

*Fryer v Frost* [2009] NTSC 65

PARTIES: FRYER, James Robert

v

FROST, Adrienne Veronica Elise

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: 12 of 2006 (20604623)

DELIVERED: 4 December 2009

HEARING DATES: By Written Submissions

JUDGMENT OF: MASTER LUPPINO

**CATCHWORDS:**

Costs – Objection and reconsideration following taxation – Time limit for objection – Extension of time for objection – Form of objection – Service of objection.

Practice and procedure – Inherent Jurisdiction of the Master.

*Limitation Act* s 44(1)

*Supreme Court Rules* rr 3.01(2), 63.55, 77.01

**REPRESENTATION:**

*Counsel:*

Plaintiff: Written Submissions  
Defendant: Written Submissions

*Solicitors:*

Plaintiff:	Mary M Allan
Defendant:	Withnalls Territory Lawyers

Judgment category classification: B

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Fryer v Frost* [2009] NTSC 65  
No 12 of 2006 (20604623)

BETWEEN:

**JAMES ROBERT FRYER**  
Plaintiff

AND:

**ADRIENNE VERONICA ELISE FROST**  
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

- [1] This matter arises out of a taxation of a bill of costs. The taxation was completed on 18 September 2009. The order in relation to the taxation was authenticated on 3 November 2009.
- [2] The plaintiff has since given notice (“Notice”) pursuant to Rule 63.55(1) of the *Supreme Court Rules* (“the Rules”) requesting that I reconsider two rulings I made in the course of the taxation. Rule 63.55(8) requires that I give written reasons for decision following my reconsideration.
- [3] The Notice is in letter form dated 2 October 2009 which was received at the Master’s Chambers by facsimile on that date. The Rules do not specify a form for notice under Rule 63.55(1). The rules simply require that notice is

to be given to the Taxing Master, within a specified time, served upon the other party within a specified time and that that notice shall include a statement of the objections upon which the request for reconsideration is based, see Rules 63.55(1)-(6).

- [4] A number of issues have arisen in relation to the Notice and some background information regarding the course of the taxation will put those issues in context.
- [5] The taxation in question commenced on 11 September 2009. It was on that date that the rulings the subject of the Notice was made.
- [6] The Statement of Objections subscribed to the Notice (“Objections”) show that the Objections relate to counsel fees. Various counsel fees were disallowed. Counsel’s account in relation to attendances at Court on 1 May 2008 described the attendances as “interlocutory”. Given the general rule in Rule 63.18 that each party bears their own costs in an interlocutory matter, the entire amount charged for the date (\$2,000.00) was disallowed.
- [7] The second disallowance related to counsel fees generally. The fees were charged by Senior Counsel. The matter was not certified as fit for Senior Counsel. Accordingly I disallowed counsel fees across the board to the extent that they were in excess of the applicable Senior Junior rate..
- [8] The taxation was not completed on 11 September 2009 and was adjourned to 18 September 2009. On that occasion Ms Farmer, solicitor for the defendant,

was held up in another court and arrived late. The taxation proceeded in her absence.

[9] Ms Allan, solicitor for the plaintiff, indicated at the outset on that day that she wished to revisit the rulings on the counsel fees made on 11 September 2009, specifically the two rulings referred to above. Although I was prepared to proceed with the ongoing taxation in the absence of the solicitor for the defendant, I was not prepared to revisit items that had already been determined in the absence of the solicitor for the defendant. I therefore declined to deal with those matters until Ms Farmer arrived. Upon Ms Farmer's arrival the taxation proceeded to its conclusion and time did not permit the revision of those rulings and it was left on the basis that those would be dealt with by the review process. An order for costs as required by Rule 63.54 was made on that date.

[10] In submissions provided by the plaintiff for the purposes of this reconsideration, the plaintiff states that there was some discussion between the solicitors at the conclusion of the taxation as to the relevant time for the commencement of the 14 day period in Rule 63.55(3). It has been submitted, and not contradicted, that Ms Farmer agreed that the time commenced to run from the conclusion of the taxation. I have no recall of that discussion.

[11] The Notice was filed on 2 October 2009. Although Rule 63.55(3) refers to notice being "filed", Rule 63.55(2) says that the application is to be by "notice to the Taxing Master". As stated above the notice was in letter form

and was transmitted by facsimile to the Master's Chambers. The facsimile footprint on the Court copy indicates that transmission commenced at 4.01 pm on that day. The practise of the Court is to accept documents for filing by facsimile on the basis that originals are promptly filed thereafter. That has occurred. As there is no form specified by the Rules for the notice and as the letter constituting the notice contains the statement of objections required by O 63.55(4), I consider the notice to be sufficient and to have been properly filed on 2 October 2009.

[12] The response of the defendant pursuant to Rule 63.55(7) ("Response"), raised the question of the time limit for the giving of the Notice. The defendant alleged that the Notice was forwarded by email transmission on Friday 2 October 2009 at 4.36 pm, well after the closure of the Supreme Court Registry. I suspect that 4.36 pm is the time that the notice was transmitted to the defendant's solicitors by way of service. Rule 63.55(6), although requiring service of the Notice on the same day that it is filed, does not require service within any particular timeframe on that day. Valid service has therefore occurred.

[13] Notwithstanding that I considered the Notice had been filed and served within 14 days of the conclusion of the taxation, I invited further submissions from the parties as to when the 14 day period in Rule 63.55(3) commenced to run.

[14] Rules 63.55(1) and (3) provide as follows:

### **63.55 Objection, reconsideration and review**

(1) Where a Taxing Master decides to allow or disallow, wholly or in part, an item in a bill or to allow some amount in respect of an item, a party to the taxation proceeding who objects to the decision may apply to have the Taxing Master reconsider the decision.

...

(3) A notice under subrule (2) shall be filed within 14 days after the date of the decision to which it relates.

[15] The plaintiff submits that the time for the purposes of Rule 63.55(3) runs from the order for taxation made under Rule 63.54(1). The defendant disagrees. In my view it is clear however that on the wording of Rule 63.55(1) and (3), time commences from the date of the ruling on the item of taxation which is the subject of the reconsideration. The decision which can be the subject of a notice under Rule 63.55(1) is the decision relating to a particular item in the bill. Rule 63.55(3) then states that the 14 days runs from the day “after the date of the decision to which it relates”. The reconsideration process is not an appeal. It is in the nature of a review with specific provisions to enable that to occur. Although I accept that ordinarily the time for an appeal commences to run from the finalisation of the matter sought to be appealed, different and specific considerations apply in the case of the reconsideration under Rule 63.55.

[16] In my view therefore, the Notice was filed seven days late.

[17] I had also invited the parties' submission on the question of the extension of time.

[18] Both parties agree that the general power of the Court in Rule 3.02(1) to extend time does not apply to the current matter as that Rule only applies to time limits fixed by "this Chapter" which refers to Chapter 1 of the Rules. Rule 63.55 is also within Chapter 1 and so Rule 3.02(1) clearly applies. The power to extend time by that Rule is entirely discretionary.

[19] The defendant also submits that section 44(1) of the *Limitation Act* has no application to this case as that is predicated on the extension being sought in relation to a "step in an action". Section 44(1) of that Act provides as follows:

**44 Extension of periods**

(1) Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for –

(a) instituting an action;

(b) doing an act, or taking a step in an action; or

(c) doing an act or taking a step with a view to instituting an action,

a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit.

[20] Presumably the defendant is submitting that a reconsideration under Rule 63.55 is not a step in an action. No authority has been put forward in support

of that proposition. I cannot agree with it. Certainly the substantive part of the proceeding has been completed given that a determination has been made following trial. However there is nothing in section 44(1) of the *Limitation Act* to restrict the application of that section to only the substantive part of the proceedings. Taxation is a step in an action as is enforcement of the costs fixed by a taxation. In the same way a right to seek a reconsideration given by the Rules must also be a step in the action. In any event the time limit is to the doing of an act within the meaning of the first limb of section 44(1)(b).

[21] Ms Farmer also submitted, contrary to the submission of the plaintiff, that there was no inherent jurisdiction vested in me as Master to extend the time. It is unnecessary for me to consider this given my decision in relation to Rule 3.02(1) and section 44(1) of the *Limitation Act*, however I will briefly address that.

[22] Although the Master is a member of the Court, generally the Master cannot exercise the inherent jurisdiction of the Court absent some specific authority. Rule 77.01(1)(a) of the Rules, authorises the Master “in a proceeding to which this Chapter applies” to inter alia make an order including in the exercise of the inherent jurisdiction of the Court. Ms Farmer relies on the distinction between “Master” in Rule 77.01 and “Taxing Master” in Rule 63.55. I do not consider that anything turns on that. Although the Taxing Master can be a person other than the Master (see Rule 63.01(3) and the definition of Taxing Master in Rule 63.01(1)), the term also

includes the Master and where the Master is also the Taxing Master the distinction is meaningless. Hence, noting that the reconsideration under Rule 63.55 is a proceeding to which the Chapter applies, in my view I can exercise the inherent jurisdiction of the Court to extend the time.

[23] Turning now to consider whether an extension should be ordered, both under Rule 3.02(1) and section 44(1) of the *Limitation Act*, the issue is entirely discretionary. In my view relevant matters are:-

- (1) The late filing of the Notice was by way of an error, excusable in my view, on the part of the solicitor for the plaintiff;
- (2) The default was excusable given that ordinarily time for taking a step in the nature of review or appeal runs from the conclusion of the matter sought to be reviewed or appealed; the defendant's solicitor was apparently under the same misapprehension;
- (3) There was no default on the part of the plaintiff himself;
- (4) Reconsiderations under Rule 63.55 are rare and it is unreasonable to expect a solicitor to be aware of the minute provisions in the Rules and specifically, with variations with the usual procedures which apply to appeals and reviews;
- (5) The plaintiff's solicitor complied with the time limit that she mistakenly believed applied to the review;

(6) The plaintiff's solicitor had given notice of the intention to revisit the matters now covered by the notice at the start of the second day of the taxation and, but for the non attendance of the solicitor for the defendant, that matter would likely have been dealt with then;

(7) The defendant has not shown any prejudice which will flow in the event that the extension is granted.

[24] Weighing up all those factors I consider that it is appropriate to extend the time and I consequently order, pursuant to section 44(1) of the *Limitation Act*, that the time for the plaintiff to file notice pursuant to Rule 63.55(1) be extended to 5 pm 2 October 2009.

[25] Having now dealt with all preliminary matters, I now proceed with the substantive issues for reconsideration.

[26] In relation to the counsel fees on 1 May 2008, these have been disallowed in their entirety in the belief that Rule 63.18 applied namely, that it was in relation to an interlocutory matter. The evidence produced clearly indicates that the attendance was not interlocutory and should have been described as a directions hearing before the trial Judge. Rule 63.18 does not apply in that event.

[27] The Response to this Objection is that the overall charges for counsel for the plaintiff are excessive. That is also the basis of the Response to the second Objection.

[28] In relation to the second Objection, what was not known on 11 September 2009 was that counsel had not charged at the full hourly rate applicable to Senior Counsel per the Guide to Counsel Fees. Noting that there is approximately a 25 per cent difference in the hourly rate payable to a Senior Junior compared to a Senior Counsel, an across the board reduction of 25 per cent was made. However, based on the actual hourly rate charged by counsel, that reduction was excessive.

[29] The defendant complains that in any event counsel fees are excessive overall. The defendant seems to base this claim on a comparison of the counsel fees incurred by the defendant. Although that can be a guide in many cases, it cannot be conclusive. It does depend on the issues of each particular case. Generally work to be performed on behalf of a plaintiff is expected to be more than the work performed on the part of the defendant in the same case given that the plaintiff bears the onus of proof.

[30] In my view nothing further has been put forward by the defendant over and above what was already taken into account when the counsel fees were first considered in the course of the taxation and I do not consider it necessary to revisit that.

[31] In relation to the first Objection, I allow the Objection and will make an appropriate adjustment to the allowance for counsel fees. Likewise I allow the second Objection and I will consequently make an appropriate adjustment on this account also.

[32] On my calculation, the net effect is that counsel fees should have been allowed at \$27,672.12 and I will make an appropriate order to reflect this. The plaintiff is to submit the formal order for authentication.

[33] I do not propose to make any further orders as to costs. Clearly further work has been required by the plaintiff however that only arises as a result of the solicitor for the plaintiff not being able to properly and fully deal with the objections on 11 September 2009. On the defendant's part, none of this would have been necessary had the defendant's solicitor attended on time on 18 September 2009.

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