

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : COMO -v- HELMERS [2011] WASC 179 (S)

CORAM : CORBOY J

HEARD : 13, 22, 29 JUNE, 18 & 20 JULY, 23 & 25 AUGUST,
19 SEPTEMBER 2011

DELIVERED : 28 JULY 2011

PUBLISHED : 29 JULY 2011

**SUPPLEMENTARY
DECISION** : 10 JANUARY 2012

FILE NO/S : CIV 2002 of 2011

MATTER : Section 138C of the *Transfer of Land Act 1893*

BETWEEN : MICHAEL BERND COMO
Plaintiff

AND

HELGA-EVA HELMERS
First Defendant

THE REGISTRAR OF TITLES
Second Defendant

Catchwords:

Practice and procedure - Special costs order - Relevant principles - Whether requirements of s 280(2) *Legal Practitioners Act 2008* (WA) satisfied

Legislation:

Legal Profession Act 2008 (WA), s 280

Result:

Plaintiff to pay the first defendant's costs of the originating summons with limit on certain items in the Supreme Court scale of costs lifted

Category: B

Representation:

Counsel:

Plaintiff	:	Mr C P Stokes
First Defendant	:	Mr A J Aristei
Second Defendant	:	No appearance

Solicitors:

Plaintiff	:	Chris Stokes & Associates
First Defendant	:	Corser & Corser
Second Defendant	:	No appearance

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

Como v Helmers [2011] WASC 179

Fagan v Morien [2008] WASC 54 (S)

Heartlink Ltd v Jones as liquidator of HL Diagnostics Pty Ltd (in liq) [2007]
WASCA 254 (S)

CORBOY J:

The application and the result

1 Mr Como and Ms Helmers are brother and sister. By her will, their late mother devised and made a gift and bequest of land located in South Perth to Ms Helmers. Ms Helmers became the registered proprietor of the land in January 2010. Mr Como lodged a caveat over the land in March 2011.

2 The Registrar of Titles sent a notice under s 138B of the *Transfer of Land Act 1893* (WA) to Mr Como in May 2011. Mr Como commenced proceedings by originating summons in June 2011 seeking an order extending the operation of the caveat until further order of the court. An *ex parte* order extending the caveat was made. A hearing between the parties was subsequently held at which Mr Como's application to further extend the operation of the caveat was dismissed: *Como v Helmers* [2011] WASC 179.

3 Mr Como's application was strictly an interlocutory application. However, it was heard a few days before a contract for the sale of the land was due to be settled. In the circumstances, the parties treated the hearing of Mr Como's application for a further extension of the caveat as, in effect, the final hearing of his originating summons. Mr Como had not commenced other proceedings to vindicate any claim that he might have had to an estate or interest in the land.

4 Ms Helmers sought the costs of the application. Mr Como accepted at the hearing of Ms Helmers' application that he was obliged to pay her costs. He also accepted that the originating summons should be dismissed and that the costs order should be for the costs of the summons and not just the interlocutory application that had been determined in favour of Ms Helmers (ts 112; the originating summons was subsequently dismissed by consent on 18 October 2011). However, Ms Helmers contended that Mr Como should be ordered to pay costs assessed on an indemnity basis. That contention was opposed by Mr Como.

5 Ms Helmers' application for indemnity costs was rejected. However, she was given leave to make a further application seeking a special costs order. These are my reasons for making such an order.

The orders sought by Ms Helmers

6 Ms Helmers seeks an order that Mr Como pay her costs of the originating summons without reference to the limits provided for at

item 10(a) and item 11 of the *Legal Practitioners (Supreme Court) (Contentious Business) Report and Determination 2010* (the Costs Determination).

7 Item 10(a) of the Supreme Court scale of costs as established by the Costs Determination provides an amount of \$10,230 for proceedings in chambers other than proceedings to which item 11 applies. That amount is fixed on the basis of two days' preparation for a one-day hearing in chambers.

8 Item 11(a) provides an amount of \$31,680 for an originating summons. That is based on two days' preparation for a one-day hearing and 50 hours' getting up by a senior practitioner.

Mr Como's position

9 Mr Como did not provide any submissions in response to Ms Helmers' further application for a special costs order. The court is, nevertheless, required to exercise its discretion to award costs judicially and so it is still necessary for it to be satisfied that it is appropriate to make the order sought by Ms Helmers.

The evidence

10 Ms Helmers' application was supported by an affidavit made by Ronald William Bower, a member of the firm of solicitors who appeared for her in this matter. In summary, Mr Bower stated that:

- (a) Ms Helmers resided in Germany (par 7).
- (b) The question of whether the caveat ought to have been extended was significant for Ms Helmers as she had entered into a contract for the sale of the South Perth land. As has already been noted, settlement on the sale of the land was scheduled to occur a few days after the hearing between the parties to extend the operation of the caveat on an interim basis (pars 14 and 15).
- (c) His firm had instructed Ms Maria-Luisa Coulson, a legal costs consultant, to 'undertake a global review of the work undertaken and the costs incurred' regarding Mr Como's applications (par 21).
- (d) His firm had rendered accounts and had work in progress in respect of Ms Helmers' instructions in a total amount of \$42,392.64. Ms Coulson estimated that an amount of \$33,252.45

could be claimed from the plaintiff in respect of that work on the basis of the orders sought by Ms Helmers.

- (e) Counsel for Ms Helmers had rendered accounts totalling \$24,420. Ms Coulson estimated that an amount of \$16,027 could be claimed from Mr Como on account of counsel's fees on the basis of the order sought by Ms Helmers.
- (e) Much of the work performed by his firm and counsel fell within item 10(a) of the Supreme Court scale of costs.

Ms Helmers' submissions

11 Ms Helmers submitted that a special costs order may be made if it was established that:

- (a) there was a fairly arguable case to be put before a taxing officer to the effect that the bill of costs should tax out at more than the limit that would be imposed by the relevant costs determination;
- (b) the action was of 'unusual difficulty' or 'complexity' or 'importance'.

12 It was contended that the evidence given by Mr Bower of the advice received from Ms Coulson satisfied the first of those requirements. It was further contended that Mr Como's application was of unusual difficulty or complexity or importance having regard to the issues to be determined. Reference was made to the reasons for decision and the advice of counsel.

Determination of the application

13 Section 280 of the *Legal Profession Act 2008* (WA) concerns the effect of a costs determination. Section 280(1) provides that subject to any costs agreement, the taxation of bills of a law practice or any other aspect of the costs charged by a practice is regulated by an applicable costs determination. However, s 280(2) provides that:

Despite subsection (1), if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, the court or officer may do all or any of the following -

- (a) order the payment of costs above those fixed by the determination;
- (b) fix higher limits of costs than those fixed in the determination;

- (c) remove limits on costs fixed in the determination;
- (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or assessed.

14 In *Heartlink Ltd v Jones as liquidator of HL Diagnostics Pty Ltd (in liq)* [2007] WASCA 254 (S) the Chief Justice analysed the approach to be taken to the equivalent provision in the *Legal Practice Act 2003* (WA) (s 215). His Honour observed that:

The policy considerations that should guide a court when addressing an issue under s 215(2) are, firstly, that the court should not usurp the role of the taxing officer and, secondly, that at least where party and party costs are concerned, the court should make an order that would give effect to the general principle of allowing the successful party to be compensated for their costs by the unsuccessful party, where appropriate. [13]

15 Ms Helmers' submissions concerning the requirements for a special costs order reflected the Chief Justice's observations about the approach that should be adopted to give effect to those policy considerations.

16 The Chief Justice also accepted that the word 'unusual' when used in s 215(2) (s 280(2)) only qualified the expression 'difficulty' and not the words 'complexity' or 'importance' [17]. He rejected a submission that the word 'importance' did not relate to the significance attached to the matters litigated by the parties themselves. His Honour held that:

It seems to me that by reference to 'importance' in this context, the legislature is allowing the court to have regard to the question of whether the work done was appropriate to the significance of the issues that arose in the litigation. [19]

17 Finally, his Honour observed that the question of whether an order should be made under s 215(2) *Legal Practice Act*/ s 280(2) *Legal Profession Act* was a matter of 'impression rather than ... a matter of detailed evaluation' [20] since the determination was ordinarily made before a taxation had been undertaken.

18 I, of course, accept the Chief Justice's identification of the relevant principles and apply those principles to determine this application. I would only add that I agree with the submission made by Ms Helmers that the expression 'unusual difficulty' suggests that a matter was more difficult than would ordinarily be expected in an application of the kind under consideration: see *Fagan v Morien* [2008] WASC 54 (S) [19] (Templeman J).

19 I am satisfied that the order sought by Ms Helmers should be made having regard to the principles to which I have referred:

- (a) I accept that the evidence of Mr Bower concerning the advice given by Ms Coulson is sufficient to demonstrate that it is 'fairly arguable' that a taxing officer might properly fix the costs of the originating summons at more than the limits for the relevant items specified in the Supreme Court scale of costs.
- (b) I accept as a matter of impression that Mr Como's application to extend the caveat raised issues that were more difficult than would ordinarily be expected on an application to extend or remove a caveat. I also accept that the application raised a matter of importance to the parties given the imminent sale of the South Perth land and the considerable amount of acrimony and controversy that the terms of their late mother's will had caused between them. The work undertaken by Ms Helmers' solicitor does not appear to have been disproportionate to the significance of the issues raised by Mr Como's application. The matter was dealt with on a reasonably expedited basis, the evidence was extensive and a number of legal and factual questions were argued and determined. Those questions concerned not just whether Mr Como had a caveatable interest (a matter that Mr Como contended could be established on several alternative bases) but also whether the caveat was defective in form and whether it had been lodged for a proper purpose.

20 It is not immediately apparent to me that much of the work undertaken by Ms Helmers' solicitors and counsel falls to be assessed under item 10(a) rather than item 11 of the Supreme Court scale. That is a matter for the taxing officer. However, I should emphasise (as did Martin CJ in *Heartlink*) that the only effect of the order to be made is to free the taxing officer from the constraints that would otherwise be imposed by the limits specified for item 10(a) and item 11 in the Supreme Court scale of costs forming part of the Costs Determination. It is entirely a matter for the taxing officer whether, in fact, the amount to be allowed on a party and party basis should exceed the scale allowance for those items - that is, whether the work claimed was properly and appropriately done and if so, the amount that ought to be allowed for that work.