39/78

SUPREME COURT OF VICTORIA

CULHANE v HAINES

Crockett J

25 October 1976

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – DAMAGE SUSTAINED – CLAIM ISSUED AND SERVED ON DEFENDANT – NO ADMISSION MADE IN RESPECT OF CLAIM – PAYMENT IN MADE THE DAY PRIOR TO HEARING – FINDING BY MAGISTRATE IN FAVOUR OF THE CLAIM PLUS COSTS – WHETHER MAGISTRATE IN ERROR.

At a hearing before a Magistrates' Court, the applicant, who there appeared as the defendant, was ordered to pay the sum of $1,000 together with the sum of $262.80 by way of costs, which the parties agree are, as a matter of calculation, costs properly assessed. Following a collision which occurred on the 24th October 1975, the Respondent caused to be issued a Special Summons claiming $1,000, the excess having been abandoned, the return date of which was the 30th January 1976.

Prior to the issue of that summons, the complainant's solicitor did not make a demand upon the defendant or his insurers whose name was known. Documents allowing proof by affidavit of the cost of the repairs and interrogatories were served with the summons. Notice of payment into Court of the sum of $1,000 together with $48.50 costs was served by posting, the copy notice being received by the complainant's solicitor only three days before the hearing. The money was not in fact paid into Court until the 29th January 1976 (the day prior to the hearing). It was argued for the applicant that costs exceeding $48.50 should not be awarded due to the failure to have written a letter of demand.

HELD: Order nisi discharged.
It is clear that as no action which the complainant might have taken, if taken, would have served to have effected a saving in costs and as, when the defendant had notice of the claims being made and its amount when the summons was served on him, he elected to allow the matter to proceed without an admission of liability at least until three days before the hearing (indeed, on the proper interpretation of the events as they occurred probably until the hearing itself) there was no reason why the ordinary principle should not be applied, namely that costs follow the event. In those circumstances the proper order was that which was pronounced by the Magistrate.

CROCKETT J: ... It is agreed between the parties that the sum of $48.50 covers only the costs of instructions to sue, including the tendering to the complainant by his solicitor of advice on the matter, and, perhaps, also, the cost of the preparation of a summons.

The money was not taken out of court, and on the return date both parties were present in court and were represented by their respective legal advisers. No admission of liability was then made although it appears that the principal issues of negligence and quantum of damage were not contested by the defendant. However, the defendant was concerned that, before an order could be made against him proof should be provided that the complainant owned the car which had suffered the damage in question. In fact, some evidence was given both by the complainant and his wife as to the circumstances of the accident so as to prove beyond question that it occurred because of negligence on the part of the defendant.

At the conclusion of the evidence the defendant submitted that, whilst there was no doubt that an order would have to be made against him in the sum of $1,000, the complainant should not receive by way of costs a sum in excess of $48.50.

Although it is not explicit in the order nisi, the argument has proceeded on the basis that what is contested is the ordering of costs representing the difference between $262.80 and $48.50. The grounds of the order nisi, compendiously stated, amount to a complaint that the Magistrate failed properly to exercise the discretion vested in him; and in particular he failed to take into account, or give due weight to, matters relevant to the discretion he was required to exercise. Before me it was stated those matters to which no weight, or no proper weight, was given are,

firstly, the admitted failure of the complainant's solicitor to write a letter of demand before issue of proceedings, and, secondly, that no quantification of the claim was communicated to the defendant prior to the issue of the proceedings.

The early cases to which my attention has been directed suggest that the general principle is that even if a party takes successful action without a previous demand having been made, then that party remains entitled to receive the costs associated with the institution of such proceedings. However, that general principle has been eroded somewhat by later cases, the effect of which is that a prospective defendant should be given an opportunity by the other party to submit to the claimant's demands. It is said that the justification for this attitude is the court's discouragement of peremptory and unnecessary issue of process. I should add the discretion vested in the Magistrate is to be found in s105 of the *Justices Act* 1958, and is expressed in wide and general terms. It provides that the Magistrate may order such costs as to him shall seem just and reasonable. This statutory power would appear to give the Magistrate an unfettered discretion so far as costs are concerned. However, like all other curial discretions, it must be exercised judicially.

In my view it is relevant to take into account whether any step or steps have been taken with a view to the prevention of unnecessary expenditure or legal costs. If a court concluded that, in the circumstances, reasonable action would have required an opportunity being given to the opposite party to submit to the plaintiff's claim, then failure to provide such an opportunity might very well be an appropriate factor to be taken into account in determining whether the claimant should receive the costs which he has in fact incurred by initiation of proceedings.

In this case, therefore, if, immediately after the nature of the complainant's claim being made known to the defendant the defendant indicated that he was not contesting that claim, the complainant still insisted on proceeding with the action, then it would be open to the Magistrate properly to consider that the costs associated with such insistence should lie at the door of the complainant himself, notwithstanding that the ultimate order was one in his favour.

However, that is not this case. What essentially occurred in the present case is this: The defendant, whilst being informed orally of the intention to institute a claim, did not know of the quantification of that claim until a copy of the summons itself was served on him on the 8th January. If at that stage he or his solicitor had indicated a willingness to submit to that claim, pointing out that any further expenditure of legal costs was unnecessary, then I should have thought that the proper exercise of discretion would have rendered the defendant immune from liability for any costs subsequently incurred and, indeed, perhaps from the costs of the summons itself, because there had been no opportunity given before issue of the summons to avoid the costs of such summons. But the defendant, not only did not give any such indication to the complainant, but allowed the matter to proceed.

It is said on behalf of the defendant that the Notice of payment into Court constituted an indication to the complainant that submission to his demand was being made, and that, accordingly, the communication to him of the contents of the Notice should be sufficient to exculpate the defendant from responsibility for payment of the costs other than the sum of $48.50.

In my view there are two answers to this submission. In the first place, insofar as the notice of Payment-in may have constituted a concession that liability to pay the full amount of the complainant's claim was made, it was a concession made only three days before the hearing. It is not contested that by that time the costs totalling the sum of $262.80 awarded had been incurred. Consequently, in my view the failure to have given or to have written a letter of demand has had no effect upon any possible saving of costs that might have been expected to have flowed from the writing of such a letter.

The other answer is this: The Notice of Payment into Court was made with a denial of liability. That factor would not prevent the Notice from being valid so as to assist the defendant on costs if the matter was contested and a sum less than was paid into court was recovered.

But, for the purpose of the present exercise, the complainant was entitled to read the document as indicating that the defendant would not be consenting to an order being made against him.

Moreover, the fact was that the order was not made by consent. Indeed, as I have indicated, essential elements in the complainant's claim were required to be established by oral evidence before the point was reached whereby the Magistrate was able to make the order the complainant was seeking. For this reason also, the failure to have written a letter of demand has in no way had any effect upon a possible saving of costs.

The reasons expressed by the Magistrate in making the order he did seem to have turned upon the fact that the amount of costs included in the Notice of Payment into Court did not include a sum with respect to stamp duty and service as the Rules require for the Notice of Payment to be deemed an effective Notice. To my mind this is not to the point. The argument of the defendant involved reliance upon the Notice as a document in a way different from any reliance dependent upon the document's legal efficacy in accordance with the Payment-in Rules.

It may, therefore, be that the Magistrate's discretion miscarried because attention was given to an irrelevant consideration. If this is the case, I am free to exercise for myself the discretion required to be exercised. On the other hand, the matter could be referred back to the Magistrate for him to review in the light of this judgment the discretion to be exercised.

However, as it is my opinion that that discretion could be exercised in only one way, I think I should exercise it myself.

It is clear for the reasons I have given that as no action which the complainant might have taken, if taken, would have served to have effected a saving in costs and as, when the defendant had notice of the claims being made and its amount when the summons was served on him, he elected to allow the matter to proceed without an admission of liability at least until three days before the hearing (indeed, on the proper interpretation of the events as they occurred probably until the hearing itself) there is no reason why the ordinary principle should not be applied, namely that costs follow the event. In those circumstances I am of the view that the proper order, for the reasons that I have given, is that which was pronounced by the Magistrate.
