09/89

SUPREME COURT OF VICTORIA

NORTHLAND AUTOMOTIVE PROTECTION SERVICES v PHIL TULLOCH (trading as FOUR STAR MOTORS)

King J

18 August 1988

COSTS – CIVIL PROCEEDINGS – DEFAULT JUDGMENT ENTERED – APPLICATION TO SET ASIDE SUCCESSFUL – WHICH PARTY SHOULD PAY COSTS – WHETHER COSTS FOLLOW THE EVENT: *MAGISTRATES' COURTS RULES* 1986, R157.

Notwithstanding that the usual practice in Magistrates' Courts in applications to set aside a default judgment may be to order that the applicant/defendant pay the respondent/complainant's costs, the presiding Magistrate in an appropriate case, may apply the rule that 'costs follow the event' and grant the successful applicant/defendant the costs of the day.

KING J: [1] This matter is a proceeding under Part XI of the *Magistrates' Courts Act* 1971 being the return of an order nisi to review the order of a Stipendiary Magistrate made in the Magistrates' Court at Heidelberg on 3rd February 1988. The order nisi was granted by Master Barker on 1st March 1988. The order subject to review was made on an application by Phil Tulloch, the respondent before me, under **[2]** s152 of the *Magistrates (Summary Proceedings) Act* 1975 for an order that a default judgment against him dated 30th June 1987 be set aside. The said judgment was on a default summons issued on 5th December 1986 to recover $1,085.00 from Mr Tulloch for work and labour done by the applicant in this matter, Northland Automotive Protection Services (to which I shall refer as "Northland").

The Stipendiary Magistrate granted the application, ordering that the order of 30th June 1987 be set aside, that the complaint in the default summons be placed in the list, and that its hearing be adjourned to a date to be fixed. He ordered also that a notice of defence be filed within twenty-one days and that Northland pay Mr Tulloch's costs of the application fixed at $489.00.

The order nisi contains six grounds, but the only one relied on by Mr Randall of counsel, who appeared before me for Northland, was:-

> "(f) the Magistrate was wrong in the circumstances before him in ordering the Complainant" (i.e. Northland) "to pay the costs of the Applicant" (i.e. Mr Tulloch) "on the default summons".

It appears from an affidavit sworn by Mr Jones, who appeared as counsel for Mr Tulloch on 3rd February 1988, that the application to set aside the default judgment was stood down in the morning of that day until after lunch, because counsel briefed for Northland had left the brief in his chambers. As a result another barrister, Mr Parncutt, brought the brief to the Heidelberg Court at about 1.30 pm. and represented Northland before the Court when the matter came on at 2.00 pm.

[3] The ground set out in Mr Tulloch's application to set aside the default judgment was as follows:-

> "The reason why I did not give notice of intention to defend the complaint is that following a telephone conversation with the complainant's solicitor regarding the mis-naming of me as the defendant, I was informed by the complainant's solicitor that this mistake would be corrected so that the defendant would read as 'FOUR STAR MAPS'. I heard no more in this matter until I was subsequently presented with the order."

Two affidavits were presented to His Worship, one by Northland's solicitor and the other by Mr Tulloch. In addition Mr Tulloch gave oral evidence and was cross-examined by Mr Parncutt. No

oral evidence was given for Northland. It was common ground that Mr Tulloch made a telephone call to Northland's solicitor after service upon him of the default summons, and said that he did not consider he was personally liable to Northland. The said affidavits differ as to what further was said on this occasion. According to Mr Tulloch he said that he was incorrectly named in the summons, as he had not traded under the name of "Four Star Motors", but that Philmore Motors Pty Ltd traded under that name. He said that he was one of the owners and directors of that company. He said that Northland's solicitor assured him that he would amend the summons to read "Philmore Motors Pty. Ltd." trading as "Four Star Motors", and he believed that the problem had been sorted out. Northland's solicitor deposed that he informed Mr Tulloch that his instructions were that all dealings had been on a personal basis and suggested to him that should he wish to defend the matter he would have to serve and file a notice of defence. He proceeded to enter a default judgment because he did not receive a notice of defence from **[4]** Mr Tulloch.

Mr Parncutt in his affidavit in the proceedings before me, conceded that Mr Tulloch, by giving oral evidence before the Stipendiary Magistrate and tendering certified copies of documents from the Commissioner of Corporate Affairs that Philmore Motors Pty Ltd was the registered proprietor of the business names "Four Star Motors" and "Phil Tulloch Four Star Motors", proved the incorporation of Philmore Motors Pty Ltd. He says also that Mr Tulloch gave oral evidence of his conversation with Northland's solicitor, and according to Mr Tulloch, in an affidavit made by him in these proceedings, he was cross-examined and challenged on this subject by Mr Parncutt.

On the basis of the affidavits before him, the oral evidence of Mr Tulloch and the documents produced by Mr Tulloch the Stipendiary Magistrate, according to Mr Parncutt, found that:-

> "(a) Mr Tulloch had advised Northland's solicitor that he was the wrong party to the proceedings;
>
> (b) Mr Tulloch had been incorporated at all material times;
>
> (c) Northland's solicitor had had ample opportunity to verify Mr Tulloch's advices by making a 'simple company search and business name search' prior to entering judgment;
>
> (d) Northland's solicitor had acted with undue haste;
>
> (e) Northland's solicitor told Mr Tulloch that he would 'look into the matter and if true (the defendant being the wrong party) take action against the proper party'."

It was conceded by Mr Randall before me that the said findings were open to the Magistrate on the evidence **[5]** before him, and I think that this was a proper concession to make. On the point in issue Mr Randall submitted before me that Northland had, pursuant to the Rules, obtained judgment and incurred the further costs of a summons to debtor, that the usual costs order on the setting aside of a default judgment was that the defendant was ordered to pay the complainant's costs, and that the Magistrate wrongly exercised his discretion in departing from this practice on this occasion.

Mr Lincoln of counsel for Mr Tulloch agreed with Mr Randall as to what was the usual practice, but contended that this was not such a case. He pointed out that Rule 157 of the *Magistrates' Courts Rules* 1986 provided that subject to the provisions of any Act and of the Rules the costs of and incidental to all proceedings in a Magistrates' Court were in the discretion of the Court, and that under Rule 150, for any special reason, the Court might allow such costs in excess of the scale as it may deem just. He said that such an application would normally be consented to and take a very short time; however, due to Northland's counsel's brief having been left in his chambers and to the contest which took place in the afternoon of the hearing, His Worship was justified in finding that Northland should pay Mr Tulloch's costs of the day.

I think it is clear that His Worship was entitled within the proper exercise of his costs discretion to so find. Mr Tulloch's case was clearly stated in his summons, and the Stipendiary Magistrate accepted his evidence, as he was entitled to do, as to what took place between him and Northland's Solicitor. Having made this finding of fact he **[6]** was entitled to find that to grant Mr Tulloch the costs of the day was to apply the usual principle that costs follow the event. Mr Randall submitted that in any event the costs are higher than His Worship was entitled to award. A dissection of the costs order of $489.00 is set out on the back of Mr Jones' brief, which was

exhibited before me. Mr Randall directed my attention to the last two items, namely:-

> "Additional solicitor's costs $100 Witnesses' costs $150"

I have some difficulty with this argument. My main difficulty is that ground (e) of the order nisi raises the general point that the Stipendiary Magistrate should not have made a costs order in Mr Tulloch's favour, but does not refer to the quantum of that costs order. General reference is made to this subject in the affidavit evidence. According to Mr Parncutt the Magistrate said that "the matter would be unlikely to come again" and therefore made a "loading" of $250 in respect of general preparation of the costs of the application, which costs be awarded against the complainant. Mr Jones says that to the best of his recollection, the Stipendiary Magistrate made no such remarks.

According to the usual practice of the Court on such applications, Mr Jones' evidence is to be accepted where it conflicts with Mr Parncutt's evidence. This means that there is no evidence before me as to why His Worship awarded the last mentioned two items. This may be due to the fact that the question of the quantum of costs was not raised in the grounds of the order nisi. In the absence of evidence dealing with this matter, I think I am bound to **[7]** find that the Magistrate's findings on quantum were pursuant to a proper exercise of his costs discretion. My conclusion is therefore that the order nisi must be discharged.
