CITATION:	Ward Keller v Judith Tomlinson [2002] NTMC 052
PARTIES:	WARD KELLER
	v
	JUDITH TOMLINSON
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMES VICTIMS ASSISTANCE
FILE NO(s):	20204171
DELIVERED ON:	23rd December 2002
DELIVERED AT:	DARWIN
HEARING DATE(s):	10th December 2002
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Practice & Procedure – Costs – Crimes (Victims Assistance) – Solicitor client costs-application section 24(1) of Crimes (Victims Assistance) Act – factors to consider –

Solicitor for the Northern Territory v Pauline Moketarinja (1996) 5 NTLR 206
Barras v Northern Territory of Australia and Smith (2002) NTMC 039
Cassandra May Yaxley v Northern Territory of Australia & Joseph Phillip Collins (2002) NTMC 036

REPRESENTATION:

Counsel:

Applicant:	John Neill
Respondent:	Cathy Spurr
Amicus Curaie:	Bill Priestly

Solicitors:

Applicant:	self
Respondent:	Halfpennys

Judgment category classification:	A
Judgment ID number:	[2002] NTMC 052
Number of paragraphs:	47

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

No. 20204171

BETWEEN:

Ward Keller
Applicant

AND:

Judith Tomlinson
Respondent

REASONS FOR DECISION

(Delivered 23rd December 2002)

JUDICIAL REGISTRAR FONG LIM:

1. The Applicant is the former solicitor of the Respondent in her application for an assistance certificate pursuant to section 5 of the Crimes (Victims Assistance) Act. The Applicant has applied pursuant to section 24(1) of the Crimes (Victims Assistance) Act for an order that the Applicant be granted leave to render and account to the Respondent for work done by the Applicant in relation to her Crimes Victims Assistance application.

2. I was provided with the affidavit evidence of Mr Tregear of the 5th of November 2002, Mr Neill of the 9th & 10th of December 2002, Mrs Tomlinson of the 27th November 2002 and Mr Tomlinson of the 10th of December 2002.

3. The issues put before me were:

3.1 Can an application pursuant to s 24 (1) be made before an Assistance certificate is issued? The effect of section 8(10) on the operation of s24(1) and the application of Solicitor for the Northern Territory v Pauline Moketarinja (1996) 5 NTLR 206 in relation to these applications.

3.2 What are the factors the court should consider when deciding whether to grant an application pursuant to s 24(1) and the purpose of section 24(1).

3.3 What percentage should be fixed pursuant to rule 38.07 of the Local Court rules and upon what basis should the taxation (if any) take place.

3.4 When can a solicitor make and application under section 24(1) of the Crimes (Victims Assistance) Act ("the Act")?

> "Section 24(1) states:
> (1) A legal practitioner shall not be entitled –
>
> (a) to recover from an Applicant costs in respect of an application under section 5;
>
> (b) to claim a lien in respect of costs on an amount paid or payable under section 20; or
>
> (c) to deduct costs from an amount so paid or payable,
>
> except to the extent to which the costs have been allowed as between the legal practitioner and the Applicant by the Court on the application of the legal practitioner or the Applicant"

4. Section 8(10) of the Act states

> "10) Where the Court issues an assistance certificate it may, subject to this Act and the Regulations, make such order as to costs and disbursements as it thinks fit."

5. The Applicant referred me to the decision of Mr Loadman SM in the matter of Barras v Northern Territory of Australia [2002] NTMC 039 in which His Worship considered an application under section 24(1). I am of course bound by this decision. His worship was faced with an application by Ward

Keller inter alia for an order that Ward Keller be paid its fees on a solicitor client basis in accordance with rule 63.59(2) of the Supreme Court Rules to be taxed at 100% of the Supreme Court cost scale. His worship found

> "That Section 24(10) CVA imposes no fetter on the provisions of SCR 63.56 to 63.59"
>
> and that
>
> "It would have been open…….for the Applicant's solicitor to have sought to recover on a solicitor and own client basis"
>
> and further
>
> "open though to any solicitor on proper notice to seek to recover costs on a solicitor own client basis at a specified percentage fixed after having regard to the relevant criteria set out ins Rule 38.04(3)"

6. The Applicant in this matter, who is the same Applicant as in Barras case has applied his worship's reasoning and made applications for both those orders.

7. The Respondent's argument is that any application for costs cannot be made until an assistance certificate is issued relying on section 8(10) and Mildren J's reasoning in Moketaringa. This argument was supported by the solicitor representing the Northern Territory as amicus to the court.

8. The Respondent and the Crown argue that it is a matter of accepting that the Crimes (Victims Assistance) Act is beneficial legislation and that it was the intention of the legislature through section 8(10) and section 24(1) read together that an Applicant for an assistance certificate not be liable for costs at all until an assistance certificate is issued.

9. The Applicant accepts the beneficial nature of the Act but argues that section 8(10) and hence Moketaringa's case only apply to the costs between the Applicant for assistance and the Northern Territory not the solicitor client costs between the Applicant and their solicitor. Mr Neill further

argued that there is no support for the argument that it was the intention of the legislature to exclude solicitor from pursuing his client for his fees only that those fees cannot be extracted from the assistance granted to the Applicant.

10. Mr Loadman in Barras case ruled that considering the beneficial nature of the legislation and given the analysis in Barbara Woodruffe v Northern Territory of Australia (2002) 10 NTLR 52 by the Court of Appeal,

> "It is sufficient to observe firstly that to allow a legal practitioner to recover profit costs in excess of those received by the Applicant form the first Respondent would impinge on that philosophy and obviously reduce in money terms the benefit received be the Applicant."

11. However his worship had decided earlier in his reasons at paragraph 16 that

> "In any Local Court matter……. appropriate for the making of a costs order for recovery of costs by a solicitor from his or her client it is governed by the provisions of SCR 63.59"

12. His Worship accepted at paragraph 26 of his decision that section 8 (10) does mean that unless an Assistance certificate is issued the Court is not empowered to make any order for costs by a Respondent to an Applicant. This is of course the view taken by Mildren J in Moketaringa. His worship further ruled that only when considering an application under section 24(1) can the Court make an order for costs without an assistance certificate.

13. I have to agree with his worship that section 24 allows a solicitor to make an application in the absence of the issuance of an Assistance certificate. If the operation of section 24 were limited by section 8(10) then it would have the effect of allowing Applicants who decide not to pursue their application for whatever reason to avoid paying their solicitors for the work up to that stage. It is my view that section 24 requires the solicitor to make the application for costs as against the client to allow the Court the opportunity to decide at what rate those costs should taxed at and whether the solicitor should be allowed to claim costs from his client at all.

14. What are the factors the court should consider when deciding whether to grant an application pursuant to s 24(1) and the purpose of section 24(1)?

15. It is my view that the courts discretion in this matter is unfettered and that it can take into account any of matters which it thinks are appropriate. In a situation such as this where the client has terminated the instructions with the solicitor and has subsequently decided not pursue the claim it is my view that it is incumbent upon the court to look into the reasons why the instructions were terminated and why the client has decided not pursue their claim. These matters should be considered in light of the beneficial nature of the legislation.

16. The letter dated the 15th September 2002 of Mr & Mrs Tomlinson annexure B to the affidavit of Pam Tregear sworn the 5th November 2002 is the only indication of why the Tomlinsons have decided not to pursue their applications for assistance. Mrs Tomlinson does not in her affidavit state why she has decided not to pursue her application. The letter of the 15th of September 2002 states

> "They *(the police)* were extremely critical of the this when that contacted me, as they were of the claim in general – In fact they give our case very little chance of success.
>
> Given that advise both Judy and I do not intend to continue with this case"

17. It was therefore upon the advice of the police that the application for assistance had little chance of success that the Tomlinson's had decided to not proceed. I do note that the application for assistance remains on foot. I do not have enough evidence before me to decide whether the advise given by the Police was good advice or not and therefore I make no comment about the likelihood of success of the Tomlinson's claim for an assistance certificate.

18. It is also clear from the contents of the letter of the 15th November 2002 that Mr & Mrs Tomlinson had difficulties with the accounts sent by Ward Keller prior to that letter and Mr Tomlinson's perception of how Mr Neill had dealt with him. There is no dispute that Ward Keller had done some work on the application for assistance there was however a question in Mr Tomlinson's mind about the quality of that work.

19. Solicitors and their clients often have disagreements about advice given and actions taken and it is also common for clients to disagree with the fees charged to them. However whether those complaints are justified rarely comes to the attention of the court.

20. If it were the case that the court was convinced that the advice given to the client was of so little value to the client or was in fact wrong then it is my view that the court when considering an application under section 24 could refuse the application by the solicitor. There is not enough evidence before me in this case to show that the advice given was wrong and I am not convinced that it was therefore I cannot refuse the application on that basis.

21. Mrs Tomlinson claims in her evidence that she was of the understanding that she had been advised by Mr Neill and signed a costs agreement to the effect that unless there was an Assistance certificate issued that she would not be responsible for costs. Mrs Tomlinson accepted that she had been told that she would have to pay for disbursements and those disbursements wouldn't be more than $750.00.

22. Mrs Tomlinson had an agreement with Ward Keller regarding the payment of costs in relation to her matter ("the costs agreement"). A copy of that agreement was annexed to her affidavit and marked "JT3"and it is appropriate to go to the terms of that contract.

23. Paragraph 1 of the costs agreement states:

> "The professional fees chargeable by Ward Keller and payable by the client will be limited to the extent to which these costs are allowed as between Ward Keller and the client by a Court on the application of Ward Keller or the client, or as agreed between Ward Keller and the Northern Territory of Australia."

24. Paragraph 5 reads:

> "Ward Keller may render accounts for disbursements at such times as we consider appropriate, NOT only at the end of this matter. Ward Keller will render an account for professional fees only at the end of the matter, or when Ward Keller cease acting for the client."

25. Paragraph 9 reads:

> "In the event that you the client terminate Ward Keller's retainer for any cause or if Ward Keller cease to act for you for any reasonable cause, Ward Keller will charge you in accordance with Attachment A for any work which is either necessary or proper associated with such termination or cessation ,"

26. The agreement was signed by Mrs Tomlinson with an acknowledgment that she had read and understood the agreement. Counsel for Mrs Tomlinson argued that the agreement was confusing in its terms and could not have been explained properly to Mrs Tomlinson at the time she signed it. Annexure "A" of the affidavit of John Neill sworn on the 10th December 2002 shows that Ms Saraglou spent 11 minutes with the Tomlinsons "going through their costs agreement". Counsel for Mrs Tomlinson argues that this is not enough time to properly explain the agreement and all of its consequences

27. Further explanation of the issue of costs was contained in the letter by Ward Keller to Mrs Tomlinson dated 30th November 2002 annexed to her affidavit and marked "JT1". Mrs Tomlinson states in her affidavit at paragraphs 6&7 that she understood that she and her husband would only have to pay disbursements for the work done on their crimes victims assistance applications. The relevant paragraph of the letter reads:

> "8. Lawyers are not allowed to charge clients in matters under the Crimes (Victims Assistance) Act for professional fees, except as directed by the Court at the end of the day"

28. She also states at paragraph 10 of her affidavit that when she saw Ms Saroglou to sign the costs agreement that there was no explanation of that agreement. I do not have any affidavit evidence before me of Ms Saroglou as to the advise she gave Mrs Tomlinson at the time and I am not convinced that a full explanation of the agreement was given to Mrs Tomlinson.

29. It is important to note that the correspondence between Mrs Tomlinson and Ward Keller did not allude to the issue of costs on the termination of instructions before the conclusion of the application even though the costs agreement did. It is therefore very important that there was not a full explanation of the costs agreement to the Tomlinsons. If the relevant clause was never specifically pointed out then the contents of the letter of the 30th of November 2002 could have led the Tomlinson's to wrongly believe that they were not going to be responsible for fees at all whether they were successful or not.

30. Mr Neill argued that the paragraph of the letter quoted above made it clear that fees could be charged if "directed by the court at the end of the day". However it is my view that statement could be and obviously was interpreted as referring to the conclusion of the Application for Assistance. The terms of the costs agreement and the correspondence between Ward Keller and the Tomlinsons did not make it clear what was to happen should the application not proceed and it was open to the Tomlinsons to interpret those documents as meaning that they would not be charged any fees. Mrs Tomlinson states in her affidavit at paragraph 8 that "John Neill advised us that in Crimes (Victims Assistance) applications, the lawyers then pursue their costs after the case is completed and that would not affect us at all." This statement was not denied by Mr Neill in his affidavits. He did state

however that he made it clear that a lawyer could make an application to the court for fees at the end of the day.

31. It is argued by Mr Priestley appearing as amicus that the intention of the legislature was to protect an Applicant from the legal costs of making an application and that is why section 24 makes it clear there is no right unless the court otherwise orders. I cannot accept however that the legislature intended to exclude solicitors from fees completely (there is nothing in the second reading speech which suggests that) It is my view section 24 merely gives the court a supervisory role over the circumstances in which a solicitor can charge his client fees and upon what basis those fees will be charged.

32. I accept the evidence of Mrs Tomlinson that she understood she would not be responsible for costs of the application for assistance should it be pursued. I understand that Mrs Tomlinson had issues with the advice given by Ward Keller and if they were suing for their fees on contract that is something she could use in her Defence. Ward Keller is not suing for fees in this case they are applying to the court for the right to render an account (upon which they may sue at a later date). I have found earlier in these reasons the quality of advice is something to consider in a section 24 application but I do not have enough evidence to reach a conclusion regarding the quality of that advice.

33. I find on the balance of probabilities that Mrs Tomlinson's truly believed that she would not be responsible for costs of the action. However I am not convinced that Mrs Tomlinson even considered the issue of costs upon termination of instructions before the conclusion of the matter because all of the advice was concentrated on costs at the conclusion of the matter. It is evident from Mrs Tomlinson's affidavit evidence that she did not specifically consider the issue of costs upon the termination of instructions and nor was she specifically referred to the relevant clause in the costs agreement. Therefore she cannot now say that she had an understanding at

the time of the termination of Ward Keller's instructions before the conclusion of the matter that she would not be paying them for work done.

34. In those circumstances I am prepared to grant Ward Keller's application to render an account to the Mrs Tomlinson.

35. **What cost scale should apply and upon what basis should the account be rendered or taxation take place?**

In his decision in the Barras case _ Mr Loadman SM held that to fix a percentage the court should consider the factors set out in rule 38.04(3) and that there was no need to set the basis upon which a solicitor could charge because that was set out in Order 63.57 of the Supreme Court rules (see paras 44-47 & 51 of his worship's decision).

36. Turning then to the factors set out in rule 38.04:

> "(3) In fixing the appropriate percentage, the Court is to –
>
> (a) have regard to –
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> (i) the complexity of the proceeding in fact and law;
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> (ii) the amount awarded to the plaintiff or defendant;
>
> (iii) the efficiency with which the parties conducted the proceeding;
>
> (iv) the preparedness of the parties at a conciliation conference, prehearing conference or hearing of an interlocutory application; and
>
> (v) any other matter the Court considers appropriate;"

37. Whether or not the costs claimed are reasonable is not for me to decide that is a matter for the taxing officer. It is my task to look at the overall work done by the solicitor and look at the complexity of the claim and the efficiency in which the matter was dealt with before I set the percentage applicable. The only unusual feature of this application for assistance was that it related to an offence of trespass, not an offence which caused actual physical injury to the Applicant. Such a claim is not excluded under the

definition of injury but may be a little more difficult to establish. So the legal issues were not complex. Mr Luppino SM considered a similar case in Cassandra Yaxley v Northern Territory of Australia & Collins (2002) NTMC 036. In that case the Applicant made an application for assistance arising out of her husband's apprehension of an intruder into their house. His Worship accepted that the applicant's mental injury arose of the commission of the offence of unlawful entry but did not arise out of the damage to the property. His Worship found that the injury arose of the fact that there was an intruder in the applicant's house. In this matter Mrs Tomlinson was claiming for mental injury arising out of the trespass to her property but her damages claim was based in the fact that she became aware that there had been intruders on her property.

38. The application was lodged out of time and some of the costs claimed are for the application for extension of time. Mrs Tomlinson says in her affidavit that the timing of the filing of the application was always in Ward Keller's hands and left to Ward Keller. The advice of Ward Keller in the letter of the 30th November 2001 was to hold off filing the application so as not to upset a possible settlement in Mr Tomlinson's Work Health matter. However it should be noted that further advice in that same letter was that "but so as to be within time given the 12 month limitation period". Even with this advice the application was filed out of time.

39. Mr Neill in his affidavit of the 9th of December 2002 states that he has been told by and verily believes that Ms Saraglou had advised the Tomlinsons' of that the applications were going to filed out of time. This evidence is contrary to the evidence of Mrs Tomlinson that she had left it to Ward Keller to decide when the application should be filed. I have to accept the direct evidence of Mrs Tomlinson over the heresay evidence of the Mr Neill and find it more likely that the Tomlinsons did just leave it to their solicitors to decide the timing of the filing of the applications.

40. Mr Neill argued that the filing of the application for assistance had to be delayed so as not to jeopardise the settlement of Mr Tomlinson's work health claim. This may be so nevertheless the application could have been filed and not served pending the settlement thereby negating the need for an application for extension of time. Therefore there is some doubt about the efficiency of the service given to Mrs Tomlinson by Ms Saraglou a junior solicitor of Ward Keller at the time.

41. The only other issue to consider is that there was a an extraneous factor which led to the termination of Ward Keller's instructions by Mrs Tomlinson and that was Mr Tomlinson's anger with the result achieved in his Work Health matter and the accounts already sent by Ward Keller. Mrs Tomlinson's decision to terminate Ward Keller's instructions was also influenced by the advice received from a representative of the Police that her application was unlikely to succeed. I will make no comment on the quality of that advice except to say it should not be the practice of police officers to advise "victims" on the likelihood of the success of their claims under the Crimes (Victims Assistance) Act. I am sure that the particular police officer did not have all of the relevant information and should not have been advising Mr & Mrs Tomlinson except as to the prosecution of any criminal charges.

42. I should also take into account the beneficial nature of the legislation and the court's role in ensuring that Applicant's in meritorious applications for assistance are not penalised when it comes to costs. It is my view that Mrs Tomlinson's application, on the little information I have, had some merit even though it may have been a difficult road to success, she chose to terminate her instructions for a combination of reasons, she did not consider at the time she would be responsible for costs up to that date. Mrs Tomlinson still has a current application on foot and could pursue that claim but says she has chosen not to and as she has a solicitor acting for her now she has made that choice in consultation with that solicitor.

43. Taking into account all of these matters and the confusion caused about the charging of fees it is my view that Ward Keller's costs should be rendered on the basis of 60% of the Supreme court scale of fees.

44. I further rule that any costs claimed for the extension of time application between Ward Keller and Mrs Tomlinson be disallowed.

45. The starting point upon which the taxation of these costs should take place is on a solicitor client basis unless there is an agreement or order of the court otherwise (see order 63.57 of the Supreme Court Rules). The Applicant has claims that in this matter the basis of the taxation should be on a solicitor client basis however does not support his argument with any substantial argument.

46. There is an agreement in this matter regarding costs and that agreement defers to the Court making an order under section 24 of the Act therefore it is open to the court to decide whether the costs should be on a solicitor client, standard or indemnity basis. It is my view that Applicants in these proceedings as a general rule should not be subject to costs more than they could have recovered from the Northern Territory should the application be successful. It would fly in the face of the nature of the legislation to allow a solicitor to gain more for costs so as to reduce the amount of the award the Applicant receives. Therefore unless there is something particularly unusual about the case and unless it can be establish that the Applicant themselves have acted unreasonably regarding their dealings with their solicitor the court should not allow for more costs than could be recoverable as against the Northern Territory. There is nothing particularly unusual about this matter.

47. I therefore order the following:

1. Ward Keller be granted leave to render an account for fees to Mrs Judith Tomlinson for their work on her behalf in this proceeding on a standard basis at 60% of the Supreme Court scale of costs.

2. The costs regarding the application for an extension of time shall not be included in the account the Mrs Tomlinson and shall not be recoverable from her.

3. Should the costs not be agreed then the account shall be taxed in accordance with Order 63.37 of the Supreme Court Rules.

4. Each party to bear their own costs of this application.

Dated this 23rd day of December 2002

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Tanya Fong Lim
JUDCIAL REGISTRAR