
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : TALON CONTRACT PTY LTD -v- BRUCE
HAVILAH & ASSOCIATES [2010] WASC 79

CORAM : MASTER SANDERSON

HEARD : 22 MARCH 2010

DELIVERED : 22 MARCH 2010

PUBLISHED : 28 APRIL 2010

FILE NO/S : LPA 18 of 2009

BETWEEN : TALON CONTRACT PTY LTD (ACN 124 098 853)
Appellant

AND

BRUCE HAVILAH & ASSOCIATES
Respondent

Catchwords:

Costs - Appeal from decision of registrar including time to allow party charged to have practitioner's bill taxed - Turns on own facts

Legislation:

Nil

Result:

Appeal allowed
Extension of time refused

Category: B

Representation:

Counsel:

Appellant	:	Ms M L Coulson
Respondent	:	No appearance

Solicitors:

Appellant	:	Wilson & Atkinson
Respondent	:	No appearance

Case(s) referred to in judgment(s):

Bosco v Solomon Brothers [2006] WASC 307
Harrison v Hocking [2000] WASC 188
Hay v Butler & Crooks (a firm) (1991) 7 WAR 333
Monopak Pty Ltd v Maxim Litigation Consultants [2007] WASC 112
Pullinger Readhead Lucas v Golden West Resources Ltd [2009] WASC 140
Webb v Bateman (Unreported, WASC, 27 May 1986)

- 1 **MASTER SANDERSON:** This was an appeal against a decision of a Registrar of this court extending time to allow a party charged to have a practitioner's bill of costs taxed. At the conclusion of the hearing I advised counsel that I would allow the appeal. I indicated I would publish reasons for my decision. These are those reasons.
- 2 Throughout these reasons I will refer to the client appellant as the 'party charged' and the solicitor respondent as the 'practitioner'. The evidence upon which my decision is based comprises five affidavits. There are two affidavits of Barrie Palmer for the party charged, the first sworn 23 November 2009 and the second sworn 21 December 2009. There are three affidavits filed on behalf of the practitioner, each was sworn by Daniel Joseph Morris and are dated respectively 23 November 2009; 17 December 2009; and 24 December 2009. The chronology which follows is drawn from these five affidavits.
- 3 A costs agreement was entered into between the practitioner and the party charged on 10 October 2007. The instructions from the party charged related to proceedings in the Federal Magistrates Court. An invoice was rendered by the practitioner on 22 October 2007. This is the earliest invoice sought to be taxed. In June 2008 the party charged first expressed concerns as to the cost of the proceedings. An invoice was rendered by the practitioner to the party charged in November 2008. This is the latest invoice sought to be taxed. On 8 January 2009 the practitioner filed a notice of withdrawal as solicitor for the party charged effectively bringing to an end the relationship between the party charged and the practitioner.
- 4 On 17 December 2008 the accountant for the party charged, a Mr Vella, requested the practitioner tax their costs. The practitioner disputes this was a valid request for taxation. On 30 January 2009 the practitioner commenced proceedings in the Magistrates Court for recovery of unpaid fees. In June 2009 the party charged engaged independent solicitors. On that same day the practitioner invited these solicitors to inspect the practitioner's files. That invitation has not been accepted. On 18 June 2009 the party charged notified the practitioner of its intention to seek an enlargement of time to tax accounts. On 29 June 2009 the Magistrates Court proceeding was stayed by consent. The application for the enlargement of time was lodged on 25 June 2009.
- 5 Two things ought be said about the proper approach to this appeal. First, O 60A r 4(1) of the *Rules of the Supreme Court* 1971 (WA) applies to the discretion of a Registrar exercising his or her jurisdiction to extend

time pursuant to s 229 of the *Legal Practice Act 2003* (WA) (the Act). That was made clear by the decision of *Monopak Pty Ltd v Maxim Litigation Consultants* [2007] WASC 112 [16]. In extending time to allow a bill to be taxed a Registrar is not 'acting as a taxing officer'. He or she is exercising their discretion as a Registrar.

6 Second, the authorities suggest an appeal from a Registrar is a hearing de novo. Recently Jenkins J in *Pullinger Readhead Lucas v Golden West Resources Ltd* [2009] WASC 140 [6] doubted this may be the case. But to date this has been the approach adopted by the court and it was the approach that I adopted in this matter.

7 Section 231 and s 232 of the Act are designed for the protection of the party charged: see *Hay v Butler & Crooks (a firm)* (1991) 7 WAR 333 [9]. Both sections are designed to provide a system where 'the client is satisfied that bills of costs are not excessive while imposing time limits to prevent a client unfairly taking advantage of the provisions to delay the obligation to pay proper costs': *Harrison v Hocking* [2000] WASC 188 [78]. The discretion to enlarge time is 'a power ... to regulate the rights of the parties to the bill in a proper case by enlarging time so as to ensure justice is done or that no injustice results as between the parties': see *Webb v Bateman* (Unreported, WASC, 27 May 1986) 6 (Franklyn J). The onus of proof lies on the party charged to persuade the court, having regard to all the relevant facts, that an extension of time ought be granted: see *Bosco v Solomon Brothers* [2006] WASC 307 [6].

8 The Act specifically imposes strict time limits on a request for taxation to ensure that if a taxation of costs is to be called for by the client it is called for promptly. Unless a client requests taxation the practitioner is entitled to proceed on the basis that a taxation of costs will not be requested: see *Monopak v Maxim Litigation Consultants* [113].

9 There are at least five matters to be considered in the exercise of the discretion to extend time. These considerations are to be found in the Consolidated Practice Directions [4.7.4] (this Practice Direction was revoked on 9 December 2009 following the proclamation of the *Legal Profession Act 2008* (WA) however it is relevant to this application). These factors are:

1. the reason for the delay in requesting taxation of practitioners' bills;
2. whether a refusal to allow an extension of time may cause injustice to the party charged;

3. whether there is evidence that suggests the bills may be excessive;
4. whether and to what extent extending the time would cause prejudice to the practitioner; and
5. the practitioner's reasons for opposing the application.

10 I will deal with each of these matters in turn. The party charged has not in my opinion provided a satisfactory explanation for the delay. Mr Palmer, a director of the party charged, says he was not aware of the right to tax invoices until 'the applicant's representative' (who was Mr Vella the accountant for the party charged) provided him with a copy of a letter dated 17 December 2008 in which Mr Vella requested on behalf of the party charged that the fees of the practitioner be taxed.

11 Mr Palmer also says that on behalf of the party charged he raised in a number of meetings with the practitioner concerns as to the costs incurred and the quantum in dispute. He says he instructed the practitioner to take the matter to mediation. Mr Palmer says he has 'never been shown a costs agreement' and that the other director of the party charged, Darren Pearce, has informed him that he (Mr Pearce) did not read the costs agreement before signing it and was not aware of its terms.

12 All of that evidence can be accepted. However, it does not explain the six month delay between the date of the purported request for taxation on 17 December 2008 and the date of the application to enlarge time filed on 25 June 2009. It would appear that even if Mr Palmer and his associate Mr Pearce were unaware of the right to have costs taxed the party charged advisor, Mr Vella, was aware that taxation was possible. Nowhere is it explained what advice Mr Vella gave, if any, and what steps were taken after the advice was given.

13 Consideration of these matters clearly favours the practitioner.

14 The party charged makes no specific reference to any injustice that will be suffered if time is not enlarged. It is worthy of note that as of June 2009 the party charged was represented by independent solicitors. It can be assumed these solicitors were well aware of the right to have the practitioner's bills taxed and the need to extend time for taxation. In my view it cannot be said that a refusal to extend time would visit injustice upon the party charged.

15 There is no evidence to suggest that this is a case of overcharging. The party charged has not particularised any instances of overcharging.

True it is that the party charged appears from time to time to have complained to the practitioner about the costs involved in the matter relative to the quantum of the claim. But no specific complaints were ever made. The practitioner says that no work was undertaken that was not necessary. There is no evidence to the contrary.

16 Again this is a factor which favours the practitioner.

17 There is no real evidence of prejudice to the practitioner in extending the time other than the natural prejudice associated with the delay in the party charged paying the practitioner's costs. That in itself must be seen as a prejudice although in an of itself it could not be seen as decisive. It is however a factor which favours the practitioner.

18 Finally, there are the practitioner's reasons for opposing the extension. Essentially the practitioner says he was acting honestly, ethically and with proper motive and his bills were proper in every respect. He says that he has reviewed his bills in light of the party charged's complaints and he is satisfied they are reasonable. That being so he does not see it as appropriate to concede an extension of time.

19 In my view there is nothing in the evidence to suggest the practitioner is being unreasonable in refusing to agree to an extension of time and opposing the party charged's application. This is a further factor which favours the position of the practitioner.

20 Taking into account all matters which are to be considered in an application such as this I am satisfied that all favour the practitioner's position. I could see no reason for extending the time in this matter. Accordingly I allowed the appeal, set aside the orders of the Registrar, refused an extension of time and ordered that the party charged pay the costs of the application to the Registrar and the costs of the appeal.