CITATION: *Skeen v Epsomm Pty Ltd [2004] NTMC 023*

PARTIES: JASON ANTHONY SKEEN
v
EPSOMM PTY LTD
ABN 31 286 933 565
T/AS THE HUMPTY DOO TAVERN

TITLE OF COURT: WORK HEALTH COURT
JURISDICTION: WORK HEALTH ACT

FILE NO(s): 20403858
DELIVERED ON: 24 March 2004
DELIVERED AT: DARWIN
HEARING DATE(s): 18 March 2004
COSTS DECISION OF: D LOADMAN, SM

CATCHWORDS:

INDEMNITY COSTS ON SUMMARY JUDGMENT APPLICATION – PRINCIPLE APPLICABLE TO COSTS AWARD

CASES REFERRED TO:

COLGATE-PALMOLIVE COMPANY and COLGATE-PALMOLIVE PTY. LIMITED v. CUSSONS PTY. LIMITED; CUSSONS PTY. LIMITED v. COLGATE-PALMOLIVE COMPANY and COLGATE-PALMOLIVE PTY. LIMITED No. NG594 of 1989 FED No. 801/93 Costs (1993) 46 FCR 225 ("Colgate")

LATOUDIS v. CASEY [1990] HCA 59; (1990) 170 CLR 534 F.C. 90/054 (20 December 1990) ("Latoudis")

Re: FOUNTAIN SELECTED MEATS (SALES) PTY. LTD. And: INTERNATIONAL PRODUCE MERCHANTS PTY. LTD.; IBRAHIM HUSSEIN DELLAL; JOHN ROBERT DONNAN; HASET SALI and ROSS PETER MCLINDIN No. VG152 of 1983 Practice and Procedure ("Fountain")

REPRESENTATION:

Counsel:

Worker:	S Southwood
Employer:	I Morris
Insurer:	M Grant

Solicitors:

Worker:	Priestley Walsh
Employer:	Hunt and Hunt

Judgment category classification: B
Judgment ID number: [2004] NTMC 023
Number of paragraphs: 19

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20403858

BETWEEN:

JASON SKEEN
Worker

AND:

EPSOMM PTY LTD
ABN 31286 933 565
TRADING AS THE HUMPTY DOO
TAVERN
Employer

DECISION ON COSTS

(Delivered 24 March 2004)

Mr David LOADMAN SM:

1. Following this Court's decision of 18 March 2004, some procedural orders were made by consent. Relevant only to this decision was a certificate for the engagement and the appearance of senior counsel.

2. In relation to costs on the claim (the counterclaim nor any issue touching it were not justiciable) Mr Southwood seeks award of costs on an indemnity basis.

3. Spawned perhaps by an indulgence from the Court, in regard to the counterclaim being referred by analogy with the flower in the recited extract from Gray's *Elegy Written in a Country Churchyard*, is via Mr Southwood a copy of the work by Gray namely *Ode on the Death of a Favourite Cat, Drowned in a Tub of Gold Fish".* This Court was at first forced to conclude that Mr Southwood was comparing "*The fair round face, the snowy*

beard" with the facial features of the hirsute Mr Morris. The problem with that is, the cat is female and "*Presumptuous Maid*" would not be an apt description of Mr Morris. Consequently factually or in jest Mr Southwood seems then to be wishing the same fate on Mr Morris as was suffered by the cat [the cat drowned attempting to eat two goldfish in a bowl]. This is a fate which is not within the power of the Court. Perhaps on further reflection such a fate is wished by him on the counterclaim, although if that be so, the relevance of the ode is obscure to this Court. So much for indulgence.

4. Necessarily, if somewhat reluctantly, the Court now must deal with the issue of the basis upon which the costs order if any should be made. Firstly the application for summary judgment being upheld embraces the philosophy of costs being awarded to the worker as the successful party according to the principles outlined in the decision of *Latoudis.*

5. As highlighted by Sheppard J in *Colgate*, the usual basis for an order of costs to the successful litigant is on a "party and party" basis. The recovery of all costs actually charged to the litigant for the expert witness, solicitor and counsel is never achieved and to the uncomprehending litigant is without logic.

6. Nevertheless it is the usual basis of a costs order and the reasons for such are comprehensibly canvassed in *Colgate* as are the historical issues for different costs awards in the passages at p251 onwards and on p253. The Court, it is pointed out, has a wide discretion in relation to issues of costs but such discretion must be judicially exercised:-

> *"In Fountain Selected Meats (Sales) Pty. Limited v. International Produce Merchants Pty. Limited (1988) 81 ALR 397, Woodward J said (at 400-401):-*
> *"As I said in Australian Transport Insurance Pty Ltd. v. Graeme Phillips Road Transport Insurance Pty Ltd (1986) 71 ALR 287 at 288, concerning this court's discretion in the award of costs: 'That discretion is "absolute and unfettered", but must be exercised judicially (Trade Practices Commission v. Nicholas Enterprises*

(1979) 28 ALR 201 at 207). Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases where 'there is some special or unusual feature in the case to justify the court exercising its discretion in that way' (Preston v. Preston (1982) 1 All ER 41 at 58). It is sometimes said that such costs can be awarded where charges of fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court's discretion - for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties: see Andrews v. Barnes (1988) 39 Ch D 133; Forester v. Read (1870) 6 LR Ch App 40; Christie v. Christie (1873) 8 LR Ch App 499; Degman Pty Ltd (in liq) v. Wright (No. 2) (1983) 2 NSWLR 354.

'Another case cited in argument was Australian Guarantee Corp Ltd v. De Jager (1984) VR 483 where (at 502) Tadgell J allowed solicitor and client costs because he found the pursuit of the action to have been 'a high-handed presumption'.' No doubt the expression 'high-handed presumption' was appropriate in the case Tadgell J had to decide, and he needed to go no further; but in order to establish a convenient principle in such cases it is necessary to be a little more prosaic. I believe that it is appropriate to consider awarding 'solicitor and client' or 'indemnity' costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion."

And further, at p255

"French J dealt with the matter again in J-Corp Pty Limited v. Australian Builders Labourers Federation Union of Workers - Western Australian Branch, (Federal Court of Australia, 19 February 1993, unreported). He referred (at 5) to Fountain and his earlier decision in Tetijo. In relation to Fountain he said (at 5):- "Although there is said to be a presumption in such cases that the action was commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law, it is not a necessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. It is sufficient, in my opinion, to enliven the discretion to award such

costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case. The case against the BTA (a reference to one of the respondents) was paper thin. The BTA's name was invoked on a sign associated with the picket and appeared in a newspaper advertisement referred to in the evidence. Two of the union officials involved in the picket had BTA authorisations to inspect premises under the relevant award. But much more than that was necessary to justify proceedings for a contravention of s.45D. In my opinion the order sought by the BTA should be made."

And further, at p256

"It seems to me that the following principles or guidelines can be distilled out of the authorities to which I have referred:-

1. The problem arises in adversary litigation, i.e. litigation as between parties at arm's length. Different considerations apply where parties may be found to be entitled to the payment of their costs out of a fund or assets being administered by or under the control of a trustee, liquidator, receiver or person in a like position, eg. a government agency or statutory authority.

2. The ordinary rule is that, where the Court orders the costs of one party to litigation to be paid by another party, the order is for payment of those costs on the party and party basis. In this Court the provisions of Order 62, rules 12 and 19, and the Second Schedule to the Rules will apply to the taxation. In many cases the result will be that the amount recovered by the successful party under the Order will fall short of (in many cases well short of) a complete indemnity.

3. This has been the settled practice for centuries in England. It is a practice which is entrenched in Australia. Either legislation (perhaps in the form of an amendment to rules of Court) or a decision of an intermediate court of appeal or of the High Court would be required to alter it. No doubt any consideration of whether there should be any change in the practice would require the resolution of the competing considerations mentioned by Devlin LJ in Berry v. British Transport Commission and Handley JA in Cachia v. Hanes on the one hand and by Rogers J in Qantas on the other. The relevant passages from the respective judgments have been earlier referred to.

4. In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some

basis other than the party and party basis. The circumstances of the case must be such as to warrant the Court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis whether here or in England. The tests have been variously put. The Court of Appeal in Andrews v. Barnes (39 Ch D at 141) said the Court had a general and discretionary power to award costs as between solicitor and client "as and when the justice of the case might so require." Woodward J in Fountain Selected Meats appears to have adopted what was said by Brandon LJ (as he was) in Preston v. Preston ((1982) 1 All ER at 58) namely, there should be some special or unusual feature in the case to justify the Court in departing from the ordinary practice. Most judges dealing with the problem have resolved the particular case before them by dealing with the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule. But as French J said (at 8) in Tetijo, "The categories in which the discretion may be exercised are not closed". Davies J expressed (at 6) similar views in Ragata.

5. Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in Fountain and also by Gummow J in Thors v. Weekes (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in Tetijo); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in Ragata) or in wilful disregard of known facts or clearly established law (Woodward J in Fountain and French J in J-Corp); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in Ragata); an imprudent refusal of an offer to compromise (eg Messiter v. Hutchinson (1987) 10 NSWLR 525, Maitland Hospital v. Fisher (No. 2) (1992) 27 NSWLR 721 at 724 (Court of Appeal), Crisp v. Keng (Supreme Court of New South Wales, 27 September 1993, unreported, Court of Appeal) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in EMI Records). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.

> *6. It remains to say that the existence of particular facts and circumstances capable of warranting the making of an order for payment of costs, for instance, on the indemnity basis, does not mean that judges are necessarily obliged to exercise their discretion to make such an order. The costs are always in the discretion of the trial judge. Provided that discretion is exercised having regard to the applicable principles and the particular circumstances of the instant case its exercise will not be found to have miscarried unless it appears that the order which has been made involves a manifest error or injustice.*

7. From the above passages there can be gleaned all relevant principles that are to be applied by the Court in relation to its decision.

8. Mr Grant says merely because the philosophies embraced by thus employer were not previously ventilated in any court, does not justify this Court classifying the pursuit of such relief as being hopeless. He referred the Court to authorities in support of his proposition, which the Court does not recite and from which the Court finds nothing particularly relevant and certainly nothing qualifying the principles referred to in the passages from *Colgate* and or *Fountain* referred to above.

9. Other authorities tendered by both counsel are not radically illuminating. Mr Southwood would have it that the employer's attempt to circumvent its obligations imposed by the *Work Health Act* could be described as procrustean.

10. This employer actually terminated payments to a worker clearly injured at work and on duty, thereby attracting the benefits of the Work Health Act at a time where on all expert evidence he was partially incapacitated from performing the work he had been originally engaged to perform.

11. Further such action was taken by the employer after the employer had agreed to implement the prescribed gradual return to work program.

12. In relation to the counterclaim, particulars said to justify the employer's actions are set out at page 5 of the substantive judgment of this Court. In

relation to particulars 1(a), 1(c) and 1(d) the allegations of misconduct were necessarily based on hearsay evidence.

13. In relation to 1(b) the worker admitted the possession of the barstools but provided an explanation.

14. But for the concessions by Mr Southwood to establish the breach of the mutuality obligation, would have necessitated the adduction of oral evidence. It was that very exercise envisaged by Mr Morris that would have dictated the failure of the worker's application. It ought be the case that caprice, especially by an employer fixed with clear statutory obligations, should not be encouraged by the Court. The employer was clearly possessed of the rights and obligations conferred by section 75A2 of the *Work Health Act*. It did not need to act as it did in law in order to avoid employing the worker. It had a clear statutory remedy for that.

15. Its activities were unprecedented. Its activities were drastic and to some extent draconian. Mr Grant says that novelty per se is not be penalised with an indemnity costs award. So much is trite.

16. In relation to principle 4 enunciated in *Colgate* and referred to above, the Court states the relevant guiding principle, namely:-

> *"The circumstances of the case must be such as to warrant the Court in departing from the usual course" "as and when the justice of the case might so require"*

17. Principle 5 instances examples of circumstances which courts have found fit within the confines of the parameters of principle 4. they are no more than examples. They do no establish a code.

18. One justification for awarding indemnity costs on the dictum of the Judge in *Fountain* is to justify such an award because of a course of proceeding in wilful disregard of practice, in this case established procedure over some 15 years or so. That is in this case above sufficient to justify such an award.

Order

19. The court consequently orders that the employer pay the worker's costs on the claim together with the costs of his application for summary judgment, including all reserved costs, and his costs of senior counsel on an indemnity basis. Such costs shall , in the absence of agreement, be taxed.

Dated: 24 March 2004

DAVID LOADMAN
STIPENDIARY MAGISTRATE