15/02; [2002] VSCA 100

SUPREME COURT OF VICTORIA — COURT OF APPEAL

KOWAL v ZOCCOLI

Winneke P, Ormiston and JD Phillips JJ A

19 June 2002 — (2002) 4 VR 399

CIVIL PROCEEDINGS – COSTS – LOSS OF INCOME BY PARTY ATTENDING COURT TO INSTRUCT – INCOME LOST BY ATTENDANCE AT COURT – WHETHER LOSS OF INCOME INCLUDED IN COSTS, EXPENSES OR DISBURSEMENTS.

Rule 63A.69 of the *County Court Rules* provides:

> "All costs shall be allowed as are necessary or proper for the attainment of justice or for enforcing or defending the rights of any party."

K., a medical practitioner, in defending a claim in the County Court for damages for professional negligence, attended court on five days to instruct. The case was settled before K. was to give evidence. K.'s bill of costs included a claim of $25,383.30 for professional fees lost due to his attendance at court. The judge allowed K. $217 per day according to the scale of allowances for witnesses in the County Court. Upon an application for leave to appeal—

HELD: Leave to appeal refused.
The main question arising on this appeal is whether such "costs" as are referred to in the County Court Rules include a doctor's loss of fees on the days on which he attended court as a litigant, in substance a claim for loss of income. The accepted basis for an award of costs is that they are by way of indemnity and are intended to reimburse the litigant for costs actually incurred; they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant. It is difficult to see how loss of income can in any sense be said to be a cost or an expense or a disbursement. Loss of earnings is not to be allowed to a litigant if it is not contemplated by the relevant legislation or rules. Compensation for such loss of earnings is not encompassed within the ordinary notion of "costs" as it appears in Rule 63A.69.

WINNEKE P:
1. I will invite Phillips JA to deliver the first judgment in this matter.

JD PHILLIPS JA:
2. This appeal arises out of a proceeding in the County Court brought by the plaintiff, the present respondent, for damages for professional negligence against the would-be appellant, an ophthalmic surgeon. On the fifth day of the trial, 20 August 1999, the matter was resolved when the plaintiff accepted the defendant's offer of compromise. Orders were made in consequence, including an order that the defendant do pay the plaintiff's costs taxed on Scale D up to and including 11 August 1999 and that the plaintiff pay the defendant's costs as and from 12 August 1999, taxed on scale D.

3. As directed by the trial judge, bills of costs were prepared and exchanged. On 30 August 2000 the Taxing Registrar taxed the defendant's costs at $55,169.07, which included, under Item 56 of the bill, which was headed "Dr Kowal's fees and expenses for attendance at the court throughout the trial as the Defendant", the sum there claimed of $25,383.30. This was put in the bill in a column headed "Disbursements". The claim was made apparently on the basis that Dr Kowal, the defendant, had lost his professional fees on the five days of his attendance during the trial. The amount was quantified by reference to his appointment book, which for those days was full, although, it would appear, none of the patients was seen, and the claim was for fees so lost.

4. After the taxation, the plaintiff sought a review of the determination of the Taxing Registrar under Rule 63A.57 of Chapter I of the County Court Rules. On 23 October 2000, a judge ordered that the amount allowed for costs be varied by substituting, for the amount claimed in Item 56 of the bill, the sum of $1,085, being an allowance of $217 per day according to the scale of allowances

for witnesses in the County Court. As this effected a reduction in the costs of more than $24,000, the doctor would now appeal.

5. At the outset it should be noted that such an appeal is from an interlocutory order. An interlocutory order may be made either before or after judgment in the main proceeding, and it seems to me clear that, while the orders made by the judge on 20 August 1999 were final, including the order for costs, an order on the taxation of those costs, and in consequence an order varying the taxation, must be interlocutory. Both the taxation of the costs and an order varying the result of the taxation are orders giving effect to what otherwise is a final order or judgment, but in themselves they are not final but interlocutory. Reference may be made here to *Smith v Cowell*[1], *Benfield v Australian National Railways Commission*[2] and *Biala Pty Ltd v Mallina Holdings Ltd*[3].

6. The doctor therefore needs leave to appeal before the appeal is competent. No leave has yet been obtained and, when this was pointed out this morning, counsel for the doctor, Mr Cawthorn, sought leave orally. No objection was taken to leave being sought so late, and the first question is whether leave should now be granted retrospectively. In my opinion, that leave ought not to be granted, mainly because, as will be seen, I think that the appeal has no merit.

7. Although the proceeding in the County Court was settled before the time had come for the doctor himself to give evidence, the doctor had been in attendance while the plaintiff's experts had been in the witness box; and, as the County Court judge noted at the outset in his reasons for judgment, the solicitor for the plaintiff conceded that Dr Kowal was present in court on the relevant dates and that it was necessary for him to be at court to instruct counsel. As to that, reference may be made to *McCoughtry v Schrick*[4], *Petrunic v Barnes*[5] and *Australian Blue Metal Ltd v Hughes*[6]. The judge agreed, therefore, that it was appropriate for the taxing officer to find that Dr Kowal's attendance at court was "necessary and proper for the attainment of justice", reflecting the words in Rule 63A.69 of the County Court Rules. That rule reads: "All costs shall be allowed as are necessary or proper for the attainment of justice or for enforcing or defending the rights of any party." See also Rule 63A.29. The main question arising on the appeal in this instance is whether such "costs" as are referred to in those rules include a doctor's loss of fees on the five days on which he has attended court as a litigant, in substance a claim for loss of income.

8. In my opinion, whatever has been said about that question in the past, it was answered adversely to the would-be appellant by the majority judgment in *Cachia v Hanes*[7], in which, although the case dealt with a litigant in person, the majority spoke generally about the ambit of the word "costs" within a provision such as that here in question. Thus, the majority said, at 409:

> "It is fundamental to the appellant's argument that the time he lost in preparing and conducting his case constitutes 'costs' within the meaning of this rule [being Rule 23(2) of Part 52 of the Supreme Court Rules 70 NSW]. He is, however, unable to sustain that proposition. The 'costs' provided for in the Rules do not include time spent by a litigant who is not a lawyer in preparing and conducting his case. They are confined to money paid or liabilities incurred for professional legal services. It is only in that sense that the Rules speak of 'costs'."

So too, at 410-411:

> "It has not been doubted since 1278, when the Statute of Gloucester introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant."

It was on that basis that compensation was denied to the litigant in person in *Cachia v Hanes* for any loss of time involved in his preparing his case or in his conducting the case. In other words, that compensation was denied him because of the nature of "costs" allowed, and not because of anything attending the special position of a litigant in person. Thus again, at 414:

> " ... the accepted basis for an award of costs is that they are by way of indemnity. They are intended to reimburse the litigant for costs actually incurred; they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant. If costs were to be awarded otherwise than by way of indemnity, there would be no logical reason for denying compensation to a litigant who was represented."

And further, at 414-5:

> "Putting to one side the question posed by the relatively rare exception of a solicitor acting in person there is no inequality involved: all litigants are treated in the same manner. And if only litigants in person were recompensed for lost time and trouble there would be real inequality between litigants in person and litigants who were represented, many of whom would have suffered considerable loss of time and trouble in addition to incurring professional costs."

To my mind what was said in that case by the majority answers the claim now made by the doctor for loss of income.

9. It is difficult to see how loss of income can in any sense be said to be a cost or, indeed, an expense or a disbursement. What was said in *Cachia v Hanes* simply confirms what seems at first so evident. None the less counsel for the doctor relied upon *Petrunic v Barnes* which, and it is obvious, runs counter to what I have just quoted. In *Cachia* the majority, after referring to the legislative change made in England to allow for some such compensation to a litigant in person, said this[8]:

> "We should add that the English legislation and rule represent a straightforward approach to the problem, in contrast to the approach adopted in some cases where courts have treated the loss in earnings of a litigant incurred in the course of the preparation or conduct of his case as a disbursement. Clearly that is merely an indirect way of recompensing a litigant for time spent in the preparation or conduct of his case which, if it is not contemplated by the relevant legislation or rules, is not permissible."

The footnote to the penultimate sentence in what I have just quoted reads as follows:

> "See *Kerridge v Foley*, ureported, Supreme Court of New South Wales, 19 August 1970; *Secretary Department of Foreign Affairs and Trade v Boswell (No.2*) (1992) 39 FCR 288. Cf. *Petrunic v Barnes* [1989] VR 927; *Australian Blue Metal Ltd v Hughes* [1970] 2 NSWLR 119,"

Mr Cawthorn submitted that the High Court had not disapproved *Petrunic v Barnes*, but I do not see it that way. Loss of earnings was not to be allowed to a litigant, said the majority, "if it is not contemplated by the relevant legislation or rules". The question here is whether compensation for such loss of earnings is so contemplated, and nothing has been put to us in argument to suggest that it is. Certainly it is not encompassed within the ordinary notion of "costs" as it appears in Rule 63A.69 or Rule 63A.29, and that for the reasons given *in extenso* by the High Court.

10. Indeed, as I apprehend it, the foregoing has since been borne out by the Court of Appeal's decision in *Walton v McBride*[9]. In that case the power of a medical tribunal to award "costs" was in question. It was held that the term "costs" included a party's costs of attending as a witness but did not extend to that party's costs of attending to observe or to instruct legal representatives. That was a narrow view, but it was adopted by Kirby P as authoritatively established by the High Court in *Cachia v Hanes*, notwithstanding his Honour's own views as expressed in dissent in *Cachia* when in the Court of Appeal[10]. In *Walton* his Honour said this of his previous views[11]:

> "They must now be taken to have been overruled by *Cachia v Hanes* in the High Court. *Kerridge*, *Petrunic* and other cases are footnoted to the majority judgment in that last-mentioned case (at 417). It is clear that the majority in the High Court disapproved of them."

His Honour then quotes what I have just set out about the need to find, in the relevant legislation or rules, something permitting compensation otherwise than for costs, strictly so called, and continued:

> "It is clear in the passage just cited that the High Court has rejected the notion of litigants recovering costs of attending and instructing."

This is, moreover, in line with what was said by Handley JA in *Cachia v Hanes* when in the Court of Appeal, for his Honour said, at 318:

> "Under the existing law represented litigants do not receive anything like a complete indemnity against the costs incurred and time lost in litigation. A legally represented litigant must spend considerable time in the preparation of his or her own case and in instructing solicitors. If such a litigant is

> successful he or she receives no compensation for loss of time apart from sums properly allowable as witness expenses. A party is not allowed on taxation `the costs of attending merely to observe or instruct': see *Russo v Russo* [1953] VicLawRp 12; [1953] VLR 57 at 67; [1953] ALR 95. Nor does a successful represented litigant receive a complete indemnity for the costs paid to his or her solicitors."

If this is different, as I think it is, from what was said by the Federal Court in *Secretary Department of Foreign Affairs and Trade v Boswell (No.2)*[12], then that case should not, in my view, be followed now in the light of *Cachia v Hanes* in the High Court.

11. In deference to the care with which Mr Cawthorn developed his submissions, I simply add that, although he sought to rely upon *Kerridge v Foley*[13], in my opinion the treatment of that case by Samuels JA in *Cachia v Isaacs (No.2)*[14] is more in line with the decision of the High Court in *Cachia v Hanes* than was the argument Mr Cawthorn sought to mount by reference to it. See also *Russo v Russo*[15], which Murphy J sought to distinguish in *Petrunic*, but which Handley JA appears to have approved in *Cachia v Hanes*.[16]

12. That is enough to dispose of the present case, for it establishes that the Taxing Registrar in the County Court erred in allowing what was, in effect, compensation for loss of income. The County Court judge, on review, allowed the doctor the ordinary witness allowance: and so much is authorised by the High Court in *Cachia v Hanes*; for the majority said[17]:

> "Of course a litigant who qualifies as a witness is entitled to the ordinary witness's fees."

There is no cross-appeal against the amount allowed by the County Court judge in this instance and so no point is made of the allowance by the judge for the five days for which the doctor claimed, notwithstanding that he did not give evidence.

13. There is, however, one other complaint now made by the would-be appellant about the judge's decision and that is the subject of a ground of appeal added by leave this morning. The new ground reads:

> "7. Alternatively, his Honour erred in failing to allow Dr Kowal witness expenses for 5 days at the scale item for witnesses giving evidence in an expert or professional capacity, namely $1,413 per day."

14. It will be recalled that in setting aside the decision of the Taxing Registrar the judge allowed in lieu an amount of $217 per day for the five days of the doctor's attendance at court. That was allowed as the maximum permitted under the heading "Witnesses expenses", a section appearing towards the conclusion of Appendix A in Chapter I of the County Court Rules. His Honour allowed $217 by reference to the second paragraph of that section, rejecting as inappropriate the first paragraph commencing "witnesses giving evidence ... " and under which a maximum is permitted of $1,413 per day. The complaint made in the new ground 7 is that the judge should have allowed the greater sum instead of the lesser.

15. His Honour's view was that under the first paragraph allowance could be made only for the days spent by a witness while in court actually giving evidence, and in that regard his Honour distinguished the position under the differently framed equivalent in this Court, which appears in Appendix B to Chapter I. Now, whether his Honour was right or not, it is a matter which might be thought peculiarly within the province of the County Court itself, involving as it does the proper interpretation and application of that court's own scale of costs. Ground 7 has been raised very late in the day: as I have said, ground 7 was introduced by amendment only this morning. The doctor was granted by the judge an allowance per day for five days, notwithstanding that he was not called upon to give evidence; and while the fact that his attendance was necessary and proper for the attainment of justice was not put in issue on the appeal now under consideration, it might have been otherwise had the allowance made been at the higher rate. I do not know, and I do not mean to speculate. But in all of the circumstances, I would not grant leave to appeal by reference to the added ground.

16. Otherwise, the proposed appeal seems to me to have no merit and accordingly, for the reasons I have given, I would refuse leave to appeal altogether.

WINNEKE P:
17. I agree.

ORMISTON JA:
18. I also agree.

WINNEKE P:
19. The formal order of the Court is that the application for leave to appeal made retrospectively at today's date is dismissed with costs.

20. The Court will also order that the appeal constituted by the notice filed in the Registry on 6 November 2000 is dismissed as incompetent.

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[1] (1880) 6 QBD 75.
[2] (1992) 8 WAR 285.
[3] (1990) 2 WAR 381 at 388.
[4] [1947] VicLawRp 49; [1947] VLR 342; [1947] ALR 426.
[5] [1989] VicRp 81; [1989] VR 927.
[6] [1970] 2 NSWLR 119.
[7] [1994] HCA 14; (1994) 179 CLR 403; 120 ALR 385; (1994) 68 ALJR 374.
[8] At 416-7.
[9] (1995) 36 NSWLR 440.
[10] (1991) 23 NSWLR 304.
[11] (1995) 36 NSWLR 440 at 452-453.
[12] [1992] FCA 629; (1992) 39 FCR 288; (1992) 111 ALR 553; 111 A Crim R 553.
[13] Unreported, Supreme Court of NSW, 19 August 1970.
[14] Unreported, Court of Appeal, NSW, 23 March 1989, per Samuels JA at pp21-22.
[15] [1953] VicLawRp 12; [1953] VLR 57 at 67; [1953] ALR 95.
[16] See also *Cachia v Isaacs (No.2*) per Samuels JA at p18.
[17] At 417.

APPEARANCES: For the Appellant Kowal: Mr P Cawthorn, counsel. Blake Dawson Waldron, solicitors. For the Respondent Zoccoli: Mr TP Tobin, counsel. Riordan and Partners, solicitors.
