

CITATION: *Wright v Kunbarllanjuja Community Government Council* [2004]  
NTMC 041

PARTIES: Lyle Wright  
v  
Kunbarllanjuja Community Government  
Council

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH ACT

FILE NO(s): 20212500

DELIVERED ON: 1 June 2004

DELIVERED AT: DARWIN

HEARING DATE(s): 12 May 2004

DECISION OF: D LOADMAN, SM

**CATCHWORDS:**

TAXATION OF COSTS – ITEMS ON THE COMPOSITE SCALE SET OUT IN THE  
APPENDIX TO SUPREME COURT RULE 63.74 NAMELY ITEM 10 (REQUIRING  
DISCOVERY AND INSPECTION \$300) AND ITEM 11 (PROVIDING DISCOVERY  
AND INSPECTION \$225) – CHARGE DISALLOWED IN ITS ENTIRETY BY TAXING  
MASTER FOR REASON OF FAILING TO ENGAGE IN PHYSICALLY INSPECTING  
DISCOVERED DOCUMENTS

*Work Health Act*

*Supreme Court Act and Rules*

**REPRESENTATION:**

*Counsel:*

Worker: V Farmer  
Respondent: J Bradley

*Solicitors:*

Worker: Withnall Maley & Co  
Respondent: Morgan Buckley

Judgment category classification: B  
Judgment ID number: [2004] NTMC 041  
Number of paragraphs: 41

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

No. 20212500

BETWEEN:

**LYLE WRIGHT**  
Worker

AND:

**KUNBARLLANJNJA COMMUNITY  
GOVERNMENT COUNCIL**  
Respondent

DECISION

(Delivered 1 June 2004)

Mr David LOADMAN SM:

**Preliminary**

1. In the above matter, on 26 February 2004 a Judicial Registrar, fulfilling the functions of a Taxing Master, delivered a decision which is in the following terms:

*“1. Costs taxed and allowed at \$8709.52  
plus disbursements of \$6136.40.  
2. Each party bear their own costs of taxation.”*

2. By letter of 8 March 2004 and pursuant to Supreme Court Rules (“SCR”) 63.55(1), the solicitors for the worker sought a review of the Taxing Master’s decision. The Rule in question is in the following terms:

**“63.55 Objection, reconsideration and review**

**(1) Where a Taxing Master decides to allow or disallow, wholly or in part, an item in a bill or to allow some amount in respect of an item, a party to the taxation proceeding who objects to the decision may apply to have the Taxing Master reconsider the decision. “**

3. The decision on review was delivered by the Taxing Master in a document styled “Review of Taxation Ruling” dated 22 March 2004, attached to a letter by the Taxing Master of that date.
4. The review and the argument on appeal addressed to this Court on 17 May 2004 canvassed many issues. Without traversing all of those issues, it was the agreed position of both the worker’s counsel and the employer’s counsel, that the Taxing Master’s disallowance of the composite fees, being items 10 and 11 of the composite scale included in the Appendix to SCR comprised the key to the two substantive issues ventilated on the appeal.
5. Crisply the issues are whether :
  - (a) the composite fees, being items 10 and 11 set out above should have been disallowed in part or in whole; and
  - (b) in the particular circumstances of the taxation, the Taxing Master had acted properly in applying the provisions of SCR 63.34(6), which is in the following terms:

**“(6) If on the taxation of a bill, other than the taxation of a bill referred to in subrule (5), the amount of professional charges contained in the bill is reduced by 20% or more, the Taxing Master may refuse to allow to the solicitor filing the bill the amount or any part of the amount claimed in the bill in respect of the taxation of the bill and, if the Taxing Master so directs, the solicitor shall personally pay the costs of attending the taxation incurred by a party who, in the opinion of the Taxing Master, had a right to appear on the taxation and who did so appear.”** [This Court’s underlining]

6. There was argument addressed on behalf of both parties as to what the category and quantum was of the professional charges, upon or to which, the 20% reduction ought apply and so excite the discretion vested in the Taxing Master.
7. In the light of the concession by counsel for the employer, the argument of the worker’s counsel is then reflective of a common position, namely that the provisions of SCR 63.34(6) cannot be applied and would have no work to do, if this Court on the appeal decided that the disallowance of the composite fee, for the reasons supplied by the Taxing Master, was an

inappropriate exercise and an invalid deduction from the “*charges contained in the bill*”.

8. If it is determined that the Taxing Master was not entitled to disallow the composite fee for the reasons stated, or in addition, if that disallowance was otherwise in any event inappropriate, the relevant issues on the appeal will all be determined. Because of that fact, this Court will focus on that issue first.

### **The Legislation**

9. The relevant items as already recited are items 10 and 11 of the composite scale:

<b>10.</b>	<b>Requiring discovery and inspection</b>	<b>300</b>
<b>11.</b>	<b>Providing discovery and inspection</b>	<b>225</b>

10. The relevant Notes in SCR Appendix are:

**“2. Where work actually done by a solicitor is, in the opinion of the Taxing Master, adequately compensated for by an appropriate composite fee of a kind referred to in items 1 to 6 (inclusive) of the composite scale, the Taxing Master shall allow for that work a fee equal to that composite fee. [This Court’s underlining]**

(Which can only mean in this Court’s finding that if a claim is made for an amount exceeding that composite fee, instead of allowing an increased fee calculated in accordance with Note 3, the Taxing Master has the power to do no more than say he is only prepared to allow the composite fee)

**3. Subject to paragraph 4A, a Taxing Master may, in his discretion, and if satisfied that the amount of work reasonably done and time reasonably spent in doing that work warrants it, allow a fee (calculated in accordance with Part 2 of this Appendix) larger than that recoverable under paragraph 2.**

**4. Subject to paragraph 4A, where a solicitor actually does work of a kind covered in the aggregate by a composite fee referred to in items 7 to 13 (inclusive) of the composite scale, he may, instead of charging in accordance with Part 2 of this Appendix, charge and be allowed for that work the appropriate composite fee.” [This Court’s underlining]**

(Of course that governs items 10 and 11. So as long as the professional work is for the relevant category covered by the composite scale item, it is not incumbent on the practitioner to detail or be in a position to detail his professional work as he would otherwise be required to do if claiming for an increased fee based on item remuneration.)

**“5. A composite fee to which items 7 to 13 (inclusive) relates means a lump sum fee in respect of all allowances for time spent in carrying out work that, in the Taxing Master's opinion, is or should be included in that composite fee.**

**6. (3) items 10 and 11 include all time taken in carrying out work in respect of the giving or obtaining of discovery and the inspection of documents in accordance with Order 29, but do not include work done in or incidental to an application to the Court in which discovery or inspection is sought;”**

[This Court's underlining]

(So for instance an application to compel discovery by a recalcitrant practitioner who has failed or refused to discover, but is validly required otherwise to do so is not covered or included in the work for which the composite fee is allowed.)

11. The only sensible construction to be placed upon the above provision for a composite fee is, where it finds or is capable of finding application and is the course elected by the solicitor preparing the Bill, it should be allowed. There does not need to be any examination which would otherwise be appropriate, if the exercise being embarked by the Taxing Master was the one provided for in SCR Note 3. The worker's counsel submitted that the Taxing Master was completely at liberty to embark on such an exercise if he or she so chose. That is not the conclusion reached by this Court. Here the error is exacerbated. It is not simply that a reduction is made, which in this Court's finding would have in any event constituted error, but the whole item is disallowed on the basis of the perceived omission of some step in the exercise conceived by the Taxing Master as appropriate.
12. First of all common sense dictates that, if every time a composite fee was claimed, the individual components of professional activity usually or conceptually connected to or related to the exercise of that particular

function was to be examined in infinite or minute detail, the entire purpose of providing a composite fee would be defeated.

13. However, more importantly, SCR 63.46(1) relevantly provides:

**“63.46 Discretionary costs**

- (1) Except where these Rules or an order of the Court otherwise provides –  
(a) the fees; and  
(b) the allowances,  
which are referred to in the Appendix, and are there expressed to be discretionary,  
shall be allowed at the discretion of the Taxing Master.” [This Court’s underlining]

14. The discretionary charges in this Court’s ruling are all of those charges set out elsewhere in the Appendix other than those items contained in the composite scale. Clearly what is reasonable and necessary and is claimed by way of professional charges is a matter unequivocally subject to the discretion of the Taxing Master. The first and primary reason is because those items are “*there expressed to be discretionary*”. No such expression in this Court’s finding is of application to the composite fees.

15. Further, the meaning to be given to the above provision must be assisted by the provisions of SCR 63.46(2):

**“(2) In exercising a discretion under subrule (1), the Taxing Master shall have regard to –**

- (a) the complexity of the item or of the proceeding in which it arose and the difficulty or novelty of the questions involved;  
(b) the nature and importance of the proceeding;  
(c) the skill, specialized knowledge and responsibility involved;  
(d) the number and importance of the documents prepared or perused, without regard to length;  
(e) the place where and the circumstances in which the business involved was transacted;  
(f) the labour involved and the time spent by the solicitor or counsel;  
(g) the amount or value of money or property involved;  
(h) other fees and allowances payable to the solicitor or counsel in respect of other items in the bill; and  
(j) any other relevant circumstances.

16. Clearly the exercise in sub-rule (2) is to be excepted from engagement by the Taxing Master when a composite fee is claimed and the exercise of the discretion in this Court’s finding must be read down to allow what the composite fee provides for the category of work, in this case work covered by items 10 and 11 of the composite scale.

17. SCR 1.09 (the interpretation section) provides:

**" 'discovery' means discovery and inspection of documents or discovery by written interrogatories or oral examination;"**

There is no definition of what "inspection of documents" entails at all. It is to be noted that inspection of documents in any event is not categorised or defined as being an exercise exclusively involving travelling from point A to point B and physically sitting in the office at point B, perusing the documents whilst there, and returning to office.

18. The examples of a departure, from what seems to be the Taxing Master's view of normal discovery abound. There might be simultaneous joint discovery by a plaintiff and a defendant and a third party. They may elect, as is often done, to meet at some central point and to there exchange documents, photocopied or otherwise reproduced in accordance with previously stated requirements. To suggest that such an exercise, because it did not entail that which the Taxing Master dictates is a necessary integral part of discovery, should cause the composite fee to be disallowed is surely untenable. Another example comprises documents being discovered which are already in possession of the parties seeking discovery. In such circumstances, clearly no responsible practitioner would seek to either physically have an inspection of the other side's documents or even to have them copied. Again, to penalise a prudent and professional action such as that by disallowing the composite fee is also untenable. Conceptually the examples of departing from what the Taxing Master perceived as the usual practice are numerous.

19. It is to be noted that making discovery of documents as defined in SCR 1.09 does not even mention either inspection or copying.

**"make discovery of documents" means make an affidavit of documents complying with the requirements of this Chapter, file the affidavit and serve a copy on the party or person entitled to the discovery;**

20. Of course the Rules relating to discovery run from SCR 29.01 to SCR 29.16. It is interesting to observe in passing to observe the provisions of 29.02(2) which is in the following terms.

**“29.02 Discovery**

**(2) Nothing in this Order is to be taken to prevent the parties from agreeing to dispense with or limit the discovery of documents that, but for the agreement, they would be required to make to each other. “**

21. If the Taxing Master is correct in the exercise of her powers, any agreement dispensing with notional steps which may normally be part of a discovery exercise, would be visited with a disallowance of the composite fee.

**Authorities**

22. Since 1904 at the very least, there is authority which has been consistently followed in England and in the State of Victoria, which precludes the exercise embarked upon by the Taxing Master being condoned or appropriate.
23. In a decision of *Price v Clinton*, [1906] 2 Ch at 487, His Honour Mr Justice Joyce, delivered a decision which has been followed consistently. In that particular matter, a specific solicitor brought 17 different actions against the same defendant in respect of alleged misrepresentations contained in a prospectus of a company of which the defendant was a director. The actions were never consolidated and there was never any issue of a single action being a test case. The defendant’s solicitor in respect of each action lodged a separate bill of costs for taxation. The Taxing Master did not allow the fee in each case.
24. The applicant took out a summons, which was heard in the Chancery Division, contended that the Taxing Master ought to have allowed the full fee specified in the scale for the entering of each separate appearance. He had not done that and had made discretionary adjustments on the basis that, in essence though not in fact, there was a consolidation or a duplication of



work which made it appropriate in exercising his discretion to reduce the scale charge.

25. His Honour relevantly ruled as follows:

*“Now what the taxing Master has done is this: He considered that, notwithstanding Appendix N, he had a discretion as to the amount to be allowed, and that by virtue of Order LXV., r. 27, sub-r. 29, and under the peculiar circumstances of this case, he. was entitled to allow, and did allow, a smaller sum than the amount specified in the appendix. But it appears to me that whether this sub-rule enables the taxing Master to .allow more than the specified amount, or whatever the authority may be which it confers upon him, it does not entitle him to allow a smaller sum than the amount specified in the appendix.”*

26. From *Law of Costs*, GE Dal Pont, Lexis Nexis Butterworths, 2003 (at 15:66), the following extract is relevantly set out:

*“The scale also prescribes a composite scale, setting out charges for correspondence, preparing documents, telephone calls and copying. Where the work actually done by a solicitor is, in the taxing master's opinion, adequately compensated by an appropriate composite fee, the taxing master must allow for that work a fee equal to that composite fee. The taxing master may, however, allow a larger fee, calculated according to the basic scale, if satisfied that the amount of work reasonably done and time reasonably spent warrants it. The composite scale also prescribes fees for the various steps in a litigious matter, such as taking instructions, making applications, seeking and providing discovery, and dealing with interrogatories. Where a solicitor actually does work of this kind, he or she may, instead of charging in accordance with the basic scale, charge and be allowed for that work the appropriate composite fee .”*

27. The worker’s solicitor referred this Court to a decision by Luppino SM delivered 20 December 2002 and sought to rely on paragraph 1 of the Registrar’s ruling set out at page 3 of 5 (as it is) of the internet version of the decision. As pointed out, that ruling by the Taxing Master is of no assistance since it is exactly the attitude of the Taxing Master expressed in this matter. This Court is aware otherwise that the finding of Luppino SM is antithetical to this Court’s finding. The distinction which this Court

relies upon and which does not seem to have been ventilated before Luppino SM may account for a different decision being reached. In the event, this Court respectfully disagrees with the said decision of Luppino SM.

### **Findings**

28. It is the finding of this Court that going behind the composite fee is an extraordinary exercise—having scant regard to time or profit. If it was the case that double the composite fee could validly be claimed on the basis of proper item remuneration, it is difficult to conceive that any solicitor in this day and age would not choose to make that claim and opt to endeavour to obtain a substantially higher allowance than that of the composite fee. The composite fee is there to avoid the very exercise embarked on by the Taxing Master.
29. It must follow then, it is the decision of this Court that the deductions of items 10 and 11 from the Bill of Costs ought not to have been made.
30. As it has already been conceded, if the Court arrived at the finding it has, resolution of the issue recited in paragraph 5(b) of this decision would not be necessary.
31. Nevertheless in the hope that it will provide assistance in the future, this Court addresses the provisions of SCR 63.34(6).
32. SCR 63.33 imbues the Taxing Master with the same powers a Master has on a hearing of an application in a proceeding. Recourse to section 29 of the *Supreme Court Act* shows the Master is vested with all of the powers and other specified authorities of a Court and of a Judge, excepting the power to commit for contempt. That obviously means that from time to time, after having become seized of the matter, it is within the Taxing Master's power to adjourn the taxation of costs upon which he or she has embarked providing of course the requisite formalities have been complied with.

33. SCR 63.34 provides in sub-rule (1)

**“63.34 Costs of taxation**

**(1) Costs to be taxed under these Rules include the costs of the taxation.”**

34. The amount claimed in this Bill of Costs, in respect of the taxation of the Bill, having regard to the provisions of sub-rule(1) set out above, include in this Court’s finding those costs apparently styled “short charges” in this jurisdiction. Specifically those charges are set out at page 21 of 24 of the Bill. Although for instance, the attendance at taxation is not quantified in dollar figures (for reason that it pertains to a future situation), it is nevertheless part of the total amount of the “professional charges contained in the Bill”.

35. It follows that in the event this Court was to have made a finding on that aspect of the matter it would have found a Taxing Officer was obliged to take into account those items referred to at page 21 to 24 apparently also referred to as Part C of the Bill in this jurisdiction and to have applied SCR 63.34(6) to that total amount of professional charges.

36. Further this Court chooses to comment on the typed order of 4 February 2004, which is in the following terms:

*“1. Adjourned for Judicial Registrar to do calculations and written ruling.*

*2. Parties to file and serve written admission on costs for taxation within 14 days of J R Fong Lim's written ruling*

*3. Internal review on 26 February 2004.”*

From reference to the Judicial Officer’s notes on the relevant bench sheet, it seems order 2 ought to have read “*parties to file and serve written submissions re costs of taxation ...*” In the event it does not. It is far from clear as to what the typed order meant.

37. On 5 February 2004 what is described as a ruling was distributed by letter from the Taxing Master. The letter to the employer's solicitor simply confuses what was to be done even further in this Court's perception because it provides "*I refer to the above taxation and enclose for your information a copy of my ruling. You will note that I have ordered parties to file and serve their submissions re costs within 14 days of the receipt of my letter*". The "ruling" seems actually to comprise a letter addressed to the solicitors for the worker bearing the same date and under the heading "Summary" seems to decree what costs are taxed and allowed and are indeed quantified. However, the letter goes on to say the "costs of taxation" are the subject of the request for submissions.
38. In any event, on 17 February 2004 the employer by letter made written submissions and on 19 February 2004 on behalf of the worker written submissions were made. On 26 February 2004 the Taxing Master makes the order previously set out in this decision. That would seem on any basis to be an end to the matter and there is nothing at all which indicates to this Court that anything contained in those submissions was considered by the Taxing Master and there was no ruling on them. Indeed there is no change between the figure of \$8709.52 set out in the letter dated 5 February 2004 and the figure in the order of 26 February.
39. This Court was requested by the parties to proceed to quantify the Bill rather than compel the parties to return and have the matter further addressed by the Taxing Master. However, that of course cannot be the exercise indulged in by this Court in respect of the costs of the appeal.

### **Conclusion**

40. The appeal succeeds.
41. In the circumstances, the orders that conceptually the Court would make but upon which it will hear the parties are:-

- (a) that the disallowance of the composite fees claimed pursuant to items 10 and 11 of the composite fee scale set out in the SCR Appendix is set aside and the Taxing Master is directed to allow same;
- (b) that insofar as it is necessary, and by virtue of this Court's finding, the Taxing Master be required to adjust by taxing on the costs disallowed as a consequence of applying the provisions of SCR 63.34(6);
- (c) the costs of the appeal to this Court to be addressed at a time and date to be fixed, it being necessary to assess the basis of taxation and fix the percentage of the Appendix to apply to the quantification of such costs.

Dated: 1 June 2004

**DAVID LOADMAN**  
STIPENDIARY MAGISTRATE