

26/12; [2012] VSC 273

SUPREME COURT OF VICTORIA

BROWN v GLEN EIRA CITY COUNCIL (No 2)

Daly AsJ

8, 21 June 2012

COSTS – IN SUMMARY CRIMINAL PROCEEDINGS – POWER OF MAGISTRATES TO REFER QUANTIFICATION OF COSTS TO THE COSTS COURT: *MAGISTRATES’ COURT ACT 1989, S131A; CRIMINAL PROCEDURE ACT 2009, S401.*

In *Brown v Glen Eira City Council* MC18/12; [2012] VSC 198, Daly AsJ made an order on 17 May 2012 deferring the question whether the costs order made by the Magistrate in the original proceedings should be referred to the Costs Court of the Supreme Court. The parties to the case were then given an opportunity to make submissions as to whether the Costs Court would have jurisdiction to determine the question of costs in the proceeding and if so, whether such an order should be made.

HELD: Appeal allowed. The quantification of the professional costs claimed by the Council for the defence of the primary proceeding be referred to the Costs Court for determination in accordance with these reasons.

1. Section 131A of the *Magistrates’ Court Act 1989* ('Act') confers powers upon Magistrates to refer the quantification of costs in a summary criminal proceeding to the Costs Court.

2. The powers conferred by and procedures introduced by the *Criminal Procedure Act* are not of themselves intended to derogate from the powers conferred upon the Magistrates’ Court by the Act. The reference to an “integrated” or “unified” system of criminal procedure in the Second Reading speech was intended to refer to there being greater uniformity and consistency in the procedures utilised by the different courts within the court system rather than confer upon the *Criminal Procedure Act* the status of a complete code governing criminal procedure.

DALY AsJ:

Introduction

1. On 17 May 2012, I delivered reasons for judgment substantially in favour of the appellant, Mr Brown (“VicRoads”), holding that the learned Magistrate, by making an award of \$65,145.32 in respect of the respondent’s (“Council’s”) professional costs, had erred in law, for reasons which need not be restated for current purposes.

2. I then sought 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 s17D(1)(b) of the *Supreme Court Act 1986* by reason of s131A of the *Magistrates’ Court Act 1989* (“Act”), or whether the *Criminal Procedure Act 2009* is an exclusive code governing criminal proceedings in Victoria (such that the absence of a provision equivalent to s131A of the Act in the *Criminal Procedure 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.

3. I also sought submissions with respect to the question of costs, both in respect of the costs hearing before Magistrate Cure on 14 December 2010 (“costs hearing”), and of the appeal itself, and in particular in respect of whether those costs ought to be reserved pending the quantification of the costs of the primary proceeding.

Does section 131A of the Act apply to summary criminal proceedings?

4. In relation to the question of whether the Costs Court has jurisdiction to hear and determine the question of costs in the primary proceeding, counsel on behalf of VicRoads submitted, in summary, that:

(a) the Magistrates' Court is a creature of statute, with the Act being the empowering Act. Nothing in the *Criminal Procedure Act*, including the provisions with respect to the determination of the question of the costs of criminal proceedings, derogates from the general powers conferred upon the Magistrates' Court by the Act;

(b) sections 131 and 131A of the Act do not expressly exclude criminal proceedings from their ambit, and should not, by reason of s401 of the *Criminal Procedure Act*, be read down to exclude criminal proceedings;

(c) other provisions of Part 7 of the Act, of which ss131 and 131A form a part, refer to matters which are of their very nature relevant only to criminal proceedings. For example, s126(1)(d) and (e) empower the Court to close proceedings to the public in proceedings involving charges in relation to a sexual offence, s126A empowers the court to bind over an accused to keep the peace, s127 refers to "informants" and "plaintiffs", and "accuseds" and "defendants", s131(2)(c) and (3) refer expressly to the Court making awards of costs against an informant who is a member of the police force, and the power of the Court to make orders for costs against an accused, ss133 and 134 deal with contempt proceedings, and s140 empowers the Governor-in-Council to make regulations with respect to a wide range of matters, including regulations governing bail justices and fees and charges under the *Infringements Act 2006*; and

(d) further, in any event, s131A of the Act, which empowers the Magistrates' Court to order that the costs of, and incidental to a proceeding be assessed, settled, taxed or reviewed by the Costs Court, ought to be construed expansively.

5. Counsel for the Council conceded that if I were to determine that the learned Magistrate had power to refer the question of costs to the Costs Court, there is no doubt that this Court would have the power to do so following the successful appeal. However, he submitted, in relation to the jurisdiction of the Magistrates' Court to make orders under s131A of the Act in criminal proceedings, that:

(a) section 401 of the *Criminal Procedure Act* expressly provides for and regulates the award of costs in criminal proceedings;

(b) it is clear from the wording of s401(2), which is almost identical to the wording of s131A, that the legislature had in contemplation s131 of the Act, and consciously adopted some relevant aspects of s131 in the *Criminal Procedure Act*, but not others;

(c) the objectives of the Criminal Procedure Act include the provision of "one integrated set of criminal procedure laws" and to "consolidate existing criminal procedure laws";^[1] and

(d) the contention that the legislature intended for s401 of the *Criminal Procedure Act* to be a complete code in relation to the award of costs in summary criminal proceedings is supported by s308(3) of the *Criminal Procedure Act*, which provides for the "settling" of the reasonable legal costs of any acquitted person by the Costs Court in circumstances where the DPP refers a point of law to the Court of Appeal. As such, if the legislature had intended there be a power to refer the quantification of costs in summary criminal proceedings to the Costs Court, it would make express reference to it in s401 of the *Criminal Procedure Act*.

6. Counsel for the Council also submitted that, even though the powers of this Court under s272 of the *Criminal Procedure Act* are wide, they do not extend to a power to make orders that the learned Magistrate herself did not have in the proceeding below. Accordingly, if Magistrate Cure did not have the power to order that the question of costs be referred to the Costs Court, this Court does not either.

7. In my view, s131A of the Act confers powers upon Magistrates to refer the question of costs in any proceeding substantially for the reasons advanced by counsel for VicRoads.

8. In particular, I agree that the powers conferred by and procedures introduced by the *Criminal Procedure Act* are not of themselves intended to derogate from the powers conferred upon the Magistrates' Court by the Act. I read the reference to an "integrated" or "unified" system

of criminal procedure in the Second Reading speech is intended to refer to there being greater uniformity and consistency in the procedures utilised by the different courts within the court system rather than confer upon the Criminal Procedure Act the status of a complete code governing criminal procedure. By way of analogy, it would be considered absurd for the powers conferred upon this Court by the *Supreme Court Act* to be read down by reference to the *Civil Procedure Act* or the *Criminal Procedure Act*.

9. Similarly, the general powers of the Magistrates' Court under the Act should not be taken to be read down by reference to legislation dealing with procedural matters unless a clear intention to do so is apparent.

10. Finally, in my view, the provisions conferring jurisdiction upon the Costs Court ought to be construed expansively. In the Second Reading speech for the legislation which established the Costs Court,^[2] the then Attorney-General stated as follows:

This bill builds on a range of initiatives in the justice system to ensure that our courts and tribunals deliver justice in a fair and efficient manner. It complements the government's jurisdictional and civil procedure reforms in the court system in recent years and the development of case-flow management processes by the courts themselves; and

[a specialist cost office] would facilitate the application of uniform principles of taxation and uniformity of procedure across all jurisdictions, facilitate the appointment of specialist and expert personnel, relieve magistrates of the burden of undertaking taxations and create greater efficiencies within the courts (emphasis added).

11. It is difficult to reconcile the objectives and contemplated benefits of the Cost Court with a construction of s131A which limits the matters to be dealt with by the Costs Court to civil proceedings alone, given the heavy burden of the summary criminal case load in the Magistrates' Court.

12. Accordingly, given that I have found that the Magistrates' Court has powers under s131A of the Act to refer the quantification of costs in a summary criminal proceeding to the Costs Court, I do not need to consider whether by reason of s272(9)(a) of the *Criminal Procedure Act*, combined with s17D(1)(c) of the *Supreme Court Act*, this Court could make an order that the quantification of costs in the primary proceeding be referred to the Costs Court.

13. The question remains, whether I should refer the quantification of the Council's costs to the Costs Court, or remit the matter back to Magistrate Cure or another magistrate for determination according to law? Counsel for VicRoads submitted (as he did in the course of the costs hearing) that the matter ought to be remitted to the Costs Court, on the grounds that the Costs Court has specialist expertise in the quantification of costs, and this expertise is not limited to costs in civil proceedings. Further, if the matter were to be remitted back to Magistrate Cure that there was a strong possibility that VicRoads would immediately make an application for her Honour to withdraw on the grounds of apprehended bias by reason of her decision below. Therefore, it is in the interests of both efficiency and justice that the proceeding be referred to the Costs Court.

14. Counsel for the Council opposed this course, on the basis that Magistrate Cure was in the best position to make an assessment of the costs of the primary proceeding. Further, he noted the comments I made in the reasons for judgment in the appeal itself regarding the different principles and considerations applicable to costs in civil and criminal proceedings and submitted that the Costs Court, which primarily deals with costs issues in civil proceedings, would not necessarily have any particular expertise in dealing with the question of costs in summary criminal proceedings.

15. In response, counsel for VicRoads (who has a substantial "costs" practice) submitted that it was not uncommon for the Costs Court to deal with costs issues in criminal proceedings, particularly in solicitor-own client reviews under the *Legal Profession Act* 2004. There appears to be agreement that remitting the quantification of costs back to a different magistrate is not a particularly helpful remedy.

16. In my view, having regard to the length of time since the matter was before Magistrate Cure, and the potential for further disputation between the parties, the just and efficient course of action is to make an order referring the Council's costs to the Costs Court for assessment in

accordance with the factual findings of the learned Magistrate regarding VicRoads' conduct of the primary proceeding.

17. I do not share the reservations of counsel for the Council regarding the skill and expertise of the Costs Court in dealing with the question of costs in criminal proceedings and, as a specialist tribunal, it is well placed to deal with this matter efficiently and expeditiously.

18. However, it is necessary for me to give some guidance to the Costs Court as to what principles ought to apply to the assessment of costs of a successful defendant in the position of the Council. Generally, in the absence of any special order to a different effect, the approach which ought to be adopted by a magistrate, or the Costs Court, is best summarised by the statement of Mandie J (as he then was) in *R v Sobh*^[3] 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 reasonable to the defence of the proceedings or that the costs or charges were reasonable in amount and not excessive.

19. This formulation puts the onus upon the party claiming costs to show, if challenged, the reasonableness of the costs claimed. It is a more generous test than the default position which applies to the assessment of costs in civil proceedings, that is, party-party costs. However, in the current case, the learned Magistrate made orders that the Council's professional costs be paid by VicRoads on an indemnity basis. As I ultimately found that this order was open to her Honour, having regard to the remarks of the Court of Appeal in *Norton v Morphett*,^[4] the Council ought to be entitled to have its costs on an indemnity basis. Accordingly, the onus of proof will be on VicRoads to demonstrate that the costs claimed by the Council were unreasonable and/or unreasonably incurred. However, an assessment of costs on an indemnity basis does not confer upon Council an automatic right to recover all of the amounts paid by it to its solicitors.

Costs of the Appeal and the Costs Hearing

20. Counsel for VicRoads suggested that I should, contrary to my preliminary indication, order that the Council pay VicRoads' costs of the appeal, on the basis that there is no sound reason why the ordinary rule that costs follow the event should be displaced. I had found that the Magistrate had made an error of law, which ought to be rectified, and there has been no disentitling conduct on the part of VicRoads in the course of this proceeding, being the appeal itself.

21. Counsel for the Council submitted that the question of the costs of the appeal ought to await the outcome of the quantification process, as it might be that the ultimate outcome of the assessment may be an award equal to or higher than the amount awarded by Magistrate Cure. Further, offers and counter-offers may be relevant.

22. In my view, the costs of the appeal and the costs of the costs hearing ought to be treated discretely. The appeal was well founded, and the costs of the appeal should follow the event. However, the costs of the costs hearing ought to await the quantification process.

Orders

23. Accordingly, subject to suggestions and comments from counsel, I propose to make the following orders:

(1) The appeal be allowed

(2) Paragraphs 1, 2 and 4 of the orders made on 14 December 2010 be set aside.

(3) The quantification of the professional costs claimed by the Council for the defence of the primary proceeding be referred to the Costs Court for determination in accordance with these reasons, the factual findings made by Magistrate Cure regarding VicRoads' conduct of the proceeding, the reasons for decision in *Brown v Glen Eira City Council (No. 1)* and according to law.

(4) The Council pay VicRoads' costs of the appeal.

(5) The question of the costs of the costs hearing be reserved.

^[1] Second-Reading speech, 4 December 2008, *Hansard*, Legislative Assembly, p.4982.

^[2] *Courts Legislation Amendment (Costs Court and Other Matters) Bill* 2008.

^[3] [1994] 74 A Crim R 453, at 459.

^[4] [1995] VSCA 211; [1995] VICSC 211; (1995) 83 A Crim R 90; Court of Appeal, 31 October 1995, 9841 of 1993.

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