CITATION:	*Robbins v Nominal Insurer* [2010] NTMC 039
PARTIES:	BRYAN ROBBINS v NOMINAL INSURER
TITLE OF COURT:	Work Health
JURISDICTION:	Work Health – Alice Springs
FILE NO(s):	20901912
DELIVERED ON:	8 June 2010
DELIVERED AT:	Alice Springs
HEARING DATE(s):	19 April 2010
JUDGMENT OF:	J M R Neill SM

CATCHWORDS:

REPRESENTATION:

Counsel:	
Applicant:	Alan Lindsay
Respondent:	Miles Crawley
Solicitors:	
Applicant:	Povey Stirk
Respondent:	Cridlands MB

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 039
Number of paragraphs:	38

IN THE WORK HEALTH COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20901912

BETWEEN:

BRYAN ROBBINS
Applicant

AND:

NOMINAL INSURER
Respondent

REASONS FOR JUDGMENT

(Delivered 8 June 2010)

Mr JOHN NEILL SM:

1. On 17 November 2009 Povey Stirk on behalf of the Worker filed an interlocutory application seeking to amend or substitute the Respondent in these proceedings. The application was eventually heard on 9 March 2010, when I ordered that the Nominal Insurer was substituted as Respondent instead of the Employer, and I made ancillary Orders. Order 7 provided that the Nominal Insurer was to have its costs of and incidental to the application to substitute, to be taxed in default of agreement at 100% of the Supreme Court scale. I adjourned the question of whether those costs should be payable by the Worker or by his solicitor Povey Stirk to 19 April 2010. No further affidavit material was filed.

2. On 19 April 2010 Povey Stirk appeared by their counsel Mr Alan Lindsay. I heard argument on the question of who should pay the costs ordered by me in Order 7 of 9 March 2010, and on the related question whether any costs incurred by the Worker for relevant work on his behalf by Povey Stirk, should be disallowed. There was no separate appearance by or on behalf of the Worker. I reserved my Decision on these costs issues.

POWER TO MAKE SUCH COSTS ORDERS

3. The Work Health Court is a creature of statute. It has no inherent jurisdiction. It does have implied power but it is not necessary to consider the possible extent of such implied power on this costs issue because the issue is covered by statute.

4. Section 95 of the *Workers Rehabilitation and Compensation Act* allows the Chief Magistrate to make Rules relevant to the awarding of costs and to any practice or procedure relevant to costs.

5. Such Rules have been made. Rule 23.03 gives the Work Health Court the broadest discretion to determine by whom, to whom, when and to what extent costs are to be paid. That discretion may be exercised at any stage of a proceeding. That discretion must be exercised having regard to s.110 of the Act.

6. In addition, Rule 23.02 incorporates Order 63 of the Supreme Court Rules into the relevant Work Health Court Rules. Order 63 Rule 21 specifically provides the power to make these sorts of costs orders.

Rule 63.21 of the Supreme Court Rules

7. Rule 63.21 of the Supreme Court Rules provides as follows:

> **63.21 Costs liability of legal practitioner**
>
> (1) Where a solicitor for a party, whether personally or through a servant or agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by other misconduct or default, the Court may order that:
>
> (a) all or any of the costs between the solicitor and the client be disallowed;
>
> (b) the solicitor repay to the client the whole or part of money paid on account of costs;

(c) the solicitor pay to the client all or any of the costs which the client has been ordered to pay to a party; or

(d) the solicitor pay all or any of the costs payable by a party other than his client.

(2) Without limiting subrule (1), a solicitor is in default for the purpose of this rule where an application in or trial of a proceeding cannot conveniently be heard or proceed, or fails or is adjourned without useful progress being made, by reason of the failure of the solicitor to:

(a) attend in person or by a proper representative;

(b) file a document which ought to have been filed;

(c) lodge or deliver a document for the use of the Court which ought to have been lodged or delivered;

(d) be prepared with proper evidence or account; or

(e) otherwise proceed.

(3) The Court shall not make an order under subrule (1) without giving the solicitor a reasonable opportunity to be heard.

(4) The Court may, before making an order under subrule (1), refer the matter to the Master for inquiry and report.

(5) Order 50, with the necessary changes, applies to a reference to the Master for inquiry and report made under subrule (4).

(6) The Court may order that notice of a proceeding or order against a solicitor under this rule be given to his client in such manner as it directs.

(7) This rule, with the necessary changes, applies to a barrister as it applies to a solicitor.

Section 110 of the Workers Rehabilitation and Compensation Act

8. This section has no equivalent in any other legislation in the Northern Territory or elsewhere in Australia as far as I am aware. It must be considered in the exercise of this Court's discretion as to costs – see Rule 23.03 (3). It provides as follows:

> **110 Costs**
>
> In awarding costs in a proceeding before the Court, the Court shall take into account the efforts of the parties made before or after the making of the application under section 104 in attempting to come to an agreement about the matter in dispute and it may, as it thinks fit, include as costs in the action such reasonable costs of a party incurred in or in relation to those efforts, including in particular the efforts made at the directions hearing and any conciliation conference.

9. In this case, any consideration of s.110 will be limited to the circumstances of and incidental to this interlocutory application filed on 17 November 2009. That is, it will encompass the decision by Povey Stirk for the Worker to make a claim against the Nominal Insurer, then to commence proceedings against the Employer as Respondent instead of against the Nominal Insurer, given that those lawyers had already made the claim on behalf of the Worker against the Nominal Insurer pursuant to s.167 of the Act. It will then encompass the decision to seek to substitute the Nominal Insurer for the Respondent and the interlocutory application for that purpose. It will encompass all relevant dealings between Povey Stirk and the representatives of the Nominal Insurer.

THE SCHEME OF SECTION 167 OF THE ACT

10. Section 167 of the *Workers Rehabilitation and Compensation Act* allows for recovery by an injured Worker from the Nominal Insurer rather than from the Employer. Such recovery is dependant upon the Worker's establishing the various prerequisites identified in one of the other of 2 different scenarios, contained respectively in subsection (1) or subsection (2) of s.167. The relevant scenario in this matter is that contained in ss.167 (1). This is the scenario where the Employer

is still available but for some reason it has defaulted in payment of any amount of compensation it is liable to pay to the Worker under the Act. To establish the operation of ss.167 (1) it is necessary among other matters to establish that "… the liability of the Employer to pay the compensation is not covered in full by a policy or policies of insurance and indemnity obtained in accordance with this Act" – see ss.167 (1) (c). This requirement is in addition to and not in substitution for the other prerequisites identified in ss.167 (1).

11. Evidence for the lack of coverage by the required policy of insurance and indemnity was provided in this case as a result of enquiries conducted by Mr Stirk of Povey Stirk on behalf of the Worker, only in February 2010 – see paragraph 6 of his affidavit sworn 24 February 2010 and filed in these proceedings.

12. Mr Anderson formerly of Povey Stirk formed the view on or prior to 12 November 2009 that he should have commenced proceedings against the Nominal Insurer rather than against the Employer. He believed that he had "made a mistake" in identifying the Employer as the Respondent in the proceedings – see paragraph 22 of his affidavit sworn 12 November 2009 and filed in support of the interlocutory summons dated 17 November 2009.

13. Proceedings for recovery from the Nominal Insurer come within Division 7 of Part 7 of the Act which contains sections 167 – 173 inclusive. These sections all speak in terms of a Worker's making a claim against the Nominal Insurer, but nowhere do they require that any proceedings arising out of such a claim must themselves be commenced against the Nominal Insurer rather than against the Employer. Indeed the provisions of ss.170 (2) are consistent with the proceedings' being commenced either against the Employer or against the Nominal Insurer. Subsection 170 (2) provides:

> 2) Where a claim for compensation under section 167(1) or (2) is made against the Nominal Insurer, the claim shall be dealt with and determined as if the Nominal Insurer were the employer of the worker making the claim or in respect of whom it relates, and for that purpose:
>
> (a) the claim shall be deemed to have been made under Part 5;

(b) a reference to an employer in Part 5 (other than in sections 75A and 84) or Part 6 or 6A shall be read and construed (with necessary changes) as a reference to the Nominal Insurer; and

(c) the Nominal Insurer shall have the same rights, powers, duties and liabilities in respect of the claim (other than under sections 75A and 84) as the employer.

14. The claim could have continued against the Employer named as the Respondent in the proceedings, and been dealt with and determined as if the Nominal Insurer were the Employers. I find that it was not in fact necessary for the Worker to have substituted the Nominal Insurer for the Employer in these proceedings. For this reason, I find that it was not necessary for Povey Stirk on behalf of the Worker to have made the interlocutory application filed on 17 December 2009.

COSTS INCURRED

15. Having made that interlocutory application and having briefed counsel to advise and to attend on the hearing of that application on 9 March 2010, Povey Stirk opened up all the issues requiring consideration at the Court appearances on 9 March 2010 and 19 April 201, and in this Decision.

16. Povey Stirk have carried out significant work in relation to this interlocutory application. They have carried out that work on behalf of their client the Worker. I infer that the Worker has been and/or will be obliged to pay Povey Stirk for this work on his behalf.

17. One question now is whether the Worker should be relieved of any obligation to pay any costs to Povey Stirk for their work on his behalf in relation to this interlocutory application.

18. In addition, the Nominal Insurer has incurred costs in responding to this application. On 9 March 2010 I ordered that it should have its costs of and incidental to the interlocutory application – see Order 7 of 9 March 2010. A further question now is whether those costs should be paid by the Worker or by Povey Stirk.

CASE LAW

19. There has been no detailed consideration of Supreme Court Rule 63.21 by the NT Supreme Court or by the NT Local Court. The Rule was noted in passing by Angel J in the NT Supreme Court Decision delivered on 1 June 2006 Campbell v Airport Transfer System Pty Ltd and Other, but the learned Judge based his analysis and Decision in that case on the inherent power of the Supreme Court. He did however in his analysis refer to and endorse some English cases which are of value in considering the operation of Rule 6.21.

20. Rule 63.21 (1) gives the Court the power to make costs orders against a solicitor where "… a solicitor for a party… has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by other misconduct of default…". This creates 6 discrete categories where such a costs order might be made. These categories are disjunctive – any one of them might suffice.

    These 6 categories are:

    Where a solicitor has caused costs to be incurred –

    i) improperly; or

    ii) without reasonable cause;

    or, alternatively, where a solicitor has caused costs to be wasted by –

    iii) undue delay; or

    iv) negligence; or

    v) other misconduct; or

    vi) other default.

21. In Myers v Elman [1940] AC 282, Lord Wright considered the inherent jurisdiction of the UK Courts in relation to ordering a solicitor personally to pay a party's costs. He relevantly said at page 319:

"… The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgement is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is the solicitor's duty to ascertain with accuracy may suffice…".

22. In Ridehalgh v Horsefield [1994] Ch 205 the Court of Appeal considered the issue in the context of s.51 of the English Supreme Court Act 1981. That section, similarly to our Rule 63.21, provides power to make such costs orders in the event of conduct found to be "improper" or "unreasonable" or "negligent".

23. At page 223-233 their Lordships said:

> "'Improper' means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgement limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> 'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.
>
> The term 'negligence' was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, uses 'negligence' as a term

of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligence unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We rejected this approach.

But for whatever importance it may have, we are clear that 'negligence' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession".

CHRONOLOGY

1. 10 November 2006: date of accident
2. 5 September 2008: date of making Work Health claim against the Employer
3. 13 October 2008: letter Povey Stirk to Nominal Insurer enquiring how Worker can make a claim directly on it
4. 29 October 2008: Povey Stirk on behalf of Worker make claim on Nominal Insurer
5. 7 November 2008: Nominal Insurer disputes claim by Notice of Decision
6. 12 November 2008: Cridlands MB for Nominal Insurer write to Povey Stirk asking 6 questions
7. 18 November 2008: Povey Stirk seed mediation of dispute created by Nominal Insurer's Notice of Decision
8. 2 December 2008: Povey Stirk answer the 6 questions from Cridlands MB, including advising that they on behalf of the Worker do not know whether the employer had a policy of Work Health insurance relevant to the Worker's claim, but that they

"assume it did not

9. 24 December 2008: Certificate of Mediation showing "No Change"

10. 14 January 2009: Povey Stirk file initiating Application in Work Health Court commencing proceedings against the Employer, not against the Nominal Insurer

11. 14 January 2009: Povey Stirk on behalf of Worker also file a Statement of Claim against the Employer as Respondent in the form of a "mere" appeal against the Nominal Insurer's Notice of Decision, as if it were a section 69 notice rather then a section 85 notice

12. 9 February 2009: email Cridlands MB to Povey Stirk enquiring whether the Application was intended for the Employer or the Nominal Insurer, as Respondent

13. 2 April 2009: email Povey Stirk to Cridlands MB – Worker will apply to substitute Nominal Insurer for Employer as Respondent

14. 20 April 2009: Povey Stirk write to Work Health Court asking to list the matter to substitute Respondent

15. 21 April 2009: Work Health Court Registry writes to Povey Stirk advising they will have to make an interlocutory application

16. 7 August 2009: Cridlands MB write to Povey Stirk pursuing the issue of who should be the Respondent

17. 12 November 2009: Rennie Anderson of Povey Stirk swears affidavit in support of application to substitute Respondent – says nothing about whether the Employer had Work Health insurances as at date of accident

18. 17 November 2009: Povey Stirk file interlocutory application to substitute Respondent

19. 7 December 2009: affidavit of Candice MacLean for Nominal Insurer is filed

20. 8 December 2009: first return of interlocutory application before Judicial Registrar – adjourned at request of Povey Stirk as they not ready to proceed – costs reserved

21. 2 February 2010: second return of interlocutory application – Povey Stirk still not ready – adjourned – costs ordered against Worker fixed in sum of $105

22. 24 February 2010: affidavit of John Stirk – first evidence of investigation into Employer's insurance as at date of accident

23. 8 March 2010: further affidavit of John Stirk

24. 9 March 2010: 3rd return of interlocutory application – Orders made substituting Nominal Insurer for Employer as Respondent, ancillary orders, costs order in favour of Nominal Insurer

25. 19 April 2010: 4th return of interlocutory application – Povey Stirk represented by counsel – submissions/argument about

payment of costs by Worker or by Povey Stirk – Decision reserved.

ANALYSIS AND FINDINGS

24. In this matter I find that there was never at any stage any question of improper conduct on the part of the Worker's solicitor.

25. I am satisfied that Povey Stirk did not cause costs to be incurred without reasonable cause. It is plain from Mr Anderson's communications with the Nominal Insurer and subsequently with Cridlands MB that he turned his mind to the Worker's recovery of benefits from the Nominal Insurer once there had been no response from the Employer. He then turned his mind to the procedural mechanisms involved in pursuing the Nominal Insurer, including the interlocutory application of 17 November 2009. Povey Stirk had reasonable cause for pursuing the matter in general terms as they did.

26. I find that there was delay on 3 occasions. There was first the 6 weeks between Cridlands MB's email of 9 February 2009 and Povey Stirk's response on 2 April 2009, then second, the 8.5 months between that response and the making of the interlocutory application on behalf of the Worker on 17 November 2009 and third, the 3 months between the first return of the interlocutory application on 8 December 2009 and the argument on 9 March 2010. These 3 periods of delay did not themselves incur great costs either to the Worker or the Nominal Insurer. Nevertheless, the delays did cause some costs, and I am satisfied that these costs were wasted, and the delay in each case was undue.

27. I now turn to consider the question of negligence. I find that Mr Anderson of Povey Stirk had not satisfied himself that a claim could be made against the Nominal Insurer when he made that claim. The absence of a policy of insurance and indemnity covering the Employer as at 29 October 2008 when the claim against the Nominal Insurer was made (item 4 of Chronology) was clearly not known to Mr Anderson as late as 2 December 2008, as stated in his letter of that date to Cridlands MB (item 8). The absence of such a policy was a condition precedent to making that claim. I find on the balance of probabilities that Mr

Anderson still did not know whether such a policy had existed as at the date of injury when he swore his affidavit on 12 November 2009 (item 17). That affidavit says nothing about any enquiries by Mr Anderson in relation to the insurance issue.

28. I find that Povey Stirk were negligent either in commencing the proceedings against the "wrong" Respondent, namely the Employer rather than the Nominal Insurer, necessitating the application to substitute, or alternatively, once having commenced against the Employer, in pursuing the interlocutory application to substitute when it was not in fact necessary to do so, as I have found in paragraph 14 of this Decision.

29. Either way, the Worker was exposed to the costs of this work carried out by his own solicitor, as well as the work required in response by the solicitor for the Nominal Insurer, when that work did not need to be carried out.

30. These were matters which "… it was a solicitor's duty to ascertain with accuracy…" as stated by Lord Wright in Myers v Elman (above). It was a failure "… to act with the competence reasonably to be expected of ordinary members of the profession" as considered in Ridehalgh v Horsefield (above).

31. Accordingly, I find that the making of the claim against the Nominal Insurer at the time that was done, and the filing of the interlocutory application on 17 November 2009, both constituted negligence within the meaning of sub-Rule 63.21 (1) on the part of Mr Anderson and therefore on the part of Povey Stirk who were at all times the employer of Mr Anderson and vicariously liable for his conduct of in those aspects of his work for the Worker.

32. Last, I turn to the category of "costs wasted… by default". Here I find assistance in the provisions of Rule 63.21 (2) where it says "… a solicitor is in default for the purpose of this rule where an application in… a proceeding cannot conveniently be heard or proceed, or… is adjourned without usefull progress being made, by reason of the failure of the solicitor to:

    (d) be prepared with proper evidence or account; or

(e) otherwise proceed".

I find that the lack of evidence as to the Employer's relevant Work Health insurance on 8 December 2009 and again on 2 February 2010, was such a default. I find that the need to adjourn the hearing of the interlocutory application on 8 December 2009 and again on 2 February 2010, was such a default. I find that some costs were wasted by those defaults.

33. Having found undue delay, negligence and default sufficient for the operation of Rule 63.21 (1), I must now consider whether I should make costs orders affecting Povey Stirk directly. This is not an automatic consequence – the sub-Rule provides that the Court "may" make relevant orders.

34. In many of the cases dealing with costs orders against solicitors personally there are cautionary notes sounded. It is suggested that the Court's discretion to order such costs is to be exercised with care and circumspection. One reason put forward is that the risk of personal liability for costs of a client's opponent may cause a solicitor to put his own interests above those of his client – see generally Ridehalgh v Horsefield (above) and also Medcalf v Mardell [2003] 1 AC 120, particularly at p.143.

35. I return to consideration of the issues of undue delay and default leading to some wasted costs, and to s.110 of the Act. Cridlands MB at all times attempted on an ongoing basis to engage Povey Stirk for the Worker in relation to the claim made against the Nominal Insurer, in discussing whether the proceedings should be against the Nominal Insurer rather than the Employer, in making the foreshadowed interlocutory application, and in prosecuting it once made. Povey Stirk were slow to respond as appears from the Chronology and as I have outlined above. For those reasons, I find that Povey Stirk made inadequate efforts in attempting to come to an agreement concerning the matter in dispute, for the purpose of s.110 of the Act.

36. Perhaps even more importantly, I note the delay as a whole occasioned by the red-herring in this matter of who should have been named as Respondent in these proceedings. This delay commenced on 9 February 2009 when the solicitor for the Nominal Insurer first raised the issue, and concluded only on 9 March 2010 when

I made Orders disposing of the interlocutory application filed on 17 November 2009 – a period of 13 months.

37. Over this period of 13 months, the Worker's Application before the Court was at a standstill. This delay would have been sufficiently upsetting for any ordinary person caught up in the legal process, but it may well have been particularly challenging to this Worker. I note that the Worker's claim dated 5 September 2008 (part of annexure "A" to the affidavit of Mr Anderson sworn 12 November 2009) is for injuries described as "arm and anxiety". I note that a further part of the annexure "A" is the medical certificate dated 3 August 2007 of Dr Greg Winterflood, in which he stated the Worker "… was physically unable to carry on his usual occupation until March 2007; but since then has remained depressed and anxious and has not worked for those reasons".

38. Taking this aspect of the delay into account as well as the nature of the negligence I have found I am satisfied that the Worker should not be liable for costs incurred for work which although carried out on his behalf nevertheless unduly delayed the prosecution of his case and failed to advance his case. Accordingly, I make costs orders against Povey Stirk personally.

ORDERS

1. All costs between Povey Stirk and the Worker of and incidental to the interlocutory application filed 17 November 2009, are disallowed.

2. Povey Stirk within 7 days repay to the Worker the whole of any money paid on account of the costs referred to in Order 1

3. The Worker pay the costs of the Nominal Insurer as ordered on 2 February 2010 and as ordered in Order 7 made on 9 March 2010.

4. Povey Stirk pay to the Worker all of the costs payable by him in accordance with Order 3 within 7 days of their becoming payable.

5. The question of costs reserved by Judicial Registrar McNamara on 8 December 2009 is returned to her for determination.

6. A copy of this Decision and these Orders is to be provided to each of the solicitors for the Worker and for the Nominal Insurer.

7. Copies of the Orders made on 9 March 2010 and of this Decision and these Orders are to be provided to the Worker by providing additional copies to Povey Stirk for that purpose, and Povey Stirk are directed to provide those copies to the Worker promptly.

Dated this 8th day of June 2010.

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John Neill
STIPENDIARY MAGISTRATE