51/92

SUPREME COURT OF VICTORIA

TOYCORP LTD (Receivers & Managers Appointed) v SILVER GRACE PTY LTD

Smith J

7 May 1992

COSTS – CIVIL PROCEEDINGS – PLAINTIFF AWARDED A SMALL PORTION OF ORIGINAL CLAIM – LITIGATION UNDULY PROTRACTED DUE TO PLAINTIFF'S INADEQUACY – WHETHER COSTS FOLLOW EVENT – WHETHER OPEN TO AWARD LESSER AMOUNT OF COSTS DUE TO PLAINTIFF'S UNJUSTIFIED CONDUCT.

After a 2-day hearing of a civil proceeding, a Magistrate awarded the plaintiff $2,058.50 on an original claim of $17,382.64, and dismissed the counterclaim. The Magistrate fixed the plaintiff's costs at $614 on the basis that but for the plaintiff's conduct which was a basic cause of the litigation itself and the length of it, the matter could have proceeded as an arbitration of not more than 2 hours. The Magistrate disallowed the plaintiff's costs of defending the counterclaim as it had no real impact on the plaintiff's costs of the litigation. Further, no costs were allowed to an accountant who was called as a witness for the plaintiff on the basis of numerous inadequacies and errors in the plaintiff's accounts. Upon appeal—

HELD: Appeal dismissed.
Whilst the usual practice is to award costs to a successful party, it was open to the Magistrate in the circumstances of the present case to conclude that the plaintiff's conduct was not justified and accordingly, depart from the usual practice.

SMITH J: [1] I give my reasons in this matter. This is an appeal by Toycorp Limited from an order of the Magistrates' Court at Melbourne that the respondent, who was the defendant in that proceeding, pay to the appellant the sum of $2,058.50 and $614 in costs, together with $436.38 for interest and $64.50 for fee on issue, and an order dismissing the counterclaim of the respondent without costs.

The appellant had sued the respondent claiming $17,382.64 in respect of various sums allegedly owing to it by the respondent under a franchise agreement. The respondent had filed a defence and counterclaim in which it challenged the accuracy of the accounts relied on by the appellant to the extent of approximately $14,500. In its counterclaim it sought to recover $10,242.86 in respect of moneys paid for ordinary shares in the plaintiff, $7,625 for moneys allegedly wrongly appropriated for franchise fees and $7,500 for damages for wrongful determination of the franchise agreement.

The hearing of the proceedings in the Magistrates' Court occupied two days, and there was a further day on which the learned Magistrate invited written submissions from the parties. Those submissions were provided. The appeal was referred to the Causes List by order of Acting Master Williams on 19 February 1992. In that order, four questions of law were identified for consideration. The first related to the merits of the original case. It was abandoned before me by the appellant in light of a recent Full Court decision dealing with the same point of law. The remaining questions for **[2]** my consideration are:

> (b) whether the Magistrate, having found for the plaintiff on its claim, was in error in not awarding the plaintiff witness fees and expenses in respect of the witness Milne;
>
> (c) whether the Magistrate was in error awarding the plaintiff as costs and fees the amounts of $614 and $64.50 respectively;
>
> (d) whether the Magistrate, having dismissed the defendant's counterclaim, was in error in not awarding the plaintiff costs in respect of the counterclaim.

Thus, this appeal relates to the exercise by the learned Magistrate of her discretion as to

costs. No reasons were given by Her Worship for the costs order that was made. It was common ground that the test laid down in the *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627 is applicable to the questions raised in this case. The principles were stated as follows:

> "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 a Court of Appeal is satisfied that it is clearly wrong .... Again, the nature of the error may not be discoverable but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate Court may infer that there has been a failure properly to exercise discretion which the law reposes in the Court of first instance."

The outline given above of the issues in the case and the order made indicate that the respondent's counterclaim was dismissed without costs and the appellant succeeded in respect of a small portion of its original claim. If the learned Magistrate had applied the usual rule of costs following the event, she would have applied the scale of **[3]** costs under Order 26 *Magistrates' Court Civil Procedure Rules* 1989 by reference to the defendant's counterclaim of $25,017.86 (See Rule 26.04(a)). The award of $614 costs was significantly less than the amount of costs that would have been awarded if the scale applicable to the respondent's counterclaim had been applied. It matches, however, the maximum amount of costs that may be awarded for a two-hour arbitration session. (See *Magistrates' Court Arbitration Regulations* 1990 Schedule 2). The summary arbitration procedure, however, is available only for cases where the plaintiff claims less than $5,000. The order for out-of-pocket expenses did not provide any compensation for the costs of an accountant, Mr Milne, who was the appellant's witness, and was apparently present throughout the hearing. Mr Milne was an employee of the receiver and manager and not an employee of the appellant.

Plainly, the learned Magistrate decided that this was not a case in which the usual rule of costs following the event should be applied in the usual way. It is possible, however, from a reading of the material, including Her Worship's reasons and an analysis of what took place at the hearing, to discern a likely explanation for what, on the face of it, is an unusual costs order. It was open to Her Worship to take the view that the counterclaim did not have any real impact on the appellant's costs of the litigation. Further, she was very critical of the appellant in its conduct of the case and the numerous inadequacies and errors in its accounts which in several instances resulted in the plaintiff reducing its claim, for example, to $10,246.84 at the **[4]** beginning of the trial and to $6,754.27 on the second day of the trial. It is sufficient to quote the following passage from her reasons for judgment.

After referring to Mr Milne's evidence that he had not verified the accounts arithmetically and his admission that franchise invoices were incorrect, and other matters which she described as "typical of the shifting sands in which the plaintiff's case was built", she stated:

> "The plaintiffs evidence consisted mainly of assertions that the figures presented were correct. No attempt was made to directly answer the defendant's allegations as to discrepancies in the figures and no real explanation was offered in relation to the acceptance of amounts paid by the defendant to which it had always maintained it had paid and which had not been acknowledged by the plaintiff up to or during the trial. It is clear that only by constantly challenging the figures put on behalf of the plaintiff was the defendant able to reduce the original amount of $17,382.64 to the sum of $6,573.96 which was the eventual figure claimed by the plaintiff'.

It was plainly open for the learned Magistrate to take the view that the conduct of the appellant connected with, leading up to the litigation and in the course of the litigation was a basic cause of the litigation occurring and of the length of the litigation. It was open to her to conclude that the conduct was not justified. Such considerations have been accepted as considerations that warrant a departure from the usual practice in awarding costs. See *Donald Campbell & Co. Ltd v Pollack* (1927) AC 732, 812; [1927] All ER 1; *Tela Pty Ltd v Ampol Ltd* [1986] FCA 392; (1986) ATPR 40-746; *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] VicRp 12; [1991] 1 VR 129; 6 ANZ Insurance Cases 76,243.

Accordingly, I am satisfied that it was reasonably open to the learned Magistrate to depart from the usual practice of costs following the event. For **[5]** similar reasons, I am satisfied that it was open to the learned Magistrate to not award witness expenses in respect of Mr Milne. As to the

award of costs on the scale appropriate to a two-hour arbitration, the respondent was prepared to concede that that was in fact the approach taken by the learned Magistrate. That approach could, I think, only be justified if it was reasonably open to the learned Magistrate to conclude that, but for the conduct of the appellant connected with and leading up to the litigation, the matter would have proceeded as an arbitration under the summary arbitration procedures and was likely to have taken no more than two hours.

A number of arguments can be and have been put as to why that view of the situation was not open to the learned Magistrate. The learned Magistrate however, was plainly in the best position to form a view as to what would have happened if the appellant had acted justifiably in relation to the dispute and litigation. She had observed the parties in their conduct of the litigation and was in a position to form a view about the history of the matter. While views obviously could differ, I am not persuaded the solution the learned Magistrate adopted in the exercise of her costs discretion was not open to her. It reflected a view of the case that was open to her and provided a commonsense way of giving effect to that view.

For the foregoing reasons, I am not persuaded that the exercise of the costs discretion by the learned Magistrate miscarried and, accordingly, the appeal will be dismissed.

APPEARANCES: For the appellant Toycorp Ltd: Ms JE Richards, counsel. Madgwicks, solicitors. For the respondent Silver Grace Pty Ltd: Mr P Booth, counsel. McGrath Colman Stewart, solicitors.
