PARTIES:	**AHERNE, Barry Leslie**
	v
	WORMALD AUSTRALIA PTY LTD
TITLE OF COURT:	COURT OF APPEAL (NT)
JURISDICTION:	APPEAL FROM SUPREME COURT (NT)
FILE NOS:	No. AP 14 of 1995
DELIVERED:	Darwin 21 July 1995
HEARING DATES:	13 July 1995
JUDGMENT OF:	Kearney, Angel JJ and Gray AJ

CATCHWORDS:

COSTS - general principles - Court's discretion should not be exercised against a successful party except for some reason connected with the case.

Donald Campbell & Co. Ltd v Pollak (1927) AC 732, applied

REPRESENTATION:

Counsel:

Appellant: J Tippett

Respondent: S Gearin

Solicitors:

Appellant: Ward Keller

Respondent: De Silva Hebron

Judgment category classification: C

Judgment ID Number: gra95009

Number of pages: 10

gra95009

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP14 of 1995

ON APPEAL from the Judgment of His Honour Chief Justice Martin in proceeding No 154 of 1994

BETWEEN:

BARRY LESLIE AHERNE
Appellant

AND:

WORMALD AUSTRALIA PTY LTD
Respondent

CORAM: KEARNEY, ANGEL JJ and GRAY AJ

REASONS FOR JUDGMENT

(Delivered 21 July 1995)

KEARNEY J: I have had the benefit of reading the opinion of Gray J. I respectfully concur in his Honour's reasons and conclusions, and in the orders he proposes.

ANGEL J: I concur in the orders proposed by Gray AJ and with his reasons therefor.

GRAY AJ: This is an appeal from a refusal by Martin CJ to award costs to a party who successfully appealed from an order of the Work Health Court.

The present appeal is brought by Barry Leslie Aherne, who was previously an employee of Wormald International (Aust) Pty Ltd the present respondent. Hereafter, it will be convenient to refer to the appellant and respondent as "the worker" and "the employer" respectively.

On 17 October 1990, the worker ceased his employment with the employer. The worker alleged that he suffered "stress-depression" arising out of his employment which resulted in total incapacity for work.

On 7 December 1990, the worker submitted a claim for compensation under the Work Health Act ("the Act"). Liability was accepted by the employer on 1 March 1991. Thereafter weekly payments, backdated to 17 October 1990, were paid by the employer. On 28 June 1993, without notice to the worker, the employer ceased making payments. Upon application by the worker, The Work Health Court ordered that the payments be reinstated and arrears paid. This order was complied with. On 22 September 1993, the employer gave notice to the worker that the weekly payments would cease. The notice was given pursuant to s69 of the Act. It alleged:

> "That being under an obligation pursuant to Section 75 B of the Work Health Act to undertake reasonable medical treatment you are failing to undertake such reasonable medical treatment and in particular failing to take anti depressant medication which has been prescribed for you thus prolonging your illness and any alleged incapacity for work arising from it.
>
> Enclosed with this notice is a copy of a report from Doctor Brian R Meldrum dated the 9th September 1993."

The weekly payments finally ceased on 7 October 1993. The worker appealed from the cessation of payments by a notice

under s104 dated 27 October 1993. At the same time the worker gave notice of a claim for compensation under the Act with an accompanying Statement of Claim. The particulars of injury given were "Major depressive illness with anxiety, tension, depression, irritability, poor memory and concentration."

These matters came on for hearing before the Work Health Court on 17 January 1994. The court was constituted by Mr Hannan SM. Mr Tippett, of counsel, appeared for the worker and Mr Downs, of counsel, appeared for the employer.

The question of the validity of the cessation of weekly payments was dealt with first. It became the subject of much debate which extended over several days and necessitated one substantial adjournment. It was not until 29 June 1994 that the learned Magistrate gave his ruling.

In the meantime, various things had happened. On 18 January 1994, the learned Magistrate made an order that weekly payments be resumed upon an interim basis. The employer did not comply with this order and appealed to this court against the order for interim payments. This led the worker to apply to the Work Health Court for orders to enforce the order. Mr Gray CSM and Mr Trigg SM each made orders in favour of the worker but each of these orders was appealed by the employer. Each of these three appeals came on before Mildren J who made various orders on 21 June 1994. The subject matter of all these appeals was the question of interim payments. Accordingly, there is no need to discuss that litigation further, except to say that it all occurred prior to Mr Hannan SM giving his ruling upon the validity of the employer's s69 notice.

As I have said, Mr Hannan's ruling was not given until 29 June 1994. The effect of the ruling was that the worker had

"failed to undertake reasonable medical treatment" and that, accordingly, the s69 notice was valid.

Because of the arguments presented to this court on the present appeal, it is necessary to say something about the issues raised before the learned Magistrate.

The validity of the employer's s69 notice depended upon the case being brought within the provisions of s75B(2) of the Act which provides:

> "(2) Where a worker unreasonably fails to undertake medical, surgical and rehabilitation treatment or to participate in rehabilitation training or a workplace based return to work program which could enable him to undertake more profitable employment, he shall be deemed to be able to undertake such employment and his compensation under Subdivision B of division 3 may, subject to section 69, be reduced or cancelled accordingly."

At the relevant time the worker was undergoing treatment by Dr Marinovich, a consultant psychiatrist. Dr Marinovich diagnosed a post-traumatic stress disorder and directed that certain drugs be taken. This medication was changed from time to time in accordance with the worker's reaction to the drugs. Dr Marinovich first saw the worker on 22 February 1993 and regularly thereafter. He opined that the worker was unable to work and his prognosis was poor. He disputed the view that the worker's condition would improve if his drug medication was increased.

Dr Meldrum, also a psychiatrist, examined the worker on behalf of the employer on 6 October 1992 and 6 September 1993. Dr Meldrum's opinion was that the level of the anti-depressant drugs being taken by the worker was inadequate and that his condition would be improved by increasing the dosage.

Each of these doctors gave evidence before the learned Magistrate and was cross-examined at some length. The above summary of their evidence is by no means complete but is, I believe, sufficient for present purposes.

In the course of argument before the learned Magistrate, Mr Tippett emphasised that s75B(2) requires proof that the worker not only unreasonably refused treatment but refused treatment which "could enable him to undertake more profitable employment". The two aspects of the requirements of s75b(2) were particularly stressed in Mr Tippett's submissions to the learned Magistrate at the close of the employer's case, although they seem to have been ignored in the learned Magistrate's reasons for his final ruling.

The worker appealed to this court from the learned Magistrate's ruling and the appeal came on for hearing before Martin CJ on 28 October 1994. There was a cross-appeal by the employer to which it is necessary to make a short reference. Following the learned Magistrate's ruling on 29 June 1994, Mr Tippett sought to proceed with his substantive claim for compensation. Mr Downs opposed this course. He contended that the injury alleged in the Statement of Claim was a different injury from the injury for which liability was admitted and that s106 required that a conference be held before the court could hear the worker's claim for compensation. Mr Downs sought an adjournment for this purpose.

The learned Magistrate ruled that he would hear the worker's claim forthwith and he embarked upon the hearing. That hearing was not completed and was later stayed by an order of this court. The employer's cross-appeal attacked the learned Magistrate's ruling that the worker's claim could proceed without the holding of a s106 conference.

The appeal was argued before Martin CJ on 28 October 1994 and his Honour reserved judgment. A prepared judgment was handed down on 22 December 1994 in which the worker's appeal was allowed. The gist of his Honour's reasons was that there was no evidence that the worker had refused treatment which could have enabled him to undertake profitable employment and that, accordingly, the s69 notice was invalid.

The employer's cross appeal was also allowed, it being held that the requirements of s106 could not be dispensed with.

The prepared reasons for judgment said nothing on the question of costs. It does not appear from anything in the Appeal Book that there was any application for costs by either party when the judgment was handed down. However, since the argument before this court concluded, research initiated by Kearney J has revealed a record of the proceedings on 22 December 1994. The record shows that his Honour proposed that each party should bear their own costs. The solicitor for the worker resisted this proposal and, in the result, his Honour said, "I will adjourn the question of costs".

Nothing further appears to have occurred until 28 March 1995 when the orders made on the appeal were authenticated. The orders, as authenticated, made no reference to the order adjourning the question of costs.

Notwithstanding the apparent finality of the orders as authenticated, it appears that Martin CJ was persuaded to entertain an application in relation to the appeals on 21 April 1995. At 8.27am on that day, Mr Tippett announced his appearance for the worker. Ms Gearin announced her appearance for the employer but expressed her mystification as to the nature of the morning's proceedings. His Honour asked Mr Tippett to explain the purpose of the gathering. Mr Tippett

stated that his aim was to seek "consequential orders upon your Honour's finding in the matter that the section 69 notice was in fact invalid." After reminding his Honour of the subject matter of the appeals and their outcome, Mr Tippett continued:

> "We come before you today, Your Honour, for two things; firstly, consequential orders upon Your Honour's finding that the section 69 notice was an invalid cancellation of the worker's payments and hence an entitlement continued to exist in the worker to receive compensation from the employer; that notice having, because of Your Honour's decision, no effect. The second issue is that of costs and Your Honour made no order as to costs at the time. I want, if Your Honour will hear me, to address you shortly in relation to that issue as well."

This court is presently concerned only with Mr Tippett's application for an order for the worker's costs of the appeal and, for which he later made application, the worker's costs of the proceedings below so far as those costs related to the s69 notice issue. Mr Tippett's "application" was not made on summons, either under Rule 36.07 (the "slip" rule) or otherwise. No supporting evidence was led, either orally or on affidavit.

Ms Gearin raised no objection to the issue of costs being re-opened. She did not submit to his Honour, or to this court, that the court was functus officio as its judgment had passed into record. She put an argument as to costs which later found favour with his Honour and to which I shall refer in a moment. The result for which she contended was there should be no order as to costs. Before the debate concluded his Honour expressed doubt as to whether an order in relation to the costs below could be made because (as was the fact) the learned Magistrate had made no order as to costs. At the conclusion of the argument his Honour reserved his decision.

On 11 April 1995, his Honour handed down a prepared judgment. After referring to the orders made on 22 December 1994, his Honour said:

> "The appellant returns to this Court to seek what his counsel terms, "consequential orders". There is no formal application on this Court's file, but I understand from counsel that the appellant seeks an order from this court that he is entitled to be paid weekly compensation as if the notice under s69 of the *Act* had not been given. He also seeks an order as to the costs of the proceedings in this Court."

It is noteworthy that neither in that passage or thereafter does his Honour make any reference to Mr Tippett's application for the worker's costs of the proceedings in the Work Health Court.

After dealing with the other aspect of Mr Tippett's application, his Honour dealt with the question of costs in the following terms:

> "As to costs, the major issue before the Court on appeal was as to whether the appellant had unreasonably failed to undertake medical treatment. That occupied most of the time and on that the appellant was unsuccessful. He succeeded on the issue as to whether the respondent had to show that if he had undertaken the treatment he could be enabled to undertake more profitable employment. On that there was no evidence, the outcome depending on statutory interpretation. The respondent was successful on the cross-appeal going to the question of whether the learned Magistrate was obliged to call a conference under s106. Argument on that point took comparatively little time. However, the appellant was successful on the major point in the appellate proceedings, that is, the ruling that the s69 notice was invalid.
>
> In all the circumstances, there will be no order as to costs of the appeals."

It can be seen that his Honour considered that the s75B(2) point could be divided into two separate issues for the purpose of exercising the court's discretion as to costs. In so doing his Honour accepted a submission along those lines

which had been put forward by Ms Gearin at the hearing on 21 April 1995.

Having considered the transcript of the proceedings before his Honour on 28 October 1994, I do not think that the s75B(2) point can be sub-divided in the manner suggested. It is true that Mr Tippett vehemently submitted that there was no evidence of an unreasonable failure by the worker to undertake any treatment, let alone treatment which could enable him to work. This primary submission, if successful, dealt with both limbs of the requirements of s75b(2). But Mr Tippett made it plain to his Honour that, in the result of his primary submission failing, he relied upon the absence of evidence that the treatment in question could have enabled the worker to return to work. Ms Gearin, both before his Honour and this court, submitted that Mr Tippett had won the appeal on a point he had not argued before the Work Health Court or his Honour. This submission cannot, in my view, be maintained in the light of the transcript of each proceeding, in particular, passages to be found at pages 100 and 385 of the Appeal Book.

In my opinion, the s75B(2) point was one issue. The employer had to prove that two circumstances existed and it failed, in his Honour's judgment, to prove one of them. Mr Tippett submitted that neither circumstance had been proved but, in my view, his failure to prevail on both aspects does not mean that he had partially failed on the s75B(2) issue. He was wholly successful, because he persuaded the court that an essential element of s75B(2) had not been proved.

We were referred to a number of authorities concerning the way in which the court's discretion as to costs should be exercised. The principles are well settled even if their application to a particular case often proves difficult.

For the purposes of the present case, I select the statement of Viscount Cave LC in *Donald Campbell & Co Ltd v Pollak* (1927) AC 732 at pp811-12, to the effect that the court's discretion should not be exercised against the successful party except for some reason connected with the case. In this case, the worker succeeded on the sole ground upon which his appeal was brought. I consider that the court's discretion as to costs of the appeal should have been exercised in his favour. I further consider that the worker should have his costs of the proceedings in the Work Health Court in relation to the s75B(2) point. Those costs were incurred in fighting an issue upon which it has been held that the worker should have prevailed. The fact that the learned Magistrate made no order as to costs did not, in my view, present any impediment to the making of such an order. His Honour does not appear to have considered this matter and it was not included in the worker's Notice of Appeal. An appropriate amendment to the notice was made by the leave of this court and I consider that such an order should be made.

The order of his Honour that no costs of the cross appeal be allowed should, in my view, remain undisturbed.

I propose that the following orders be made on the present appeal:

1. Appeal allowed.
2. Orders of Martin CJ be varied, by adding an order that the respondent pay the appellant's costs of the appeal and the appellant's costs of the proceedings in the Work Health Court on 17 and 18 January 1994 relating to the s75B(2) issue.
3. Otherwise, orders of Martin CJ confirmed.
4. Order that the respondent pay the appellant's costs of this appeal.
