

# SUPREME COURT OF QUEENSLAND

CITATION: *Amos v Monsour P/L & Ors* [2009] QCA 123

PARTIES: **EDWARD AMOS**  
(applicant)  
v  
**MONSOUR PTY LTD**  
(first respondent)  
**FRED MONSOUR**  
(second respondent)  
**DESLEY FAYE MONSOUR**  
(third respondent)

FILE NO/S: Appeal No 8829 of 2008  
DC No 2 of 2008

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil) – Further Order

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: Judgment delivered 24 March 2009  
Further Order delivered 12 May 2009

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: McMurdo P, Fraser JA and Douglas J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **That the amount of the respondents’ costs of and incidental to the application for leave to appeal ordered to be paid by the applicant by paragraph 2 of the order of the Court of 24 March 2009 is \$12,800.**

CATCHWORDS: PROCEDURE – COSTS – RECOVERY OF COSTS – where the applicant’s application for leave to appeal refused and applicant ordered to pay respondents’ costs of and incidental to the application – where applicant disputes amounts claimed for particular items – whether Item 16 in Schedule 1 of the *Uniform Civil Procedure Rules* 1999 (Qld) applies only to attendances by a self-employed solicitor – whether the estimate of costs claimed by the respondents is a realistic estimate of the amount of costs which would be assessed on the standard basis

*Uniform Civil Procedure Rules* 1999 (Qld), r 702, Schedule 1 (Item 16)

*Amos v Monsour Pty Ltd & Ors* [2009] QCA 65, cited

COUNSEL: S Sheaffe for the applicant  
S Moody for the respondent

SOLICITORS: Keller Nall Brown for the applicant  
McInnes Wilson for the respondent

- [1] **McMURDO P:** The amount of the respondents' costs of and incidental to the application for leave to appeal referred to in paragraph 2 of the order of the Court of 24 March 2009 should be fixed at \$12,800. I agree with Fraser JA's reasons for fixing the respondents' costs in this amount and with the order he proposes.
- [2] **FRASER JA:** On 24 March 2009 the Court refused the applicant's application for leave to appeal and ordered the applicant to pay the respondents' costs of and incidental to the application for leave to appeal in an amount to be fixed by the Court: *Amos v Monsour Pty Ltd & Ors* [2009] QCA 65. The Court has since received the parties' submissions and affidavits on that topic. The respondents submit that the costs should be fixed at \$15,627.63. That figure is supported by a costs assessment. The applicant's submission accepts that the assessment is "a rough guide", but the applicant submits, with the support of his solicitor's affidavit, that various items in it are over-charged and that a realistic estimate of the amount of the respondents' costs which would be assessed on the standard basis is \$7,700.
- [3] Rule 702(2) of the *Uniform Civil Procedure Rules 1999 (Qld)* ("UCPR") provides that when assessing costs on the standard basis a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed. The material before the Court is sufficient to justify confidence that the Court can act fairly in fixing the costs in accordance with those criteria and the requirements summarised in *Amos v Monsour Pty Ltd & Ors* [2009] QCA 65 at [28]. In undertaking that exercise it is convenient to begin with a consideration of the applicant's submissions about particular items in the costs assessment.
- [4] The assessment includes \$1,937.50 for 79 letters charged at the various scale rates in Schedule 1 of the UCPR. An affidavit by the solicitor who conducted the matter for the applicant verifies his submission that on the review of his file there were only 35 letters "which attract party/party costs", including letters to the Court copied to the other party counted as two letters. On that footing the applicant claims a deduction of \$950. The respondents' solicitor may have generated other letters for which the respondents were entitled to recover costs on the standard basis, but having regard to the nature of the application for leave I would not infer that, in addition to the letters on the applicant's solicitors' file, it is reasonable to require the applicant to pay the respondents' costs of another 40 or so letters. Making the best estimate I can I would reduce the assessment by \$600 on this account.
- [5] The assessment includes \$804.40 for copying 4,022 pages at the scale rate of 20 cents per page. The applicant's solicitors' affidavit establishes that the respondents' bundle of documents (excluding double copies) contained 183 pages, so that allowing also for a 10 page outline (with three copies for the Court, one copy for counsel, one copy to keep, and one copy to serve), plus copying of lists of cases and authorities of 100 pages, there were at most 1,300 pages to copy. That would produce a figure of \$260. However, the respondents were required to file five (not three) copies of the outline and its Part A cases comprised some 300 - 400 pages rather than 100 pages. That accounts for some 3,000 pages of copying in total. The

balance of some 1,000 pages may well be explicable, but on the material I think it reasonable to deduct \$200 from the assessment on this account.

- [6] The assessment includes \$910, comprising three and a half hours at \$260 per hour, for "solicitor attending legal skill". The relevant item in the scale is Item 16, which allows \$65 for each quarter hour for "other attendances" by a solicitor, involving skill or legal knowledge and \$19 for each quarter hour (\$76 for an hour) "by an employee".
- [7] The applicant's first point is that the hearing of the application for leave to appeal lasted only about one and a half hours. According to the Court's records the hearing occupied about one and three quarter hours. Item 16 also allows for 75 per cent of the scale rate in relation to time necessarily spent at Court before an appearance in Court. Allowing for that, I would deduct \$390 from the assessment on this account.
- [8] The applicant then contends that the relevant rate is not the rate for a "solicitor". The applicant does not suggest that the respondents' counsel was not instructed by a solicitor at the hearing of the application for leave to appeal, but rather that the solicitor was an employed solicitor rather than a self-employed solicitor. The applicant argues that the references to attendances by a solicitor in the scale of costs in Schedule 1 of the UCPR are references to a self-employed solicitor. This is said to be implicit because Item 14 of the scale uses the following words:
- "Attendance for a hearing or trial held at a place other than a town  
**where the solicitor** ... carries on business."
- [9] Reference is also made to the allowance in Item 14(b) of an amount the Registrar considers reasonable where the attendance is "by the solicitor's employee". Obviously an employed solicitor does not carry on his or her own business and will not have an employee attending on his or her behalf.
- [10] However, I see no reasonable basis for construing the phrase in Item 16 of the scale "a solicitor" as meaning "a self-employed solicitor". That distinction is not made in the scale and it is not a sensible implication from the words actually used. There is no ambiguity in the term "solicitor".
- [11] The assessment allows \$1,768.29 for care and conduct of the proceeding. That is some 30 per cent of the \$5,894.30 allowed in the assessment for professional fees. Allowing for the deductions I have made for professional fee items, that figure is reduced to about \$4,700. Thirty per cent of that figure is \$1,412. The applicant contends that this item should be allowed only at 10 per cent rather than 30 per cent. The applicant's submissions contend that in another appeal between the same parties an assessor on 25 March 2009 reduced a similar item from \$1,800 to \$1,250 where the other costs totalled \$7,646.60. That would produce a figure here of about \$750 for care and conduct. It is submitted that a fair sum is \$500. I think that both figures are too low for this case.
- [12] Item 1 of the scale provides for an amount the Registrar considers reasonable having regard to the circumstances of the proceeding. Eight examples are then given of relevant circumstances. Whilst the amount involved here was small in comparison with amounts commonly dealt with in civil proceedings in the Court, the proceeding was no doubt important for the respondents, particularly having regard to the litigious history to which I have referred. As I mentioned in my reasons for refusing the application for leave to appeal, the proceeding before the primary judge occupied some one and a half days overall. The application for leave

necessarily involved some significant skill and responsibility on the part of the respondents' solicitor in defending the respondents against the application brought by the applicant.

- [13] In the result I consider that it is appropriate to allow \$1,200 for this item, amounting to a little over 25 per cent of the other professional fees. That entails a deduction from the assessment of about \$570.
- [14] The total of the above mentioned deductions from the respondents' solicitor's professional fees in the assessment (\$7,662.59) is about \$1,700, which would result in an allowance for professional fees of about \$5,900. Putting the detailed analysis to one side, that figure seems reasonable for this matter.
- [15] The assessment allows as the most significant outlay the respondents' counsel's fees in the total amount of \$7,080, comprising amounts of \$4,000 on 24 December 2008 for "telephone conferences with instructing solicitor, settling index to bundle of documents and drafting and settling outline of argument", \$280 on 4 March 2009 for "settling list of authorities" and \$2,800 on 9 March 2009 for "preparation and fee on brief to attend on hearing of application for leave to appeal". The applicant's solicitor points out that the applicant's counsel, who was senior to the respondents' counsel and had not been involved at the first instance hearing, charged a total of only \$4,545.45. In assessing the reasonableness of the respondents' counsel's fees, however, it is necessary to bear in mind the Court's usual practice of hearing full argument as on an appeal on the hearing of the application for leave to appeal. Furthermore, it is appropriate as between applicant and respondents in this case to allow some reasonable latitude in the respondents' selection of counsel in light of the lengthy, litigious history referred to in my reasons in *Amos v Monsour* [2009] QCA 65. In my opinion a total fee of about \$6,000 was reasonable as between party and party.
- [16] The applicant contends that the assessor's fee of \$574.69 included in the assessment should be excluded because it was not a requirement of the Court's order that an assessment be made and because the applicant could not properly respond to the assessment without inspecting the respondents' solicitor's file. An assessment was not strictly necessary, but no complaint is made about the quantum of the assessor's fee and I regard it as reasonable. Had the respondents not incurred the costs of the assessment they necessarily would have incurred other costs in establishing a realistic estimate of the recoverable costs. I would not make any deduction from this item.
- [17] The result of the above exercise is to provide, as a guide, a total figure for legal costs of about \$12,800. That is disproportionately high to what was at stake, but in the circumstances of this case I consider it to be reasonable when measured against the criteria in Rule 702.
- [18] Finally, the applicant argues that the respondents did not comply with the requirements of paragraph 3(c) of the order made on 24 March 2009 that the submissions and affidavits were to be in double spacing and rendered in type no smaller than 1.8 mm (10 point). Any such non-compliance was obvious only in relation to the two and a half page costs assessment, which is largely in single spacing; but it and the other documents provided by the respondents are concise, legible and to the point. They certainly complied with the spirit of the orders. The applicant's point is nit-picking. It is no justification for accepting his argument that each party should pay their own costs.

**Order**

- [19] I would order that the amount of the respondents' costs of and incidental to the application for leave to appeal ordered to be paid by the applicant by paragraph 2 of the order of the Court of 24 March 2009 is \$12,800.
- [20] **DOUGLAS J:** I agree with the reasons of and the order proposed by Fraser JA.