24/94

SUPREME COURT OF VICTORIA

KARMINE PTY LTD v ZAMBELLI

Ashley J

15 August 1994

CIVIL PROCEEDINGS – COSTS – CLAIM AND COUNTERCLAIM DISMISSED – COUNTERCLAIMANT ALLOWED COSTS – CLAIMANT DENIED COSTS – OVERALL COUNTERCLAIMANT SUCCESSFUL PARTY – WHETHER DISCRETION MISCARRIED – WHETHER S105(1) OF *MAGISTRATES' COURT ACT* 1989 APPLIES WHERE DEFENDANT SUCCESSFUL IN AN ARBITRATION: *MAGISTRATES' COURT ACT* 1989, S105(1)(2).

Upon dismissal of a claim for $1781.88 and a counterclaim for $480, the presiding Magistrate allowed Scale costs to the successful counterclaimant but no costs to the successful claimant. Upon appeal—

HELD: Appeal dismissed with costs.
1. Section 105(1) of the *Magistrates' Court Act* 1989 does not apply to circumscribe the power of a Magistrates' Court to award costs to a successful defendant to a claim (or counterclaim) determined by way of arbitration. Simply because the plaintiff succeeded on the counterclaim, the Magistrate was not bound to award the plaintiff scale costs or any costs.

2. Having regard to the Magistrate's view that the proceeding was a single dispute with the defendant overall being successful, the Magistrate was not in error in declining to award costs to the plaintiff who succeeded on the counterclaim.

ASHLEY J: [1] This is an appeal under s109 of the *Magistrates' Court Act* 1989 (the Act) from the final order of a Magistrate at the Magistrates' Court at Melbourne on 26 April 1994. The court was constituted by Mr AJ Spillane, Magistrate. The order appealed from relates only to costs. But it is desirable to sketch the whole canvas in order that the order appealed from can be seen in context.

In February 1992 the respondent, Otto Zambelli, owned a 1971 Rolls Royce. It was in need of repair. The respondent took his car to the appellant, Karmine Pty Ltd. The name of the appellant was then RA McDermott & Co Pty Ltd. The repairs were undertaken. The respondent was presented with a bill for $5,981. He claimed that the appellant had agreed with him to undertake necessary repairs for a fixed price of $4,000. He paid $4,000.

The appellant, in April 1993, issued a complaint out of the Magistrates' Court. Therein a claim was made for $1,931.88 for work and labour done and materials provided. The respondent by his defence relied upon the alleged fixed price agreement. By set-off and also by counterclaim he claimed that the appellant had carried out repairs negligently, and that the cost of rectification had been $480.

The matters, both claim and counter-claim, came on for hearing on 26 April 1994. Having account of s102 of the Act, it was dealt with by way of arbitration. Both parties were represented by counsel. The appellant's claim was amended from $1,931.88 to $1,781.88. There had been some arithmetical error. The only witnesses called were Mr Robert McDermott for the appellant, and the respondent. **[2]** The learned Magistrate dismissed both the claim and counterclaim. There is no challenge to those orders. Having heard argument as to costs, he further ordered that the respondent should have costs in respect of the unsuccessful claim by the appellant. These were fixed, in accordance with an appropriate scale, at $1,362. There is no challenge to that order.

Now I come to the subject matter of the appeal. The learned Magistrate made no order for costs in favour of the appellant upon the counterclaim which had been unsuccessful. Had costs been awarded, the appropriate scale under the *Magistrates' Court Civil Procedure Rules* 1989 (the Rules) – see Order 26 and appendix A – would have been that applying to matters where the amount of the claim was between $250 and $500. The costs prescribed by the *Magistrates' Court*

(Arbitration) Regulations 1990 would have had no application. So much was decided by O'Bryan, J in *Taylor v Hartley* [1992] Magistrates' Court Reports 303.

The items potentially relevant would seem to have been:

• Instructions to defend	$122
• Request for particulars	$46
• General preparation	$230
• Counsel's fee on hearing	$220
• Solicitor's attendance on hearing	$83

The highwater mark of an award of costs in the appellant's favour would thus have been about $700. The Magistrate, as I have said, refused to make an order of costs in favour of the appellant on the counterclaim. According to the master's order, made under R.58.09 on 26 May 1994: "The question of law shown by the appellant to be raised by the appeal is:

> **[3]** Does s105 of the *Magistrates' Court Act* 1989 operate to prohibit an award of costs in favour of a successful plaintiff/defendant to counterclaim where the amount sought by the counterclaim is less than $500 but where no award is made?"

According to the affidavit of Mr McDermott, sworn 25 May 1994 in support of the application under R.58.09, the Magistrate -

> "... held the recoverable amount had the counterclaim succeeded was less than $500. As a consequence His Worship then ruled that, in the absence of special circumstances making an award of costs appropriate, s105(1) of the *Magistrates' Court Act* 1989 disentitled the Appellant to a costs award in respect of the dismissed counterclaim since its potential value was less than $500. He indicated this was the only bar to an award of costs to the Appellant."

Three things should be said immediately. First, neither party made a submission to the learned Magistrate that could have led him to such a conclusion. Of this, more later. Second, neither party before me sought to uphold the conclusion thus expressed. Third, what the learned Magistrate is there reported to have said did not involve s105 operating to "prohibit" an award of costs in favour of a successful defendant to counterclaim. Rather, on this account, costs should not be allowed except if the court was satisfied that there were special circumstances that made it appropriate to make such an award. The question of law as framed did not, on a view of the Magistrate's reasons most favourable to the appellant, **[4]** arise. But upon that account a more circumscribed question of law arose. Counsel for the respondent did not submit that I should decline to deal with the substance of the appeal because the question was unsatisfactorily framed. I said a moment ago that neither counsel before me sought to support the conclusion which, according to Mr McDermott's affidavit, the learned Magistrate expressed. It is convenient now to express my opinion that the common position thus adopted was correct.

If it can accepted (and it was not argued to the contrary) that the sub-section may attach to a counterclaim, the circumstances which bring the provision into play are that the court "awards a party less than $500". I think that it would be a wrong use of language to describe an award by which a claim was dismissed as a claim by which a party was awarded less than $500. It seems to me that the provision is directed to the costs of a successful claimant. The circumstances dealt with by the section would include those where a claim was for less than $500 and the amount recovered was less than such sum; those where the amount claimed exceeded such sum but the amount recovered was less; and those where the amount claimed was less than $500 but where (perhaps by reason of interest) the amount awarded was greater than that sum. It may be added that the section concerns itself with the amount of an award, not with the amount claimed. I have already referred to the contrast apparent in R.26.03 and 26.04(d) of the Rules.

The reading of s105(1) which I prefer is consistent with the balance of s105. Sub-section (2) is expressed **[5]** to be subject to sub-section (1). It otherwise provides that:

> "...the Court may, in accordance with the regulations or, if there are no relevant regulations, then in accordance with the Rules, award costs to a party in respect of an arbitration under this Division."

The opening words do not mean that every factual situation *apropos* costs which may arise in an arbitration is described in sub-section (1). Rather, they mean that, subject to sub-section (1) – if it has application – the quantum of costs is to be determined in a particular fashion. So, if there are relevant regulations, costs are to be awarded in accordance therewith; if there are no such regulations, then the costs are to be awarded "in accordance with the Rules". It would be open to regulations to prescribe the costs to be awarded in favour of successful defendants. But, as O'Bryan J concluded in *Taylor v Hartley*, the regulations do not do so. That could be an accidental omission. More probably it reflects the legislature's intent that the costs inhibitions of s105(1) and (2) should only operate in respect of the costs of a successful plaintiff. Whatever be the explanation, clear it is that the regulations are silent as to the costs which may be awarded to a successful defendant.

In short, then, s105(1) does not apply to circumscribe the power of the Magistrates' Court to award costs to a successful defendant to a claim (or counterclaim) determined by way of arbitration. Further, the broad discretion as to costs vested in the Magistrates' Court by s105(2) is not, in the case of a successful defendant, inhibited by the limiting effect of the regulations. **[6]** The question, then, is whether the Magistrate's discretion as to costs miscarried because he acted upon a wrong view of s105(1). At this point a problem arises. What reasons did the Magistrate give for the conclusion that he reached? Upon this matter there is a conflict in the accounts given in the affidavits filed for the appellant and the affidavit filed for the respondent.

There were four relevant affidavits before me. For the appellant there were filed the affidavit of Mr McDermott and two recently sworn affidavits upon which I permitted the appellant to rely. The recent deponents were Simon Minahan, counsel for the appellant below; and Fiona Kelmann, the articled clerk who instructed Mr Minahan. The respondent filed and relied upon an extensive affidavit of Richard Lawson, counsel who appeared below for that party. The affidavits reveal a considerable measure of agreement upon certain relevant matters. It is common ground that the Magistrate's decision to dismiss both claim and counterclaim was followed by submissions upon costs by both counsel. According to Mr Lawson's affidavit, submissions extended over about 40 minutes. Counsel for the respondent applied for costs in respect of the unsuccessful claim by the plaintiff. He submitted that the same were not subject to the capping effect of the regulations – because his client had succeeded. That submission was, of course, consistent with the decision of O'Bryan J in *Taylor v Hartley*. It is clear that counsel for the appellant did not argue against the submission that an award of costs, if made, would not be subject to the cap imposed by the regulations; for he **[7]** sought to pursue just the same argument in an application for costs in respect of the unsuccessful counterclaim. There is further no doubt that Mr Lawson contended that the appellant should not have costs on the counterclaim. Paragraph 15 of his affidavit, with the contents of which Mr Minahan agreed, sets out the relevant submissions as follows:

> "The defendant's submission as to his liability to pay costs to the plaintiff on the counterclaim was, having regard to the amount of the counterclaim and the fact that there were no additional costs on the counterclaim which were not related to the prosecution or defence of the claim itself, no order should be made. Alternatively if such costs could be identified, they would appear to be minor. It was also submitted by the defendant that had the defendant been successful on the counterclaim, the provisions of Section 105(1) of the *Magistrates' Court Act* 1989 provided that where the monetary relief sought was less than $500 the Court must not award costs unless it is satisfied that special circumstances made it appropriate for it to do so".

I have said that counsel for the appellant submitted that his client was entitled to costs of its defence of the counterclaim "on scale". He also contended, according to paragraph 16 of Mr Lawson's affidavit – this again is an account with which Mr Minahan agreed – that:

> "The plaintiff's costs were increased by the costs of filing and serving a defence to counterclaim. He further submitted that the plaintiff had requested particulars of the defence and counterclaim".

It is clear, again, that there was discussion between the learned Magistrate and counsel upon the question whether the respondent's claim, with interest, would have exceeded $500 if successful. This was possibly relevant to the question of what scale of costs would be applied – if costs were to be awarded in favour of the appellant upon the counterclaim. As I have earlier noted, **[8]** scale costs of a successful defendant are determined according to the amount sought to be recovered. There is a scale of costs which operates where the relevant amount falls between $250 and $500. So the sum of $500 was potentially relevant quite apart from the verbiage of s105(1).

It is also common ground that, in refusing the appellant costs on the counterclaim, the learned Magistrate referred to s105(1), either specifically or in substance. The conflict is what he said in respect of it. According to paragraph 17 of Mr Lawson's affidavit:

> "His Worship said that in exercising his discretion he viewed the whole of the action as being a single dispute between the parties; and on an overall view, the defendant was the successful party. He further said that the counterclaim was for less than $500.00 and had the defendant succeeded on the counterclaim he would not have awarded any additional costs to the defendant. He said that the defendant having failed on the counterclaim, he would not award costs on it to the plaintiff. He further said that ultimately the award of costs to either party was a matter of his discretion, and that in the exercise of his discretion, the defendant should be awarded costs, and the plaintiff should not".

I have already referred to the relevant portion of Mr McDermott's affidavit. I shall not repeat it. Mr Minahan relevantly deposed:

> "... it is my clear recollection that the learned Magistrate expressed the view that he was not able to award the Plaintiff costs on the dismissal of the counterclaim by virtue of Section 105 of the *Magistrates' Court Act* 1989. Indeed, it is my recollection that his Worship had initially indicated costs would be awarded on the appropriate scale in respect of the plaintiff's costs. At that stage, I gave an estimate to the Magistrate that with interest the counterclaim would exceed $500.00 if successful. This submission was made with the view to determining the appropriate scale for costs. Mr Lawson then demurred, submitting that the interest component would not have exceeded $20.00, leaving the counterclaim in the **[9]** bracket below $500.00. The learned Magistrate then ruled that because the amount recoverable was less than $500.00, Section 105 operated to prevent him from making an order for costs unless special circumstances existed. In reaching his decision the learned Magistrate did not rely on his general discretion as to the question of costs".

The relevant portion of Miss Kelmann's affidavit is in similar terms. I note that Mr McDermott's affidavit refers to his being assisted by contemporaneous notes taken by Mr Minahan and Miss Kelmann. The latter also refers to notes in her affidavit. No notes have been exhibited to any of the affidavits filed for the appellant. Having closely considered the matter I have decided that it is appropriate to rely upon the account given by Mr Lawson in his affidavit. I have reached that conclusion upon two bases. They have a certain interrelationship. First, Mr Lawson's account is inherently the more likely; and second, to accept that account is in accord with the general rule that the court will accept, in the event of conflict, the version of proceedings in the court below which supports the decision appealed from.

Dealing with the first of these two bases, it appears to me that no submission was made to the learned Magistrate that s105(1) had the effect which, according to the appellant's affidavits, he ruled that it had. It is true that Mr Lawson referred to s105(1), but it was in the context of a submission that the appellant, in the exercise of a general discretion by the Magistrate, should get no costs on the counterclaim – it having been small and having given rise to no (or insignificant) added **[10]** costs. This was underlined by his pointing out that, had his client succeeded on that small counterclaim, he would have got no costs, absent special circumstances. It is possible, in these circumstances, that the Magistrate struck out on a path not embraced by counsel's submissions. But that seems unlikely.

I next observe that the reference to s105(1) – or to its substance – which the Magistrate made in his ruling may well have been apt to mislead the listener. There seems to be no doubt that he referred in his ruling not only to that provision but to an exercise of discretion. It seems to me the more probable that his reference to discretion was understandably but wrongly understood by Mr McDermott and his advisers to refer to a discretion inhibited by the need for special circumstances. Again, according to the appellant's affidavits, there was a bare reference to special circumstances; but no analysis by the Magistrate of the facts as would reveal the presence or absence of such circumstances. On the other hand, according to Mr Lawson's affidavit, discretionary considerations not limited by the words "special circumstances" were addressed. It seems to me the more likely course that reasons were given for what ever discretion was exercised. That in turn makes Mr Lawson's account generally the more probable.

There is this further consideration. It seems to me, upon a consideration of the circumstances, that for a magistrate to exercise a general discretion so as to deny the appellant costs on the counterclaim was a rational course. He was not bound, simply by the fact that the

appellant had succeeded on the counterclaim, to award the **[11]** appellant scale costs, or any costs. The submission which Mr Lawson had made had dwelt upon that matter. What Mr Lawson reports the Magistrate as saying – that there was a single dispute, the defendant overall being the successful party – fits in with acceptance of his submission. I have earlier noted that Mr Minahan had submitted that the plaintiff's costs had been increased. He had referred to two very minor things – filing and serving a defence to counterclaim (it is a single page, relevantly it contains four lines) and requesting particulars of counterclaim. That submission would naturally have tended to reinforce a conclusion that any costs associated with defence to counterclaim were minor indeed. While the Magistrate did what was, I think, the sensible thing, it seems to me somewhat easier to accept that he did so in the circumstances described by Mr Lawson.

In preferring the account given by Mr Lawson I wish to make it very clear that I accept without reservation the *bona fides* of Mr McDermott, Mr Minahan and Miss Kelmann in deposing to events as they recalled them. It is a very difficult task to recall the precise ebb and flow of submissions and their interrelationship with a ruling which was, no doubt, briefly given. I should refer to the second basis upon which I have concluded that the version of proceedings given for the respondent should be accepted. The general rule that would lead to such acceptance is of long-standing. It is not, of course, immutable. The rule is one of practice; it may be departed from in a proper case. Certainly it is open to the court, in the event of uncertainty, to seek a report; see R.58.14. An instance where a report was **[12]** sought is *Buzato v Vournazos* [1970] VicRp 63; [1970] VR 476; see at p477. In the present case I have concluded there is no occasion to seek a report; and that the general rule may be applied. I consider that there is reason to prefer the account of proceedings given for the respondent.

It was not contended for the appellant that, upon the respondent's account, the order as to costs of the counterclaim could be disturbed. In particular it was not submitted that, amongst the various discretionary considerations to which the Magistrate referred, it was inappropriate for him to refer to s105(1), and its effect had the respondent succeeded upon the counterclaim. I refrain, however, from expressing any opinion whether that was a pertinent discretionary consideration. In the event, the appeal must be dismissed. The question of law framed by the Master's order did not in fact arise. But I would add this: Obviously this litigation gave rise to strong feelings. Issues of credibility were involved. Perhaps those strong feelings played a part in the institution of this appeal – for the amount of money potentially involved in any costs order must have been very small. It may be that the appellant, more particularly Mr McDermott, might feel that he has been defeated upon a technicality in the appeal – that is, my acceptance of an account of events below which does not accord with his recollection. It may be cold comfort, but, whilst it is not for me to decide the substantive issue, I have concluded – as I said a little earlier – that the Magistrate's refusal to award costs on the counter claim was appropriate in all the circumstances. The appeal is dismissed.

[13] MR LAPIROW: Your Honour I make application for costs.

ASHLEY J: I don't think there is any basis upon which such an order should not be made. The respondent has been brought to court by the appellant; although I must say I think this piece of litigation was utter madness, at least from an economic standpoint. The appeal is dismissed with costs.

APPEARANCES: For the appellant/plaintiff Karmine Pty Ltd: Mr RA Connock, counsel. Davis Ford solicitors. For the respondent/defendant Zambelli: Mr MT Lapirow, counsel. Andrew Senia & Associates, solicitors.
