benchtv
a benchmark production

Précis Paper

Appeals to the Court of Appeal of Costs Assessments

This is a discussion about a recent Court of Appeal decision that raises interesting issues relating to costs assessment and the court's view of satellite litigation.

Discussion Includes

- Applications for judicial review of statutory appeals in the District Court
- The relevance of s 176, *District Court Act 1973* (NSW)
- What is the "record" in a statutory appeal from a costs assessment?
- Background facts
- The rule of thumb and claiming costs in a multi-party dispute
- Satellite litigation and the incursion of unnecessary costs

Précis Paper

Appeals to the Court of Appeal of Costs Assessments

1. In this edition of BenchTV, Michelle Castle (Barrister, 4th Floor Selborne Chambers, Sydney) and Andrew Bailey (Barrister, 4th Floor Selborne Chambers, Sydney) discuss the recent decision of *Bookarelli Pty Ltd v Katanga Developments Pty Ltd* [2017] NSWCA 69.

Background and Material Facts

2. Bookarelli was a litigation funder which entered into a deed with Katanga whereby Katanga agreed to market certain products of Bookarelli to shareholders of companies in litigation. A dispute arose as to the proper amount owing to Katanga and Katanga commenced proceedings against Bookarelli and also Mr Joukhador, a solicitor engaged by Bookarelli to receive payments.

3. In August 2013, Katanga brought an application for urgent freezing orders, which was granted by the District Court. Katanga was ordered to pay its own costs for the interlocutory application.

4. After the trial for the substantive proceedings commenced, the parties reached an agreement to settle the matter. The District Court made orders by consent disposing of the proceedings and vacated the previous interlocutory costs order. The consent orders also stipulated that Bookarelli would pay Katanga's costs of the proceedings.

5. As the parties were unable to agree on the quantum of costs under the costs order, they proceeded through the costs assessment process. There were complicated issues involved in the costs assessment as, unlike previously when a global costs certificate could be ordered in which there was no distinction between the amount owing under different costs orders, now, where there are separate costs orders in the proceedings, a costs assessor needs to make a determination in respect of each costs order: *Wende v Horwath* (NSW) Pty Limited [2014] NSWCA 170.

6. Bookarelli then appealed the decision of the costs assessor to a review panel, which affirmed the decision of the assessor. Still dissatisfied with the result, Bookarelli again appealed to the District Court. Finally, when that appeal was dismissed, Bookarelli sought judicial review of the decision in the Court of Appeal.

7. As this was litigation about other litigation, it is considered "satellite" litigation. The courts have expressed concern about the proliferation of satellite litigation.

Applications for Judicial Review of Statutory Appeals in the District Court

8. Under the *Legal Profession Act 2004* (NSW), there are two avenues of appeal: appeals by right under s 384, and appeals by leave under s 385. Under s 384, the plaintiff must identify those aspects of the cost assessment with which they are dissatisfied which relate to a question of law. Section 385 allows for a wider appeal which may incorporate factual matters. Bookarelli's appeal to the District Court was brought under both ss 384 and 385. Although it is rare that leave to be appeal be granted under s 385, leave was granted in this case.

9. The decision of the District Court was a statutory appeal arising out of the *Legal Profession Act 2004*. The Court of Appeal has determined that a statutory appeal to the District Court is not an "action" under s 127 of the *District Court Act 1973* (NSW), and therefore there is no appellate avenue to the Court of Appeal. Instead, an application for judicial review is required to bring the matter before the Court of Appeal. In order to succeed in an application for judicial review of this nature, it is sufficient to establish an error of law on the face of the record or jurisdictional error.

10. Section 176 of the *District Court Act* appears to function as a privative clause, preventing the Supreme Court from reviewing the adjudication of appeals by the District Court. However the decision of the High Court in *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1; 239 CLR 531 makes clear that despite the presence of a privative clause, recourse to the Court for judicial review on the grounds of jurisdictional error cannot be precluded. In addition, s 176 falls within a section of the *District Court Act* relating to criminal appeals, so its application to civil proceedings is not clear.

11. The more commonly held view is that relief is available in relation to jurisdictional error or error of law on the face of the record. The "record" in a statutory appeal from a costs assessment will include the orders of the court, the reasons for judgment given, and documents incorporated by reference, either explicitly or implicitly.

The Court of Appeal Proceedings

12. The arguments under s 385 of the *Legal Profession Act* were not pressed before the Court of Appeal. There were two key issues on appeal. First, Bookarelli argued that the District Court should have applied the "rule of thumb" when determining whether the Appeal Panel erred. The second issue involved consideration of the effect of the final consent orders on the previous, vacated interim costs orders.

13. The rule of thumb is a rule in relation to costs that stipulates that where a solicitor acts for two or more parties in the same proceedings, each successful party is only entitled to his proportion of the costs incurred on behalf of all, plus the costs, if any, incurred exclusively on his behalf. Common costs extend to many of the attendances that a solicitor and counsel make, including going to court and writing letters or preparing affidavits that relate to the entire matter. Examples of costs specific to one party would include conferences with only one of the clients; writing a letter to the other side referring only to one defendant; or attending court on a motion relating only to one defendant. The rule of thumb can be applied at the court level, when the court is ordering costs, but where the court has not made any determination, it is a matter for the assessor to determine whether the rule of thumb should be applied.

14. In this case, there was no mention of the rule of thumb in the consent orders made by the court, nor did Bookarelli make any assertion during the costs assessment process that the rule of thumb ought to apply. Ultimately, the Court of Appeal did not find any error in relation to the application of the rule of thumb, stating that the rule is no more than a guide that may be taken into account in cases where there are multiple defendants. It was not a "rule" that applies in all cases and its application depends on the particular circumstances of each case. Moreover, the claim against the two defendants was not the same, and the bulk of the legal costs were spent on Bookarelli's legal issues, rather than those relating to their co-defendant, and so there was no requirement to split the costs 50/50 between the two defendants.

15. The second issue related to the construction of the consent orders. Bookarelli contended that the vacation of the interlocutory costs order had the effect of carving them out from the application of the final costs order. That is, they argued that the order for costs in the final proceedings did not include the costs of the interlocutory application.

16. This issue was a simple matter of construction. The Court of Appeal made clear that the vacation of the interim costs order simply meant that there was no order in place. The payment of the interlocutory costs thus fell to be determined by the ultimate costs order. This meant that Bookarelli was required to pay all of Katanga's costs, whatever the stage was at which they were incurred.

<u>Satellite Litigation and the Incursion of Unnecessary Legal Costs</u>

17. In this matter, there was no requirement for leave. This means that in costs assessment procedures, parties have significant opportunities to seek review of a costs order: at the costs assessment itself, in the Review Panel, in the District Court, and then in the Court of

Appeal. The court has cause for concern where there is a proliferation of satellite litigation of this nature, and where multiple applications are brought to review the cost of litigation.

18. In this case, the Court of Appeal commented that if applications for judicial review on the ground of jurisdictional error are plainly without merit, it may be appropriate for the Court to consider making an order for indemnity costs against the applicant, even in the absence of such an application by the respondent.

19. Ultimately, the Court of Appeal made an order of indemnity costs against Bookarelli in relation to the application for judicial review (see *Bookarelli Pty Ltd v Katanga Developments Pty Ltd (No 2)* [2017] NSWCA 94). This was done for a number of reasons. First, it considered that in being brought to the Court in an application for judicial review, Katanga should not have to bear any portion of its costs. Moreover, there were several aspects of Bookarelli's conduct that gave rise to the indemnity costs order: first, the case was brought with little legal merit; second, the successive challenges to the amount of costs related to relatively modest amounts; and finally, these challenges generated significant costs in themselves.

20. The case is therefore an important reminder for practitioners that although there is no requirement for leave to appeal from decisions of the District Court of this nature, applications for judicial review should not be made where the case is weak. The Court will also be critical where the costs incurred in reviewing decisions are effectively whittling away the effect of the costs order.

BIOGRAPHY

Michelle Castle

Barrister, 4th Floor Selborne Chambers, Sydney

Ms Castle was a solicitor for 16 years prior to being called to the NSW Bar in 2007. Michele practices principally in professional and medical negligence, costs, disciplinary, administrative and commercial law. Prior to her career as a barrister, Michelle was a principal at a firm that specialised in legal costs, during which time she lectured and wrote extensively on the topic. Recently, Michelle has been regularly published in the NSW Law Society Journal.

Andrew Bailey

Barrister, 4th Floor Selborne Chambers, Sydney

Andrew Bailey was a solicitor for 12 years prior to being called to the NSW Bar in 2014. Andrew was a Senior Partner and Litigator at a mid-tier national firm and practice in both Queensland and NSW before coming to the Bar. Andrew practices predominantly in costs, equity, administrative, commercial, and insolvency law. He is published regularly in the NSW Law Society Journal and holds a Masters of Law from Sydney University.

BIBLIOGRAPHY

Focus Case

Bookarelli Pty Ltd v Katanga Developments Pty Ltd [2017] NSWCA 69

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_07-04-2017_insurance.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/58e1d7d6e4b0e71e17f586d9

Cases

Wende v Horwath (NSW) Pty Limited [2014] NSWCA 170
Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1; 239 CLR 531
Bookarelli Pty Ltd v Katanga Developments Pty Ltd (No 2) [2017] NSWCA 94

Legislation

Legal Profession Act 2004 (NSW)

District Court Act 1973 (NSW)