

48/08; [2008] VSC 440

SUPREME COURT OF VICTORIA

KING v SCALISE

Beach J

16, 17, 24 October 2008

CIVIL PROCEEDINGS – CLAIM FOR DEBT PLUS INTEREST AND COSTS – AGREEMENT MADE FOR A PARTY TO PAY FOR A ONE-THIRD SHARE IN A REAL ESTATE AGENCY – MONEY PAID TO RETIRED SHAREHOLDER – AGREEMENT BY SHAREHOLDER TO PAY THE PARTY FOR THE ONE-THIRD SHARE – AMOUNT NOT PAID – CLAIM AGAINST SHAREHOLDER UPHELD BY MAGISTRATE – ORDER THAT PARTY PAY INDEMNITY COSTS FOR RETIRED PERSON – WHETHER MAGISTRATE IN ERROR – ORDER THAT SHAREHOLDER PAY INTEREST PURSUANT TO S60 OF THE SUPREME COURT ACT 1986 – WHETHER MAGISTRATE IN ERROR: SUPREME COURT ACT 1986, SS58, 60.

1. Where a claim against a party to an agreement was dismissed, and the magistrate concluded that the proceedings should not have been commenced against that party, it was open to the magistrate to make an award of indemnity costs in favour of the successful party.

Colgate Palmolive v Cussons [1993] FCA 536; (1993) 46 FCR 225; (1993) 46 FLR 225; (1993) 118 ALR 248; 28 IPR, referred to.

2. Where a successful party recovered a sum certain and an application for interest was made, the question the magistrate had to decide was whether the sum was payable by virtue of some written instrument and/or whether a demand had been made before the party was joined as a defendant. In failing to determine this issue, the magistrate was in error.

3. Observations as to the effect on the award of interest where there has been delay or undue delay in taking proceedings (para 32).

BEACH J:

Introduction

1. Mr Solomon King was the plaintiff in a proceeding in the Magistrates' Court^[1] in which he sued Mr Joe Scalise and Mr Yuksel Kemal for the sum of \$75,000 plus interest plus costs.^[2]

2. On 13 September 2007, a Magistrate dismissed Mr King's claim against Mr Scalise and gave judgment for Mr King against Mr Kemal for \$75,000. Mr King's claim for interest against Mr Kemal "by way of damages"^[3] was dismissed and the Magistrate determined that "interest in accord with the *Supreme Court Act* only is allowed". The questions of interest and costs were put over for further argument and determination on 6 December 2007. On 6 December 2007, the Magistrate ordered Mr King to pay Mr Scalise's costs "insofar as reasonably incurred" and ordered Mr Kemal to pay Mr King "the scale of costs".^[4] Whilst some of the documents refer to the costs order against Mr King as being a solicitor/client costs order and other documents refer to it as an indemnity costs order, Mr King is correct to regard it as an indemnity costs order having regard to what the Magistrate said at T225.4.^[5] Further, the order Mr King obtained against Mr Kemal is clearly an order for party/party costs. So far as interest was concerned, the Magistrate ordered Mr Kemal to pay interest pursuant to s60 of the *Supreme Court Act* from 19 April 2007.

3. Mr King appeals, pursuant to s109 of the *Magistrates' Court Act* 1989 on a question of law, from the Magistrate's orders made on 6 December concerning interest and costs. Notwithstanding a statement in paragraph 29 of his affidavit sworn 16 January 2008 that he would seek leave to appeal out of time in respect of the Magistrate's orders of 13 September dismissing his claim against Mr Scalise, Mr King did not pursue any such application before me.^[6] In seeking to overturn the Magistrate's orders of 6 December, Mr King has commenced two appeals, matter number 4013 against Mr Scalise ("the Scalise appeal") and matter number 4014 against Mr Kemal ("the Kemal appeal"). At the commencement of the proceeding, the parties agreed that it was convenient for these appeals to be heard together. The current version of the notice of appeal in the Scalise appeal is an amended notice of appeal dated 5 March 2008. The current version of the notice of

appeal in the Kemal appeal is an amended notice of appeal dated 10 April 2008.

4. In the Scalise appeal, Mr King's complaints may be summarised as follows:

- (a) The Magistrate should not have made a costs order against Mr King.
- (b) If a costs order was to be made against Mr King, then:
 - (i) it should not have been made on an indemnity basis; and
 - (ii) Mr Scalise's trial costs should have been limited to four days.^[7]

Whilst the notice of appeal in the Scalise appeal suggests that Mr Kemal should have been ordered to pay Mr Scalise's costs, I take this to be no more than an assertion that there was another party who should properly have been ordered to pay Mr Scalise's costs, thus obviating any need for an order to be made against Mr King – rather than any claim by Mr King that he is entitled to an order being made against Mr Kemal (remembering that Mr Kemal is not a party to the Scalise appeal).

5. In the Kemal appeal, Mr King's complaints may be summarised as follows:

- (a) Interest should have been awarded under s58 of the *Supreme Court Act*, rather than s60.
- (b) There was no basis for depriving Mr King of interest for the period from December 2002 to 18 April 2007.
- (c) The order for costs made against Mr Kemal should have been made on an indemnity basis, rather than a party/party basis.

6. For the reasons given below, I have determined that:

- (a) The Scalise appeal should be dismissed.
- (b) The Kemal appeal should be allowed in part and that the case should be remitted for re-hearing in the Magistrates' Court on the question of interest in accordance with these reasons.

The underlying facts

7. The facts as found by the Magistrate may be summarised as follows:^[8]

(a) DKS Real Estate Pty Ltd ("DKS") carries on business as a real estate agency. At the relevant time in 2001, its directors were Ms Crystal West and Mr Kemal. Mr Scalise was an employee of DKS, but did not hold an estate agent's licence. However, prior to 2001, he had purchased a one third share in DKS for the sum of \$100,000. At the commencement of 2001,^[9] Ms West, Mr Scalise and Mr Kemal each held a one third interest in DKS. Mr Scalise was employed by DKS as a manager and received one third share of the profits. He did not actually own one third of the shares because of difficulties said to be associated with provisions in the *Estate Agents Act* 1980 limiting the ability of a person who was not a licensed real estate agent from holding shares in a company that carries on business as a real estate agent.

(b) In 2001, Mr Scalise suffered a heart attack and decided to retire. He approached Ms West and Mr Kemal seeking to be paid for his interest in DKS. Ultimately, Mr King became involved and he was advised that he could purchase a one third share in DKS for \$75,000. Mr King was not a licensed real estate agent.

(c) On 16 October 2001, a written agreement was signed by Mr King and Mr Scalise headed "In Principal" which recorded what appears to be a transaction involving the transfer of a one third share in DKS from Mr Scalise to Mr King for the sum of \$75,000. On 16 November 2001, a typed agreement signed by Mr Scalise and Mr King was made in the following terms:

"This is to certify that I, Joe Scalise have received \$70,000 (seventy thousand dollars) from Solomon King today and will receive the remaining \$5,000 (five thousand dollars) from Solomon King after six months from today.

I do hereby transfer all my rights and duties in DKS Real Estate Pty Ltd to Solomon King. It is hereby agreed that I will not claim any commissions, holiday pay or make any other claim from DKS Real Estate Pty Ltd or DKS Conveyancing Pty Ltd or from any other person associated with both companies as of today."

(d) On 16 December 2002, Mr King fulfilled the requirements for licensing as a real estate agent and sought to have a share in DKS registered in his name.^[10]

(e) After Mr King qualified for an estate agents licence, Mr Kemal refused to issue a share and Mr King approached Mr Scalise. Mr Scalise then approached Mr Kemal and was told that Mr Kemal would pay Mr King the \$75,000 that had been paid to Mr Scalise. However, Mr Kemal did not pay Mr King the sum of \$75,000 or any part thereof.

The reasons of 13 September 2007

8. The Magistrate held that, pursuant to the agreement between Mr King and Mr Scalise, Mr King “received what he had bargained for”, the evidence having revealed that Mr Scalise transferred to Mr King the interests he held in DKS for \$75,000 in accordance with the written agreement of 16 November 2001. The Magistrate said:^[11]

“Assessing the nature of the agreement between the plaintiff [Mr King] and the first defendant [Mr Scalise], the evidence reveals that the plaintiff was aware that the first defendant did not have a registered share to transfer. There was an inherent risk that the company would not issue a share in his name. ... All the agreement between the plaintiff and the first defendant did was transfer the interest in DKS that the first defendant had to the plaintiff for the sum of \$75,000.”

Mr King having received what he bargained for from Mr Scalise, the claim against Mr Scalise was dismissed. The issue that then fell for determination was whether Mr Kemal owed Mr King \$75,000. That matter was resolved in Mr King’s favour by the Magistrate on the basis that it was the “clear evidence” of Mr Kemal that he was obliged to pay Mr King on behalf of Mr Scalise and on the basis that the Magistrate did not accept Mr Kemal’s case that repayment had occurred.

9. At trial, Mr King claimed interest from Mr Kemal on the basis that he had had to borrow money from the Commonwealth Bank and had incurred interest and borrowing costs thereby to the knowledge of Mr Kemal. This claim was rejected by the Magistrate, who held that interest in accordance with the provisions of the *Supreme Court Act* would be allowed. There is no appeal from this conclusion.

The reasons of 6 December 2007

10. The reasons of 6 December 2007 commence on p224 of the transcript before the Magistrate. They commence after lengthy oral submissions by the parties, during which the Magistrate exposed some tentative views that he had as the argument unfolded. The Magistrate said:^[12]

“I will give very short reasons and if parties (sic) require I will give something in writing in relation to reasons (sic)^[13] I now give. The debate that has occurred during these proceedings application for costs, has to be taken into account. That is, I might refer to matters that have been referred to.”

Two matters require mentioning: first, none of the parties required the Magistrate to give the written reasons he offered to give; and secondly, the reasons that appear in the transcript following this statement may be capable of being augmented (in respect of discrete issues) by what was said by the Magistrate during the course of argument.^[14]

11. Determining precisely what the Magistrate’s reasons for his decision on 6 December is more difficult than is usually the case. This is because the Magistrate was interrupted on a number of occasions by counsel and, understandably, he attempted to respond to the statements made to him. Whilst the reasons commence at T224.5 and there are only three interjections by counsel on that page, on the following page (which also contains the Magistrate’s reasons), there were 17 separate occasions on which counsel spoke.

12. On the question of costs, it appears that the Magistrate ordered indemnity costs against Mr King in favour of Mr Scalise for the following reasons:

“In my view and to the best of my judgment there was no basis for breach of contract action against the first defendant [Mr Scalise] and his defence was successful, be it part of his defence included payment, nonetheless his defence was successful. In my view proceedings should not have been commenced of (sic on) known facts and on the matter of law or (sic and) accordingly the plaintiff is to pay the first defendant’s costs insofar as those costs have been reasonably incurred.”^[15]

13. On the question of the liability of Mr Kemal to Mr King for costs, the Magistrate's reasons were as follows:^[16]

"Secondly the plaintiff [Mr King] has of course been successful against the second defendant [Mr Kemal], second defendant's defence of the matter was obviously unsuccessful. I see no reason why in the circumstances I should depart from the scale in relation to plaintiff's costs in proceedings against the second defendant. In these circumstances second defendant is to pay plaintiff's scale costs."

14. As to Mr King's submission that Mr Scalise should not get all of the costs of the trial because there were days when it was not necessary for him to be present, the Magistrate said:^[17]

"It was only reasonable that the first defendant [Mr Scalise] was represented during the course of trial total number of days."

15. There was a further exchange between counsel for Mr King and the Magistrate concerning the reasons for awarding indemnity costs against Mr King and in favour of Mr Scalise. That exchange was as follows:

Counsel for Mr King: In your judgment Your Honour you didn't give reasons for awarding costs against the plaintiff on an indemnity basis, Your Honour was supposed to give reasons for it?

Magistrate: I thought I had indicated that there was no cause of action or breach of contract.

Counsel for Mr King: That is your grounds?

Magistrate: Yes, anything else that needs to be clarified?"^[18]

It is difficult to know what to make of this exchange. Counsel for Mr King was obviously doing all he possibly could to advance his client's interests and to ensure that no unfavourable orders were made against him. That being said, the statement by him that the Magistrate had not given reasons for awarding costs against his client on an indemnity basis was clearly wrong. The Magistrate had given reasons for ordering indemnity costs on the previous page of the transcript.^[19]

16. The Magistrate did not give any specific reasons for not making a *Bullock* order^[20] or *Sanderson* order.^[21] However, the question of a *Bullock* order had been specifically referred to the Magistrate in argument^[22] and it is likely that the Magistrate did not see the need to make specific reference to this issue in his "short reasons" having regard to the conclusion he reached that Mr King should not have commenced a proceeding against Mr Scalise.

17. On the question of interest, the Magistrate found that there was undue delay in commencing proceedings against Mr Kemal between 16 December 2002^[23] and 19 April 2007.^[24] The Magistrate then proceeded to apply s60 of the *Supreme Court Act*, denying Mr King any possibility of recovering interest during a period prior to 19 April 2007 when Mr Kemal was joined as a second defendant. In taking this step, he was acceding to a submission made by counsel for Mr Kemal.

The Scalise appeal

18. Mr King contends that, notwithstanding he failed in his claim against Mr Scalise, he should not be ordered to pay Mr Scalise's costs. He contends that, in the circumstances of this case, it was reasonable to sue both Mr Scalise and Mr Kemal and that Mr Kemal should pay Mr Scalise's costs, rather than the order that was made by the Magistrate. Put simply, Mr King contends that a *Sanderson* order should have been made, rather than any order for costs being made against him. The conditions for a *Sanderson* order^[25] have recently been re-stated by the Court of Appeal in *State of Victoria v Horvath (No.2)*^[26] and *Berrigan Shire Council v Ballerini (No.2)*.^[27] In short, a *Sanderson* order will not ordinarily be made unless:

(a) The plaintiff's claim against the two defendants are inter-dependent or essentially alternative claims; and

(b) it is reasonable for the plaintiff to have joined the successful defendant and the conduct of the unsuccessful defendant has been such as to make the order just.^[28]

19. The conditions for a *Sanderson* order were not present in this case. Mr King had no claim

against Mr Scalise. So much was demonstrated from the terms of Exhibits P21, P74, P39 and P77. To use the words of the Magistrate,^[29] “pursuant to the agreement the plaintiff [Mr King] received what he had bargained for”. Further, Mr King gave evidence^[30] of the agreement that was subsequently made with Mr Kemal for the repayment of \$75,000, and upon which he obtained judgment. This was not an alternative claim. That is, Mr King had an agreement with Mr Scalise which was fully performed (and thus there was no basis for suing Mr Scalise) and then Mr King had a subsequent agreement with Mr Kemal upon which he recovered judgment. It was well open to the Magistrate to conclude that proceedings should not have been commenced against Mr Scalise. Further, whilst Mr Kemal asserted below that the \$75,000 had been repaid, this was not a reasonable basis for commencing a proceeding against Mr Scalise. It follows that there was no error of law in making a costs order in favour of Mr Scalise against Mr King. Whilst the reasoning of the Magistrate on this issue may not have been explicit, it is to be remembered that his reasons were (to use his words) “very short reasons” and that written reasons were offered, and not taken up by the parties.

20. I turn now to consider the question of whether Mr Scalise should have got his costs of all days of the trial. Mr King’s submission was that there were days when Mr Scalise was not required to be present during which evidence was given concerning matters relevant to Mr Kemal. The Magistrate rejected this submission and did not limit Mr Scalise’s trial costs. I see no reason to disagree with the Magistrate. More specifically, Mr King has not shown that this exercise of discretion by the Magistrate involved any error of law. Mr King chose to sue Mr Scalise. In the context of this case, it would have been unrealistic to suggest that Mr Scalise and/or his legal representatives should absent themselves from particular days of the trial in anticipation of no issue relevant to them being raised. This ground of complaint by Mr King fails.

21. I turn now to the question of indemnity costs. The Magistrate concluded that proceedings should not have been commenced against Mr Scalise in the known facts and law. In so concluding, it is likely that the Magistrate was following what was said by Sheppard J in *Colgate Palmolive v Cussons*^[31] where his Honour referred to some of the circumstances which have been thought to justify an award of indemnity costs, including commencing or continuing proceedings in wilful disregard of known facts or clearly established law.^[32]

22. During the course of his argument, counsel for Mr King summarised the basis upon which indemnity costs had been awarded against his client as “commenc[ing] and persist[ing] with this case knowing that there was nothing to be delivered to him; that he had got what he had wanted under the contract”. Counsel for Mr King then relied upon an exchange with the Magistrate during the course of the trial and prior to the delivery of the 13 September 2007 judgment. The exchange was at T63. He contended that this showed that at one point during the trial, the Magistrate thought that Mr King had not received everything he bargained for from Mr Scalise, and thus there was a proper basis for bringing a claim against Mr Scalise. This exchange does not assist Mr King. The fact that the Magistrate may have aired tentative views before having heard all of the evidence and the submissions of the parties cannot undermine the conclusion that he ultimately reached. The ultimate conclusion was either open, or not open, to him. Having read the transcript of the Magistrates’ Court proceeding and the relevant exhibits,^[33] I am not persuaded that the Magistrate made any error of law in ordering indemnity costs. Ultimately, the matter was one that was within his discretion and whilst different courts may have exercised the discretion differently (ordering only party/party costs), there was no error in the Magistrate’s exercise of his discretion.^[34]

23. I should deal with two further submissions. Counsel for Mr King contended that the Magistrate was wrong to order indemnity costs in favour of Mr Scalise because of what was said to be a “very serious unfounded allegation by Mr Scalise’s counsel that Mr Kemal (sic Mr King)^[35] had forged Mr Scalise’s signature on ... [a] document”.^[36] All that needs be said in respect of this submission is that the fact that this suggestion was made and that the suggestion was not accepted by the Magistrate does not deprive Mr Scalise as a matter of law from an award of indemnity costs. There is nothing to show that the Magistrate’s discretion miscarried in any respect on this issue.

24. The second submission was that of counsel for Mr Scalise. He submitted that the existence of a Calderbank letter was an additional ground upon which indemnity costs could have been ordered. It is not necessary to deal further with this submission other than to say that the

Magistrate stated^[37] that whilst he should have said something about the Calderbank letter, it was not relevant to his decision.

25. It follows that the Scalise appeal must be dismissed.

The Kemal appeal

26. Mr King contends that the Magistrate made an error of law in considering the issue of interest by reference to s60 of the *Supreme Court Act* 1986, rather than s58. Section 58(1) of the *Supreme Court Act* provides:

“If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act* 1983 or, in respect of any bill of exchange or promissory note, at 2% per annum more than that rate from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain) or, if payable otherwise, then from the time when demand of payment was made.”

27. Section 60 of the *Supreme Court Act* relevantly provides:

“(1) The Court, on application in any proceeding for the recovery of debt or damages, must, unless good cause is shown to the contrary, give damages in the nature of interest at such rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act* 1983 as it thinks fit from the commencement of the proceeding to the date of the judgment over and above the debt or damages awarded.

(2) Nothing in this section—(a) ... (b) ... (c) ... (d) ...

(e) applies in relation to any sum on which interest might be awarded by virtue of section 58 or 59; or (f) ... (3) ... (4) ...”

28. It appears that the Magistrate ordered interest under s60 because of a delay by Mr King in commencing proceedings against Mr Kemal. In this regard, the Magistrate acceded to a submission made by counsel for Mr Kemal. However, in determining which of ss58 and 60 apply, the question is not whether there has been delay in commencing a proceeding, but rather the terms of the sections themselves. Mr King sought interest pursuant to s58. The Magistrate was bound to determine whether s58 applied because s60(2)(e) makes s60 inapplicable in relation to any sum on which interest might be awarded by virtue of s58. The question of any delay (undue or otherwise) is not the basis upon which one determines whether to apply s58 on the one hand or s60 on the other hand. In *David Leahey (Australia) Pty Ltd v McPherson’s Limited*,^[38] Tadgell J said:^[39]

“[I]t seems to me that s58 and s60 are not intended to overlap. Perhaps a rationalisation is that a debt recovered upon an oral contract and for which no demand for payment was made before action (which must be rare) is not within s58(1) but then falls within s60. However that is, it is clear that in this case s58(1) does apply and s60(1) does not. I therefore have no discretion in any real sense, in awarding or withholding interest because the plaintiff has a right to it ‘unless good cause is shown to the contrary’”

29. There is no issue in this case that the \$75,000 Mr King recovered from Mr Kemal was a “debt or sum certain”. The question in this case was whether the sum was payable by virtue of some written instrument and/or whether a demand had been made before Mr Kemal was joined as the second defendant. Counsel for Mr King submitted that his client succeeded on both limbs of s58. That is, the amount of \$75,000 was paid by virtue of a written instrument and there was a demand before Mr Kemal was joined. It is, of course, only necessary for Mr King to establish one of the limbs of s58 in order for s58 to apply.

30. In submitting that the \$75,000 was payable by virtue of a written instrument, counsel for Mr King sought to rely upon the written documents to which Mr Scalise was a party and which formed the basis of Mr King’s claim against Mr Scalise. However, it appears to me that the evidence discloses that Mr Kemal became liable to Mr King to pay \$75,000 by virtue of the arrangement that was entered into between the parties in the second half of 2002 and not by virtue of the original written documents to which Mr Scalise was a party. In any event, this is probably a matter that, if it remains in issue, would need to be determined by the Magistrates’ Court. Whilst there is a strong case for saying that the sum of \$75,000 was not payable by virtue of a written instrument as required by s58, on the strict test applicable to an appeal under s109 of the *Magistrates’ Court*

Act 1989, I am not satisfied that it would not have been open to the Magistrate to have found that the amount was payable by virtue of some written instrument.^[40] This matter must be remitted to the Magistrates' Court for that Court to make a finding as to whether the \$75,000 was or was not payable by virtue of a written instrument.^[41]

31. I turn now to consider the question of whether there was a relevant demand made as required by s58. As with the issue of whether there was a written instrument, the Magistrate made no finding concerning the existence of a relevant demand because he started with s60, rather than s58. Whilst it might be thought from something the Magistrate said in argument^[42] that the Magistrate thought that a demand had been made, in the end there was no finding one way or the other. The matter needs to be remitted to the Magistrates' Court to determine the question of whether a demand was made and therefore whether s58 applies. If s58 applies, the Magistrate will then need to determine whether "good cause is shown to the contrary" so as to deprive Mr King of interest in respect of the whole or any part of the period from the date of demand (or if there is a relevant written instrument, from the date when the \$75,000 was payable) to the date when Mr Kemal was joined as a second defendant.

32. The question of whether there was delay or undue delay in taking proceedings against Mr Kemal is one that is heavily dependent upon the facts and circumstances of the case. Underlying any determination that there has been undue delay are factual issues. These are matters for the Magistrates' Court and not a matter for this Court to resolve. This matter must be remitted to the Magistrates' Court to determine whether there is a relevant written instrument or a relevant demand which enlivens s58 of the *Supreme Court Act*. If s58 is enlivened, then it will be necessary for the Magistrate to determine whether there are circumstances justifying (consistently with the terms of s58) denying Mr King interest at a particular rate or interest at all during the period (or any part thereof) between when the \$75,000 became payable and the date upon which Mr Kemal was joined. Without fettering the Magistrates' Court's decision,^[43] the following points may be made:

(a) First, it would be a rare case where no period of time was allowed between the moment when a debt became payable and the issuing of proceedings. That is, even if there has been some undue delay, it is highly unlikely that the period of undue delay would be the whole of the period from the date upon which a debt became payable and the date upon which a proceeding was issued.^[44] It would follow that whatever view the trial court takes about delay, if s58 is engaged, then it would be a rare case where no interest was allowed in respect of the period before issuing proceedings.

(b) Secondly, Mr Kemal has had the use of Mr King's money during the pre-trial period. Whilst delay might disentitle Mr King from receiving interest at penalty interest rates, consideration needs to be given to whether Mr King should receive interest at some compensatory or commercial rate (about which it might be necessary to call evidence).^[45]

33. It follows that the case, insofar as it concerns Mr Kemal (but not Mr Scalise), must be remitted to the Magistrates' Court to be reheard and re-determined on the question of interest.

34. I turn now to consider Mr King's complaint concerning the failure by the Magistrate to award him indemnity costs against Mr Kemal. Mr Kemal's evidence and Mr Kemal's case below were rejected by the Magistrate. The Magistrate did not believe Mr Kemal. Whilst it might have been open to the Magistrate to award indemnity costs against Mr Kemal, he did not do so. This issue was clearly within his discretion. The short answer to Mr King's complaint is that whilst a different court might have exercised the discretion differently, no error of law has been demonstrated.

35. In his written submissions, Mr King claimed that when ordering Mr Kemal to pay his costs on a party/party basis, the Magistrate failed to take into account that Mr Kemal:

(a) "by falsely claiming that he had repaid the \$75,000 to [Mr] King, had made it necessary for [Mr] King to commence proceedings against [Mr] Scalise and then against [Mr] Kemal";

(b) "had prolonged the trial and had made necessary the presentation in evidence of a great deal of documentation by falsely claiming and presenting witnesses to support his false claims."^[46]

The Magistrate was correct to reject the assertion that any false denial by Mr Kemal was a cause of Mr King bringing a proceeding against Mr Scalise which should not have been brought. Further, there is no basis for suggesting that the Magistrate did not take into account in considering the indemnity costs issue the fact that Mr Kemal's evidence and case had been rejected. Mr Kemal

was a party to civil litigation. His evidence was not believed and his case was not accepted. Such circumstances are not unusual. There is nothing in the material that mandated an order for costs against him on other than the usual basis. There is nothing to show that the Magistrate's discretion miscarried. It follows that this aspect of the Kemal appeal fails.

Conclusion

36. For the reasons given above:

(a) The Scalise appeal will be dismissed. I will hear the parties on the question of costs.

(b) The Kemal appeal will be allowed in part and the decision of the Magistrates' Court made on 6 December 2007 on the question of interest will be set aside, with the case being remitted to the Magistrates' Court to be reheard and re-determined on the issue of interest. I will hear the parties on the question of costs.

[1] Case number U00587390.

[2] In fact the prayer for relief against both defendants was wider, damages being sought against Mr Scalise in addition to the payment of \$75,000 and "damages not exceeding \$100,000" being sought from Mr Kemal. However, in substance what was sought by Mr King was \$75,000 plus interest plus costs.

[3] See the Magistrate's judgment at p.21 line 8.

[4] See the Notice of Order Made dated 29 January 2008.

[5] The transcript records the Magistrate ordering Mr King to pay Mr Scalise "costs, so far as those costs are reasonable and is (sic) on an indemnity basis".

[6] Indeed, on the first day of the hearing before me, counsel for Mr King stated that the only complaints his client currently makes are in relation to the judgment of December, not September: see T6.7 – 6.10.

[7] See paragraph 4 of the amended notice of appeal in the Scalise appeal.

[8] Whilst much of Mr King's argument was concerned with disputing the correctness of findings and statements of fact by the Magistrate, it is to be remembered that these appeals are brought pursuant to s109 of the *Magistrates' Court Act* on a question of law only.

[9] And by no later than 9 February 2001.

[10] See judgment p.3.20 - .23, Exhibit P65 and the letter from Mr King to Mr Scalise dated 23 December 2002.

[11] At p.11 of his reasons.

[12] At T224.5.

[13] It may be that some of the language attributed to the Magistrate is not 100% accurate as the transcript has been produced by one of the parties and not a professional transcription service and from time to time words appear to have been omitted. Nevertheless, the transcript is exhibited to an affidavit of Mr King and subject to one matter concerning whether a particular period was 4½ months or 14½ months, has not been the subject of contest by Mr Scalise or Mr Kemal.

[14] But of *SZDCJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1500; (2004) 212 ALR 581; 82 ALD 35 where Jacobson J held that a transcript of a hearing before a Federal Magistrate did not sufficiently constitute reasons for decision in that case.

[15] T224.44 - .49.

[16] T224.51 - .55.

[17] At T225.16.

[18] T225.48.

[19] T224.44 - .49.

[20] Named after *Bullock v London General Omnibus Co* [1907] KB 264 at 272; [1904-7] All ER 44.

[21] Named after *Sanderson v Blyth Theatre Company* [1903] 2 KB 533 at 539.

[22] See for example T213, 215.

[23] The time at which Mr King obtained his real estate agents licence and therefore an ability to receive a transfer of shares commensurate with the interest he had purchased in DKS.

[24] When Mr King joined Mr Kemal (who had been a third party) as a second defendant.

[25] Or *Bullock* order.

[26] [2003] VSCA 24.

[27] [2006] VSCA 65.

[28] See *Berrigan Shire Council supra* at paragraph [41].

[29] On p12 of the 13 September 2007 reasons.

[30] At T13.52 – 14.25.

[31] [1993] FCA 536; (1993) 46 FCR 225 at 233; (1993) 46 FLR 225; (1993) 118 ALR 248; 28 IPR 561.

[32] See more recently *GT Corporation Pty Ltd v Amare Safety Pty Ltd (No.3)* [2008] VSC 296 and *Vink v Tuckwell (No.3)* [2008] VSC 316.

[33] See in particular T13.52 – 14.25 and Exhibit P21, P74, P39 and P77.

[34] No complaint was made about the failure of the Magistrate to use the word "wilful". In this regard, the position taken by Mr King was correct. It is to be remembered that the issue of indemnity costs is capable of arising when a proceeding has been commenced or continued in circumstances where the plaintiff, properly advised, should have known that there was no chance of success and that in those cases, the proceeding

may be presumed to have been commenced or continued because of some wilful disregard of known facts or clearly established law: see *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397.

[35] See the cross-examination of Mr King in the Magistrates' Court at T27.10 – 27.27.

[36] See paragraph 12 of Mr King's outline of argument dated 21 August 2008 herein.

[37] At T226.18.

[38] [1991] VicRp 77; [1991] 2 VR 367.

[39] At p381.

[40] See *State of Victoria v Subramanian* [2008] VSC 9 at paragraph [62]; (2008) 19 VR 335.

[41] It may not be necessary for the Magistrates' Court to determine this matter if it determines that a relevant demand was made, about which I will say more below.

[42] At T222.7.

[43] cf *Lujans v Yarrabee Coal Company Pty Ltd* [2008] HCA 51 at paragraph [4]; (2008) 249 ALR 663; (2008) 83 ALJR 34; (2008) 51 MVR 433; [2008] Aust Torts Reports 81-972.

[44] See generally *David Leahey supra* at VR p382.

[45] See generally *Meerkin & Apel v Rossett Pty Ltd (No.2)* [1999] VSCA 10; [1999] 2 VR 31.

[46] See p9 of Mr King's outline of argument in the Kemal appeal in which the detail of these claims are set out.

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