

*Van Binh v Van Pham* [2002] NTSC 52

PARTIES: MAI VAN BINH  
v  
THANK VAN PHAM

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN  
TERRITORY EXERCISING TERRITORY  
JURISDICTION

FILE NO: 234 of 1996 (9625927)

DELIVERED: 30 August 2002

HEARING DATES: 13 February 2002

JUDGMENT OF: MARTIN CJ

**REPRESENTATION:**

*Solicitors:*

Plaintiff: David Francis and Associates  
Defendant: Withnall Maley

Judgment category classification: B  
Judgment ID Number: mar0223  
Number of pages: 13

Mar0223

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Van Binh v Van Pham* [2002] NTSC 52  
No. 234 of 1996 (9625927)

BETWEEN:

**MAI VAN BINH**  
Plaintiff

AND:

**THANK VAN PHAM**  
Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 August 2002)

- [1] This is an application to review orders of the Taxing Master allowing items in a bill. The application is by Notice to Review (Supreme Court Rules 63(11) and (12)).
- [2] It arises in the context of an order made by Justice Riley on 12 April 2001 that Mr David Francis, the plaintiff's solicitor, personally pay the costs thrown away on that day. An order for costs thrown away may arise where an application or a proceeding or part of it has been ineffective (r 63.02(2)).
- [3] His Honour had convened a directions hearing to be held at 9am on 12 April 2001. By his admission, contained in a lengthy affidavit filed in Court in support of this application, Mr Francis failed to make a note of the order and

failed to attend at the time appointed. Ms Farmer, acting for the defendant, did attend at the time appointed and his Honour adjourned the proceedings until 10am. Ms Farmer telephoned Mr Francis and informed him of that and he attended before the Court at the later time fixed. The directions hearing proceeded, at the conclusion of which his Honour made orders regarding the conduct of the proceedings and the order for costs.

- [4] On 23 April Ms Farmer prepared a memorandum of costs addressed to Mr Francis, as if he were a client, detailing two attendances before the court, one in relation to the attendance at 9am, for which a charge of \$115.20 plus GST was made, and the other for the attendance at 10am for which a charge of \$153.60 plus GST was made. The total account showed the balance owing as \$295.68. The costs were stated to include “20% care and conduct”. (Although it has not become an issue in the subsequent proceedings, I have some difficulty in understanding how Ms Farmer’s attendance at court at 10am can be regarded as being subject to his Honour’s order. I can see nothing about Mr Francis’ conduct which rendered that attendance ineffective).
- [5] Mr Francis says he was extremely busy when he received the letter accompanying the memorandum of costs and the memorandum, having been involved in several complex litigation before the Supreme Court and the Local Court. However, he concluded that the amount claimed was excessive, but took no action in relation to it. The basis of his then view of excess claim is not explained by him. He adds, that at that time he had not

been served with an authenticated copy of the order, nor had the matter been completed as between the parties to the action and no order for early taxation of the costs had been made by his Honour. As later proceedings show, it appears that those matters were not realised by Mr Francis until some time after he received the account. Ms Farmer pressed for payment, as if Mr Francis was a client, by letters dated 18 May and 15 June 2001 and Mr Francis failed to respond. Mr Francis concedes that the payment of costs ordered by this Court was overlooked by him.

- [6] The order for payment of costs was authenticated on 7 August 2001.
- [7] On 3 December 2001 the proceedings between the parties were completed when Mr Francis filed a notice of discontinuance.
- [8] On 18 December 2001 Mr Francis received a summons for taxation accompanied by a bill of costs prepared in accordance with the Rules (r 63.36 and r 63.37). Mr Francis says that at that time he was extremely busy attempting to finish work prior to departure on leave and that he did not have the opportunity to peruse the bill of costs until about 28 December, at which stage he prepared a notice of objection (r 63.45). That was filed and served and at Mr Francis' request the date fixed for taxation, 22 January 2002, was adjourned. Mr Francis says that at the time he prepared the notice of objection his records did not disclose that he had received an authenticated copy of the order of 12 April 2001, although he noted that a

claim had been made for the costs of preparation of the order and the subsequent filing and service of it.

[9] Mr Francis returned to work on 29 January 2002, but did not go to his office until about 9.45am as a result of difficulties encountered through a flat battery on his wife's motor car. At approximately 10am on that day he received a telephone call from the taxing officer informing him that the taxation of the bill had been appointed to take place at 10am. He attended. He protested that he did not have sufficient time to adequately prepare for that taxation, but assumed that there would be a significant amount taxed off because the costs were only payable in respect of the appearance on 12 April. The taxation proceeded and it was allowed at \$1,300.42, including GST plus a seven and a half percent taxing fee of \$97.53, a total of \$1,397.95.

[10] As mentioned, Mr Francis had filed a notice of objection to the bill of costs for consideration by the Taxing Master. The grounds of objection, twelve in all, went to the quantum of time for which charges had been raised, whether care and conduct was claimable in respect of particular items, whether an amount had been correctly charged and alleged duplication of charges. It appears that Mr Francis was successful in respect of some of those objections. In addition to the items particularised in the bill of costs and the objections thereto, there are other matters raised upon the taxation relating to "short charges" which led to an increase over and above the amounts originally claimed.

- [11] The provisions of r 63.55 are now required to be considered. Where a Taxing Master decides to allow or disallow an item in a bill, a party to the taxation who objects to the decision may apply to have the Taxing Master reconsider the decision. That is to be done in writing and Mr Francis did so. A copy is to be served on the other party to the taxation and that party may deliver answers to the objections. That was done by Ms Farmer.
- [12] The Taxing Master is to reconsider the decision to which the objection is made and to give the parties written reasons for the decision made on reconsideration. Upon the reconsideration a party shall not, unless the Taxing Master otherwise directs, raise a ground of objection not stated in a statement of objections. The reference to the “statement of objections” in r 63.55(9) is to the “statement of objections” in r 63.55(5), being the objections to the decisions made by the Taxing Master to allow or disallow an item in the bill.
- [13] The Rules do not require the attendance of parties upon a taxation of a bill. The Taxing Master may give directions in that regard, but none was given in this case. The Taxing Master may disallow the costs of attendance on a taxation of a party whose attendance is unnecessary. Notwithstanding those Rules, a party interested may attend a taxation before the Taxing Master (r 63.48).
- [14] It seems to me that the taxation of a bill of costs and consideration of any objections under r 63.45 thereto, may be dealt with summarily by the Taxing

Master in the absence of all or any of the parties. However, when a decision is made to allow or disallow an item, a party who objects may proceed under r 63.55.

[15] The grounds of objection to an item in the bill under r 63.45 are to be stated specifically and concisely (63.45(2)(c)). On the other hand, a statement of objection under r 63.55 is to specify the items as to which the applicant objects and state “briefly but specifically the nature and grounds of each objection”. Opportunity is given for answers, and after reconsideration the Taxing Master is to give written reasons for the decision on reconsideration. A formal process is followed of objection, answer, reconsideration and reasons. It is when that latter step has been concluded that issues may be brought to this Court for review. Upon such a review this Court may exercise all the powers and discretions of a Taxing Master, set aside or vary the orders of the Taxing Master, remit an item in the bill to the Taxing Master or make such other order as it thinks fit (r 63.55(17)).

[16] I have already referred to the objections made by Mr Francis to the bill of costs. They had nothing to do with the right of Ms Farmer to proceed with the taxation at the time that she did, nor with the power of the Taxing Master to embark upon the process. The request to the Taxing Master to reconsider the decision went to the whole of the bill of costs and not to any individual item. The grounds upon which the reconsideration was sought related to the date upon which the orders made by his Honour on 12 April 2001 were authenticated and there being no order then made that the

taxation take place prior to conclusion of the proceedings. In the request for the consideration it was put that save for the items relating to Ms Farmer's personal appearance before his Honour on the two occasions on 12 April, and her telephone call to Mr Francis to advise of the adjournment from 9am to 10am, all of the steps taken in pursuance of the order prior to the conclusion of the proceedings were premature and should not have been allowed as they unnecessarily inflated the amount of potential costs recoverable from Mr Francis. Accordingly, those costs were unreasonably incurred and were not recoverable from him. It was further put that no allowance should have been made in respect of the attendance on the taxation, nor in respect of negotiations for settlement of the bill of costs and that Mr Francis should not have been ordered to pay the costs of the taxation. That request was dated 6 February 2002. Apparently Mr Francis had further thoughts about the matter, and on 11 February filed what was called a "supplementary request to Taxing Master to reconsider decision" which with greater particularity relied upon the fact that the order of his Honour was not authenticated until 7 August 2001, was never served and reasserted that the costs were not recoverable in any event until the proceedings concluded on 3 December 2001.

[17] Ms Farmer responded by objecting to the Taxing Master reconsidering the matters raised in Mr Francis' grounds for reconsideration upon the basis that the items had not been objected to in the original objection to the bill of



costs. She relied on r 63.55(9). I have already referred to that Rule. It reads:

“On a reconsideration under subrule (8) a party shall not, unless the Taxing Master otherwise directs, raise a ground of objection not stated in a statement of objections.”

It was further put by Ms Farmer that her client was entitled to the costs of and incidental to being required to proceed to taxation, because the order made by his Honour had not been complied with by the defendant by way of agreement as at the date of taxation, 29 January 2002.

[18] The Taxing Master delivered reasons on 18 February 2002. With reference to the objection based upon the date of authentication of the costs order it was ruled:

“This objection was not contained in the original statement and as I have not been asked to so direct and have not directed that new grounds may be raised, Mr Francis’ request is not allowed”.

[19] As to the charges allowed at taxation concerning the preparation of the bill of costs, attendances at taxation and the extraction, filing and service of the costs order, the Taxing Master noted that those items were argued upon the taxation of the bill of costs and upon reconsideration those costs were recoverable and the objection was disallowed.

[20] I now turn to the grounds stated in the “Notice to Review”. They are as follows:

- “1. That there was no basis for the Learned Taxing Officer to find that the Applicant meant its supplementary request dated 11 February 2002 to the Learned Taxing Officer to reconsider her said decision of 29 January 2002 to be considered as an amended version of the initial request dated 6 February 2002 of the Applicant made to the Learned Taxing Officer to reconsider her said decision of 29 January 2002 and that in such circumstances, the grounds specified in the initial request dated 6 February 2002 should be disregarded;
2. That there was no basis for the Learned Taxing Officer to conclude that the said initial request to her to reconsider her said decision of 29 January 2002 and the supplementary request to her to reconsider such decision did not constitute a request for a direction by the Learned Taxing Officer that matters raised in such request and supplementary request should be considered by the Learned Taxing Officer notwithstanding such matters were not raised as grounds of objection in the original statement of objections to the Defendant’s bill of costs dated 11 December 2001 and filed in the proceeding;
3. That the Learned Taxing officer did not consider, or alternatively did not properly consider, all or any of the matters raised in the said request and supplementary request respectively made to the Learned Taxing Officer to reconsider her said decision of 29 January 2002, which matters should have been considered by the learned Taxing Officer on their merits.
4. That by her reference to “short charges allowed at taxation” the learned Taxing Officer has clearly misconstrued the nature of the objection of the Applicant in paragraph 1 of the Applicant’s said Supplementary Request, which objection was based upon the failure of the Respondent to authenticate the order of Riley J made 12 April 2001 or to serve such order on the Applicant.

[21] I doubt that the matters raised by Mr Francis in his application for reconsideration fell within the purpose of that procedure and likewise doubt that the issues sought to be raised on the Notice to Review fell within the

purpose of that procedure. The Rules relating to each are directed to the allowance or disallowance of items in a bill, not conditions precedent to the Taxing Master's power to tax a bill. It seems to me that Mr Francis raised the question of the date of authentication of his Honour's order as to costs as an afterthought consequent upon the taxation of the bill. The argument which was sought to be raised was that till such time as the order had been authenticated and served costs associated with the preparation and taxation of the bill of costs should not have been allowed. Presumably if that procedure had been followed, then Mr Francis would have come to terms and paid the costs properly due pursuant to the order.

[22] It seems to me that the following Rules of Court have application in the circumstances as I understand them:

1. A Taxing Master has all of the powers of the Master under the Supreme Court Act and Rules upon the hearing of an application in a proceeding (r 63.33 and see r 77.01(a)).
2. A failure to comply with the Rules in Ch 1 of the Rules is an irregularity and does not render a proceeding or step taken, or a document, judgment or order, in the proceedings a nullity (r 2.01).
3. Where there has been a failure to comply, the Master may, inter alia, set aside a step taken in the proceedings (r 2.02).

4. The Master shall not set aside a step taken in proceedings, or a document, judgment or order on the ground of failure to comply with a Rule, on the application of a party, unless the application is made within reasonable time, and before the applicant has taken a fresh step, after becoming aware of the irregularity (r 2.03).
5. An order of the Court takes effect on and from the day it is made, unless otherwise ordered (r 59.02(1)).
6. Unless the Court otherwise orders, an order shall not be enforced until the order has been authenticated and filed (r 60.01)). Service is not required except in some circumstances, for example, under r 66.10.
7. The Taxing Master's order on taxation is to be authenticated and filed in accordance with r 60.01 (r 63.54) and it is that which is enforced if need be. As to the order on reconsideration, see r 63.55(10).
8. An order for costs includes the cost of taxation (r 63.34).
9. Subject to the following, the costs a party is required to pay shall be paid immediately, but where the Court makes an interlocutory order for costs, they shall not be taxed until conclusion of the proceedings to which they relate ( 63.04(2) and (3)).

[23] Applying those Rules to the situation as it appears to me:

1. The order for costs was authenticated before the bill of costs was taxed. It did not need to be served. If there was any irregularity it did not render the steps taken by Ms Farmer a nullity.
2. No application was made by Mr Francis to set aside any step in the proceedings at any stage.
3. The costs were taxed on 29 January 2002 after the conclusion of the proceedings on 3 December 2001.
4. No objection to the allowance of the proper cost of items in the bill relating to the taxation of the costs should be allowed. Nor should there be allowed any objection to the proper cost of items in the bill relating to the authentication of his Honour's order.
5. The Taxing Master erred in upholding Ms Farmer's contention that Mr Francis was debarred from raising the grounds put forward in the application for reconsideration.
6. There was no merit in the grounds put forward by Mr Francis in the application for reconsideration even if they were properly raised within that which the Rules permit.

[24] Mr Francis' complaints about the way in which Ms Farmer went about the taxation of costs which he had been ordered to pay are without merit. For reasons which he has explained he did nothing when Ms Farmer

endeavoured, in her own way, to resolve the matter without the need for taxation.

[25] It is ordered that:

1. The order of the Taxing Master upon reconsideration is set aside.
2. The application for review is dismissed.
3. The Taxing Master's order upon completion of the taxation of the bill is confirmed.

-----