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SUPREME COURT OF VICTORIA

MANSELL v KEATING

O'Bryan J

2, 5 May 1995

COSTS – CHARGE DISMISSED – ORDER OF COURT ENTERED IN REGISTER – NO APPLICATION MADE FOR COSTS WHEN CHARGE DISMISSED OR ORDER ENTERED IN REGISTER – APPLICATION FOR COSTS SUBSEQUENTLY MADE – REFUSED – WHETHER MAGISTRATE *FUNCTUS OFFICIO* – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION: *MAGISTRATES' COURT ACT* 1989, S131.

Upon dismissal of a charge or before the order of the court was authenticated by entry in the register, no application by the defendant was made. Some 5 weeks later, an application for costs was made which was dismissed. Upon appeal—

HELD: Appeal dismissed.
Once the order was entered in the register, the proceeding had been finally determined and the magistrate was *functus officio*. The defendant was not able to apply for costs in the absence of a current proceeding.

***In the Marriage of Kazimierczak* [1987] FLC 76, 415, distinguished.**
***Brew v Whitlock (No. 3)* [1968] VicRp 63; [1968] VR 504, applied.**

O'BRYAN J: [1] This is an appeal by a successful defendant from the Magistrates' Court at Wodonga pursuant to s92 of the *Magistrates' Court Act* 1989 on a question of law from a final order of the Court in that proceeding. The question of law is "Whether the learned Magistrate erred in determining that he was unable to adjudicate on the successful defendant's entitlement to costs on the basis that there was no *res* before him."

The circumstances giving rise to this appeal may be reviewed shortly. The defendant was charged in the Magistrates' Court at Wodonga with a criminal offence. The proceeding was heard summarily by a Magistrate on 27 April and 8 June 1994. The charge was dismissed and the order of the Court was entered in the register on 8 June 1994 pursuant to s18(2) of the Act. It is common ground that no application for costs was made on behalf of the defendant by the solicitor who appeared for him on 8 June in the Magistrates' Court when the charge was dismissed or before the order of the Court was authenticated by entry in the register.

On 9 June the solicitor for the defendant wrote to the clerk of the Magistrates' Court at Wodonga requesting that the matter be relisted for determination of an application for costs. On 14 July the learned Magistrate dismissed the application. It is from the order made on that date that this appeal is brought.

The question for determination is whether the learned Magistrate was *functus officio* and no application for **[2]** costs could be made in respect of the proceeding after the order was entered in the register on 8 June. Had an application for costs been made on 8 June, following dismissal of the charge, the learned Magistrate would have made an order in favour of the successful defendant. Since the decision in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 a court of summary jurisdiction, in exercising a statutory discretion to award costs in criminal proceedings, will ordinarily make an order for costs in favour of a successful defendant. The Magistrates' Court has a statutory discretion to award costs in relation to "all proceedings in the Court". (s131(1)). The respondent conceded in the Court below, on 14 July, that had an application for costs been made on 8 June the respondent could not contest the making of an order for costs. Mr Morgan-Payler argued, however, that before the learned Magistrate could exercise his discretion to award costs a formal application for costs had to be made to the Court. It was not for the Magistrate to award costs in the absence of a formal application.

There are two authorities which, in my opinion, are relevant to the resolution of this appeal. The first is: *In the Marriage of Kazimierczak* [1987] FamCA 19; [1987] FLC 91-849; [1987] FLC 76,415, a decision of the Full Court of the Family Court of Australia. This decision is strongly relied upon by Mr Freckleton for the appellant. In property proceedings a Family Court ordered a husband to pay a lump sum to his wife and provided for the wife to retain certain chattels. No order for costs was sought in the wife's application nor at the time judgment was delivered. Subsequently, the wife made a further application for the return of a chattel and sought costs in relation to **[3]** the earlier property proceeding. The husband appealed against the costs order, arguing that because the judgment had been perfected by being drawn up and signed by the Registrar the Court was *functus officio* and no new order could be made for costs.

The Court in rejecting this argument held that:

> "The question of costs in the Family Court is regulated by s117 of the Act. Since the power to award costs is derived from the statute any limitation as to the exercise of that power must be found within the statute itself."

By reference to s4(1) and the definition of matrimonial cause, para.(b) which includes "a completed proceeding", the Court held that an application for costs may be made at any time in relation to proceedings which have been completed provided the application for costs is not too remote in time from the original proceeding.

In my opinion because this decision is founded upon a statutory provision to award costs in terms unlike the provision in s131 of the *Magistrates' Court Act* it should be distinguished. Apart from this distinction, the decision is in conflict with the second authority to which I shall now refer: *Brew v Whitlock (No.3)* [1968] VicRp 63; [1968] VR 504. On appeal to the Full Court the appellant obtained an order for a money sum with costs. No application was made by the appellant's counsel for interest on the judgment pursuant to s78 of the *Supreme Court Act* 1958 when judgment was pronounced. The judgment was duly entered in accordance with the order of the Court. Subsequently, the appellant applied to the Court to amend the judgment to include an award of interest. It was not contested that had an application for interest been made **[4]** at the time of the disposal of the appeal an award of interest would have been made. The Court held that:

> "The Full Court was not called upon to make an award of interest, and, indeed, it was without the power under s78 to award interest in the absence of such an application. Nor was the position remedied at any time up to the perfecting of the judgment on appeal. At no time when the Court was determining the appeal was any application before it. It is now too late for any application to be made which would satisfy the requirements of s78. Effect cannot be given to the present application as a substantive application for an award of interest."

The Court considered and rejected an alternative application founded upon the "slip rule" (O.XXVIII R.11 now R.36.07). In my opinion, these two authorities show that an oral application must be made to the Court for an order for costs or interest on judgment (if applicable). A successful party entitled to costs and/or interest cannot rely upon the Court initiating an application for costs or interest (if applicable) on their behalf. There is no onus on the Court to raise the question of costs or interest following announcement of the decision. This is so in both civil and criminal proceedings.

Although the material before the Court does not disclose explicitly why the solicitor for the appellant did not apply for costs on 8 June I would infer that, either he intended to make an application but forgot or the question of costs was not considered until some time after the Court order was made.

In my opinion, the decision in *Brew* is authority for the proposition relied upon by counsel for the respondent namely, that once the order in the Magistrates' Court was entered in the register at that stage the proceeding had been **[5]** finally determined by the Court and the learned Magistrate was *functus officio*. The appellant was not able to apply for costs in the absence of a current proceeding. The position would have been otherwise had an application been made on 8 June to reserve the question of costs for hearing on a subsequent date. This was not done. The learned magistrate became *functus officio* after the order made on 8 June became a final order of

the Court. Cf. *Carroll v Price* [1960] VicRp 101; [1960] VR 651 at 657; *Pittalis v Sherefettin* [1986] QB 868 at 879; [1986] 2 All ER 227; [1986] 2 WLR 1003; *Blamey v Blamey* [1995] FLC 81,532 at 81,535.

In the result I am of the opinion that the decision in the Court below on 14 July was correct. The appeal will be dismissed with costs to be paid by the appellant.

APPEARANCES: For the appellant/defendant Mansell: Mr I Freckleton, counsel. Marshall Sheehan & Associates, solicitors. For the respondent Keating: Mr Morgan-Payler, counsel. Solicitor to the DPP.
