Supreme Court of New South Wales

Cockburn v Shehadie [2013] NSWSC 758 (13 June 2013)

Last Updated: 17 June 2013

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New South Wales

Case Title:	Cockburn v Shehadie
Medium Neutral Citation:	[2013] NSWSC 758
Hearing Date(s):	30 November 2012
Decision Date:	13 June 2013
Jurisdiction:	Common Law
Before:	Button J
Decision:	(1) Leave to appeal out of time granted. (2) Appeal dismissed. (3) Decision of the panel on 17 November 2011 confirmed. (4) The plaintiff is to pay the costs of the defendant of the appeal.
Catchwords:	COSTS - Limitation Act 1969 - whether limitation period relevant to cost assessors - whether claims for legal costs by barrister are cause of action - cause of action accrues when work last done - whether assessor failed to consider relevant material
Legislation Cited:	Legal Aid Commission Act 1979

Legal Profession Act 1987

Legal Profession Act 2004

Limitation Act 1969

Cases Cited:

Adamson v Miller [2005] NSWSC 971

Baker v Kearney [2002] NSWSC 746

Coburn v Colledge [1897] 1 QB 702

Coshott v Barry [2012] NSWSC 850

Coshott v Lenin [2007] NSWCA 153

Coshott v Woollahra Municipal Council [2008] NSWCA 176

Frumar v Owners of Strata Plan 36957 [2006] NSWCA 278; (2006) 67 NSWLR 321

Khoury v Hiar [2006] NSWCA 47

Nabatu Pty Ltd v Crawley t/as Aubrey F Crawley & Company (Supreme Court of New South Wales, Harrison M, 9 April 1998, unreported)

Category:

Principal judgment

Parties:

Malcolm Cockburn (plaintiff)

Michael John Shehadie t/as Michie Shehadie & Co, Solicitors (defendant)

Representation

- Counsel:

Counsel:

M Cockburn (plaintiff)

P Cutler (defendant)

- Solicitors:	Solicitors:
	Michie Shehadie & Co, Solicitors (defendant)
File Number(s):	2011/413386

JUDGMENT

1. Many years ago, the plaintiff, who is a barrister, did some legal work for the defendant, who is a solicitor. Years later, the plaintiff rendered a bill to the defendant in the sum of $387,200. The defendant did not pay that bill. The plaintiff applied for a costs assessments order, pursuant to s 201 of the *Legal Profession Act* 1987 ("the Act"). The cost assessor refused to make a determination, on the basis that s 14 of the *Limitation Act* 1969 barred recovery of the fees. The plaintiff appealed to a panel consisting of two costs assessors, pursuant to s 208KA of the Act.

2. The panel took a slightly different approach from the costs assessor. It reviewed the assessment of the costs assessor and issued a certificate to the effect that costs were assessed as nil. Again, that approach was founded upon s 14 of the *Limitation Act*.

3. Pursuant to s 208L of the Act, the plaintiff appealed to this Court. That section is contained in Subdivision 4B of the Act. The section is as follows:

"208L Appeal against decision of costs assessor as to matter of law

(1) A party to an application who is dissatisfied with a decision of a costs assessor as to a matter of law arising in the proceedings to determine the application may, in accordance with the rules of the Supreme Court, appeal to the Court against the decision.

(2) After deciding the question the subject of the appeal, the Supreme Court may, unless it affirms the costs assessor's decision:

(a) make such determination in relation to the application as, in its opinion, should have been made by the costs assessor, or

(b) remit its decision on the question to the costs assessor and order the costs assessor to re-determine the application.

(3) On a re-determination of an application, fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings, may be given."

4. Because this appeal is from the review conducted by a panel, s 208KI of the Act is also relevant and is as follows:

"208KI Appeal against determination

(1) Subdivision 4B applies in relation to a decision or determination of a panel under this Subdivision as if references in Subdivision 4B to a costs assessor were references to the panel.

(2) Subject to subsection (1), the panel's determination of an application for review of a costs assessor's determination is binding on all parties to the assessment that is the subject of a review and no appeal or other review lies in respect of the determination."

5. Before turning to the three grounds upon which the plaintiff relies in seeking to demonstrate an error of law, it is convenient to state that the parties agreed that, pursuant to the transitional provisions of the *Legal Profession Act* 2004, the relevant legislation was the Act as it stood on 30 September 2005, the last date that the Act had effect. I have accepted and acted upon that joint submission.

6. A preliminary matter with which it is convenient to deal now is the fact that the appeal was lodged out of time by a matter of days. Although counsel for the defendant opposed leave being granted in those circumstances, he was not able to point to any prejudice accruing to the defendant, other than, of course, that the matter would be determined by me on the merits. In the circumstances, I do not consider that a matter of days should stand in the way of the plaintiff seeking to have the matter adjudicated in this Court, and the necessary leave to appeal out of time should be granted.

7. The submissions of the plaintiff, though lengthy, boiled down to the proposition that the reasons for determination of the panel revealed three legal errors.

8. The first was said to be that, in the reasons for determination it was said that a costs assessor, and the panel itself, may determine questions of liability as well as quantum. The plaintiff submitted that that is not the case.

9. The second was a finding by the panel that s 14 of the *Limitation Act* has the effect that the plaintiff is statute barred from recovering costs from the defendant.

10. The third was said by the plaintiff to be the fact that the panel *"ignored material relevant to their finding that to assess the costs claimed would be of no utility".* The material was said to be material *"under cover of a letter dated 2 March 2009"* of the defendant, and said by the plaintiff to establish certain facts.

11. Before turning to discuss the three asserted errors of law, it is convenient to consider first what s 208L of the Act means when it speaks of *"a matter of law arising in the proceedings to determine the application"*. The decisions of *Frumar v Owners of Strata Plan 36957* [2006] NSWCA 278; (2006) 67 NSWLR 321 and *Coshott v Woollahra Municipal Council* [2008] NSWCA 176 are authority for the proposition that, in using that form of words, the section is requiring the plaintiff to establish an error of law.

12. As a result, although many of the submissions of the plaintiff were directed towards establishing jurisdictional error, I do not consider that he needs to go that far in order to succeed in this appeal

First asserted legal error

13. After an extensive review of authority, the panel determined that the assessor was in error in making *"no determination".* However, the panel substituted for that decision a determination that costs were to be assessed as *"nil"*. Each of those results, equally adverse to the plaintiff, was founded upon the asserted operation of s 14 of the *Limitation Act* on the entitlement of the plaintiff to his legal costs. Underlying that approach was a determination that the panel could consider questions of liability.

Submissions

14. As a basal proposition, the plaintiff, who appeared for himself, submitted that a costs assessor or a costs panel has no power to determine questions of liability. He submitted that a panel is confined to questions of quantum.

15. His submissions invited attention to the language of the Act. In particular, he noted that s 208A of the Act is expressed in mandatory terms:

"208A Assessment of bills generally

(1) When considering an application relating to a bill of costs, the costs assessor *must* consider:

(a) whether or not it was reasonable to carry out the work to which the costs relate, and

(b) whether or not the work was carried out in a reasonable manner, and

(c) the fairness and reasonableness of the amount of the costs in relation to that work.

..."

(emphasis added)

16. Secondly, he submitted that the decision of *Khoury v Hiar* [2006] NSWCA 47 is directly on point. In that decision, Giles JA, with whom Beazley JA (as her Honour then was) and Bryson JA agreed, said at [43]:

"I do not think s 47 [of the *Legal Aid Commission Act* 1979] precluded an assessment of the whole of the costs. *Assessment of costs was concerned with quantification, not with liability.* Depending on the various exceptions in s 47(3) (3A), (4) and (4A) of the Act, the legally assisted person might have been liable for some or all of the costs. An assessor could assess "the whole of or any part of the costs" (LP Act s 202(1)), but if the claiming party asked for assessment of the whole of the costs the assessor would assess the whole, including the part for which the legally assisted person might not be liable. The assessor might or might not have been entitled to decide whether or not the claiming party was liable to pay that party's legal representatives the costs claimed, see *Wentworth v Rogers* [2005] NSWSC 1431 at [20]- [29] and the cases there considered, but that would be part of assessment. *I do not think the assessor had to, or could, enter into whether one or more of the exceptions applied, or decline to assess costs on the ground that the legally assisted person was not liable to pay them to the claiming party.*" (emphasis added)

17. In short, he submitted that the statute is clear in requiring that the process of costs assessment be undertaken, regardless of questions of utility or futility due to underlying factors that may negate liability. And he submitted that there is a decision of the New South Wales Court of Appeal that is directly on point and in his favour.

18. Counsel for the defendant submitted that the words of the statute must be read in context. He submitted that they are machinery provisions setting out what an assessor and the panel must do having determined to embark upon a costs assessment. They are not provisions that mandate a futile exercise.

19. As for the decision in *Khoury v Hiar*, he accepted that it was seemingly against him. However, he submitted that that decision was a result of the unique statutory interaction between the *Legal Aid Commission Act* 1979 and *Legal Profession Act* 1987, and that interaction neither arises directly here nor informs the present situation.

20. He referred to a number of authorities to the effect that cost assessors can, in appropriate circumstances, determine questions of liability.

21. Finally, as a matter of statutory interpretation, he submitted that it would hardly be likely that Parliament has imposed upon a facet of the legal system a mandatory obligation to undertake a process that could be an exercise in futility, especially when such a process, directed towards questions of costs, will inevitably lead to the accrual of further costs.

Determination

22. Dealing first with the statute itself, I do not consider that the provisions to which the plaintiff invited attention require a mechanistic and undiscerning adoption of a fruitless exercise. Rather, I regard them as setting out machinery provisions as to what an assessor or a panel is to do once it is determined that there is utility in undertaking the task of costs assessment because there is an underlying liability to pay the costs in question.

23. Secondly, there is authority of long-standing to the effect that cost assessors may determine questions of liability, and should do so in appropriate cases: see *Baker v Kearney* [2002] NSWSC 746 and *Adamson v Miller* [2005] NSWSC 971.

24. Thirdly, the decision of *Khoury v Hiar* can be distinguished. It focuses upon the particular interaction of the Act and the *Legal Aid Commission Act* 1979. Whilst it is true the Giles JA spoke of the need for cost assessors to assess questions of

quantum not liability, it is clear from the paragraph that I have extracted that that was in circumstances in which the respondent was clearly liable to pay some costs; namely, those that had accrued before she was granted legal aid. The statement of Giles JA must be considered in context. I consider that the judgment in *Khoury v Hiar* was speaking of the particular statutory framework and the particular facts that pertained in that appeal.

25. Fourthly, it is noteworthy that, pursuant to s 208J of the Act, once a costs certificate has been issued, it may be filed and enforced as a judgment. That machinery provision strongly militates against the proposition that costs assessment should be undertaken when in truth there is no underlying liability.

26. Fifthly, speaking generally, I would be slow indeed to come to the view that Parliament has imposed a potentially complicated, time-consuming and costly process on a part of the legal system when it could be utterly futile.

27. In all the circumstances, I am not persuaded that it was an error of law for the panel to determine that both the assessor and the panel itself were empowered to determine questions of liability, and should do so in this case.

Second asserted error

28. The panel determined that s 14 of the *Limitation Act* had the effect that the defendant had no liability to pay the claimed legal costs of the plaintiff. The plaintiff submitted that that finding was an error of law. The submission was founded on two bases.

Submissions

29. First, the plaintiff submitted that the right to costs is not a *"cause of action",* to adopt the phrase used in s 14. He drew a distinction between what he called a *"statutory judgment*", and a *"curial judgment"*, and submitted that a right to costs pursuant to the Act is in the former category.

30. He submitted that, because an assessment of costs is not made by a judicial officer, it cannot be that what is being determined is a cause of action. In short, he submitted that the process of costs assessment is not a cause of action, and is therefore not subject to s 14 of the *Limitation Act.*

31. Secondly, and as an ancillary position, he submitted that any right to legal fees of a barrister is not accrued when the last legal work is done. Rather, he submitted that it accrues when a bill of costs is presented to a solicitor. On that basis, even if the section does apply, he submitted that the application for costs assessment was made within six years of the presentation of the bill.

32. Counsel for the defendant submitted that there is clear authority for the proposition that a claim for legal fees is in truth founded on the cause of action of contract or quasi contract.

33. As for the time at which the cause of action accrues, he submitted that it has been established for over 100 years that legal fees accrue at the time when the last work was done. He submitted that, in this case, that was in 2001, and the limitation period is fatal to the claim of the plaintiff.

Determination

34. Turning first to the question of statutory interpretation as to whether s 14 of the *Limitation Act* applies to claims for legal fees under the act, s 14 is as follows:

"14 General

(1) An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims:

(a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed,

(b) a cause of action founded on tort, including a cause of action for damages for breach of statutory duty,

(c) a cause of action to enforce a recognizance,

(d) a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

..."

35. Because neither party relied upon it, I will not proceed to explore whether s 14(1)(d) could perhaps found a basis for the application of this section.

36. As for the question as to whether or not a claim for legal fees is a cause of action, I consider that the decision in *Coshott v Lenin* [2007] NSWCA 153 at [9] and [12] is clear: what the plaintiff seeks is founded on contract or quasi contract, and is therefore a cause of action.

37. Furthermore, it would be strange indeed if a claim by a barrister against a solicitor arising from their relationship as legal professionals and founded on some other form of contract, or a tort, were to be the subject of the limitation period contained in the section, but not a claim between the same persons with regard to legal fees.

38. Thirdly, whether the costs are sought pursuant to a statement of claim or an assessment under the Act, that procedural question can hardly be determinative as to whether s 14 of the *Limitation Act* operates to denude the solicitor of liability.

39. Fourthly, since *Coburn v Colledge* [1897] 1 QB 702 it has been established that a cause of action founded on legal fees accrues from when the last work was done. That principle has been applied by this Court: see, for example, *Nabatu Pty Ltd v Crawley t/as Aubrey F Crawley & Company* (Supreme Court of New South Wales, Harrison M, 9 April 1998, unreported) and *Coshott v Barry* [2012] NSWSC 850.

40. In short, I do not discern an error of law in the finding of the panel that the *Limitation Act* operates to bar the claim for costs of the plaintiff against the defendant.

Third asserted error

41. The third error of law said to have been committed by the panel and relied upon the plaintiff is that the panel "*ignored*" the material to which I have referred above. The material in question consisted of a letter from the defendant to the costs assessor of 2 March 2009, along with 25 annexures.

42. This ground can be dealt with shortly without recitation of submissions. There are number of reasons why I do not accept the proposition that the panel ignored that body of material.

43. First, it would be remarkable if the panel had ignored material that was so voluminous.

44. Secondly, the reasons of the panel explicitly refer to the panel having received the letter and its annexures.

45. Thirdly, in its written reasons, the panel undertook a detailed analysis of the history of the matter, including events as long ago as 2000 and 2001. I do not accept that in that process the panel ignored the material under consideration.

46. Fourthly, simply because the panel did not derive from that material the conclusions for which the plaintiff contends does not demonstrate that the panel ignored the material.

47. Fifthly and finally, if I am wrong with regard to the four findings that I have made and detailed above, in any event it is difficult to see what effect that the asserted error could have had. The plaintiff did not submit before me that any of the findings said to derive from the allegedly ignored material would have overcome the limitation question. As I have said, I do not discern error in the approach of the panel that the limitation question is determinative. Accordingly, even if I were to find that this third asserted error were made out, I cannot see how that could determine the real issue in the appeal.

48. In short, I do not find that the third asserted legal error is made out.

Costs

49. The parties accepted that the success or failure of the appeal would determine the question of the costs of the appeal.

Orders

(1) Leave to appeal out of time granted.

(2) Appeal dismissed.

(3) Decision of the panel of 17 November 2011 confirmed.

(4) The plaintiff is to pay the costs of the defendant of the appeal.

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