

34/08; [2008] VSC 249

SUPREME COURT OF VICTORIA

OSMAN v CRANE ENFIELD METALS PTY LTD & ORS

Williams J

13 May, 10 July 2008

CIVIL PROCEEDINGS – ASSESSMENT OF PROFESSIONAL FEES AND COSTS IN THE MAGISTRATES' COURT – PROCEEDINGS UNDER THE ACCIDENT COMPENSATION ACT 1985 – ORDERS MADE THAT COSTS BE TAXED ON A PARTY/PARTY BASIS – ASSESSMENT OF COSTS BY DEPUTY REGISTRAR – FINDING BY DEPUTY REGISTRAR THAT COSTS SHOULD BE ASSESSED ON SAME BASIS AS COUNTY COURT – APPEAL AGAINST DEPUTY REGISTRAR'S ORDER TO MAGISTRATE – FINDING BY MAGISTRATE THAT DEPUTY REGISTRAR ACTED UPON A WRONG PRINCIPLE – ONE MATTER REFERRED TO DEPUTY REGISTRAR FOR FURTHER DETERMINATION – OTHER MATTER DECIDED BY MAGISTRATE AS TO QUANTUM OF COSTS – WHETHER MAGISTRATE IN ERROR: MAGISTRATES COURT CIVIL PROCEDURE RULES 1999, ITEM 33 OF MAGISTRATES' COURT SCALE OF COSTS.

1. When assessing the professional costs upon the determination of a civil claim, it is not correct for the assessment to be calculated in the same way as it would have been under the County Court scale. Section 131 of the *Magistrates' Court Act 1989*, the *Magistrates' Court Civil Procedure Rules 1999* and the Preamble to the Magistrates' Court scale give flexibility and allow room for the exercise of appropriate discretion in relation to the taxation of costs without the need for the process to be interpreted as mirroring that in the County Court.

Tankard v Chafer [2005] VSC 171; MC17/2005, applied.

2. Where on the question of the assessment of costs a magistrate had sufficient material before him to make a necessary decision as to the appropriate loading taking into account the matters referred to in O26A.20(2) of the *Magistrates' Court Civil Procedure Rules*, the magistrate did not fail to engage in the proper process in determining the amount which should have been allowed for general preparation in that case.

WILLIAMS J:

The claim

1. The plaintiffs in each proceeding seek relief in the nature of *certiorari* quashing orders made on 6 August 2007 in the Magistrates' Court at Melbourne. The plaintiffs argue that the learned magistrate erred in law in each case.

2. The challenged orders set aside assessments of costs made on 26 and 30 April 2007, respectively, under Order 26A of the *Magistrates' Court Civil Procedure Rules 1999* ("the Magistrates' Court rules") by the Taxing Registrar of the County Court in his capacity as a Deputy Registrar of the Magistrates' Court ("the registrar"). Each plaintiff contends that the magistrate was wrong to conclude that the registrar erred as to the assessment of costs for "General Preparation" under item 33 in the Magistrates' Court Scale of Costs (Appendix A to the *Magistrates' Court Civil Procedure Rules 1999*) ("the Magistrates' Court scale").

3. The first defendant in each proceeding was the plaintiff in the Magistrates' Court. The Magistrates' Court is not represented before the Court and will abide by its decision in accordance with the practice endorsed by the High Court in *R v Australian Broadcasting Tribunal & Ors*.^[1]

Background

4. The plaintiff in each proceeding had made an application under the *Accident Compensation Act 1985* against the respective first defendant. Orders had been made by consent in each case that the defendant should pay the plaintiff's costs, to be taxed on a party/party basis. The costs appear to relate to work performed between about late 2005 and early 2007.

5. Bills of costs had been prepared by the plaintiffs' solicitors and the defendants had each objected to the assessment for general preparation work under item 33 in the Magistrates' Court scale.

6. The claim for costs for general preparation was item 52 in the bill relating to the Osman proceeding. The bill itemised attendances by a solicitor and clerk, letters, perusals, scanning, drawing and photocopying documents. It claimed a total of \$1,962.40 plus a loading of 40 per cent (\$784.96) “for care, skill and attention having regard to the work and labour done, and the time spent by the solicitor, the importance of the matter, the complexity or the issues raised in the proceedings and the particular and specialised legal skill knowledge required” – a total of \$2,747.36.

7. General preparation was charged as item 101 (under the heading “Instructions for Brief”) in the bill in Hanna. The bill also recorded attendances by solicitor and clerk, letters and the scanning, drawing and perusal of documents. A total of \$4,033.60 was arrived at and a loading of 50 per cent claimed, making a total amount sought of \$6,050.40 for this item.

8. In each case, the bill appears to comply with instructions as to the format for the description of work in a note to item 21 of the Scale of Costs in Appendix A to the *County Court Rules of Procedure in Civil Proceedings* 1999 as it stood between 1 January and 31 December 2006 (“the County Court scale”). Item 21 was entitled “Instructions for Brief”. No such notes appeared under item 33 of the Magistrates’ Court scale.

9. It should be noted that the applicable descriptions of work in item 21 of the County Court scale under the heading “Instructions for Brief” and that in item 33 of the Magistrates’ Court scale, headed “General Preparation” were otherwise very similar.

Magistrates’ Court scale

10. Before 1 January 2005, the *Magistrates’ Court Civil Procedure Rules* 1999 provided in Appendix A for the costs of General Preparation as item 16, as follows:

Item		Less than \$500	\$500 to less than \$5000	\$500 to less than \$7500	\$7500 to less than \$20,000	\$20,000 up to and including \$40,000	Over \$40,000
16.	General Preparation Including all necessary instructions (including instructions for negotiations for settlement), and instructions for brief for Counsel or brief notes for Solicitor (where necessary) including attendances personally, and/or by telephone, correspondence, perusals and examinations or scanning and preparation for delivery of brief to Counsel (or brief notes to Solicitor).	252	824	1017	1222	1527	1833

11. Between 1 January 2006 and 31 December 2006 (when much of the costed work was done), the relevant Magistrates’ Court scale item was item 33, described as follows:

Item 33 Particulars of Service

(Costs for items 2 to 80 are set out in Table 1)

General Preparation

For work necessarily and properly done in preparing for hearing and not otherwise provided for, including—

- (a) taking instructions for examination of any party or witness;
- (b) considering the facts and the law;
- (c) attending on and corresponding with client;
- (d) interviewing and corresponding with witnesses and taking proofs of their evidence;
- (e) obtaining reports or advice from experts and maps, plans, photographs and models;

- (f) making search in any public office and elsewhere for relevant documents;
- (g) inspecting any property or place material to the proceeding;
- (h) perusing relevant documents;
- (i) general care and conduct of the proceeding.

12. Table 1 specified the following amounts as the scale costs for general preparation under item 33:

	A	B	C	D	E	F	G
(Costs in dollars for items 2 to 80)							
Item	Less than \$500	\$500 to less than \$5000	\$5000 to less than \$7500	\$7500 to less than \$20,000	\$20,000 to less than \$40,000	\$40,000 to less than \$70,000	\$70,000 and over
33.	266	870	1074	1291	1612	2331	3625

County Court scale

13. During the same period, item 21 appeared in the County Court scale as follows:

Item		A	B	C	D
		<i>Up to and including \$7500</i>	<i>Over \$7500 up to and including \$20,000</i>	<i>Over \$20,000 up to and including \$50,000</i>	<i>Over \$50,000</i>
21.	Instructions for Brief For work necessarily and properly done in preparing for trial or hearing and not otherwise provided for, including – (a) taking instructions for examination of any party or witness; (b) considering the facts and the law; (c) attending on and corresponding with client; (d) interviewing and corresponding with witnesses and taking proofs of their evidence; (e) arranging to obtain reports or advice from experts and maps, plans, photographs and models; (f) making search in any public office and elsewhere for relevant documents; (g) inspecting any property or place material to the proceeding; (h) perusing relevant documents; (i) the general care and conduct of the proceeding: – not exceeding	1976.00	3954.00	5638.00	8059.00

Notes

A. This item should begin with a short statement of

- (i) the main issues;
- (ii) any particular difficulties of fact or law;
- (iii) any special skill, knowledge or responsibility required.

B. This should be followed not by a chronological narrative, but by an analysis of the work done separated on the main headings appropriate to the subject matter. Under a heading, for example, “Attendances on and correspondence with client” there should be included a statement of the number of attendances on the client, the total time occupied and the number of letters sent, but not the details of every attendance or of every letter. However, where objection is lodged to the stated number of letters or attendance, the practitioner lodging the bill for taxation must remove from his file the attendance notes and copy letters claimed, and be in a position to produce same in chronological order at the taxation. If a Judge or Registrar in respect of a party-party bill of costs or the Taxing Master on the taxation of a solicitor-client bill of costs considers that the maximum amount provided for in this item is not sufficient remuneration for the care and conduct including skill and responsibility involved throughout the course of proceedings and in obtaining instructions for brief or brief notes then the Judge, Registrar or Taxing Master may allow such amount in excess of the scale or give such directions that in all the circumstances are fair and reasonable.

14. In Osman, the registrar considered the claim in relation to individual items and applied a loading of 35 percent, allowing \$1,965 in relation to item 52, after taxing off \$782.
15. In Hanna, he taxed off the amount of \$1,679, having applied a loading of 40 percent in relation to part of the work. He allowed the sum of \$4,371 for item 101.
16. The defendant in each proceeding sought a review of the registrar's assessment under r26A.30 of the Magistrates' Court rules by an application filed on 9 May 2007.

Order 26 and O 26A of the Magistrates' Court rules

17. Order 26.01 of the Magistrates' Court rules provided that the court was required to fix the costs of any complaint or application on the day of hearing and determination, "unless it [was] impracticable to do so". Order 26A had been inserted into the Magistrates' Court rules with effect from 1 January 2005. It applied if costs were not fixed on the day of hearing under O26.

18. Under O26.02(1), costs were to be fixed in accordance with the Magistrates' Court scale, but if the court considered the scale sum inadequate or excessive, O26.02(2) gave it power to allow a greater or lesser sum. The court had power to award "reasonable costs" for any case not provided for in the scale under O26.02(3).

19. Appendix A also commenced with the following statement:

If in any case the Court or registrar thinks that any item is inadequate or excessive, the Court or registrar may allow a greater or lesser sum than the scale provides.

20. Order 26A.03 provided that costs in a proceeding in the Magistrates' Court were, subject to O26A, to be assessed on a party and party, solicitor and client, indemnity or any other basis which the court might direct.

21. Order 26A.04 and O26A.05 provided:

26A.04 On an assessment on a party and party basis, all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed must be allowed.

26A.05 On an assessment on a solicitor and client basis, all costs reasonably incurred and of reasonable amount must be allowed.

22. Under O26A.08(1) costs assessed in accordance with O26A were required to be assessed by a registrar unless otherwise ordered.

23. Under O26A.09(5) the registrar had a discretion to allow an appropriate fee which the registrar considered to be fair and reasonable in the circumstances, if he or she considered a fee, cost or disbursement under the Magistrates' Court scale inadequate to compensate for the work actually done .

24. Order 26A.14 described the content of a bill as follows:

26A.14

(2) The bill must contain—

(a) items numbered in chronological order describing briefly the work done by the solicitor for the party entitled to costs, and stating beside each item the amount claimed for the work and the amount of any disbursement made;

(b) at the conclusion of the chronological description of the work done, a description, having regard to the matters referred to in Rule 26A.20, of work done justifying an allowance under Appendix A of the amount claimed beside that item.

25. Order 26A.20 dealt with what were described as "discretionary costs" as follows:

26A.20

(1) Except as these Rules or any order of the Court otherwise provides, the fees and allowances which

are discretionary that are referred to in Appendix A must be allowed at the discretion of the registrar.

- (2) In exercising the discretion under subrule (1) the registrar must have regard to—
- (a) the complexity of the item or of the proceeding in which it arose and the difficulty or novelty of the questions involved;
 - (b) the nature and importance of the proceeding;
 - (c) the skill, specialised knowledge and responsibility involved;
 - (d) the number and importance of the documents prepared or perused, without regard to length;
 - (e) the place where and the circumstances in which the business involved was transacted;
 - (f) the labour involved and the time spent by the solicitor or counsel;
 - (g) the amount or value of any money or property involved;
 - (h) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same proceeding;
 - (i) any other relevant circumstances.

The registrar's reasons

26. The registrar provided written reasons for his decisions in each matter. The reasons were substantially in the same terms and I will set out those given in Hanna:

Reasons in Relation to the Item:

- I clearly have a discretion to depart from the scale allowance as is evidenced by the notes preceding the 2006 Magistrates' Court Scale of Costs which, *inter alia*, read "*If in any case the court or registrar thinks that any item is inadequate or excessive, the court or registrar may allow a greater or lesser sum than the scale provides.*"

This discretion is further substantiated by Order 26A.09(5) and Order 26A.20 of the *Magistrates' Court Civil Procedure Rules* 1999. The 2006 scale provided no impediment to the exercise of that discretion in relation to this item.

- The 2005 Magistrates' Court Scale of Costs contained the following footnote after item 57: "*Note: Costs for items 58 to 68 may be allowed in appropriate circumstances in substitution for the costs already provided for.*"

This footnote had the effect of limiting items, particularly general preparation, to the scale allowance unless "appropriate circumstances" was established. What constituted "appropriate circumstances" was not defined. The removal of that footnote in the 2006 scale removed any limitations to my discretion in relation to any scale item including the general preparation item and I believe that was the intention of the Magistrates' Court.

- I believe that the introduction of Order 26A of the Magistrates' Court rules and the removal of the aforementioned footnote in the 2006 scale indicated an intention by the Magistrates' Court to bring the Rules and Scales of Costs in line with those of the County Court. This was particularly so in view of the probability of more complex, lengthier and more difficult proceedings arising from the increase of the Magistrates' Court jurisdiction to \$100,000.00.

- The exercise of my discretion cannot and should not be restricted by the particular type or category of proceeding or the quantum of the claim or amount of judgment. Rather the allowance for general preparation is and should be determined by the extent of the work necessarily and properly done in preparing for hearing as described in item 33 of the scale.

- With the increase to the jurisdiction, most Magistrates' Court proceedings, and particularly workcover proceedings, are now identical to County Court proceedings. The amount of work performed by practitioners to run the case is the same. Accordingly, it is proper to reward practitioners for their work in Magistrates' Court proceedings on the same basis as they are awarded in the County Court on a case by case basis. I believe this was also the intention of the Magistrates' Court.

- General preparation is a discretionary item and there is no standard rule or formula for its calculation. It is dependent upon a number of matters and after considering all of the work performed, the general care and conduct of the proceeding and the circumstances of the case I formed the view that an above scale award was justified for the item. I exercised my discretion accordingly.

27. Each of the defendants sought a review by the learned magistrate of the registrar's decision in relation to the general preparation item in the respective bill, under Order 26A.30 of the Magistrates' Court rules.

The magistrate's decision

28. The learned magistrate concluded that the registrar's decision in each case was wrong

and should be set aside in relation to the calculation of the work described under the “General Preparation” heading in the Osman bill and the “Instructions for Brief” heading in the Hanna bill.

29. In each of his decisions, his Honour considered the registrar’s reasons set out above. He noted that the detail required as to the item 21 “Instructions for Brief” in a bill being assessed under the County Court rules was not required in relation to an assessment of work described in item 33 of the Magistrates’ Court rules. He went on to state the view that the registrar had, nevertheless, not misdirected himself by considering such detailed itemisation of the claim. Such detail would undoubtedly assist the registrar in considering the item, but he still needed to properly consider the relevant provisions of the rules.

30. The magistrate referred to s131 of the *Magistrates’ Court Act* which provided that all costs in the court were discretionary except in certain circumstances. Notwithstanding the numerous provisions in the Magistrates’ Court rules for the award of amounts greater or less than those provided for in the scale, the proper starting point was the amount specified in the scale. He referred, generally in this regard, to comments by Gillard J in *Tankard v Chafer*.^[2]

31. His Honour concluded that the registrar had erred in considering that his discretion in relation to item 33 was unimpeded. The removal in 2006 of the footnote after item 57 did not, in his view, remove any limitation to the exercise of discretion in relation to any item in the scale; it had been superfluous, having regard to numerous provisions in the rules he identified which allowed for costs to be awarded above and below scale item amounts.^[3]

32. His Honour went on to say that he did not think the Magistrates’ Court’s response to the increase in its civil jurisdiction evinced an intention to bring its costs rules into line with those of the County Court. He noted the changes to the scale classifications “A” to “G”, as well as the difference in the requirement for detail of the items constituting “General Preparation” in the Magistrates’ Court and “Instructions for Brief” in the County Court.

33. The learned magistrate expressed the view that the registrar was incorrect if he was identifying, as the real issue, the work “necessarily and properly done in preparing for the hearing”. His Honour said that the scale amounts might not reflect work “necessarily and properly done”, but that they must provide the starting point for an assessment; otherwise there would be no point in having them.

34. The magistrate disputed the registrar’s proposition that the typical matter in the Magistrates’ Court was of the “crash and bash” variety and that, therefore, all other claims were necessarily more complex and deserving of above scale allowances. He thought it inappropriate to compare different areas of the court’s jurisdiction and expressed the view that the taxing officer should have considered the range and type of disputes within the relevant area of civil jurisdiction when considering the question of “General Preparation”.

35. The plaintiffs refer, in particular, to the following passage from the learned magistrate’s reasons as an expression of what they argue are his Honour’s erroneous conclusions in relation to the registrar’s exercise of discretion:

However my major concern in the registrar’s reasons is the penultimate ‘dot’ point paragraph in the ‘Reasons in Relation to the Item’. I set this paragraph out in full: -

“With the increase to the jurisdiction, most Magistrates’ Court proceedings, and particularly WorkCover proceedings, are now identical to County Court proceedings. The amount of work performed by practitioners to run the case is the same. Accordingly, it is proper to reward practitioners for their work in Magistrates’ Court proceedings on the same basis as they are rewarded in the County Court on a case by case basis. I believe this was also the intention of the Magistrates’ Court.”

The WorkCover jurisdiction of this Court is not particularly now identical to the County Court. This court’s general WorkCover jurisdiction is conferred by s43 of the *Accident Compensation Act*. It is limited to a “decision, recommendation or direction for or in respect of a sum or matter ... which does not exceed \$40,000” as opposed to the general civil jurisdiction limit of \$100,000.

Alternatively, the Magistrates’ Court can consider any claim for weekly payments but only make an order for those weekly payments for a period or periods in arrears which do not exceed 130 weeks (for claims after January 2005) or 104 weeks (for earlier claims). The County Court has no such limits.

The County Court has sole jurisdiction to deal with common law claims or claims for death benefits pursuant to the *Accident Compensation Act*. The Magistrates' Court has no jurisdiction for those types of claims.

Further, ss50(3)-(5) of the *Accident Compensation Act* makes it clear that a distinction is to be drawn between Magistrates' Court costs and County Court costs consequential upon any settlement or judgment in the County Court.

The clear inference is that the costs will be lower in the Magistrates' Court and that the mere issue of proceedings in the County Court will not justify costs on the more generous County Court scales.

Although the work performed by practitioners may be the same whether the proceedings are issued in the County Court or the Magistrates' Court, it cannot be said that 'Accordingly, it is proper to reward practitioners for their work in Magistrates' Court proceedings on the same basis as they are awarded in the County Court on a case by case basis'.

For the above reasons I find that the registrar has made a relevant error as referred to in the *Australian Coal* decision and acted upon wrong principles as set out above.^[4]

36. The magistrate went on to state that he agreed with the registrar that it was proper for consideration to be given to a loading being made for general preparation for skill, care and attention in appropriate cases. He did not, however, believe it appropriate to add a loading to the general preparation item 33 for the work done and then allow an extra percentage loading for "skill, care and attention". His Honour was of the view that the question as to whether there should be a loading for skill, care and attention should be considered as part of the question whether any loading at all should be added to the item 33 amount; he referred, by way of example, to the registrar's obligation to have regard to matters including skill, knowledge and responsibility under O 26A.20 of the Magistrates' Court rules.

37. The magistrate decided that it was appropriate to remit item 101 of the Hanna bill of costs for re-assessment by the registrar. He considered the case to be a complex one. His Honour did not have the file in the court and expressed the view that the exercise would involve a lengthy consideration of a large number of attendances, letters, perusals etc. He thought it more cost effective to remit it in the circumstances.

38. The learned magistrate concluded, however, that it was appropriate for him to deal with the Osman assessment. He considered the proceedings to be much less complex. He referred to the pleadings and the bill of costs which showed the number of medical attendances and those who were involved. He noted that the defence had reopened issues and had complicated the proceedings by raising additional issues; this required an allowance in "general preparation" costs of an additional amount. Taking all these matters into account, he concluded that a 15 per cent loading was appropriate in Osman.

Submissions - Assessment under O26A

39. The plaintiffs argue, essentially, that the magistrate erred in law by concluding that the registrar was wrong in applying the principle that it was proper to reward practitioners for their work in the Magistrates' Court proceeding on the same basis as they were rewarded in the County Court. Mr Osman also contends that the magistrate erred in his determination that a loading of 15 per cent was appropriate in his case.

40. Counsel for the plaintiffs cites the history of costs rules in the Magistrates' Court, noting the historical differences between that court's costs structure and those in the Supreme and County Courts. He argues that the 2004 amendments to the Magistrates' Court rules which inserted O26A as from 1 January 2005, introduced a very similar taxing regime to that which had prevailed in the County Court from at least 1980. Counsel refers, in particular, to O26A.20 which sets out matters to which a registrar must have regard in exercising the discretion as to costs and which, in his submission, virtually mirrors O63.48 in the *Supreme Court Rules* and O63A.48 in the County Court rules. He notes that, simultaneously with the introduction of O26A, the description of work described under the "General Preparation" heading in the Magistrates' Court scale was amended to mirror, in part, the description of work entitled "Instructions for Brief" in the County Court scale.

41. Counsel notes the minor differences in the wording of sub-para (e) of each scale item description of general preparation work and the reference in the County Court scale to amounts “not exceeding” those fixed, in effect, as totals. He contends that, historically, under predecessor provisions to O26 of the Magistrates’ Court rules, costs were assessed on the day of hearing, in accordance with the scale which provided for an extremely limited discretion. Accordingly, he suggests that, when the Magistrates’ Court rules were amended, those words “not exceeding” in the County Court rules were overlooked. He concedes, however, that they suggest that the amount stated in the County Court scale is not intended to be invariably awarded and that their omission from the Magistrates’ Court scale cannot be ignored.

42. He contends that O26 allows the process applicable to costs decisions made by a magistrate on the day of hearing to continue, whereas O26A contemplates assessments in more complex cases where such an instant result is not achievable.

43. Counsel for the plaintiffs refers to the absence from the Magistrates’ Court scale of the notes which follow item 21 in the County Court scale and argues that their omission is not significant. He submits that these notes are simply directions to the drawer of a bill, reflecting the common law position set out in *Slingsby v Attorney-General*^[5] and *Higgins v Nicol (No 2)*^[6] and requiring assessment to be done in a two stage process involving itemisation of work done and the addition of a loading for skill and care.^[7] He contends that the only way in which the registrar could have determined whether the scale item for general preparation was adequate was to measure the total of the scale charges for itemised work. This approach, he argues, is contemplated by O26A.04 (which is mirrored in O63.69 of the Supreme Court rules and O63A.69 of the County Court rules).

44. Counsel for the first defendants argue that the magistrate was correct to find that the registrar had erred in essentially calculating costs of general preparation on an item by item basis, rather than on the basis of the amount fixed by the Magistrates’ Court scale.

45. Counsel for the first defendants seek to distinguish *Slingsby* as a case relating to the content of a bill of costs in circumstances where there was no prescribed amount for instructions for brief and the situation was complicated by the fact that the bill included costs relating to other litigation.

46. Senior counsel for the first defendants argues that, although *Slingsby* does not assist the plaintiffs, it is, nevertheless, helpful to the first defendants, in so far as Swinfen Eady LJ stated in that case that it might appear, from the very fact that a large sum has been allowed, that the taxing officer has taken something into consideration which he ought not have done or has acted on wrong principle.^[8] Senior counsel for the first defendants argues that it would appear that the registrar did just that in *Osman and Hanna*. Having characterised *Osman* as a “run of the mill case”, he nevertheless ultimately fixed an amount for general preparation which, senior counsel contends, was some 83% more than the amount fixed by the scale. In *Hanna*, the registrar allowed the sum of \$4,371, notwithstanding that the scale “D” amount for item 33 in the 2006 Magistrates’ Court scale was \$1,291. Senior counsel contends that the registrar, therefore, allowed an additional amount which was 238% of the scale allowance and significantly greater even than the amount of \$3,625 fixed for the top scale, “G”.

47. The first defendants do not dispute the proposition that, after reference to the scale, it would have been appropriate for the registrar to have increased the scale amount for the general preparation item by a percentage because of its inadequacy, having taken into account the matters referred to in Order 26A.20(2). They contend, however, that the learned magistrate was correct to conclude that there should be no second overall allowance for such matters as complexity, skill and care.

48. Counsel for the first defendants argue that the registrar erred by first calculating the total by reference to the itemised costs applicable to work actually done and then using that amount as the starting point in determining whether the scale adequately rewarded the solicitors for their work. They contend that the proper approach is that endorsed by Gillard J in *obiter dicta* in *Tankard v Chafer*^[9], in which, in relation to an appeal about an allowance of counsel’s fees several times greater than the scale amount, his Honour stressed the significance of the scale in Magistrates’ Court proceedings. As the appellant had been successful, there was no need for

Gillard J to address the appeal relating to costs, nevertheless, his Honour made the following statement:

As a general rule, the Magistrates' Court should be slow to increase the scale fees because the Court thinks the item is inadequate. The scale costs and fees should be the norm. ... The Magistrates' Court is the court in this state dealing with claims of lesser monetary value than in the higher courts, and the costs should not be at a level which deters litigants. Further, defendants defend proceedings in the expectation that the costs will be determined in accordance with the scale of costs.

49. Counsel for the plaintiffs replies that the Court ought not regard *Tankard* as authoritative, given that Gillard J's statements were by way of *obiter dicta* and related to fees fixed under O26, rather than O26A which, he contends, prescribes a process for more complex cases which cannot be dealt with by the magistrate on the day of hearing. The description of matters to which O26A.20 requires the registrar to have regard in the exercise of any discretionary power in relation to the assessment of costs reinforces the correctness of the approach adopted by the registrar. Counsel also argues that fixing a brief fee involves far less discretion than the assessment of costs relating to general preparation.

50. Counsel for the first defendants submit that there is no legislative intention to disregard the Magistrates' Court scale. Senior counsel notes the differences in the amounts allowed under it and the County Court scale and argues that there is a clear intent that greater amounts were to have been allowed in the County Court for general preparation work. The first defendants rely, in particular, upon the presence of the notes under item 21 in the County Court scale as an important indication of the method for assessment in that court and their absence as an important indication of the legislative intent with regard to assessment under the Magistrates' Court scale.

51. Senior counsel also argues that, in so far as the registrar was proceeding on the basis that in WorkCover matters the County Court scale was to apply, the learned magistrate had been correct to conclude that the statutory scheme under the *Accident Compensation Act* 1985 did not support that premise and that the courts dealt with different WorkCover matters. Senior counsel referred to particular items (such as items 43, 44 and 57) in the Magistrates' Court scale, relating specifically to WorkCover attendance, to make his point. He also notes the magistrate's reference to the s50(3), (4) and (5) *Accident Compensation Act* 1985 provisions under which costs awarded or agreed under a settlement should be calculated on the Magistrates' Court scale in a proceeding under the Act brought in the County Court. Senior counsel argues that this is another indication of general legislative intent that there should be a difference between the methodology for assessment in the two courts and that it was the registrar who had erred in concluding to the contrary.

52. Counsel for the plaintiffs responds that the *Accident Compensation Act* provisions do not support the first defendants' case, because they pre-date the 1 January 2005 amendments and because they still would have effect by ensuring that the itemised total costs would have been calculated according to the Magistrates' Court scale where appropriate.

Osman bill

53. Counsel for the plaintiffs then contends that the magistrate erred in adopting the approach of simply taking the scale fee for general preparation and adding a loading of 15 per cent when fixing the costs in relation to general preparation in *Osman* which he decided not to remit for reassessment. As he was able to exercise all the powers and discretions of the registrar with respect to the subject matter of the review under Order 26A.30(7), the magistrate should have considered the various items of work and not just taken a "broad brush approach".

54. Counsel for the first defendants respond that the learned magistrate did not err. He had sufficient information as to the work undertaken by way of the detailed bill, as well as the pleadings, the registrar's reasons and the submissions made in relation to the objections. The magistrate was, therefore, in a position to decide whether the scale was adequate and then to determine what percentage loading was appropriate in that context.

Conclusions - Assessment under O26A

55. It is common ground that the principles applicable to the magistrate's review of the exercise of the registrar's discretion in relation to the assessment of costs for general preparation were

described by Kitto J in *Australian Coal and Shale Employees' Federation v Commonwealth*.^[10] His Honour was considering the discretionary power of a taxing officer in relation to quantum. He referred to authorities which appeared to him:

... to establish that the true principle limiting the manner in which appellate 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 that 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.^[11]

56. The magistrate determined that the registrar acted on a wrong principle in concluding that the costs should be assessed “to reward practitioners for their work in Magistrates’ Court proceedings on the same basis as they are rewarded in the County Court on a case by case basis” and that such was the intention of the Magistrates’ Court. In my view, he was correct.

57. I am not persuaded that the Magistrates’ Court intended to amend its rules from 1 January 2005 so as to require the assessment of costs by the registrar in relation to work described in item 33 by the method used to assess costs under item 21 of the County Court rules. In so far as the plaintiffs argue that the intent is indicated by the similarity between some of the provisions of O26A and those of O63A of the County Court rules, the fact remains that the rules in the two courts are not identical and that the equivalents of only some of the rules in O63A have been introduced by O26A. The similarities between certain of the Magistrates’ and County Court rules pointed out by counsel for the plaintiffs do not persuade me to the contrary.

58. If the Magistrates’ Court had intended to introduce the County Court approach to the calculation of costs of general preparation work, it could have made that clear by amending its rules to make item 33 mirror County Court item 21. There are, however, significant differences between the two scales. The note to item 21 instructs the drawer of the bill to detail those matters listed and appears to contemplate a total amount of costs being calculated up to an amount “not exceeding” the sums set out as applicable to scales “A” to “D”. Item 33, on the other hand, sets out what appear to be a considerably lower lump sums applicable in cases which might only have been brought in the County Court before the Magistrates’ Court’s jurisdiction was increased. Further, there are no notes of the type which follow item 21 in the County Court scale as to the detail to be included in a bill. The Magistrates’ Court scale, nevertheless, allows for the exercise of discretion as to whether that scale amount is adequate in the circumstances, as the learned magistrate pointed out.

59. Order 26 itself was amended from 1 January 2005 by the insertion of O26.01(2) which provided that O26A was to apply if costs were not fixed by the court on the hearing and determination day of the complaint or application. It was O26.02(1) which provided that costs were to be fixed in accordance with the Magistrates’ Court scale. Item 33 in the Magistrates’ Court scale was introduced simultaneously with O26A and O26.01(2) and yet the amended scale does not relevantly expressly distinguish between the situation in which costs are fixed by the magistrate on the day of hearing and that in which a bill is prepared for assessment by a magistrate or registrar under Order 26A.

60. In so far as counsel for the plaintiffs seeks to distinguish between the process to be adopted under O26 when a magistrate fixes costs on the day of hearing for general preparation under item 33 on the Magistrates’ Court scale and the exercise undertaken by the registrar under O26A, I am not persuaded by his arguments. It would seem unlikely that the Magistrates’ Court would have intended that it should be inferred from the addition of O26A that a party awarded costs would be entitled to what might be different amounts, depending upon whether costs were to be assessed on the basis of a bill or whether the magistrate made an assessment on the day.

61. Whilst the jurisdiction of the Magistrates’ Court has indeed increased and there is great variety of work dealt with by the court, as the plaintiffs submit, s131 of the *Magistrates’ Court Act 1989*, the *Magistrates’ Court rules*^[12] and the preamble to the Magistrates’ Court scale give flexibility and allow room for the exercise of appropriate discretion in relation to the taxation of costs, without the need for the process to be interpreted as mirroring that in the County Court.

62. For the reasons given by the learned magistrate, I am not satisfied that the removal from the 2006 Magistrates' Court scale of the note under Order 57 in the 2005 rules had any such effect. I am persuaded by the first defendants' submissions that the magistrate was correct to conclude, in effect, that the registrar erred in discerning a statutory intent that the costs should be calculated in the same way as they would have been under the County Court scale.

63. Gillard J's observations by way of *obiter dicta* in *Tankard* as to the significance of the scale in the assessment of costs in the Magistrates' Court provide guidance in relation to an assessment under O26A and the magistrate was justified in relying upon them to the extent he did. The significant difference between the total amount specified under the County Court scale and the scale amount for a Magistrates' Court claim of similar quantum which might not previously have been able to be brought in the lower court supports this conclusion.

64. More generally, that I am not persuaded to take a contrary view of the magistrate's decision by the authorities and texts relating to the process for the calculation of general preparation costs in the higher courts to which counsel for the plaintiffs refers.

65. I do note, nevertheless, that, although s50(3)-(5) of the *Accident Compensation Act* would seem to indicate a general legislative intent^[13] that the amount of costs awarded under the Magistrates' Court scale would be lower than that calculated in accordance with the County Court scale, they are ultimately of little assistance because the differences in item remuneration between the scales would maintain that differentiation, in any event.

Osman assessment

66. I am further not persuaded that the learned magistrate erred in deciding not to remit the issue of the costs of general preparation in *Osman*. It is correct to say that, under O26A.30(7), on the review he had the powers of the registrar. Nonetheless, I agree with senior counsel for the first defendants that the magistrate had sufficient material before him to make the necessary decision as to the appropriate loading taking into account the matters to which O26A.20(2) refers. I am not persuaded that he failed to engage in the proper process in determining the amount which should have been allowed for general preparation in that case.

67. The applications should be dismissed.

[1] [1980] HCA 13; (1980) 144 CLR 13 at 35; 29 ALR 289; (1980) 54 ALJR 314 per Gibbs(1), Stephen(1), Mason, Aickin and Wilson JJ.

[2] [2005] VSC 171.

[3] Orders 26.02, 26A.09(5), 26A.20, 26A.33 and the note at the commencement of Appendix A.

[4] Magistrates' Court hearing Transcript: *Osman v Crane Enfield Metals Pty Ltd*, 6 August 2007 at pp [8-9].

[5] [1918] P 236.

[6] (1972) 21 FLR 34.

[7] Counsel also cited *Quick on Costs* (1996, Law Book Company) at [2.1740-2.2060]; Dal Pont, GE, *Law of Costs* (2003, Butterworths) [15.76]-[15.80] as to the general practice for assessment of general preparation costs in the higher courts.

[8] [1918] P 236 at 239.

[9] [2005] VSC 171 at [79].

[10] [1953] HCA 25; (1953) 94 CLR 621.

[11] [1953] HCA 25; (1953) 94 CLR 621 at 626.

[12] See: Orders 26.02(2), 26A.04, 26A.05 and 26A.09(5).

[13] See: *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 723-4; (1987) 19 ATR 74 per Kirby P.

APPEARANCES: For the plaintiffs *Osman & Hanna*: Mr J Brett, counsel. Arnold Thomas & Becker, solicitors. For the first defendant in each case: Mr J Ruskin QC with Mr Mark Lapirow, counsel. Wisewoulds, solicitors.
