15/95; [1995] VSC 211

SUPREME COURT OF VICTORIA — COURT OF APPEAL

NORTON v MORPHETT and ANOR

Ormiston, Phillips and Hayne JJ A

17 August, 31 October 1995 — (1995) 83 A Crim R 90

COSTS – SUMMARY PROCEEDING DISMISSED – DEFENDANT ENTITLED TO COSTS – TEST TO DETERMINE COSTS - WHETHER AWARDED ON "AN INDEMNITY BASIS" – WHETHER OPEN TO ALLOW COSTS REASONABLY INCURRED AND OF REASONABLE AMOUNT – QUANTUM OF COSTS – DISCRETION – RELEVANT FACTORS: *MAGISTRATES' COURT ACT* 1989, S131(1).

1. The question which fell for determination in *Latoudis v Casey* (1991) 170 CLR 534 was <u>when</u> should an order for costs be made in favour of a successful defendant, not <u>how</u> those costs should be fixed. The judgments in the case do not require a magistrate to award costs on "an indemnity basis" or to award an amount which will meet the bill rendered by the defendant's practitioner.

2. Pursuant to s131(1) of the *Magistrates' Court Act* 1989, a magistrate has an unfettered discretion both in relation to the awarding of costs and to the fixing of the amount.

3. The essential inquiry for the magistrate is how much the unsuccessful party might reasonably be required to pay to the successful party. Whilst the discretion is not to be limited by reference to the Civil Scale of Costs, such a Scale may be useful in providing some guidance. The Magistrate may undertake a task which is largely akin to that of a taxing officer and allow only those costs which have been reasonably incurred and of a reasonable amount.

4. Accordingly, there was no error of principle where a magistrate said that he was prepared to allow an amount of costs which was "just and reasonable" and taxed off more than 50% of the bill of costs as being unnecessarily incurred.

***Norton v Morphett and Anor* MC 37/94, affirmed.**

ORMISTON JA: **[1]** I have had the advantage of reading the judgments of both Phillips JA and Hayne, JA in draft form and, for the reasons which they express, I likewise consider that this appeal should be dismissed with costs. Not only do I agree that no error of principle by the magistrate in fixing the accused's costs has been demonstrated but I wish especially to place emphasis on the closing observations in each of those judgments. Appeals of this kind are properly to be discouraged and this Court may in future make orders for the costs of such appeals which will reflect its disapproval of them.

PHILLIPS JA: *[After setting out the facts of the summary proceedings which were dismissed and the Magistrate's decision in relation to the application for costs, His Honour continued]*...**[4]** [T]he appellant's starting point was always the judgments in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287. The appellant's principal contention was that those judgments required that the order for costs in favour of the appellant be for costs "on an indemnity basis". In my opinion, that submission was not made out. It depended, rather, upon taking what was said by the members of the High Court in *Latoudis* out of context – and so I turn first to consider that case.

In *Latoudis*, the High Court was concerned with the criteria to be applied by a Court of summary jurisdiction when exercising its statutory jurisdiction to award costs in criminal proceedings which have terminated in favour of the defendant (170 CLR at 537 per Mason CJ). Two approaches had emerged in the States. According to the first, costs ought generally to be awarded to the successful defendant; whereas according to the second, the discretion was altogether at large (save that in Victoria the costs were limited by statute to such costs as the Court saw to be "just and reasonable"), with no inclination either way. A majority of the Court preferred the first of these, describing it as "a guideline according to which the discretion should be exercised" (a "guideline" being a legitimate consideration in the exercise of a discretion which is otherwise

broad and unlimited, as distinct from a "fetter" which is impermissible: *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819). That choice between the two competing approaches to the awarding of costs was the whole point of *Latoudis.* **[5]** Thus, Mason CJ said (170 CLR at 544):

> "... I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant."

Toohey J said (170 CLR at 565):

> "If a prosecution has failed, it would ordinarily be just and reasonable to award the defendant costs, because the defendant has incurred expense, perhaps very considerable expense, in defending the charge."

McHugh J identified the issue on the appeal as "whether in summary criminal proceedings a successful defendant should ordinarily be awarded his or her costs" (170 CLR at 566) and resolved the issue affirmatively. None of this involved the High Court in a consideration of the particular basis upon which such costs, when ordered, should be taxed and, in my opinion, what their Honours said in *Latoudis* cannot properly be used to determine that question. Yet that is precisely how the appellant sought to argue here. In so doing, counsel pointed to particular references made by their Honours in *Latoudis* to the prosecution's "indemnifying" the successful defendant, "reimbursing" him or paying "all" his costs: see for example 170 CLR at 543-544 per Mason CJ at 565 per Toohey J, and at 566-567, 569 per McHugh J. But, as I have said, such words can be used to support the appellant's submission only if they are taken out of context. One or two examples will suffice. In the course of his judgment, Mason CJ said (170 CLR at 543):

> "If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli* v *Abbott* (1981) 53 FLR 108 at 111."

Counsel seized upon the word "indemnify" but it is plain from **[6]** the context, and indeed from what immediately follows, that the Chief Justice was here concerned only to deny that an order for costs was the imposition of a penalty or punishment. His Honour was contrasting punishment with compensation. Moreover, in saying that costs "are awarded to indemnify," his Honour was doing no more than echoing what is often heard, that is, that "costs are an indemnity". That is said, however, not in order to expand what is granted, but to limit it; for the expression emphasises that an order for costs cannot go beyond what has been actually spent or incurred: for example, *Harold v Smith* [1860] EngR 516; 157 ER 1229 at 1231; (1860) 5 H & N 381 at 385; 29 LJEx 141, *Gundry v Sainsbury* [1910] 1 KB 645 at 649, *Angor Pty Ltd v Ilich Motor Co Pty Ltd* [1992] FCA 348; (1992) 37 FCR 65 at 70-71. That principle is long established and it was re-affirmed very recently in *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403; 120 ALR 385; (1994) 68 ALJR 374. It is in that sense that costs are an indemnity. Again, appellant's counsel relied upon the following passage in the Chief Justice's judgment at 544:

> "Nevertheless, I am persuaded that, in ordinary circumstances, an order for costs should be made in favour of a successful defendant. However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs."

Here, the appellant seized upon the word “all” in order to found a submission that it must follow from what his Honour said that ordinarily "all" costs incurred will be recoverable under an order for costs in favour of a successful defendant. But that was not what was meant. First, the passage I have just quoted occurs immediately after a passage in which the Chief Justice denies that civil proceedings provide a complete analogy, for which reason he "would not be prepared to accept **[7]** that in summary proceedings there should be any general rule that costs follow the event". "Nevertheless", his Honour continues, he is persuaded that ordinarily costs may be ordered in favour of the successful defendant.

In what then followed, his Honour was drawing a contrast between that ordinary order for costs and the more limited order that might sometimes be appropriate in criminal proceedings, denying to the defendant, though successful, some portion of his costs or perhaps all of them.

Thus the Chief Justice continued immediately after the passage just quoted:

> "If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor. I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs."

In that context, when speaking of an order for less than "all" the defendant's costs, his Honour did not imply that, when an order is made "in ordinary circumstances", the order will necessarily cover each and every item of expenditure actually incurred. Nor, I think, did Toohey, J mean anything different in the passage in his Honour's judgment at 565 upon which the appellant sought particularly to rely.

It is for these reasons that I reject the submission of the appellant that the judgments in *Latoudis* required that the magistrate award costs "on an indemnity basis". In my opinion, the judgments in *Latoudis* did not address the basis upon which costs were to be fixed and in that sense allowed; **[8]** *Latoudis* was concerned with the much more general question whether, and if so when, costs were to be awarded at all to a successful defendant after summary prosecution. In *Arthur v McLeish* ([1996] VicRp 28; [1996] 1 VR 411, Brooking, Tadgell and Teague JJ, 31 August 1994), Tadgell J had occasion to distinguish between the making of an award of costs and the taxation of costs in consequence of the award; and that is a useful distinction to bear in mind here.

Of course, in the Magistrates' Court there is no separate taxing officer and so the two functions, of awarding costs and fixing them in amount, are not uncommonly performed at the one time – and so it was here in substance (for the adjournment from 26 August 1993 to 27 October may be ignored for this purpose). Apparently there was no contest but that, when the charge was dismissed, the appellant, as defendant to the prosecution, should have an award of costs; the only question was the amount at which those costs should be allowed or fixed. Hence there occurred on 27 October what was equivalent to a taxation, although when the order for costs came to be made there was but the one order, for the costs so fixed and allowed. That must not be permitted to conceal that two steps, not one, underlay that order and, while *Latoudis* was obviously concerned with the first, the second was not being there addressed.

Having dealt thus far with what in my opinion was not decided in *Latoudis*, I turn now to such guidance as may properly be said to be afforded to a magistrate who is called upon to fix costs in favour of a defendant in a case such as this. First, there are the terms in which the discretion is conferred by the statute. When *Latoudis* was decided, the **[9]** relevant legislation governing costs before a magistrate was found in s97 of the *Magistrates (Summary Proceedings) Act* 1975 (and that section is set out in the judgment of Dawson J at 547). Para(a) of s97 dealt with criminal proceedings and para(b), with civil. In each case, the Court was empowered to order "such costs as the Court thinks just and reasonable". Such a provision appears to confer the widest discretion, and yet it was in that context that the High Court held that the successful defendant on a summary prosecution should ordinarily have his costs. The relevant provision is now s131 of the *Magistrates' Court Act* 1989 and the discretion is, arguably, even more widely expressed (although I note in passing that in *Latoudis* Dawson, J described it as "to similar effect": 170 CLR at 547). Subs(1) and subs(2) of s131 read as follows:

> "(1) The costs of and incidental to all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.
>
> (2) Subs(1) applies unless it is otherwise expressly provided by this or any other Act or by the rules."

Since the magistrate's decision in the case under appeal, some qualifications on the exercise of the discretion conferred by subs(1) have been introduced into the section by the addition of further subsections, but they cannot fall for consideration now. In this case, it was simply subs(1) of s131 that fell to be applied; for, in terms of subs(2), it was not then "otherwise expressly provided by this Act [the *Magistrates' Court Act*] or any other Act or by the rules". There were, and are, no

Rules of Court governing the award of costs in criminal proceedings in the Magistrates' Court. **[10]** To my mind, s131(1) was to be given effect according to its terms when the magistrate came to fix the amount of costs to be allowed in this case.

Under s131(1) the magistrate plainly has an unfettered discretion – both in relation to the awarding of costs and in relation to the fixing of their amount. In relation to the first, *Latoudis* must be taken into account when the magistrate is deciding whether to order costs or not; but when such an order is resolved upon, the question of fixing the amount of those costs is one on which he is altogether at large. Of course the discretion conferred in this regard is a judicial discretion and must be exercised accordingly; it cannot be exercised capriciously, by reference to mistaken facts or irrelevant considerations or for some purpose altogether foreign to that for which the discretion is conferred in the first place: see, for example, *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-505; 9 ABC 117; (1936) 10 ALJR 202, *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627 and *Magna Alloys and Research Pty Ltd v Coffey* [1981] VicRp 3; [1981] VR 23 at 26. But subject to such considerations which go to ensure that discretions which are conferred in general terms are nevertheless exercised judicially, the discretion is at large and the magistrate must exercise it as he sees fit in the light of all the particular circumstances of the case before him.

Appellant's counsel submitted before us that the exercise of that discretion was not to be limited, in a case like this, by considerations pertaining to an award of costs in the civil jurisdiction, and he instanced in particular the scales of costs relevant to civil proceedings. So much may be accepted, because the discretion should not regarded as **[11]** "limited" by reference to such things. But that is not to say that those very things may not provide guidance if in a given case they appear useful to the magistrate. In *Latoudis*, the analogy with civil proceedings was rejected as imperfect, to a greater or lesser degree (see per Mason CJ at 533-534, per Dawson J at 559, per Toohey J at 565, per McHugh J at 568) but that was said in relation to the question whether there should be any award of costs at all. 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 proceedings, for want of anything more specific, may surely afford some guidance, but only if in a given case the magistrate finds them useful.

Indeed, the appellant's own solicitor found them useful for, there being no scales of fees applicable in criminal proceedings, he brought in a bill based, he said, upon the scale of costs in a civil proceeding where the amount at issue was between $5,000 and $10,000. The decision whether that was or was not an appropriate basis from which to work was for the magistrate in the exercise of discretion. In fact, the magistrate chose to work from a lower scale than that selected magistrate by the solicitor, but in so choosing the magistrate was not shown to have gone beyond the limits of his discretion. In my opinion, the reference to such scales for guidance cannot be said, as a matter of principle, to betoken error.

Next, there is the appellant's submission that the only proper basis for the allowance of his costs after summary prosecution was the "indemnity basis" explained in the *EMI case*. There is no doubt but that the concept of awarding costs on an "indemnity basis" was developed as a tool in civil **[12]** proceedings and so the appellant's submission for its adoption in this case sits ill with his submission that considerations germane to civil proceedings are irrelevant to criminal proceedings; but the two submissions may be treated as advanced in the alternative. In respect of his having costs on an indemnity basis, the appellant's primary submission was, of course, that that result was dictated by the judgments in *Latoudis*, and I have rejected that. But it remains to consider if the result is none the less the appropriate one in the exercise of discretion, where the costs are sought by a successful defendant after summary prosecution.

Once again it cannot be said that it must, or even should, be so as a general proposition; for to accept such a result as always appropriate would plainly be inconsistent with the major premise, which is that the discretion is broad and unfettered and is to be exercised as the magistrate sees fit in all the circumstances of the particular case. It was contended that the magistrate had in this case accepted the submission that the costs were to be allowed or fixed on an "indemnity basis" and had then departed from it, acting instead upon a party and party basis. Yet it seems obvious enough that the magistrate referred to an "indemnity" because he was being pressed with the judgments in *Latoudis* and, that being so, he doubtless meant by the word no more than

was meant in that case. There, the use of that word was in the context of the saying that "costs are an indemnity" and its use did not require that the magistrate proceed to allow or disallow specific items or amounts upon any particular, identified basis of taxation, let alone the so-called "indemnity basis".

Nor was it necessary for the magistrate to identify **[13]** some particular basis of taxation in civil proceedings as a guide. If, after referring to "indemnity", he proceeded upon what could be described as the most usual basis of taxation in civil proceedings – that of party and party – that is not in itself relevant error. These descriptions of the different bases for the taxation of costs do no more than encapsulate a particular approach to the task in hand and one label or another may be more or less accurate in describing the magistrate's approach in this case. In civil proceedings the basis for taxation in a given case is derived essentially from the terms of the relevant order for costs. In this case, the magistrate was at large as to the amounts to be allowed or disallowed and I see no need to decide if his approach was akin to taxation on a party and party basis. Suffice it to say that, if it was, I do not consider that on that account the discretion miscarried.

Indeed, if this cross-reference to civil proceedings is warranted at all, even the most casual survey of the differences that have grown up there between the various forms of taxation must demonstrate how little reason there was in this instance to suppose that the defendant ought to have had his costs on any more generous basis than party and party. In civil proceedings, the forms of taxation evolved over many years by reason of a number of factors, ranging from the form in which some rule of Court was for the time being cast (such as the former O65 R27(29) of Chapter I of the *Supreme Court Rules*) to a desire on the part of the Court, in the circumstances of a given case, to provide for the successful party something closer to a complete indemnity as to costs than would otherwise be recovered. I had occasion to explore this **[14]** in *re National Safety Council of Australia, Victorian Division (In liquidation) (No 2)* [1992] VicRp 34; [1992] 1 VR 485 at 498-507; (1991) 9 ACLC 413. It is well-accepted that, to a greater or lesser degree, all forms of taxation may fall short of providing a complete indemnity, save perhaps where a solicitor is taxing his bill against his own client - and then the indemnity is not afforded to the client, but is required of him. In that situation, the inquiry is very different; for it is about what the client may properly be required to pay in virtue of the contractual retainer, and questions of authority are therefore all important. See, for example, the gloss that was put on O.65 R27(29) by *In re Blyth & Fanshawe* (1882) 10 QBD 207 at 210 and *Re Malleson, Stewart, Stawell and Nankivell* [1931] VicLawRp 22; [1931] VLR 127 at 130.

In contrast, when the Court is considering an order for costs in favour of the successful party against the unsuccessful party, the enquiry is what the latter may reasonably be required to pay the former at the conclusion of adversarial litigation, and, however far the order for costs may be pitched in favour of the successful party, there must always be excluded, at the very least, any costs which have been unreasonably incurred or which are unreasonable in amount (which was the limitation imposed by Megarry, V-C in *EMI Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59; [1982] 2 All ER 980; [1982] 3 WLR 245 when describing the effect of an order *inter partes* for costs "on an indemnity basis"). At the very least to that extent (even if not beyond, as will more commonly be the case) the order must therefore fall short of providing a complete indemnity according to its terms (whether or not that proves so in its application). See also and compare *In re Grimthorpe, deceased* [1958] 1 WLR 381 at 386 per Danckwerts J, *In re* **[15]** *Nation Life Insurance Co. Ltd* [1978] 1 WLR 45 at 49 H per Templeman J, *Giles v Randall* [1915] 1 KB 290 at 295 per Buckley LJ and *Smith v Smith* [1906] VicLawRp 12; [1906] VLR 78 at 80; 11 ALR 452; 27 ALT 109 per a'Beckett J.

In this Court, the three most common forms of taxation now recognised by the Rules are taxation on the bases of party and party, solicitor and client and solicitor and own client: RSC Chapter I R63.27, R63.28, R63.58. It cannot be doubted that an order may be made *inter partes* for the taxation of costs on the basis of solicitor and own client (see, for example, *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] VicRp 12; [1991] 1 VR 129; 6 ANZ Insurance Cases 76,243) and perhaps that amounts to much the same thing as is elsewhere formulated as an order for costs "on an indemnity basis". (Even an order expressly in those terms might be allowed under our R63.28(c).) But in whatever form such an order is cast, not only does it not afford in terms an indemnity which is necessarily complete; it is also rarely made. Such an order involves a most significant departure from the usual order for costs which is on the basis of party and party and

in an adversarial situation there must be some special reason for such an order (as was confirmed in *Verna Trading).* It is made, for instance, in cases of contempt or where the Court is concerned to punish: *Degmam Pty Ltd v Wright (No 2)* [1983] 2 NSWLR 354 at 358, *Morgan v Carmarthen Corporation* [1957] 1 Ch 455 at 469; [1957] 2 All ER 232. It is never made as of course.

Now, it may be accepted that in this instance the appellant was seeking no more than the payment of his costs on the "indemnity basis" identified in the *EMI case*; for counsel applied to the magistrate for all the appellant's costs **[16]** save those which were shown to be unreasonable in amount or unreasonably incurred. But given that to require costs to be paid to that extent is most unusual in civil proceedings *inter partes*, I think that the submission was very bold. Insofar as it flowed from anything said in *Latoudis* I have rejected it. Insofar as it depended upon the case possessing some special or difficult feature, there was nothing upon which the appellant might seize. As the magistrate said, this was not a case which was in any way out of the ordinary; it was a summary prosecution attended by no special features and if the appellant's solicitor sought to make anything more of it (for example, by making application, as he did, under the *Freedom of Information Act* for the police brief) it is difficult to see why the prosecution should be required to underwrite his efforts. Nor did the magistrate see it otherwise. In short, the magistrate saw no reason for granting costs in this case on any special basis and, so far from detecting in that any appealable error, I can only say that I agree.

The only circumstance which was relied upon and which might be said to distinguish this case from hundreds like it in the Magistrates' Court was this: that on the day before the hearing the prosecutor spoke with the appellant's solicitor and offered to discontinue if no costs were sought. The offer was rejected and the matter went ahead, with witnesses being called on both sides and cross-examined. It was perhaps a pity that so much court time had to be spent on the matter when, on the day before, the only point of difference between the parties appears to have been one of costs. But I do not accept the appellant's submission that because the prosecutor made the offer to discontinue on terms, the prosecutor must have **[17]** considered that there was no case to answer and that therefore to proceed was in breach of the duty to prosecute only where there is evidence to support the charge. To offer to discontinue on terms does not amount to an admission that in the view of the prosecutor there is no case; and on the following day there was in fact no submission of no-case made at the end of the prosecutor's evidence. In my opinion, the conversation relied upon did not amount to a special circumstance calling, when the charge was dismissed, for something more rigorous in the way of costs against the prosecution than was otherwise appropriate.

More than once in this case, in the course of examining the items claimed by the appellant through the bill of costs prepared by his solicitor, the magistrate said that he was prepared to allow what was "just and reasonable" and there can be no error of principle there, given that the magistrate was at large. As already described, the procedure he followed was to consider each item in the solicitor's bill, entertaining first an explanation from the appellant for the claim and then hearing objection from the prosecution and any response from the appellant. In relation to some items, he refused to allow the claim, saying that the work done was not "necessary". This reflected, no doubt, the magistrate's view that this was a "simple case". To say that the work for which some particular claim was made was not "necessary" in the circumstances, amounts to no more than a decision that the work was not "reasonably necessary" - and if not reasonably necessary, then it was not reasonably incurred. To my mind, there was no difficulty at all in the magistrate's deciding, as I think he did, to allow only what had been reasonably incurred and was **[18]** reasonable in amount; for the essential inquiry was how much the unsuccessful party might reasonably be required to pay to the successful party. It may be that the most useful formulation of the test is still that framed nearly 90 years ago by Parker J in *Peel v London and North Western Railway Co* [1907] 1 Ch 607 at 612 and adopted by McArthur J in *Malleson, Stewart, Stawell and Nankivell* at 134:

> 'Would it be necessary or proper for a reasonably prudent man, endeavouring to get justice, but endeavouring to get it without any undue expenditure of money, to incur the expense in question?'

But however the test be framed, the question what shall be allowed and what not allowed in a given case is ultimately for the decision of the magistrate in the exercise of his discretion in all of the particular circumstances of the case. And it will be apparent from what I have said that I am not persuaded that in this case the magistrate fell into appealable error in arriving at his

decision. Thus far, I have dealt largely with the principles affecting the exercise of the discretion to allow or disallow particular items in the solicitor's bill of costs which was put forward as the basis for allowing costs against the prosecution. Counsel argued before us that the appellant had entered into an agreement for payment of those fees and expenses and in the absence of anything to show that that agreement was unreasonable the appellant should now be entitled to be paid by the prosecution all that the solicitor was charging him. This approach was rejected implicitly by the magistrate and in so doing he was plainly correct. Indeed, to do otherwise might have involved abandoning the discretion altogether to the appellant's solicitor. Beyond this, there **[19]** was no argument put to us about individual items in the bill; nor is that surprising given the limited nature of the appeal.

As I described it at the outset, what the magistrate undertook in this instance was a task largely akin to that of a taxing officer. In this connection it is as well to recall what Jordan CJ said in *Schweppes' Ltd v Archer* (1934) 34 SR (NSW) 178 at 183-184; 51 WN (NSW) 71 in a passage adopted by Kitto J in *Australian Coal and Shale* (94 CLR at 628-629):

> "In appeals as to costs, the principles to be applied are these. The Court will always review a decision of a Taxing Officer where it is contended that he has proceeded upon a wrong principle, for the purpose of determining the principle which should be applied; and an error in principle may occur both in determining whether an item should be allowed and in determining how much should be allowed. Where no principle is involved, and the question is whether the Taxing Officer has correctly exercised a discretion which he possesses and is purporting to exercise, the Court is reluctant to interfere. It has undoubted jurisdiction to review the Taxing Officer's decision even where an exercise of discretion only is involved, and will do so freely on a proper case, using its own knowledge of the circumstances ... but it will in general interfere only where the discretion appears not to have been exercised at all, or to have been exercised in a manner which is manifestly wrong; and where the question is one of amount only, will do so only in an extreme case."

Nothing could be further from this case. Essentially the decision under appeal was a decision on quantum only, by one who was acting in the place of a taxing officer, and in such cases, unless there is some significant error of principle to be detected in the approach adopted by the magistrate (and in my opinion there was none here), the passage just quoted shows how difficult it will ordinarily be to persuade a court on appeal to interfere: see also *Magna Alloys and Research Pty Ltd v Coffee (No 2)* [1982] VicRp 10; [1982] VR 97 at 102-103. Given that the **[20]** principles affecting review of taxation are so well-established, it is perhaps particularly troubling that in this case there was not only one appeal, but two, over a sum of $1,698.78. For the reasons I have given, I agree with the learned Judge who entertained the appeal from the Magistrates' Court: there was no appealable error in the decision of the magistrate. Accordingly the appeal to this Court from that decision was properly dismissed and it follows that the further appeal to this Court should also be dismissed, and with costs.

*[**HAYNE, JA** delivered a separate judgment in which he agreed with the reasons of Phillips, JA and that the appeal should be dismissed].*

ORDER: Appeal dismissed with costs.

APPEARANCES: For the Plaintiff (Norton): Mr D Perkins and Mr J Lavery, counsel. Solicitors for Plaintiff: Kuek and Associates. For the Defendant (Morphett): Mr A Albert, counsel. Solicitor for Defendant: Victorian Government Solicitor.
