

CITATION: *Bullock v Nationwide News Pty Ltd and Bradshaw* [2002] NTMC 050

PARTIES: ANTHONY MARK EWART BULLOCK  
Plaintiff

v

NATIONWIDE NEWS PTY LTD  
First Defendant

and

ROBERT ALBURY BRADSHAW  
Second Defendant

TITLE OF COURT: Local Court

JURISDICTION: Local Court Act

FILE NO(s): 9303413

DELIVERED ON: 20 December 2002

DELIVERED AT: Darwin

HEARING DATE(s): 3 December 2002

JUDGMENT OF: Mr V M Luppino SM

**CATCHWORDS:**

Costs – Application for review of Judicial Registrar’s ruling on costs issues – Whether a Taxing Officer has power to go behind a claim for a composite fee – Whether charges for in house counsel fees are to be charged as a cost item or a disbursement.

Supreme Court Rules rr 63.02(2), 63.26, 63.55(1), 63.72(9) and 63.73  
Local Court Rules rr38.02 and 38.16

*House v R* (1936) 55 CLR 499; *Edwards v Edwards* [1958] P 235; *Myers v Elman* (1940) AC 282; *Copping v ANZ McCaughan Ltd* (1995) 63 SASR 523.

**REPRESENTATION:**

*Counsel:*

Plaintiff:	Not Represented
First Defendant:	Mr J Neill
Second Defendant:	Mr G McDonald

*Solicitors:*

Plaintiff:	Hunt & Hunt
First Defendant:	Ward Keller
Second Defendant	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID number:	2002 NTMC 050
Number of paragraphs:	27

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

No. 9303413

BETWEEN:

**ANTHONY MARK EWART BULLOCK**  
Plaintiff

AND:

**NATIONWIDE NEWS PTY LTD**  
First Defendant

and

**ROBERT ALBURY BRADSHAW**  
Second Defendant

REASONS FOR DECISION

(Delivered 20 December 2002)

Mr V LUPPINO SM:

1. An interlocutory application was made in the substantive proceedings in this matter by the second defendant. That application sought an order for a hearing separate from that of the first defendant. That application was unsuccessful.
2. Consequently, on 25 May 1999 an order for costs was made against the second defendant. That cost order was as follows:-
  1. The second defendant pay the plaintiff's and the first defendant's costs of and incidental to this application fixed at 80% of the Supreme Court scale.
  2. The application is certified fit for junior counsel;

3. Pursuant to that cost order the first defendant filed a Bill of Costs which was taxed by the Judicial Registrar on 26 August 2002. At that time the Judicial Registrar reserved her ruling on three questions, namely:-
  1. Is the composite scale fee for an interlocutory application available only to the applicant's costs of the application and not the costs of the respondent;
  2. When a solicitor claims fees as a barrister having been briefed from within his firm, are those fees claimable as a disbursement or as costs;
  3. If the solicitor's fees claimed for counsel work are to be claimed as costs and not disbursements, is the payee party allowed to claim care and conduct separately on items included as cost items.
4. On 28 August 2002 the Judicial Registrar delivered her rulings and in answer to the three questions respectively ruled:-
  1. A solicitor can elect to claim the composite fee for an interlocutory application but that is subject to the taxing officer being satisfied the work comprised within that application was done and that the solicitor claiming is in entitled to that amount.
  2. As there is no third party who had to be paid, the fees as claimed are in reality solicitor's costs and not disbursements.
  3. Yes, in relation to time claimed for preparation and attendance at hearing.
5. By letter dated 30 August 2002 addressed to the Judicial Registrar, the solicitors for the first defendant sought a reconsideration of parts of the Judicial Registrar's ruling pursuant to Order 63.55(1) of the Supreme Court Rules. The rulings the subject of that request were:-
  1. The ruling that the first defendant had not "done the work" included in the composite fee for a contested interlocutory application and was therefore not entitled to be paid that fee and instead must file and serve and amended bill of costs on an itemised basis;

2. The ruling that it would be difficult to justify the composite fee for a contested interlocutory application in any matter where counsel had been briefed for the argument, unless there was substantial preparation done;
3. The ruling that the fees to be charged by a solicitor appearing as counsellor are not to be treated as a disbursement for the purposes of a taxation of costs.
6. By letter dated 17 September 2002, the Judicial Registrar advised the first defendant that she had re-considered her rulings and that her views remained unchanged.
7. The first defendant then made application for a review of the Judicial Registrar's rulings pursuant to Rule 38.16 of the Local Court Rules. The basis of the application is set out in the application filed 26 September 2002 which essentially mirrors the request for reconsideration dated 30 August 2002 referred to in paragraph 5 hereof.
8. The matter came on for hearing before me on Tuesday, 3 December 2002. The plaintiff was not represented at the hearing as the application involves issues between the defendants only. Mr Neill appeared on behalf of the first defendant and Mr McDonald appeared on behalf of the second defendant.
9. It is common ground that Mr Neill, a partner of Ward Keller, had carriage of the matter including the relevant interlocutory application on behalf of the first defendant. Mr Maxted, who was then an employed solicitor at Ward Keller, was briefed as in house counsel. A brief was delivered to Mr Maxted who engaged in two hours preparation. He attended on the lengthy hearing of the contested interlocutory application.
10. The first issue in the review before me was whether the Judicial Registrar could look behind the composite fee allowed in the Rules.
11. During the course of submissions Mr McDonald reminded me that the nature of the appeal, involving as it does an appeal from the exercise of a

discretion, requires there to be an error in the exercise of the discretion before the decision can be reviewed. It is not sufficient that the Court hearing the appeal would have decided the matter differently in the absence of that error *House v R* (1936) 55 CLR 499.

12. In relation to the first issue, Mr Neill submitted that the Judicial Registrar erred in ruling that she could look behind the composite fee and direct a taxation on an itemised basis. He submitted that paragraph four of the notes to the appendix to Order 63 of the Supreme Court Rules supported this. He also drew on support from Master's Practice Note No. 1 of 1988 issued by former Master Le Fevre as well as the Masters Taxation Guidelines dated November 1993. The former stipulates that the purpose of the appendix to the Supreme Court Rules was to simplify the process of drawing, reading and taxing the bill of costs. The latter guidelines provide, under the heading "composite scale", that practitioners are not bound by the composite scale and that they may elect to charge for an item by reference to the itemised scale. However those guidelines stipulate that only work reasonably done and time reasonably spent could be charged for on that basis. Further those guidelines stipulate that unless the sum total of those charges exceeds the composite fee by 20% or more, only the composite fee will be allowed in any event. This strongly suggests that the application of the composite fee is at the option of the party seeking costs.
13. Mr McDonald in turn submitted that the overriding consideration in a cost matter is that costs must be reasonably incurred and must be reasonable in amount. He submitted that there is a very wide discretion granted to a court in relation to orders for costs. He submitted that this discretion enabled a taxing officer to go behind the composite fee in appropriate cases. He submitted this particularly applied where in house counsel was briefed and that it was incumbent on a court to go behind the composite fee to ensure that only a fair and reasonable amount is paid by the paying party.

14. In support of his submission Mr McDonald referred to various rules in the Supreme Court Rules notably Rules 63.02(2), 63.26 and 63.72. He submitted that where in house counsel is briefed, it is inappropriate for a taxing officer not to ask what work was done and to blindly follow or apply the composite fee. He submitted that Rule 63.02, which contains an express reference to a discretion regarding counsel fees, shows that there is a broad discretion in relation to counsel fees. He further submitted that it is necessary for a court to look at the totality of the situation to properly exercise that discretion and that necessarily involves looking behind the composite fee.
15. Mr Neill's argument was very persuasive given that the wording of the various paragraphs in the Supreme Court Rules clearly suggest that whether the composite fee was charged was an option available to the party claiming costs. Notwithstanding that I note there is nothing in the Rules which affirmatively states that to be the case and I think that is critical in the end. In my view, in the absence of a specific directive in the Rules, the general discretion available to courts which has been universally held to exist in relation to orders for costs must dictate that a taxing officer can go behind the composite fee.
16. It is an accepted principle that the discretion as to costs is absolute. At common law a court has the power to disallow any work which is improperly done or unnecessarily done (*see Edwards v Edwards* [1958] P 235 and *Myers v Elman* (1940) AC 282. The exercise of this power in relation to composite fee items necessarily involves the Court having the power to go behind the composite fee.
17. The absolute discretion of the courts in relation to costs is the common thread in the various authorities on costs. Further there is authority for the proposition that an interpretation of legislation (or rules) which purports to

fetter that discretion is not to be lightly adopted, see *Copping v ANZ McCaughan Ltd* (1995) 63 SASR 523.

18. In my view the effect of this is that a clear statement is required in any legislation (or rules) which purports to fetter the discretion of a court in relation to costs. It is for this reason that I consider it very telling that there is no clear statement in the Rules to indicate that the option of the party entitled to costs to claim a composite fee overrides the general discretion.
19. Accordingly I uphold the decision of the Judicial Registrar to the extent that it turns on the issue as to whether she, as a taxing officer, had the power to go behind the composite fee.
20. The remaining issue in this matter is whether the fees to be charged by a solicitor appearing as counsel should be treated as an item of costs or as a disbursement. The Judicial Registrar ruled in favour of the latter. She reasoned that, unlike with most disbursements, there was no third party who had to be paid. It may well be that the test she applied is indeed a proper test to apply to determine whether something is technically a disbursement in the strict sense. However, resolution of this issue depends on the principles of statutory interpretation. Matters such as that considered by the Judicial Registrar can be relevant. However the principles of statutory interpretation essentially attempt to ascertain the intention of the body passing the relevant item of legislation, in this case Rules of Court. For the reasons which follow, I think it is clear that the Rules intend and require that counsel fees are to be treated as a disbursement, irrespective of whether they relate to independent counsel or in house counsel.
21. I think this is most apparent from those parts of the Rules which make special provision for the fees to be allowed to in house counsel. I refer here to Rule 63.73 of the Supreme Court Rules. This specifically acknowledges

that a solicitor may appear as counsel, variously self-instructed or instructed by a partner employee or fellow employee.

22. The various counsel fees prescribed by the Rules set a higher rate for the first day as opposed to subsequent days. This I think is to take into account reading and preparation time. The reduced first day rate for in house counsel in the Supreme Court Rules reflects the fact that there is some level of knowledge on the part of in house counsel thereby reducing the extent of reading and preparation time required as compared to independent counsel. I think this is clear also from the fact that another even lower rate is prescribed where a legal practitioner briefs himself as counsel as opposed as to where a solicitor briefs another member of his firm. In the latter case there is an even greater extent of familiarity with the matter than in the former case. This clearly justifies a further reduction in the amount allowed for the fee on brief. According to Rule 63.73(3), in the former case three-quarters of the fee otherwise payable is allowable and in the latter case, the proportion is five sixths.
23. Accordingly the Rules have very specific provisions in relation to in house counsel as compared to independent counsel. In view of that I would have expected an affirmative provision in the Rules if the intention was then to be that in house counsel fees were to be treated as a cost item and not a disbursement. It is arguable that if in house counsel fees are a cost item then they are subsumed within the composite fee. In light of the fact that the Rules already make reductions in the amount otherwise payable to in house counsel, it could not be the intention that those fees could be subsumed with the composite fee. That would then render the Rules prescribing reduced rates for in house counsel quite superfluous in the majority of cases.
24. Moreover, such an interpretation creates an anomalous situation in the current case given that an order was made certifying the matter as fit for

junior counsel. Rule 63.72(9)(a) of the Supreme Court Rules provides that counsel fees for attendance on an interlocutory application are only payable once such a certification is made. An interpretation which treats in house counsel fees as a cost item as opposed to a disbursement so that it is subsumed in the composite fee would make such a certification superfluous to that extent. Moreover I would have expected that if the requirement for certification under 63.72(9)(a) was only to effect independent counsel, (which would be anomalous in itself given that allowance is already made in respect of in house counsel fees), then some affirmative recognition of that could have been made in that Rule. Again, the absence of anything along those lines is very telling.

25. I think therefore that, absent any specific provision in the Rules to that effect, the only difference in the treatment of counsel fees as between independent counsel and in house counsel should be the reduction applicable pursuant to Rule 63.73(3). Accordingly it is my view that all counsel fees, whether for independent counsel or in house counsel are to be treated as a disbursement for taxation purposes.
26. In summary therefore, in my view:-
  1. The taxing officer has a discretion to go behind the composite fee allowed to solicitors in relation to interlocutory applications and can require costs to be taxed on an itemised basis;
  2. In house counsel fees are to be treated as a disbursement and not as a cost item for taxation purposes.

27. I will hear the parties as to the costs of this application.

Dated this 20th day of December 2002.

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V M LUPPINO  
STIPENDIARY MAGISTRATE