

CITATION: *Sommer v Coates Hire Operations Pty Ltd NTMC 028*

PARTIES: CRAIG LYNDON SOMMER

V

COATES HIRE OPERATIONS PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO: 21509773

DELIVERED ON: 11 December 2015

DELIVERED AT: Darwin

HEARING DATES: 23 September and 16 October 2015

JUDGEMENT OF: JMR Neill

CATCHWORDS: COSTS LIABILITY OF LEGAL PRACTITIONER;
APPORTIONMENT OF COSTS LIABILITY WHERE TWO DIFFERENT LEGAL
FIRMS HAD A CONTEMPORANEOUS INVOLVEMENT ON BEHALF OF THE SAME
CLIENT IN THE SAME MATTER

Work Health Court Rules 23.02 and 23.03

Supreme Court rules 1.09(1), 63.21

Legal Profession Act sections 4, 6(a), 14(1)(a)

Ridehalgh v Horsefield [1994] Ch 205

Campbell v Airport Transfer System Pty Ltd & Ors [2006] NTSC 40

REPRESENTATION:

Counsel:

Worker:	Jude Lee
Mr Connop:	Peter L. Hanlon
Mr Saupin:	Peter Mariotto

Solicitors:

Worker:	Jude Lawyers
Mr Connop:	Connop Barristers & Solicitors
Mr Saupin:	MSP Legal

Judgment category classification: A

Judgment ID number: 028

Number of paragraphs: 53

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

No. 21509773

BETWEEN:

CRAIG LYNDON SOMMER
Plaintiff

AND:

COATES HIRE OPERATIONS PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 11 December 2015)

John Neill SM:

Introduction

1. The Worker Craig Sommer (“Mr Sommer”) was employed by the Employer as a mechanic when he suffered an injury to his left hip joint in the course of his employment on or about 10 March 2012. He made a claim under the *Workers Rehabilitation and Compensation Act*, now retitled the *Return To Work Act* (“the Act”), and that claim was accepted by the Employer.
2. Mr Sommer and the Employer subsequently fell into dispute concerning his ongoing entitlements under the Act (“the dispute”). Mediation of the dispute as prescribed under the Act was unsuccessful.
3. At the time the dispute arose Mr Sommer was resident in Western Australia. He consulted lawyer Marc Saupin of the Perth law firm Saupin Legal (“Mr Saupin”). Mr Saupin identified Darwin lawyer Mr Wayne Connop of Connop

Barristers & Solicitors (“Mr Connop”) to carry out work for Mr Sommer in Work Health Court proceedings to be commenced in the Northern Territory. Mr Connop on behalf of Mr Sommer subsequently commenced proceedings before the Work Health Court in Darwin by filing an initiating Application on 20 February 2015 (“the proceeding”).

4. The name Connop Barristers & Solicitors appeared as Mr Sommer’s solicitor on the initiating Application and on two versions of a Statement of Claim subsequently filed in the proceeding.
5. The Employer by its solicitor criticised the first Statement of Claim prepared and filed on behalf of Mr Sommer. The Employer continued to raise objections to an amended Statement of Claim subsequently filed on behalf of Mr Sommer. The pleadings in both the first Statement of Claim and the amended Statement of Claim and the criticisms of and complaints about those pleadings by the solicitor for the Employer at case management attendances eventually led the Judicial Registrar of the Work Health Court on 29 July 2015 to refer the matter to me as managing magistrate for the Work Health Court. I listed the matter before me for Directions on 6 August 2015.
6. By letter dated 31 July 2015 Mr Connop gave notice he had ceased to act for Mr Sommer in the proceeding.
7. The Employer appeared by its solicitor at the Directions on 6 August 2015 but there was no appearance by or on behalf of Mr Sommer. I adjourned the matter before me to 27 August 2015 and directed the registry of the Court to notify Mr Sommer and also Mr Saupin and Mr Connop of the adjourned time and date.
8. On 12 August 2015 Mr Sommer’s present lawyer Jude Lawyers filed a Notice of Acting in the proceeding.

9. On 27 August 2015 Mr Sommer appeared by Jude Lawyers and Mr O’Loughlin of counsel. The Employer appeared by its solicitor. I was informed that the initiating Application filed 26 February 2015 had incorrectly spelled Mr Sommer’s name, and that the corporate Employer’s name was also incorrect. Even more importantly, an incorrect box namely box (b) had been ticked on the Application form rather than the correct box (f), with the result that an entirely inappropriate cause of action had been identified as being brought before the Court. I made Orders permitting Mr Sommer there and then to hand up and file an amended Application which cured these defects and also a substituted Statement of Claim. I adjourned to 23 September 2015 the question of costs thrown away in the proceeding and also the related question of whether Mr Sommer or his previous solicitors should be responsible for those costs. I directed copies of those Orders be served on each of Mr Saupin and Mr Connop. I directed each of those solicitors to file affidavits relevant to the related question.
10. By interlocutory application filed 10 September 2015 Mr Sommer formally sought orders that:
“(a) all or any of the costs between the solicitors Mr Marc Saupin and Mr Wayne Connop and the Worker be disallowed;
(b) the solicitors Mr Marc Saupin and Mr Wayne Connop pay to the client all or any of the costs which the Worker is ordered to pay to the Employer”.
11. On 23 September 2015 Mr Sommer and the Employer appeared by their respective solicitors, Mr Connop appeared for himself and Mr Mariotto of MSP Legal appeared for Mr Saupin. I heard submissions and ordered as Order 1 that Mr Sommer pay the Employer’s costs of and incidental to the proceeding, including its costs of and incidental to Mr Sommer’s interlocutory application filed 10 September 2015, all up to and including 23 September 2015, to be taxed in default of agreement at 100% of the Supreme Court scale. As Mr Saupin had filed an affidavit but Mr Connop had not, I adjourned Mr Sommer’s interlocutory application for further submissions on

the question of indemnification of Mr Sommer, to 16 October 2015. The Employer was excused from further attendance on the interlocutory application.

12. On 16 October 2015 appearances were as before save that Mr Connop now appeared by counsel Mr Peter Hanlon. I heard further submissions on behalf of Mr Sommer, Mr Connop and Mr Saupin and I directed written submissions on the statutory interpretation of Rule 63.21(1) of the *Supreme Court Rules* be filed and served. I otherwise reserved my Decision on Mr Sommer's interlocutory application filed 10 September 2015.

The Issues

13. Both Mr Connop and Mr Saupin conceded that the standard of legal work performed for Mr Sommer at all times up to 31 July 2015 (when Mr Connop ceased to act for Mr Sommer) was inadequate. Mr Saupin by affidavit deposed that he had reimbursed all costs charged by him to Mr Sommer, and Mr Sommer acknowledged that this was so. Both Mr Connop and Mr Saupin conceded that an order should be made in terms of Order (a) sought in Mr Sommer's interlocutory application filed 10 September 2015, that all or any costs between each of them and Mr Sommer be disallowed. Both lawyers agreed that a version of Order (b) in the interlocutory application should also be made, namely that Mr Sommer should be fully indemnified for the costs I ordered against him by Order 1 made 23 September 2015. However, that is where the consensus ended.
14. Each of Mr Connop and Mr Saupin took the primary position that the other should be solely responsible for indemnifying Mr Sommer for his costs. Mr Connop took the position in the alternative that if there was to be any apportionment of liability to indemnify Mr Sommer then it should be a joint liability. Mr Saupin's position was that Mr Connop should be solely liable, and in the alternative that any apportionment should be nominal with Mr Connop bearing the great majority of this liability.

Power to Order Solicitor to Pay Costs

15. Although counsel for each of Mr Connop and Mr Saupin have conceded that the standard of the work carried out on behalf of Mr Sommer up to 31 July 2015 was inadequate it is still necessary for me to make that finding and to identify any basis for ordering any solicitor to indemnify Mr Sommer for the costs I ordered against him by Order 1 made 23 September 2015.
16. The evidence before me consisted of the Work Health Court file in the proceedings, the affidavit of Craig Sommer sworn 10 September 2015, two affidavits of Marc George Saupin sworn respectively on 17 September 2015 and 22 September 2015, and an affidavit of Wayne Connop made 1 October 2015.
17. Rule 23.02 of the *Work Health Court Rules* provides that Order 63 of the *Supreme Court Rules* applies with the necessary changes as part of the costs rules of the Work Health Court.
18. 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 or 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.*

19. Mr Mariotto on behalf of Mr Saupin made the submission that the wording in subrule 63.21(1) - “Where **a solicitor for a party** (emphasis added)...” - necessarily limits the application of rule 63.21 to a solicitor on the record for a party to a proceeding. If correct, that would mean there is no power in the Work Health Court arising from rule 63.21 of the *Supreme Court Rules* to make a costs order against a solicitor who is not and never has been on the record in the proceeding under consideration. Mr Saupin is in that position in this case. Mr Mariotto filed detailed written submissions dated

22 October 2015 in support of this argument. He additionally argued that Mr Saupin is not a “solicitor” for the purposes of this rule. I have not been persuaded by either of these submissions.

20. “*Solicitor*” is defined in rule 1.09(1) of the *Supreme Court Rules* as “*an Australian legal practitioner as defined in section 6(a) of the Legal Profession Act, other than a barrister as defined in that Act*”.
21. “*An Australian legal practitioner*” is defined in section 6(a) of the *Legal Profession Act* as “*...an Australian lawyer who holds a current practising certificate or a current interstate practising certificate*”.
22. “*Current interstate practising certificate*” is defined in section 4 of the *Legal Profession Act* as meaning “*a current practising certificate granted under a corresponding law*”.
23. “*A corresponding law*” is defined in section 14(1)(a) of the *Legal Profession Act* as “*a law of another jurisdiction that corresponds to the relevant provisions of this Act or...*”.
24. In Western Australia there is the *Legal Profession Act 2008* which corresponds overall with the Northern Territory *Legal Profession Act* and which among other things regulates the granting of practising certificates to lawyers in that State.
25. In his affidavit sworn 17 September 2015 Mr Saupin deposes in paragraphs 1, 2 and 3 to being “the Legal Practitioner Director of Marc G Saupin Pty Ltd t/as Saupin Legal in Western Australia”. He deposes to having been “entitled to act as a legal practitioner in Australia since 20 December 2006”. He deposes to practising “exclusively in criminal law, corporate crime, administrative/regulatory laws and building and construction law in Western Australia”. From this evidence I infer that at all times material to this matter Mr Saupin held a current Western Australian practising certificate which I find was a current interstate practising certificate for the purposes of section

6(a) of the NT *Legal Profession Act*, and he was therefore an Australian legal practitioner as defined in that Act. Accordingly I find that at all material times Mr Saupin was a solicitor as defined for the purposes of the *Supreme Court Rules*, including rule 63.21.

26. I have found Mr Saupin was a solicitor, but was he “a solicitor for a party” for the purposes of subrule 63.21(1)? The use of the indefinite article “a” before the word “solicitor” shows the rule is not necessarily confined to one particular solicitor for a party – there may be more than one. The rule could have but does not refer to a solicitor on the record for a party. Although subrule 63.21(2) does appear to identify the sort of work usually carried out by a solicitor on the record for a party, it is prefaced with the words “*Without limiting subrule (1)...*”. Subrule 63.21(7) provides that “*this rule, with the necessary changes, applies to a barrister as it applies to a solicitor*”, thereby enlarging the reach of rule 63.21 well beyond any narrow interpretation limiting it to a solicitor on the record for a party.
27. I am satisfied and I rule that rule 63.21 is not limited in its operation to a solicitor on the record for a party to a proceeding. It can apply to a solicitor who carries out work for a party to a proceeding even if the solicitor is not on the record in that proceeding.
28. If I am wrong in my interpretation of the application and reach of rule 63.21 of the *Supreme Court Rules* I am nevertheless satisfied and I rule that the Work Health Court has sufficient power independently of rule 63.21 to make costs orders against a solicitor, or a legal practitioner more generally, in the circumstances of this case. This arises by virtue of subrule 23.03(1) of the *Work Health Court Rules*. That subrule provides: “*Subject to the Act, these rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court’s discretion and **the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid*** (emphasis added)”.

29. I am satisfied and I rule that the Work Health Court has the power to order either Mr Connop or Mr Saupin or both of them together in proportions to be determined by the Court, to pay to Mr Sommer any or all of the costs which on 23 September 2015 I ordered him to pay to the Employer.

Costs Liability of a Legal Practitioner

30. Supreme Court rule 63.21 creates 6 separate categories where such a costs order might be made. Any one category can be sufficient. These 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

other default.

31. Both the original Statement of Claim and the amended Statement of Claim filed in these proceedings before 31 July 2015 pleaded common law concepts of unsafe systems of work and also negligence on the part of the Employer leading to Mr Sommer's work injury. Communications between Mr Connop and Mr Saupin and Mr Sommer reveal an emphasis on the lawyers' seeking instructions for common law assessments of damages. However the Work Health jurisdiction is a no-fault statutory jurisdiction which provides for specific statutory remedies. There is no role for common law concepts of these kinds.

32. The pleading of and pursuit of instructions for these common law concepts in the Work Health jurisdiction reveals an ignorance of the jurisdiction indicative of negligence. “Negligence” was considered in *Ridehalgh v Horsefield* [1994] Ch 205 where the English Court of Appeal was dealing with legislation equivalent to rule 63.21. At page 223 their Lordships rejected the approach that negligence in this context must involve an actionable breach of the legal representative’s duty to his own client. They said: “*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*”. This approach was approved by Angel J of the NT Supreme Court in *Campbell v Airport Transfer System Pty Ltd & Ors* [2006] NTSC 40.
33. I am satisfied that the two versions of a Statement of Claim prepared and filed in these proceedings prior to 31 July 2015 were patently inadequate for the purposes of the Work Health jurisdiction. This together with the persistence of Mr Connop and/or Mr Saupin in pleading and pursuing common law concepts in the Work Health jurisdiction such that the other party found it necessary to complain to the Judicial Registrar and he in turn found it necessary to refer the matter to the managing magistrate for the Work Health Court, and together with the incorrect naming of the parties and incorrectly identifying the cause before the Court in the initiating Application, all together amounted to a failure to act with the competence reasonably to be expected of ordinary members of the profession. I find that this failure caused costs to be wasted both by negligence and by undue delay.
34. The undue delay was effectively from the filing of the initiating Application on 20 February 2015 which subsequently needed to be amended, up to the filing of the substituted Statement of Claim by new lawyers for Mr Sommer on 27 August 2015. This was a period of over 6 months. The costs wasted

are the costs thrown away the subject of Order 1 which I made on 23 September 2015.

35. I am satisfied in the exercise of my discretion that Mr Sommer should be indemnified by Mr Connop and/or Mr Saupin for the costs payable by him pursuant to Order 1 made by me on 23 September 2015.

Apportionment

The Evidence

(i) Mr Sommer's Affidavit 10 September 2015

36. Mr Sommer attended personally on Mr Saupin in Perth on or about 7 January 2015 for about one hour. Mr Saupin agreed to act for Mr Sommer in his NT Work Health claim. Mr Saupin wrote on 8 January 2015 to the Employer's Work Health insurer on his firm's letterhead with the heading "Craig Sommers (*sic*) Workers Compensation" saying: "*We confirm Mr Sommers has retained this firm to act for him in the above matter... We are instructed our client has rejected Allianz latest offer... we advise that we accept service on behalf of our client*".
37. Mr Saupin arranged for Mr Connop to be the Darwin lawyer involved on behalf of Mr Sommer. Mr Sommer received, signed and returned Mr Connop's Terms of Engagement for Mr Connop's work. Mr Sommer also received and signed a costs agreement between himself and Mr Saupin. This identified the work to be carried out as "Civil matter – Work Claim Appeal Darwin Magistrates Court". Mr Sommer paid Mr Saupin \$4,240 for work carried out and invoiced to him by Mr Saupin, and \$11,000 in anticipation of work to be carried out. On about 9 September 2015 following representations by Jude Lawyers, Mr Saupin refunded this entire amount of \$15,510 to Mr Sommer.

ii) Mr Saupin's Affidavits 17 September and 22 September 2015

38. Mr Saupin's evidence on affidavit was to the effect that he identified Mr Connop as a Darwin lawyer. He chose Mr Connop in part because Mr Connop on his website claimed to practise "*in the area of work health issues and workers compensation*". Mr Saupin sent him all relevant documents and claimed that Mr Saupin's role thereafter was limited to being an intermediary between Mr Sommer and Mr Connop, and that Mr Connop "*had full carriage of this matter*". He conceded that some of his email correspondence might have given a different impression of his role in the matter and that "*some loose language has been employed by me*", however the correct position was that Mr Connop was in charge of running the proceeding.

iii) Mr Connop's Affidavit 21 September 2015

39. Mr Connop's version of their relationship and history is very different from Mr Saupin's. Mr Connop deposed to a discussion at the outset with Mr Saupin that he was to be Mr Saupin's "town agent" in Mr Sommer's NT proceeding. He said Mr Saupin told him that Mr Saupin would be doing all of the work and Mr Connop would attend to filing documents and non-contentious appearances before any hearing. Mr Saupin was to be counsel at any hearing. In an email sent on 5 February 2015 at 3:08pm Mr Saupin told Mr Connop: "*I have a costs agreement with the client. You can simply invoice my firm for work done and my firm will settle your accounts*".
40. Mr Connop said that Mr Saupin sent him the already prepared initiating Application for filing. Mr Saupin sent Mr Connop another email earlier on 5 February 2015 at 11:42am attaching "*bundles of documents identified as Sommers Appeal2 & 3...Would you please attend to matters to file this appeal in the Work Health Court*".
41. Mr Saupin appeared by telephone at the first directions conference in the proceeding on 6 May 2015. This arose because Mr Connop had another

engagement. At that attendance Mr Sommer was ordered to file his Statement of Claim within 21 days.

42. By a tax invoice dated 19 May 2015 and addressed to “Craig Sommers” Mr Connop billed Mr Sommer \$2,500 including GST for his work described as “*Work health legal advice*”.
43. Mr Sommer’s first Statement of Claim was filed on 2 June 2015. Although it bore a stamp showing the name Connop Barristers & Solicitors and stated Mr Sommer’s address for service was care of that firm, it also stated “*This pleading was settled by Marc Saupin of Counsel*”. Mr Connop in paragraph 27 of his affidavit states that Mr Saupin drafted “the last two Statements of Claim”. I note that only two versions of any Statement of Claim were filed in this proceeding.
44. By email dated 18 June 2015 Mr Saupin wrote to the solicitor for the Employer in response to criticisms about Mr Sommer’s Statement of Claim. He advised: “*We have by way of response invited **our agent in the NT** Mr Connop to address those matters (emphasis added)*”.
45. On 1 July 2015 the lawyers for the parties appeared on a further directions conference. The Judicial Registrar Mr Julian Johnson noted on his bench sheet that Mr Connop appeared “*as town agent*”.
46. Mr Connop deposed in paragraph 22 of his affidavit that he had never personally spoken to Mr Sommer.

Analysis and Conclusions

47. I heard submissions about and I was referred to authorities on the legal relationship between a principal solicitor and an agent, and on what is the legal meaning of a “town agent”. I do not find these concepts relevant in the circumstances of this case. This is because on the evidence before me on the balance of probabilities I do not accept that either solicitor was simply any

sort of agent of the other. I do not accept that either solicitor acted merely as an intermediary or post box for the other.

48. I find that each solicitor entered into a written and signed costs agreement with Mr Sommer to carry out work for him in relation to this proceeding. I find that each solicitor rendered one or more tax invoices to Mr Sommer in respect of that work. I find that each solicitor appeared on behalf of Mr Sommer before the Court constituted by the Judicial Registrar for case management purposes, on at least one occasion.
49. I am satisfied and I find that each solicitor had some hand in the preparation and drafting of both the first Statement of Claim and the amended Statement of Claim. I am satisfied on the balance of probabilities that Mr Saupin settled the first Statement of Claim.
50. I am satisfied on the balance of probabilities on all the evidence before me and I find that each of Mr Saupin and Mr Connop separately had a solicitor/client relationship with Mr Sommer, with all the professional obligations of competence and responsibility arising within such a relationship.
51. I am satisfied and I find that each solicitor was substantially involved in the actual legal work carried out on behalf of Mr Sommer from its commencement and up to 31 July 2015. In the exercise of my discretion on the basis of these findings I do not propose to undertake some arithmetical assessment of each solicitor's precise contribution to or control of that work.
52. I rule that the liability to indemnify Mr Sommer for the costs he was ordered to pay to the Employer by my Order 1 made 23 September 2015 should be apportioned equally.

Orders

53. I make the following Orders:

1. All costs between Wayne Connop or Connop Barristers & Solicitors and the Worker of and incidental to this proceeding are disallowed.
2. Wayne Connop or Connop Barristers & Solicitors repay to the Worker the whole of any payment made to him by or on behalf of the Worker in respect of the proceeding not already repaid.
3. All costs between Marc George Saupin or Saupin Legal and the Worker of and incidental to this proceeding are disallowed.
4. Marc George Saupin or Saupin Legal repay to the Worker the whole of any payment made to him by or on behalf of the Worker in respect of the proceeding not already repaid.
5. Wayne Connop or Connop Barristers & Solicitors pay to the Worker 50% of the costs against the Worker pursuant to Order 1 made 23 September 2015 within 7 days of those costs being ascertained and becoming due and payable by the Worker.
6. Marc George Saupin or Saupin Legal pay to the Worker 50% of the costs against the Worker pursuant to Order 1 made 23 September 2015 within 7 days of those costs being ascertained and becoming due and payable by the Worker.

Dated this 11th day of December 2015

John Neill SM