

55/92

## SUPREME COURT OF VICTORIA

**TAYLOR v HARTLEY**

O'Bryan J

1 December 1992

**COSTS – CIVIL PROCEEDINGS – ARBITRATION – DEFENDANT SUCCESSFUL – NO AMOUNT AWARDED – WHETHER "COSTS CAP" APPLIES: MAGISTRATES' COURT CIVIL PROCEDURE RULES 1989, O26, Appendix A; MAGISTRATES COURT (ARBITRATION) REGULATIONS 1990, Sched 2.**

Where a complaint is referred to arbitration, the defendant is successful and no amount is awarded, the relevant regulations for the purpose of fixing costs are not the *Magistrates' Court (Arbitration) Regulations 1990*. In such a case, the Court should apply the scale of costs in Appendix A to the *Magistrates' Court Civil Procedure Rules 1989*.

**O'BRYAN J: [1]** On 7th October 1991 the Magistrates' Court at Heidelberg heard and determined a summons in which the respondent Hartley claimed from the appellant Taylor \$2,062 property damage arising out of a motor car collision. The Court referred the complaint to arbitration in accordance with s102 of the *Magistrates' Court Act 1989* and thereafter an arbitration was conducted by a Magistrate.

The Magistrate determined that the complaint should be dismissed and made an award dismissing the claim. The award was made an order of the Court pursuant to s104(3) of the Act. The Magistrate awarded costs to the successful defendant which he proceeded to fix in accordance with the *Magistrates' Court (Arbitration) Regulations 1990*.

Section 105(2) of the Act provides:

"Subject to sub-section (1), the Court may, in accordance with the regulations or, if there are no relevant regulations, then in accordance with the rules, award costs to a party in respect of an arbitration under this Division."

The point raised in this appeal is whether the arbitration regulations are "relevant regulations" for the purpose of fixing the costs of a successful defendant following arbitration. Clause 6 provides:

"For the purposes of s105(2) of the *Magistrates' Court Act 1989* the Court may award costs to a party in accordance with Schedule 2."

Schedule 2, so far as it is relevant, provides:

"1. For all professional costs including solicitors' costs and fees to counsel where the amount awarded—  
(a) is \$500 or more but does not exceed \$3,000. Not more than \$614 for each 2 hour session."

**[2]** It may be observed that Schedule 2 is concerned to fix costs when an amount is awarded and does not purport to fix costs when no amount is awarded. Possibly, the omission was an oversight. However, s105(2) of the Act provides an alternative method of awarding costs to a party in respect of an arbitration.

The learned Magistrate regarded the arbitration regulations as "relevant regulations" for the purpose of costs and did not consider Order 26 of the *Magistrates' Court Rules*. Order 26 governs costs in the Court which must be fixed in accordance with the scale of costs in Appendix A to the Rules. The scale of costs applicable is covered by Rule 26.03. The scale of the defendant's costs in the Court is determined by "the amount sought to be recovered."

In my opinion, in regarding the arbitration regulations as relevant, the learned Magistrate fell into error. He should have proceeded to Order 26 because the arbitration regulations do not fix the costs of a successful defendant when no amount is awarded.

The appellant appealed to this Court on a number of grounds. Grounds (a) and (b) are no longer relevant. Ground (c) cannot be determined, in my opinion, because the material before the Court is deficient inasmuch as it does not show that the Magistrate held he was bound to award costs in accordance with the arbitration regulations. That he awarded costs in accordance with the arbitration regulations is clear. His reasons for doing so are not revealed in the material before the Court.

Question (d) reads:

[3] "Should the Magistrate have awarded costs in accordance with Order 26 and Appendix A *Magistrates' Court Civil Procedure Rules 1989*?"

In my opinion the answer to the question of law is yes. Had the learned Magistrate fixed costs in accordance with the Rules an amount of \$1,029 would have been calculated and ordered to be paid by the respondent to the appellant in the Court below. It is now appropriate to vary the order in the Court below and to substitute \$1,029 for \$575 wherever appearing, and I so order. The question of law marked (d) is answered yes. The respondent shall pay the costs of the appellant in this Court.

**APPEARANCES:** For the appellant Taylor: Mr McDermott, counsel. Ciardullo & Co, solicitors. No appearance for the respondent Hartley.

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