

Chatley v Northern Territory of Australia & Jones [2002] NTSC 20

PARTIES: CHATLEY, Stephen
v
NORTHERN TERRITORY OF
AUSTRALIA
AND
JONES, Alan
TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY
JURISDICTION: INTERLOCUTORY APPLICATION
FILE NO: 22/00 (9920598)
DELIVERED: 2 April 2002
HEARING DATES: 26 March 2002
REASONS OF: MASTER COULEHAN

CATCHWORDS:

PRACTICE – Northern Territory – costs - counsels fees - cancellation fees
PRACTICE – Northern Territory – costs - reconsideration - O.63.55
Supreme Court Rules - evidence on reconsideration - powers of Taxing
Master - O.63.33 Supreme Court Rules

Commissioner, Australian Federal Police v Razzi (No. 2) 30 FCR 64,
followed

REPRESENTATION:

Solicitors:

Plaintiff: Caroline Sciculuna
Defendant: Povey Stirk

Judgment category classification: B
Judgment ID Number: mas05
Number of pages: 5

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS
No. 22/00 (9920598)

Between:

STEPHEN CHATLEY

Plaintiff

and

**NORTHERN TERRITORY OF
AUSTRALIA**

First Defendant

and

ALAN JONES

Second Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 2 April 2002)

1. In this proceeding the plaintiff claimed damages for negligence arising out of the treatment of an injury to his left ring finger. The proceeding was listed for hearing for 5 days. It settled late on the day before trial and judgement was entered by consent the following day in the sum of \$33,500 plus costs to be taxed.
2. On 26 February 2002, in the course of taxing the plaintiff's bill of costs, a claim for fees paid to senior counsel for the plaintiff was disallowed. The plaintiff had claimed senior counsel fees in the sum of \$3,170.00 per day for the first three and a half day set aside for the trial. Of this time, 8 hours was

said to have been spent on written submissions as to costs, but no costs were allowed in respect of the application for costs because there was no specific order for costs in that application. The plaintiff was allowed \$3,170.00 senior counsels fee for the first day only, in addition to preparation fees, travelling time and conferences.

3. The plaintiff has requested a reconsideration of the decision to disallow cancellation fees, pursuant to O.63.55. The grounds of objection read as follows:

“The Plaintiff requests a review on the basis that he has incurred counsel’s fees in the total amount that was claimed and the disbursements were reasonably incurred in the prosecution of the Plaintiff’s claim. The Plaintiff accepts his counsel’s advice as stated in Mr. Water’ covering letter and on his account of 17 July 2001 that given the late settlement, counsel was not able to absorb all of the time that had been thrown away.”

4. In the letter referred to senior counsel stated that he had been able to obtain one and a half days work during the period set aside for the trial and that it was not possible to arrange more because of the late settlement.
5. The plaintiff also sought to rely on an affidavit sworn by senior counsel filed with the request for a reconsideration. This was objected to on the ground that the evidence was available at the taxation and cannot now be introduced. There is no guidance as to the introduction of evidence in a reconsideration under O.63.55, however, O.63.33 gives a Taxing Master power wide powers, and would appear to permit the introduction of this evidence. It is desirable that parties rely on all available evidence at the taxation rather than attempting to introduce it on a reconsideration, but, the plaintiff should be given a reasonable opportunity to present his best case and it would be fair to

admit this evidence. The defendant did not seek to introduce evidence in rebuttal.

6. In his affidavit senior counsel affirms the truth of the letter and adds that he was only able to take up one and a half days with advice work and made efforts to re-schedule conferences without success, the problem being the late settlement and the limited number of briefs available to senior counsel, especially at short notice. He does not say that he had been offered work that and had to decline by reason of this proceeding or that he had no work to do in preparation for future trials or hearings.

7. O.63.72(2) provides that counsels fees are in the discretion of the Taxing Master, and there is no reference to cancellation fees. The guidelines published in the Law Almanac provide:

“Where the counsel has been engaged to appear in a matter which is expected to last longer than two days and the matter is settled before trial or before the completion of the hearing, the Taxing Master may, in an appropriate case and where it is considered reasonable to do so, allow a fee to counsel for having kept time set aside for the trial of the matter. As a general guide, if the matter is settled a month or more before trial, no allowance will be made.”

8. This may be contrasted with the opinion of Wilcox J. in *Commr. Aust. Federal Police v Razzi* (no.2) 30 FCR 64 at page 67 where his Honour said:

“I do not think that a solicitor-client order would in fact enable recovery of “cancellation fees”. A solicitor-client costs order enables the recipient to the order to recover the actual costs, reasonably incurred, of all work reasonably required and actually performed in connection with a matter. But it does not extend to fees for work not done.

However, even if there was a basis for recovery of “cancellation fees”, I would require a deal of persuasion ever to make an order which would have the effect of permitting a party to recover such payments from someone else. The charging of “cancellation fees” by some barristers seems to be a practice of very recent origin. In 21 years at the Bar, from 1963 to 1984, I never heard of such fees being asked. There were, of course, occasions when cases were suddenly adjourned, or when they took less time than had been estimated, so that the barristers briefed in the matter found themselves unexpectedly out of court. Very often they would have refused other work because of the case and its estimated duration. But, as I understood the situation, barristers generally accepted that any financial loss caused by such circumstances was to be borne by them. Any disadvantage had to be balanced against the advantage conferred by the rule which permits barristers to charge a full fee on a matter settled after delivery of the brief but before any hearing. This approach was fair. The unexpected time out of court was rarely the personal fault of the barrister’s client, or even the opposing party. Moreover, it was right in principle. The practice of demanding “cancellation fees” can rest only on the premises that, if a case does not proceed or finishes early, the barrister will be left without remunerative work. But, except perhaps for beginners at the bar who are unlikely in any even to be able to command a “cancellation fee”, the premise is rarely well-founded in point of fact. Most established barristers find that their problem is over-employment, not under-employment. For most, some unexpected time out of court is a welcome opportunity to catch up with chamber work.

At a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and the legally-aided, any new practice which further increases costs requires meticulous justification. I am not aware of any attempted justification of “cancellation fees”. It seems to me that it would be desirable for Bar Councils and Law Societies to examine such fees,

and perhaps issue a ruling or some guidelines, before the practice becomes firmly entrenched”.

9. With respect, I agree generally with the views expressed by His Honour. It is difficult to envisage circumstances in which a cancellation fee, other than that usually payable for the first day, would be appropriate and reasonable in a case set down for only a week, although the wording of the guideline does suggest that there may be such a case. A cancellation fee is more likely to be appropriate and reasonable in a proceeding set down for several weeks. There appears to be nothing in the circumstances of this proceeding that would justify the cancellation fees sought.
10. I re-affirm my decision that the cancellation fees claimed for the second, third and fourth days should not be allowed.

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Master Coulehan
