28/97

SUPREME COURT OF VICTORIA

BROTT v ALMATRAH

Batt J

22 April 1997 — [1998] 2 VR 83

PROCEDURE – COSTS – CIVIL PROCEEDINGS – SOLICITOR LITIGANT IN PERSON – SUCCESSFUL ON THE CLAIM – ENTITLED TO PROFESSIONAL COSTS BUT NOT INCLUDING UNNECESSARY COSTS – DISCRETION AS TO QUANTUM OF COSTS – COURT MAY REDUCE AMOUNT HAVING REGARD TO SELF-INSTRUCTION OR SELF-ATTENDANCE: *MAGISTRATES' COURT ACT* 1989, S105; *MAGISTRATES' COURT (ARBITRATION) REGULATIONS* 1990, Sched 2.

1. Where a solicitor litigant appears in person and is successful on the complaint, the solicitor is entitled to professional costs except those costs which are unnecessary.

***Guss v Veenhuizen [No 2]* [1976] HCA 57; (1976) 136 CLR 47; (1976) 12 ALR 271; 51 ALJR 209, followed.**

***Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403; 120 ALR 385; (1994) 68 ALJR 374, considered.**

2. In determining the incidence and quantum of costs, the magistrate, in exercising a discretion, may reduce the amount of costs allowable having regard to the solicitor's self-instruction or self-attendance.

BATT J: [1] This is a very small case but it raises a not unimportant principle concerning costs of solicitor litigants in person, about which I am told that there is either some misunderstanding or variation in practice. In addition, there are consequences of the fact that the complaint below was subject to the arbitration provisions of the *Magistrates' Court Act* 1989 which appear to have been overlooked in this case, as in at least one other case which I have heard. There was no appearance for the respondent (the defendant below). I am satisfied by the affidavit of Loula Mazloungas sworn 13 March that the respondent was duly served personally with a copy of the authenticated order of Master Wheeler made 29 February 1997 and a copy of the affidavit of the appellant sworn that day, together with the two exhibits to that affidavit (besides having those documents posted to him), and that service was effected within the time required by Master Wheeler's order, even if I treat the service on a Sunday as having occurred on the next day. I am satisfied also by the affidavit of Ms Mazloungas, sworn 21 April 1997, that she posted to the respondent a letter informing him that the case was listed for hearing at 10.30am this morning. That was done (I was told by counsel and by the Listing Master) pursuant to an undertaking required by and given to the Listing Master at the callover that the respondent would be notified of the hearing date. I have, further, admitted into evidence a registered receipt in respect of the letter so posted, as I am entitled to do by virtue of rule 40.05(1) and 2(c).

[2] It is true that, although the delivery confirmation option was ticked on the registered post receipt, no material was put before me from Australia Post showing confirmation of delivery. But in all the circumstances I am entitled to apply the presumption of regularity and infer, in the absence of evidence to the contrary, delivery of the letter: I collected the cases relating to the presumption in *Westpac Banking Corporation v Market Services International Pty Ltd* (unreported, 1 October 1996) at p22 of the transcript of reasons. I should add that the Listing Master informed me that her secretary, in accordance with her practice, wrote to the respondent, as being a person who did not attend the callover, informing him of the fixing of the case for hearing today. I therefore proceed in the absence of the respondent. It follows that I have not had the benefit of contradicting argument. The Magistrates' Court of Victoria at Melbourne has also been notified of this proceeding but, not unnaturally, the magistrate has not sought to take any part in it or file any affidavit or report.

This is an appeal on a question of law under s109 of the *Magistrates' Court Act* 1989 from what is described in the extract from the register of the Magistrates' Court of Victoria at Melbourne

as an "order" made by the Magistrate, on 29 January 1997 on the hearing of a complaint by the appellant, a solicitor (to use the convenient word in former legislation), against the defendant for unpaid legal fees, including disbursements, in the total sum of $900. But because of the small size of the claim, it is **[3]** important to note that the complaint in fact proceeded under the arbitration provisions of the Act which are found in Division 2 of Part 5 (sections 102 to 106). That would be the ordinary requirement of s102(1). It is confirmed by the handwritten heading to the appellant's affidavit initiating the appeal sworn 28 February 1997, where s102 is referred to. There was no suggestion before me (and the onus of making and making good any such suggestion would be on the appellant) of an order having been made under s102(3) that the complaint be heard and determined by the Magistrates' Court and not referred to arbitration. Accordingly, the determination of the magistrate was required by s104 to take the form of an award in writing.

The only written version of the award that is before me — namely exhibit "IAB2", the extract from the court register — is, as I have said, expressed as an order. But no doubt the entry can be corrected if necessary. By s104(3) an award of the court in an arbitration under Division 2 has effect as if it were an order made by the court in a proceeding heard and determined by it. Accordingly, s109 relating to appeals to this court on a question of law from a final order of the Magistrates' Court in a civil proceeding is applicable to the magistrate's determination here in question. Although by s103(2) the Magistrates' Court in conducting an arbitration, though bound by the rules of natural justice, is not bound by the rules of evidence and is not required to conduct any proceedings in a **[4]** formal manner, that court is required by s103(4) to determine according to law any question that arises for determination in an arbitration. Accordingly, the question of the costs of the appellant raised in this appeal was required to be determined in accordance with law.

Section 105 deals with costs in an arbitration. It provides:

> "(1) If an arbitration relates to a complaint under which monetary relief is sought and the Court awards a party less than $500, the Court must not award costs unless satisfied that special circumstances make it appropriate to do so.
>
> (2) Subject to sub-section (1), the Court may, in accordance with the regulations or, if there are no relevant regulations, then in accordance with the Rules, award costs to a party in respect of an arbitration under this Division."

As will be seen when I refer to the magistrate's award in detail, sub-s(1) was inapplicable because more than $500 was awarded on the complaint. Sub-section (2) therefore applied. There are regulations, namely, the *Magistrates' Court (Arbitration) Regulations* 1990. Regulation 6 provides that for the purposes of s105(2) the court may award costs to a party in accordance with Schedule 2. That schedule provides in paragraph 1 that for all professional costs, including solicitors' costs and fees to counsel, where the amount awarded is $500 or more but does not exceed $3,000, the amount that may be awarded is "not more than $662 for each 2 hour session". There is provision at the end of the paragraph for further professional costs to be awarded in accordance with appendix A to the *Magistrates' Court* **[5]** *Civil Procedure Rules* if an arbitration hearing requires more than one two-hour session. But there was no suggestion before me that this arbitration required that and, from the nature of the claim, I would, in the absence of any evidence to the contrary, confidently infer that the hearing lasted considerably less than two hours. Paragraph 2 provides for the allowance of disbursements and indeed the magistrate here allowed disbursements.

The appellant was successful below on his complaint. The certified extract from the register shows that the order made was for recovery of $900 plus interest of $380 and costs of $274 and that a stay of 30 days was granted. The $274 is for disbursements or expenses only. (I should say parenthetically that the complaint claimed $280.50 costs but they are only what were thought to be, under appendix A, the costs at that preliminary stage. It is in my view clear that they were not meant to be disbursements most of which were ultimately allowed. In any event, even if they were, so that no professional costs were initially claimed in the complaint, that would not prevent an application for professional costs being made at trial and, if appropriate, granted.) According to the appellant's affidavit, at any rate, the magistrate made no reference whatsoever to s105 or the regulations.

The appellant had also sought an order for overall professional costs and costs of his appearance before the magistrate. He had throughout the proceeding, under his firm name or style, acted for himself and in particular had appeared on the day of hearing in the **[6]** Magistrates' Court, 29 January 1997. The evidence before me shows that the magistrate refused to include in the award for costs the appellant's professional costs of acting on his behalf. In refusing the appellant's application the magistrate said words to the effect that he had a discretion in relation to costs and he would apply a well-known principle, that a solicitor acting for himself is not entitled to costs. (I may say parenthetically that s131(2) makes it clear that in this case s131(1) does not apply for there is express provision otherwise in s105: the costs under s105(2) that "may" be awarded must be awarded "in accordance with the regulations".)

In my view it is clear that the magistrate under s105(2) had, as he would have had in the non-arbitral jurisdiction of the court under s105(2), a discretion as to the incidence and quantum of costs. (I should say that s104(4), enabling written reasons for an award to be obtained on request, was not availed of in this case. There was, not unnaturally, no answering affidavit and I proceed on the footing of the facts stated in the appellant's affidavit which I have summarised so far as material.) However, the question is whether the magistrate's exercise of discretion miscarried by reason of the application of an incorrect principle (*Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627). Such a miscarriage of the exercise of the discretion would, if it occurred, in my view, constitute an erroneous determination of a question of law under s109. Consistently with that analysis, the master's order, made under rule 58.09 **[7]** states as the question of law shown by the appellant to be raised by the appeal "whether the magistrate erred in the exercise of his discretion in refusing the appellant his professional costs for appearing at the trial of the proceedings".

As I have said, the appellant succeeded on the complaint below. There was no reason why professional costs should not have followed the event, as they would have done, but for the fact that the appellant was a solicitor and acted and appeared for himself. That, but for that reason, professional costs would have followed the event is shown by the fact that the magistrate made an order in the appellant's favour for payment of disbursements. So the magistrate exercised the discretion which he had, but only on the basis of an asserted principle, controlling, it would seem, his decision.

The principle to control his decision, subject to any other discretionary factors which might make its application inappropriate in part or in whole, is in fact, in my view, to the contrary of that which the magistrate stated. By a rule of practice a solicitor acting for himself is entitled to professional costs: *Guss v Veenhuizen [No.2]* [1976] HCA 57; (1976) 136 CLR 47 at 51 to 53; (1976) 12 ALR 271; 51 ALJR 209, which was the case on which the appellant relied. The rationale for that exception from the general rule that litigants in person are not entitled to professional costs is stated both by Gibbs ACJ and Jacobs and Aickin JJ at page 51 and by Brett MR in the case cited at pages 51 and 52, *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD **[8]** 872 at 875. The exception applies whether the solicitor initiated the litigation or merely responded to it: for example, *London Scottish Benefit Society* at 876.

The exception in favour of solicitor litigants in person was doubted in obiter statements by a differently constituted majority of the High Court in *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403 at 411 and 412; 120 ALR 385; (1994) 68 ALJR 374, where it was described as somewhat anomalous, dubious and questionable. However, at pages 412-413 the majority said that it was not necessary to go so far as to abandon the exception in favour of the general principle for the purposes of the case before the High Court. In other words, the High Court in *Cachia v Hanes* did not overrule *Guss*. I have looked at all cases I could find that have considered *Cachia*. In the Federal Court in *Cashman & Partners v Secretary, Department of Human Services and Health* [1995] FCA 1730; (1995) 61 FCR 301 at 312 and 313; (1995) 22 AAR 390 Beazley J took the same view as I take, namely, that *Cachia* recognised the entitlement to costs of a solicitor acting for himself or herself, and held that it was contrary to long-established, even if anomalous, principle to limit costs of such a solicitor to out of pocket expenses. Her Honour thus treated *Guss* as not overruled but good law. Likewise, Higgins J in *GBT Corporation Pty Ltd v Scott* (1994) 116 FLR 266 at 268 treated the general rule that a litigant in person is not entitled to other than out of pocket expenses as not applying to a legal practitioner appearing on his or her own behalf in litigation, relying on *Guss*. That case was decided after the High Court's decision in *Cachia* but, so far as I

can see, only the New South Wales Court **[9]** of Appeal's majority decision reported at (1991) 23 NSWLR 304, which was affirmed by the High Court was cited to or by Higgins J. In *Fitzpatrick v Waterstreet* (1995) 18 ACSR 694 Cohen J in listing factors relevant to a discretion referred to the exception as doubtful, but went no further. In *Swanson v Harley* (1996) 185 LSJS 240 Lunn DCJ in the South Australian District Court expressed the view, with which I agree, that there was no definitive statement in *Cachia* and did not seek to resolve the conflict of authority. However, in *Dobree v Hoffman* (1995) 14 WAR 408 at 414 Ipp J concluded that the acceptance by the majority in *Guss* of the exception in favour of solicitor litigants in person did not constitute a precedent binding on him since it was *obiter* and held in effect that there was no exception for solicitors representing themselves. Although it may be that the statements in *Guss* strictly are obiter, they are "judicial dicta" (to use Megarry J's classification) and are strong ("the well-established rule of practice"). Moreover, the remarks of the majority in *Cachia* are themselves obiter, as is pointed out by Paul Lynch, *"Cachia v Hanes: The Resurgence of the Indemnity Principle in Australia"* (1995) 13 Aust Bar Rev 177 at 198, an article in which, I acknowledge, the author expresses his preference for the views in *Cachia* and at 200 and 204 says that the High Court has "signalled its intention" of abandoning the exception and that it "should" no longer be regarded as good law in Australia. To my mind, the significant fact is that the majority in *Cachia* expressly held back from overruling *Guss*. Abandonment by the High Court of the exception is for **[10]** the future, if at all. In view of *Guss* it is that a court should state what the law "should" be on this topic.

Thus, in my view, it is not for me at first instance to choose between the two High Court decisions. I must treat the statement of the law in *Guss* as still left standing, and it is right in point. Therefore in this difficult state of the law I should follow it, even though I recognise that the High Court of Australia, if it has occasion to consider the matter again, may well overrule it. I should not, however, as a judge at first instance seek to anticipate that. I merely note that the composition of the High Court has already changed since *Cachia*. It is to be noted that the exception from the general rule concerning costs of litigants in person does not authorise the awarding to a solicitor of items which are unnecessary because the solicitor is his or her own client, such as obtaining instructions from himself or herself or attendances on himself or herself: *Cachia* at 411 and *Walton v McBride* (1995) 36 NSWLR 440 at 452-453. (Special leave to appeal was refused in that case by the High Court on 25 November 1995: (1995) *Legal Reporter* page SL5.) The reason for the exception's not extending to such item is explained in the case principally relied upon in *Guss*, that is *London Scottish Benefit Society* at 875 to 876, where, with the corrigendum taken in from page xi of the volume, Brett MR said:

> "It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person **[11]** cannot be charged for what does not exist. He cannot be charged for the solicitor consulting himself or instructing himself or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing by a solicitor, subject to this restriction: that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances."

The same view as to the exception and its qualification was stated by Madden CJ in *Wright v Trenchard* (1895) 1 ArgusLR 22 and by the Full Court of this court in *Ogier v Norton* [1904] VicLawRp 72; (1904) 29 VLR 536, where instructions for brief to, it would seem, counsel separate from the barrister who otherwise had been acting for himself were allowed. In *Martin v Armstrong* (1916) 33 WN (NSW) 50, the deputy prothonotary of New South Wales disallowed attendances by the solicitor upon himself and the drawing of his own proof but considered that the solicitor might charge for drawing observations or a case, even though such observations or case contained matters which he himself might be called upon to prove. In *Hopkins v Forster* (1910) 32 ALT (Supplement) 5; 16 Argus LR(CN) 6, a Victorian County Court judge allowed a solicitor litigant the costs of perusing the other party's interrogatories and the costs of attending court under the scale of costs, or his expenses as a witness, whichever allowance was the higher, but not both. In *GBT Corporation* at 270-271 Higgins J said that when instructions for brief are claimed by a solicitor who is self-briefed or briefed by another member of her or his firm, a fee should be allowed for preparing for trial or instructions for brief notes for solicitor. His Honour said that in assessing any such fee savings by virtue of **[12]** self-briefing or by a partner or other firm member briefing the solicitor appearing should be considered.

For the reasons which I have given, I conclude that the question of law should be answered

affirmatively, that is to say, that the magistrate erred in law in the exercise of his discretion by applying a wrong principle. However, I also consider that the quantum of professional costs to be awarded is not that which counsel for the appellant submitted was appropriate and perhaps asked me to award, namely, $933, based on items in the appropriate scale in appendix A to the *Magistrates' Court Civil Procedure Rules*; for, as I have indicated, the quantum is governed by s105(2) and Schedule to the *Magistrates' Court (Arbitration) Regulations*. Having regard to the magistrate's award of disbursements, he should, in my view, have awarded professional costs in accordance with s105 and the regulation and its schedule. Under those provisions the maximum available for award was $662. In my view, it is clear from s105(2) as I have indicated, and also from regulation 6 that the magistrate had a discretion as to the quantum. Whilst the costs permitted under the regulation are not itemised as are those in appendix A, it would, in accordance with the qualification upon the exception in favour of solicitors, have been appropriate for the magistrate to have considered whether to make some reduction on the ground that some of the $662 in the particular case was or was likely to be referable to matters of self-instruction or self-attendance or the like. I have referred to cases which show how those **[13]** factors affect what items are allowable and the extent to which they are allowable.

Counsel for the appellant asked me to remit the case to the Magistrates' Court, rather than trying myself to quantify the costs, and I propose to follow that course. I do that even though I am conscious that that course entails the incurring and claiming of more costs and even though under s109(6) I may make such order as I think appropriate. I do so because, in the absence of agreement or some other compelling factor, I do not consider that I should seek to exercise the magistrate's discretion. I further consider that the case should simply be remitted to the Magistrates' Court of Victoria at Melbourne, without saying anything as to whether the Magistrate, if available, should or should not hear it on the remittal. That is a matter in this case, in my view, for those administering the Magistrates' Court of Victoria at Melbourne to determine.

Finally, I make two comments on the order which I shall shortly pronounce. First, insofar as it might be considered that rule 26.01 is applicable to arbitration under Division 2, which may be doubtful, it is obviously impracticable, indeed impossible, for the costs to be fixed now on the day on which the complaint was heard and determined. Secondly, although the question of law identified by the master is limited to the costs of appearance, the appellant's argument went beyond those costs. It is unnecessary to consider whether the question can and should be amended, for my answer to it necessitates setting aside the award of **[14]** costs, thus leaving other professional costs open to argument on the re-hearing, subject to the effect of Schedule 2 to the regulations.

For the reasons I have given I make orders as follows:

1. The appeal be allowed.

2. The award made on 29 January 1997 by the Magistrates' Court of Victoria at Melbourne, in proceeding J01402934 be set aside so far only as it fixed costs at $274.

3. The case be remitted to the Magistrates' Court of Victoria at Melbourne for re-hearing as to the quantum of costs and disbursements (including those referable to the re-hearing) in accordance with law.

4. The respondent pay the appellant's costs of and incident to this proceeding, including any reserved costs.

In "other matters" it will be recorded:

The court was satisfied that the respondent had been duly served in accordance with paragraph 3 of the order of Master Wheeler made 28 February 1997 and had been duly notified of the fixing of this appeal for hearing this day.

APPEARANCES: For the Appellant: Mr LMF Watts, counsel. Isaac Brott & Co, solicitors. For the Respondent: No appearance.
