CITATION:	*Michael Tsangaris v Inner Red Shell Pty Ltd & Theophanis Katapodis* [2004] NTMC 051
PARTIES:	MICHAEL TSANGARIS v INNER RED SHELL PTY LTD AND THEOPHANIS KATAPODIS
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20104985
DELIVERED ON:	June 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	7th June 2004
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Costs against Legal Practitioner personally – Rule 32.01(c) Local Court rules

Ridehalgh v Horsefield [1994] Ch 205

Da Sousa v Minister of State for Immigration, Local Government and Ethnic Affairs [1993] 114 ALR 708

Construction Enterprises Pty Ltd v Lafarge Plasterboard Pty Ltd [2002]unreported decision of Master Coulehan of Supreme Court in the Northern Territory of Australia

REPRESENTATION:

Counsel:

Plaintiff:	Asha McLaren
1st and 2nd Defendant:	John Dearn

Solicitors:

Plaintiff:	Asha McLaren
1st & 2nd Defendant:	Brian Johns

Judgment category classification:	C
Judgment ID number:	[2004] NTMC 051
Number of paragraphs:	21

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

No. 20104985

BETWEEN:

Michael Tsangaris
Plaintiff

AND:

Inner Red Shell Pty Ltd
1st Defendant

Theophanis Katapodis
2nd Defendant

REASONS FOR DECSION

(Delivered 9th June 2004)

Judicial Registrar Fong Lim:

1. The Plaintiff was unsuccessful in his application to have this proceedings transferred to the Supreme Court and the Defendant made an application for an order that the Plaintiff's solicitor be personally liable for the costs of that application pursuant to Section 32(1)(c) of the *Local Court Act.*

2. Section 32(1)(c) provides that

> 32. Costs liability of legal practitioner
>
> (1) Where a legal practitioner for a party to a proceeding, whether personally or through a servant or an agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct or default, the Court may make an order that –
>
> (a) all or any of the costs between the legal practitioner and the client be disallowed or that the legal practitioner

repay to the client the whole or part of any money paid on account of costs;

(b) the legal practitioner pay to the client all or any of the costs which the client has been ordered to pay to any party; or

(c) the legal practitioner pay all or any of the costs payable by a party other than the client.

3. The basis of the application for costs against the Solicitor for the Plaintiff is that the application to transfer the proceedings to the Supreme Court was misconceived. The defendant's argument is that the Plaintiff's solicitor's failure to recognise the lack of merit in the application should be seen as negligent conduct and is therefore a proper subject of a costs order pursuant to section 32(1)(c).

4. Counsel referred me to an extract from Cairns "Civil Procedure" page 627 where the learned author sets out the three stage test. First, whether there was improper, unreasonable or negligent conduct, secondly whether that conduct caused unnecessary cost and thirdly whether it is just to order the costs against the solicitor or barrister.

5. The Court of Appeal in England in the matter of *Ridehalgh v Horsefield* [1994] Ch 205 tried to define what conduct would invoke the court's exercise of its discretion to order costs against a solicitor. The Court of Appeal suggested that improper conduct is that which is improper according to professional consensus. Unreasonable conduct was defined as conduct which is vexatious and is designed to harass rather than advance the litigation. Further negligent conduct is conduct that falls short of what is expected of ordinary members of the legal profession. The Court of Appeal was very careful to state that a practitioner was not engaging in improper, unreasonable or negligent conduct if acting on instructions for an application that was bound to fail.

6. This issue was also discussed by the Federal Court *in Da Sousa v Minister of State for Immigration , Local Government and Ethnic Affairs* [1993]114 ALR 708 . French J was asked to issue costs against the solicitor for the applicant on the basis that the application was misconceived and the solicitor ought to have known it would fail. The facts were that the Applicant applied for an entry permit pursuant to one regulation of the Immigration Act which on the facts did not apply to her. The application was refused and the Applicant came to the court to overturn that decision. The application to the court also failed. His Honour was concerned that the solicitor ought to have known that the application was doomed to fail and he was also concerned that in fact the application could jeopardise the Applicant's right to apply for a visa under the proper regulation.

7. Justice French was at pains to note that the power to order costs against a solicitor personally should be exercised with care and discretion and only in clear cases. His honour did order partial costs against the solicitor in question saying it was an appropriate case to do so because the application

> "reflected a serious failure to give reasonable attention to the relevant law and facts as did the proceedings in this court".

8. Both *Ridehalgh v Horsefield* (supra) and *Da Sousa v Minister for Immigration* etc (supra)_ were applied in the Northern Territory matter of *Construction Enterprises Pty Ltd v Lafarge Plasterboard Pty Ltd* an unreported decision of Master Coulehan of 14th March 2002. The Master ordered costs against the solicitor in person on the basis that he had no authority to act for his client once his client had been placed into liquidation. The solicitor did not know of the liquidator's appointment until after the application had been heard by the court. The Master considered the authority of *Yonge v Toynbee* (1910) 1 KB 215 in which a solicitor was found liable for costs following the termination of his authority even though he did not know of the termination. The decision was followed in the

Australian case of *The Bullfinch Surprise Gold Mining co v Butler* 35 ALT 99 and the Master found himself bound by these authorities.

9. In *Yonge_v Toynbee Swinfe*n Eady J (at page 233) justified making the order against the solicitor in the following way:

> " .. . in the conduct of litigation the court places much reliance upon solicitors who are its officers; it issues writs at their instance , and accepts appearances for defendants... .. without questioning their authority............much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one...."

10. The facts in this case are clearly distinguishable to those in this case are clearly distinguishable to those in *Yonge v Toynbee* and *Construction Enterprises Pty Ltd v Lafarge Plasterboard Pty Ltd.*_ However part of the reasoning used in those cases is equally applicable in this matter. In Yonge's case the court stated the reliance of the court upon solicitors as officers of the court as an important factor in deciding whether a solicitor ought to be made responsible for costs.

11. The Court relies on solicitors as officers of the court to present the best case for their clients considering the facts and law. Solicitors are expected to properly advise their clients of the law as it applied to the facts of the client's case and to obtain full instructions from their clients to enable them to give appropriate advice. A solicitor must give reasonable attention to the law and facts available.

12. The Counsel for the Defendant argued that the application to transfer the proceedings to the Supreme Court was misconceived and bound to fail and the solicitor for the Plaintiff should be responsible for the costs.

13. The Counsel for the Plaintiff argued that the application was not misconceived. She argued that there was enough evidence before the court to support the application for a transfer in the form of her client's affidavit

and the affidavit of the accountant. She also argued that the threat of costs order against her personally was a tactic to "scare her off" acting for her client.

14. I agree that the court's power to order costs against a solicitor should not be used to deter solicitors from pursuing a client's interest nor should unjustifiable conduct of litigation financially prejudice a litigant. These two issues were discussed in the Court of Appeal in *Ridehalgh v Horsefield* and led to the Court's analysis of the circumstances in which a court may order costs against a practitioner personally as discussed earlier in these reasons.

15. Basically the Court must be very certain that the actions of the solicitor in making the unsuccessful application were either unreasonable, improper or negligent and that conduct has caused the Defendant to incur unnecessary costs.

16. I have ruled that the application to transfer the proceedings should fail on the basis that the evidence before the court did not support the application because the evidence relied upon showed that the "value" of the Plaintiff's claim was well within the jurisdiction of this court. The solicitor for the plaintiff clearly misunderstood how to apply the evidence available in assessing the value of her client's claim. The evidence of the accountant was relied upon by the Plaintiff without any qualification and that evidence showed value of the claim for partnership income at nil. With that uncontroverted evidence before the Court there was no option but to dismiss the application.

17. There is no suggestion by the solicitor that she had been required to make the application by her client against her advice and therefore I can only assume that the application was made upon the advice of the solicitor.

18. It is not my view that the solicitor for the Plaintiff has been improper in her conduct of this application nor do I believe that the application was

vexatious and therefore unreasonable. It is my view, however, that the solicitor for the Plaintiff failed to look closely enough at the evidence available and the application of the *Local Court Act* before making this application. The solicitor for the Plaintiff has not had proper regard for the facts and the law and consequently has brought an application before the court that was doomed to fail.

19. Accordingly it is my view that an order for costs ought to be made against the solicitor personally.

20. It should be noted that the Plaintiff has filed an appeal of my decision to dismiss the application to transfer these proceedings. It is my view, in relation to that appeal, that should the Plaintiff succeed in that de novo appeal because further evidence is put before the court this costs order should not be disturbed. The order should not be disturbed because one of the reasons the order is made is that the solicitor should have realised the evidence as it stood did not support her application.

21. My orders are:

    21.1 The Plaintiff's solicitor Asha McLaren pay to the Defendant the Defendant's costs of and incidental to the application to transfer the Plaintiff's proceedings to the Supreme Court.

    21.2 The costs are to be at 80% of the Supreme Court costs scale.

Dated this 9th day of June 2004

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Tanya Fong Lim
JUDICIAL REGISTRAR