31/07; [2007] VSC 196

SUPREME COURT OF VICTORIA

NGUYEN v OBEROI HOTELS (AUSTRALIA) PTY LTD

Hansen J

19 April, 15 June 2007

COSTS – UPON DISMISSAL OF CHARGES – DISCRETION TO AWARD COSTS TO BE EXERCISED JUDICIALLY – TEST TO BE APPLIED BY MAGISTRATE – IN DETERMINING QUESTION OF COSTS TWO STEPS INVOLVED – WHETHER TO ORDER COSTS AND FIXING AMOUNT – SENIOR COUNSEL BRIEFED – MAGISTRATE FAILED TO STATE WHY SENIOR COUNSEL'S FEE ALLOWED – MAGISTRATE IN ERROR – MAGISTRATE TO BE SATISFIED THAT THE COSTS CLAIMED WERE REASONABLY INCURRED AND REASONABLE IN AMOUNT – MAGISTRATE TO CONSIDER EACH ITEM OF THE CLAIMED COSTS – A COSTS ORDER DOES NOT MEAN AN INDEMNITY OF 100% OF THE COSTS INCURRED – WHETHER LATE DISCLOSURE OF RELEVANT FACTS SHOULD RESULT IN A GLOBAL REDUCTION OF COSTS – REFERRED TO MAGISTRATE FOR FURTHER CONSIDERATION OF THE QUESTION OF COSTS: *MAGISTRATES' COURT ACT* 1989, S131.

OHP/L were charged under the *Accident Compensation Act* 1985 in relation to the summary dismissal of a worker employed by OHP/L. G. the general manager of the hotel where the worker was employed was the person who carried out the dismissal on the grounds that the employee had been dishonest about her injury. G. was not interviewed by the informant prior to the hearing of the charges. On the hearing, G. gave evidence of the basis for the employee's dismissal which was accepted by the magistrate. The charges were dismissed and OHP/L applied for costs. After hearing argument in the matter the magistrate awarded most of the claimed costs including those of senior counsel. Upon appeal—

HELD: Appeal allowed. Costs orders set aside. Remitted to the magistrate for determination in accordance with law.

1. In determining questions of costs a magistrate performs two distinct functions, namely whether to order costs and fixing the amount of costs payable. It is important to bear in mind that while this process may be conceptualised as a two-stage process, the end result is a single order. The order will represent that which the magistrate considers just as between the parties in light of the relevant circumstances.

***Norton v Morphett* (1995) 83 A Crim R 90, followed.**

2. In determining that OHP/L was justified in retaining senior counsel, the magistrate relied on several irrelevant matters such as hearsay evidence in an email from G. as to the consequences of OHP/L being convicted of the charges and the necessity for counsel to have expertise in employment and criminal law. Experienced and competent junior counsel could have run the case. In those circumstances, it was not open to the magistrate to conclude that the test for allowing the fees to senior counsel was satisfied.

3. In exercising the discretion judicially, the magistrate was required to be satisfied on the evidence that the costs claimed were reasonably incurred and reasonable in amount. That is, whether it was just and reasonable that such costs should be recovered from the informant. The onus was on OHP/L to establish that the costs it sought were reasonably incurred, reasonable in amount and ought to be paid by informant.

***Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381, applied.**

4. At the hearing, the informant challenged many of the items claimed by OHP/L. In those circumstances, the magistrate should have considered each item to determine whether the item was reasonably incurred, reasonable in amount and ought to be paid by the informant. The magistrate was in error by not examining each challenged item.

5. *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287 does not establish that a successful defendant should be fully indemnified by the prosecution. The purpose of an order for costs is to compensate (or indemnify) the party in whose favour the order runs, rather than to punish the party against whom the order is made. Any costs order is an indemnity but that does not mean that the indemnity is 100%. In awarding a full indemnity of counsel's fees and suggesting that a defendant should not ordinarily be out of pocket,

the magistrate acted on a misunderstanding of the concept of "indemnity" in relation to costs and accordingly, was in error.

6. The magistrate did not consider the possibility that OHP/L's failure to disclose evidence of G. might operate not only by way of a global reduction of costs but also in relation to particular items the incurring of which might have been avoided by a timely disclosure. It would have been open to the magistrate to consider whether any items should be disallowed as only arising because of the late disclosure of G.

HANSEN J:

1. This is an appeal on a question of law pursuant to s92 of the *Magistrates' Court Act* 1989 brought by Michael Nguyen ("the appellant") against a costs order made by a Magistrate whereby he ordered that the appellant pay the costs of Oberoi Hotels Pty Ltd ("the respondent") fixed at $63,107.75. The Magistrate made the order on 7 November 2005 following the dismissal on 7 September 2005 of three charges brought by the appellant (in his capacity as a Victorian WorkCover Authority informant[1]) against the respondent under the *Accident Compensation Act* 1985. The appeal is limited to the question of costs.

2. The question of law raised by the appellant's amended notice of appeal is whether in making the costs order the Magistrate erred in the exercise of his discretion under s131 of the *Magistrates' Court Act* 1989. Relevantly s131 provides that:

> (1) The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid. (2) ...
>
> (2A) In exercising its discretion under subsection (1) in a proceeding, the Court may take into account any unreasonable act or omission by, or on behalf of, a party to the proceeding that the Court is satisfied resulted in prolonging the proceeding.
>
> (2B) The Court must not make an order awarding costs against a party in the exercise of its discretion under subsection (1) on account of any unreasonable act or omission by, or on behalf of, that party that the Court is satisfied resulted in prolonging the proceeding without giving that party a reasonable opportunity to be heard.

3. The notice of appeal lists 15 grounds of appeal. It is not necessary to set out the grounds. There is much overlap and repetition between them. Counsel for the appellant took the approach of condensing the grounds into several main complaints. It is convenient for me to approach the matter in the same way. In short, counsel submitted that the Magistrate's costs discretion was vitiated by the following four errors of law.

4. First, when deciding to allow fees of the respondent's senior counsel, the Magistrate took into account several irrelevant matters, in particular hearsay evidence contained in an e-mail which was handed to the Magistrate over an objection which was not ruled upon, and which contained allegations that could not be tested by cross-examination. On the facts before him, it was not open to the Magistrate to conclude that the test established in the authorities for allowing the fees of senior counsel was satisfied. Secondly, the Magistrate erred by not examining each item of the respondent's claim for costs to determine if they were reasonably incurred and reasonable in amount; see *Norton v Morphett*[2]. Thirdly, by awarding a full indemnity of counsel's fees and more than 80% of the solicitor's fees, the Magistrate "breached the principle of keeping down extravagance in litigation" referred to in *Norton*. Also, *Latoudis v Casey*[3] did not require that the respondent receive a full indemnification. Fourthly, the Magistrate erred by not reducing the costs payable by the appellant on account of the respondent's conduct of the case, namely the fact that it waited until the first day of the trial to tell the informant that it was the general manager Gibson who made the decision to dismiss the employee, when the prosecution had prepared its case on the basis that a different person had made the decision to dismiss.

5. The notice of appeal seeks the setting aside of the costs order and in lieu thereof an order fixing the respondent's costs in a lesser amount, or alternatively an order remitting the question of costs to the Magistrates' Court for determination according to law. During argument, counsel for the appellant conceded that the appropriate order was that the matter be remitted to the Magistrates' Court.

Background

6. In order to understand the issues raised on the appeal, it is necessary to describe in some detail the facts and circumstances of the case.

7. In July 2003, the respondent, which operates the Windsor Hotel, summarily dismissed an employee who was a housekeeping supervisor. The employee had previously been absent from work for several weeks, claiming to be suffering from a work related shoulder injury. She received sick pay from the respondent while absent. She subsequently made a WorkCover claim against the respondent in respect of the injury. At the request of the respondent's insurer, a specialist examined the employee and concluded that there was no work related injury. The general manager of the hotel, Gary Gibson, accepted the opinion of the specialist and considered that the employee had been deceiving the respondent as to her injury. As trust was important in the employee's role as a room attendant, he decided to summarily dismiss her. It appears that the employee was informed of her dismissal at a meeting she attended on 22 July 2003, there also being present a union representative, and two of the respondent's employees being the human resources manager, Ms Jutta Sundermann, and the executive housekeeper, Miriam Mallia who was the dismissed employee's supervisor.

8. Subsequently, the appellant conducted an investigation into the dismissal. On 1 June 2004, the informant conducted a recorded interview with Sundermann and Mallia. Sundermann told the informant that she was "in charge of all matters in regard to staff". As to how the decision to dismiss the employee was made, and the discussions leading up to it, Sundermann said that "we" made a decision to dismiss the employee based on the specialist's opinion that there was no recognised injury or incapacity for employment. The informant then asked her who made the decision to terminate, and Sundermann responded "I have consulted a solicitor of ours, so we got legal advice, saying what can we do next time". Sundermann then stated that she organised the meeting on 22 July 2003 "to discuss our decision in regard to future employment [of the employee]", and that she had previously advised the employee of her right to have a witness attend the meeting.

9. On 12 August 2004, the appellant filed three charges against the respondent under s242(3)(b) of the *Accident Compensation Act* 1985, which provides that:

> "An employer must not dismiss a worker from employment because the worker has—
> (i) given the employer notice of an injury; or
>
> (ii) taken steps to pursue a claim for compensation; or
>
> (iii) given or attempted to give a claim for compensation to the employer, self-insurer or the authority."

The penalty for an offence is 25 penalty units for a first offence and 50 penalty units for a second or subsequent offence[4]. The three charges brought by the appellant were alternatives under the three limbs of s242(3)(b), arising from the same factual circumstances. The respondent pleaded not guilty to each charge.

10. After several adjournments, the case came on for hearing on 5 September 2005 and went for three days, concluding on 7 September 2005. The prosecution called evidence from three witnesses, namely the dismissed employee, her treating general practitioner, and the informant. During the evidence of the latter, there was a *voir dire* to determine the admissibility of the record of interview between the informant and Sundermann and Mallia. The Magistrate ruled that the interview was inadmissible as the employees were not authorised to speak on behalf of the respondent. No challenge is made to that finding. Shortly thereafter, the prosecution closed its case. Senior counsel for the respondent then made a no case submission which was rejected by the Magistrate. The respondent then commenced its case. It called one witness, Gibson, who senior counsel for the respondent had described in his brief opening on the first day of the trial as the only person at the hotel with the power to hire and fire employees. Gibson gave evidence that he did not dismiss the employee because of any of the matters set out in s242(3)(b), but rather because he accepted the opinion of the specialist, and considered that the employee had been dishonest about her injury, such that he had lost trust and confidence in her. Following final submissions, at 10.50am on 7 September the hearing adjourned. The Magistrate returned at 2.45pm and gave oral reasons for decision. In short, he accepted Gibson as an honest witness and accepted his evidence as to the reason for the dismissal. The Magistrate concluded that the

employee was not dismissed because of the reasons set out in s242(3)(b) and therefore dismissed the three charges.

11. Following dismissal of the charges, junior counsel for the respondent sought costs and for that purpose provided the Magistrate and counsel for the prosecution with two documents, entitled "Schedule of Costs" and "Solicitor Fees", which contained a summary of the costs sought by the respondent totalling $65,028.35. It is useful to set out the costs claimed in further detail. Senior counsel's fees were $23,430, which sum included three days of trial at $5,500 per day in addition to $6,930 for conferences with witnesses, advice, preparation and reading performed between 12 May and 1 September 2005. Junior counsel's fees were $17,468.75 which included three days of trial at $1,800 per day in addition to $12,068.75 for conferences with witnesses, advice, drafting, research and preparation performed between 24 September 2004 and 1 September 2005. The solicitor's fees were $24,129.60 which included three days of trial at $1,980 per day, fees of $1,155 and $1,540 for "preparation for trial read brief" on 29 August and 2 September 2005 respectively, fees totalling $6105 for conferences with witnesses and potential witnesses, and $330 for attending court seeking an adjournment on 10 May 2005. It appears that the adjournment application was unopposed and was made to enable the respondent's solicitor to travel overseas. There were many other items in the solicitor's fees but this is a sufficient description for present purposes. I note that most items were charged at a rate of $330 per hour, but some items were charged at $385 per hour.

12. Upon receiving the lists of costs, counsel for the informant told the Magistrate that he considered the costs excessive and sought an adjournment to enable him to consider the question of costs more thoroughly, both as to liability and quantum. The Magistrate duly adjourned the case to 17 October 2005.

13. By letter to the respondent's solicitor dated 23 September 2005, the informant's solicitor conceded liability for costs, leaving quantum as the only issue. On 4 October the respondent's solicitor wrote to the informant's solicitor acknowledging the concession and requesting that he advise by 10 October as to which items in "my bill" the informant objected to and the grounds for objection. On 4 October the informant's solicitor replied by letter stating:

> "The Authority objects to the total amount claimed in these proceedings having regard to the jurisdiction, the nature of the charges and the disbursements incurred, in particular the need for two counsel, in particular senior counsel, and an instructing solicitor to attend.
>
> In addition, having regard to the foregoing, and from experience, your professional costs are with respect, grossly excessive."

The letter concluded by inviting the respondent's solicitor to "make a reasonable offer to settle this issue". Then, on 13 October the informant's solicitor sent a further letter to the respondent's solicitor, offering $25,000 to settle the costs issue and requesting that, if the offer was not acceptable, the solicitor "please make available your file for our perusal on the morning of 17 October 2005, subject to any valid claim of privilege, as well as any costs agreements and estimates provided to your client regarding this case". The respondent's solicitor rejected the offer by facsimile sent on the same day.

Costs submissions before the Magistrate

14. On 17 October 2005 the matter returned before the Magistrate, the informant represented by his solicitor while the respondent was represented by its solicitor and junior counsel. The audio equipment in the court room malfunctioned so there is no transcript of the hearing. However it appears that the representatives for both parties spoke to written submissions[5] which they provided to the Magistrate.

15. The informant's solicitor submitted that the respondent's costs should be reduced significantly for two main reasons. First, the costs were excessive and unreasonable in amount having regard to the jurisdiction, the nature of the charges, and the relative simplicity of the case. Secondly, the respondent conducted its case in such a way as to justify a reduction in the amount of costs it should be awarded on the principles in *Latoudis v Casey*[6].

16. The submission on the first point was developed by reference to particular areas of costs

said to be excessive. For example, in the circumstances of the case it was unnecessary for the respondent to have briefed senior counsel. In short, having regard to the decision in *Day v Hunter*[7] the respondent had not demonstrated that silk was reasonably required. Competent junior counsel had been retained by the respondent from the beginning of the proceeding, and it was reasonable to assume that he was capable of running the case. It was therefore unreasonable that the informant should pay the extra cost occasioned by retaining senior counsel. Further, and in these circumstances, the respondent's solicitor's fees of $1,980 per day for three days in court were unreasonably incurred and excessive in amount. The fee was greater than that charged by junior counsel, and a sum of $600 per day was more appropriate. As to the quantum of counsel's fees, a fair allowance was three days for junior counsel at $1800 per day, that is $5400 in total. As to the fees for reading the prosecution brief, it was submitted that none should be allowed, as in the circumstances of this case preparation costs should have been fused in the brief fee; *Magna Alloys & Research Pty Ltd v Coffee (No 2)*[8]. The submission also challenged the allegedly excessive charges for conferences, totalling $8,700 in circumstances where the respondent only called one witness. Further, having three lawyers at conferences was excessive and over-cautious. The court should only allow one hour for a conference with junior counsel, that is $500. Also, the respondent should not have the costs of the adjournment on 10 May 2005 given that it was sought by the respondent's solicitor as a personal indulgence.

17. As to the second point, it was submitted that the respondent effectively brought the prosecution on itself by withholding information with the result that the prosecution was misled into believing it had a good case. The respondent failed to take its chance to explain from the outset its position, namely that Gibson dismissed the employee because of a reason other than those proscribed by s242(3)(b). Instead, the respondent waited until the first day of the trial to tell the informant that it was Gibson (and not Sundermann or Mallia) who made the decision to dismiss the employee. Further, even if no reduction in costs was justified on the principles in *Latoudis*, that case was not authority for the proposition that a costs order should fully indemnify the respondent.

18. Counsel for the respondent's submission on costs began by referring to *Latoudis* including the statement by Toohey J in that case that "ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket"[9]. Counsel submitted that in the circumstances of the case it was reasonable to retain senior counsel. The prosecution brief contained eight witnesses (albeit not all were called) and the respondent anticipated calling up to five witnesses. The case was not a simple one. This was the first case on s242(3), interpretation of the section was required, there was a potential issue as to whether the defence of honest and reasonable mistake applied to the offences, and there was a factual issue as to who had the authority to make the decision to dismiss on behalf of the respondent. Further, the consequences to the respondent of a conviction would have been serious, would have affected financial and contractual relationships and been a public relations disaster. The respondent was entitled to protect its good standing and reputation in the community. As to these matters, counsel tendered a bundle of correspondence, which included letters passing between the informant, the respondent, and the Australian Hotels Association. It appears that the solicitor for the informant objected to the tender of some of this correspondence as being irrelevant and taken out of context. It appears that the Magistrate did not rule on the objections but nothing turns on this matter and I say nothing more about it. More significantly, counsel for the respondent also handed to the Magistrate a copy of an e-mail from the respondent's general manager Gibson to the respondent's solicitor, dated 14 October 2005, and forwarded by the solicitor to junior counsel on 15 October, which stated:

> "Dear Sally
> Please find set out below the reasons why we instructed you to defend the VWA prosecution, you may wish to format it as you see fit.
>
> The reason [sic] why we had to defend the VWA prosecution are as follows:
> 1) If convicted of this offence the possibility of serious negative publicity and reputational damage to the Oberoi Group in Australia and elsewhere.
>
> 2) Conviction of an offence can constitute default under loan agreements and other contracts.
>
> 3) The possibility of negative impact on sale of business, being convicted of the offence, would have

> negatively impacted on Oberoi's contractual obligations relating to the contract of sale, in fact this in its self [sic] could have derailed the sale of the Hotel.
>
> 4) A conviction would have had serious negative implications with regards to the ongoing relationship with the new owners, Oberoi may not have been awarded the ongoing management contract for The Windsor.
>
> Based on the above reasons we were advised to vigorously defend this prosecution.
>
> Regards Garry R Gibson General Manager"

19. The informant's solicitor objected to the tender of the e-mail on the basis that it had never been raised before, contained hearsay evidence, the claims made could not be tested by cross-examination, and the claims regarding the impact of the prosecution on the respondent were unfounded and speculative. The Magistrate did not make any ruling as to the admissibility of the e-mail. It is also convenient to note at this point that the informant's solicitor deposed that he also told the Magistrate that he had requested access to the respondent's solicitor's file in order to satisfy himself that the costs claimed had been incurred and were reasonable in amount, that counsel objected on the basis that the file was privileged, and that the solicitor responded by stating that he did not wish to see the content of any legal advice, but rather only wanted to confirm that certain documents existed, that work claimed for was done and that claimed costs were reasonable. The Magistrate did not make any ruling as to the request to see the file.

Magistrate's decision on costs

20. The Magistrate reserved his decision and on 7 November 2005 gave oral reasons for his costs order. In his reasons, recorded on the transcript, he began by referring to the cases of *Day v Hunter* and *Latoudis v Casey*, including the statement of Toohey J in *Latoudis* that "ordinarily it would be just and reasonable that the defendant against whom a prosecution has failed should not be out of pocket"[10]. He noted that the discretion to award costs under s131 must be exercised judicially, that what costs are reasonable depends upon the circumstances of each case, and that the principles in the cases cited above can and ought to apply to the present case. As to the reasonableness of the respondent retaining senior counsel, he observed that the statement of Starke J in *Day v Hunter* (to the effect that it would be a very rare occasion that the costs of senior counsel would be allowed in the Court of Petty Sessions) was made some forty years ago when it was rare for senior counsel to appear in that jurisdiction, and that it is no longer a rare occurrence to see senior counsel in the Magistrates' Court. The Magistrate then referred to the informant's submission that there was no evidence that a conviction would have affected the respondent's profitability or raised issues of corporate governance. He set out the reasons advanced by the respondent for its decision to brief senior counsel, including setting out in full the matters referred to in the e-mail. The Magistrate said:

> "I accept that those reasons would not necessarily have been known to the informant until after or during the hearing or perhaps on the first day of the hearing but those reasons are in my opinion substantial reasons for a corporation such as the defendant company to employ senior and junior counsel to ensure that the charges were properly defended. The defendant company had a substantial business interest to protect and the fact that experienced and competent junior counsel could probably have run the case was not the only consideration for the defendant company."

The Magistrate went on to accept the respondent's submissions as to the factors affecting the complexity of the case, that there were lengthy negotiations to settle the case, and that the informant had been invited to withdraw the charges. He then said:

> "For these reasons I find it was reasonable and prudent for the defendant company to employ senior counsel to ensure that the defendant company's interests were protected during the hearing. Further I find nothing unreasonable about the fees charged by senior and junior counsel for the hearing."

He accepted the respondent's submission that it was necessary to have conferences with a number of witnesses, as it was reasonable for counsel to expect that more than one witness would be required to defend the charges. That most were not called did not disentitle the respondent to the cost of the conferences. He therefore allowed $23,430 for senior counsel and $17,468.75 for junior counsel. These were the full amount claimed for counsel in the "Schedule of Costs".

21. The Magistrate then dealt with the respondent's solicitor's fees. After referring to relevant authorities, he accepted that it was necessary to examine each item of the solicitor's claim to determine whether the claimed item appeared necessary and was reasonable in amount. After stating that the solicitor had filed a "detailed statement of itemised professional costs indicating the time spent, the nature of the attendance and her charge for each item of attendance", the Magistrate said:

> "There is no evidence before me to suggest that any particular item of those costs is unreasonable in amount or in time spent or that any item was unnecessary in nature."

The Magistrate did, however, disallow some items that he considered "unreasonable or an apparent or an unnecessary duplication". For example, "four hours claimed for forwarding the transcript to the client on 14 February 2005 is apparently unreasonable without explanation and there is no explanation in the bill of costs in relation to that item". Also disallowed were "10 hours claimed for correspondence to the client in relation to advice on 2 June 2005". I interpolate that counsel on the appeal agreed that these items disallowed by the Magistrate were never in fact claimed. Rather, the Solicitor Fees document comprised five separate bills and the hours referred to were simply running sub-totals referable to each of the five bills. So the four hours referred to on 14 February 2005 was not for forwarding the transcript to the client but rather was a total of the time spent on the matter since the previous bill date. It is apparent that the Magistrate simply misread the document.

22. The Magistrate also disallowed the costs of the adjournment on 10 May 2005.

23. As to the solicitor's fees for attending the trial, the Magistrate concluded that it was reasonable for the solicitor to attend each day of the trial, though the fee was greater than that of junior counsel and in that regard "somewhat excessive". On that basis, and noting that on the highest scale of costs in the civil jurisdiction of the Magistrates' Court the daily attendance fee allowed for solicitors is $1492, he allowed $1500 per day for the solicitor over two and a half days (as the case did not run for three full days) giving a total of $3,750. Adding $16,449 for the solicitor's professional fees, a total of $20,999 was allowed for the solicitor's fees.

24. The Magistrate said that he accepted that the costs amounted to a considerable sum "but that situation was envisaged by the High Court in *Latoudis* when Toohey J said and I quote 'If a prosecution has failed it would ordinarily be just and reasonable to award the defendant costs because the defendant has incurred expense, perhaps very considerable expense, in defending the charge'."

25. Finally, the Magistrate rejected the informant's submission that the respondent's conduct of the case was such as to justify a qualified costs order. The respondent did not mislead the informant or induce him to believe that the prosecution would succeed. Rather, the informant made mistakes and did not conduct the investigation with precision. Sundermann had not been pressed as to who made the decision to dismiss the employee, and it was the informant's error to have interviewed persons not duly authorised by the respondent. An interview with Gibson would have revealed further facts, and while the informant only became aware of Gibson at trial, it elected to proceed in any event.

26. The Magistrate thus ordered that the informant pay the respondent's costs in the sum of $61,097.75. Discussion ensued as to the costs of the costs argument, and the Magistrate ordered the informant to pay a further $2,010, bringing the total to $63,107.75. The appellant does not challenge the liability to pay $2,010.

Submissions on appeal

27. Counsel for the appellant condensed the various grounds of appeal and written submissions into several main complaints, which it is convenient to set out in the same order as they were argued by counsel. In short, counsel submitted that the Magistrate's costs discretion was vitiated by his acting on several wrong principles particularised in the grounds set out below.

28. First, the Magistrate did not follow the correct test to determine whether to allow the respondent senior counsel's fees, namely whether the retention of senior counsel was reasonably necessary for the attainment of justice or the enforcement of the litigant's rights; see *Beasley*

v Marshall (No 3)[11], *Oldaker v Currington*[12] and *Commissioner for Corporate Affairs v Green*[13]. Rather, the Magistrate relied on the following irrelevant matters as justifying the respondent's retaining of senior counsel…

> (a) He acted on the e-mail tendered by the respondent's counsel when the tender was objected to as containing hearsay evidence that could not be tested by cross-examination. In short, there was no evidence that the respondent would be affected in the way alleged in the e-mail;
>
> (b) The Magistrate accepted that the respondent's case "required the procurement of evidence from a number of members of staff of the Windsor Hotel and that there was a necessity for counsel to have expertise in employment law and criminal law", whereas these were not matters going to the question whether senior counsel was reasonably required or whether his fees should be paid for by the appellant;
>
> (c) The Magistrate relied on the fact that there were pre-trial negotiations to settle the case as a reason for allowing senior counsel;
>
> (d) The Magistrate stated that "experienced and competent junior counsel could probably have run the case", which should have led him to the conclusion that silk was not required, as the presentation of the case by the junior would have been entirely sufficient as understood in the authorities;
>
> (e) The Magistrate's decision to allow the costs of senior counsel was vitiated by *Wednesbury* unreasonableness in the sense that, on the facts of the case, it was not open to him to conclude that the test in the authorities was satisfied. Counsel referred to *Day v Hunter* where Starke J held that the fees for senior counsel should not be allowed, notwithstanding that that case raised a constitutional matter which ultimately went to the High Court;
>
> (f) the Magistrate failed to address the informant's submission that the case did not require two counsel; and
>
> (g) the Magistrate erred in allowing counsel's preparation fees without considering whether those items should properly have been fused in the brief fee, as to which see *Magna Alloys*[14].

29. Secondly, the Magistrate erred by not examining each item of the respondent's claim for costs to determine if they were reasonably incurred and reasonable in amount; see *Norton v Morphett*[15]. There was no explanation as to each item. As to counsel's fees, the Magistrate simply accepted the respondent's submission that it was necessary for counsel to have conferences with a number of witnesses, and ultimately concluded that there was nothing unreasonable about the fees charged by junior and senior counsel overall. As to the solicitor's fees, the Magistrate allowed those costs in circumstances where, by claiming legal professional privilege over the whole file, the solicitor produced no evidence upon which the Magistrate could determine that the claimed fees were reasonably incurred and reasonable in amount. In effect, the appellant was denied natural justice by not being able to inspect the file. To the extent that there was evidence of cost items before the Magistrate (in the form of the schedule of costs) counsel submitted that several items, particularly the solicitor's conferences with potential witnesses, invited scrutiny as to their nature and whether they were necessary for the case. Without scrutinising the items, the Magistrate could not determine that the appellant should bear those costs. The Magistrate also effectively reversed the onus of proof by saying that there was no evidence before him to suggest that any particular item of the solicitor's costs was unreasonable in amount. The onus should have been on the respondent to justify the reasonableness of the costs claimed. Further, the fact that the Magistrate disallowed certain items which were not even claimed evidenced a failure to understand the document.

30. Thirdly, by awarding a full indemnity of counsel's fees and more than 80% of the solicitor's fees, the Magistrate "breached the principle of keeping down extravagance in litigation" referred to in *Norton*. Also, *Latoudis* did not require that the respondent receive a full indemnification.

31. Fourthly, the Magistrate erred by not reducing the costs payable by the appellant given the respondent's failure to reveal earlier that Gibson made the decision to dismiss the employee.

32. Counsel for the respondent submitted the following. First, there was no disentitling behaviour by the respondent in the conduct of its defence such as would justify a qualified costs order under the principles in *Latoudis*. While the interview may have led to some confusion as to

who made the decision to dismiss the employee, the identity of the decision maker was essentially irrelevant, as the real issue was the reason for the dismissal. The employees in the interview said the same thing as Gibson said in evidence, namely that the employee was dismissed because of a breakdown in trust following receipt of the specialist's opinion that she had no work related injury. Secondly, it was open to the Magistrate to conclude that two counsel were required by the respondent, as the case was not as simple as the appellant contended. There were potentially multiple witnesses, and issues of statutory interpretation and other legal issues. Thirdly, while the appellant now criticised the Magistrate for not reviewing each item of costs, there was no evidence that the informant pressed the Magistrate to review each item in the way now contended. The informant had the opportunity to raise objections to specific items of costs before the Magistrate but chose not to do so. The informant relied on broad concepts such as whether senior counsel (or two counsel) should have been retained, and that the costs were excessive. And although there was a request to inspect the respondent's solicitor's file, the request was denied and the matter was not pursued further. Further, to require a Magistrate to scrutinise individual items in the way suggested by the appellant would be impractical in the sense that it would take up too much of a Magistrate's time; in short the system could not bear it. Fourthly, counsel emphasised the discretionary nature of the Magistrate's decision and that while there may have been some looseness in his language – for example as to his stating that there was no evidence that fees were unreasonable – there was no error of principle to vitiate the discretion. The Magistrate had full awareness of the issues in the case, the complexities of the evidence and the legislation, and the benefit of detailed written submissions. While the amount of costs he awarded may have been generous, it was within the proper bounds of his discretion.

Decision

33. In *Norton*[16], Phillips JA observed that in determining questions of costs a Magistrate performs two distinct functions, namely whether to order costs and fixing the amount of the costs payable. His Honour further noted that because there is no separate taxing officer in the Magistrates' Court, the two functions are often performed at the one time but that cannot conceal the fact that two steps are involved. His Honour observed that[17]:

> "Under s131(1) the magistrate plainly has an unfettered discretion – both in relation to the awarding of costs and in relation to the fixing of their amount. In relation to the first, *Latoudis* must be taken into account when the magistrate is deciding whether to order costs or not; but when such an order is resolved upon, the question of fixing the amount of those costs is one on which he is altogether at large. Of course the discretion conferred in this regard is a judicial discretion and must be exercised accordingly; it cannot be exercised capriciously, by reference to mistaken facts or irrelevant considerations or for some purpose altogether foreign to that for which the discretion is conferred in the first place: see for example, *House* [1936] HCA 40; (1936) 55 CLR 499 at 504-505; 9 ABC 117; (1936) 10 ALJR 202, *Australian Coal & Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627 and *Magna Alloys & Research Pty Ltd v Coffey* [1981] VicRp 3; [1981] VR 23 at 26. But subject to such considerations which go to ensure that discretions which are conferred in general terms are nevertheless exercised judicially, the discretion is at large and the magistrate must exercise it as he sees fit in light of all the particular circumstances of the case before him."

It is important to bear in mind that while this process may be conceptualised as a two stage process, the end result is a single order. The order will represent that which the Magistrate considers just as between the parties in light of the relevant circumstances. The possibilities are as different and variable as the circumstances themselves. One or more items of costs claimed may be allowed in part or in a reduced amount, the amount depending on the basis (party/party or otherwise) considered appropriate. Further, the disallowance or reduction of an item, or items, may be by reason of a factor in the conduct of the successful party, or the facts and circumstances overall, including the conduct of the unsuccessful party. It may also, for instance, be considered appropriate that of the costs otherwise fixed in an item by item sense, the order should only require the unsuccessful party to pay a stated portion or percentage thereof.

34. Turning then to the appellant's four complaints, I conclude as follows.

35. On the first complaint, the Magistrate's discretion was clearly vitiated by several errors. In determining that the respondent was justified in retaining senior counsel, the Magistrate relied on several irrelevant matters. First, he relied on the e-mail from Gibson to the respondent's solicitor as though it were evidence of matters asserted therein. In fact, the e-mail was hearsay and being objected to, could not have been received as evidence of the matters asserted. Yet, without ruling

on the objection, the Magistrate acted upon it. This was clear error. Secondly, the Magistrate relied on the fact that the respondent's case "required the procurement of evidence from a number of members of staff of the Windsor Hotel and that there was a necessity for counsel to have expertise in employment law and criminal law" and that there were pre-trial negotiations to settle the case, as reasons for allowing senior counsel. Even if the above facts be assumed correct, they merely went to the respondent's need for counsel who had expertise in employment and criminal law, and was competent to procure evidence from staff and conduct pre-trial negotiations. They did not establish the reasonableness of the involvement of senior counsel. Indeed, the Magistrate did not state why senior counsel was required to perform these tasks. Furthermore, he specifically stated that "experienced and competent junior counsel could probably have run the case". With respect, I agree with that observation and would do so even if the matters in the e-mail had been established by admissible evidence. The first complaint is made out.

36. As to the second complaint, although the Magistrate clearly had a wide discretion in fixing the amount of costs, the discretion was to be exercised judicially. The Magistrate was required to be satisfied on evidence that the costs claimed by the respondent were reasonably incurred and reasonable in amount. And, as McInerney J observed in *Commissioner for Corporate Affairs v Green*[18], the question was not merely whether the respondent's costs were reasonably incurred but whether it was just and reasonable that such costs should be recovered from the appellant. The onus was on the respondent to establish that the costs it sought were reasonably incurred, reasonable in amount and ought be paid by the respondent. To the extent that the Magistrate suggested otherwise, he erred. In this regard, I reject the respondent's submission that the informant did not challenge specific items of costs. On the contrary, the informant's solicitor's written submission raised specific objections to specific fee items including, to name just a few, conferences with witnesses, the fees of senior counsel (given the submission that silk was not required and that two counsel were not required), the solicitor's court attendance fees, whether it was reasonable for more than one lawyer to confer with the same witnesses, and preparation fees. The written submission made specific suggestions as to what amounts should be allowed (and disallowed) for specific items. As to preparation fees, there was a specific submission that the preparation fees should not be allowed as the preparation time was less than the ten hours which was held to be properly fused in the brief fee in *Magna Alloys*. And although the Magistrate stated that there was nothing unreasonable about counsel's fees (which might be seen as an implicit rejection of the *Magna Alloys* argument), he did not explain why separate preparation fees were reasonable and should not be fused in the brief fee as contended for by the informant.

37. In the circumstances of the case, that is where the informant challenged many items of the respondent's claimed costs, the Magistrate should have considered each item of the respondent's claimed costs in order to determine whether the item was reasonably incurred, reasonable in amount, and in all the circumstances ought be paid by the appellant. I do not overlook that the respondent claimed legal professional privilege over the file, and certainly the Magistrate could not compel the respondent to waive its privilege, but that could not alter the fact that the respondent had to establish the reasonableness of its claimed costs by evidence. In my view, the second complaint is made out.

38. As to the third complaint, I need say only this. *Latoudis* does not establish that a successful defendant should be fully indemnified by the prosecution. As Phillips JA pointed out in *Norton*, the reference to indemnification in *Latoudis* has been taken out of context. Their Honours in *Latoudis* were referring to the fact that the purpose of an order for costs is to compensate (or indemnify) the party in whose favour the order runs, rather than to punish the party against whom the order is made. It is a fundamental but often overlooked principle that any costs order, whether it be made on a party/party or some higher or other basis, is an indemnity. But that does not mean that the indemnity is 100% of the costs incurred. In the present case, in my view the Magistrate's reference to passages in *Latoudis* suggesting that a defendant should not ordinarily be out of pocket led him to award costs on a complete indemnity basis with the exception of the items mentioned earlier. In so ordering the Magistrate acted on a misapprehension of *Latoudis* and a misunderstanding of the concept of "indemnity" in relation to costs[19]. The third complaint is made out.

39. As to the fourth complaint, namely whether the Magistrate erred in refusing to reduce the costs payable by the appellant on account of the respondent's failure to reveal Gibson's role,

I say only this. The three errors identified above in the Magistrate's exercise of discretion are such that it is difficult to say whether, and if so to what extent, they affected his decision not to reduce the costs payable to the respondent by reason of the failure to reveal Gibson's role. In saying this, I note that it is clear enough from his reasons that the Magistrate rejected the informant's submission as to the appropriateness of a qualified costs order – having concluded that the respondent had not relevantly misled the informant nor induced the informant to think that charges could be successfully brought against the respondent – but it is apparent that the Magistrate did not turn his mind to the possibility that the respondent's failure to disclose might operate not only by way of a global reduction of costs but also in relation to particular items the incurring of which might have been avoided by a timely disclosure. That is to say, as the Magistrate did not consider the reasonableness of individual cost items claimed by the respondent, he did not consider whether any items should be disallowed as only arising because of the late disclosure of Gibson. Ultimately, the question of what costs should be allowed is a matter for the Magistrate to determine in all the circumstances of the case, including the fact of the late disclosure of Gibson's evidence. The respondent might well have taken the course of telling the informant well before the trial that it was relying on Gibson's evidence, and it might be supposed that the trial would have been shortened by timely advice of that matter. However it would not have followed that the prosecution would have been abandoned had the informant been aware in advance of the substance of Gibson's evidence. Thus, while I cannot conclude that the fourth complaint is made out, since the discretion must be exercised afresh this fourth aspect also must be considered along with all relevant circumstances.

40. For the above reasons the appeal will be allowed, the order of the Magistrates' Court at Melbourne made on 7 November 2005 will be set aside, save to the extent of $2010 conceded as correctly ordered, and the matter will be remitted to the Magistrates' Court for determination in accordance with law. I will hear the parties on the matter of costs.

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[1] I refer to Mr Nguyen as both "the appellant" and "the informant" depending on the context.
[2] (1995) 83 A Crim R 90.
[3] [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[4] As counsel told me, the maximum penalty in this case was $2,612.50.
[5] Exhibits DPC17 and DPC18 to the appellant's solicitor's affidavit. The informant's solicitor's written submissions run to 21 pages while the respondent's counsel's written submissions are 4 pages in addition to an attachment containing 6 pages extracted from *Williams' Civil Procedure*.
[6] [1990] HCA 59; (1990) 170 CLR 534; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[7] Unreported, 31 May 1966, Supreme Court of Victoria, Starke J.
[8] [1982] VR 97.
[9] [1990] HCA 59; (1990) 170 CLR 534 at 565; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[10] [1990] HCA 59; (1990) 170 CLR 534 at 565; (1990) 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287.
[11] (1986) 41 SASR 321; [1986] Aust Torts Reports 80-005.
[12] [1987] VicRp 61; [1987] VR 712.
[13] [1978] VicRp 48; [1978] VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381.
[14] [1982] VicRp 10; [1982] VR 97.
[15] (1995) 83 A Crim R 90.
[16] (1995) 83 A Crim R 90 at 95.
[17] At 95-96.
[18] [1978] VicRp 48; [1978] VR 505 at 517; (1978) 3 ACLR 289; [1978] ACLC 40-381.
[19] See *Norton* per Hayne JA at 101.

APPEARANCES: For the appellant Nguyen: Mr OP Holdenson QC and Mr AW Sandbach, counsel. Victorian WorkCover Authority. For the respondent Oberoi Hotels (Australia) Pty Ltd: Mr TP Tobin SC and Mr GA Pauline, counsel. Stonier & Associates, solicitors.
