

29/90

## SUPREME COURT OF VICTORIA

***CARPET CALL (VIC) PTY LTD v SUCKLING***

O'Bryan J

24 January 1990

**CIVIL PROCEEDINGS – DEFAULT/CROSS SUMMONSES – ORDERS MADE ON BOTH CLAIMS – ONE PARTY DEPRIVED OF COSTS – DISCRETION AS TO AWARD OF COSTS – GENERAL RULE – CONSIDERATIONS IN EXERCISE OF DISCRETION MUST BE RELEVANT: *MAGISTRATES' COURTS RULES* 1980, R157.**

Notwithstanding the discretion given to a magistrate by Rule 157 of the *Magistrates' Courts Rules* 1980 to award costs, the settled practice is that in the absence of special circumstances connected with the proceedings, a successful litigant should be awarded costs. It would not be relevant to the exercise of a magistrate's discretion to deprive a successful party of its costs on the ground that the other party did not intentionally withhold payment or on account of a salesman's behaviour prior to the institution of proceedings.

**O'BRYAN J: [1]** These are orders to review decisions or orders made in the Magistrates' Court sitting at Port Melbourne on 18 May 1989. By default summons dated 26 September 1988, the applicant claimed from the defendant the sum of \$3,200 being the balance due for carpet sold and laid at 42 Bridge Street, Northcote, on 30 June 1988. The applicant also claimed interest and costs. By notice and particulars of defence dated 17 November 1988, the defendant denied indebtedness to the applicant in the amount claimed and asserted breaches of the agreement and in particular, failure to supply gold Omarlay underlay and five protective mats made from the carpet. The defence asserted that the cost of removing the inferior underlay supplied and replacing it with the underlay ordered was \$930. By cross summons dated 28 April 1989, the defendant claimed damages of \$20,000 including \$930 on account of the inferior underlay.

The default summons and cross summons were heard together in the Magistrates' Court over two days. When the hearing began, the defendant reduced the cross summons claim to \$930. The material before this court shows that the defendant contended it was a term of the agreement that the applicant would supply gold Omarlay underlay and five protective mats and had omitted to do so. The defendant's evidence established to the satisfaction of the learned Magistrate that no protective mats were supplied and that gold Airstep underlay was supplied by the applicant although gold Omarlay had been [2] ordered. Further, that the cost of replacing the underlay supplied with gold Omarlay, would be \$930. Otherwise, the applicant was entitled to recover \$3,200 from the defendant.

On the second day of the hearing, the applicant brought to court five protective mats for the defendant and the dispute in relation to the mats was then resolved. The court made orders as follows: In respect of the default summons, the learned Magistrate made an order that the default summons be struck out. In respect of the cross summons, the certificate of order of the court states:

- (1) Claim 5884622 struck out.
- (2) Order on the counter claim that the complainant should pay \$930 to the defendant.
- (3) Order that the defendant should pay \$3,200 to the complainants.
- (4) Order that the complainant should pay the defendant's costs of this actions, fixed at \$1,378 together with \$7.00 interest.
- (5) Not relevant.

One should presume that "complainants" meant the applicant, and "defendants" meant the defendant. The defendant in this proceeding was the complainant in the court below on the cross summons and the applicant was the defendant. [3] It was conceded by Mr Margetts for the defendant that the order striking out the default summons [Claim 5884622] was wrong and the court records should be rectified. The findings made by the learned Magistrate required her to

order the defendant to pay the applicant \$3,200 in respect of Claim No. 5884622. Further, the applicant was entitled to interest on its judgment. By striking out the claim, the learned Magistrate deprived the applicant of interest on the judgment sum, to which it was entitled as a matter of law. Interest amounting to \$279 has been calculated by Miss Smallwood, for the applicant, and the calculation is not disputed by Mr Margetts.

In respect of the default summons order, the applicant obtained an order nisi on three grounds. Ground 3 was abandoned at the hearing. The grounds now relied upon read:

(1) The Magistrate erred by ordering that the plaintiff's claim be struck out notwithstanding that she ordered that the defendant should pay to the plaintiff the sum of \$3,200 being the amount of the plaintiff's claim, such order being made in the defendant's cross action.

(2) The Magistrate's discretion in respect to costs was not properly exercised by:

(a) without there being any justification for doing so, departing from the usual rule that the successful party should obtain an order for costs in his favour;

(b) alternatively to sub-paragraph (a) hereof without there being any justification for doing so, failing to decide in accordance with the provision of Rule 162(c) of the *Magistrates' Courts Rules* 1986;

(c) failing to give any or any proper reasons for departing from the usual rule that the successful party should obtain an order for costs in his favour;

**[4]** (d) alternatively to sub-paragraph (c) hereof, failing to give any or any proper reasons for failing to decide in accordance with the provisions of rule 162(c) of the Rules.

The issue here is whether the learned Magistrate should have ordered the defendant to pay costs to the applicant as the successful party, in accordance with the well-established rule as to costs. In respect of the cross summons, the applicant obtained an order nisi on three grounds – two of which were abandoned at the hearing. Ground 1 reads:

The Magistrate's discretion in respect of costs was not properly exercised by:

(a) without there being any justification for doing so, departing from the usual rule that the successful party should obtain an order for costs in his favour;

(b) alternatively to sub-paragraph (a) hereof, without there being any justification for doing so, failing to decide in accordance with the provisions of rule 162(c) of the *Magistrates' Courts Rules* 1986; and

(c) failing to give any or any proper reasons for departing from the usual rule that the successful party should obtain an order for costs in his favour;

(d) alternatively to sub-paragraph (c) hereof, failing to give any or any proper reasons for failing to decide in accordance with provisions of Rule 162(c) of the Rules.

The same issue as to costs is raised in the second order nisi. **[5]** Rule 157 of the *Magistrates' Courts Rules* 1980 is in these terms:

"Subject to the provisions of any Act and of these Rules, the costs of and incidental to all proceedings in a magistrates' court shall be in the discretion of the Court."

*Prima facie*, the applicant was the successful party on the default summons and the defendant was the successful party on the cross summons. The *Magistrates (Summary Proceedings) Act* 1985 and Rules of Court required the parties to proceed in separate proceedings by means of a default summons and a cross summons. Counsel advised me that before the decision was announced, the defendant did not pay into court the amount claimed on the default summons, nor did she admit liability to pay any sum. The learned Magistrate offered the following reasons for the orders she pronounced as to costs. Exhibit CMH-6A at p20:

"(The Magistrate) is satisfied that the defendant never intended withholding payment. Mr Gigliotti's attendance was one of the difficulties in this case and (she) accepts the evidence of the defendant that they took objection to this (his conduct). There was non supply of the mats and the underlay. It flows from this that they should not be penalised by having to pay costs."

In Exhibit GG-2 the reasons for the order as to costs are expressed as follows:

"I am satisfied the defendant did not intentionally withhold payment. I take a dim view of the action

of the complainant in endeavouring to exchange the mats for the cheque in full payment. The reason for non-payment was the nonsupply of the mats and the complaints made in relation to the underlay. I do not propose to go further into my finding on the evidence. It follows that the defendant should get costs."

[6] The legal principles as to costs are well established. Notwithstanding that the power to award costs is discretionary, the settled practice is that in the absence of special circumstances, a successful litigant should be awarded costs. *Ritter v Godfrey* (1922) KB 47; [1918-19] All ER 714. Although an appellate Court will not lightly overturn an exercise of discretion, should the discretion be exercised according to a wrong principle or by taking into account any matters which were irrelevant or by neglecting to take into account any matters which were relevant, an order may be overturned. Cf. *Bailey v Wallace* [1970] VicRp 15; (1970) VR 109 at 111-112; *Thorne v Doug Wade Consultants Pty Ltd* [1985] VicRp 48; [1985] VR 433 at 500; 57 LGRA 90. Having determined that the learned Magistrate was required to make an order on the default summons for the amount claimed, it follows that, in the absence of special circumstances, the applicant should receive its costs in respect of the default summons. Cf. *Ritter v Godfrey*; *Donald Campbell & Co v Pollak* (1927) AC 732; [1927] All ER 1.

A refusal of costs to a successful party will not be justified except for some reason connected with the case. *Donald Campbell* at 812. One has to find a valid reason for the exercise of the learned Magistrate's reason to deprive the applicant of its costs, referable to the default summons.

I have considered carefully the expressed reasons of the learned Magistrate, bearing in mind one should not subject a magistrate's reasons to too critical analysis, and am unable to find a valid reason to deprive the applicant [7] altogether of its costs. It was not relevant to the question of costs to find that, "the defendant did not intentionally withhold payment". The defendant never offered to pay the account in part, nor did she make a payment into court of the amount held due and payable namely, the difference between the amount claimed, \$3,200, and \$930, the amount claimed in the cross summons. [see Rule 87]. The state of mind of the defendant is not a relevant matter to the question of costs.

The applicant was obliged to institute a proceeding in the Magistrates' Court to recover the amount found due to it under the contract. The defence denied liability to pay any sum. The second reason of the learned magistrate: "the action of the complainant in endeavouring to exchange the mats for the cheque in full payment", is not a reason connected with the case. The learned Magistrate was not entitled to penalise the applicant by depriving it of costs on account of the behaviour of its salesman before the proceeding in court was instituted.

In my opinion, the discretion was not exercised judicially because the learned Magistrate took into account matters which were not relevant. Accordingly, in respect to the default summons, the learned Magistrate should have ordered that the defendant pay to the complainant \$3,200 plus interest of \$279, plus costs. The calculation of costs to be awarded is not a matter I should determine because, in exercising the discretion conferred by Rule 157, the learned Magistrate might [8] determine that the applicant should receive only part of its costs as the main issue at the hearing was the claim that the applicant supplied the wrong underlay. However, it is difficult to see how the applicant could be deprived of costs incurred to the commencement of the hearing or, possibly, a proportion of the total costs of the hearing. The order of the costs will have to be determined in Claim No. 5884622 by the learned Magistrate, after the parties have been heard again. Consequential variations and corrections need to be made to the order made on the cross summons. Paragraph 1 will be deleted and the parties should be identified correctly as per the summons.

I propose to hear counsel now as to the formal orders which should be made consequent upon these reasons. Each order nisi will be made absolute with costs and I shall grant a certificate under the *Appeal Costs Fund Act* to the unsuccessful defendant.

**APPEARANCES:** For the applicant Carpet Call: Ms ML Smallwood, counsel. Sly & Weigall, solicitors. For the defendant Suckling: Mr T Margetts, counsel. Molomby & Molomby, solicitors.