

CITATION: *Judith McCartney v Northern Territory of Australia* [2004]
NTMC 068

PARTIES: JUDITH MCCARTNEY
v
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: LOCAL COURT

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20309141, 20317477, 20317475

DELIVERED ON: 20th August 2004

DELIVERED AT: Darwin

HEARING DATE(s): 9th August 2004

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Taxation of Costs – application of prescribed fees –
Taxing officer’s discretion – multiple applications – splitting of fees –

Price v Clinton [1906] 2 Ch 487

Spence v NTA and Dunne 15th December 2003

Bullock v Nationwide News [2002] NTMC 050

Wright v Kunbarlanjna Community Government Council [2004] NTMC 041

Freese v Northern Territory of Australia [2004] NTMC 66

REPRESENTATION:

Counsel:

Applicant: Howard
Respondent: Farmer

Solicitors:

Applicant: Hunt & Hunt
Respondent: Withnall Maley

Judgment category classification:

Judgment ID number: [2004] NTMC 068

Number of paragraphs: 40

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

No. 20309141, 20317477, 20317475

BETWEEN:

Judith Mc Cartney
Applicant

AND:

Northern Territory of Australia
Respondent

REASONS FOR JUDGMENT

(Delivered 20th August 2004)

Judicial Registrar Fong Lim:

1. The Applicant was successful in obtaining an Assistance Certificate under the Crimes (Victims Assistance) Act in relation to three separate injuries. The matters did not require a hearing. The issue between the parties is now matter of costs, whether the Applicant can claim the prescribed fee for preparation for each of the three files or whether she is only entitled to one fee split between the three matters. Parties have also asked me to rule on whether a party can claim the prescribed fee for part of the work and then fees on time scale for the balance. In particular the Respondent challenged the Applicant's right to claim costs of the taxation on a time basis and argued that those costs should be included in the hearing fee.
2. These issues have been the subject of several decisions of this court by Judicial Registrars and Magistrates.
3. Section 24(4) of the *Crimes Victims Assistance Act* sets out the costs regime which is applicable in these applications 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) or as prescribed under subsection (4)(b).”

4. The Crimes (Victims Assistance) Regulations set a lump sum fee for work specified and also sets the prescribed percentage under section 24 (4)(b) as 40% of the costs otherwise allowable under the Appendix to Order 63. The prescribed lump sum fees are:

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.

6. Costs: lump sum fees etc. allowable if assistance 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 exceeding \$5 000, are as follows:

(a) a fee of –

(i) \$1 000 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) \$1 300 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) \$400 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; or

(ii) \$800 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) \$500 if the hearing does not exceed half a day;

(ii) \$850 if the hearing exceeds half a day but does not exceed one day; or

(iii) \$850 for the first day of the hearing plus \$500 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.

5. The Applicant has claimed the lump sum amount for preparation pursuant to regulation 6(1)(a) (i) and further preparation pursuant to regulation 6(1)(b)(ii) for each of the three applications. The Applicant then claims costs of taxation on a time basis at 80% of the Supreme Court costs scale. The Applicant argued that if the Applicant elects to claim the prescribed lump sum then the Court only has to be satisfied that the work done is included in the description as prescribed then the amount should be allowed. The Applicant also argued that there is no power of the taxing officer to go behind the lump sum fee. Further the Applicant argued that the costs of taxation are not contemplated in the prescribed fees therefore the Court should look to the Local Court Rules in relation to those fees.

6. The Respondent argued that the Applicant cannot claim the prescribed amount for all three applications because in fact the preparation work done for each application was done altogether culminating in one affidavit supporting all three claims. The Respondent further argued that the claim on a time basis is not available to the Applicant once she has elected to use the prescribed lump sum and if it were allowed it should only be allowed at the 40% rate prescribed by the rules.
7. The matter has come before me for a taxation of costs. Given that there are no cost rules regarding taxation of costs contained in the Crimes (Victims Assistance) Rules pursuant to rule 5 of the Crimes (Victims Assistance) Rules the Local Court rules will be applied and through them the rules contained in Order 63 of the Supreme Court Rules
8. It is trite to say that the power to order costs comes from the legislation. In this legislation a particular costs regime has been set. It is accepted in the authorities that when the legislature set that regime it failed to consider the existence of multiple claims and other necessary work which the Applicant may have to undertake eg taxation of costs. There is no mention of these aspects in the description of the lump sum fees therefore the parties look to the Taxing Master for guidance on what and how fees for such circumstances can be claimed.
9. **Can the Taxing Master look behind the lump sum fee?** - In Price v Clinton [1904] 2 Ch 487 the Master found that because there were multiple applications the Plaintiff should not be allowed the full amount of the lump sum scale fee for an Appearance and reduced the fee accordingly. The Master was overturned on appeal. Joyce J in considering the relevant rules found that the Master's discretion was to allow more than the composite fee claimed not to allow less. His Honour stated at page 490 that:

“ There is no provision in the rules or appendix for such a case as the present, where there are several actions against the same defendant,

and all the plaintiffs are represented by the same solicitor, nor is there anything like it. If any special provision is to be made to meet a case like the present where there are many actions, that provision must be made by a new rule or an alteration of the appendix.... Therefore, in my opinion 6s.8d must be allowed for each appearance in this case.”

10. More recently there has been one decision by Judicial Registrar Monaghan of this court in relation to a claim for the prescribed lump sum fee for hearing for multiple applications. In Brown v Northern Territory of Australia [2003] NTMC 049 the Applicant had four applications which were dealt with together in one hearing. The Applicant claimed a hearing fee for each of the applications. Judicial Registrar Monaghan referred to the description of the composite item in Regulation 6(1)(c) which refers to “for attending the hearing of an application”. Judicial Registrar disallowed a hearing fee for each file on the reasoning that the regulation provided for attending the hearing and therefore as there was only one hearing there should only be one fee allowed.
11. On more general principles there have been two decisions of Magistrates which are contradictory in their conclusions as to whether the Taxing officer has the discretion to look behind the composite scale fee set by the Supreme Court. The parties to this action have submitted that those authorities apply equally to the lump sum prescribed fees under the Crimes (Victims Assistance) regulations.
12. In Bullock v Nationwide News and Bradshaw [2002] NTMC 050 Luppino SM considered an appeal of a ruling by myself to look behind the composite fee. The circumstances were that the first defendant had claimed the composite scale fee for an interlocutory application and also claimed counsel’s fees for the appearance on the interlocutory application. I found that the composite scale fee included the appearance work and therefore cannot be claimed when counsel does the appearance work. My decision was appealed to Mr Luppino. His worship confirmed that there was a power in

the Taxing Master to go behind the composite fee. At paragraph 16 of his decision His Worship states:

“It is an accepted principle that the discretion as to costs is absolute. At common law a court has the power to disallow any work which is improperly done or unnecessarily done (see *Edwards v Edwards* [1958]p235 and *Myers v Elman* [1940]AC 282. This exercise of this power in relation to composite fee items necessarily involves the Court having the power to go behind the composite fee”

13. His Worship goes on further to say that the legislation should not be interpreted to fetter the discretion of the Court in the matter of costs unless there is a clear statement in the legislation to that effect see *Copping v ANZ McCaughan Ltd* [1995] 63 SASR 523.). His Worship went on to confirm the Taxing officer’s power to look behind the composite fee.
14. In *Wright v Kunbarllanjuja Community Government Council* [2004] NTMC 041 Mr Loadman SM also consider a ruling of mine as Taxing officer to look behind the composite scale fee, this time the fee for discovery. In this case the Plaintiff had filed and served his list of documents but had not physically inspected the documents. The composite fee was disallowed and the Plaintiff required to provide the court with a claim for time spent on the process of discovery on the basis that inspection was included in the description of the composite fee claimed and therefore as it had not been done the composite fee cannot be claimed. In his decision His Worship decided that when a composite fee is claimed then the Taxing Master has no discretion to disallow a part or whole of that fee.
15. At paragraph 12 of his decision Mr Loadman SM finds that :

“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.”
16. His Worship referred to Order 63.46 of the Supreme Court Rules which 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.”

17. Mr Loadman found that the charges set out in the Appendix other than that set out in the composite fees are the “discretionary charges” referred to in Order 63.46.

18. His Worship finds, at paragraph 14, that:

“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.”

19. His Worship’s reasoning is that there must be some distinction between the different charges contained in the Appendix, there must be those that are discretionary and those that are not. His Worship also referred to Order 63.46(2) which sets out the factors to be considered by the Taxing Master when exercising his discretion. His Worship finds that :

“Clearly the exercise in subrule (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 that category of work, in this case work covered by items 10 & 11 of the composite scale.”

20. Mr Loadman was referred to Mr Luppino’s decision in Bullock’s case and explained the difference in his opinion by the fact that Mr Luppino had not been pointed to the distinction between discretionary costs and composite fee. Mr Loadman respectfully disagreed with Mr Luppino’s finding.

21. His Worship Mr Loadman found that the composite scale was produced by the legislature to stop the need for the Taxing Officer to go through the detail of the work described. He does accept however that the Taxing Officer has to be satisfied that the “category of work” as described was done before the fee should be allowed.
22. Interestingly Mr Loadman did not turn his mind to the fact that there are in fact composite scale items which clearly require the Taxing Master to exercise his discretion eg the fee for Ordinary letter requires the Taxing Master to consider whether legal skill was required in the creation of the letter and if not the item would not be allowed at the Ordinary letter rate.
23. It is difficult to reconcile these two decisions and in my view they cannot be reconciled. This makes my task all the more difficult. It should be clear to the parties from my previous decisions that in my view the taxing officer has the discretion to look behind the composite fee if it necessary to do so in order to properly assess whether the fee claimed is a reasonable amount reasonably incurred. Obviously in these two cases I came to the conclusion that the amount claimed was not reasonable even if the costs were reasonably incurred. The way I came to that conclusion was to analyse what work had been done and decide whether it was reasonable to charge the composite fee for that work.
24. It is still my view that a taxing officer even when considering the composite scale, must be satisfied that the work said to be included in that composite fee has been done otherwise it would not be a reasonable charge. Therefore I respectfully disagree with the conclusion reached by Mr Loadman in Wright’s case(even though I now agree that in that case the composite fee should have been allowed) that in all cases the composite fee should be allowed and the taxing officer has no discretion to look behind it. I prefer Mr Luppino’s conclusion in Bullock’s case.

25. I accept Mr Loadman’s finding that the claim for costs under item 10 or 11 of the composite scale includes all work relating to discovery and inspection but does not require the party claiming the item to have given inspection if it has not been required of them pursuant to Order 29 of the rules (see Note 6(3) of the Appendix). This can be distinguished from the facts in the Bullock’s case where the applicant had claimed the composite fee for an interlocutory application which includes all work of and incidental to an application (see note 6 (2) of the Appendix) yet the appearance work was in fact done by a barrister (whose fees as “in house” counsel were also claimed). Simply put, in Bullock’s case the applicant was double dipping.
26. Order 63.03(2) gives the Taxing officer the general discretion to tax costs as he thinks fit if the strict application of the order would result in an anomaly. It is worthwhile to set out the exact terms of Order 63.03(2):

“63.03 General rule

(1) Subject to these Rules and any other law in force in the Territory, the costs of a proceeding are in the discretion of the Court.

(2) Where in the opinion of the Taxing Master or the Court the strict application of this Order (other than this subrule) would result in an anomaly, the Taxing Master or the Court may tax costs, or make such order in relation to costs, as he or it thinks equitable in the circumstances and the costs so taxed or ordered are payable and may be enforced under this Order accordingly.”

27. If Mr Loadman’s interpretation was applied to Bullock’s case, then the taxing officer would accept that an interlocutory application was done and allow the composite scale for that application even though the Applicant was in fact double dipping. To my mind that would be to allow an anomaly, to allow an unreasonable charge which would go against the general principle that a successful party be paid his costs at a “reasonable amount in respect of all costs reasonably incurred”(rule 63.26).

28. In conclusion it is my view that when a party claims a composite amount, the taxing officer should allow that amount if the type of work described is reasonably done. If however the taxing officer is satisfied that to allow the composite fee would be to create an anomaly in light of the general principles then the taxing officer has a general discretion to disallow the amount. To decide whether it is a reasonable amount the taxing officer must look behind the composite scale or lump sum fee only to be satisfied that the type of work described has generally been done and that there has not been another claim for the fees for the same work.
29. It should be made clear to parties that the composite fee will be allowed unless the taxing officer involved is of the opinion to do so would create an anomaly.
30. **Multiple applications – how does the lump sum apply?** – In light of the above, it is for the Taxing officer to consider whether, in the case of multiple applications to allow a lump sum fee for each file for the same work done. In Brown v Northern Territory of Australia [2003] NTMC 49 Judicial Registrar Monaghan only allowed one hearing fee for a total of 5 applications on the basis that the description contained in the regulations for the lump sum for a hearing was for “ the hearing” In Brown’s case even though there were 5 applications there was only one hearing.
31. In relation to the present case, the Applicant has applied for three preparation fees, one for each application and the Respondent has objected on the basis that only one affidavit was prepared and therefore only one preparation fee should be allowed. The Applicant argued even though there was only one affidavit prepared, there were separate steps taken for each application. For example, there were convictions for two of the offences so a separate certificate of conviction had to be obtained for each. The hospital records were obtained for each attendance and a separate request was made for each attendance. There were originally separate attendances for

prehearing conferences until it was arranged with the Court that the files were dealt with together. There can be no consolidation of proceedings in this jurisdiction, the legislation provides that there must be a separate application for each injury. It is clear that for each matter instructions have been taken, applications prepared, the medical files have been obtained and there has been attendances on prehearing conferences. Whilst instructions regarding the separate assaults may have been taken at the same time the fact that there were three incidences would have meant more time was spent in obtaining those instructions from the applicant. Applying the principles set out earlier in these reasons, I am satisfied that the work described in the lump sum fee regulation 6(1)(a)(i) was done for each application and therefore should be allowed.

32. The claim for an additional fee of \$400 for each application is a little more vulnerable as some of the preparation up to the hearing (which didn't occur) was jointly done eg attendances on pre hearing conferences and mentions. The affidavit prepared was a single affidavit however it did address each offence separately. It would be incongruous to penalise the Applicant's solicitors for being efficient. The difference in the amount of legal skill that would go towards producing three affidavits which contained the same facts as the one affidavit is nil. It is my view that separate preparation was done for each offence culminating in a single affidavit and therefore separate fees should be allowed.

33. **Can the Applicant claim taxation costs on a time basis if they have claimed lump sum for preparation?** – Section 24 (5) of the Crimes (Victims Assistance) Act provides:

“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) or as prescribed under subsection (4)(b).

34. In Freese v The Northern Territory of Australia [2004] NTMC 066 Judicial Registrar Monaghan went into a detailed analysis of the application of

section 24(5) and I respectfully agree with her conclusions in that matter. Registrar Monaghan found that a restrictive interpretation of the section, that is if the party elects to claim any of their costs under subsection (4)(a) then they cannot claim other costs on a time basis, would defeat the purpose of the Act. The amendments to the Act which introduced the lump sum fee structure were introduced to help contain costs claimed by the Applicant. The purpose of the Act is to provide Assistance to victims of crime. I do not believe it was the intention of this Legislature to deny the Applicant costs properly claimed. I agree that a valid interpretation of section 24(5) is to allow the Applicant to use either or both methods of costing whichever they choose. Further it is clear that the lump sum fees set out in the regulations did not contemplate all possible situations.

35. In Freese's case Registrar Monaghan allowed extra costs for an application to approve an infant compromise. In Nalita Ferguson v Northern Territory of Australia [2004] NTMC 036 ,I allowed costs of taxation on a time basis when other costs had been claimed in the lump sum.
36. It is my view that as the costs of taxation are clearly not included in the descriptions of any of the lump sum amount allowable then the Applicant should be able to claim those costs on a time basis at 40% of the Supreme Court costs scale.
37. **Conclusion:** It is my view that:
 - a. A taxing officer can look behind the lump sum fee to assess the work included is properly included and claimed for should only do so in cases where an anomaly is created.
 - b. An Applicant can use both the lump sum fees and time basis in the same Bill of Costs and it is up to the taxing officer concerned to ensure that the work claimed for on a time basis is not already included in the lump sum fee.

c. Any claim on a time basis should be at the prescribed rate, that is 40% of the amount claimable under the Supreme Court Scale.

38. It should also be noted that it is my view if a composite is disallowed on the basis that the work included in the composite has not been done then the party should be allowed to redraw its claim to make a claim on a time basis as it is not the role of the taxing officer to deny a party their right to costs only to assess whether the amount claimed is as reasonable amount reasonably incurred.

39. Parties should also note that I intend to disallow the claim for \$103.00 for drawing and engrossing the summons for taxation and allow it only at \$56.00.

40. Therefore my orders are :

40.1 For file number 20309141 costs are taxed and allowed at \$1482.00.

40.2 For file number 20317477 costs are taxed and allowed at \$1152.00.

40.3 For file number 20317475 costs are taxed and allowed at \$1537.00.

Dated this 20th day of August 2004

Tanya Fong Lim
JUDICIAL REGISTRAR