

CITATION: *Premila Freese v The Northern Territory of Australia* [2004] NTMC 066

PARTIES: PREMILA FREESE  
v  
THE NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victim's Assistance)

FILE NO(s): 20300282

DELIVERED ON: 28 July 2004

DELIVERED AT: Darwin

HEARING DATE(s): 11 June 2004

JUDGMENT OF: B Monaghan

**CATCHWORDS:**

Taxation of Costs- whether in a single bill, costs can be claimed under both percentage scale and lump sum scale; whether application for approval of compromise can be claimed as an uncontested interlocutory application under para 9(b) of Appendix to Order 63 Supreme Court Rules.

*Crimes (Victims Assistance) Act* ss24(4),(5)  
Crimes (Victims Assistance) Reg 5  
Local Court Rule 15.08  
Order 63, para 9(b) of Appendix to Supreme Court Rules.  
Interpretation Act s62A

*Bullock v NT News* [2002] NTMC 050  
*Wright v Kunbarllanjnja Community Government Council* [2004] NTMC 041

**REPRESENTATION:**

*Counsel:*

Applicant: Ms Milner  
Respondent: Mr Johnson

*Solicitors:*

Applicant: Halfpennys  
Respondent: Priestly Walsh

Judgment category classification:

Judgment ID number:

[2004] NTMC 066

Number of paragraphs:

26

IN THE LOCAL COURT

AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20300282

BETWEEN:

**PRIMILA FREESE**  
Applicant

AND:

**THE NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

REASONS FOR DECISION

(Delivered 28 July 2004)

JUDICIAL REGISTRAR MONAGHAN:

1) The Taxation of costs hearing on 11 June 2004 identified one issue in dispute between the parties. That issue stemmed from the interpretation to be placed on Section 24(5) of the *Crimes (Victims Assistance) Act*. Sections 24(4) and (5) state as follows:

*(4) The Regulations –*

*(a) may prescribe a lump sum fee for specified work done in respect of an application under section 5, and specified disbursements incurred in doing that work, as the costs allowable in respect of that application; and*

*(b) may prescribe a percentage of the costs otherwise allowable under the Appendix to Order 63 of the Supreme Court Rules as the costs allowable for work done in respect of an application under section 5.*

*(5) A legal practitioner who is entitled to recover costs in respect of an application under section 5 may claim those costs as prescribed under subsection (4)(a) (“**the lump sum scale**”) or as prescribed under subsection (4)(b) (“**the percentage scale**”).*

2) The questions for me as taxing officer are:

- a) Can an applicant claim part of her costs under the lump sum scale referred to in s24(4)(a) and part under the percentage scale referred to in s24(4)(b) or does she have to elect which scale she uses and apply only one?
- b) If an applicant can apply both scales to the same bill of costs, then is her claim for the costs of an application for approval of compromise properly claimed as an uncontested interlocutory application under paragraph 9(b) of the Appendix to the Supreme Court Rules?

3) The Crimes (Victim's Assistance) application in question related to an assault on a minor by a fellow school student. The application for Victim's Assistance was brought by the minor through his litigation guardian. The précis to the applicant's bill of costs states:

*“The matter was resolved by way of consent orders whereby the applicant’s solicitor was required to prepare and place before the court an application that the compromise outlined in the consent agreement be approved, an affidavit in support and an opinion in relation to the said compromise. Such documentation is required to be prepared in order for the matter to be finalised and such applications cannot be finalised without such documentation being prepared and filed. There is no specific provisions in the regulations outlining the recovery of those costs in the circumstances and the applicants solicitors request payment pursuant to regulation 7 under section 24(4)(b) of the Crimes (Victim's Assistance) Act”.*

4) The applicant elected to claim the majority of their costs under the lump sum scale referred to in section 24(4)(a) of the *Crimes (Victims Assistance) Act* and detailed in the *Crimes (Victims Assistance) Regulations*. They claimed \$750 for work done up to the first pre hearing conference in accordance with regulation 5(1)(a)(i). They claimed an additional fee of \$700 for further work done up to the hearing pursuant to regulation 5(1)(b)(ii) on the basis that the offender had not been found guilty of the offence resulting in the injury.

5) Regulation 5 reads as follows:

**5. Costs: lump sum fees etc. allowable if assistance not over \$5 000**

*(1) For the purposes of section 24(4)(a) of the Act, the fees and disbursements allowable as costs in respect of an application under section 5 of the Act, where the assistance certificate specifies an amount not exceeding \$5 000, are as follows:*

*(a) a fee of –*

*(i) \$750 for work up to and including the first prehearing conference, including taking instructions, obtaining preliminary medical reports, preparing, filing and serving the application, attending the mention and attending the first prehearing conference; or*

*(ii) \$1 050 if the work referred to in subparagraph (i) also includes an application for an extension of time for the purposes of section 5(3) of the Act;*

*(b) an additional fee of –*

*(i) \$350 for further work up to the hearing of the application, including obtaining additional expert medical reports, attending further prehearing conferences and all preparation for the hearing of the application; or*

*(ii) \$700 if the work referred to in subparagraph (i) relates to an application in respect of which the offender has not been found guilty of the offence that resulted in the injury suffered by the victim and where it was necessary to obtain police records or obtain evidence from witnesses;*

*(c) for attending the hearing of an application, an additional fee of –*

*(i) \$400 if the hearing does not exceed half a day;*

*(ii) \$800 if the hearing exceeds half a day but does not exceed one day; or*

*(iii) \$800 for the first day of the hearing plus \$400 for each day or part of a day thereafter;*

*(d) all reasonable disbursements, excluding counsel's fees.*

*(2) A fee referred to in subregulation (1)(c) is not allowable if, during the hearing of the application, the parties reach an agreement in pursuance of section 10A of the Act and the Court specifies the agreed amount in the assistance certificate. (my underlining)*

6) The applicant settled this claim prior to any hearing but required the court to approve the compromise as the applicant was a minor. Local Court Rule 15.08 sets out the procedure for approval of compromise as follows:

*(1) Where a claim is made in a proceeding by, on behalf of or against a person under a disability, no compromise, payment of money or acceptance of an offer of compromise under Part 20, whenever entered into or made, is, so far as it relates to the claim, valid without the approval of the Court.*

*(2) Subject to subrule (3), an application for approval referred to in subrule (1) is to be filed not later than 28 days after the compromise, payment or acceptance is entered into, made or given.*

*(3) If an application for approval is made at the hearing of a proceeding, the Court may dispense with the requirement of subrule (2).*

*(4) At the hearing of an application for approval, evidence is to be given of –*

*(a) the date of the compromise, payment or acceptance;*

*(b) the date of birth of the person under a disability; and*

*(c) the signature of the litigation guardian.*

*(5) The compromise, payment or acceptance is to be taken to have been entered into, made or given at the time of approval by the Court.*

7) The lump sum scale in the Crimes (Victims Assistance) Regulations does not cater for such applications as the only further additional lump sum fee that can be claimed is for attendance at the hearing (see Regulation 5(1)(c) above.) The applicant therefore claimed for work done in preparing the application for approval of the compromise as an uncontested Interlocutory Application under paragraph 9(b) of the Appendix to the Supreme Court Rules being the composite scale rate.

- 8) The first question for the taxing officer is whether an applicant can claim part of her costs under the lump sum scale envisaged in s24(4)(a) *Crimes (Victims Assistance) Act* and defined in the Regulations and part under the percentage scale envisaged in s24(4)(b) or does she have to elect which scale she uses and apply only one.
- 9) Mr Johnson, solicitor for the respondent, objects to the application for compromise being dealt with in the manner sought. He argues that the applicant has chosen to claim costs by application of s24(4)(a) –ie a lump sum fee- and that the “lump sum fees” set out in the Regulations are the only fees allowable. He relies on an earlier unreported decision of mine in *Spence v NTA & Dunne* handed down on 15 December 2003 wherein I said:

*It appears to me that Section 24(5) above clearly states two alternatives- namely lump sum fee or percentage scale. It does not suggest a combination of the two is envisaged-rather that an election should be made as to which alternative the applicant prefers.*

*Two of the key objects of the amendments to the legislation introduced in 2002 were to simplify the process and to reduce legal costs. This is clear from the Second Reading Speech of Dr Toyne dated 22 August 2002. An “either/or” option as regards the method of preparing a bill of costs appears to me to be in keeping with such objects.*

- 10) If I follow the reasoning in my earlier decision, then the applicant would not be able to claim under the percentage scale for their costs in preparing the application for approval of a compromise. In fact, they would have to either resubmit their whole bill using the percentage scale (ie by applying the costs framework set out in the Supreme Court Rules) or simply forego any claim for recovery of their costs with respect to the compromise and claim lump sum fees for preparation alone.
- 11) An application for approval of a compromise does not appear to be included in the three tiered lump sum arrangement set out in the Regulations. When considering Reg 5, for example, there is a lump sum fee of \$750 for “*work up to and including the first pre hearing conference*”. The fee includes “*preparing, filing and serving the application*”. The approval of the court to the appointment of a

litigation guardian, one would expect, would be included in this lump sum as it is work done in preparing for the first prehearing conference. A higher fee is allowed under the lump sum fee if an application for an extension of time is required.

- 12) An “*additional fee*” of either \$350 or \$700 is claimable “*for further work up to the hearing of the application*”. The higher amount is claimable if the offender has not been found guilty of the offence that resulted in the injury and where it was necessary to obtain police records or evidence from witnesses. Does this “*additional fee*” for “*further work up to the hearing of the application*” include an application for approval of a compromise? I do not consider that it would. The basis for the additional fee tends to be an allowance for such matters such as obtaining evidence and briefing witnesses –all matters preparatory to a hearing. The application for approval of a compromise can hardly be considered in this category.
- 13) A further lump sum fee is claimable for attending the hearing of the application – the amount depending upon the length of the hearing. The applicant has not claimed this fee as a settlement was reached prior to the hearing.
- 14) If I am to follow my reasoning in my earlier decision in *Spence v NTA* (supra) as regards the interpretation of s24(5), then the applicant is left unable to be compensated for the application for approval of a compromise- unless they redraft their bill using only the percentage scale. This does not appear to me to be a fair and reasonable conclusion to reach unless that is clearly what the legislation allows. The approval of a compromise is not simply a “rubber stamping”. The Court expects a proper application to be made and to be supported by affidavit evidence. One would expect such work to be claimable.
- 15) In my earlier decision in *Spence v NTA* (supra), I based my reasoning on the fact that the new amendments were supposed to simplify the victims assistance process and limit costs. I am now faced with a different circumstance in which the application of both lump sum and percentage scales has in fact lead to a cost effective outcome.
- 16) Further, the new Crimes Victims legislation attempts to support pretrial settlements and to deter applicants continuing to hearing without good reason.

There are costs implications should an applicant refuse a settlement offer and then obtain equal or less at a hearing (See Section 17(4) Transitional provisions). There is also the inability of an applicant to claim the costs of attending at a hearing if they settle during the hearing (see Reg 5(2)). The applicant here is not attempting to rot the system by claiming their costs in preparing the approval of compromise application. They simply want to be paid for their time.

- 17) Section 62A of the Interpretation Act states: *In*  
*interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.*
- 18) It appears that the construction that best promotes one of the purpose s of the Act-namely a containment of costs-is one that allows the applicant to look to either or both methods of costing when they are preparing a bill of costs. There is nothing in the wording of s24(5) to prevent such an interpretation. For these reasons, I do not intend to follow my earlier reasoning in *Spence v NTA (supra)* as, in the light of the factual scenario before me, such an interpretation would place unnecessary restrictions on the ordinary meaning of Section 24(5) and would lead to an unreasonable result. Thus I intend to consider the claim for to costs relating to the approval of the compromise.
- 19) Can the applicant claim the costs of applying for approval of compromise on the basis that it is an uncontested interlocutory application? An interlocutory application pursuant to Part 25 Local Court Rules and claimed under the composite scale would normally include a court appearance. By contrast, provided sufficient information is included in the written application, an approval of a compromise is dealt with “in chambers” with no requirement that the parties attend in person. Is it reasonable to allow the applicant to claim the costs as an uncontested interlocutory application when no appearance was required?
- 20) Whilst, as I have stated earlier, the requirements of Part 25 are circumvented in most cases by the matter being dealt with without the need for an appearance by the

parties at a hearing, the application falls within a general definition of an uncontested interlocutory application under Part 25.

21) The next issue is whether the claim for costs with respect to this item can be claimed by application of Item 9(b) of the composite scale (Part 3 of Appendix to Order 63 Supreme Court Rules). This scale currently allows \$654 for an uncontested application. By application of Regulation 7 of the Crimes (Victims Assistance) Regulations, the amount claimed is 40% of that figure being \$261.60. The Notes to Part 3 of the Appendix state:

*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. Without limiting the meaning of paragraph 5 –*

*... (2) item 9 includes all time taken in carrying out work in and incidental to an application to the Court in a proceeding and in particular an application under Order 46. (Order 46 relates to interlocutory and other applications)*

22) In the circumstances before me, I note that the applicant was not required to attend at an interlocutory hearing. They were required however to provide a detailed written application. In such circumstances, is the applicant entitled to the whole of the amount claimed under the composite scale and is the taxing officer entitled to “look behind” that scale in any event? There is a divergence of judicial opinion on this issue. In *Bullock v NT News* [2002] NTMC 050, Mr Luppino upheld a Taxing Officer’s power to go behind the composite scale to satisfy herself that the work was done and that the solicitor claiming was entitled to the amount claimed. In the more recent decision of *Wright v Kunbarllanjnja Community Government Council* [2004] NTMC 041, Mr Loadman SM reached an opposing view that the purpose of the composite scale would be defeated if a taxing officer could look behind it.

- 23) In the circumstances before me, I do not intend to look behind the amount claimed under the composite scale. I rely on the broad discretion of the taxing officer to make rulings on various items on the grounds of reasonableness. The applicant was not required to attend at an interlocutory hearing. They were required however, to provide a sufficiently detailed written application and affidavit-and they did so.
- 24) I take account of the fact that in many interlocutory matters, the attendance at the interlocutory hearing is of a perfunctory nature and adds little to the written application and affidavit evidence. Most applications for the early return of documents would fall within that category. Often the most important component of an interlocutory application is not the appearance work but the work done in preparing the written application and supporting affidavit. The composite sum, if chosen, may relate to a matter which took a solicitor one hour in time all up-or ten times that. In considering the sum claimed by the applicants for this item-ie \$261.60 –and in considering the work they undoubtedly did in applying for the compromise, I consider their claim for composite sum is reasonable in any event. I therefore allow the application for approval of the compromise to be claimed as an uncontested interlocutory application under 9(b).
- 25) I note that approximately 7 units of time could be claimed by the applicant at a clerks rate for the attendance of Ms Milner at the taxation. The bill filed does not appear to be claiming any amount for her appearance so I have not done so. If this was an error in formatting the bill, then 7 units should be added at clerks rates.
- 26) Costs are taxed in the sum of \$2,048.36 together with disbursements of \$548.27

Dated this 28th day of July 2004.

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**JUDICIAL REGISTRAR**