hearing.

50 In the extensive written submissions there are a number of contentions concerning the way in which the Act should be administered. Amongst other

contentions that are made is that it is necessary that procedural fairness be afforded. It is submitted that procedural fairness was not afforded to the Department in that inadequate reasons or no reasons were provided for deciding the matter in favour of the Department only on the conceded basis, notwithstanding that all the evidence had been considered and that opposition had been withdrawn. I am unable to see any lack of procedural fairness. The transcript makes clear that the fullest opportunity was given by the magistrate to the departmental representative and full notice not only that the magistrate would make the order sought but of the basis on which it would be likely to be made.

51 Emphasis was placed upon an asserted necessity to give full reasons even in these circumstances. As I have said, I do not conclude that the magistrate erred by failing to give reasons or sufficient reasons in the context of there having been, by the magistrate, a reading of all the evidence, a reference to that and an obvious appreciation of the factual issues, an acceptance by the magistrate of the concession and proper understanding of the withdrawal of the opposition as I have referred to.

52 It is submitted that it was incumbent upon the magistrate to ensure that all parties accepted the concession. I am unable to detect in the transcript that the Departmental representative rejected the concession. True it is she also sought that the other reason be determined in the Department’s favour but she did not reject the concession that was made or at any point indicate the evidence, the concession and the withdrawal of opposition were in any way insufficient for the statutory purposes except upon the basis of the view for which I am unable to find support that the matter would not be able to proceed later on any reason other than that found by the magistrate.

53 When I was referred by counsel for the Department to the cases in the United Kingdom and New South Wales to which I have earlier referred, I sought assistance as to whether in them or elsewhere was any authority for that view expressed by any superior court and after some considerable debate I was told there was none. I was, however, referred to English cases concerning a two-stage or “threshold” process of dealing with applications for care orders. I have been referred also to New South Wales cases referring to the “threshold”. True it is that for any other orders to be made ancillary to the making of a care order or procedurally for the making of a final order, the magistrate must find the need for care and protection. Such a finding is not necessarily antecedent but is necessary. It is not, however, required that there be a separate hearing to determine that and then a consequential subsequent hearing to make a final order, as I read the Act. The need for care and protection is a necessary finding to be made because that is the finding upon which the Act posits whatever other orders might be made. The Act does not so treat the reasons for that finding. I see no need for any such finding to be made by a different magistrate to the magistrate who considers what other orders might be made and particularly the final order.

54 I am told that as a result of that view, a practice seems to exist that one

magistrate will determine the care order and that other magistrates will then make subsequent orders, and that is why they will only proceed upon the basis of what reasons were found under s.79(1) by the former magistrate for the making of the care order.

55 If there is some such practice it may well warrant, in some such case in which it has been adopted, an examination on appeal, but this is not that case. This magistrate has indicated here that the assessment process which is, after all, for the purpose of preparation of the care plan, should proceed on the widest of all possible bases encompassing all the facts arising from the materials before him. It does not seem to me that there is any such restriction on him doing so, nor could anyone point to anything under the Act saying there was. I see no ground for complaint.

56 Reference to the English authority, on my reading of it, appears to be entirely mistaken insofar as that reference is made for the purpose of suggesting that it is legally imperative that matters be conducted by some sort of separate hearings or in such a restricted way. I do not see those cases represent authority for that view.

57 Reference has also been made to the English cases to suggest that no such concession as was made here should be received without it having been made in a detailed and express fashion such as might well be appropriate to the admission of the commission of a criminal offence.

58 If that was so, in all such matters as this where the Department makes allegations as it made here, often of mistreatment and assault, it would be impossible for the matters to go ahead on concessions unless admissions liable to be tendered in prosecutions were made. If that were so, they would be unlikely to be made.

59 Counsel for the Department has suggested that the application of s.128 of the Evidence Act 1995 might avoid that difficulty but that is a section which is notoriously difficult and complicated to apply or administer and obviously problematical where the rules of evidence under the Act might only apply if the discretion to apply them is exercised. It has been suggested that all concessions and admissions should be made in detail in writing. How this could avoid the effect to which I have referred I am unable to say. In effect, such a restriction would prevent a parent from conceding that their child should be taken into care or would compel the magistrate to embark upon the resolution of complex but uncontested matters of fact or, indeed, conceded matters.

60 The written submissions submitted that it was critical the court determine the specific ground the magistrate in this case it was asserted did not. The submissions contained a number of errors in paragraph 20. Specific reference was made in that paragraph to some lines in discussion during submissions to the magistrate as supporting the proposition that the magistrate had mistaken his jurisdiction. I merely read those passages in the transcript as the magistrate raising for the parties’ consideration and submissions complexions that the evidence might take. I do not see that the

references made there show that the magistrate had mistaken his jurisdiction.

61 It is interesting that in subsection (vi) of paragraph 20 it was set out that the learned presiding magistrate dealt with the matter on the basis that the mother was prepared to consent “without admission” to the court making a finding on the provisions of s.71(1)(e) and the submission was made that such an approach was impermissible “having regard to the overall circumstances of this case.” The suggestion here made seems to be that this case raised some special legal rule not necessarily applicable to others. I am unable to see for myself why this should be so. Nor am I able to accept that it is not a valid exercise of power or a sufficient discharge of his duty for the learned Children’s Court magistrate to accept a concession made by a party “without admissions” even “in such circumstances”.

62 It is also contended that the concession was not a concession of any factual matters. It plainly was, however, and it was plainly a concession of the matters to which s.71(1)(e) related. The magistrate knew what they were, they were reported in all the evidence. The suggestion that the concession was not a concession made by consent seems to be a suggestion that it was not a real concession because it was not expressly accepted by the departmental representative. As I have said, I am unable to see that the departmental representative made any objection. That case representative did not say that the concession was not accepted. It was not a case of rejection of or opposition to the concession. It was rather a case of her accepting what she had got and wanting more. But that more was not forthcoming by way of concession. The substance of it remained, however, in the evidence before the magistrate. That representative, in my view, did accept the concession as far as it went, as did the magistrate and the evidence supplemented it.

63 It is accepted in paragraph 25 of the submissions that it is not inappropriate in all cases for concessions to be made by parents or other interested parties. However, as I have already said, it is contended that those concessions have to be made to such an extent and in such detail as to amount, as it were, to full confessions in themselves.

64 That appears to be the proposition that counsel for the Department accepted when he advocated a procedure by way of concession which would require the party making the concession to enter the witness box, and have applied to their circumstances the provisions of the Evidence Act 1995, particularly those relating to the making of admissions, take an objection to answering questions, have that objection determined, then have the benefit of a certificate under s.128. That is not the making of a concession, that is the giving of evidence and the making of admissions.

65 The English authorities to which I was taken concerning the making of concessions and the considering of questions of fact, in my view, do not assist the submission made on behalf of the Department at all. A number of restrictions on the court’s power to receive admissions or concessions were

submitted to be appropriate in paragraph 26. It is not necessary for the purposes of determination of this case that I deal with that. Suffice it to say that as to the idea that the court must embark on an enquiry where a concession or admission is offered before accepting the concession or admission, to ascertain the primary motive for the party making the concession or admission and ascertain that the making of the concession or admission was not to obtain some advantage in the proceedings, or as seem to be submitted orally, to avoid the evidence being used later or in other proceedings by making the concession without admissions or on a without prejudice basis and, if so, to reject it, is one that is not at all attractive when one has regard to the purposes of concessions or admissions as having some utility in enabling the court to determine proceedings before it.

**Conclusion**

66 I conclude then that I am not persuaded that the learned magistrate fell into any such error as might have warranted a declaration, an order under s.65, or orders in the nature of mandamus or certiorari as have been sought. Further, bearing in mind that the assessment, I am informed, has proceeded upon the wider basis and having regard to the conduct of the parties below, as I have considered, even if the legal ground for any such order had been made out, this would be a proper case for the exercise of a discretion to decline to make any of the orders sought.

67 I conclude, therefore, that the summons should be dismissed.

68 Although the Department did not seek costs, expressing the view that this was a matter of general public importance, nonetheless, the legal representative of the child and the legal representative of the mother, are persons who have been properly joined as defendants in the proceedings and who, in the interests of their respective clients, have properly been before the court. The child’s representative is legally aided. There is no good reason why the costs of that representative should not be paid by the plaintiff to relieve part of the burden on the Legal Aid authorities in this State, even though they are one other Department in the same Government with the Department of Community Services. In addition, I see no reason why the mother’s costs should not be paid bearing in mind the conduct of the proceedings below on her behalf and the conduct of them here. She was entitled to be heard, particularly because she had a real interest in whether or not she should be, as the Departmental submissions orally asserted, compelled either to dispute in whole any grounds asserted, even though they may effect her adversely, or to remain wholly silent -

> HIS HONOUR: Before proceeding to final costs determination, Mr. Sadie, is there anything further you want to say on the question of costs?
>
> SADIE: No, your Honour.

69 HIS HONOUR: In those circumstances I order the plaintiff pay the costs of the first and fourth defendants. As to the other defendants, there will be no order as to costs.

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Last Modified: 11/03/2003

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