Richfort Pty Ltd trading as JEBPAB v Edna Baluyut [1999] NTCA 98

PARTIES:	RICHFORT PTY LTD trading as JEBPAB
	v
	EDNA BALUYUT
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	ORIGINAL
FILE NO:	AP 25 of 1998
DELIVERED:	17 September 1999
HEARING DATES:	2 June 1999
JUDGMENT OF:	MARTIN CJ, GALLOP AND MILDREN JJ

CATCHWORDS:

WORKERS' COMPENSATION – APPEAL FROM WORK HEALTH COURT - COSTS
Construction of provisions in Work Health Court Rules 1987 (NT) r 29 – whether costs awarded are "solicitor and client" costs or "party and party" costs – whether any prima facie rate of costs exists when awarding costs.

Work Health Act 1986 (NT) s 108; *Interpretation Act 1978* (NT) s 61;
Legal Practitioners Act (NT) 1978 Part X; *Supreme Court Rules* 1987 O 63, O 63.46(2*)*
Local Court Rules 1998 (NT) s 61; *Work Health Rules* 1987 (NT) r 29

Buckland v Watts [1962] 2 All ER 985, applied
Elders Trustee v O & E Herbert Estates (1996) 5 NTLR 123, applied
Baalman v Dare Reed (1984) 52 ACTR 3, applied
Athanasiou v Ward Keller (6) Pty Ltd (1998) 8 NTLR 23, applied
Cachia v Hanes (1994) 179 CLR 403, considered

REPRESENTATION:

Counsel:

Appellant:	S Southwood
Respondent:	J Tippett

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Cridlands

Judgment category classification:	B
Judgment ID Number:	mil99196
Number of pages:	14

IN COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 25 of 1998

Richfort Pty Ltd trading as JEBPAB v Edna Baluyut [1999] NTCA 98

BETWEEN:

RICHFORT PTY LTD trading as JEBPAB
Appellant

AND:

EDNA BALUYUT
Respondent

CORAM: MARTIN CJ, GALLOP AND MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 17 September 1999)

MARTIN CJ:

[1] The facts and circumstances relating to this appeal are set out in the reasons of Mildren J, and I need not repeat them.

[2] The application of r 29 of the *Work Health Court Rules* (1987) NT is open to disagreement as the various judgments upon it in this case show.

[3] I agree, with respect, that subrule (2) cannot apply to costs as between solicitor and client. The Act does not enable the Chief Magistrate to regulate those costs. The subrule must accordingly be intended to apply to costs as between party and party, as is the whole of the rule. The meaning

being anything but plain, the Court must not treat the rule as unmeaning, but to make sense of it. The first thing to notice is that it applies to "legal practitioner acting for a party to whom costs are payable", that means, where costs are payable to a party (not the legal practitioner), being a party in whose favour a costs order has been made.

[4] The legal practitioner is then entitled to "charge and be allowed the relevant fees set out in the Rules of the Supreme Court". To my mind the words "charge and" are surplusage in this context. The words "allowed" and its opposite "disallowed" are frequently employed in the context of taxation of costs as between party and party (see O 63 *Supreme Court Rules* (1987) NT).

[5] The reference to subrule (2) in subrule (3) is obviously a mistake or a misprint for (1). As corrected, the subrule enables the Court to fix a percentage of less than 100% of the Supreme Court fees as the scale of fees to be applied in allowing costs between party and party. The same idea is reflected, for example, in Supreme Court r 63.07(a) providing that it may be ordered that "a portion … of taxed costs" be the entitlement. (Rule 63.46 seems to apply only to item 4 in Part 2 of the Appendix to that Order which provides a discretion to increase the charges allowable, and see the Registrar's powers under r 30(15) of the *Work Health Rules* in that regard).

[6] The question then becomes in what circumstances may the Work Health Court order that a percentage of less than 100% of the Supreme Court scale

be paid as between party and party. It is clearly a matter of discretion which may be exercised taking into account a variety of factors. The amount of compensation awarded, and the complexity of the dispute are examples only, to those must be added the importance of the issue in respect of which costs were incurred and by taking into account the power of the taxing officer to disallow costs incurred unreasonably.

[7] The learned Magistrate in the Work Health Court has not been shown to have erred in the exercise of his discretion. Angel J rightly dismissed the appeal, although upon grounds with which I would respectfully not agree.

[8] I would dismiss the appeal from the decision of Angel J and order that the appellant pay the respondent's costs.

[9] I note that the Work Health Rules under consideration were repealed upon the commencement of Rules made by the Chief Magistrate on 31 May 1999. The date of commencement was the date of commencement of the *Work Health (Amendment) Act (No 2)* (1998), namely 1 August 1999. I note, however, that costs for work done in pending proceedings before that commencement date are to be determined in accordance with the current Rules.

GALLOP J:

[10] I have read the judgment of Mildren J in draft form. I agree that the appeal to this court should be dismissed with costs. Because of the respective ways in which the question of party and party costs was dealt with by the

Magistrate at first instance and by Angel J on appeal it is necessary for me to add my own observations on the way r 29 of the *Work Health Rules* should be construed.

[11] So far as the result of the litigation is concerned, the Magistrate made an order that the employer pay the worker's costs to be agreed or taxed at 100% of the Supreme Court scale. On the appeal to the Supreme Court against that order, Angel J dismissed the appeal.

[12] I agree with Mildren J that r 29 is curiously drafted. It provides -

> 29. COSTS AND WITNESSES' FEES
>
> (1) The Court may in a proceeding exercise its power and discretion in relation to costs at any stage of the proceeding or after the conclusion of the proceeding.
>
> (2) Subject to subrule (3), a legal practitioner acting for a party to whom costs are payable shall be entitled to charge and be allowed the relevant fees set out in the Rules of the Supreme Court.
>
> (3) The Court in ordering costs under subrule (2), whether on making a determination, in a preliminary conference or at an interlocutory stage, may order that a specified percentage (being nor more that 100%) of the fees set out in the Rules of the Supreme Court be paid.
>
> (4) The amount of witnesses' expenses shall be at the same rates and subject to the same conditions as the witnesses' expenses payable under the *Local Courts Act* to witnesses before a Local Court.
>
> (5) Where the Court makes an order as to costs, the parties may agree to settle the amount of costs payable pursuant to the order.

[13] The starting point in the construction of r 29 is, in my opinion, to analyse the meaning of the word "costs" where it variously appears in the rule. The word "costs" has two distinct meanings. It means,

> "(1) the amount a client has to pay a solicitor as the price of professional work, whether or not it consists of contentious or non-contentious business, including professional disbursements made for the purposes of that work; or
>
> (2) the amount which a client becomes entitled to receive as a result of a judgment or order in contentious business from another person, usually another party to the legal proceedings in which the judgment or order is made, or from a fund, as reimbursement of the amount, including the client's disbursements (*Buckland v Watts* [1962] 2 All ER 985 at 987), which has had to be paid to the client's solicitor for the business undertaken."

[14] I venture to repeat what I said in *Elders Trustee v O & E Herbert Estates* (1996) 5 NTLR 123 at 129. See also Oliver, *Law of Costs* at 4 and *Quick on Costs*, Chapter 1, para 1.30 to 1.50.

[15] There are two different legal relationships encompassed in the word "costs". In the first sense set out above, it relates to the relationship between the client and the client's solicitor. A bill of costs or memorandum of fees and disbursements (whatever form of account is rendered) is addressed by the solicitor to the client. The client is liable to pay the costs and upon payment, those costs belong to the solicitor. They are his remuneration for his professional work. Those costs are sometimes referred to as solicitor and client costs.

[16] The second meaning set out above relates to the relationship between the client and another person who will normally be another party to the legal proceedings in which the costs have been awarded. Pursuant to that relationship, the party who is entitled to recover costs from the other party sends an itemised bill of costs (in whatever form) to the other party and when paid (normally by the authority of the client to the successful party's solicitor), those costs belong to the client or successful party. They represent an indemnity wholly or partially against the costs the client has incurred in the proceedings in which they have been awarded. Such costs are known as party and party costs.

[17] It is important to distinguish those meanings of the word "costs" in construing r 29. In subrule (1) the costs referred to are party and party costs. In subrule (2) the costs referred to are solicitor and client costs. In subrule (3) the costs referred to are the party and party costs. Likewise, in subrule (5) the costs referred to are party and party costs. Incidentally, I agree with Mildren J that the reference to subrule (2) in subrule (3) is an error and what the draftsman meant to refer to was subrule (1).

[18] In exercising his discretion to order a specified percentage of the fees set out in the Rules of the Supreme Court, the Magistrate had regard to the nature of the litigation, the quantum involved and the conduct of the parties to the litigation. In my opinion, he was correct in taking those matters into account. Having done so, he ordered that the party and party costs be paid at 100% of the Supreme Court scale, which is the appropriate scale pursuant

to subrule (2). He also appears to have taken into account, using his judicial knowledge, that for many years solicitors in the Northern Territory charge at a rate not less than the Supreme Court scale. In my opinion, the Magistrate was wrong to take that into account. Rule 29 has nothing to do with solicitor and client costs except in subrule (2) where reference is made to the scale of costs as fixed by Rules of the Supreme Court as the appropriate scale.

[19] There is no presumption that in ordering costs under subrule (1) a court should ordinarily fix upon the rate of 100% of the Supreme Court scale. The percentage of the Supreme Court scale must be fixed by reference to the nature of the case, its complexity, the quantum involved, the difficulty in conducting a resolution of the issues and the conduct of the parties. What the successful party's solicitor charges his client is irrelevant to the exercise of the discretion to fix a specified percentage of the fees set out in the Supreme Court Rules pursuant to r 29(3).

[20] I do not understand subrule (2) to confine a legal practitioner to the Supreme Court scale in the costs which he charges the client. What subrule (2) does in conjunction with subrule (3) is to ensure that on a party and party basis the costs can never exceed 100% of the Supreme Court scale. A client dissatisfied with what he is charged on a solicitor and client basis is left with his entitlement to have the bill of costs taxed on a solicitor and client basis pursuant to Part X of the *Legal Practitioners Act*. Where a Taxing Master taxes a solicitor and client bill pursuant to the *Legal Practitioners*

Act, it is no part of his function to fix the scale of the costs he is taxing. His function is to fix an amount to be allowed for each item in the bill of costs, taking into account the relevant factors.

[21] I agree that the appeal should be dismissed.

MILDREN J

[22] The respondent worker brought an application for compensation in the Work Health Court. Ultimately, after the proceedings in the Court had been conducted by the parties for some time and had generated some 56 documents on that Court's file, the parties reached a compromise which resulted in an agreement being recorded pursuant to s108 of the *Work Health Act*. The terms of the agreement required the appellant employer to pay to the worker weekly compensation for a closed period in August – September 1998 and physiotherapy and medical expenses totalling in all $584:31, and also, to pay "the worker's costs at the rate and upon the basis as is specified by the court. Costs to be taxed if not agreed".

[23] The question of the rate and the basis of the costs were determined by Mr Trigg SM on 23rd September 1998. The worker sought costs on what Mr Trigg SM describes as the "indemnity basis". It is probable that what is meant by this is on the basis of solicitor and own client. The employer argued that the costs ought to be at 50% of the Supreme Court scale. Mr Trigg SM declined to award "indemnity costs" but ordered that the employer

pay the worker's costs to be agreed or taxed at 100% of the Supreme Court scale.

[24] From this decision, the employer appealed to the Supreme Court. Angel J dismissed the appeal. His Honour held, in effect, that the appellant had not demonstrated that the learned Magistrate had erred on the facts and inferences to be drawn from them. In considering the appellant's argument, his Honour construed r29 of the *Work Health Rules* in a manner which limited the operation of that rule to solicitor and own client costs only. This was not in accordance with the approach of the learned Magistrate who treated r29 as applying to party party costs, and as giving the Court a full discretion to award such percentage of (and including) 100% of the Supreme Court scale of costs as the Court thought fit. His Honour considered that, although r29 applied only to solicitor and own client costs and that there was no party party scale provided for, the discretion is to be exercised in the knowledge that subject to any other order the court may make as to those costs, the successful party will be entitled to charge at the rate of 100% of the Supreme Court scale, with the result that, unless the successful party's conduct is such as to disentitle him or her to recover party party costs at 100% of the scale, that party is entitled to tax her costs at 100% of the scale. Angel J concluded that it had not been shown that the worker's conduct disentitled her to an order that her costs be taxed on 100% of the scale.

[25] In this Court, Mr Southwood for the appellant submitted that Angel J erred in his construction of r29. It was submitted that there was no prima facie

rule requiring the successful party's costs to be taxed at 100% of the scale, but rather a general discretion to award such percentage of the scale as is appropriate having regard to the complexity of the proceeding, the quantum of the award, the difficulty of the issues involved and any other relevant factors. As the amount of compensation awarded was very small and the matter itself uncomplicated, he submitted that the proper exercise of discretion required the Court to award significantly less than 100% of the scale. Mr Tippett for the respondent did not seek to support Angel J's construction of the effect of r29, but contended that the approach of Mr Trigg SM was correct, and no error by his Worship had been shown.

[26] Rule 29 is curiously drafted. It provides:

> 29. COSTS AND WITNESSES' FEES
>
> (1) The Court may in a proceeding exercise its power and discretion in relation to costs at any stage of the proceeding or after the conclusion of the proceeding.
>
> (2) Subject to subrule (3), a legal practitioner acting for a party to whom costs are payable shall be entitled to charge and be allowed the relevant fees set out in the Rules of the Supreme Court.
>
> (3) The Court in ordering costs under subrule (2), whether on making a determination, in a preliminary conference or at an interlocutory stage, may order that a specified percentage (being not more than 100%) of the fees set out in the Rules of the Supreme Court be paid.
>
> (4) The amount of witnesses' expenses shall be at the same rates and subject to the same conditions as the witnesses' expenses payable under the *Local Courts Act* to witnesses before a Local Court.

(5) Where the Court makes an order as to costs, the parties may agree to settle the amount of costs payable pursuant to the order.

[27] Subrule 29(3) refers to "in ordering costs under subrule (2)". This is clearly a drafting error, as subrule (2) does not empower the court to make any order as to costs. If this be so, the introductory words to subrule 29(3) must either refer to subrule (1) or to subrule (3) itself. Although there is no practical difference between these alternatives, I consider that these words must be taken to refer to subrule (1) rather than to subrule (2), as the form of words used by the draftsman suggests he intended to refer to a subrule other than subrule (3).

[28] In construing subrules (2) and (3), it is necessary to consider the rule-making power as to costs. S95(1)(a) of the Act empowers the Chief Magistrate to make rules "regulating and prescribing the awarding, scales and taxation of costs (including disbursements and witnesses' expenses)". There is no provision in the Act entitling the Work Health Court to tax a bill of costs between solicitor and client, or to fix solicitor client costs in relation to Work Health Court matters. There are, on the other hand, provisions in Part X of the *Legal Practitioners Act* which extensively provide for the control, regulation and taxation by the Master of the Supreme Court of costs as between solicitor and client for all work of a professional nature. Further, this Court has inherent jurisdiction, as part of its supervisory powers over legal practitioners, to control costs charged by solicitors to their clients: see *Baalman v Dare Reed* (1984) 52 ACTR 3 at

17; *Burstein v Roberts* (1995) 123 FLR 411 at 422; *Athanasiou v Ward Keller (6) Pty Ltd* (1998) 8 NTLR 23 at 30. In those circumstances there is no doubt that the Chief Magistrate has no power to make rules of court fixing solicitor and own client costs in proceedings conducted in the Work Health Court, there being no express statutory provision, and no necessity to imply such a power. Accordingly, we should approach the proper construction of r29 on the basis that it should be read and construed subject to the *Work Health Act* and so as not to exceed the power of the authority granted thereby: see *Interpretation Act*, s 61.

[29] Applying those principles to the construction of r29, I consider that r29(2) should be construed to mean that, in considering what rate of costs should be allowed as between party and party under r29(3), the Court will assume that the solicitor for the successful party is entitled to charge his or her own client at the rates set out in the Rules of the Supreme Court. This is the prima facie rule, but that is "subject to subrule (3)" which gives the Court a wide discretion to order that the rate as between party and party shall be at any specified percentage of the Supreme Court scale, up to, but not exceeding 100% as the Court sees fit. Consequently, should it be the fact that the successful party's solicitor has agreed to accept remuneration at a rate less than 100% of the Supreme Court scale, consistently with the principle that costs are meant to be an indemnity, the court may not award costs at a higher rate.

[30] I do not accept Mr Southwood's contention that the rate to be selected depends upon the complexity of the proceeding, the quantity of the award or the difficulty of the issues involved. These factors are already matters which the taxing officer is bound to take into account in making discretionary allowances under the *Supreme Court Rules*: see r63.46(2). To fix a specified rate at less than the full amount of the scale because of those factors would involve duplication of those factors. Further, as Mr Trigg SM pointed out, the quantum of the award is not a reliable indicator. An applicant may seek only a declaration of liability in order to protect his position in the eventuality that his injury is productive of some future financial loss. There is no analogy between the issues likely to be tried in the Work Health Court and the type of litigation commonly litigated in the Local Court, where, pursuant to r38.04 of the *Local Court Rules*, these factors are specifically required to be considered.

[31] Mr Southwood contended that costs are never a full indemnity, relying on what fell from the joint judgment of five Justices of the High Court in *Cachia v Hanes* (1994) 179 CLR 403 at 414, where their Honours observed that "party and party costs have never been regarded as a total indemnity to a successful litigant for costs incurred". Their Honours clearly had in mind the traditional difference between solicitor and own client costs and party party costs, and the passage cited does not support the contention that the rate of a scale should be adjusted down from the rate at which a successful party has been charged by his solicitor. The difference between the two

types of costs is reflected in the fact that not all work (including disbursements) properly charged by a solicitor to his own client, is recoverable on a party party basis; and is also reflected in the fact that a solicitor may be justified in charging his own client above the maximum scale of party party costs. The purpose of r29(2), (and it is reflected also in the wording of r29(3), is to put it beyond doubt that whatever actual rate a solicitor charges his client in excess of the scale, the successful party cannot recover more than 100% of scale costs.

[32] The conclusion I have reached is that, whilst the Court has a wide discretion, the rate to be allowed should ordinarily be at the rate of 100% of the Supreme Court scale, unless there is good reason to order otherwise. What amounts to 'good reason' is not confined to the conduct of the parties, as Angel J thought, but may include other relevant factors including, for example, what the successful party's solicitor in fact agreed to charge his own client.

[33] Applying those principles to the circumstances of this case, there is no basis for disturbing the order of Mr Trigg SM, as it has not been shown that he took into account irrelevant factors or failed to properly take into account relevant factors or that his discretion otherwise miscarried.

[34] I would dismiss the appeal with costs.
