

22/08; [2008] VSC 78

SUPREME COURT OF VICTORIA

BROTT v KERSTING & ANOR

Curtain J

26 & 27 February, 19 March 2008

CIVIL PROCEEDINGS – COSTS – MOTOR VEHICLE COLLISION – SOLICITORS ISSUED PROCEEDINGS IN THE DRIVER'S NAME – DRIVER NOT THE OWNER OF THE MOTOR VEHICLE – CLAIM DISMISSED – MAGISTRATE NOT SATISFIED THAT DRIVER HAD SUFFERED LOSS – COSTS SOUGHT AGAINST THE SOLICITOR PERSONALLY – COSTS APPLICATION LASTED THREE DAYS – PARTIES HAD OPPORTUNITY TO BE HEARD AND FILE WRITTEN SUBMISSIONS – FINDING BY MAGISTRATE THAT COSTS WERE INCURRED WITHOUT REASONABLE CAUSE AND IMPROPERLY – ORDER THAT THE SOLICITOR PERSONALLY PAY THE COSTS – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT 1989*, SS131, 132(3).

Where upon the dismissal of a complaint (after a hearing over three days) an application was made that the complainant's solicitor pay the costs personally and the solicitor was given (over a period of four days) to make oral submissions and file written submissions, and the magistrate found that the defendant's costs were incurred without reasonable cause and improperly, the solicitor was not denied natural justice on the basis that he was denied a reasonable opportunity to be heard. Accordingly, it was open to the magistrate to order that the solicitor pay the costs personally.

CURTAIN J:

1. Stephen Parker drove into a car being driven by Eugene Kersting. Mr Kersting took the car to Collision Repair Centre to be repaired. Mr Kersting was not the owner of the car. Mr Kersting was told he would not have to pay for the repairs to the car. He signed a document, which was a purported arrangement whereby another company, Elite Claims Management Pty Ltd, was authorised to recover and retain moneys from the other party involved in the collision. The repairs were carried out. There was apparently a dispute as to the payment for the repairs with Mr Parker or his insurance company. The debt owed to Collision Repairs was subsequently factored to NRC Recovery^[1].

2. The firm, Issac Brott & Co, issued proceedings in Mr Kersting's name against Mr Parker. Negligence was not in dispute, but quantum and liability was. The plaintiff's claim was dismissed because the Magistrate was not satisfied that the plaintiff had suffered loss as a result of Mr Parker's negligence.

3. Normally costs would follow the event, but counsel for Mr Parker sought an order for costs against Issac Brott & Co and/or Issac Brott. After a hearing, which lasted four days, the Magistrate ordered the plaintiff to pay the defendants' costs and Mr Issac Brott was ordered to pay to Mr Kersting the sum that he had been ordered to pay to Mr Parker. The Magistrate, in making the order, was exercising the discretion conferred by s131 of the *Magistrates' Court Act* and governed by s132 of the Act. The Magistrate gave detailed reasons for her decision and had recourse to written submissions submitted by counsel for Mr Brott and Mr Parker. Mr Kersting, who was unrepresented at the costs application, also submitted written submissions.

4. Issac Brott & Co issued an originating motion seeking certain orders in the nature of *Certiorari* and *Mandamus* pursuant to Order 56 of the Supreme Court Rules, in particular, that Order 2 of the costs order made against him by Magistrate Patrick on 12 July 2006 be quashed, alleging an error of law on the face of the record constituted by her Honour's reasons for her decision and instituted an appeal pursuant to s109 of the *Magistrates' Court Act*. The appeal has been stayed pending determination of this matter by order of Senior Master Mahoney on 26 November 2006. Mr Levine, counsel who appeared in this court on behalf of the applicant, sought that the two matters be effectively heard together as the issues are, in essence, the same. Mr Levine also sought to amend the Notice of Motion by adding paragraph (k) and the appeal (by amending paragraphs 11 and 22). Mr Levine also sought leave to amend the name of the plaintiff

as the proceedings had been brought in the name of Issac Brott & Co when the order for costs had been made against Issac Brott personally. The applications were not opposed and leave was granted to amend accordingly.

5. The applicant's complaint is essentially that Mr Brott was denied natural justice, in particular that:

- (a) he was denied a reasonable opportunity to be heard;
- (b) there was a failure to provide any or proper particulars in respect of the application for costs;
- (c) the Magistrate had no evidence upon which she could reasonably have based her decision^[2]; and
- (d) the Magistrate relied upon written submissions and the accompanying letter which was forwarded to the Magistrate by Mr Kersting but which was not served on either Mr Brott or Mr Parker's legal representative.

6. The matter has a protracted and disjointed history. The substantive matter came on for hearing on 21, 22 and 23 February 2005. At that time, Mr Parker, the defendant, was represented by Mr Ravida of counsel and Mr Kersting was represented by Mr Scriva of counsel, who was briefed by Issac Brott & Co. At the conclusion of the evidence and after hearing submissions, her Honour dismissed the plaintiff's claim. An application for costs was foreshadowed and subsequently commenced on 23 March 2005. At that time, Mr Kersting was unrepresented as Mr Scriva had withdrawn, citing potential conflict of interest. Mr Brott was personally represented by counsel, Mr McDermott, and Mr Ravida again appeared on behalf of Mr Parker. Mr Ravida sought an order "that costs ought to be paid by the solicitor for the plaintiff and not the unsuccessful plaintiff, and that those costs ought to be awarded on a solicitor/client basis" or, alternatively, if unsuccessful in that application, "costs against the unsuccessful plaintiff as costs follow the event".^[3]

7. In support of that submission Mr Ravida contended that the proceedings were not brought on the instructions and authority of the named plaintiff but were brought on behalf of the repairer, the recovery agent and/or the factorer, and that Issac Brott & Co were aware of this and were acting therefore on behalf of other named parties.^[4] Counsel contended in particular that such a conflict or potential conflict between the interests of other parties and the plaintiff amounted to misconduct within the terms of s132 of the *Magistrates' Court Act*.

8. Submissions were made by both counsel and, indeed, Mr Kersting^[5] who, it appears, passionately and succinctly put his case that he should not have to pay costs. Counsel for Mr Brott, Mr McDermott, raised the issue of legal professional privilege, and this matter was then raised by her Honour with Mr Kersting. It appears her Honour explained the privilege to him, and Mr Kersting said he understood it, but it appears her Honour perhaps doubted his assurance and she determined to proceed and to be mindful of any difficulties. Mr McDermott called Ms Fergus, the solicitor who had the care and control of the file, to give evidence about two letters on the file which were sought to be tendered in evidence on the cost application and Mr Brott was called to give evidence on the same point. It was during his cross-examination that Mr Kersting expressed his dissatisfaction with the course the proceedings were taking and stated that he –

"liked everything to be out in the open now because everything has gone the wrong way. ... I am ready to sit there now and state everything because it's just becoming a joke really, all this".^[6]

9. Mr Kersting then articulated particular matters which the Magistrate regarded as potentially serious allegations and adjourned the proceedings to enable Mr Kersting to get further advice.

10. No application was made by counsel for Mr Brott on that day for any further particularisation of the costs application being made against him.

11. The matter came back on before her Honour on 14 December 2005. At this time, Mr Brott was now represented by Mr Levine. Mr Ravida again appeared on behalf of Mr Parker and Mr Kersting was once again unrepresented. Mr Levine made three applications:

1 That the Magistrate disqualify herself due to a reasonable apprehension of bias;

2. that the authority of Issac Brott & Co was *res judicata* and could not be heard in a costs application; and
3. that the costs application was an abuse of process.

12. These three applications were supported by extensive written submissions^[7]. The applications and the submissions were considered and dismissed, and counsel for Mr Brott then sought a further adjournment of the costs application to require the defendant to file and serve written particulars of the basis of the costs application. Her Honour held that basis of the costs application had been adequately particularised in Mr Ravida's submissions on 23 February and his opening on 24 March, and that no particulars had been sought in the intervening period. The matter then proceeded with Mr Brott resuming the witness box and being cross-examined by Mr Ravida.^[8] In that cross-examination, Mr Brott said Mr Murdaca (who was a consultant to Collision Repair Centre and Elite Pty Ltd^[9]) gave him instructions to issue proceedings, that he did not speak to Mr Kersting until an advanced stage in the proceedings and that he did not tell Mr Kersting that he acted for Mr Murdaca to cover the cost of repairs and, when asked if he had advised Mr Kersting prior to the commencement of proceedings that he would have a cost liability if unsuccessful, Mr Brott said that he had told Mr Murdaca. Mr Brott said he told Mr Kersting that he acted for both Collision Repair Centre and the factorer, but that he did not advise Mr Kersting of the conflict of interest between the factorer and Mr Kersting because he did not think there was one. He was asked further questions about the content of conversations between he and Mr Kersting, such questions which, *prima facie*, appear to be in breach of legal professional privilege, and it appears that no objection was taken either by Mr Brott, his counsel or Mr Kersting to those questions being answered; nor was there any intervention by the Magistrate.

13. At the end of that day's hearing, Mr Levine renewed his application for written particulars; that application was dismissed. The next day, two further questions were asked of Mr Brott in cross-examination and nothing was pursued in re-examination. Mr Murdaca, Mr Scriva and Mr Kersting then gave evidence in the ensuing two days, at the conclusion of which her Honour then set a timetable for the filing of written submissions and replies by all parties.^[10]

14. Her Honour delivered her judgment in respect of the costs application on 12 July 2006. On that date, Mr Brott appeared on behalf of Issac Brott & Co, Ms Ritchie appeared on behalf of Mr Parker and Mr Kersting yet again appeared in person.

15. As stated previously, her Honour gave detailed reasons for coming to the view that the costs of the defendant in this matter were incurred without reasonable cause and improperly; they were that Issac Brott or his employee or employees –

- (a) instituted proceedings at the instigation of, and in the interests of a person or persons other than his client, Mr Kersting;
- (b) failed to take proper or adequate instructions from Mr Kersting;
- (c) failed to advise Mr Kersting of the consequences of bringing proceedings in his name, given that he was not the legal owner of the vehicle;
- (d) failed to properly advise Mr Kersting as to his liability for the cost of repairs;
- (e) placed pressure on Mr Kersting to sign documents and participate in the proceedings when Mr Kersting indicated that he did not wish to do so without advising him as to his options;
- (f) acted in the interests of other persons or entities whose interests were in conflict with Mr Kersting's interests; and
- (g) failed to properly advise Mr Kersting of the cost consequences to him of the liquidation of the company on which Mr Brott and his employers knew Mr Kersting was relying as provided the cost indemnity.

16. It was this conduct her Honour found that caused the proceedings to be instituted and prosecuted which would otherwise not have been instituted or continued to the hearing stage with Mr Kersting as plaintiff and in this way the defendant was placed in the position of incurring costs in defending that claim.

17. Her Honour, in her reasons for her decision, stated that it had been made clear throughout the proceedings that the authority to act would be raised in the costs issue and held that the costs proceedings was part of the same substantive proceedings. Her Honour came to the view that sufficient notice of particulars had been given and her Honour was satisfied that Issac Brott & Co and Mr Brott were given adequate notice of the costs application against them and the basis for it. In her Honour's view, the nature of the allegations were clearly raised throughout the proceedings and at the commencement of the costs application. Her Honour noted that once the application had been outlined by counsel for Mr Parker, no further particulars were sought by counsel for Mr Brott. Her Honour held that Mr Brott had "ample opportunity to seek further clarification if that had been required".

18. The hearing in respect of liability took three days and in respect of the costs application, four days. In these circumstances, when the proceedings are taken as a whole, when all the parties made written submissions, including a reply on behalf of Issac Brott & Co in respect of the costs application, it is clear that the issues were sufficiently well ventilated and apparent to the parties.

19. It is not disputed that neither party received Mr Kersting's written submissions, nor were they given an opportunity to respond to them. Those submissions cannot now be produced to the Court, as a search of the Court file has failed to produce them and Mr Kersting took no part in these proceedings. The content of the submissions and the extent to which her Honour relied upon them nonetheless may be gleaned from her Honour's reasons. Her Honour referred to the submissions as part of the narrative and remarked as follows:

"His submissions consistently with the evidence he had given and the position he had taken throughout the proceedings are that he did not engage Issac Brott & Co 'to work' on his behalf. He says that he attended Court because Mr Scriva rang him on the morning of the hearing to 'threaten' him that he must attend Court or that he would be liable 'for all money and expenses'. He attaches a copy of a letter sent to him by Issac Brott & Co after the hearing of the costs application containing an offer by Mr Murdaca to inspect the vehicle and make good any defect in repairs. The letter also alleges that Mr Kersting had obtained a financial advantage by deception".

20. Her Honour, however, did not accept Mr Kersting's position that Mr Brott was not acting for him as she was satisfied that by his subsequent conduct Mr Kersting had adopted and ratified the actions purported to be taken on his behalf. This finding was adverse to Mr Kersting and favourable to Mr Brott. So, not only did her Honour not rely upon the submissions of Mr Kersting, her decision on this point was inconsistent with the position adopted by him. Further, the letter referred to in her Honour's remarks as being attached to the submissions had emanated from the office of Issac Brott & Co, so it could not be that they are not familiar with its contents.

21. The failure to afford the parties the opportunity to respond to written submissions, indeed to be made aware of the content of those submissions, may well amount to a procedural unfairness but the content of the obligation to accord procedural fairness depends upon the circumstances of the case^[11] and that an objective test should be applied to determine whether a fair hearing had been given.^[12] However, her Honour stated that Mr Kersting's submissions were consistent with his evidence, of which clearly the parties were aware. Her Honour, it appears, relied upon the submissions to a limited degree only. They appear to form part of the narrative of her judgment, as distinct from her rationale for it and, indeed, to the extent that she rejected the contention that Mr Brott was not acting for Mr Kersting, found contrary to the tenor of Mr Kersting's evidence, which finding, if not favourable to Mr Brott, was certainly adverse to Mr Kersting. In these circumstances it cannot be said that the failure to provide an opportunity for the parties to respond to Mr Kersting's submissions amounts to a denial of natural justice.

22. Mr Levine, counsel for Mr Brott in these present proceedings, submitted that there was no evidence upon which her Honour could conclude that there had been improper conduct or negligence on behalf of Mr Brott in issuing the initial proceedings. It is apparent, however, that her Honour did not make a finding that Mr Brott had been negligent. The evidence is overwhelming that Mr Kersting was not the registered owner of the car; if Mr Brott or his employees had in fact taken instructions from Mr Kersting and had asked the one fundamental question, which clearly was not asked, the proceedings would never have been issued in Mr Kersting's name. It was for this reason that her Honour held that the costs of the defendant were incurred without reasonable

cause and improperly. Indeed, it appears that Mr Brott argued agency and bailment in an effort to overcome this basic deficiency, and in that way Mr Parker was called upon to answer a case that should never have been brought. True it is that Mr Brott does not owe a duty of care to Mr Parker, after all, Mr Parker is not his client, but the Magistrate has complete discretion to award costs under the provisions of s132 of the *Magistrates' Court Act*; provided, pursuant to sub-s(3), that the practitioner has had a reasonable opportunity to be heard. The section does not require written particulars, the issue of ownership of the car was clearly apparent, the issue of authority to sue was thoroughly canvassed in the evidence of Mr Murdaca, Mr Brott and Mr Kersting and, indeed, was crucial to the question of the recoverability of the cost of the repairs to the car and essential to the bringing of a successful action against Mr Parker. In my view, the findings of her Honour were well open on the evidence before her.

23. Her Honour drew counsel's attention to the ambit of the issue of costs during the course of the hearing^[13], stating:

"The question really is whether there is any basis on which costs should be awarded against Issac Brott & Co and whether there is any basis for not continuing in the ordinary course of events of awarding (an order) against Issac Brott & Co and Mr Kersting or Issac Brott & Co and not Mr Kersting, or Mr Kersting and not Issac Brott & Co or, I suppose theoretically, against nobody. That seems unlikely in the circumstances".

24. It is apparent then that all possibilities contemplated by an order under s131 and s132 of the *Magistrates' Court Act* were being raised as possibilities by the Magistrate in those proceedings and thus it cannot be said that her Honour, counsel, or the parties were not aware of the orders open to her Honour in the exercise of her discretion.

25. In these circumstances, where her Honour exercised her discretion in making an order pursuant to s132(1)(b) in ordering Issac Brott Solicitor to pay the costs of which Mr Kersting was ordered to pay, it cannot be said to amount to a denial of natural justice.

26. Mr Levine also submitted that Mr Brott had been prevented, by operation of legal professional privilege, from mounting his own case and from cross-examining Mr Kersting. As stated previously, it appears that legal professional privilege was waived by Mr Kersting, for he was extensively cross-examined on matters which would otherwise attract the privilege. Mr Kersting was advised of his right to claim the privilege and her Honour was alert to it and mindful of it. The cross-examination of Mr Kersting by counsel representing Mr Brott was conducted with vigour, to say the least. Although Mr Brott may well have considered himself constrained by legal professional privilege whilst he was in the witness box, it cannot be said on a fair reading of the transcript that his position was compromised by constrained cross-examination of Mr Kersting.

27. Matters of client and solicitor communications were raised by Mr Levine, such as letters of demand, as well as evidence given as to the manner in which Mr Kersting had engaged Mr Brott, and his understanding of Mr Brott's interest in representing Mr Murdaca. These were answered by Mr Kersting, who essentially stated he had nothing to lose and so was prepared to be completely honest. In any event, even without intruding into matters the subject of legal professional privilege, the submission is not sustainable in light of the fundamental deficiency in the case, and that is that Mr Kersting was not the owner of the car.

28. For these reasons, I am satisfied that Mr Brott has not suffered a denial of natural justice. Mr Brott had reasonable opportunity to be heard in respect of the matters raised going to the heart of the costs issue, that is, ownership of the car; the written submissions by Mr Kersting did not form the basis for the judgment against Mr Brott, instead her Honour's decision was based on findings of fact made by her Honour, having heard the evidence over a hearing which in total encompassed seven days. Her Honour's reliance on the matters the subject of the submissions was minimal, the submissions were consistent with the evidence of Mr Kersting, privilege was effectively waived and cross-examination unfettered throughout the hearing, and finally the Magistrate made clear the scope and ambit of her discretion to make orders in any manner pursuant to s131 of the *Magistrates' Court Act* and was cognisant of the requirements of s132(3) of that Act, which her Honour regarded as having been met and complied with. Accordingly, for the above reasons, I have come to the view that her Honour's exercise of her discretion does not constitute an error of law and I would dismiss the appeal and the originating motion.

[1] Her Honour Magistrate Patrick's reasons p216.

[2] See p1 of the transcript.

[3] Transcript CB p276.

[4] CB p277.

[5] CB pp303-4.

[6] CB p333.

[7] CB pp351 and 355.

[8] (Recourse is had to Stephen Donely's affidavit dated 2 February 2007 as the proceedings of this day were not transcribed.)

[9] At a later date Mr Murdaca became a director of Collision Repair Centre. Transcript p57.

[10] CB transcript pp501-2.

[11] *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 584; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.

[12] *R v Wise* [2000] VSCA 169; (2000) 2 VR 287.

[13] CB p398 and transcript p42.

APPEARANCES: For the plaintiff Brott: Mr M Levine, counsel. Isaac Brott & Co, solicitors. The firstnamed defendant appeared in person. For the secondnamed defendant: Mr Carmody, counsel. Ligeti Partners, solicitors.
