

AUSTRALIA / JUDGMENT

Bechara v Kobeissi [2005] NSWSC 192

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New South Wales

Supreme Court

CITATION : Bechara v Kobeissi [2005] NSWSC 192

HEARING DATE(S) : 9 March 2005

JUDGMENT DATE : 24 March 2005

JURISDICTION : Common Law Division

JUDGMENT OF : Master Malpass at 1

DECISION : 1. The certificate as to determination of costs by Costs Review Panel issued on 21 October 2004 be set aside; 2. The Court remits its decision on the questions decided in this appeal and orders a redetermination of the application; 3. Costs are reserved; 4. The exhibit may be returned.

CATCHWORDS : Costs assessment - appellant in person - no regard had to what may have been a costs agreement - respondent under misapprehension as to what was being assessed and did not make submissions on totality of bill - decision as to a matter of law arising in the costs assessment.

LEGISLATION CITED : Legal Profession Act 1987, ss208C, 208L, 208M

Maria Bechara (Plaintiff)

PARTIES : Mohammad Kobeissi (Defendant)

FILE NUMBER(S) : SC 13830/04

Mr P Gray-Grzeszkiewicz (Plaintiff0

COUNSEL : Mr N Ajaje (Solicitor) (Defendant)

Bechara & Company (Plaintiff)

SOLICITORS : ANB Lawyers (Defendant)

LOWER COURT JURISDICTION : Costs Assessment Review Panel

LOWER COURT FILE NUMBER(S) : 92087/03

LOWER COURT JUDICIAL OFFICER : Mr C G O'Brien & Mr R W Gulley

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IN THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

Master Malpass

24 March 2005

13830 of 2004 Maria Bechara v Mohammad Kobeissi

JUDGMENT

1 Master: The plaintiff is a solicitor. She acted for the defendant in personal injury proceedings. The proceedings were settled on 3 July 2003.

2 Following the settlement, there were communications between the parties concerning the quantification of the costs. The question was not resolved by consensus and the plaintiff sought a bill of costs. The plaintiff's bill of costs was the subject of an application for assessment by a costs assessor.

3 The application was made by the defendant. During the assessment, he did not have legal representation.

4 The application advised that the amount of costs in dispute was the whole bill. The Manager, Costs Assessment referred the application to a Costs Assessor (Mr Johnstone).

5 I shall now refer to correspondence that passed between the Costs Assessor and the parties. The Court has been informed that correspondence to and from the Costs Assessor went to both parties.

6 By letter dated 8 March 2004, the Costs Assessor advised the defendant that he would need to particularise in writing his objections to the bill and that it was not sufficient to object to the totality of the bill.

7 By letter dated 25 March 2004, the Costs Assessor wrote to the plaintiff. The letter enclosed a copy of a letter dated 15 March 2004 received from the defendant. The letter from the Costs Assessor commented that there were what he described as two general objections and an overall objection to all the items in the bill. The letter called upon the plaintiff to make now any submissions that she wished to make by way of reply. It also asked her some specific questions.

8 By letter dated 13 April 2004, the plaintiff responded to the letter from the Costs Assessor. She did not make submissions by way of reply in relation to the totality of the bill.

9 By letter dated 27 April 2004, the Costs Assessor wrote to the defendant reiterating that it was not sufficient to object to the totality of the bill. It advised that if he did not receive further submissions by a specified date, the Costs Assessor would proceed to assess the costs in dispute without further reference to either party. Apparently, this letter evoked no further response from the defendant.

10 It appears that the material before the Costs Assessor may have included two documents. One was a copy of a conditional costs agreement between solicitor and client provided to him by the defendant. Apparently, it was undated and not signed by the defendant. The other was a copy of a costs agreement signed by his wife. This was provided to him by the plaintiff.

11 On 25 May 2004, the Costs Assessor issued a certificate as to determination of costs (in the sum of \$266,372.24). The court has been told that it effected a reduction in the amount of the bill in the order of \$100,000.00. The certificate was accompanied by a statement of reasons.

12 The statement of reasons disclose a number of matters. It discloses that the Costs Assessor dealt with the two general matters and found in favour of the plaintiff. Despite what had been earlier said by the Costs Assessor in correspondence, the statement disclosed that he did deal with the overall objection made by the defendant and did have regard to all items in making the assessment. The reasons reveal that he had reduced the amount of the bill by reason of what he regarded as matters that were, *inter alia*, excessive.

13 The reasons make no mention of the costs agreement. When regard is had to what is said in the reasons, it can only be concluded that he did not have regard to any question concerning what may have been a costs agreement and/or the provisions of, *inter alia*, s208C of the Legal Profession Act 1987 (the Act).

14 The Costs Assessor may have been placed at a disadvantage. The application was a litigant in person. He did not have the assistance of submissions he could have expected to receive had the applicant been legally advised.

15 The plaintiff applied to have the matter referred to a panel. The application set out a number of grounds. For present purposes, it is only necessary to refer to two matters. She claimed that the Costs Assessor had erred in treating the defendant's approach to the bill as being an objection to all of its items. The plaintiff took the stance that she had been led to believe that the Costs Assessor would only deal with the two general matters and so she did not make submissions on each and every item of the bill. Further, she raised the matter of the lack of regard had by the Costs Assessor to the questions of the costs agreement and 208C.

16 On 21 October 2004, the Panel issued a certificate as to determination. It set aside the certificate issued by the Costs Assessor. It allowed an increase in professional fees of \$3,668.00.

17 The Panel provided a document headed "Reasons for determination of review". The reasons are subdivided under various headings. One of them is "Grounds for Review" (paragraph 4). It referred to the 16 grounds of review. In 4.1, it rejected the contention that the Costs Assessor had erred in regarding the whole bill as being in dispute. In 4.2, it rejected the contention that the plaintiff was not afforded a reasonable opportunity to make submissions ("This ground is not made out"). In 4.4, the Panel dealt with the matters of s208C and the costs agreement.

18 On 18 November 2004, the plaintiff filed a summons in this Court. Relief is sought pursuant to ss208L and 208M of the Act. The principal matters relied on are the two matters earlier referred to.

19 As has been often said, s208L provides a narrow avenue of appeal in relation to a decision as to a matter of law arising in the costs assessment proceedings. Section 208M confers a discretionary power on the Court to grant leave. It is a discretion exercised having regard to the circumstances of the particular case before the Court and so that justice is best served between the parties. The onus rests with the plaintiff to satisfy the Court that the challenged decision should be disturbed.

20 The defendant has raised a question going to the competence of the application for relief pursuant to s208M. It is said that it has been made out of time. The plaintiff takes the stance that it should be granted an extension of time. I shall return to this matter in due course.

21 Before proceeding further, I should mention that the solicitor for the defendant did seek to rely on the contents of an affidavit sworn by his client. In my view, it deposed to material that was not relevant to the narrow ambit of this appeal.

22 It is a matter of great concern to this Court that the granting of relief in this case should see the parties being placed in a position where they are back to the commencement of the assessment process. Unfortunately, there seems to be no other option. The amount at issue is significantly large.

23 It seems to me that the plaintiff is entitled to relief under either of ss208L or 208M.

24 In my view, the peremptory dismissal of what was dealt with in 4.1 and 4.2 was erroneous. It appears likely that the Costs Assessor may have undergone a change of mind and without notifying the plaintiff, proceeded to assess the bill on the basis that the whole of it was in dispute. In my view, the plaintiff was entitled to have notice of that change of mind and an opportunity to make submissions.

25 It seems to me that what was said by the Panel in 4.4, glosses over what were the real issues. The costs assessor did not address the matter of the costs agreement at all (and so failed to have regard to it) and further this brought about a situation where findings were not made either as to it or in respect of the provisions contained in s208C.

26 In the circumstances, I am satisfied that I should set aside the certificate issued by the Panel.

27 Whilst matters concerning lack of reasons and denial of procedural fairness may not give rise to an appeal pursuant to s208L, the other matter does fall within the ambit of that section. In the circumstances, it suffices if the Court deals with the matter pursuant to s208L. Accordingly, there is no need to further dwell on the questions raised as to the availability of s208M as a source of relief.

28 Whilst other matters were argued (including lack of reasons), it seems to me that this appeal can be disposed of without the need to consider them.

29 Accordingly, I make the following orders:-

1. The certificate as to determination of costs by Costs Review Panel issued on 21 October 2004 is set aside;
2. The Court remits its decision on the questions decided in this appeal and orders a redetermination of the application;
3. Costs are reserved;
4. The exhibit may be returned.

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