FEDERAL COURT OF AUSTRALIA

Coshott v Prentice [2017] FCAFC 229

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| Appeal from: | *Coshott v Prentice (No 2)* [2017] FCA 394 |
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| File number: |  |
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| Judges: | **LOGAN, KERR AND FARRELL JJ** |
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| Date of judgment: | 21 November 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – costs – application for review of taxation of costs – construction of r 40.27 of *Federal Court Rules 2011* (Cth) – whether trial judge erred by finding no error where taxing officer disallowed costs where no objection taken – r 40.27 of *Federal Court Rules 2011* (Cth) – appeal dismissed |
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| Legislation: | *Federal Court Rules 2011* (Cth) r 40.27, r 40.29, r 40.30, r 40.31 |
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| Cases cited: | *Ann Street Mezzanine Pty Ltd (in liq) v Beck* (2013) 215 FCR 150  *Cassimatis v Australian Securities and Investments Commission* (2016) 334 ALR 350  *Coshott v Crouch* [2017] FCAFC 135 |
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| Date of hearing: | 21 November 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 16 |
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| Counsel for the Appellants: | Mr MW Young SC |
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| Solicitor for the Appellants: | Murphy Lyons Lawyers |
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| Counsel for the Respondent: | Mr J Jackson |
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| Solicitor for the Respondent: | O’Neill Partners |

ORDERS

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|  | | NSD 746 of 2017 |
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| BETWEEN: | RONALD MICHAEL COSHOTT  First Appellant  FEWIN PTY LTD ACN 051 132 453  Second Appellant | |
| AND: | MAXWELL WILLIAM PRENTICE  Respondent | |

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| JUDGES: | LOGAN, KERR AND FARRELL JJ |
| DATE OF ORDER: | 21 NOVEMBER 2017 |

THE COURT ORDERS THAT:

1. The applicant be granted an extension of time until 18 May 2017 for the filing of a notice of appeal.
2. The draft notice of appeal which is Annex B to the affidavit of Nicholas George Prassas filed on 18 May 2017 be deemed to be a notice of appeal filed that day.
3. Service of that notice be dispensed with.
4. The appeal be heard instanter.
5. The appeal be dismissed.
6. Liberty be granted to the respondent to apply for a lump sum costs order on or before 28 November 2017.
7. Any such application be accompanied by an affidavit or affidavits filed and served, together with an outline of submissions of not more than three pages.
8. By 5 December 2017, the appellants file and serve such affidavits, if any, in response to the application, together with an outline of submissions of not more than four pages. That outline of submissions is to state whether the appellants object to the determination of any lump sum costs application by the Court on the papers and furnish in detail reasons why that objection is made.
9. In default of the respondent complying with orders 6 and 7 on or before 28 November 2017, the appellants pay the respondent’s costs of and incidental to the appeal and the application for an extension of time, to be taxed, if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(EX TEMPORE – REVISED FROM TRANSCRIPT)

LOGAN J:

1. Fewin Pty Ltd and Mr Ronald Michael Coshott have appealed against a judgment delivered in the original jurisdiction in respect of their application for a review of a costs outcome before a taxing officer of the Court. The respondent, Mr Maxwell William Prentice, is the party against whom an order for costs was made earlier by the Court.
2. The appeal is one which required an extension of time for the filing of the notice of appeal. An adequate explanation was given by affidavit in respect of the quite limited delay. The respondent, Mr Prentice, did not oppose the granting of the extension. Further, the parties were at one in the position that the resultant appeal should, upon the granting of an extension, be heard *instanter*.
3. The point at large in respect of the appeal concerns the proper construction of r 40.27 of the *Federal Court Rules 2011* (Cth), which provides:

**Taxation**

1. If a notice of objection under rule 40.25 (1) has not been filed, only the party who has filed the bill may attend the taxation.
2. If a notice of objection has been filed, only the party who has filed the notice of objection and a party who has filed a notice of response under this Division may attend the taxation.

(3) A party is bound by the party's notice of objection or notice of response, with the effect that:

(a) no amount will be taxed off any item to which objection has not been taken in the notice of objection; and

(b) no amount will be allowed for any item to which objection has been taken in the notice of objection but not responded to in the notice of response.

(4) Despite subrule (3) the taxing officer will only allow costs to which a party is entitled.

*Note* ***Costs as between party and party*** and ***costs on an indemnity basis*** are defined in the Dictionary.

(5) At the taxation, a party may apply to the taxing officer for leave to make oral submissions for the purpose of explaining or clarifying an objection in the notice of objection or a response in the notice of response.

(6) The taxing officer is to tax the bill in accordance with this Part and on completion is to issue a certificate of taxation.

1. The notice of appeal raises the following ground in respect of the construction of r 40.27:
2. The primary judge erred by ruling that Rule 40.27(3)(a) of the Federal Court Rules 2011 (the Rules) did not preclude the Registrar as taxing officer from ruling under rule 40.27(4) of the Rules upon those items in the bills of costs which fell outside the Notices of Objection and the Response. Her Honour should have ruled that those items in the bills of costs attracting rule 40.27(3)(a) of the Rules were beyond the competence of the taxing officer under rule 40.27(4) of the Rules.

[sic]

1. The appellants’ submissions involved a rehearsal, in essence, of the submission made to the primary judge in respect of the construction of the rule. They are none the worse for that. The particular construction promoted by the appellants is that the taxing officer was not at liberty to depart from subjects or items raised on objection. In other words, the contention was that the statement in r 40.27(3)(a), that no amount will be taxed off any item to which objection has not been taken in the notice of objection had the effect of binding the taxing officer not to tax off items in respect of which, relevantly here, Mr Prentice had not taken objection.
2. The submission was enlarged upon by the promotion of the proposition that any different construction of r 40.27 would, as the primary judge observed at [3] of that same proposition:

… impose an intolerable burden on the taxing officer to review every item in a bill of costs to ensure that he or she allowed only “costs to which a party is entitled”.

1. That particular construction of r 40.27 runs up, as the primary judge apprehended and ultimately found, against the language of r 40.27(4). The primary judge observed, at [5]:

Another indication that the taxing officer will only allow any costs to which a party is entitled, irrespective of the process of objection and response, is that rule 40.27(3) starts with the words “A party is bound by”. While I accept that the effect is then prescribed by reference to not disallowing or allowing items it seems to me that the intent of subrules (3) and (4), read together, is that it is the parties who are bound by their objections and responses, not the taxing officer.

1. Reference was made on behalf of the appellants to the Explanatory Statement issued by the Court at the time when the current Rules were made. The relevant part of the Explanatory Statement, pp 25, 26 and 27, is neutral in my view in respect of the construction of r 40.27. It does not descend in any detail into the particular rationale for r 40.27.
2. Neither party put to us that it was necessary in respect of the construction of r 40.27 to embark upon a consideration of the nature of the review which was being conducted by the primary judge. It is enough for present purposes to note that views which had been expressed as to the nature of a review were noted by Kenny J in *Ann Street Mezzanine Pty Ltd (in liq) v Beck* (2013) 215 FCR 150 at [11] (*Ann Street Mezzanine v Beck*) and the subject of further consideration by Edelman J, when a judge of this Court, in *Cassimatis v Australian Securities and Investments Commission* (2016) 334 ALR 350 at [7] to [16] under the heading, “The court’s power on a review of a taxation of costs.” I expressly refrain from expressing any view in respect of the nature of a review before a taxing officer as it is unnecessary to consider the same to resolve the appeal.
3. Some support perhaps for the position promoted by the appellants is found in an observation which Kenny J made in *Ann Street Mezzanine v Beck* at [12], where her Honour observed in respect of a review proceeding:

No party can raise any ground of objection, or response to objection, not taken in the party’s original notice to the taxing officer under r 40.25(1) or r 40.26(1).

That, though, is but the first premise in the submissions for the appellant. It was unnecessary to consider, and her Honour did not pass upon the construction of r 40.27.

1. The difficulty for the appellants and this, in essence, is the point promoted for the respondent – is that it would be subversive of the costs regime in the Rules for a taxing officer to be bound by an absence of objection to allow whatever appeared in the bill of costs submitted for taxation. Regard to the context in which r 40.27 is found bears this out. In particular, the taxing officer is subject to an imperative requirement found in r 40.29 to allow costs for work done in accordance with either Schedule 2 or, as the case may be, Schedule 3, depending upon whether the work was done either before, or on or after, 1 August 2011. Further, there is a prohibition found in r 40.30 as to costs which a taxing officer is not to allow. Yet further, particular items are, by r 40.31, consigned to the exercise of a discretionary value judgment, to be made by the taxing officer, having regard to considerations which are identified in that rule. It seems to me that these particular strictures are reason enough to construe r 40.27(4) as its language might, in any event, suggest, by the presence of the word “despite”, as not inhibiting the taxing officer.
2. The observation made by the primary judge (at [7] - [8]) as to the import of r 40.27(3) and r 40.27(4) is, for this reason, one shared by me; in other words, it is the parties who are bound by their objections and responses, not the taxing officer.
3. As to the particular concern voiced in the appellants’ submissions about the burden which would be placed on the taxing officer by such a construction, the answer, in truth, is that the taxing officer is obliged to tax a bill by reference to rr 40.29, 40.30 and 40.31. The frequency of occasion, if any, for a taxing officer to proceed outside an objection will be dependent upon the attention given by the party preparing, filing and serving a bill of costs to the question of itemising and evidencing an entitlement to costs for which the rules of court provide.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 22 December 2017

# REASONS FOR JUDGMENT

# KERR J:

1. I concur with the reasons that Justice Logan has provided orally today. As Justice Logan has indicated, there is no necessity for this court to be prescriptive regarding the nature of a de novo review. But, in addition to the cases that his Honour has referred to, it is relevant that, in a matter determined by the Full Court in *Coshott v Crouch* [2017] FCAFC 135, it was identified that the primary judge in that matter had been:

…correct to apply the long-established principle that, notwithstanding a de novo review requires a judge to hear the matter afresh, it is not inconsistent with that duty, in conducting a review from a determination of a registrar on a matter of costs and remuneration, to proceed on the basis that there will be limited circumstances in which a court will interfere with a taxing officer’s decision.

1. In this matter, the construction argument was determined correctly by her Honour, and there is no reason otherwise to look behind the conclusions reached by the taxing officer.

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| I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 22 December 2017

# REASONS FOR JUDGMENT

# FARRELL J:

1. I concur with the reasons of Justice Logan, and the orders that he proposes.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 22 December 2017