
AUSTRALIA / JUDGMENT

Gregory, R.E. v. Philip Morris Ltd [1987] FCA 315

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CATCHWORDS

Contempt of Court - witness - intimidation - state of mind of
alleged contemnor.

Conciliation and Arbitration Act 1904

REGINALD EDGAR GREGORY v. PHILIP MORRIS LIMITED

V No. 2 of 1987

Gray J.

15th June 1987

Melbourne

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IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY V No. 2 of 1987

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INDUSTRIAL DIVISION

Between: REGINALD EDGAR GREGORY

(Applicant) And: PHILIP MORRIS LIMITED

(Respondent)

Coram: Gray J.

Date: 15th June 1987

REASONS FOR JUDGMENT

On 29th April 1987, the trial of this matter was proceeding in Court No. 5 at 451 Little Bourke Street, Melbourne. The case for the respondent was in progress. In the course of the afternoon, Dr. Jessup, counsel for the respondent, announced that two witnesses whose arrival had been expected, had not arrived and that he was unable temporarily to proceed with the evidence. The Court adjourned for a short time. On the resumption of the hearing, evidence was given by one Andrew James Egan and then

by Peter John Brown.

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An order having been made early in the trial excluding witnesses from the court room, Mr. Brown waited in the ante-

room until he was called to give evidence.

On the following morning, Dr. Jessup informed the Court that allegations were made as to the intimidation of a witness. He invited the Court to deal with the matter as a contempt in the face of the Court, pursuant to 0.40 r.] of

the Federal Court Rules. Some discussion took place,

following which the trial was adjourned to provide an opportunity for the filing of a notice of motion, a statement

of charge and an affidavit, in accordance with 0.40 rr.5(1)

and 6 of the Federal Court Rules. AS a result, on 30th

April 1987, a notice of motion was filed seeking that John Karadeas be punished for contempt of Court. The notice of motion was made returnable at 9.45 am on the following day,

and the time for service was abridged by the Court.

At 9.45 am on 1st May 1987, Mr. Karadeas appeared by Mr. Marin of counsel, who requested an adjournment to enable a defence to be prepared. The motion for contempt was finally heard on Monday, 11th May 1987. Mr. E. W. Gillard Q.C. appeared with Dr. Jessup for Philip Morris Limited to

move the Court, and Mr. Marin appeared for Mr. Karadeas.

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The statement of charge is in the following terms:

"John Karadeas is charged with contempt of this Honourable Court in that, between 3.30 p.m. and 4.00 p.m. on Wednesday 29th April 1987, outside the Court Room in which the proceedings herein were then being conducted:

1. he said to one Peter John Brown, who was then waiting to be called to give evidence

herein, in substance - 'You will get

yours' - and when the said Brown said in substance - 'Look, I don't even know what

they want me for' - he said in substance - *'You'll get yours, you'll get yours';

2. he repeated the statement to the said Brown 'You'll get yours' several times;

3. he made at least one such statement

leaning towards the said Brown and holding his face about 6 to 10 inches in front of the said Brown's face;

4. at the time of making at least one such statement to the said Brown he was making offensive facial expressions to the said Brown ;

5. he made the said statements and acted in the manner aforesaid believing that the said Brown was in the precincts of the

Court for the purpose of giving evidence on behalf of the Respondent;

6. he made the said statements and acted in the manner aforesaid with a view to

detering the said Brown from giving evidence or giving full and frank evidence

herein;

7. he made the said statements and acted in the manner aforesaid with a view to instilling in the said Brown an apprehension that some adverse or

prejudicial consequences would be visited

upon him by reason of his being a witness herein or by reason of the evidence which he was to give;

the statements and conduct of the said Karadeas as set out above, being calculated to and having

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a tendency Csicl to interfere with the administration of justice with respect to the calling and giving of evidence herein.

DATED the 30th day of April 1987.

Csigned] Solicitors for the Respondent"

Mr. Brown is an electrical supervisor employed by Philip Morris Limited. Mr. Karadeas is a fitter employed by the same company. It is common ground, that at the time of the alleged contempt, Mr. Karadeas and Mr. Brown were both in

the anteroom of the Court. Also present in that room were

others, including Terry Brush and her husband Philip, Ivor Wheeler, Ivan Jameson, Bill Wilson and Delma Gregory, the

wife of the applicant in the proceeding. Mr. Brown was leaning on the wall ata corner opposite the lift. Mr.

Karadeas and some or all of the others mentioned above were

standing near the window, engaged in conversation.

Mr. Brown's evidence was that an altercation occurred between himself and Mrs. Brush, who was unknown to him. The

evidence is set out in the following terms in his affidavit:

"5. Then the lady enquired loudly - 'Why are you staring at me?', I said - 'What?'. She repeated loudly, - 'Why are you staring at me?'. I couldn't believe what I was hearing as I was deliberately trying to ignore the group. I said ~ 'I am not staring at you'. She then started moving towards me and said - 'Yes you were, you were staring at me'. She stopped in front of me and said - 'Now why were you staring at me?'. I once again denied that I had

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been staring at her. She then walked back to the group."

Mr. Brown's evidence was that an altercation then began between himself and Mr. Karadeas. In his affidavit, this altercation is described as follows:

"6. The group was looking at me and Karadeas said in a raised voice, - 'Now there's a man with 20-20 vision', and gesturing with his right hand, (palm toward himself and fingers opened widely). Once again I was at a loss as I had no idea what he was talking about. He repeated - 'There's a man with 20-20 vision'. I said 'What?', he repeated - 'There's a man with 20-20 vision'.

7. I said - 'What are you talking about?', he said - 'You know what I'm talking about, you'll get yours', and then began moving towards me. I said - 'Look I don't even know what they want me for'. As he was closing towards me he said - 'You'll get

yours, you'll get yours'. He stopped directly in front of me and leant his body forward so that his face was about 6 to 10 inches in front of mine and stood glaring at me while pulling offensive expressions on his face. He then repeated - 'You'll get yours'. He then turned away and joined in with the group who were preparing to enter the Courtroom."

Mr. Brown adhered substantially to this evidence under cross-examination.

Mr. Karadeas gave evidence in his own defence. He agreed that there was a conversation between Mrs. Brush and Mr. Brown in which Mrs. Brush was inquiring why Mr. Brown was staring at her. Mr. Karadeas's evidence as to the words used

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were somewhat different from that of Mr. Brown; he said that Mrs. Brush asked whether Mr. Brown knew her, and asked or told Mr. Brown not to stare at her.

Mr. Karadeas also agreed that he said something about Mr. Brown having 20/20 vision. His version was that he said, "Have you got your 20/20 vision working again, Brownie?". On Mr. Karadeas's evidence, this remark or

question was only said once, and nothing more was said about 20/20 vision.

Mr. Karadeas also denied having made any threat to Mr. Brown in the nature of "You'll get yours", or to have approached Mr. Brown at all. According to him, after his question about 20/20 vision, Mrs. Gregory suggested that proceedings inside the courtroom had begun again, and the group moved back into the courtroom.

The other six persons referred to above also gave

evidence on behalf of Mr. Karadeas. Each of them swore that she or he had not heard Mr. Karadeas say, "You'll get yours", or any words to that effect, had not heard Mr. Karadeas make any threat at all to Mr. Brown, and had not seen Mr. Karadeas approach Mr. Brown.

Although there were variations in detail, and the accounts of some of the witnesses were incomplete, the etdiar Tiel ol peamete

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evidence of these witnesses tended to confirm that a conversation took place between Mrs. Brush and Mr. Brown _in which Mrs. Brush asked Mr. Brown why he was staring at her, asked whether he knew her or she should know him, and asked him not to stare at her. The evidence also tended to confirm that a single remark about 20/20 vision was made by Mr. Karadeas, and that the group of people moved into Court as a

group, without Mr. Karadeas having approached Mr. Brown at

all.

Mr. Gillard accepted that the elements of contempt of

court must be proved beyond reasonable doubt before a person

can be punished for contempt. His submission was that there could be no possibility of mistake. According to him, the Court would have to take the view that one side or the other was lying, and should take the view that the lies were being told by Mr. Karadeas and the witnesses who gave evidence on his behalf. It was suggested that Mr. Karadeas had a motive for lying, namely that he was liable to be punished for contempt of court, and that the other witnesses were well disposed to him, and likely to want to assist him. Mr. Gillard made much of the fact that none of the six witnesses called on Mr. Karadeas's behalf was prepared to say in evidence in chief that no threat had been made. He put it that the witnesses all wished to help Mr. Karadeas but that their consciences would not allow them to go this far.

Instead, they sought refuge in the proposition that they had

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not heard any threat or seen any approach. Indeed, the Court

was treated to the unusual spectacle of counsel

cross-examining the witnesses to persuade them to say that no

threat was made, intending to ask the Court to disbelieve

this evidence if the witnesses were prepared to agree. Only Mrs. Gregory and Mr. Brush in cross-examination were prepared to agree with this proposition; the others allowed the possibility that Mr. Karadeas might have made a threat which

they had not heard.

In my view, I could not find Mr. Karadeas guilty of contempt of court without disbelieving his evidence and that of the six witnesses called on his behalf. This I cannot do. It is not enough to say that an accused person should be disbelieved because he or she has a motive for lying; if that view were taken, sworn evidence by an accused person in his or her own defence would never carry any weight at all. The question must always be whether the Court finds the evidence of the accused person worthy of credit. In the present case, having regard to all of the other evidence, I do so find. I was also impressed by the candour with which some of the other witnesses gave their evidence, notably Mrs. Gregory and

Mr. Brush.

I accept that it is unlikely that Mr. Brown should have fabricated the evidence which he gave. I am disquieted in

one respect about that evidence, however. It seems to me to

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be highly likely that a person threatened in the

Circumstances in which Mr. Brown claimed to have been

threatened, and believing as he claimed to believe that the

threat was associated with the fact that he was about to give.

evidence in Court, would seize the first available

opportunity to complain to someone who might be able to protect him from the consequences of giving evidence in the

face of the threat, and to deal with the person threatening. Such a person is the judge in charge of the trial at which the person gives evidence. Mr. Brown did not complain to me, but gave his evidence and left. On his evidence, the first complaint he made about the alleged threat was to the industrial officer of Philip Morris Limited in a car, on the way back to the company's premises at Moorabbin. He did not attempt to speak to the company's counsel or solicitor at the

end of the day's proceedings.

I find myself in the position of being unable to accept the version of one side against the other.

This means that I am in a state of doubt as to whether Mr. Karadeas made any

threat to or approached Mr. Brown in the way alleged. For this reason, the motion to punish Mr. Karadeas for contempt

of court must be dismissed.

Even if I had been satisfied that Mr. Karadeas did approach Mr. Brown and say "You'll get yours", in my view the

Same result would follow. If such a threat were made, there

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must be at least a doubt as to whether the threat had any connection with the fact that Mr. Brown was to be a witness in the proceeding, other than the fact that Mr. Brown's presence in the anteroom of the Court was the result of his appearance to give evidence. On the evidence, if Mr. Karadeas made any threat, he may well have been motivated to do so because of his belief that Mr. Brown had been staring at Mrs. Brush, and Mrs. Brush's reaction to the alleged staring. The fact that Mr. Brown was about to give evidence

in the proceeding may not have prompted the making of any threat, if one was made.

Mr. Gillard argued that, even if Mr. Karadeas threatened Mr. Brown for some reason other than Mr. Brown's attendance as a witness, a contempt was nevertheless committed. He drew attention to a number of authorities said to support the proposition that it is unnecessary to prove intention to interfere with the course of justice, in order

to establish that a contempt has been committed. In John

Fairfax & Sons Pty. Ltd. v. McRae (1955) 93 C.L.R. 351, at p.371, Dixon C.J., Fullagar, Kitto and Taylor Jd. said:

"The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded by the court as a relevant consideration, its importance varying according to circumstances."

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In R. v. Odhams Press Ltd.; Ex Parte Attorney-General [19573

1Q9.B. 73, at p.80, after referring to various authorities,

the Court of Appeal said:

"These cases clearly show that lack of intention or knowledge is no excuse, though it may have a

great bearing on the punishment which the court Will inflict and, in our opinion, they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognizance and punish.

The test is whether the matter complained of is

calculated to interfere with the course of justice, not whether the authors and printers

intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame. It is obvious that if a person does not know that proceedings have begun or are imminent, he cannot by writing or speech be said to intend

to influence the course of justice or to prejudice a litigant or accused person, but that

is no answer if he publishes that which in fact is calculated to prejudice a fair trial."

In *Brambles Holdings Ltd. v. Trade Practices Commission* (No.

2) (1980) 44 F.L.R. 182 at pp.194-195, Franki J. rejected an

argument that to prove a criminal contempt, it was necessary to establish the relevant mens rea, or guilty state of mind. In doing so, his Honour relied upon a passage from the judgment of Donovan L.J. in *Attorney-General v. Butterworth* [1963] 1 Q.B. 696 to Which I shall return shortly. Mr.

Gillard also referred to *Registrar Court of Appeal v. Collins*

[1982] 1 N.S.W.L.R. 682, at pp.690-691, where Moffitt P. said

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"While intention to interfere with the due administration of justice is not a necessary element in the offence, where it

does exist, contempt will be more easily found ...

With the exception of the *Brambles Case*, all of those cases involved the publication of newspaper articles, or (in the *Collins Case*) pamphlets, likely to influence the results of court proceedings which were then in progress. It is easy to understand why the law would cast on publishers the onus of ensuring that no interference with the course of justice occurs by reason of their publications. Leaving aside other

legal consequences, it is more difficult to see why a threat to

someone in the vicinity of a court should amount to a contempt of court if the person threatened happens to be a witness, even if the threat is not connected in any way with that fact. It cannot be the case that every threat uttered in the vicinity of a court whether to a witness or potential witness or to another person, is a contempt of court. Nor can it be the case that, if two people exchange threats in a vicinity of a court, and one turns out to be a potential witness, although that fact was unknown to the other at the time when the threats were uttered, that other person is guilty of contempt of court.

The authorities do recognize that there are some situations in which the intention or purpose or motive of a

person must be taken into account in determining whether he

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or she has committed a contempt of court. Such cases occur at least where people have performed acts which they were

entitled to perform, but which have had effects which might

be said to interfere with the course of justice.

Attorney-General v. Butterworth [1963] 1 Q.B. 696 was a

case concerning victimization of a witness after the relevant trial was finished. The witness concerned was dismissed from certain honorary offices within a trade association, after having given evidence against the trade association in the Restrictive Practices Court. Some of

those responsible for the dismissal were motivated by their

desire to punish the witness for having given evidence, some were motivated partly by that same desire to punish and

partly by other reasons, and some were motivated by the other

reasons only. In the result, the Court of Appeal upheld the

convictions for contempt of court against those who were

motivated, wholly or partly, by the desire to punish. At

pp.722-723 Lord Denning M.R. said:

"Much of the argument to the contrary was based on

Reg. v. Odhams Press Ltd., Ex parte Attorney-

General ££1957]3 1 Q.B. 731, which established, it was said, that the test of criminal contempt was objective and not subjective. I do not like those obscurantist expressions 'objective' and 'subjective'. But as the argument developed it seemed to go something like this: In considering whether a man has been guilty of contempt of court you do not look at his knowledge or intention, but only at what he did. If his action was calculated to interfere with the course of justice that is enough, irrespective of his state of mind at the time. It was said that

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such a test could fairly be applied whilst proceedings are pending, but not after they have concluded. But just see what this argument leads to. It would mean that, if a stranger struck a witness on his way home, he would be guilty of a contempt of court, even though he knew nothing about the case. But on the other hand if a party struck a witness on the other side after he got home and struck him because of the evidence he had given, he would not be guilty of contempt of court. Those strange propositions were said to

be supported by some of the observations in In re

Johnson ££(1888) 20 Q.B.D. 683. If they go so far as that, I cannot agree with them.

I think the short answer to this contention is that contempt of court is a criminal offence, punishable summarily by the court itself, and, like all criminal offences, it requires in general a guilty mind. I do not think that Reg.

- v. Odhams Press Ltd., Ex parte Attorney-General ££1957]3 1 Q.B. 73] warrants the large proposition that has been drawn from it; and in any case it has since been reversed by section 11(1) of the Administration of Justice Act, 1960. At any rate, the law requires a guilty mind in these cases of intimidation or victimisation of witnesses. It is easy to imagine cases where the dismissal of a witness from his employment, or his suspension or expulsion from a trade union, might well be done and justified for reasons quite apart from the evidence he has given, and that clearly would not be a contempt of court. It seems to me that the intimidation of a witness is only a contempt of court if it is done with the purpose of deterring him from giving evidence or influencing him to give it in a sense different from that in which he would otherwise have given it, and the victimisation of a witness is only a contempt of court if it is done with the purpose of punishing him for having given evidence in the sense he did."

At pp.725-726, Donovan L.J. said:

"The question is whether the respondents' action was calculated so to interfere, and this involves a consideration not of their state of mind on this particular point but of the inherent nature of their act: see as to this the decision in

Reg.v. Odhams Press Ltd., Ex parte Attorney-

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General [£19571 1 9.8. 731. Some time was spent in discussing the implications of this decision. It was suggested for the respondents that it means that the test in cases of contempt is always purely objective. Was the action of itself calculated to interfere with the administration of justice? An article publicly accusing a man of crime against whom criminal proceedings had already been begun would clearly have that effect. But simply to try to remove a man like Greenlees from two honorary posts which he held, and to do so in conditions of comparative privacy, could not, it is argued, possibly have a corresponding effect. I conceive the position, however, to be this. Reg. _v. Odhams Press Ltd., Ex parte Attorney-General C£1957 1 QO.B. 733 makes it clear that an intention to interfere with the proper administration of justice is not an essential

ingredient of the offence of contempt of court. It is enough if the action complained of is

inherently likely so to interfere. A newspaper

article accusing a man of crime after proceedings have been begun and before his trial plainly

answers that description. But there may be other

actions where the likely effect is not self-evident, and further inquiry will have to be

made. The present case is an instance. The respondents were within their legal rights in seeking to relieve Greenlees from his honorary posts. But if the object of doing so was not merely to exercise that right for the good of the branch but to punish him for the evidence which he gave before the Restrictive Practices Court,

and if the taking of such revenge was calculated to interfere with the administration of justice,

then it will be no answer for the respondents to

say that, while intending to punish Greenlees, still they had no intention of interfering with

the administration of justice. Thus far the case is no different from Req. v. Odhams Press Ltd.,

Ex parte Attorney-General [(CL19571 1 Q.B. 731. But where it differs is that in order to determine the likely effect of what the respondents did one has to inquire into their motives."

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On this issue, Pearson L.J. said nothing, other than to agree with the judgments of both other members of the Court. It is

clear that there are differences between the respective

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approaches of Lord Denning M.R. and Donovan L.J. It is also clear that both were of the view that, in a case involving victimization of a witness, the state of mind of the alleged contemnors was in some measure an element to be proved before the Court could find that a contempt had been committed. If this were not so, there could be no justification for the acquittal of the persons who have participated in the dismissal of the witness from his offices, but who were not actuated by desire to punish him for having given evidence

against the association.

In *In re B. (J.A.) (An Infant)* [1965] 1 Ch. 1112 at

pp.1122-1123, Cross J. (as he then was) discussed the extent to which the alleged contemnor, in a case involving threatening of a witness, must know that the person

threatened is a witness. His Lordship said:

"It is quite sufficient that he should know that

he is a potential witness - a person who, unless

prevented, will very likely give evidence." His Lordship did not discuss any question of the intention of the alleged contemnor to dissuade the person threatened from giving evidence, or to change the nature of her evidence, although it is clear from the facts found that his Lordship

must have been satisfied that the threat concerned was

directed to one or other of these ends.

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In Registrar of the Supreme Court, Equity Divison v. McPherson €19803 1 N.S.W.L.R. 688, the New South Wales Court

of Appeal was dealing with a case of destruction of a

document allegedly in anticipation of its being subpoenaed. At pp.697-699, Moffit P. and Hope J.A. discussed

Butterworth's Case and In re B. (J.A.) (An Infant). Their

Honours continued:

"The inquiry is whether a material purpose of GKM,

in destroying the document, was to prevent it from being produced to the Court upon the compulsion of a subpoena in proceedings then pending."

In Viner v. Australian Building Construction Employees and

Builders Labourers' Federation (1982) 2 I.R. 47, the question

was again one of intimidation of witnesses and parties. At pp.52-53, Keely J. made specific findings as to the purpose or intent of the alleged contemnors to dissuade persons from giving evidence, or from giving evidence unfavourable to the particular party, and to induce applicants in the proceedings to discontinue as applicants. There is no suggestion that these findings were relevant only to the question of penalty. The need for such findings does not appear to have been

discussed on appeal. See Australian Building Construction

Employees' and Builders Labourers' Federation v. Viner (1982) 2 I.R. 53.

From these authorities, I conclude that, in a case of

alleged contempt of court involving intimidation of a

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witness, it must be proved beyond reasonable doubt that the alleged contemnor had some appreciation that the person

threatened was a potential witness and some intention to

dissuade the potential witness from giving evidence, or from.

giving truthful evidence. The requirement of intention may perhaps be satisfied by reckless disregard of the likely effect of such a threat. In the present case, assuming that

Mr. Karadeas was aware that Mr. Brown had attended at the Court to give evidence, and assuming that he did make threats as alleged, there must be a serious doubt as to whether he had any intention to dissuade Mr. Brown from giving evidence,

or to influence the content of that evidence.

The motion for contempt must therefore be dismissed.

In *Viner v. Australian Building Construction Employees' and*

Builders Labourers' Federation (No. 1) (1981) 56 F.L.R. 5, at

pp. 27-32, it was held that a motion for punishment for contempt of court is a separate and distinct proceeding from the proceeding in respect of which the contempt is alleged to have been committed. It followed that "s1 197A of the Conciliation and Arbitration Act 1904, which restricts the power of the Court to award costs in proceedings in matters arising under that Act, is inapplicable. I shall hear the parties on the question of costs before pronouncing final

orders.

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I certify that the preceding eighteen (18) pages are a

true copy of the Reasons for Judgment of the Honourable Mr. Justice Gray.

Dated: 12+ ©: IIASF

Associate MEHWe one.

Counsel

Mr. E. W. Gillard Q.C. with Dr. C. Jessup for Philip Morris Limited.

Instructing Solicitors: Mallesons Stephen Jaques Mr. P. Marin for Mr. Karadeas.

Instructing Solicitors: Holding Redlich & Cooper Korbl

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