Maley Pty Ltd v Burnett & Ors [2010] NTSC 63

PARTIES:	MALEY PTY LTD v MARTIN JOHN BURNETT v DIANNE MARIA BURNETT v SPICECANE PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	10 of 2008 (20802641)
DELIVERED:	24 November 2010 via Court box
HEARING DATES:	16 November 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Costs – Taxation on indemnity basis – Costs of interstate solicitors – Applicable scale of costs for interstate solicitors – Applicable basis of taxation for interstate solicitors – Counsel fees on an interlocutory summons.

Supreme Court Rules (NT), O 63.04, 63.18, 63.25, 63.27, 63.32, 63.42, 63.66, 63.72

Supreme Court Civil Rules (SA) 2006, r 264, 265

REPRESENTATION:

Counsel:

Plaintiff:	Ms Savvas
Defendants:	Mr Walters

Solicitors:

Plaintiff:	MSP Legal
Defendant:	Paul Walsh & Associates

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Maley Pty Ltd v Burnett & Ors [2010] NTSC 63
No. 10 of 2008 (20802641)

BETWEEN:

MALEY PTY LTD
Plaintiff

AND:

MARTIN JOHN BURNETT
First Defendant

AND:

DIANNE MARIA BURNETT
Second Defendant

AND:

SPICECANE PTY LTD
Third Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 24 November 2010)

[1] This is a ruling on a taxation of costs. The taxation raised issues concerning the charges of interstate legal practitioners as well as counsel fees on interlocutory applications.

[2] The order for costs required by Order 63.14 of the *Supreme Court Rules* ("the Rules") was a consent order made 15 December 2009. The order of the Court was:-

1. The costs payable by the plaintiff arising out of its discontinuance of the proceeding including (but not limited to) costs of and incidental to the summons filed by the defendants on 31 July 2009, be taxable in default of agreement on the indemnity basis.

2. The plaintiff pay the defendants' costs of and incidental to the summons filed by the defendants on 19 November 2009, to be taxed in default of agreement on the indemnity basis.

[3] The Defendants were represented in the proceedings by Paul Walsh & Associates who acted as town agents for the South Australian firm of Grope Hamilton Lawyers. Unremarkably, there are differences between the provisions in the Rules and the scale of costs fixed there under and those applicable in South Australia.

[4] The relevant provisions from the Rules are as follows:-

63.04 Time for order for costs, taxation and payment

(1) The Court may exercise its power and discretion as to costs at any stage of a proceeding or after the conclusion of the proceeding.

(2)-(5) Omitted.

63.18 Interlocutory application

Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders.

63.25 Bases of taxation

Subject to this Part, costs in a proceeding which are to be taxed shall be taxed on:

(a) the standard basis; or

(b) the indemnity basis.

63.27 Indemnity basis

On a taxation of costs on the indemnity basis, all costs shall be allowed except to the extent that they are of an unreasonable amount or have been unreasonably incurred, and any doubts which the Taxing Master has as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

63.32 Ascertaining costs on a taxation

(1) Subject to these Rules, the scales of costs contained in Parts 2 and 3 of the Appendix, together with the notes and provisions contained in Parts 1 and 3 of the Appendix, apply in relation to the taxation of all costs for work done after the commencement of this Order.

(2)-(4) Omitted

63.42 Charge of lawyer out of Territory

(1) Where a bill includes a charge for work done by a lawyer practising in a place out of the Territory:

(a) the charge shall be shown as a disbursement; and

(b) so far as practicable, the charge shall, if allowed, be allowed in an amount appropriate to the place where the lawyer practices.

(2) Where subrule (1) applies, a bill in taxable form of that lawyer's fees shall be attached to the bill of the party claiming the disbursement.

63.66 Increased allowance

The Taxing Master may, in relation to a particular taxation of costs, increase the amount or value of an allowance or expense in the Appendix as he thinks fit.

63.72 Counsel's fees

(1)-(8) Omitted.

(9) No fee shall be allowed:

(a) for counsel attending on an interlocutory application, unless the Court otherwise certifies; and

(b) for more than one counsel, unless the Court certifies that the retainer of more than one counsel was warranted.

(10) Omitted.

[5] In addition paragraph 14 of the Taxation Guidelines is relevant and that provides as follows:-

14. Agency:

Where the agent is an interstate solicitor, rule 63.42 must be complied with. It would assist the Taxing Master if a copy of the relevant interstate costs scale were attached to the agent's bill.

Agency charges for advising the principal how to proceed are not recoverable on the standard basis of taxation.

[6] The relevant South Australian Rules are:-

264 Basis for awarding costs

(1) The Court may, in the exercise of its discretion as to costs, award costs on any basis the Court considers appropriate.

(2) As a general rule, however, costs are awarded as between party and party (that is, on the basis that the party entitled to the costs will be reimbursed for costs reasonably

incurred by the party in the conduct of the litigation to an extent determined by reference to the scale of costs in force, under these rules or the previous rules, when the costs were incurred).

(3)-(4) Omitted

(5) In exercising its general discretion as to costs, the Court may—

(a) award costs as between solicitor and client (that is, on the basis that the party will be fully reimbursed for costs reasonably incurred by the party in the conduct of the litigation); or

(b) award costs on the basis of an indemnity (that is, on the basis that the party will be fully reimbursed for costs incurred by the party in the conduct of the litigation except to the extent that the party liable for the costs shows them to have been unreasonably incurred); or

(c) award costs by way of lump sum; or

(d) award costs on any other basis the Court considers appropriate.

265 Time for making and enforcing orders for costs

(1) The Court may deal with costs at any stage of proceedings (before or after final judgment has been given).

(2) Omitted.

[7] It is suggested that the meaning of indemnity costs under the South Australian Rules is more favourable than the meaning in the Rules. Based on the meaning in the South Australian Rules, the South Australian principals have claimed costs on a time basis at the applicable hourly rate determined by the Rules which is $278.00 per hour. This is in lieu of the scale applicable under the South Australian Rules which contains many composite fee type items.

[8] The first issue for determination is whether the Northern Territory meaning or South Australian meaning of 'indemnity' applies to the principal's bill of costs. Mr Walters, for the Defendants submitted that Rule 63.42 (1)(b) where it provides *"…allowed in an amount appropriate to the place where the lawyer practices…"*, justifies applying the definition of indemnity costs in the South Australian Rules.

[9] The effect of Mr Walters' submission is that on a taxation of the costs of interstate lawyers in this Court, the substantive provisions of the rules of Court in those jurisdictions, or at common law, would apply in the Northern Territory and would take precedence over the Rules.

[10] I do not consider that the language of the Rule supports that interpretation. What is very telling in my view is the reference in both paragraphs of the costs order to *"…the indemnity basis"* (emphasis added). Precisely the same phrase appears in Rule 63.25. Reference is made therefore to a specific indemnity basis, i.e., the indemnity basis and that can only refer to the indemnity basis in Rule 63.25.

[11] If the interpretation suggested by Mr Walters had been intended then I would have expected that the wording would have clearly reflected that. The better view is that the phrase *"…allowed in an amount appropriate to the place where the lawyer practices…"* from Rule 63.42(1)(b) refers only to the scale of costs in the other jurisdiction as opposed to the substantive law or rules in that jurisdiction.

[12] As to the second issue, counsel from South Australia appeared by audio link on the hearing of an interlocutory application. Costs on interlocutory applications are regulated by Rule 63.18 to the effect that, absent a court order to the contrary, each party bears their own costs of an interlocutory application. The costs order addresses that and the costs of the interlocutory application are recoverable.

[13] However, in respect of counsel fees on an interlocutory application, Rule 63.72(9)(a) applies and that provides that no fee for counsel to attend on an interlocutory application is allowed unless the court certifies the matter as fit for counsel.

[14] Mr Walters told me that in South Australia the Taxing Master has the discretion to allow such costs. He submitted that as counsel was from South Australia and was unaware of that rule, I should make an appropriate concession, presumably pursuant to Rules 63.04 and 63.66.

[15] I am not prepared to make any order on that basis. Any person appearing as counsel in the Court is assumed to have all necessary knowledge of the rules and procedures which apply. Concessions simply to cure any misapprehension or lack of knowledge of interstate counsel as to differences in rules or practice in this jurisdiction and interstate counsel's home jurisdiction are inappropriate.

[16] Mr Walters then asked that I certify the matter as fit for counsel. That appears to be permitted by Rule 63.04(1). Ms Savvas opposed such an order.

She pointed out that it would also have been opposed had it been sought at the appropriate time. She submitted that the application was a straightforward application to set aside a default judgment and it was not argued in any event.

[17] The best person to assess whether an interlocutory application is fit for counsel is the judicial officer hearing the application. That person has the benefit of the knowledge of the application and the complexities involved. I consider it inappropriate to revisit that at this stage of the proceedings. The application could have, and should have, been made to the judicial officer hearing the application. Presumably that did not occur only due to the ignorance of counsel of the existence of Rule 63.72(9). Any decision that I would now make on the question, without revisiting the entire application, would be based on an inferior knowledge of the nature of the application and the issues. I decline to certify the subject interlocutory hearing as fit for counsel.

[18] A directions hearing will be convened to set the timetable for completion of the taxation and any procedural orders.