

CITATION: *Northern Aboriginal Investment Corporation Pty Ltd & Ors v Paul Walsh & Ors* [2019] NTSC 43

PARTIES: NORTHERN ABORIGINAL INVESTMENT CORPORATION PTY LTD

and

NORTHERN AUSTRALIA ABORIGINAL DEVELOPMENT CORPORATION PTY LTD

v

PAUL WALSH & ASSOCIATES PTY LTD

and

PAUL WALSH

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 51 of 2018 (21826067)

DELIVERED: 5 June 2019

HEARING DATE: 6 September 2018

WRITTEN SUBMISSIONS: 24 September; 8 and 15 October 2018

JUDGMENT OF: BLOKLAND J

CATCHWORDS:

LEGAL PRACTITIONERS – Costs – *Legal Profession Act 2006* (NT) – application for review of assessment of costs by costs assessor – whether Court should receive further submissions, arguments or evidence beyond what was available to assessor – whether discretion to receive further material is enlivened as a result of procedural unfairness or other substantive error – plaintiffs granted leave to file and serve grounds or objections and particulars identifying material before the assessor that supports those grounds or objections – defendants may file and serve response to grounds or objections and identify any materials upon which they seek to rely– matter to be listed for mention to set timetable for completion of review.

Legal Profession Act 2004 (NSW)

Legal Profession Act 2006 (NT) ss 3, 332, 335, 341, 344, 345, 346, 347, 352, 353, 354(1), 354(2), 354(3), 354(4), 355, 361, 362(1), 362(3)

Legal Protection Regulations 2007 (NT)

Black v Alexiou (2014) 34 NTLR 174; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475; *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674, referred to.

REPRESENTATION:

Counsel:

Plaintiffs:	J Short
Defendants:	T Liveris

Solicitors:

Plaintiffs:	Ward Keller
Defendants:	Paul Walsh

Judgment category classification:	B
Judgment ID Number:	BLO1905
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Northern Aboriginal Investment Corporation
Pty Ltd & Anor v Paul Walsh & Anor [2018] NTSC 43
No 51 of 2018 (21826067)*

BETWEEN:

**NORTHERN ABORIGINAL
INVESTMENT CORPORATION PTY
LTD**

First Plaintiff

AND:

**NORTHERN AUSTRALIA
ABORIGINAL DEVELOPMENT
CORPORATION PTY LTD**

Second Plaintiff

AND:

PAUL WALSH & ASSOCIATES

First Defendant

AND:

PAUL WALSH

Second Defendant

Ruling on procedure to be undertaken on the review

(Delivered 5 June 2019)

Background

- [1] By Originating Motion the plaintiffs applied under s 352 of the *Legal Profession Act 2006* (NT) (“*LPA*”) for a review of two determinations made by costs assessor Julian Wade Roper¹ (“the assessor”).
- [2] On 2 May 2018, the assessor certified² he had conducted a costs assessment of invoices issued by the defendants to the plaintiffs for the period 9 December 2014 to 1 October 2015. The assessment was based on the plaintiff’s application for a costs assessment, together with materials and submissions produced by both parties. The assessor dismissed the plaintiff’s application in respect of one invoice (No. 14-197) on the basis it was out of time under s 332(5) of the *LPA*. The assessor certified the balance of the invoices as fair and reasonable and allowed them in their entirety for the sum of \$45,862.50.
- [3] On 3 May 2018, with reference to the same materials considered for the certification of 2 May 2018, the assessor certified the costs of his assessment as \$7,700 to be paid by the parties in equal shares.
- [4] The assessor provided detailed reasons for the assessments.³
- [5] Prior to conducting the review in this Court, counsel for the parties notified the Court there was a dispute about the nature of a review of this kind. After

¹ Mr Roper was appointed as the assessor by his Honour, the Chief Justice under the *LPA*.

² *Legal Profession Act 2006* (NT) s 345.

³ *Legal Profession Act 2006* (NT) s 347.

a directions hearing the parties filed written submissions on how the review should be conducted.

- [6] The main issue between the parties is whether in the course of conducting the review the Court should receive further submissions or arguments, or possibly evidence beyond that which was before the assessor. The plaintiffs argue fresh material may and in this instance should be considered by the Court on review. The defendants argue the review should be restricted to the material, including submissions, that was before the assessor and that there is no need to invoke any exception in this instance that would allow the plaintiffs to submit any further material beyond what was before the assessor.

Statutory framework and context

- [7] The review of a costs assessment is to be conducted in accordance with the *LPA* and the *Legal Profession Regulations 2007* (NT) (“the Regulations”) following a costs assessment. The nature of the review must be determined from the context in which it appears, there being no settled determined meaning of ‘review’.⁴
- [8] In short, costs assessments are conducted under Division 8, Subdivision 1-4 of the *LPA*. Application is made to a costs assessor under s 332 of the *LPA* by a client or an associated third party as defined by the *LPA*. The

⁴ *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170; 86 NSWLR 674 at 708 [157] (Barrett JA) citing *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ).

application for a costs assessment must be made in accordance with s 335 of the *LPA* and the Regulations. Subdivision 3 of Division 8 sets out the procedures to be followed for a costs assessment. The substantive criteria for assessments of legal costs are set out in s 341. The costs assessor is to determine the application for assessment by either confirming the amount, or in the case of a finding that the amount is unfair or unreasonable, substituting the amount the assessor thinks is appropriate.⁵ The costs assessor must issue a certificate specifying the outcome of the determination under s 345. Under s 346 the assessor is required to determine the costs of the costs assessment.

- [9] An application for review, in this instance by the Court, must be made within the time limitations, notice and fee stipulations under s 352 and in accordance with the Regulations. Additionally, s 353 allows the reviewer to review the costs of a costs assessment.
- [10] Section 354(1) provides that on review of a determination, the reviewer may affirm the assessor's determination or set aside the determination and substitute the determination the reviewer thinks should have been made. Section 354(2) provides the reviewer has all the functions of a cost assessor and must determine the application for review in the way a costs assessor would be required to. Significantly for this matter, s 354(3) provides 'the

⁵ *Legal Profession Act 2006* (NT) s 344.

assessment must be conducted on the evidence that was received by the costs assessor who made the determination...’

[11] Further, s 354(4) prohibits the reviewer from receiving further material unless the reviewer ‘decides otherwise’. Section 354(4) provides as follows:

In addition, unless the reviewer decides otherwise, the reviewer must not:

- (a) receive submissions from the parties to the assessment; or
- (b) receive any fresh evidence or evidence in addition to or in substitution for the evidence received by the costs assessor.

[12] Drawing on the statutory framework, on one view it would appear the intention is that the review be conducted on the materials before the assessor unless there is some reason to require otherwise. It would seem the conduct of the review is directed to finality, efficiency and limiting further costs to the parties, bearing in mind the objects of the *LPA* include the promotion of the administration of justice and the protection of consumers of legal services and the public generally.⁶ On the other hand, finality and efficiency may be advanced through a reviewer being directed to any particular matter or matters that are in contention. If, during the course of the review, a reviewer finds they require further documents from a party or the assessor, s 355 provides an appropriate mechanism. This provision anticipates there may be circumstances in which a reviewer considers it necessary to go to further material, not initially provided by the parties. It is readily

⁶ *Legal Profession Act 2006* (NT) s 3.

conceivable this may be required after consideration of any matters of contention between the parties.

[13] The review process is to be differentiated from the appeal mechanism, which is governed by Subdivision 6 of the *LPA*. The appeal provisions apply to both appeals from a costs assessment and a review.⁷ An appeal is confined to matters of law.⁸ If, on appeal, a decision of a costs assessor or reviewer is not affirmed, the Court may receive fresh evidence as part of a re-determination process.⁹

[14] Although the co-existence of the appeal provisions are not finally determinative of how the review of procedure should be conducted, the fact the appeal provisions grant a remedy for errors of law tends against an interpretation that would allow consideration of possible errors of law on the part of the assessor during the review process. However, if there are errors of law or errors of some substance, considerations of efficiency, finality and conservation of costs equally dictate that those matters be dealt with during the course of the review rather than in later appeal proceedings. Consequently, if there are issues of law to be raised, it would be preferable that they are identified during the review process.

⁷ *Legal Profession Act 2006* (NT) s 361.

⁸ *Legal Profession Act 2006* (NT) s 362(1).

⁹ *Legal Profession Act 2006* (NT) s 362(3).

Further consideration of the issues between the parties

- [15] Submissions made on behalf of the defendants emphasise that the primary requirement of Subdivision 5 of Division 8 of the *LPA* is that the review be conducted on the evidence received by the costs assessor and that there is no reason to receive further material. Relying on *Black v Alexiou*¹⁰ it was submitted the reviewer was to conduct the assessment ‘from scratch’.¹¹
- [16] The brief extracts from *Black v Alexiou* relied on by the defendants need to be seen in their broader context. First, the Court in *Black v Alexiou* did not have the benefit of the reasoning of the New South Wales Court of Appeal in *Wende v Horwath (NSW) Pty Ltd* (“*Wende*”),¹² dealing with almost identical provisions concerning the review of a costs assessor’s determination under the *Legal Profession Act 2004* (NSW). Further, the judgment in *Black v Alexiou* referred to and discussed s 353 of the *LPA* which deals with the costs of the assessment, not the legal costs.¹³ There is no requirement that a reviewer make a preliminary decision on whether to conduct a review under Subdivision 5, provided the application is properly made. In any event, the decision in *Black v Alexiou* appears to have proceeded on the assumption that the reviewer is likely to examine broader issues rather than purely repeating the original assessment:¹⁴

10 [2014] NTSC 46; 34 NTLR 174.

11 *Black v Alexiou* [2014] NTSC 46; 34 NTLR 174 at 181 [12] (Kelly J).

12 [2014] NSWCCA 170; 86 NSWLR 674.

13 *Black v Alexiou* [2014] NTSC 46; 34 NTLR 174 at 181 [11], 182 [15].

14 *Black v Alexiou* [2014] NTSC 46; 34 NTLR 174 at 181 [12] (emphasis added).

The assessment must be conducted on the evidence that was received by the costs assessor, unless the reviewer decides otherwise, neither fresh material nor submissions are received. In other words, when conducting a review of a costs assessment, the reviewer has to re-conduct the assessment from scratch – *not just determine whether there has been any error in the original assessment.*

[17] Further, relying on *Wende*¹⁵ the defendants submitted the reviewer's duty is to emulate a costs assessor and the reviewer is placed in 'the same position as the assessor himself', but only insofar as required for the review to be made.¹⁶ That may be so, but that does not answer the question whether in the circumstances some indication should be given to the Court as to any matters clearly in contention. The defendants rely on the following passage from *Wende* to support the proposition that unless there is a matter to be raised such as a denial of procedural fairness during the assessment process, the scope of the review is governed by s 354(1) of the *LPA* and there is no reason to exercise the discretion to receive further material:¹⁷

The panel, in reaching its own conclusion on the question of quantification raised by the original application for assessment, is confined to the material that was before the assessor and any additional material that it determines to receive consistently with s 375(3). If it is alleged that a party to the assessment was denied an opportunity to put material before the assessor in accordance with the legislation, the panel's evaluation of that allegation may well influence its view of the quality of the product of the assessor to which it is required by s 375(3) to have regard. The allegation might incline the panel to allow further submissions, additional evidence or both with a view to remedying the deficiency in the material on which its own assessment is to be based.

15 [2014] NSWCA 170; 86 NSWLR 674 at 707-708 [156] per Barrett JA, with whom Beazley P and Basten JA agreed, citing Kitto J in *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475 at 502.

16 Defendants' outline of submissions dated 8 October 2018 at [8].

17 *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170; 86 NSWLR 674 at 709-710 [166].

[18] As the Court already has the submissions made by the parties to the assessor, the defendants submitted there was no reason to consider further material under s 354(4) of the *LPA*.¹⁸

[19] The plaintiffs have identified a number of issues that may go to procedural fairness or otherwise suggest substantive errors.¹⁹ I have not considered the strength of these matters against the material provided to the Court,²⁰ however they appear to be the kind of issues or contentions envisaged by their Honours in *Wende* as representing an appropriate occasion to consider further material during the course of the review. This is particularly so in relation to any competing contentions, the starting point being the original determination of the costs assessor. In *Wende*, Barrett JA described the process of review as follows.²¹

[158] In the present context, it is the task of a review panel to review an assessment that has been made necessary because the person ordered to pay costs and the person to whom they are payable have not agreed the amount. One person wishes to see the assessor determine a large amount, the other a small amount. Each is able to present a case to the assessor. While the circumstances are not adversarial in any strict sense, the panel must consider competing contentions and make up its mind in the light of them.

18 The Defendants point out that the application for a Costs Assessment was made on 26 April 2016 accompanied by a letter setting out matters on which clarification was sought. On 29 November 2017 the defendants submitted a response including submissions and evidence to the costs assessor. The plaintiffs made submissions to the costs assessor dated on 6 December 2017. On 2 March 2018 the Defendants provided itemised bills. On 11 April 2018 and 20 April 2018 the plaintiffs and defendants made further submissions respectively.

19 Plaintiffs' submissions in Reply, 15 October 2018 at 5-6. Examples given are that the assessor made findings of fact without giving the parties an opportunity to address certain issues; an alleged error in relation to the onus of proof; findings as to characteristics of the parties without submissions; the assessor making self-initiated queries.

20 Cost Assessor's Documents Produced Further to Consent Order, filed 4 September 2018.

21 *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170; 86 NSWLR 674 at 708-709 [158]-[163] (Barrett JA, with Beazley P and Batten JA agreeing).

[159] There is no statutory requirement that an applicant for review articulate objections to the original assessment or state what are often described as “grounds of review”. Under s 373, an application for review made by a party dissatisfied with an assessor’s determination must set out the assessor’s determination and, as required by clause 132 of the Legal Profession Regulation, be accompanied by an affidavit of service (having regard to the s 373(5) requirement that notice of the application; for review be given to the other parties to the assessment), a copy of all of the costs assessor’s certificates of determination relating to the assessment and a copy of the assessor’s statement of reasons.

[160] Under clause 131 of the regulation, the application for review must be in the approved form. The approved form (Form 4) contemplates that the grounds for making the application for review will accompany the application.

[161] The function of the review panel will vary according to the way in which the applicant for review chooses to frame the application. If specific objections are stated, the panel will, of necessity, deal with them. If no objections are stated and the implicitly indicated desire of the applicant is merely to have the review panel conduct a general review, no specific matters will call for attention. In either such case, however, the function of the review panel is, as stated in s 375(1), to “review the determination of the costs assessor” and to decide whether the assessment should be affirmed or altered.

[162] Because the s 375(2) obligation to emulate a costs assessor is subordinate to the duty to “review” arising from s 375(1), a review panel is not required to make a new assessment as if the original assessment had never been made. The starting point will generally be the original determination of the costs assessor. The review panel will take into account not only the material specified in s 375(3) but also the application for review made under s 373(1) and referred by the Manager, Costs Assessment to the review panel pursuant to s 374(1). That application must, for these purposes, be regarded as including the documents that accompany it in conformity with clause 132 of the regulation. A panel does not exist (or, more precisely, is not “constituted”) unless and until the Manager, Costs Assessment “refers” an application for review to it.

[163] Where the person making an application for review elects to raise particular objections, a review panel will be entitled to proceed on the basis that that person is, in all other respects, content with the original assessment. In such a case, the panel will adequately perform its function by dealing with the expressed grounds of objection and giving each of them separate and distinct consideration.

- [20] Allowing for minor jurisdictional differences,²² in my view it would be consistent with the approach taken in *Wende* to permit the plaintiffs to file and serve the grounds or objections and particulars that sufficiently identify the material before the assessor which it says supports those grounds or objections. The defendants may file and serve a response to the grounds or objections and identify any materials before the assessor on which they seek to rely or draw to the Court's attention on the review. Without such grounds or the response to them, a significant part of the review would be undertaken in the dark. This approach is consistent with procedural fairness. It is the intention to complete the review once the grounds or objections and any response to them are filed. Further submissions will not be sought unless it appears necessary on the basis of provision of the grounds and the response.
- [21] The matter will be called on for mention to set a further timetable prior to the completion of the review.

²² The Northern Territory has no particular approved form for review, unlike the procedure in New South Wales. That part of the procedure is referred to in *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170; 86 NSWLR 674 at 708 [160]. Further, there is no obligation on an applicant in the Northern Territory to append the certificates and reasons for the determination: cf *Wende v Horwath (NSW) Pty Ltd* [2014] NSWCA 170; 86 NSWLR 674 at 708 [159].