

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : BUITENDAG -v- RAVENSTHORPE NICKEL
OPERATIONS PTY LTD [2012] WASC 425 (S)

CORAM : LE MIERE J

HEARD : ON THE PAPERS

DELIVERED : 10 APRIL 2013

FILE NO/S : CIV 1444 of 2009

BETWEEN : ISAK BUITENDAG
Plaintiff

AND

RAVENSTHORPE NICKEL OPERATIONS PTY
LTD
Defendant

Catchwords:

Practice and procedure - Costs - Application for a special costs order -
Application allowed - Turns on own facts

Legislation:

Legal Profession Act 2008 (WA)
Rules of the Supreme Court 1971 (WA)

Result:

Application allowed

Category: B

Representation:

Counsel:

Plaintiff	:	No appearance
Defendant	:	No appearance

Solicitors:

Plaintiff	:	HopgoodGanim
Defendant	:	Herbert Smith Freehills

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

Frigger v Lean [2012] WASC 66

Geraldton Fisheries Co-op Ltd v Minister for Fisheries (Unreported, WASC,
Library No 9187, 12 December 1991)

Schmidt v Gilmour [1988] WAR 219

Walter v Buckeridge [No 5] [2012] WASC 495

1 **LE MIERE J:** On 15 November 2012 I delivered reasons for judgment and ordered that the plaintiff's claim should be dismissed. The defendant has applied for orders that the plaintiff pay the defendant's costs of the action. The defendant also seeks special costs orders pursuant to s 280(2) of the *Legal Profession Act 2008* (WA) (LPA) that the limits on costs allowable under the applicable costs determination be removed in respect of certain items of work. The defendant also seeks orders that the plaintiff pay to the defendant the cost of the transcript of the trial, and that the plaintiff pay the defendant's costs of interrogatories and of conferences between counsel regarding objections to witness statements and the index to the trial bundle.

2 The plaintiff has agreed to the usual order that costs follow the event. I will order that the plaintiff pay the defendant's costs of the action. The plaintiff opposes the special costs orders sought by the defendant. The plaintiff also opposes the making of orders that the plaintiff pay the defendant's costs of obtaining the transcript, of interrogatories and of conferences of counsel in respect of witness statements and the index to the trial bundle.

Special costs order

3 The defendant seeks an order that the limits on costs allowable under the applicable cost determination be removed in respect of certain items of work. Section 280(2) of the LPA empowers the court to make certain orders, including removing the scale limits or any order for the purpose of enabling costs above those in the determination to be ordered or assessed, if the court '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'.

4 The plaintiff opposes the making of special costs orders on two grounds. First, the defendant has not adduced any evidence that there is a valid costs agreement between the defendant and its solicitors. The plaintiff says that a solicitor ought not to recover costs in excess of those which he is entitled to charge his client and accordingly the defendant's solicitors are confined to the applicable scale of costs. Secondly, the plaintiff submits that the matter is not one of unusual difficulty, complexity or importance.

Relevance of costs agreement to special costs orders

5 I considered this issue in *Walter v Buckeridge [No 5]* [2012] WASC 495 where I said:

Section 280 of the *Legal Profession Act 2008* applies to costs between legal practitioners and their own clients, and costs between party and party. Section 280(2) empowers the court, if it is of the requisite opinion, to order the payment of costs above those fixed by the determination or to make one of the other orders specified. The power to make such a 'special costs order' is not conditioned upon there being a costs agreement between the legal practitioner and his client. To put it another way, if the court is of the requisite opinion it may order the payment of costs above those fixed by the determination in relation to solicitor and own client costs and in relation to party and party costs. In neither case is it a condition of the power to order the payment of costs above those fixed by the determination that there be a costs agreement made in accordance with div 6 under which the legal practitioner is entitled to charge costs above those fixed by the determination [56].

I remain of that opinion. The plaintiff's first objection fails.

Power to make special costs orders

6 The first question is whether the conditions for the making of a special costs order are satisfied. It is not necessary for the court to find that the costs allowable under a determination are in fact inadequate. It is sufficient if the court considers that it is fairly arguable that the taxing officer might properly allow costs at an amount greater than the amount allowable under the relevant legal costs determination: *Frigger v Lean* [2012] WASC 66 [81] (Allanson J with whom Newnes and Murphy JJA agreed).

7 In *Frigger v Lean* [2012] WASC 66 Allanson J said:

The questions arising under s 280 are to be addressed as matters of impression rather than detailed evaluation: *EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd* [2008] WASC 275 (S) [7]. In some cases, it may be necessary to prove the criteria in s 280 by specific evidence. In other cases, the court may be able to form a view from its knowledge of the case, as in *Verdell Pty Ltd v F & G Nominees Pty Ltd* [2002] WASC 58 (S2) [14] - [15]. In the present case, the primary judge had heard and determined the applications to remove the receiver as plaintiff and to set aside the injunction, and had then determined the application to permanently stay the appellants' action. It was open to his Honour to form the necessary opinion from his own knowledge of the matter and from the papers before the court without requiring further evidence such as a draft bill of costs [82].

8 It is established by a number of decisions in this court that the adjective 'unusual' in s 280(2) of the LPA qualifies only the word 'difficulty' and not the words 'complexity' and 'importance'.

9 Order 66 r 12(1) of the *Rules of the Supreme Court 1971* (WA) (RSC), which provided for special costs orders before 1 January 2004, provided that where the court is of opinion that a special order as to costs should be made by reason of the unusual complexity or importance of the case or for any other good or sufficient reason the court may order that any particular allowance in any relevant scale may be raised or a limit removed. In *Schmidt v Gilmour* [1988] WAR 219 the Full Court held that the amount of work done in getting up the case for trial may constitute a good and sufficient reason for making an order increasing the scale notwithstanding that the case is not one of unusual complexity or of importance. However, under s 280(2) of the LPA, the amount of work done in relation to an item in the scale cannot constitute a good and sufficient reason to depart from the scale unless the amount of costs allowable in respect of the item under the costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter.

The defendant's submissions

10 In her affidavit sworn on 1 February 2013 Ms Klimczak, a solicitor who had the day-to-day conduct of the action on behalf of the defendant, says that the action broadly involved allegations by the plaintiff in relation to the following issues:

- a. the reasons for his dismissal (summary dismissal claim);
- b. the manner in which the investigation into his alleged misconduct was conducted (breach of policies claim);
- c. information reported in the media surrounding his dismissal (breach of confidentiality claim); and
- d. computation of damages.

11 Ms Klimczak says that there were broadly seven grounds of dismissal on which the defendant relied with a further six issues to be considered in relation to two of those grounds. Additionally, the plaintiff made allegations related to his prior disciplinary history, involving two prior incidents. The relevant conduct occurred over the course of approximately six months. The defendant says that the matter was made

unusually difficult by the complex set of facts and circumstances referred to by Ms Klimczak. The defendant says that the matter was factually complex for the same reasons, that is the number of grounds of misconduct and related issues regarding the defendant's policies and approach to community investment and the farmhouses, the volume of material involved, including in relation to the defendant's investigation, and the complex interpretation of the share plans in the context of the issue of damages. The defendant says that the following matters attest to the complexity of the factual issues:

- (a) the matter spanned over three years;
- (b) there were numerous amendments to pleadings and interlocutory applications;
- (c) the volume of material involved in the matter was substantial, and as a result, significant time was required in order to give discovery, and prepare the matter for hearing;
- (d) the defendant's opening and closing submissions were lengthy and involved considerable factual and legal analysis;
- (e) the matter required the evidence of a large number of witnesses from various locations;
- (f) the duration of the hearing was lengthy (10 days) in order to allow the significant amount of material to be put forward; and
- (g) the trial bundle alone comprised seven lever arch files.

12 The defendant further says that the matter was of very great importance to the parties. The plaintiff was a senior manager of the mine, and the allegations of dismissal related to him putting himself in a conflict of interest situation. The defendant says that the most important of its policies relate to safety and the Guide to Business Conduct. The defendant considered it important to defend the matter because of the different, narrow interpretation taken by the plaintiff, and it considered it important to defend its interpretation of the policy. This had the potential for global implications for the BHP Billiton Group if the defendant's views were accepted. The defendant further says that the plaintiff's statement of claim made a number of serious allegations of bias against senior managers acting on behalf of the defendant in relation to the conduct of the investigation and the disciplinary process. The plaintiff also made a number of statements to the media about his dismissal, his

intention to commence proceedings and the closure of the Ravensthorpe Nickel Operation of which he was the general manager. The plaintiff also made comments to the media during the trial and after the judgment was handed down. The defendant says that given the comments that had been made by the plaintiff as reported in the media, and the allegations of bias against its senior managers, the defendant considered it important to defend the allegations that it had not acted properly in relation to the dismissal of the plaintiff.

13 The defendant seeks a special costs order in relation to its defence, giving discovery, getting up case for trial and counsel fees. The pleadings were amended on a number of occasions. The statement of claim was amended five times, the defence four times and the plaintiff's reply four times. The defence pleads facts which would have required extensive investigation and taking of instructions, as well as requiring time to employ the facts within a legal framework and structure the defence. The effect of [10] of Ms Klimczak's affidavit of 1 February 2013 and [9] of her affidavit of 4 February 2013 is that approximately 219 hours of work were billed by all solicitors and counsel involved in the work in relation to the various versions of the defence. The Legal Practitioners (Supreme Court) (Contentious Business) Determination 2008 and the Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 (the Determinations) allow 10 hours for a senior practitioner.

14 There were four affidavits of discovery sworn on behalf of the defendant. These included a total of 352 documents occupying approximately four lever arch files. In her affidavits Ms Klimczak says in effect that approximately 290 hours work by the defendant's solicitors and counsel related to discovery. The Determinations allow 10 hours for discovery.

15 The defendant submits that the amount of costs allowed for getting up case for trial under the Determinations is inadequate because of the complexity of the matter. There were 14 witnesses required to give evidence and 24 filed witness statements. The trial bundle was extensive, and it is apparent that substantial work went into investigating and identifying relevant documentary evidence. The effect of Ms Klimczak's affidavits is that approximately 1,760 hours were spent by the defendant's solicitors and counsel related to getting up the case for trial. The Determinations allow 120 hours for getting up.

16 The defendant seeks a special costs order for counsel fees on brief, ie the first day of trial and preparation and a further special costs order for

counsel fees for the second and each successive day of the hearing. The Determinations allow counsel fees on brief calculated on the basis of 3.5 days of preparation in addition to the first day of trial. A comparison of the hourly rate and daily rate allowed for counsel under the 2010 Determination shows that the fees for trial and preparation are calculated on the basis of a 10 hour day. Accordingly, the counsel fees under the Determinations for preparation and the first day of trial are calculated on the basis of 45 hours. In her affidavits Ms Klimczak says that the defendant's counsel, Mr De Kerloy, billed approximately 132 hours of work in preparing for the trial. It is not clear that all of that work is properly designated as part of the fee on brief. Nevertheless, it is apparent that Mr De Kerloy spent more than 35 hours in preparing for the trial.

The plaintiff's submissions

17 The plaintiff submits that there was no unusual difficulty or factual complexity surrounding the matter, although there was a significant amount of material involved. In respect of the defendant's claim that the matter was of importance, the plaintiff submits that every case is of utmost importance to the parties involved, but that there was nothing of particular import or significance in this case that would require the court to remove the limits on the scale rates. The plaintiff submits that in any event, any limits with respect to maximum hourly rates that may be fixed in the cost determinations should not be removed.

Matter is complex

18 In my opinion the matter was a difficult case but I am not satisfied that it is unusually difficult for a matter heard in this court. I am satisfied that it was a complex case. The complexity arises from the numerous grounds which the defendant relied on to justify the summary dismissal. Those grounds required a consideration of the terms of the Contract of Employment, including the defendant's policies and their application to the primary facts and inferred facts which underlie each of those grounds. The volume of evidentiary material was extensive. Whilst it is not conclusive, the length of the parties' written closing submissions is an indication of the complexity.

19 I am also satisfied that the amount of costs allowable in respect of this matter is inadequate because of the importance of the matter. The case raised no questions of general or public importance. A matter may satisfy the requirement of importance in s 280(2) of the LPA where it involves matters of importance to the parties rather than the public. There must be something about the issues in the case or its significance or

consequences that makes it important to the parties. Section 280(2) of the LPA does not require that the matter be one of unusual importance. The case involved issues concerning conflict of interest and whether the plaintiff's conduct breached policies of the defendant. The media coverage of the case, before, during and after trial, is some, albeit not definitive, indication that the matter was important. The issues, their significance and the consequences for the parties justified an amount of work being done, or resources employed, such that the costs allowable under the relevant costs determination is likely to be inadequate because of the importance of the matter.

Costs allowable under Determinations for defence inadequate

20 Before the court's discretion to make a special costs order is enlivened, it must be of the opinion not only that the matter is complex or important, but that the amount of costs allowable in respect of the matter under the relevant costs determinations is inadequate because of the complexity or importance of the matter. It is fairly arguable that the taxing officer might properly allow costs at an amount greater than the amount allowable under the relevant Determinations for preparing and settling the defence. As I have said, the defence was amended four times. Ms Klimczak has sworn that solicitors and counsel did approximately 219 hours of work in relation to the various versions of the defence. It is a matter for the trial judge to determine as a matter of judgment whether, on the face of it, the amount of work done appears to have been reasonably done so that the amount allowable under the relevant costs determinations is inadequate. This is a judgment which is essentially preliminary and provisional in nature. My impression is that the amount of work reasonably required to prepare and settle the defence in its various versions might properly exceed the amount allowable under the relevant Determinations. Two hundred and nineteen hours is an extraordinary amount of time to be spent on preparing and settling the defence. It will be for the taxing officer to assess what amount should properly be allowed. I am of the opinion that the amount of costs allowable in respect of the defence under the Determinations is inadequate because of the complexity and importance of the matter.

Costs allowable under Determination for discovery inadequate

21 I am of the opinion that the amount of costs allowable for giving discovery of documents under the Determinations is inadequate because of the complexity and importance of the matter. As I have said, there is evidence that the defendant's solicitors and counsel did approximately 290 hours of work related to discovery. That seems an unusual amount of

time. It may be that some, or even a large part, of that work was related to the plaintiff's discovery rather than giving discovery. Furthermore, the taxing officer may assess that a large part of that work was not reasonably necessary. Nevertheless, it is fairly arguable that the taxing officer might properly allow costs for giving discovery at an amount greater than the amount allowable under the relevant Determinations.

Costs allowable under Determination for getting up inadequate

- 22 The defendant seeks a special costs order for getting up case for trial. I have already referred to the relatively large number of witnesses and witness statements. There is evidence that the defendant's solicitors and counsel spent approximately 1,760 hours on work related to getting up the case for trial. That is a very large amount of work. The Determinations allow only 120 hours for getting up. It is fairly arguable that the taxing officer might properly allow costs at an amount greater than the amount allowable under the Determinations for getting up. Of course, it will be for the taxing officer to assess whether all, or any part, of that work was reasonably necessary. The material before me does not enable me to form a judgment whether 1,760 hours, or anything like that, was reasonably necessary. My finding is only that it is fairly arguable that the amount allowable under the Determinations is inadequate because of the complexity and importance of the matter.

Costs allowable under Determination for fee on brief inadequate

- 23 The defendant seeks a special costs order for counsel fee on brief. As I have said, the Determinations allow an amount for counsel fees for preparation and the first day of trial calculated on the basis of 45 hours work. There is evidence that the defendant's counsel billed 132 hours of work in preparing for the trial. It does not necessarily follow that the defendant should recover all of those costs. However, it is fairly arguable that the taxing officer might properly allow costs for the fee on brief at an amount greater than the amount allowable under the Determination. It will be a matter for the taxing officer to determine whether all or what part of the work done was reasonably necessary and proportionate to the case. I am of the opinion that the amount allowable for the fee on brief under the Determination is inadequate because of the complexity and importance of the matter.

Costs allowable under Determination for subsequent counsel fees not inadequate

24 I am not satisfied that the counsel fee for the second and each successive day under the 2010 Determination is inadequate because of the complexity or importance of the matter. The trial went for 12 days. Accordingly, the Determination allows for 110 hours for preparation and attendance at trial on the second and successive days of trial. Ms Klimczak's affidavit says that Mr De Kerloy billed 106.5 hours related to preparation for attendance at trial on the trial days. Whilst the complexity and importance of the matter might have caused additional work to be reasonably necessary in preparation for the trial I am not satisfied, having regard to the course of the trial, that the allowance under the 2010 Determination is inadequate.

Hourly rates

25 The plaintiff submits that any limits with respect to maximum hourly rates under the Determination should not be removed. The hourly and daily rates set out in the Table in the Determinations are the maximum hourly and daily rates which the Legal Costs Committee determined shall be used to calculate the dollar amounts in the scale of costs. Each item in the scale of costs specifies a dollar amount with reference to the fee earner. The rates are set by the Costs Committee as a result of a survey of solicitors to ascertain hourly rates charged by them for work performed by practitioners and subsequently revised as a result of enquiries by the committee and submissions from the Law Society and the Bar Association. As a result, the hourly and daily rates in the Determinations reflect the rates generally charged by practitioners. It may be appropriate to increase the hourly rate having regard to the work that was done and the person who did it. There is evidence that the number of hours spent on the defence, discovery, getting up case and counsel fee on brief exceed by a considerable magnitude the number of hours allowed under the scale. I have formed the judgment that the number of hours allowable in respect of those items of work under the relevant determination is inadequate because of the complexity and importance of the matter. However, the evidence before me, and my knowledge of the matter as case manager, does not lead me to the conclusion that there should be any increase in the hourly rates set out in the Determinations.

Transcript

26 The trial went for 12 days. Many primary facts and inferred facts were in issue. It was necessary for the parties to refer in the course of the

trial and in closing submissions to the evidence in detail. That is demonstrated by the numerous transcript references in the closing submissions of both parties. It was reasonably necessary for the defendant to obtain a copy of the transcript. The plaintiff should pay the defendant's costs of obtaining the transcript.

Interrogatories

27 The defendant was granted leave to administer interrogatories. The defendant's interrogatories related to certain identified matters. The defendant says that if the plaintiff had pleaded those matters the defendant would not have needed to request these interrogatories.

28 Order 66 r 47(1) of the RSC provides that the cost of interrogatories shall be reserved for consideration of the judge at the trial. Rule 47(2) provides that in considering whether any order or allowance should be made for the costs of interrogatories, the judge shall consider whether the party requesting answers to interrogatories has by his conduct in connection with the request, unnecessarily increased the costs, and whether the results achieved have justified wholly or in part the additional costs involved. In *Civil Procedure Western Australia* at [66.47.1] the authors cite ***Geraldton Fisheries Co-op Ltd v Minister for Fisheries*** (Unreported, WASC, Library No 9187, 12 December 1991) as authority for the propositions that:

A successful party who has administered interrogatories pursuant to leave ought to have the costs of them unless, after trial, they are plainly shown to have been unnecessary or unreasonable at the time they were administered. Proper preparation may involve investigation well beyond what is directly productive of evidence led at trial. It is not the rule that costs are allowed only for the preparation which produces admissible evidence.

Applying those principles, the defendant should have the costs of administering interrogatories.

Conferences

29 The defendant seeks an order pursuant to O 66 r 18(2)(b) of the RSC that the plaintiff pay the defendant's costs of the conferences between counsel on 10 February 2012 and 15 February 2012 regarding objections to witness statements and the index to the trial bundle. The defendant submits that the conferences between counsel were necessary in order to limit the objections to be dealt with at trial and avoid an unnecessary delay in the progress of the matter. The plaintiff submits that counsel conferences are a normal part of the process, including conferences in

respect of witness statements, and that the plaintiff should not be ordered to pay the defendant's special costs of the conferences.

30 Before June 2010 conferences between counsel were not specially provided for in the scale of costs. However, the 2010 Determination introduced into the scale at item 24 'pre-trial, mediation, conferrals, or other conferences'. Practice Direction 4.1.2.2 provides for the usual orders made in the CMC list. In relation to witness statements the usual orders include:

46. If any dispute concerning the admissibility of any statement or any part thereof has not been resolved, counsel for the parties shall confer and attempt to resolve it. Such conferral shall, if practicable, be in person and failing that shall be by telephone.

That reflects the practice in this court that counsel confer in an attempt to resolve objections to witness statements. It appears to me that the costs of the conferences may be allowed under item 24 of the scale. In any event, I am satisfied that the costs should be allowed. Out of an abundance of caution I will order that the plaintiff pay the defendant's costs of the conferences between counsel on 10 February 2012 and 15 February 2012 regarding objections to witness statements and the index to the trial bundle to be assessed under item 24 of the 2010 Determination.

Conclusion

31 Orders should be made to the following effect:

1. The limits on costs allowable under the applicable Legal Practitioners (Supreme Court) (Contentious Business) Determinations should be varied in respect of the following items of work:
 - (a) scale item 3(b) - defence;
 - (b) scale item 7(b) - giving discovery of documents;
 - (c) scale item 16 or 17 - getting up or preparation of case;
 - (d) scale item 19(a) or 20(a) - counsel fees on brief, including first day of trial and preparation;
- by removing the limit on the number of hours that may be allowed in the scale for each item of work.

2. The plaintiff shall pay to the defendant the cost of obtaining the transcript of the trial of the action.
3. The plaintiff shall pay the defendant's costs of administering interrogatories.
4. The plaintiff shall pay the defendant's costs of the conferences between counsel on 10 February 2012 and 15 February 2012 regarding objections to witness statements and the index to the trial bundle to be assessed under scale item 24(a).
5. The plaintiff should pay the defendant's costs of applying for special orders as to costs.