18/12; [2012] VSC 198

SUPREME COURT OF VICTORIA

BROWN v GLEN EIRA CITY COUNCIL

Daly AsJ

8 October 2011; 17 May 2012

COSTS – DEFENDANT SUCCESSFUL IN SUMMARY PROCEEDINGS – PRINCIPLES GOVERNING THE ASSESSMENT OF COSTS – 88 CHARGES AGAINST LOCAL COUNCIL DISMISSED – APPLICATION BY COUNCIL FOR COSTS – COMPILATION BILL SERVED ON INFORMANT VICROADS – 325 ITEMS OBJECTED TO – DECISION BY MAGISTRATE TO AWARD COSTS ON AN INDEMNITY BASIS – AWARDED COSTS FIXED AT 80% OF PROFESSIONAL COSTS CLAIMED – ALLOWED COSTS FOR TWO COUNSEL – REFUSED TO REMIT THE MATTER TO THE COSTS COURT OF THE SUPREME COURT – WHETHER MAGISTRATE IN ERROR – WHETHER MAGISTRATE GAVE ADEQUATE REASONS FOR DECISION: *MAGISTRATES' COURT ACT* 1989, SS131, 131A; *CRIMINAL PROCEDURE ACT* 2010, SS272, 401; *SUPREME COURT ACT* 1986, S17D(1)(b).

Upon the dismissal of 88 charges laid by VicRoads against the Glen Eira City Council, an application was made to the Magistrate for costs. The Magistrate granted the application and ordered VicRoads to pay the Council's costs on an indemnity basis. Further orders were made whereby the Council was awarded a sum representing 80% of the sum claimed by the Council, plus a sum for both senior and junior counsel. Upon appeal—

HELD: Appeal allowed. Orders made by the Magistrate set aside. Adjourned to consider whether the application for costs should be referred to the Costs Court of the Supreme Court.

1. 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;

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

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

(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;

(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;

(f) a magistrate may have regard to scales of costs relevant in civil proceedings but is not bound or limited by them;

(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;

(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;

(i) the relevant enquiry is what the unsuccessful party may reasonably be required to pay the successful party at the conclusion of the litigation;

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

(k) the governing principle to be applied is one of reasonableness.

***Norton v Morphett* [1995] VSC 211; [1995] VICSC 211; (1995) 83 A Crim R 90; and *R v Sobh* 74 A Crim R 453, applied.**

2. 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.

3. In the current case, the obligation on the Council to demonstrate that its costs claim was reasonable did not necessarily require the Magistrate to order that the Council prepare a bill in accordance with the equivalent civil scale. It did not require the Magistrate to undertake an item by item assessment of each of the items objected to by VicRoads, or otherwise undertake the detailed and painstaking exercise of a taxation of costs. However, given the challenge to the Council's costs claim by VicRoads, it would have been appropriate to directly engage with and rule upon the submissions made by VicRoads with respect to such issues as the appropriateness of time based billing, the assertions by VicRoads that the hourly rates charged were excessive, that the bills contained charges for non-legal work, there was duplication of effort and charges, and some of the charges for particular items of work were excessive. It may well be that the Council could demonstrate that many or all of the tasks done by its solicitors, and the time taken to do so, was necessitated by the conduct of VicRoads in its prosecution of the proceeding, and accordingly, the amounts charged by its solicitors were reasonable in all of the circumstances. However, in the current case, there was no onus placed upon the Council to do so, even in a broad sense.

4. To the extent that the order for indemnity costs was based upon the Magistrate's finding that VicRoads' conduct of the prosecution unnecessarily prolonged the primary proceeding (in its entirety, rather than just the final hearing), that finding was one the Magistrate was uniquely placed to make, was clearly open on the material before her, and in any event neither VicRoads' oral or written submissions directly addressed the Council's criticisms of VicRoads' conduct, which were spelt out in some detail in the Council's written submissions.

5. The authorities confer a broad and flexible discretion upon magistrates in criminal proceedings with respect to costs, and expressly allow magistrates, in appropriate cases, to make an award of costs on a "global" basis, such that there is certainly no obligation upon a magistrate to undertake an item by item assessment akin to a taxation of costs. The Magistrate certainly did not make an error of law in that respect. However, to the extent that the authorities require an assessment of the reasonableness of the costs claimed by the Council, the Magistrate erred in not requiring the Council to demonstrate, even in a relatively broad brush sense, the reasonableness of the work undertaken by its solicitors and the rates charged for that work.

6. In relation to the awarding of costs fixed at 80% of professional costs, by fixing the Council's costs in an apparently arbitrary sum, without any explanation as to the reason for the percentage figure reached, the Magistrate failed to exercise her discretion in a judicial manner.

7. In relation to the award for the total cost of two counsel, the Magistrate's finding was justified and that the rates claimed were appropriate.

8. In relation to the appropriate remedy, the matter would be best dealt with by the Costs Court of the Supreme Court. However, the parties were given an opportunity to make submissions as to whether the Costs Court would have jurisdiction to determine the question of costs in this proceeding.

DALY AsJ:

Background

1. Mr Wayne Brown is an officer of VicRoads, the public authority charged with, among other things, enforcing compliance with certain provisions of the *Road Safety Act* 1986 ("Act"). He was the informant in a matter brought before the Magistrates' Court at Dandenong, whereby VicRoads laid 88 charges against the Glen Eira City Council ("Council"). Under s171(2) of the Act:

> (2) A person is guilty of an offence if—
> (a) a vehicle is in breach of a mass, dimension or load restraint limit or requirement; and
> (b) the person is the consignor of any goods that are in or on the vehicle.

2. The Council had entered into contracts with Thiess Services Pty Ltd ("Thiess") to collect household waste for transport to a depot in Clayton. Thiess in turn engaged a number of owner drivers to carry out the collections operation. In July 2008, VicRoads conducted an audit at the weighbridge located at the depot, and discovered that a number of garbage trucks had exceeded the mass limits established under r 158 of the Road Safety (Vehicles) Regulations 2009. VicRoads prosecuted Thiess and the owner drivers, each of whom pleaded guilty. The Council was charged by summons issued on 2 March 2009.

3. At the commencement of the hearing of the proceeding by Magistrate Cure on 8 February

2010 ("primary proceeding"), counsel for VicRoads informed the Court that the following facts were admitted by agreement:

(a) the date of the offence;
(b) the place of the offence;
(c) the Council was a consignor within s171 of the Act;
(d) the identity of the vehicles in question;
(e) that the vehicles were on a highway; and
(f) the weight alleged against each vehicle.

4. In defending the charges, the Council relied upon s179(1) of the Act, which provides as follows:

> (1) If a provision of this Part states that a person has the benefit of the reasonable steps defence for an offence it is a defence to the charge of the offence if the person charged establishes that
> (a) the person did not know, and could not reasonably be expected to have known, of the conduct that constituted the commission of the offence; and
> (b) either
> (i) the person had taken all reasonable steps to prevent that conduct from occurring; or
> (ii) there were no steps that the person could reasonably be expected to have taken to prevent the conduct from occurring.

5. Section 179(2) sets out a list of matters that the Court may have regard to in assessing whether things done or omitted to be done by the person constitute "reasonable steps" for the purpose of s179(1).

6. Accordingly, the primary proceeding, which took place over two to three hearing days, focussed on the statutory defence relied upon by the Council. Magistrate Cure found that the Council did take reasonable steps to avoid the commission of the breaches and therefore was entitled to rely upon the statutory defence. She dismissed all of the charges, and in her written reasons delivered on 18 February 2010 stated: "I award the Defendant costs against the informant".

7. VicRoads and the Council were unable to agree upon an appropriate amount for the Council to be reimbursed in respect of costs. Accordingly, the parties appeared before Magistrate Cure on 13 October 2010 to seek a ruling from her in relation to the question of costs. As it became apparent during the course of this hearing that the argument with respect to costs could not be accommodated by the Court timetable on that day, the matter was adjourned to 14 December 2010.

8. At the conclusion of the hearing with respect to costs ("costs hearing"), Magistrate Cure made the following orders:[1]

> Application granted
> 1. The informant pay the defendant's costs on an indemnity basis.
> 2. The sum of $65,145.32 being allowed for the defendant's solicitors' costs representing 80% of the sum of $81,439.15 being the total claimed by the defendant as payable to its solicitors.
> 3. The informant pay the defendants costs claimed for both junior and senior counsel at $30,300.
> 4. The costs of this application for costs be allowed in the sum of $4,200.
> 5. Payment be stayed for 30 days.

The Costs Hearing

9. For the purpose of identifying and determining the issues in this appeal, it is necessary to go into some detail regarding the material which was before the learned Magistrate prior to and during the course of the costs hearing.

10. The following documents were before the learned Magistrate:

(a) a document prepared by the Council headed "Application for Costs"
(b) a document headed "Submissions of Informant" prepared on behalf of VicRoads;
(c) a document headed "Compilation and transcript of 10 tax invoices issued by the defendant's solicitors to the defendant and relied upon by the defendant for the purposes of obtaining an order for costs ("Compilation Bill");[2] and
(d) a document headed "Objections to Bills of Costs" prepared on behalf of VicRoads, which, in summary form, objected to each of the items referred to in the Compilation Bill.

11. Accordingly, VicRoads prepared for the costs hearing in a manner which anticipated that the hearing would be conducted in a manner akin to a taxation or assessment of costs in the Costs Court.

12. The Council claimed $112,470.64 in respect of the costs of the primary proceeding, including $81,429.70 in respect of professional costs, and $30,300 for counsels' fees. The Council had engaged both senior and junior counsel. In its submissions supporting its application for costs, the Council submitted, in summary:

> (a) in criminal cases in the Magistrates' Court, costs are awarded by way of indemnity to the successful party, not to punish the unsuccessful party (see *Latoudis v Casey*);[3]
> (b) contested criminal proceedings are not to be equated with contests between civil litigants and the Court is not bound by the scale of costs relevant to civil proceedings;
> (c) the costs claimed by the Council were reasonably incurred, and the work undertaken was reasonably required and/or incidental to its defence;
> (d) there was no disentitling conduct on the part of the Council which would warrant a reduction in the amount of costs recoverable by it: in fact, the Council co-operated fully with VicRoads during the course of the investigation of the proceeding;
> (e) the conduct of VicRoads during the course of the primary proceeding was unreasonable, in that it unnecessarily prolonged the proceeding, and for some time the Council was unable to properly assess the case it was to meet. The Council's submissions included a table which summarised the conduct of VicRoads which was said to have unreasonably prolonged the primary proceeding;
> (f) VicRoads' response to a subpoena issued on behalf of the Council was unreasonable, and led to a separate contested hearing in which the Council was ultimately successful;
> (g) in the context of the number of charges and the potential penalties which would apply if the Council was unsuccessful in defending the charges, it was reasonable for the Council to engage both senior and junior counsel; and
> (h) a relevant matter was that the Council had invited VicRoads to discontinue the prosecution on two occasions, once by letter dated 24 July 2009 (to which no response was provided) and on the first day of the primary proceeding (when counsel for the Council stated that if the prosecution was discontinued, the Council would not claim its legal costs to date).

13. The submissions prepared on behalf of VicRoads did not squarely address the submissions on behalf of the Council in respect of the manner in which VicRoads conducted the primary proceeding. Rather, VicRoads contended that the costs claimed by the Council were calculated on a basis that is not recognised in law as being fair and reasonable, but rather on a basis and at a rate which is unjustifiable and excessive. In particular, VicRoads submitted that the Council:

> (a) claimed solicitors' costs on a "time based" system, that is not using an objective measure of the work, such as a scale of costs but claiming costs based on time spent by the solicitors;
> (b) claimed solicitors' costs at a rate which is substantially in excess of the time based element of any scale of costs in Victoria in any court, even for non-litigious work;
> (c) claimed costs for attendances which are not normally chargeable even on a solicitor -own client basis; and
> (d) claimed costs for attendances that had occurred between members of Norton Rose with each other, and were therefore not recoverable.

14. Further, VicRoads submitted that while briefing senior counsel was appropriate in the circumstances, retention of two counsel was not justified.

15. VicRoads' submissions provided an overview of the basis upon which costs could be determined as appropriate in accordance with the usual basis of taxation in civil proceedings: that is, an explanation of the principles of taxation on a party/party, solicitor/client, indemnity, and solicitor/own client basis. Further, VicRoads submitted that the principles espoused in *Latoudis* need to be read in the context of later authorities, and in particular the decision of the Court of Appeal in *Norton v Senior Constable Morphett*,[4] which rejected the contention that *Latoudis* stands for a principle that successful defendants should receive their costs on an indemnity basis, calculated in accordance with their costs agreements with their lawyers, and regardless of the reasonableness of the expenses claimed.

16. VicRoads' submissions also cited *Norton*, along with the decision by Mandie J (as he then was) in *R v Sobh*,[5] as support for the contention that considerations relevant to an award of costs in the civil jurisdiction may provide guidance to a magistrate in criminal proceedings if they

appear useful. VicRoads submitted that the applicable civil scale is an adaptable and appropriate scale, is *prima facie* reasonable both in terms of determining the basis upon which the costs are to be calculated and the amount allowed for those costs, and that the Court should not allow costs based on a time based costs agreement. In particular, at paragraph 22 of its submissions, VicRoads contended:

> The Court should be alert to the need not to adopt a procedure in the awarding of costs against an informant that will treat those defendants who come before it who are wealthy and prepared to spend their money extravagantly from being in a position to deter those public bodies who are responsible for the administration of the law from commencing proceedings against them.

17. I have summarised the written submissions of the parties before the costs hearing at some length, because it appears from the contents of the transcript of the hearings on 13 October 2011 and 14 December 2010, and the affidavit of Anthony Norman Murdoch sworn on 14 January 2011, that the learned Magistrate made her decision primarily based upon the contents of the parties' written submissions, rather than oral argument during the course of the hearing.

18. During the first hearing on 13 October 2010, counsel for VicRoads contended that the determination of the issue of costs was governed by Part 7 of the *Magistrates' Court Act* 1989, as the primary proceeding commenced in March 2009 prior to the enactment of the *Civil Procedure Act* 2010. Relevantly, s131 of the *Magistrates' Court Act* provides 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) Sub-section (1) applies unless it is otherwise expressly provided by this or any other Act or by the Rules or the regulations.
> (2A) In exercising its discretion under sub-section (1) in a proceeding, the Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the Court is satisfied resulted in prolonging the proceeding.
> (2B) The Court must not make an order awarding costs against a party in the exercise of its discretion under sub-section (1) on account of any unreasonable act or omission by, or on behalf of, that party that the Court is satisfied resulted in prolonging the proceeding without giving that party a reasonable opportunity to be heard … .

19. Further, s131A of the *Magistrates' Court Act* provides that:

> 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.

20. Counsel for VicRoads suggested that as an alternative to reviewing each of the individual objections to the items in the Compilation Bill, the learned Magistrate refer the costs claimed by the Council to the Costs Court for assessment under s131A of the *Magistrates' Court Act*.

21. Counsel for the Council contended that the relevant provision governing the question of costs was s401 of the *Criminal Procedure Act* 2010,[6] as the transitional provisions of the Criminal Procedure Act provided that the costs of the proceeding were governed by Part 8.2 of that Act, not Part 7 of the *Magistrates' Court Act* (which includes ss131 and 131A of that Act). As Part 8.2 of the *Criminal Procedure Act* does not include a provision equivalent to s131A of the *Magistrates' Court Act*, the Council submitted that the learned Magistrate did not have the power to refer the costs hearing to the Costs Court. In any event, counsel submitted that Magistrate Cure, having heard and determined the primary proceeding, including some hearings concerned with procedural matters, was best placed to determine the question of costs. She drew the learned Magistrate's attention to the Council's written submissions regarding VicRoads' conduct of the prosecution and the proceeding.

22. In particular, the Council levelled the following criticisms of VicRoads' conduct of the primary proceeding which caused the Council to incur unnecessary costs, being:

> (a) VicRoads' refusal to provide further and better particulars of the charges;
> (b) VicRoads' failure to serve an initial brief including all evidence it proposed to rely upon;
> (c) provided records of interview of potential witnesses on the basis that they purported to be statements of the evidence they would give;

(d) failed to provide statements of potential witnesses on two occasions despite having undertaken to do so;
(e) failed to respond to a witness summons seeking production of documents, then raised a ground of resistance to the summons on the day of the hearing of the objection to the summons, necessitating an adjournment of the hearing date; and
(f) over a twelve month period continually maintained that the drivers of the vehicles being the subject of the charges would be called to give evidence, but, despite repeated requests, failed to provide statements or articulate the issue upon which their evidence would be relevant.

23. During the course of the hearing, when it became apparent that the learned Magistrate would not have sufficient time to accommodate the costs hearing on that day, the learned Magistrate determined that she would not refer the issue to the Costs Court,[7] not on the basis of any lack of express power to do so, but on the basis that she was best placed to determine the matter of costs.

24. When the parties returned on 14 December 2010, the learned Magistrate:

(a) informed the parties that she had read the parties' submissions;[8]
(b) stated "take it as a starting point that I am going to award indemnity costs";[9]
(c) asked counsel for VicRoads to develop his submission that she would fall into error if she were to accept the claim for costs on the basis of the Council's solicitors' bills;[10]
(d) queried whether it was necessary for the Court to make a finding of misconduct before making an award of indemnity costs;[11]
(e) heard submissions from counsel for VicRoads regarding the inappropriateness of time based billing, the need for an objective assessment of the Council's solicitors' bills, and the potential benefit of referring the Council's cost claim to the Costs Court;[12]
(f) stated that she was not prepared to deal with the Council's claim on an item by item basis (that is, she was not prepared to review VicRoads' objections to the individual items in the Compilation Bill);[13]
(g) restated her intention to award costs on an indemnity basis;
(h) stated, in respect of costs, "I agree that they are exorbitant, but the matter needs to be resolved";[14]
(i) heard submissions upon why two counsel should not be allowed, then found that it was not unreasonable in the circumstances of the proceeding that the Council briefed two counsel;[15]
(j) confirmed that she agreed with counsel for the Council on the question of the manner in which VicRoads conducted the proceeding;[16]
(k) heard submissions with respect to VicRoads' criticisms of time based billing, charging for interoffice discussions, and charging for nonlegal work;
(l) determined that she did not need to make a finding as to whether the *Criminal Procedure Act* or the *Magistrates' Court Act* applied to her determination of the issue of costs;[17] and
(m) gave the following statement of reasons with respect to the question of the costs of the primary proceeding:[18]
"All right, thank you, Mr Murdoch [sic]. I've already indicated that I am going to grant costs on an indemnity basis. I don't need to rule whether or not I do so under s131 of the *Magistrates' Court Act*, where I [am] conferred a wide discretion, or whether I do so under s401 of the *Criminal Procedure Act*, because of the similarity in that discretion.
I take the view that there were certainly – sorry, there was conduct by the prosecution that prolonged these proceedings, and that the prosecution failed to disclose its case fully and did so over a period of time, and I accept the submissions by the defendant about the piecemeal disclosure of the brief, the need to subpoena documents, and therefore to a degree, I find the prosecution's conduct unreasonable in that regard, and particularly with the conduct relating to disclosing witnesses, and that was over a period of almost a year between March 2009 and February 2010, and I've already indicated that I regarded as reasonable in the circumstances of this case for the defence to engage both senior and junior counsel.
The running of the case was assisted by (indistinct) and I made a number of remarks in my written decision about both the proceeding and the carriage of the prosecution, and they're matters that I take into account. It's my intention to award, exercising my discretion, 80 per cent of the professional costs sought in the defence submissions and counsel's costs. So I'm not quite sure what that will end up to. I couldn't quite work out what counsel's costs were because counsel's fees, the box was blank. I presume that you'll be able to work that out, but if you want to go away and work out what 80 per cent of professional costs are, and counsel's fees. I would presume, Ms Gwynn, that ends the matter, does it, as far as I'm concerned?"

25. The learned Magistrate then heard and determined the question of the costs of the costs hearing itself,[19] and awarded the Council $4,200 in respect of the costs hearing (substantially less than was originally claimed by the Council).

This Appeal

26. VicRoads by its amended notice of appeal filed 28 March 2011, seeks orders that:

This appeal be allowed.

The orders of the Court made on 14 December 2010 be set aside.

In place of the said orders made on 14 December 2010 that there be orders as follows:

(i) That the appeal is allowed.

(ii) That the order of the Magistrates' Court at Dandenong in awarding costs be quashed.

(iii) That the matter be referred to the Costs Court of the Supreme Court for taxing or, in the alternative, the case be remitted to the Magistrates' Court at Dandenong to be heard before another magistrate with the direction to deal with the matter in accordance with law.

(iv) That the respondent pay the costs of this appeal and the costs of the proceedings before the Magistrates' Court (including any reserved costs).

(v) Such further or other orders or relief hearing as to which this Honourable Court may deem fit.

27. The appeal is brought under s272 of the *Criminal Procedure Act*. Section 272(1) of that Act provides as follows:

> A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to the Supreme Court on a question of law, from a final order of the Magistrates' Court in that proceeding.

28. The question of whether an order for costs made after an order was made in respect of the primary proceeding (as was the case here) is a "final order" was not raised by either party. Given the number of occasions this Court has heard and determined appeals from the Magistrates' Court in respect of costs alone (see the discussion and authorities cited in paragraph 34 below), it appears to be generally accepted that an order with respect to costs is a final, rather than an interlocutory order.

29. VicRoads relied upon the following grounds of appeal, namely that the learned Magistrate erred in law as follows:

(a) by concluding under the circumstances to award costs on an indemnity basis;

(b) by ruling under the circumstances that she would not hear argument on the validity of the costs claimed by the respondent:

(i) pursuant to the itemisation of the respondent's bill; and/or

(ii) by law;

(c) by concluding under the circumstances to award costs fixed at 80% of professional costs claimed by the respondent;

(d) by ruling or directing herself under the circumstances to:

(a) refuse or fail to hear the appellant on the question of costs;

(b) refuse or fail to:

(i) consider or adequately consider the written submissions of the appellant;

(ii) consider or adequately consider the authorities tendered or sought to be tendered by the appellant;

(iii) consider or adequately consider the written objections to the bills of costs;

(e) by concluding under the circumstances that:

(i) the costs of two counsel should be allowed; and/or

(ii) the total cost of two counsel be allowed at 100% claimed;

(f) by refusing to remit the matter to the Costs Court for the taxation of costs;

(g) by refusing or failing to give reasons:

(i) for the award of costs on an indemnity basis;

(ii) for the award of costs at the percentage awarded;

(iii) for allowing the claim for two counsel;

(iv) for the basis of her ruling on costs; and/or

(v) at all.

30. VicRoads accepted that it was within the discretion of the learned Magistrate to order that VicRoads pay the Council's costs of the proceeding and the Magistrate had a wide discretion as to costs. However, the following specific criticisms of the learned Magistrate's decision in respect of costs were made:

> (a) the learned Magistrate had prejudged the matter by indicating at the early stage of the hearing that she was minded to make an order awarding indemnity costs in favour of the Council, and that she was not prepared to remit the matter to the Costs Court;
>
> (b) the learned Magistrate provided inadequate reasons for making an award of indemnity costs;

(c) in circumstances where the learned Magistrate made an observation that the costs claimed by the Council were "exorbitant", the learned Magistrate erred in failing to review the amounts claimed in the itemised bill and/or consider submissions in relation to the particular items claimed by the Council, but rather, simply fixed costs at 80% of the professional costs claimed by counsel and all counsels' fees; and
(d) the learned Magistrate failed to give adequate reasons for exercising her discretion with respect to costs on the basis that two counsel should be allowed and that the total costs of two counsel be allowed.

31. In response, in his written and oral submissions, counsel for the Council submitted as follows:

(a) as the appeal is against a discretionary decision of a judicial officer in a summary jurisdiction there is a strong presumption of the correctness of the decision appealed from;
(b) there were ample grounds upon which the learned Magistrate could reasonably have determined to make an award for indemnity costs (and in any event, counsel for VicRoads did not lead any evidence or more than faintly press an argument that VicRoads' conduct did not justify an award of indemnity costs);
(c) it was not open for VicRoads to agitate, as a question of law, that the briefing of two counsel was not justified. The finding that briefing two counsel was appropriate was a matter entirely within the discretion of the learned Magistrate;
(d) VicRoads was not shut out of advancing its argument that costs should not be awarded on an indemnity basis. The learned Magistrate had read the detailed written submissions of both parties, and asked counsel for VicRoads to develop his submissions as to why the Court should not accept the Council's costs claim based upon the bills rendered to it by its solicitors;
(e) it was open to the learned Magistrate to assess the costs on a global basis, rather than assess the items claimed on an individual basis, there being clear authority that such an approach is open to a magistrate in a summary criminal proceeding;[20] and
(f) the learned Magistrate gave clear reasons as to why she made the award of costs she did make, having had regard to the written and oral submissions of both parties. It was open for her to take into account:
(i) VicRoads' conduct;
(ii) the novelty of the provisions being considered;
(iii) that the statutory defence was new and untested in this context;
(iv) the uncertainty as to the way VicRoads' case was put;
(v) the potential financial consequences of an adverse outcome for the Council given the number of offences and the potential penalties which could be levied; and
(vi) the Council's offer to forgo its claim for costs if VicRoads withdrew the charges.

The Legal Context

32. Despite the numerous grounds of appeal, there are two primary issues for determination in this appeal: first, whether the learned Magistrate erred in exercising her discretion to award costs on an indemnity basis and, secondly, whether the learned Magistrate erred in the manner and procedure she adopted to quantify those costs.

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;[21]
(b) generally speaking, a successful defendant should not be out of pocket as to costs reasonably incurred and reasonable in amount;[22]
(c) the issue of costs should be looked at from the perspective of the successful defendant;[23]
(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;[24]
(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;[25]

> (f) a magistrate may have regard to scales of costs relevant in civil proceedings but is not bound or limited by them;[26]
> (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;[27]
> (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;[28]
> (i) the relevant enquiry is what the unsuccessful party may reasonably be required to pay the successful party at the conclusion of the litigation;[29]
> (j) any order for costs must always exclude any costs which have been unreasonably incurred or which are unreasonable in amount;[30] and
> (k) the governing principle to be applied is one of reasonableness.[31]

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* [1990] HCA 59; (1990) 170 CLR 534 at 566: 310; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287: "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.[32]

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.[33]

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.[34]

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".[35]

42. The difference between criminal and civil proceedings means that the well developed framework for awarding costs in civil proceedings is not readily transferable to criminal proceedings. For example, most awards of costs in civil proceedings are made on a party/party basis (which will usually provide substantially less than a full indemnity to the beneficiary of the order), and special circumstances must be shown before a party can obtain a more generous costs order than what is "necessary or proper" for the attainment of justice, being the usual test for assessing costs on pa party-party basis. In *Ugly Tribe Company Pty Ltd v Sikola*,[36] Harper J set out special circumstances which might give rise to an award of costs on an indemnity basis, including, (but not limited to):

> (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;
> (b) the making of an incorrect allegation of fraud;
> (c) conduct which causes loss of time to the Court and to other parties;
> (d) the commencement or continuation of proceedings for an ulterior motive;
> (e) conduct which amounts to a contempt of court;
> (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law;
> (g) the failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial.

43. The principles espoused in *Ugly Tribe* have been the subject of widespread approval and adoption in subsequent proceedings concerning the question of when it is appropriate to make an award for indemnity costs. Other instances where it might be found to be appropriate to order indemnity costs include:

> (a) where the other party has rejected a reasonable offer of settlement;
> (b) where the other party has engaged in conduct amounting to an abuse of process;
> (c) where the other party has failed to comply with its duties to the Court under the *Civil Procedure Act* 2010.

44. It is apparent from the matters referred to above that the conduct with which the courts are concerned to regulate through the use (or threat) of special costs orders is conduct which might be engaged in from time to time by litigants in civil proceedings.

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,[37] 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.[38] His Honour correctly referred to *Norton* as authority for the principle that the reference to "indemnity", in *Latoudis* did not, in fact, require that a successful defendant must be fully indemnified for any costs incurred in defending the proceeding. However, he went on to state, as follows:

> An award of indemnity costs is not, therefore, the usual order as to costs. The usual order is that costs be paid on a party and party basis. The circumstances in which an order that indemnity costs be paid was examined in *Colgate-Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225; (1993) 46 FLR 225; (1993) 118 ALR 248; 28 IPR 561. While that decision concerned costs in civil proceeding, the principles stated therein apply *mutatis mutandis* to criminal proceedings. That is consistent with the reasoning in *Hamdorf v Riddle* ([1971] SASR 398 at 402). In the ordinary course the order will be that costs will be paid on a party and party basis. An order that costs be paid as an indemnity will be made only if there be some special or unusual feature in the case to justify the court in departing from the ordinary practice.[39]

46. Having reviewed the authorities referred to by his Honour, in his judgment and the judgments of the various judges in *Latoudis*, I have some doubt as to whether the relevant passages go so far as to import concepts such as "party-party", "solicitor-client", or "indemnity" costs into the determination of an appropriate award of costs in criminal proceedings. Rather, the relevant statements reflect the developing view, cemented by the High Court in *Latoudis*, that a successful defendant was ordinarily entitled to some recompense for the legal costs incurred in mounting a successful defence, in the absence of some relevant disentitling conduct, much as a successful litigant in a civil proceeding would be. Indeed, as stated by the Court of Appeal in *Norton*:

> The judgment in *Latoudis* did not address the basis upon which costs were to be fixed and in that sense allowed; *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.[40]

47. To the extent that his Honour implies that a magistrate determining the question of costs is only faced with the choice between awarding costs on a party-party, or, in special circumstances, an indemnity basis, then this approach is inconsistent with the line of Victorian authority which emphasises the right of a successful defendant to recover "reasonable" legal expenses incurred in defending the proceeding, and that a successful defendant bears the onus to demonstrate the reasonableness of those expenses if challenged. The Victorian authorities also emphasise the flexibility open to magistrates in the exercise of their discretion with respect to costs: to limit their options to making an order for "party-party" or "indemnity" costs would, in my view, limit that flexibility.

48. However, in *Norton*, the Court of Appeal indicated that the use of concepts such as "party-party" and "indemnity" costs, while not mandated, may be useful in determining how costs might be assessed and quantified[41]. Accordingly, the learned Magistrate would not have been in error in making an award characterised as an award of costs on an "indemnity" basis. However, having determined that she would award costs on an indemnity basis, the quantum of costs ultimately ordered in favour of the Council was not calculated consistently with an award of that nature. In a civil proceeding, a beneficiary of an order for indemnity costs would still be required to prepare an itemised bill in accordance with the applicable civil scale, and only those items which were shown to have been unreasonably incurred or are of an unreasonable amount would be disallowed. [42] In this case, the learned Magistrate simply applied a percentage discount to the sum of the professional costs charged to the Council by its solicitors.

49. Where the learned Magistrate fell into error was, in circumstances where she had observed that the costs claimed were "exorbitant", and faced with submissions challenging the reasonableness of the charges on a number of bases, by resolving the issue by merely applying an arbitrary discount to the sum claimed by the Council, rather than by undertaking some degree of analysis of the reasonableness of the costs claimed by the Council. The criticisms levelled by VicRoads at the bills rendered by the Council's solicitors were not, on first glance, unreasonable in themselves, even if they may have ultimately been rejected in the determination of the quantum of costs recoverable by the Council. The learned Magistrate did not appear to have turned her mind to the specific issues raised by counsel for VicRoads regarding the Council's costs claim, such as the claim for costs on the basis of time based bills, that the hourly rate charged by the Council's solicitors was excessive, that the claim included charges for non-legal work and intra-firm conferences, and that there appeared to be significant duplication of work and charges.

50. The obligation imposed upon a judicial officer with respect to the exercise of their discretion with respect to costs is aptly summarised in *Caltex Refinery Co Pty Ltd v Maritime Services Board of New South Wales*, where the Court of Criminal Appeal considered whether a judge of the Land

and Environment Court of New South Wales had taken the correct approach when assessing what costs were "just and reasonable" within the meaning of the relevant legislation:

> The judge, in so reaching a final decision, must act, of course, judicially. This must entail, at the very least, a clear, and sufficiently exposed, process of reasoning to a quantum of costs. A result which is, in truth, nothing more than an infinitive stab in the dark is neither just nor reasonable as required by s52. [43]

51. It is certainly understandable that a magistrate exercising jurisdiction in a criminal matter would be attracted to a global approach in preference to the daunting task of dealing with each and every objection raised by VicRoads in its submissions (noting that each of the 325 items in the *Compilation Bill* was the subject of objection). Indeed, the presentation of the *Compilation Bill* in this fashion possibly detracted from the force of VicRoads' argument regarding the potential unreasonableness of the costs claimed by the Council. However, on closer analysis, having regard to the *Compilation Bill* and VicRoads' written submissions before the learned Magistrate, it probably would have been sufficient to have heard submissions and ruled with respect to a few key issues of principle, which would then have led to a reasoned determination of the quantum of costs.

52. This is not to say that it is never appropriate to fix costs in a global sum, or deal with the question of costs in a reasonable broad brush fashion, indeed, the authorities make that clear. It depends upon the circumstances, such as the length and complexity of the proceeding, or the quantum claimed. However, in a case such as the current proceeding, where a six figure sum had been claimed for work done in a proceeding which resulted in a hearing of less than three days duration, and in circumstances where the legal representatives of the party liable to pay had specific, and possibly cogent, criticisms of the quantum claimed, some greater degree of rigour is required than that undertaken in this case, such that the learned Magistrate failed to undertake the duty imposed upon her by the authorities to require the Council to demonstrate that its costs claim was reasonable. As such, the learned Magistrate failed to exercise the admittedly broad discretion open to her judicially.

53. In the current case, that obligation did not necessarily require the learned Magistrate to order that the Council prepare a bill in accordance with the equivalent civil scale. It did not require the learned Magistrate to undertake an item by item assessment of each of the items objected to by VicRoads, or otherwise undertake the detailed and painstaking exercise of a taxation of costs. However, given the challenge to the Council's costs claim by VicRoads, it would have been appropriate to directly engage with and rule upon the submissions made by VicRoads with respect to such issues as the appropriateness of time based billing, the assertions by VicRoads that the hourly rates charged were excessive, that the bills contained charges for non-legal work, there was duplication of effort and charges, and some of the charges for particular items of work were excessive. It may well be that the Council could demonstrate that many or all of the tasks done by its solicitors, and the time taken to do so, was necessitated by the conduct of VicRoads in its prosecution of the proceeding, and accordingly, the amounts charged by its solicitors was reasonable in all of the circumstances. However, in the current case, there was no onus placed upon the Council to do so, even in a broad sense.

54. Turning to the questions of law identified in the Notice of Appeal, I make the following findings and observations:

(i) Under the circumstances, did the learned magistrate err in law in exercising her discretion to award costs on an indemnity basis?

While the award of costs on an indemnity basis is inconsistent with the test consistently adopted in Victoria with respect to the award of costs to successful defendants in summary criminal proceedings, which emphasises the obligation upon a party claiming costs to show that they were for work reasonably done and were charged at a reasonable rate, it is apparent from the reasons of the Court of Appeal in *Norton* that making such an order was within the bounds of her discretion. To the extent that the order for indemnity costs was based upon the learned Magistrate's finding that VicRoads' conduct of the prosecution unnecessarily prolonged the primary proceeding (in its entirety, rather than just the final hearing), that finding was one she was uniquely placed to make, was clearly open on the material before her, and in any event neither VicRoads' oral or written submissions directly addressed the Council's criticisms of VicRoads' conduct, which were spelt out in some detail in the Council's written submissions.

(ii) Under the circumstances, did the learned Magistrate err in law in exercising her discretion not

to hear argument on the validity of the costs claimed by the Respondent:
(a) pursuant to the itemisation of the Respondent's bill; and/or
(b) at law?

The authorities confer a broad and flexible discretion upon magistrates in criminal proceedings with respect to costs, and expressly allow magistrates, in appropriate cases, to make an award of costs on a "global" basis, such that there is certainly no obligation upon a magistrate to undertake an item by item assessment akin to a taxation of costs. The learned Magistrate certainly did not make an error of law in that respect. However, to the extent that the authorities require an assessment of the reasonableness of the costs claimed by the Council, the learned Magistrate erred in not requiring the Council to demonstrate, even in a relatively broad brush sense, the reasonableness of the work undertaken by its solicitors and the rates charged for that work, the learned Magistrate has made a vitiating error of law.

(iii) Under the circumstances did the learned Magistrate err in law in exercising her discretion to award costs fixed at 80% of professional costs claimed by the Respondent?

For the reasons referred to in the preceding paragraph, by fixing the Council's costs in an apparently arbitrary sum, without any explanation as to the reason for the percentage figure reached, the learned Magistrate failed to exercise her discretion in a judicial manner.

(iv) Under the circumstances did the learned Magistrate err in law in exercising her discretion to award costs on the basis disclosed by the Respondent in its solicitor's bills of costs?

For the reasons referred to under sub-paragraph (ii) above, by fixing the Council's costs in an apparently arbitrary sum without any explanation as to the reason for the percentage reached, the learned Magistrate failed to exercise her discretion in a judicial manner.

(v) Under the circumstances did the learned Magistrate err in law in exercising her discretion to award costs:
(a) by refusing or failing to hear the Appellant on the question of costs; and/or
(b) by refusing or failing to:
(i) consider or adequately consider the written submissions of the Appellant; and/or
(ii) consider or adequately consider the authorities tendered or sought to be tendered by the Appellant; and/or
(iii) consider or adequately consider the written objections to the bills of costs?

It is apparent from a review of the transcript of the hearing and the contents of the written submissions that while the learned Magistrate had read the parties' submissions, and had heard argument from counsel for VicRoads regarding the inappropriateness of making a costs order based upon the bills rendered to the Council by its solicitors, it appears that the learned Magistrate gave limited, if any consideration to the challenges made by VicRoads to the reasonableness of the costs claimed by the Council. This is notwithstanding the fact that the submissions made by VicRoads regarding the applicability of principles governing the award of costs in civil proceedings were, in my view, somewhat misconceived and may have contributed to the failure of the learned Magistrate to properly exercise her discretion with respect to costs.

(vi) Under the circumstances did the learned Magistrate err in law in exercising her discretion to award costs:
(a) on the basis that two counsel should be allowed; and/or
(b) that the total cost of two counsel be allowed at 100% claimed?

There is no doubt that the learned Magistrate's finding that retaining two counsel was justified, and that the rates claimed were appropriate, is entirely within the bounds of her discretion, and as such, ought not be disturbed.

(vii) Under the circumstances did the learned Magistrate err in law in exercising her discretion not to remit the matter to the Costs Court of the Supreme Court for taxing of costs?

The question of whether the learned Magistrate had the power to remit the question of costs to

the Costs Court is a live issue in the costs hearing and in this appeal, in that there is some room for debate as to whether the question of costs in criminal proceedings is governed exclusively by s401 of the *Criminal Procedure Act*, or whether there is still a residual power under s131A of the *Magistrates' Court Act* to refer the question of costs to the Costs Court. In any event, her decision not to remit the matter to the Costs Court, on the basis that she was familiar with the primary proceeding and had dealt with some preliminary issues, was well within the bounds of her discretion.

(viii) Under the circumstances did the learned Magistrate err in law in refusing or failing to give reasons:
(a) for the award of costs on an indemnity basis; and/or
(b) for the award of costs at the percentage awarded; and/or
(c) for allowing the claim for two counsel; and/or
(d) for the basis of her ruling on costs; and/or
(e) at all?

While the learned Magistrate did give reasons for making an award of indemnity costs which were adequate in the context of the matters raised in the parties' written and oral submissions, no substantial reasons were given for the quantum of the costs ordered. While the absence of reasons does, of itself, indicate that the quantification of costs was little more than an "intuitive stab in the dark", when it comes to the question of costs, there is authority which suggests that, of itself, inadequacy of reasons is not a basis for setting aside an order with respect to costs. In *Penfold v Penfold*, the majority in the High Court stated as follows:

> Judges very frequently make orders for costs without giving reasons or making findings, even when costs are in issue. The absence of reasons or findings does not in itself indicate that a judge has erroneously exercised his discretion to award costs, though it will place an appellate court in the position of examining the circumstances and of determining for itself whether the circumstances show that the discretion was erroneously exercised.[44]

In respect of (a) above, while the learned Magistrate gave only brief reasons for her decision to make an award of indemnity costs, from reviewing the transcript of her oral reasons, it is apparent that the Magistrate adopted the submissions made by counsel for the Council in her written submissions.

In respect of (b), no reasons were given by the learned Magistrate for choosing the figure of 80%: or why a discount of 20% ought to be applied. However, by reason of the observations made above, the lack of reasons of itself is not a vitiating error of law.

In relation to (c), while no detailed reasons were provided by the learned Magistrate, the lack of reasons would not of itself lead me to allow the appeal on that point alone, given that the finding that two counsel were justified was unremarkable in itself, and open to her based upon her experience in hearing the proceeding.

In relation to (d) and (e) the learned Magistrate did give reasons for why she made the award that she did, notwithstanding that the use of the term "indemnity costs" was probably misconceived. In any event, the error of significance was the approach taken to the assessment of costs, rather than the adequacy of the reasons provided.

Remedies

55. Accordingly, I will allow the appeal, and set aside paragraphs 1, 2 and 4 of the orders made on 14 December 2010. Paragraph 3 of the orders made on 14 December 2010 will remain undisturbed. The question remains, what orders ought to be made in their place?

56. Section 272(9)(a) of the *Criminal Procedure Act* 2010, under which this appeal is brought, provides as follows:

> after hearing and determining the appeal, the Supreme Court may make any order that it thinks appropriate, including an order remitting the case for rehearing to the Magistrates' Court with or without any direction in law.

57. The terms of s272(9)(a) confer a wide discretion upon this Court with respect to the outcome of the appeal. In the current case, there appears to be four options open to me in determining

what remedy ought to lie from a successful appeal, being:

> (a) remitting the costs hearing back to Magistrate Cure to hear and determine the question of costs in accordance with these reasons, on the basis that, having heard and determined the proceeding itself, she remains in the best position to deal with the question of costs;
> (b) remit the question of costs to a different magistrate;
> (c) refer the question of costs to the Costs Court for a taxation, review, or assessment; or
> (d) following the making of appropriate directions, make an order quantifying the costs liable to be paid by VicRoads in substitution for paragraph 2 of the orders made on 14 December 2010, the findings made by the learned Magistrate regarding the conduct of the proceeding and these reasons, in a manner consistent with the authorities.

58. I will seek further submissions from the parties in respect of the appropriate remedy. However, my preliminary view is that this is not an appropriate matter for remittal to the Magistrates' Court, either to Magistrate Cure or another magistrate. Any advantage of having Magistrate Cure conduct the costs hearing again has no doubt greatly diminished with the effluxion of time, and a differently constituted court would have no advantage at all. Rather, the matter would be best dealt with by either the Costs Court, as it has the particular and unique expertise in dealing with the assessment of costs. However, there appears to be a real issue as to whether the Costs Court has jurisdiction to deal with a costs hearing of this nature.

59. Section 17D(1)(b) of the *Supreme Court Act* 1986 provides that the Costs Court has jurisdiction to hear and determine the assessment, settling, taxation or review of costs in proceedings in the Magistrates' Court:

> If, by or under any Act, the Rules or the Rules of those courts or VCAT, costs are to be assessed, settled, taxed or reviewed by the Costs Court;

60. Section 17D(1)(c) of the *Supreme Court Act* provides that the Costs Court:

> has jurisdiction to hear and determine the assessment, settling, taxation or review of costs in proceedings in:
> ...
> (ii) the Magistrates' Court
> if, by any order of a court ... costs are to be assessed, settled, taxed or reviewed by the Costs Court.

61. It is not entirely clear whether any order contemplated by s17D(1)(c) must be made by the court hearing the proceeding, or whether the order could be made by any court, including this Court on appeal. Accordingly, I would seek further submissions from the parties regarding the following issues:

> (a) whether the Costs Court has jurisdiction to hear and determine the question of costs in this proceeding under s17(1)(b) of the *Supreme Court Act* by reason of s131A of the *Magistrates' Court Act*, or whether the *Criminal Procedure Act* is an exclusive code governing criminal proceedings in Victoria (such that the absence of a provision equivalent to s131A of the *Magistrates' Court Act* means that the Costs Court does not have jurisdiction under s17D(1)(b) of the *Supreme Court Act*);
>
> (b) whether the breadth of the power conferred upon this Court under s272(9)(a) of the *Criminal Procedure Act*, combined with s17D(1)(c) of the *Supreme Court Act* enables this Court to make an order conferring jurisdiction upon the Costs Court to hear and determine the question of costs in accordance with these reasons; and
>
> (c) even if this Court could make an order referring the proceeding to the Costs Court, whether that is the appropriate remedy in the circumstances.

62. I will also hear further from counsel on the question of costs. My preliminary view is that the costs of the costs hearing on 14 December 2010, and this appeal ought to be reserved pending the final quantification of the costs of the proceeding, notwithstanding the success of the appeal. The ultimate outcome of the quantification of costs may be a relevant matter in the determination of which party should bear the costs of the costs hearing and this appeal.

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[1] During the course of the preparation for the hearing of the appeal it was discovered that the original record of orders was incorrect. The parties by agreement arranged for an amended certified order to be made, which was authenticated on 2 September 2011.

[2] In preparation for the hearing in respect of costs, VicRoads had prepared a document which disaggregated the various items in the bills submitted to it by the Council for the purposes of enabling a ready assessment of each of the items billed. Effectively, VicRoads had converted the invoices sent to them by the Council's solicitors, Norton Rose, into a bill in taxable form, save that the professional costs claimed were shown as

being charged on an hourly rate rather than a task based scale of costs (reflecting the content of Norton Rose's bills). This document ran to 18 pages and included 325 items (excluding counsel fees).
[3] [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[4] Court of Appeal, unreported, 31 October 1995, 9831 of 1993; [1995] VSC 211; [1995] VICSC 211; (1995) 83 A Crim R 90.
[5] [1994] 74 A Crim R, 453.
[6] Section 401 of the *Criminal Procedure Act 2010* provides as follows:
(1) Unless otherwise expressly provided by this Act or by the rules of court, the costs of, and incidental to, all criminal proceedings in the Magistrates' Court are in the discretion of the court and the court has full power to determine by whom and to what extent the costs are to be paid;
(2) In exercising its discretion under sub-section (1) in a criminal proceeding, the Magistrates' Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the court is satisfied resulted in prolonging the proceeding.
[7] T12, 18-21.
[8] T3, 1-3.
[9] T3, 30-31.
[10] T4, 1-7.
[11] T5, 28.
[12] T 6-8.
[13] T8, 23-24.
[14] T10, 11-13.
[15] T13, 8-10.
[16] T16, 22-27; T18, 16-24.
[17] T25, 24-31; T26, 1-20.
[18] T26-27.
[19] T34, 3-4.
[20] See, for example, *Sobh,* at 460.
[21] *Latoudis*, at 566 per McHugh J.
[22] *Sobh*, at 459.
[23] *Latoudis*, at 542
[24] *Sobh,* at 459.
[25] *Latoudis,* at 43
[26] *Norton*, at 111 per Phillips JA.
[27] *Sobh,*at 460, *Chugg v Pacific Dunlop Ltd (No. 2)* [1999] 3 VR 94, at 949.
[28] *Norton v Morphett*, at 3, per Hayne JA.
[29] *Norton*, at 14, per Phillips JA.
[30] Ibid.
[31] See *Lovejoy v Johnson* (Coldrey J) unreported BC9705272, 20 October 1997, at 5.
[32] at 459.
[33] Unreported, BC9705272, 20 October 1997, at 5.
[34] *Norton*, at 11, per Phillips JA.
[35] at 14, per Phillips JA.
[36] [2001] VSC 189.
[37] [2008] SASC 84.
[38] At [24].
[39] at [25] to [26]
[40] at 8, per Phillips JA.
[41] at 13, per Phillips JA
[42] See, Rule 63.30.1 of the *Supreme Court Rules*.
[43] (1995) 36 NSWLR 552; (1995) 78 A Crim R 368 at 380; (1995) 87 LGERA 188.
[44] [1980] HCA 4; [1980] 144 CLR 311, at 315-316.

APPEARANCES: For the appellant Brown: Mr MT Lapirow, counsel. VicRoads, solicitors. For the respondent Glen Eira Council: Mr R O'Neill, counsel. Norton Rose Australia, solicitors.