21/00; [2000] VSC 238

SUPREME COURT OF VICTORIA

HAIR BY WILLIAM JAMES PTY LTD and ANOR v TUCKER

Gillard J

18 May 2000

CIVIL PROCEEDING – CLAIM BASED IN CONTRACT AND TORT – CLAIM FOR DAMAGES FOR NEGLIGENT PERFORMANCE OF HAIRDRESSING SERVICES – CLAIM AGAINST EMPLOYER OF HAIRDRESSER FOR "BREACH OF CONTRACT/NEGLIGENCE" – AWARD MADE AGAINST EMPLOYER – WHETHER MAGISTRATE IN ERROR – WHETHER MAGISTRATE FOUND AGAINST EMPLOYER IN TORT RATHER THAN FOR BREACH OF CONTRACT BY NEGLIGENT PERFORMANCE – COSTS – INCREASED SCALE COSTS ALLOWED IN RELATION TO FEES TO COUNSEL AND FOR GENERAL PREPARATION – NATURE AND EXTENT OF HEARING – WHETHER MAGISTRATE IN ERROR IN ALLOWING GREATER SUMS THAN PROVIDED BY SCALE: *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, R26.02(2).

T. sued H P/L and C. for damages for personal injury and expenses as a result of hairdressing services which were negligently performed by the hairdresser C. The claim against H P/L alleged a breach of contract by the negligent performance of a contract to provide hairdressing services. In relation to C., the claims were based on negligence and assault. At the conclusion of the hearing, the magistrate made orders in favour of T. together with awards of interest. In relation to the question of costs, the magistrate ordered:
"Defendant to pay plaintiff's costs including any reserved costs on Magistrates' Court scale for the amount of $5,000 up to and including 30 September 1997 and thereafter to be taxed on Magistrates' Court scale D including reserved cost with counsel fees and general preparation to be assessed on County Court scale C."
Upon appeal in relation to the order against H P/L and the order for increased costs—

HELD: Appeal dismissed.
1. The original particulars of claim made it clear that T. was alleging a breach of various agreements concerning services supplied by H P/L. It was alleged that it was a term of each agreement that H P/L would exercise due care and skill. In the absence of any express terms to the contrary it is invariably an implied term in any contract to provide services that the services shall be performed in a careful and skilful manner. It is well established that a hairdresser is under a duty to exercise reasonable skill and care and is liable for damages for negligent performance of a contract to provide hairdressing services. The magistrate did not find for T. against H P/L in tort; the claim was properly characterised as negligent performance of a contract to provide services. Accordingly, it was open to the magistrate to make an order against H P/L.

2. In relation to the order for costs, the magistrate had a general wide discretion pursuant to Rule 26.02(2) of the *Magistrates' Court Civil Procedure Rules.* This rule depends on the magistrate concluding that an item in the scale of costs "is inadequate". Having regard to the fact that—
(i) the case was to some extent factually complicated
ii) many witnesses including professional witnesses were called
(iii) comparatively senior counsel had been engaged
(iv) the hearing extended over eight sitting days
(v) video link-ups were used
(vi) the matter required the presence of an instructing solicitor
(vii) two of the parties employed two counsel for part of the hearing
it was open to the magistrate to allow a greater sum for counsel and for the general preparation of the case.

GILLARD J:

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 by unsuccessful defendants against orders made by the Magistrates' Court at Melbourne on 24 August 1999 in respect to costs of two proceedings which were consolidated and heard together.

2. The first appellant Hair by William James Pty Ltd at all relevant times carried on business as a hairdresser in South Yarra. The second appellant William James Connor was employed by the first appellant performing hairdressing services.

3. The respondent Annette Melrose Tucker sought the services of the appellants to treat her hair in June 1993 and during the period from June to September 1994. She alleged that the treatment given was negligently performed and as a result she suffered personal injury and incurred losses and expenses.

Proceeding Below

4. The respondent as plaintiff instituted a complaint in the Magistrates' Court at Melbourne on 28 September 1995. The nature of her claim was described on the second page of the complaint as "breach of contract/negligence".

5. The claim was against the first appellant only. The proceeding was given a court number H02289508. The respondent claimed that the treatment performed by the first appellant pursuant to a contract, caused her hair to become "damaged making it necessary for the length of the hair to be shortened and for the plaintiff to continue to have extensions applied until the hair has regained its former length and quality".

6. It was also asserted that the works performed by the first appellant were worthless. That is, that the hairdressing services that had been provided were of no value.

7. She claimed damages of $5,000 which, at that point, was in fact the jurisdictional limit of the Magistrates' Court in relation to such a claim and also damages relating to worthless treatment namely the cost of same, rectification cost and future treatment.

8. The particulars of claim asserted damage to her hair and claimed her expenses and cost to repair her hair as special damages totalling $3,715. The relief clause claimed as follows.

> "A. Damages - $5,000
> B. Cost of application of extensions on 2 June 1994 and colour on 9 September 1994 - $700
> C. Past rectification cost - $1,515
> D. Future rectification cost - $1,500
> E. Cost
> F. Interest."

9. In August 1998 the respondent applied to amend her particulars of complaint and to join the second appellant as a defendant. In the light of what occurred it is most unfortunate that the application was opposed and more unfortunate that the Magistrate declined to permit the joinder or the amendment. The application was refused.

10. In anticipation of the proposed amendment her lawyers prepared amended particulars of complaint and claimed a sum of $40,000 which was the jurisdictional limit of the court.

11. The proposed amended complaint raised a number of separate causes of action being a claim in common law negligence and also assault against the second appellant and it further alleged that he was acting in the course and scope of his employment with the first appellant.

12. In those proposed amended particulars, the respondent also alleged that she was injured, namely, suffered an injury to her neck, that her hair was damaged and that she suffered from post traumatic stress disorder.

13. In order to overcome the fact that she was not permitted to join the second appellant, on 19 August 1997 she issued a separate complaint, this time against the second appellant as the only defendant. The claims made against the second appellant were a common law negligence claim and a claim for assault. She claimed much the same injuries resulted as she had alleged in that proposed amended particulars of demand and claimed the sum of $40,000. The second proceeding was given the number K02026173.

14. Very soon thereafter she amended her first complaint against the first appellant by adding in paragraph 11 the following which I take from the computerised court record.

> "Amend the particulars of claim by inserting in paragraph 11 the following: (E) Personal injury being damage to hair including effecting a chemic hair cut with the remainder of her hair being damaged

> and multi colour development of post traumatic stress disorder leading to a hypervigilanc anxiety nightmares and irritability."

15. The prayer for relief was also amended to delete the sum of $5,000 and to claim a sum "but not exceeding in combination with B, C and D the limits of the jurisdiction".

16. It appears that the two proceedings were consolidated on the 18 December 1997 but no order was made to deliver a consolidated particulars of claim. In my opinion, in the circumstances, it was unnecessary to so order because the two complaints were discrete and there was no overlap between the separate causes of action. The claim against the first appellant was in contract. The claim against the second appellant was in tort.

17. The two proceedings came on for hearing before Her Worship Ms Harding M. during September/October 1998 and the case was heard over nine days. All told 21 witnesses were called. The parties were represented by relatively senior counsel. The appellants apparently had two counsel for the first one and a half days of the hearing. The hearing concluded on 8 October 1998 and the Magistrate delivered reasons for her judgment on 23 December 1998. She orally delivered her reasons. She indicated that written reasons would be provided. She found for the respondent and awarded her damages but in so doing, found her guilty of contributory negligence to the extent of 40 per cent.

18. The written reasons were not provided to the parties until at a hearing on 24 August 1999. When she delivered her reasons in December 1998 the Magistrate stated that she would receive evidence in relation to the respondent's past medical expenses relating to her stress disorder and hear submissions on the questions of costs and interest. Counsel were briefed to appear on behalf of the parties to attend the hearing on 24 August 1999 and submissions were made in respect to medical expenses, interest and costs.

19. The Magistrate, after considering the submissions, delivered her reasons the same day. She accepted that a further sum should be allowed for past medical expenses and after taking into account the finding of contributory negligence which she had made, the successful respondent was entitled to a total sum of $13,176.83.

20. The Magistrate apparently then made orders, in respect to each proceeding. In the proceeding against the first appellant she ordered that it pay the sum of $13,176.83 together with interest of $1,300. In relation to the claim against the second appellant she ordered the same sum should be paid but limited interest to $800. The smaller amount of interest arose because the second appellant was not proceeded against until some time after the first proceeding was instituted as is apparent from what I have said above.

21. She then made the same order in each proceeding in respect to the costs. It provided:

> "Defendant to pay plaintiff's costs including any reserved costs on Magistrates' Court scale for the amount of $5,000 up to and including 30 September 1997 and thereafter to be taxed on Magistrates' Court scale D including reserved cost with counsel fees and general preparation to be assessed on County Court scale C."

22. The appellants are aggrieved by each order made against them in respect to the costs and have appealed to this court pursuant to s109 of the *Magistrates' Court Act* 1989. The appeal was instituted by an application to Master Wheeler pursuant to Rule 58.07 of the Rules of Court. On 9 November 1999, the Master having been satisfied that there was a prima facie case for relief stated the following questions of law were to be decided.

> "(a) Did the learned Magistrate err in the exercise of her discretion in awarding the respondent her costs from the commencement of proceeding H02289508 (28 September 1999 [sic 1995]) rather than the commencement of proceeding K02026173 (19 August 1997) — the amendment of the particulars of claim in proceeding H02280508 on 1 October 1997 and/or the consolidation of the two proceedings on 18 December 1997 at which time the basis of a negligence claim was first pleaded?
>
> (b) Did the learned Magistrate err in the exercise of her discretion in awarding the respondent some of her cost to be taxed on County Court scale "C" when the quantum award on the respondent's claim was in a sum amounting to less than half the jurisdictional limit of the Magistrates' Court?"

23. In order to understand the complaint of the appellants it is appropriate to observe that they say that the Magistrate should not have awarded the costs going back to the first proceeding but should have, in fact, awarded costs either when the second proceeding was instituted or at the later date when the proceedings were consolidated. The point being made that in her reasons for judgment the Magistrate only found in favour of the respondent in respect of her claim which was first stated in the second proceeding.

24. It can be seen from the grounds that the attack is made upon the exercise of the discretion which the Magistrate clearly had with respect to the question of costs.

25. Evidently there is now in place a procedure in the Magistrates' Court to have costs taxed. On any such taxation it will be open to the appellants to contest any item claimed. This will enable the appellants to contest any item which has been repeated unnecessarily because of the fact that there had been two proceedings.

26. Having said that, the appellants can hardly complain of the duplicity of the proceedings because the first appellant opposed the joinder of the second appellant as an added defendant and the amendment of the particulars which would have simplified the proceeding and, in my view, avoided costs. Indeed, with the benefit of hindsight, it is hard to understand why the joinder was refused. I emphasise that this is not an appeal from a taxing officer but is an appeal alleging that a discretion of a Magistrate miscarried.

Question of Law and Power to Award Costs

27. The right to appeal to this court from a final order made in the Magistrates' Court is confined to an error of law, see s109(1) of the Act. The nature of an appeal on a question of law was considered by the Full Court in *Transport Accident Commission v. Hoffman* [1989] VicRp 18; (1989) VR 197 at 199; (1988) 7 MVR 193. Even though the Full Court was talking about different legislation it has been repeatedly held since, that the observations of the Full Court apply to an appeal from a decision of the Magistrates' Court. This was pointed out by the Full Court. A right of appeal from a decision of the Magistrates' Court on a question of law must be a question which is involved in the Magistrate's decision. It follows that a decision merely on a question of fact does not constitute a question of law or could indeed constitute an error of law if there is some evidence to support it.

28. There is no doubt that a Magistrate has a very wide discretion when considering and determining the question of costs. Section 131(1) of the *Magistrates' Court Act* provides -

> "(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) Sub section (1) applies unless it is otherwise expressly provided by this or any other Act or by the rules."

29. The ambit of the jurisdiction is to be compared with the very wide jurisdiction given to this court. See s24(1) of the *Supreme Court Act* 1986. Being a very wide jurisdiction in which criteria are not set out in the enactment, the jurisdiction is unfettered but, of course, must be exercised judicially and in accordance with the law.

30. In accordance with the rule making power given to the Magistrates' Court, rules have been made with respect to costs. Order 26 of the *Magistrates' Court Civil Procedure Rules* 1989 deals with costs. The rules, in fact, do qualify the wide jurisdiction given to the court. Rule 26.02(1) provides:–

> "(1) Subject to paragraph (2) costs must be fixed in accordance with the scale of costs in appendix A to these Rules."

31. But as paragraph (2) of the sub-rule makes clear, the court if it thinks any item "in the scale is inadequate or excessive the court may allow a greater or lesser sum than the scale provides".

32. The failure to exercise a discretion in accordance with the law can constitute an error of law. However, a heavy burden rests upon an appellant alleging a discretion miscarried.

33. The principles governing an appeal against a discretionary judgment are well established. I refer to the often quoted *dictum* of Kitto J in *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627. His Honour said:

> "I shall not repeat the references I made in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513; [1950] ALR 944, to cases of the highest authority which appear to me to establish that the true principle limiting the manner in which appellant jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from and that the decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle or giving weight to extraneous or irrelevant matters or failing to give weight or sufficient weight to relevant considerations or making a mistake as to the facts. Again the nature of the error may not be discoverable but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellant court may infer that there has been a failure properly to exercise the discretion which the law reposed in the court of first instance: *House v R* [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202."

34. I emphasise that there is a strong presumption in favour of the correctness of the decision appealed from and the court should not interfere unless it is satisfied that the discretionary judgment was clearly wrong. This does require the identification and establishment of a clear error although the decision may be so unreasonable or so plainly unjust that one can infer an error. It has been said often that the Appeal Court is not permitted to interfere just because the court if sitting at first instance would have come to a different decision. Error must be demonstrated although error may be inferred if the decision is so unreasonable or plainly unjust.

Ground One

35. There appears to be an error in the expression of this ground in that the date of commencement of the first proceeding should read "28 September 1995". The complaint made by the appellants is that the respondent failed in respect to all causes of action which are set out in her original proceeding and succeeded only in her claim for negligence and hence should only get her costs from the commencement of that proceeding on 19 August 1997 or at a later date when the two proceedings were consolidated.

36. The error that the Magistrate made according to the appellants was that she misread and misunderstood the nature of the claim brought in the first proceeding according to the reasons given by her on 24 August 1999. According to an affidavit sworn by Richard Connock, barrister, on 21 September 1999, the Magistrate said in her reasons on the 24th August 1999 *inter alia*—

> "That on the original complaint on the first page beside the words 'nature of complaint' the nature of the claim was stated to be 'breach of contract/negligence' and she said that had the word 'negligence' not appeared she would have been persuaded by the appellants submissions as to cost."

37. In an answering affidavit of Gary Robert Clark, legal practitioner for the successful respondent, he deposes as follows:

> "Ms Harding when handing down her findings noted that the original proceedings made reference to breach of contract and negligence and given the findings which she had made and her judgment she found that the respondent was entitled to costs from the outset."

38. In accordance with the general practice rule I accept the version as set out in this answering affidavit insofar as the two versions may conflict.

39. It is submitted that in reaching that conclusion she made an error of law as to the true nature of the proceeding and in effect misunderstood the basis upon which the respondent had succeeded against both appellants. It is submitted that what appears in part B of the complaint under the heading "What is the nature of your claim?" is nothing more than an indication to the particulars of claim but the true nature of the claim must be ascertained from the particulars of the claim.

40. I agree that that must be so but the question is what was the true nature of the claims in the first complaint. In my opinion, that is what the Magistrate had in mind and did not misdirect

herself as to the true issue. She appreciated that the entitlement to costs depended upon the respondent succeeding on that claim. The argument put before me is that the respondent did not succeed on that claim.

41. The original particulars of claim made it clear that the respondent was alleging a breach of various agreements concerning the services supplied by the first appellant who was then the defendant. It was alleged that it was a term of each agreement *inter alia* that the defendant i.e. the first appellant, would "exercise due care and skill".

42. In the absence of any express terms to the contrary it is invariably an implied term in any contract to provide services that the services shall be performed in a careful and skilful manner. It is also well recognised by the authorities that one can claim damages for personal injury and expenses for breach of a term of a contract. By way of example, the very famous case of *Grant v Australian Knitting Mills Ltd* [1936] AC 85; [1935] All ER 209; 52 TLR 38; 154 LT 18; 79 Sol Jo 815; 105 LJPC 6 where the purchaser of underpants suffered from a skin complaint and recovered damages for personal injury against the retailer in contract.

43. In *Wren v Holt* (1903) 1 KB 610 the plaintiff recovered damages for personal injury arising out of the purchase of beer which contained arsenic. Again, this was a claim in contract. In *Grant's case* the Judicial Committee of the Privy Council emphasised that a claim in contract was, in fact, different to a cause of action in tort. In that case, as most students of the law will well remember, the manufacturer was also sued and also found liable in accordance with the principles in *Donoghue v Stevenson* [1932] UKHL 100; [1932] AC 562; [1932] All ER 1; [1932] SC (HL) 31; [1932] SLT 317; (1932) 37 Com Cas 350; (1932) 48 TLR 494; (1932) 147 LT 281; [1932] Sol Jo 396; (1932) 101 LJPC 119; (1933) 4 DLR 337; 533 CA 47; [1932] SC 31; [1932] WN 139. The Privy Council in *Grant's case* said at AC p97:

> "The liability of each respondent depends on a different cause of action, though it is for the same damage. It is not claimed that the appellant should recover his damage twice over; no objection is raised on the part of the respondents to the form of the judgment, which was against both respondents for a single amount."

44. It is well established that a hairdresser is under a duty to exercise reasonable skill and care and is liable for damages for negligent performance of a contract to provide hairdressing services. See *Dobbin v Waldorf Toilet Saloons Ltd* (1937) 1 All ER 331 and *Parker v Oloxo Ltd* (1937) 3 All ER 524. In both cases the plaintiff's hair was seriously damaged and the plaintiff succeeded in contract against the hairdresser. Indeed, I think it is most unfortunate that in this case cases such as this were not drawn to the attention of the Magistrate. They would have clearly directed her in relation to the principles to apply and would have focused her attention on the real issues before the court.

45. Indeed the law concerning the obligation to exercise a trade or profession in a skilful and careful way goes back a long way. In *Lampheir v Phipos* (1838) 8 CP 475, Tindal CJ said:

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that in all events you shall gain your case. Nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has but he undertakes to bring a fair, reasonable and competent degree of skill."

46. That case has been quoted often and has been applied in relation to persons exercising a profession, trade or business. It is well established that the cause of action is one for breach of contract, however, it is permissible to sue in tort. This, indeed, has been the rule for many years. By way of example, *Edwards v Mallan* (1908) 1 KB 1002. In that case there was a claim brought against a dentist and it was held that though the claim was brought in contract it could also be brought in tort.

47. It follows, in my opinion, that the respondent in the original proceeding alleged a breach of contract and damages arising from same. The breach was *inter alia*, the negligent performance of a contract to provide hairdressing services. Accordingly, in my view, the summary at the front of the complaint is correct. It is indeed a claim for negligent performance of a contract.

48. So in those circumstances the question is, did the learned Magistrate misdirect herself in relation to the question of costs and in relation to what was the true nature of the proceeding and what she had, in fact, found. The answer to this question depends upon whether the respondent succeeded on the first complaint. Mr Oderberg of counsel for the appellants submits that she did not. He submitted that on a proper reading of the Magistrate's reasons, she found for the respondent in negligence only and by that he means common law negligence, i.e. in tort and not for breach of contract by negligent performance.

49. If one looks at the two proceedings it is clear that the first is against the company, the first appellant and the second is against the second appellant. The causes of action are clearly discrete. The first deals with contract, the second deals with tort. The Magistrate found against the appellant company and therefore it must follow found a breach of contract by it, i.e. negligent performance. No attack has been made on the order against it as being wrong therefore the respondent, in fact, did succeed in the first proceeding. That is, of course, not the total answer to the submission and attack made upon the Magistrate's finding.

50. There are separate orders recorded and it must follow that the Magistrate found breach of contract by negligent performance causing injury. Mr Oderberg counters this by noting that the Magistrate found contributory negligence against the respondent and therefore, so the argument goes, the respondent must have succeeded only in tort.

51. When this decision was handed down the law permitted a finding of contributory negligence in a claim in contract where the claim could have been brought in tort. See: *Macpherson & Kelley v Kevin J Prunty & Associates* [1983] VicRp 53; [1983] 1 VR 573. The law has now changed and I refer to the High Court decision of *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1; 161 ALR 155; 73 ALJR 403. That decision was delivered on 4 March 1999 well after the Magistrate had given her oral reasons. So, in my view, it does not follow that only in common law negligence can one obtain apportionment and it therefore follows that that argument cannot stand up.

52. It is necessary to refer to what the respondent's solicitor, Mr Clark, deposed to in his affidavit sworn of 24 December 1999. He said, "5. The trial proceeded on the basis that the respondent's action was set out in the amended particulars of complaint dated 23 July 1997". If that was so then the question of interpreting the Magistrate's reasons and the conclusion she reached may be somewhat more difficult. The particulars referred to by Mr Clark were to the amended particulars which were refused and it follows would not be on the file. Mr Oderberg, who appeared in the trial, has no memory of this being averted to. Further and more importantly, there is no order to that effect and there is nothing in the Magistrate's reasons or the record of the court to support that observation.

53. That might have been the perception of Mr Clark and it may even be the perception of counsel for the respondent but I am not prepared to proceed on that assumption. The reality must be in accordance with the court record and indeed, as I have indicated, there is nothing in the reasons of the Magistrate which in any way puts in doubt my view that the Magistrate treated the two proceedings as discrete although consolidated and heard together. It is clear on the face of them that they are discrete.

54. It is now necessary to consider the reasons of the Magistrate in relation to her findings and I refer to a portion of them.

> "On the evidence I do not find that the defendant breached any agreement relating to the colouring of the plaintiff's hair or the extension work. The plaintiff did not inform him of the extent and type of colour work that had been performed on her hair. Further, on the evidence, the defendant did not admit to any breaches of the agreement on 2 June 94 or 5 June 94 or 15 July 94 or 9 September 94 in relation to the hair extensions or hair colouring. I accept that the defendant was at pains to perform his work to a standard satisfactory to the plaintiff at all times. In relation to the claim in negligence I am persuaded that the first and second named defendants owed a duty of care to the plaintiff. Evidence was led from the tricologist, David Salinger ... and various other hairdressers ... in relation to usual practice particularly in relation to the procedure when bleaching hair ... I am persuaded that the defendant was negligent in that I accept on balance that various chemicals were applied to the plaintiff's hair which were unsuited and overall caused a degree of damage to her hair. I do not find that the person undertaking the work lacked sufficient training and expertise. I find that the defendant was negligent in that he failed to make full enquiry as to what, if any, chemicals

had been used on the plaintiff's hair. I further find that there was contributory negligence on the part of the plaintiff in that she did not inform the defendant that her friend Sharon O'Malley, on the plaintiff's instructions, had applied some form of lightening agent to the plaintiff's hair in the recent past and that Nicole Reid, hairdresser, had applied a darker colour to her hair on 8 September 1994."

55. The Magistrate went on to find that in relation to the plaintiff's claim concerning post traumatic stress disorder that she accepted her evidence in relation to that.

56. In my opinion, read in context, the Magistrate is not saying that the defendant, i.e. the first appellant, did not breach the contract in respect of the obligation to perform the services with skill and care. Indeed her findings support that. She found against the company. This meant that she found breach of contract i.e. negligent performance and damage. It follows that the respondent was successful in the first proceeding.

57. In regard to that, one must closely look at what the Magistrate did say. On one view it might be said that she dismissed all of the claims for breach of agreement. But if one closely analyses her words that is not what she is saying. She found no breach of agreement in relation to two aspects, namely, colouring of the hair and the extension work. What she did go on to find was that there was a negligent performance in applying various chemicals to the plaintiff's hair which were unsuited and which caused damage.

58. I think on a proper analysis and maybe not necessarily fully appreciated by the Magistrate, the fact is that she has found that there has been a breach of a term, namely a term to perform the task in a careful manner. So it does follow in my view that the respondent was successful on the first proceeding.

59. What was done later, namely the amendment of her first claim to include a claim for personal injuries was, in my view, nothing more than to clarify what was already implicit in that proceeding as first instituted, namely that she was claiming damages for personal injury. It was implicit by her claiming the sum of $5,000 which on any view was considerably in excess of her particularised special damages. But, in any event, if I am wrong in concluding that, she had to prove all the elements of her first claim and on any view she did. Namely, she proved a contract, she proved a breach and she proved an entitlement to damages.

60. Of course, as a matter of law, in the absence of evidence as to the scope of the damages she would be only entitled to nominal damages but on my view she clearly did succeed in her first claim even though subsequently the ambit of her claim was extended.

61. Further and of substance the respondent could only obtain an order against the first appellant in the first proceeding. She did and therefore was entitled to her costs of that proceeding.

62. In my view, the learned Magistrate did not misdirect herself. She posed the correct question whether the first claim was in negligence. In my opinion, when properly analysed in accordance with the law and in light of her findings the claim was properly characterised as negligent performance of a contract to provide services and the respondent succeeded in relation to that. In my view, the learned Magistrate's order in relation to the question of the costs being paid from the institution of the first proceeding was correct. I am satisfied no error of law has been demonstrated.

Ground Two

63. It is clear that the Magistrate had authority to increase any amount in the scale of costs in the Magistrates' Court. This is clear from the general wide discretion that is given to the court but is also made expressly clear by the provisions of Rule 26.02(2) of the Rules of the Magistrates' Court. This Rule depends upon the Magistrate concluding that an item in the scale of costs "is inadequate" and if it is "the court may allow a greater sum … than the scale provides". So one can see that the jurisdiction to increase an amount of costs is enlivened by a conclusion that an item is inadequate. It was, in my view, open to this Magistrate to allow a greater sum for counsel and also for the general preparation of the case. She was clearly in the best position to make the assessment and the judgment.

64. The affidavits in support show that Mr Tobin of counsel, who appeared for the successful

respondent not only at the hearing but also on the application concerning costs, submitted that the items concerning preparation by the solicitor and counsel's fees were inadequate. It is necessary to go to what his submissions were and these are found in the affidavit of Mr Richard Connock in paragraph 7 and following.

> "7. In relation to the question of costs Mr Tobin submitted firstly that the respondent should get all her costs, including reserved costs and that they should be taxed. Application was then made by Mr Tobin under Rule 26.02(2) of the *Magistrates' Court Civil Procedure Rules* 1989 that the scale be departed from in three instances;
> (a) Counsel's fees;
> (b) The attendance of an instructing solicitor; and
> (c) Instructions for brief (meaning general preparation).
>
> 8. The basis for the application, it was submitted, was that the matter had been a complex one both forensically and in terms of the volume of material, it involved a hearing of eight sitting days and that the matter was one which required the presence of an instructing solicitor. In support of the latter submission Mr Tobin referred to the fact that the hearing had involved such things as video link-ups, that the respondents had had two counsel for at least part of the time. It was further submitted by Mr Tobin that both respondent and appellants had engaged comparatively senior counsel. The matter was of a kind which often be found in the County Court and that it would be appropriate to allow counsel fees on County Court scale C. Mr Tobin also sought interest from the date of issue of the original complaint".

65. It is also clear from Mr Connock's affidavit that he then made submissions opposing the application made by Mr Tobin. The affidavit states that the Magistrate considered the matter for a period of time and then indicated what she proposed to do. According to Mr Connock's affidavit she said this in relation to the question of the increase in the items in the scale –

> "As it was Her Worship awarded the respondent her costs including reserved costs and acceded to Mr Tobin's R26.02 application in relation to the attendance of an instructing solicitor, counsel's fees and general preparation; (e) interest was fixed at $1,301.08 and the second appellant's liability for same was limited to $800; (f) having accepted the respondent's submissions on costs Her Worship also noted what was said on behalf of the appellants in relation to the amendment of the claim and limited those costs to the scale based on the maximum then claimable of $5,000 up to 30 September 1997 and thereafter on scale D (excluding general preparation but including reserve costs)."

66. In the answering affidavit of Mr Clark he expressed the Magistrate's reasons in this way.

> "Her Worship indicated that she was prepared to exercise her discretion given the matters which had been placed before her and made the order for costs in favour of the respondent and in particular ordered that the respondent's counsel's fees and general preparation be taxed on County scale "C"

67. In the course of the hearing before me, Mr Oderberg was requested to identify the error which he submitted the Magistrate made in relation to the exercise of her discretion to increase an item in the scale of costs. His contention came down to submitting that the Magistrate should have taken into account the fact that it was a Magistrates' Court hearing and that the hierarchy of courts required that matters heard in the Magistrates' Court should be visited with Magistrates' Court's costs unless there was good cause.

68. He also emphasised that the Magistrate did not really refer to any particular features or factors when coming to this conclusion and in this regard he referred to what was said by McInerney J in *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381. He emphasised what His Honour said at page 517. His Honour said:

> "A separate question arises in relation to the employment of senior counsel and in relation to the 'preparation fees'. It has to be borne in mind that the question is not merely whether the costs incurred were reasonably incurred: the question for the Magistrate was whether it was just and reasonable that such costs should be recovered from the other side. In relation to this matter, the magistrate had to consider, *inter alia*, the place of the tribunal in the hierarchy of courts — though this will seldom, if indeed ever, be a decisive matter (see *Stanley v Phillips* [1966] HCA 24; (1966) 115 CLR 470 at p478; [1967] ALR 197; 40 ALJR 34) — but also the interest of the community in not discouraging the executive from bringing before the courts cases considered proper to be prosecuted".

69. It should be pointed out that that was a criminal case and the prosecution had failed. So

His Honour's observation about discouraging litigants coming to court relates to a litigant seeking to institute proceedings rather than defending. When this was pointed out to Mr Oderberg he submitted that it was wrong that defendants should be brought to court running the risk that they may be faced with an application for an increased cost at the end of the proceeding. What in effect he was saying was that it was unfair because that really did expose a defendant to something that was not appreciated at the time.

70. I think there are a number of answers to these observations. The first is that it is always open to a defendant to utilise procedures to put the plaintiff at risk by making an offer in a form which is either in accordance with the rules or in accordance with the famous case of *Calderbank*. Secondly and more importantly, the rules do, in fact, allow an increase in an item and indeed I can think of many cases over the years, especially in the County Court, where often claims are made at the end for an increase in costs by the plaintiff for a whole host of reasons including one that was very common, of claiming costs for two counsel.

71. Going back to the *Commissioner for Corporate Affairs v Green*. What His Honour said must be read in context. In that case the Magistrate was dealing with a criminal case. There was no scale of costs to guide the Magistrate or indeed any rules relating to costs. There was the general discretion to award costs. The Magistrate had to fix the amount so he was acting as a taxing master as well as exercising a discretion as to whether costs should be awarded in any event. Further, the Magistrate was dealing with two very controversial items, namely the employment of two counsel and a more controversial item back in those days, preparation fees for counsel as being separate from their brief fee.

72. None of those factors are present in the case before me. That is not to say that some of the factors mentioned by His Honour may not be relevant in an appropriate civil case.

73. Here the Magistrate had to consider whether the items claimed were inadequate. She obviously concluded they were and indeed submissions were put by both counsel focusing on that very issue whether the items were inadequate and whether she should exercise her discretion. Clearly she accepted the matters put to her by Mr Tobin. Indeed, in my view, looking at the matters that were put to the court by Mr Tobin they would justify making a different order for costs.

74. In my opinion, no error has been demonstrated and I would not infer from the result that she misdirected herself in any way. The fact was that the case was, to some extent, complicated factually and many witnesses were called, some of them professional witnesses. In my opinion it was open to the Magistrate to have made the decision she did.

75. The fact that she did not refer to the desirability of keeping costs to a minimum and that the case was in truth a true Magistrates' Court is not to the point. She was satisfied in all the circumstances that the identified items were inadequate. It follows that her jurisdiction was enlivened. She heard submissions from both counsel and having heard those submissions she went away, considered them and came back and indicated that she accepted the submissions put to her by counsel for the respondent.

76. In my opinion, she did not make any error of law in exercising her discretion in the way that she did and it follows therefore that there is no basis for any appeal taking into account that the jurisdiction of this court is only enlivened if it is demonstrated that there is an error of law. It is not a question of this court considering whether the order made was appropriate but only whether the Magistrate made an error of law in exercising her discretion. In my view she did not and accordingly ground two fails. It follows that the appellants' appeal fails and should be dismissed.

APPEARANCES: For the appellants: Mr K Oderberg, counsel. Robert Green & Co, solicitors. For the respondent Tucker: Mr B Griffith, counsel. Stringer Clark, solicitors.
