37/13; [2013] VSC 444

SUPREME COURT OF VICTORIA

PAPER AUSTRALIA PTY LTD v VICTORIAN WORKCOVER AUTHORITY

Wood AsJ

5, 14 August 2013

COSTS – CRIMINAL PROCEEDING INITIATED BY THE VICTORIAN WORKCOVER AUTHORITY – THE PROSECUTION WAS UNSUCCESSFUL – MAGISTRATE ORDERED THAT REASONABLE COSTS BE PAID BY THE AUTHORITY AND IN DEFAULT OF AGREEMENT TO BE DETERMINED BY THE COSTS COURT – THE ORDER DID NOT SPECIFY THE METHOD OR BASIS FOR CALCULATING REASONABLE COSTS – OPTIONS OPEN.

HELD: The applicant's entitlement to costs be assessed on the current Supreme Court scale for the work performed.

1. The authorities make it clear that while a successful defendant should not generally be out of pocket as a result of being required to defend the proceeding, this does not provide a "blank cheque" to a defendant to run up legal costs unreasonably, secure in the knowledge that if they are successful they are fully indemnified for costs. The touchstone is one of reasonableness.

***Brown v Glen Eira City Council* [2012] VSC 198; MC 18/2012, applied.**

2. The order made by the Magistrate was for "reasonable costs", not an order for indemnity costs, or all costs, or some other formulation.

3. Given that the matter was a serious one with serious financial and reputational consequences, the current Supreme Court scale was the appropriate basis for recovery of costs.

WOOD AsJ:

REASONS FOR RULING

1. The applicant filed a Summons for Taxation on 24 April 2013 in relation to an entitlement to costs arising from an order of the Magistrates' Court made on 7 November 2012 in case number B13326582. The Magistrates' Court proceeding was a criminal prosecution initiated by the respondent against the applicant. The prosecution was unsuccessful and hence the order for costs.

2. The wording of the order was that the "... reasonable costs of the proceedings be paid by the informant in default of agreement to be determined by the Costs Court." The order does not include the underlying method or basis for any calculation of reasonable costs. The bill of costs filed with the Summons for Taxation is drawn on the hourly rates charged to the applicant by Herbert Smith Freehills. Blocks of time were claimed by file operators with numerous tasks described within them. There was no delineation as to time taken for component tasks.

3. The respondent filed a Notice of Objection on 10 July 2013. Objection A states as follows:

> "Objection is taken to the manner in which the bill has been drawn. The liability of the prosecution to the payment of costs for a summary prosecution must be referable to the scale of costs which would, in the absence of an agreement between the solicitor and his client, apply in law. Having regard to the nature of the prosecution, and the position the Court hearing the prosecution has in the hierarchy of the Court; the appropriate scale would be "G" in the Magistrates' Court. Alternatively, the scale would be Schedule A to the Supreme Court rules at the relevant time, moderated to reflect the conduct of the matter in the Magistrates' Court."

4. A preliminary issue was identified on 19 July 2013 for hearing and consideration on 5 August 2013. The issue is the merit of this general objection.

5. In *Brown v Glen Eira City Council*,[1] Associate Justice Daly dealt with an appeal from a costs order of a Magistrate. However, Her Honour conveniently summarised the law in relation to the assessment of costs of criminal proceedings by a presiding officer as follows:

33. It is trite law that a magistrate (like any other judicial officer) has a wide discretion with respect to costs, and that an appellate court should be reluctant to interfere with a magistrate's discretion in that regard, particularly in circumstances such as this where the magistrate has had conduct of the proceeding since inception. However, the discretion must be exercised judicially, and in accordance with established authority.

34. From the authorities concerning the costs to be awarded to a successful defendant in a criminal proceeding, the following principles can be distilled:

(a) a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for costs against the informant; (*Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534, at 566 per McHugh J; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287

(b) generally speaking, a successful defendant should not be out of pocket as to costs reasonably incurred and reasonable in amount; (*Sobh*, at 459)

(c) the issue of costs should be looked at from the perspective of the successful defendant; (*Latoudis*, at 542)

(d) a party entitled to an order for costs must, if challenged, show that particular costs were in fact incurred or that the professional work charged for was done, that the work was necessary or at least reasonably required for or reasonable to the defence of the proceedings or that the costs or charges were reasonable in amount and not excessive; (*Sobh*, at 459)

(e) contested criminal proceedings are not to be equated with contests between civil litigants given the element of compulsion and the different consequences of such proceeding; (*Latoudis*, at 43)

(f) a magistrate may have regard to scales of costs relevant in civil proceedings but is not bound or limited by them; (*Norton v Morphett*,(1995) 83 A Crim 900 at 111 per Phillips JA))

(g) it is open for a magistrate, in an appropriate case, to exercise his or her discretion to award costs on a global basis, or, in fixing costs, take into account the reasonableness not only of the individual items but also of the total amount; (*Sobh* at 460, *Chugg v Pacific Dunlop* (No 2) (1999) 3 VR 94, at 949)

(h) there is no general principle requiring a magistrate to order against an informant whatever amount a defendant's legal practitioner may have chosen to charge the client or whatever costs the solicitor and client may have agreed between themselves; (*Norton*, at 3 per Hayne J)

(i) the relevant enquiry is what the unsuccessful party may reasonably be required to pay the successful party at the conclusion of the litigation; (*Norton*, at 14 per Phillips J)

(j) any order for costs must always exclude any costs which have been unreasonably incurred or which are unreasonable in amount; (*Ibid*) and

(k) the governing principle to be applied is one of reasonableness. (*Lovejoy v Johnson* (Coldrey J) unreported BC9705272, 20 October 1997, at 5)

35. Thus, the authorities make it clear that while a successful defendant should not generally be out of pocket as a result of being required to defend the proceeding, this does not provide a "blank cheque" to a defendant to run up legal costs unreasonably, secure in the knowledge that if they are successful they are fully indemnified for costs. The touchstone is one of reasonableness. Therefore, while the actual scales of costs in civil proceedings may be of assistance in reviewing the quantum of costs claimed in respect of particular items of work, or the applicable hourly rates for different types of work, it is difficult to reconcile the principles applicable to the assessment of costs claims in criminal proceedings with the different bases of costs upon which a party may be ordered to pay in civil proceedings.

36. In my view, the applicable test is best expressed by Mandie J in *Sobh*, where he considered that the principle that a successful defendant was ordinarily entitled to be fully indemnified for his or her costs … detracted from a requirement that a party entitled to an order for costs must, if challenged, show that particular costs were in fact incurred or that the professional work charged for was done, that the work was necessary or at least reasonably required for or reasonably incidental to the defence of the proceedings or that the costs or charges were reasonable in amount or not excessive. All of these matters (and no doubt other matters) may be relevant to the exercise of the magistrate's discretion in fixing costs in a particular criminal case. Generally speaking, a successful defendant should not be out of pocket as to cost reasonably incurred and reasonable in amount. As was said by McHugh J in *Latoudis v Casey* (at 566; 310): "an order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket

expenses reasonably incurred in connection with the litigation..." Furthermore, the matter should be considered primarily from the defendant's perspective. However, I do not accept the plaintiff's submission that the magistrate was in error by not exercising his discretion upon the basis that all costs claimed should be allowed unless shown to be unreasonable.

37. As is apparent from the last sentence in the passage extracted above, Mandie J rejected the submissions that a successful defendant was entitled to all costs claimed unless shown by the other party to be unreasonable: that is, he implicitly rejected a submission that the applicable test required a successful defendant's costs to be assessed as if the defendant was a beneficiary of an indemnity costs order in a civil proceeding. Rather, he made it clear that where a party entitled to costs is challenged with respect to the quantum of costs claimed, the onus is on that party to show that the costs were reasonable and not excessive.

38. While Mandie J did not directly consider the issue of whether an award of costs could be made utilising concepts such as "indemnity" or "solicitor-client" costs, it is apparent from his remarks regarding the onus of proof upon a successful defendant claiming costs that, generally, an award of costs on an indemnity basis would rarely be appropriate given that an award of costs in such terms places the onus of proof upon the party liable to pay the costs to demonstrate that the costs claimed were unreasonable and/or excessive, rather than upon the party claiming the costs to demonstrate that they were reasonably incurred and of a reasonable amount.

39. Accordingly, while the scales of costs applicable in civil proceedings are helpful in determining the quantum which is allowed in respect of particular tasks or items of work, I do not consider that the different bases of costs which may be ordered in civil proceedings to be of particular assistance to a magistrate in determining what costs a successful defendant should receive. As stated by Coldrey J in *Lovejoy v Johnson*:

In fixing costs, a magistrate may have regard to civil costs relevant in civil proceedings but is certainly not bound or limited by them. As the authorities indicate, the governing principle to be applied is one of reasonableness.

40. Similarly, in *Norton,* the Court of Appeal stated:

> Once costs have been awarded generally, the amount at which those costs should be fixed or allowed is something on which the scales in civil proceeding, for want of anything more specific, may surely afford some guidance, but only if in a given case the magistrate finds them useful.

41. Again, I find this to mean no more than that the civil scale may be a useful guide to what amounts ought to be allowed for a particular task or type of work, or what hourly rates might be appropriate to be allowed. In my view, this decision does not provide authority for a submission that the different bases of costs applicable to civil proceedings ought to be imported wholesale into the principles governing costs in criminal proceedings. In *Norton*, Phillips JA indicated that the use of concepts such as "party-party" or "indemnity" costs might be useful tools in the assessment of the quantum of emphasising the broad discretion a magistrate has in respect of costs, but again emphasised that the enquiry is what the unsuccessful party "may reasonably be required to pay the former at the conclusion of adversarial litigation". ...

45. For completeness, there is authority which suggests that, contrary to my view, the principles governing the bases upon which costs might be awarded in civil proceedings are always applicable to criminal proceedings. In *Curnow v Police* ((2008) SASC 84; (2008) 100 SASR 290; 182 A Crim R 558) Debelle J of the Supreme Court of South Australia considered that *Latoudis* was authority for the principle that, when awarding costs in summary proceedings which terminate in favour of a defendant, courts should exercise their discretion as they do in civil cases (at [24]).

6. It should be noted however that this was an analysis of the law applying to the magistrate when making an order for costs in favour of a defendant in a criminal matter. In the current matter before the Court an order has already been made by a Magistrate. The order is for "reasonable costs", not an order for indemnity costs, or all costs, or some other formulation.

7. The Magistrate in the current matter had the opportunity to give greater clarity around the basis upon which reasonable costs were to be assessed and elected not to. The parties had the opportunity to put submissions about the same issue and failed to do so.

8. The applicant's position is that recovery of costs should be based on the Costs Agreement. It is necessary to determine if the costs should be reviewed on that or on some other basis. To

determine what costs are payable and on what basis it is necessary to consider the effect of the order that the costs be assessed by the Costs Court.

9. Section 131A of the *Magistrates' Court Act* 1989 provides:

> **131A Costs may be determined by Costs Court**
> Despite section 131(1), the Court may order that the costs of, and incidental to, a proceeding in the Court be assessed, settled, taxed or reviewed by the Costs Court.

10. Section 3 of the *Magistrates' Court Act* 1989 defines a "proceeding" broadly as any matter in the Court, including a committal proceeding, but does not include the exercise by a registrar of any jurisdiction, power or authority vested in the registrar as infringements registrar.

11. Section 17C of the *Supreme Court Act* 1986 establishes the Costs Court within the trial division of the Supreme Court and section 17D provides that:

> The Costs Court—
> (1) — (a) ...; (b) ...;
> (c) has jurisdiction to hear and determine the assessment, settling, taxation or review of costs in proceedings in—
> (i) the County Court;
>
> (ii) the Magistrates' Court;
>
> (iii) VCAT—
> if, by any order of a court or VCAT, costs are to be assessed, settled, taxed or reviewed by the Costs Court;

12. The Rules in relation to assessment, settling, taxing or reviewing of costs by the Costs Court are governed by Order 63 of the civil procedure rules of each Court. In making the order pursuant to s131A of the *Magistrates' Court Act*, it is arguable the Magistrate has enlivened the civil procedure rules in relation to costs as it is only by reference to Order 63 in the rules in each of the Supreme, County and Magistrates' Courts that the Costs Court has power to assess, settle, tax or review costs. Each Court has rules as to costs.

13. The *Supreme Court Act* 1986 provides as follows in relation to the jurisdiction of the Costs Court:

> **17J Costs in proceedings in another court or VCAT**
> ...
> (2) the exercise of its jurisdiction under section 17D(1)(b), (c) or (d), the Costs Court may assess, settle, tax or review costs in accordance with—
> (a) the Rules; or
>
> (b) the Rules, including any scales of costs, of the court in which the proceeding to which the costs relate originated or of VCAT, as the case requires.

14. Sub paragraph (2)(a) obviously refers to the *Supreme Court (General Civil Procedure) Rules* 2005. The reference in sub paragraph 2 (b) is to the *Magistrates' Court Rules* in the context of this case.

15. The *Magistrates' Court General Civil Procedure Rules* 2010 state as follows:

> **63.00.1 Costs in accordance with Appendix A**
> Costs for work done in a proceeding must be fixed or determined in accordance with Appendix A to these Rules.
>
> **63.00.2 Application of scale**
> (1) In fixing or taxing costs for work done in a proceeding the appropriate scales in Table 1 and Table 2 to Appendix A to apply must be determined as follows—
> (a) ... (b) ... (c) ...
>
> (d) in a proceeding or matter for which no provision has been specifically made, the Court may direct

that the scale of costs specified by the Court applies;

(e) despite anything in these Rules, if in a proceeding or matter the Court considers that the provisions of paragraphs (a) and (c) are inappropriate or unjust the Court may, either at the hearing, or within a reasonable time after the hearing, fix the scale of costs which applies.

63.00.3 Fixing or taxing of costs in accordance with scale at the time work done
(1) ...
(2) The Costs Court, when taxing the costs for work done in a proceeding, must do so as follows—
(a) as to any work done on or after the commencement of these Rules, according to the scales in Table 1 and Table 2 in Appendix A, as in force at the time the work is done;

(b) as to any work done before the commencement of these Rules, according to the scale of costs contained in any previous corresponding Rules in force at the time the work was done.

16. If "proceeding" includes criminal proceeding (which it clearly does given the wide definition in section 3 of the *Magistrates' Court Act*), then it is arguable that the Costs Court must tax on scale absent an order to the contrary.

17. Magistrates' Court Rule 63.34 provides that the lawyer for the party to whom costs are payable are entitled to recover on scale. Similarly worded Rules can be found in the County Court and the Supreme Court which provide for the Costs Court to assess, settle, tax or review costs pursuant to the applicable court scale of costs. Order 63.34 (Supreme Court) and 63A.34 (County Court) empowers either Court to "on special grounds arising out of the nature and importance or difficulty or urgency of the case allow an increase" up to 30% in the solicitor's charges. That power only exists in Costs Court in Supreme Court matters if there is a referral of that power (63.34(4)) by a Judge.

18. Clearly courts have a wide discretion on costs and can order that they be assessed on the basis of any cost agreement. This occurs when the costs order is made. Generally the role of the Costs Court is to quantify the costs in accordance with the order made, not determine the actual basis of the quantification.

19. For example, Pullin J in *Flotilla Nominees Pty Ltd v Western Australian Land Authority & Anor*[2] described the process whereby a party seeking costs in accordance with the costs agreement produces the costs agreement to the Judge at the time the order is made and makes it clear it is not a matter for taxation.

20. At paragraph 30 His Honour states "it is my opinion that if a party wishes to seek a special costs order or an indemnity costs order to allow costs to be taxed on the rates stated in the costs agreement, then the terms of the costs agreement should be disclosed to the judge who is being asked to make the order. This should not be left as an issue to emerge before the taxing officer".

21. A more recent example occurred in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)*,[3] where Croft J made a specific order that indemnity costs be assessed in accordance with the costs agreement in operation.

22. *Magistrates Court Rules* 63.00.1, 63.00.2 and 63.00.3 cited above, while appearing in a Rule that has the word "civil" in the heading, all use the word "proceeding". Applying *Magistrates' Court Rule* 63.00.3(2) at face value the Costs Court must apply scale in order to comply with section 17J(2)(b) of the *Supreme Court Act* 1986. Section 17J(2)(a) picks up the Supreme Court scale in a Supreme Court matter as a result of the operation of Rule 63.34 in the absence of a special order.

23. The parties agree that the Magistrate was not addressed about the underlying basis of how costs were to be assessed against a reasonable test. The only guidance is that the costs be reasonable. The Magistrate did not specify whether the Costs Court should tax the costs on scale or on the basis of the Costs Agreement. Instead, her Honour referred the matter to the Costs Court for taxation pursuant to s131A of the *Magistrates' Court Act* and as such, scale ought to apply as no special order was made to allow costs to be assessed on the basis of the Costs Agreement. It was clearly open for the Magistrate to be persuaded to make a 'special order'. When a referral

was made for the assessment of costs in the Costs Court the order of the Magistrate invoked the provisions of Order 63 *Supreme Court (General Civil Procedure) Rules* 2005 and the *Magistrates' Court Rules*. There is an argument that without a special order for the assessment of costs on the solicitor's own agreement, the Costs Court must assess the costs on the applicable scale of costs. I have the option of taxing on the Magistrates' Court scale and allowing increases of items. I have elected not to adopt that course in this matter.

24. I have also elected to not tax the bill on the basis of the Costs Agreement. The Agreement provides for a range of solicitors who all worked on the matter. From the affidavit of Francesco Baldo (filed on behalf of the applicant), the hourly rates charged by solicitors working on the matter range from $730 per hour excluding GST to $440 per hour excluding GST. As a comparator, the current Supreme Court scale which came into operation from 1 April 2013 on a standard (reasonable) basis of recovery provides $360 per hour excluding GST with a discretion to increase or decrease contained in the current Rule 63.72. The current Supreme Court scale is a reasonable basis to assess these costs as most of the work was completed in 2012. If the taxation occurs on the basis of the amended Supreme Court rules that accompany the amended scale then there is a general discretion to increase or decrease items in the scale (see Rule 63.72).

25. For completeness, there is a passage in *Legal Costs Victoria* (Butterworths) dealing with costs in criminal matters. The passage has not been amended in recent years and refers to the then practice of Master Bruce (who retired in 2006) as follows at paragraph [31,075]: "The Taxing Master of the Supreme Court currently favours the application of the Supreme Court civil scale, with any appropriate modification, when taxing solicitors' costs of criminal proceedings in the County Court or Magistrates' Court rather than the application of one of the monetary civil scales of one of those courts, although these have been allowed on occasions. There may be instances of serious criminal matters in those courts where no modification of the Supreme Court scale would be appropriate".

26. It is clear from the following passage that appears [paragraph 31,120] in relation to County Court and Magistrates' Court, that judicial officers in those courts favour the civil scale in criminal matters: "The judges and taxing officers in the County Court and the magistrates in the Magistrates' Court have generally taken a different approach from that of the Taxing Master of the Supreme Court when considering the question of the appropriate scale of costs to apply as between party and party".

27. The section that follows makes it clear that in criminal matters in the County and Magistrates' Court regard is had to the civil procedure rules and costs scales in each respective Court. In *Daly v McKendrie*[4] the judge made the point that he was in a better position to determine the quantum of costs than a registrar and he used the civil scale as a guide. In *Wilson v Brady*[5] the judge also applied the civil scale at 80%.

28. At paragraph [31,120] it is also stated "Similarly in the Magistrates' Court, when determining quantum of costs as between party and party, assistance is generally obtained by reference to the *Magistrates Court Civil Procedure Rules* 1999 and the scale contained in Appendix A".

29. It is of note that the Preamble to the Magistrates' Court scale states "Scale of costs which may be claimed by Counsel and Solicitors as between party and party **as well as between solicitor and client**" (emphasis added). "Reasonable" costs is the level of recovery from a client and the scale is intended to also cover that scenario. The order is only for reasonable costs. It is certainly possible the Magistrate was merely adopting usual practice and intended scale to apply by omitting any reference to a costs agreement.

30. It is uncontested that the applicant was initially charged with two offences. One was finalised with a guilty plea and a $60,000 fine. The second which was the subject matter of the Magistrate's decision in this matter was an offence arising from a serious injury at the workplace, arising from a fall through a roof. A fatality could have been the result. The maximum fines for the charge was in the order of $300,000. However, two previous fatalities resulted in conviction and fines of $90,000 and $230,000 in 2003 and 2008 respectively. I accept that this was a serious matter with serious financial and reputational consequences. The current Supreme Court scale is the appropriate basis of recovery.

THE COURT RULED THAT:
The applicant's entitlement to costs be assessed on the current Supreme Court scale for the work performed, with the current Rule 63 of the *Supreme Court (General Civil Procedure) Rules* 2005 to apply.

The respondent is entitled to costs of the hearing on 5 August 2013 as they were successful on the preliminary point. They are also entitled to the costs associated with the bill filed with the Summons drawn on the costs agreement as a fresh bill is to be drawn and this work is now thrown away.

An application for costs of the objections was rejected on the basis that the respondent should have identified the preliminary issue at the call over and if they had done so the objections would not have been required until after determination of the preliminary issue.

An application for the costs of inspection was also rejected on the basis that the work was not thrown away and any fruits of the inspection can be utilised in the taxation irrespective of the manner in which the bill is drawn.

---

[1] [2012] VSC 198 (17 May 2012).
[2] [2003] WASC 122; (2003) 28 WAR 95; (2003) 129 LGERA 65.
[3] [2012] VSC 399.
[4] unreported, CC (Vic), Jones J, 1006/1990, 23 December 1992.
[5] unreported, CC (Vic), Murdoch J, 778/1991, 12 May 1992.

APPEARANCES: For the plaintiff Paper Australia Pty Ltd: Ms C Currie, counsel. Herbert Smith Freehills, solicitors. For the respondent Victorian WorkCover Authority: Mr M Lapirow, counsel. Victorian WorkCover Authority Enforcement Group.
