44/10; [2010] VSC 386

SUPREME COURT OF VICTORIA

HOBSONS BAY CITY COUNCIL v VIKING

Osborn J

13, 27 August 2010

COSTS – AWARD IN CRIMINAL PROCEEDING – CHARGES UNDER THE *VICTORIAN ROAD RULES* – CHARGES LAID BY LOCAL COUNCIL – CHARGES FOUND PROVED – CLAIM BY COUNCIL FOR PROFESSIONAL FEES – COSTS AWARDED BY MAGISTRATE COVERED DISBURSEMENTS FEES ONLY – REVIEW OF DISCRETIONARY JUDGMENTS – PRESUMPTION IN FAVOUR OF THE CORRECTNESS OF THE DECISION – APPELLANT MUST DEMONSTRATE A VITIATING ERROR OF LAW – WHETHER OPEN TO THE MAGISTRATE TO EXERCISE HIS DISCRETION IN THE AWARD OF COSTS – CONSISTENCY OF COST AWARDS – PROPORTIONALITY OF COST AWARDS – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S131(1).

Section 131(1) of the *Magistrates' Court Act* 1989 provides:

> The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.

The Hobsons Bay City Council ('Council') issued proceedings against V. in the Magistrates' Court in respect of a number of charges under the *Victorian Road Rules*. The defendant V. was convicted and the Council prosecutor sought an order for costs comprising legal fees, service fees, filing fees and a courtesy letter. These amounts were said to be a true calculation of the amounts properly incurred by the Council in the prosecution of the case. The Magistrate refused the application for legal fees on the basis that the costs were disproportionate to the criminality of the defendant's conduct and on the ground of consistency, that is, costs are not awarded in respect of police prosecutions in similar matters. Upon appeal—

HELD: Appeal dismissed.

1. The power of a magistrate to award costs is effectively unfettered. In cases involving the review of discretionary judgments there is a strong presumption in favour of the correctness of the decision appealed from and the general rule is that the decision should be affirmed unless the appellate court of review is satisfied that it is clearly wrong.

2. The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious.

***Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513, 518; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819, applied.**

3. In the present case it should be noted that breaches of the *Victorian Road Rules* with respect to parking infringements may be prosecuted either by a police officer, an authorised council officer or certain other authorised persons. It was open to the Magistrate to form the view that the discrepancy in costs outcomes between police prosecutions and council prosecutions in respect of the same offence and more generally raised a relevant issue of consistency. Inconsistent outcomes do not support a system in which the public may be expected to have confidence. They give rise to a system which may appear adventitious and arbitrary in its outcomes.

4. Proportionality is the touchstone of just outcomes of the criminal justice system. The purpose of an award of costs is not to punish the unsuccessful party but to indemnify the successful party. The Magistrate was entitled to compare total outcomes in terms of fines plus costs, with other outcomes of the summary prosecution system not only as informing a view as to consistency, but also as informing a conclusion as to the proportionality of the costs sought to the criminality of the conduct in issue. It was in turn open to him to conclude that the costs sought were disproportionate to the criminality of V.'s conduct. The conclusion he reached was one by a member of the court which is confronted with a large number of summary offences on a daily basis and accordingly, the issue was one on which the Magistrate was well placed to form an opinion.

5. The factors upon which the Magistrate based his decision were capable of being regarded as relevant to the exercise of his discretion and the consequent exercise of that discretion was open to him.

OSBORN J:

1. These appeals relate to orders made in the Magistrates' Court at Sunshine in January 2010.

2. In the first proceeding, the presiding Magistrate, following conviction of the respondent in respect of six charges under the *Victorian Road Rules* relating to parking offences, ordered that the respondent pay an aggregate fine of $600 and costs in the amount of $180.80.

3. In the second proceeding the presiding Magistrate convicted the respondent of two further such offences and fined it an aggregate fine of $250 and ordered it to pay costs in the sum of $65.20.

4. In each proceeding the matters were initially listed for hearing on a mention day and following no appearance by the respondent were listed for *ex parte* hearing.

5. At the conclusion of the first case the solicitor for the appellant applied for costs comprising legal fees of $1,470.26, service fees of $91.10, filing fees of $66.60 and a courtesy letter of $23.10. The solicitor deposes that these were a true calculation of the amounts properly incurred by the Council in the prosecution of the case.

6. After the Magistrate awarded costs in the sum of $180.80[1] he was asked to give reasons for his order. He then stated:

> The application for legal costs is refused on the basis that I think that they're disproportionate to the criminality of the defendant's conduct. I believe we've had this discussion in the past Mr Prosecutor, but the same reasons apply. It seems to me to be unfair to award costs based on the defendant's bad luck in being prosecuted by a council rather than by the police as a matter of principle, it cannot be or should not be the defendant that incurs the additional liability of substantial costs based on who prosecutes. It strikes me as unfair that an award of costs against the defendant when thieves, drug traffickers and other wrongdoers who do far more harm than the defendant has, are not asked to pay costs. Additionally, citizens pay rates and taxes for services, including the cost of prosecuting, supervising and imprisoning wrongdoers. It seems to me that principle ought to apply to this prosecution as well and as I also say that the costs are disproportionate to the criminality of the defendants conduct (sic). In the exercise of my discretion, the application for costs is refused.[2]

7. At the conclusion of the second case the Magistrate again received an application for costs consisting of legal fees of $170.50, filing fees of $42.10 and a courtesy letter of $23.10. The solicitor for the appellant again deposes that the costs for which application was made comprised a true and correct calculation of amounts properly incurred by the appellant in the prosecution of the case.

8. The Magistrate refused the greater portion of the application for costs 'on the same basis' as he had refused the greater portion of the application for costs in the first matter.[3]

9. It can be seen that the Magistrate's reasons invoke notions of proportionality and consistency.

10. The appellant acknowledges:

> (a) the power of the Court to award costs is contained in s131(1) of the *Magistrates' Court Act* 1989 which states:
> The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.
> (b) such discretion is effectively unfettered.

11. As counsel for the respondent emphasised, the latter part of s131(1) emphasises the 'full power' of the Court to determine the question of costs.

12. The grounds of appeal allege that the Magistrate failed to exercise his discretion properly or at all, and in the alternative that he purported to act for improper reasons and/or took into account irrelevant matters. In the further alternative it is alleged that the Magistrate failed to take relevant considerations into account.

13. The fundamental question raised by the appeal is whether it was open to the Court to exercise its discretion as it did. The general principles governing appeals from the exercise of discretion as to costs were expressed by Kitto J in *Australian Coal and Shale Employees' Federation v The Commonwealth*:[4]

> ...the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance: *House v. The King*[5]....

14. His Honour went on to endorse the following statement by Jordan CJ in *Schweppes Limited v Archer*:[6]

> In appeals as to costs, the principles to be applied are these. The Court will always review a decision of a Taxing Officer where it is contended that he has proceeded upon a wrong principle, for the purpose of determining the principle which should be applied; and an error in principle may occur both in determining whether an item should be allowed and in determining how much should be allowed. Where no principle is involved, and the question is, whether the Taxing Officer has correctly exercised a discretion which he possesses and is purporting to exercise, the Court is reluctant to interfere. It has undoubted jurisdiction to review the Taxing Officer's decision even where an exercise of discretion only is involved, and will do so freely on a proper case, using its own knowledge of the circumstances, but it will in general interfere only where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong; and where the question is one of amount only, will do so only in an extreme case. (Citations omitted)

15. In *Urban No 1 Co-operative Society v Kilavus & Anor*,[7] Hedigan J observed that in cases involving the review of discretionary judgments there is a strong presumption in favour of the correctness of the decision appealed from and the general rule is that the decision should be affirmed unless the appellate court of review is satisfied that it is clearly wrong.

16. In *Kenyon v Driessen*,[8] Ashley J (as he then was) observed:

> It is true that an exercise of discretion is not to be tested by an appeal court asking itself whether it would have exercised the discretion in the same or a different way to the way in which it was exercised in fact. On the other hand, the appeal court, before it interferes with an exercise of discretion, must be satisfied that the decision was clearly wrong. In my opinion the correct approach is that in considering that question an appeal court is not constrained to hold that an exercise of discretion was wrong only by reason that weight was given to some irrelevant consideration, or by reason only of complaint that insufficient weight was given to some relevant consideration. It may be, despite such matters, that the decision was very evidently supportable by pertinent grounds relied upon by the decision-maker.

17. These observations and the observations of Hedigan J were made in the context of appeals from the Magistrates' Court to this Court. These reflect the need for an appellant in an appeal on questions of law to demonstrate not only that an error of law occurred but that it was a vitiating error.[9]

18. In *Kymar Nominees Pty Ltd v Sinclair*,[10] Cavanough J stated:

> There is a strong presumption in favour of the correctness of a discretionary judgment of a court, and all the more so in relation to the taxation of costs. Although, strictly speaking, the present question is not one of taxation of costs but of the extent of the parties' respective liability, a reviewing court will rarely interfere on such a question, especially in an appeal limited to questions of law.

19. The right of appeal to this Court from final orders within criminal proceedings of the Magistrates' Court is one on questions of law only.[11] Accordingly, just as it is not open to challenge the weight given to relevant factors in reaching a conclusion of fact, it is not open to challenge the weight given to relevant factors bearing on the exercise of a discretion.[12] The critical question is whether it was open to the Magistrate to conclude as he did having regard to relevant factors.[13]

Preliminary questions

20. The appellant relied on the decision in *Latoudis v Casey*.[14] It must be recognised however that the present case is not one such as *Latoudis*, where a successful defendant, having been brought to Court by the informant, is ordinarily entitled to his or her costs.

21. In *Oshlack v Richmond River Council*[15] Kirby J observed:[16]

> The decision in that case [*Latoudis*] does not, and could not, lay down a general rule that the only consideration to be taken into account in the exercise of a statutory costs discretion is the compensation of the successful party for the recoverable expense to which it has been put by the litigation. With respect to the learned judges of the Court of Appeal, this reads too much into *Latoudis*. Such a rule was required neither by the matter which was before this Court for decision in that case nor by the majority's reasons.

22. Likewise, cases such as *Ohn v Walton*,[17] which was concerned with a power in the Medical Tribunal of New South Wales to order 'the complainant ... to pay such costs to such person as the Tribunal may determine,' are of no real assistance in the present case.

23. It was next submitted that if costs were not ordinarily recoverable by the Council then the Council would be deterred from bringing further prosecutions of the type in issue. I do not accept this inference should be drawn. Such prosecutions enforce a system of parking regulation from which municipal councils derive significant revenue and the evidence simply does not establish the conclusion contended for.

24. The appellant also placed substantial emphasis on the following observations by McHugh J in *Oshlack*:[18]

> Nor is the status of the respondent as a public authority presently relevant. The law judges persons by their conduct not their identity. In the exercise of the costs discretion, all persons are entitled to be treated equally and in accordance with traditional principle. The fact that a successful respondent is a public authority should not make a court less inclined to award costs in its favour. Gone are the days when one could sensibly speak of a public authority as having 'available to them almost unlimited public funds'.[19] Moreover, if costs awards are not made in favour of successful respondents such as the Council, the public services which those authorities provide must be adversely affected. Every irrecoverable dollar spent on litigation is one dollar less to spend on the services that public authorities do and ought to provide. Often enough the services that will be reduced will be those that favour the politically weak – children, the unemployed, the disabled and the aged. Such results cannot be in the public interest.

25. These observations do not assist the appellant because:

> • I do not accept that the learned Magistrate refused the appellant costs simply because it is a municipal council. Rather as I have said, he considered the issue of costs by reference to broader notions of consistency and proportionality.
>
> • *Oshlack* was concerned with fundamentally different proceedings. It was concerned with the costs of a successful council responding to an unsuccessful claim for injunctive relief, brought by a member of the public seeking to ventilate issues of the public interest.
>
> • McHugh J's observations were made in dissent and the majority of the High Court affirmed the breadth of the discretion available to the Court of first instance.

Consistency

26. I turn then to the underlying bases of the Magistrate's reasons. In my view it cannot be said that it was not open to the learned Magistrate to take into account questions of consistency. Counsel for both parties referred to the observations of Mason and Deane JJ in *Norbis v Norbis*[20] (a case concerning the exercise of discretion as to costs under the *Family Law Act* 1975 (Cth)):

> The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellant courts, whether in the form of principles or guidelines.

27. Brennan J, who agreed generally with the reasons of Mason and Deane JJ stated at 536:

> The orderly administration of justice requires that decisions should be consistent one with another and decision-making should not be open to the reproach that it is adventitious ... An unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process.

28. In the present case it should be noted that breaches of the *Victorian Road Rules* with respect to parking infringements may be prosecuted either by a police officer, an authorised council officer or certain other authorised persons.[21]

29. It was open to the Magistrate to form the view that the discrepancy in costs outcomes between police prosecutions and council prosecutions in respect of the same offence and more generally raised a relevant issue of consistency. Inconsistent outcomes do not support a system in which the public may be expected to have confidence. They give rise to a system which may appear adventitious and arbitrary in its outcomes.

Proportionality

30. Likewise the related issue of proportionality was a relevant factor. In some jurisdictions, achieving proportionality of procedural costs to the dispute in issue is an explicit obligation of civil case management.[22]

31. The same underlying concept is relevant here, but in the criminal jurisdiction of the Magistrates' Court the notion of proportionality has a further dimension. Proportionality is a touchstone of just outcomes of the criminal justice system. In *Hoare v The Queen*[23] the High Court stated:

> Secondly, a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances (see *Veen v The Queen [No 2]*).[24]

32. In *R v Young*[25] the Victorian Court of Appeal addressed a sentence in which *Veen [No 2]* and associated cases had been misinterpreted. The Court said at 953:

> ... there is nothing whatever new in what the learned judge called the principle of proportionality. We shall have to return to the question later but for the moment it is sufficient to say that for as long as any member of the court can remember it has been the law in Victoria that an offender must not be sentenced to a more severe punishment than is appropriate or proportionate to the offence which he has committed...

33. Proportionality in sentencing is necessarily a matter of judgment on which individual views may differ. In *The Queen v S*[26] the Court of Appeal adopted with approval the following further statement in *Young*:[27]

> What is a sentence proportionate to an offence is a matter of discretion and there must in most cases be a range of sentences open to a sentencing judge which are proportionate to the offence.

34. I accept that the purpose of an award of costs is not to punish the unsuccessful party but to indemnify the successful party. Nevertheless, in the present case the Magistrate was in my view entitled to compare total outcomes in terms of fines plus costs, with other outcomes of the summary prosecution system not only as informing a view as to consistency, but also as informing a conclusion as to the proportionality of the costs sought to the criminality of the conduct in issue.

35. It was in turn open to him to conclude that the costs sought were disproportionate to the criminality of the respondent's conduct. The conclusion he reached was one by a member of the court which is confronted with a large number of summary offences on a daily basis and accordingly, the issue is one on which the Magistrate was well placed to form an opinion.

36. I am not persuaded that it was not open to him to conclude that the costs sought were disproportionate to the criminality of the respondent's conduct.

37. It is submitted for the appellant that the notion of proportionality might have justified the award of a lesser award of costs, but it could not justify the award of effectively no professional

costs. This submission enters into questions of the weight of relevant factors. It is not for this Court however to weigh up the relevant factors. It is simply for this Court to ensure that the Magistrates' Court did not have regard to irrelevant factors and reached a conclusion open to it. I accept that the view put forward on behalf of the Council might be accepted, but not that it was the only view open to the Magistrate.

38. It is clear from the terms of his reasons that the Magistrate regarded his conclusions as to proportionality as fundamental to the proper exercise of his discretion. In turn his discretionary decision must stand if, as I have said, the view he reached is regarded as open to him.

Irrelevant considerations

39. Insofar as the appeal is put on the basis that the Magistrate failed to take into account relevant considerations, there is no evidence that, save in one respect, the matters relied on were expressly urged upon him and I am not able to infer that a failure to refer to them in his reasons means that he did not take account of them. The matters allegedly overlooked are stated in the amended notice of appeal as follows:

> ... relevant material considerations including:
> (a) the cost to municipal councils in properly prosecuting council by-laws and other laws;
>
> (b) prevention of breaches of council by-laws;
>
> (c) failure of the respondent to pay on-the-spot fines;
>
> (d) deterrence to wrongdoers.

40. Factor (a) was of course squarely put before the Magistrate and factors (b), (c) and (d) were implicitly caught up in the question of proportionality.

41. The relevant principle is that in some circumstances a failure to advert to particular matters in reasons will enable an inference to be drawn that regard was not had to those matters in reaching the decision in issue. In others it will not.[28] This is not a case in which an inference adverse to the Magistrate can be drawn.

Conclusion

42. In order to succeed in an appeal of this type the appellant must satisfy the Court that the Magistrate's decision was vitiated by reason of the matters to which he or she had regard, or that the decision was simply not open to him or her.

43. In my view the factors upon which the Magistrate based his decision in the present case were capable of being regarded as relevant to the exercise of his discretion and the consequent exercise of that discretion was open to him.

44. Accordingly the appeal must be dismissed.

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[1] The summation of the disbursement charges plus the courtesy letter.
[2] Affidavit of Lloyd Dewar sworn 15 February 2010, [7].
[3] The cost award was the summation of the disbursement charge and courtesy letter.
[4] [1953] HCA 25; (1953) 94 CLR 621, 627.
[5] [1936] HCA 40; (1936) 55 CLR 499, 504-505; 9 ABC 117; (1936) 10 ALJR 202.
[6] (1934) 34 SR (NSW) 178, cited in *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, 628-9.
[7] [1993] VicRp 69; [1993] 2 VR 201; [1993] ANZ Conv R 397; [1992] V Conv R 54-452.
[8] Unreported decision, 6 October 1994.
[9] *Portland Properties Pty Ltd v Melbourne & Metropolitan Board of Works* (1971) 38 LGRA 6, 18 and 22.
[10] [2006] VSC 488, [61].
[11] *Criminal Procedure Act* 2009, s272(1).
[12] *Secombs (a firm) v Sadler Design Pty Ltd* [1999] VSC 79, [58]-[59]; *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197, 199; (1988) 7 MVR 193.
[13] *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89 per Phillips JA.
[14] [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[15] [1998] HCA 11; (1998) 193 CLR 72; (1998) 152 ALR 83; (1998) 72 ALJR 578; (1998) 96 LGERA 173; [1998] 4 Leg Rep 18 ('*Oshlack*').

[16] *Ibid*, 118.
[17] (1995) 36 NSWLR 77.
[18] [1998] HCA 11; (1998) 193 CLR 72, 107; (1998) 152 ALR 83; (1998) 72 ALJR 578; (1998) 96 LGERA 173; [1998] 4 Leg Rep 18.
[19] *Kent v Cavanagh* (1973) 1 ACTR 43, 55, cited in *Oshlack*.
[20] [1986] HCA 17; (1986) 161 CLR 513, 518; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819.
[21] *Road Safety Act* 1986, s87(1) read with s77(2).
[22] See, eg *Calabro v Zappia* [2010] NSWDC 127.
[23] [1989] HCA 33; (1989) 167 CLR 348, 354; (1989) 86 ALR 361; (1989) 63 ALJR 505; 40 A Crim R 391.
[24] [1988] HCA 14; (1988) 164 CLR 465, 472, 485-486, 490-491, 496; (1988) 77 ALR 385; 33 A Crim R 230; 62 ALJR 224, cited *ibid*, 354.
[25] [1990] VicRp 84; [1990] VR 951; (1990) 45 A Crim R 147 ('*Young*').
[26] [2006] VSCA 134.
[27] At 960 as cited ibid, [20].
[28] The accepted test is stated by Sholl J in *Yendall v Smith Mitchell & Co Ltd* [1953] VicLawRp 53; [1953] VLR 369, 379; [1953] ALR 724 as set out by his Honour in *Harrison v Mansfield* [1953] VicLawRp 690; [1953] VLR 399, 404.

APPEARANCES: For the appellant Hobsons Bay City Council: Mr A Marshall, counsel. Brand Partners Commercial Lawyers. For the respondents Viking Group Holdings Pty Ltd and Viking Asset Management Pty Ltd: Mr J Searle, counsel. Viking Group, solicitors.
