

Bell v McConnel & Anor (No 2) [2012] NTSC 87

PARTIES: BELL, Kevin, Brian
v
McCONNEL, Duncan
and:
DEFLAW PTY LTD
(ACN 054 442 447)
t/as David Francis & Associates

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 143 of 2011 (21139320)

DELIVERED: 7 November 2012

HEARING DATE: 19 October 2012

JUDGMENT OF: BARR J

CATCHWORDS:

COSTS – Legal Profession Act (NT) – unsuccessful application for extension of time for review of legal costs assessment – whether Supreme Court as “reviewer” has a discretion to award costs – whether a ‘civil proceeding’ – Supreme Court Rules (NT) not applicable to review provisions – no costs discretion – no order as to parties’ costs

Supreme Court Rules (NT) r 1.02(1), r 63.03(1)
Legal Profession Act (NT) s 346, s 351, s 352, s 358, s 362

REPRESENTATION:

Counsel:

Applicant: A Woodcock
Second Respondent: D Francis

Solicitors:

Applicant: NT Law
Second Respondent: David Francis & Associates

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

Bell v McConnel & Anor (No 2) [2012] NTSC 87
No. 143 of 2011 (21139320)

IN THE MATTER of the *Legal Profession Act* and in the matter of an application by Kevin Brian Bell for a review of a determination of costs by Duncan McConnel

BETWEEN:

KEVIN BRIAN BELL
Applicant

AND:

DUNCAN McCONNEL
First Respondent

AND:

DEFLAW PTY LTD
(ACN 054 442 447)
T/as David Francis & Associates
Second Respondent

CORAM: BARR J

REASONS FOR DECISION ON COSTS

(Delivered 7 November 2012)

- [1] At par [54] of my reasons for decision in *Bell v McConnel & Anor* [2012] NTSC 66, delivered 13 September 2012, I determined that there was no merit in the application for review of the first respondent's costs assessment.

- [2] I went on at par [55] to refuse to allow further time for the application for review. I indicated that I would hear the parties' submissions on the issue of costs.
- [3] Mr Francis, counsel for the second respondent, seeks an order that the unsuccessful applicant pay the second respondent's costs. He argues that costs should follow the event. The second respondent was vexed with an application made out of time which was found to be without merit. Mr Francis argues that there are no matters which would operate in favour of the applicant to suggest that I should exercise my discretion other than by applying the general principle which favours a successful litigant, in this case, the successful respondent.
- [4] The submission on behalf of the second respondent assumes that the Supreme Court as a "reviewer" under s 351(a) *Legal Profession Act* has jurisdiction to order costs where it refuses further time for the making of an application for review under s 352(2)(a)(ii) *Legal Profession Act*.
- [5] The application to a reviewer for a review of a determination of a costs assessor is not commenced by writ or by originating motion,¹ but Mr Francis argues that it is still a civil proceeding, and hence that Chapter 1 of the Supreme Court Rules applies, since under Rule 1.02(1), Chapter 1 applies to

¹ Regulation 80L Legal Profession Regulations provides that an application under s 352(2) *Legal Profession Act* for the review of a determination of a cost assessor must be "in the approved form", but it appears that no form has yet been approved.

every civil proceeding commenced in the Court. Within Chapter 1 is Rule 63.03(1), which provides as follows:

“Subject to these Rules and any other law in force in the Territory, the costs of a proceeding are in the discretion of the Court.”

- [6] Mr Francis contends that the Supreme Court thus has jurisdiction to make the costs order he seeks, and that such costs jurisdiction is not excluded by any provision of the *Legal Profession Act*.
- [7] Mr Woodcock of counsel for the applicant opposes the making of a costs order on the ground that the Supreme Court does not have jurisdiction. He points to the fact that the *Legal Profession Act* is a comprehensive code to regulate the legal profession for the purposes of, inter alia, protecting consumers of legal services and the public generally. Relevantly, s 358(1) provides that the reviewer who conducts a review of a costs assessor’s determination must determine the costs of the review. However, Mr Woodcock points out that the costs referred to are “the costs incurred by the reviewer in the course of the review” – see s 358(9) of the Act. Thus, Mr Woodcock contends, even if the Supreme Court as reviewer had allowed further time and then undertaken a review of the first respondent’s costs determination, it would not have had power to make any order in respect of the parties’ costs, as distinct from the costs incurred by the reviewer.² Mr Woodcock argues that this is not a chance outcome; rather it is an intended aspect of the costs-free regime established under the *Legal*

² which I understand in the case of the Supreme Court as reviewer would be ‘nil’.

Profession Act for dealing with solicitor/own client costs disputes. He contends that the position on review is consistent with the fact that the costs assessor does not determine the parties' costs under s 346(2) of the Act, but rather the "costs of the costs assessment" defined by s 346(8) to mean "the costs incurred by the costs assessor (including the costs related to the assessor's remuneration) in the course of a costs assessment."

- [8] Mr Woodcock emphasises his submission by reference to s 362(1) *Legal Profession Act* which allows dissatisfied parties to a costs assessment to appeal to the Supreme Court on any matter of law:

"A party to an application for a costs assessment who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the Supreme Court, appeal to the Court against the decision."

- [9] Mr Woodcock argues that the provisions for appeals in relation to matters of law may be usefully contrasted with applications for review, in that the appeal provisions specifically incorporate the Supreme Court Rules, whereas the review provisions do not.

- [10] Mr Francis of counsel for the second respondent argues in response that the provisions of Subdivision 5 of the *Legal Profession Act* (in which s 358(9) is contained) in relation to the determination of the costs of the review are irrelevant where there has been no review. He contends that the Act is silent in relation to the costs of a failed application for an extension of time in which to apply for the review of a cost determination, and thus there is

nothing in the Act which limits or restricts the Supreme Court from ordering such costs; further, that the Supreme Court should exercise its discretion in relation to costs in the same way in which it deals with the costs of any application to the Supreme Court.

[11] I accept the submissions of Mr Woodcock. I have determined that I do not have a discretion in relation to the parties' costs of the unsuccessful application for review.

[12] In my opinion, the Supreme Court as reviewer is exercising a statutory administrative review function, and not a judicial function. Given that there is no express statutory power to award costs, it may not do so. Chapter 1 of the Supreme Court Rules does not apply. If I am wrong in this conclusion, and the application to the Supreme Court (as a reviewer) for a review of a determination of a costs assessor is a "civil proceeding", I consider that the costs jurisdiction under Rule 63.03(1) is excluded by implication, by Division 5 of the *Legal Profession Act*.

[13] If I had a costs discretion, I would have exercised it in favour of the second respondent. I agree that it was vexed with an application made out of time which was without merit. I would have applied the general principle which favours a successful litigant, in this case, the successful respondent, and made an order that the applicant pay the second respondent's costs to be taxed in default of agreement.

[14] However, in the absence of jurisdiction, I make no costs orders.

[15] In the circumstances I note that the application for review of the costs assessment filed 31 October 2011 cannot proceed because (by my earlier decision) I refused to allow further time for the application to be made. Although I probably do not have the power to make an order that the application for review be dismissed, my refusal has the same effect.
