SUPREME COURT OF QUEENSLAND

CITATION:	*Hunter v Hunter & Anor* [2015] QSC 188
PARTIES:	**CORNELIA HUNTER** (applicant/plaintiff) **v** **JOHN MALCOLM HUNTER** (first respondent/seventh defendant) **MIRONESCO PTY LTD in its own capacity and as trustee of HUNTER FAMILY TRUST** (second respondent/eighth defendant)
FILE NO/S:	SC No 4124 of 2007 CA No 260 of 2013
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2015
JUDGE:	Philip McMurdo J
ORDER:	**Delivered ex tempore on 14 April 2015:** **1. The application for an adjournment be refused.** **2. The application in respect of the cost assessment in CA 260 of 2013 be refused.**
CATCHWORDS:	PROCEDURE – COSTS – TAXATION – REVIEW – where the applicant challenged an assessment of the respondents' costs in relation to an order made by the Court of Appeal regarding the costs of the appeal – application refused PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – ADJOURNMENT – application for adjournment *Australian Coal and Shale Employees Federation and The Commonwealth* (1953) 94 CLR 621, cited *Hill v Peel* (1870) LR 5 CP 172, cited *House v the King* (1936) 55 CLR 499, cited
COUNSEL:	The applicant/plaintiff appeared on her own behalf M Wright for the first respondent/seventh defendant and second respondent/eighth defendant
SOLICITORS:	The applicant/plaintiff appeared on her own behalf

Wrightway Legal for the first respondent/seventh defendant and second respondent/eighth defendant

HIS HONOUR: The immediate question is whether, as the applicant plaintiff requests, the hearing should be adjourned until after October this year, when a case will be heard by the Family Court between the applicant and the present, seventh, defendant. The applicant hopes that by those proceedings she will receive sufficient funds to enable her to be legally represented in this proceeding. It is desirable that any party in a case in this court be legally represented, but that is not the only consideration affecting whether the court should now proceed to hear the applications, or instead, adjourn them.

A further consideration is that the applicant does appear to be in less than perfect health. She does appear to have something in the nature of flu symptoms, but her principal reason for seeking the adjournment is the one I first mentioned.

The present applications have been before this court for some time. They came before me in the applications list last August when they had to be adjourned, as the respondent suggested, so that the applicant could comply with the relevant rules, and, in particular, so that she could file an amended application which set out her grounds, as well as attaching the cost assessor's reasons. The matter was again before the court in the applications list last October when it was given – when it was adjourned to the civil list.

The position has been reached where the litigation between these parties, at least in this court, should be finalised, if that can be done without injustice. It seems to me that as the application was originally filed, and as it was set down today, it was not dependent upon Ms Hunter having legal representation. It does not appear from anything which Ms Hunter has said that the Family Court proceedings will reveal any evidence which is relevant to the present applications. For these reasons, the application for an adjournment being opposed, it will be refused.

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The challenges made by the applicant, Ms Hunter, who was the plaintiff and then the appellant in these proceedings, relate to separate assessments, each made by Mr Walter, respectively dealing with the costs awarded by the trial judge and the costs awarded by the Court of Appeal. Thus far I have heard her arguments in relation to the latter assessment upon which I will now rule. There were some submissions of general application, as well as some submissions which went to particular items where her objection was not wholly or, in some cases, partly successful. The first of her general submissions is that the entire assessment must be set aside, and the matter remitted to a new assessor, because of an error which was made in obtaining the order for the assessment.

At the trial, most of the defendants were not legally represented. The seventh and eighth defendants were represented by the firm which then came to act for all respondents in the appeal. The order made by the Court of Appeal was for the

appellant to pay the respondents' costs of the appeal on the standard basis. Mistakenly, the lawyer acting for all nine respondents presented draft orders to the registry which provided for the appointment of an assessor and the assessment of the costs of the appeal, which was restricted to the costs of the seventh and eighth respondents to the appeal. Consequently, orders in those terms were issued and the assessment proceeded.

The assessor appears to have considered that it was his responsibility to assess costs consistently with the order for costs made by the Court of Appeal, and, therefore, in his certificate he referred to the costs of the respondents. If there was any basis for thinking that his assessment was affected by the mistake which was made in procuring the order for the assessment, it would be appropriate to consider remitting the matter to him for further consideration. However, the material suggests no reason for thinking that the costs recoverable by any respondent would be different from those which would be assessed in favour of all of them. The assessor has considered that the true effect of the order by which he was appointed was that he was to assess the costs as ordered by the Court of Appeal. That does not seem to me to be erroneous, and, as I have already indicated, there is no practical consequence in this case for his having acted on that basis. I therefore reject this first submission.

I should mention a similar but distinct point now in relation to parties which concerns the second and third respondents. During the process of – or whilst the process of assessment was underway, the plaintiff, the present applicant, settled the entirety of her dispute with the second and third respondents. This was done without reference to Mr Wright of Wrightway Legal who, as I mentioned, was acting for all respondents on the appeal. But those proceedings having been settled, there was no longer any issue to be determined between them and the applicant. What should have happened is that the assessor should have been informed of the settlement.

The applicant suggests that this has affected the amount of the assessment on the basis that there would be some items within the costs which have been allowed by the assessor which would be referrable only to the second and third respondents.

There are two reasons why her submission that this settlement with the second and third respondents should result in a new assessment is a submission which should be rejected. The first is, as I have just discussed in relation to her first argument, that there is no reason to suppose that the quantification of the costs and disbursements would be different if that involved a quantification of the costs recoverable by only some of the respondents. The second thing is that the applicant, perhaps because she was without legal representation and did not know what to do, did not take steps to prevent the assessor from issuing an assessment in the names of all of the respondents.

I had at some stage considered an order under rule 742(6)(e) by which I could refer a particular question back to the assessor, namely, whether there should be any change to his assessment from this being an assessment of the costs awarded in favour of the respondents other than the second and third respondents. But upon further consideration, it does not seem to me that that is necessary or appropriate.

The third of the general submissions relates to an item for counsel's fees on the appeal. The original costs statement sought a total of $50,636.90. This did not include any

component for counsel's fees. Subsequently, the solicitor for the respondents submitted a further statement which included an allowance of $13,200 as a disbursement for counsel's fees. The total amount claimed was increased accordingly. The applicant complains that this was done without her knowledge.

The amount of the counsel's fee was reduced by about $1700 by the assessor. I did not understand the applicant to contend that the reduced amount was unreasonable. Instead, her complaints seemed to be firstly, as I've mentioned, that this was done after the original statement was presented to her and had she objected to it, and secondly that she maintained the counsel's fee had been paid by the ninth respondent, so that it was not a cost incurred by any other respondent. Further, she argued that payment of this fee by the ninth respondent was in breach of something which the court had ordered prior to the trial.

As to that last point, Mr Wright told me that the order to which the applicant referred is one which endured only until the trial, or perhaps the judgment from the trial, and, so that there was no impediment to the payment of that fee by the ninth respondent.

But in any case, the fact that an outlay was paid by one of the respondents does not affect the question of what should have been allowed for the respondents in this assessment. This was a fee which was incurred by all of the respondents, that is, for which all respondents were prima facie liable, and which happen to have been paid by one of them. It remains an item which is recoverable as part of the respondents' costs.

The challenge to the allowance of this item, therefore, cannot be accepted. There were several other individual challenges, that is, challenges to particular items. Before going to them, I should note what was said as to the appropriate approach of a court being asked to exercise the present jurisdiction by Kitto J in *Australian Coal and Shale Employees Federation and The Commonwealth* (1953) 94 CLR 621 at 627 to 629. Kitto J there said that in the present context:

> *There is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed, unless the Court of Appeal is satisfied that it is clearly wrong.*

His Honour continued:

> *A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there's been an error which consists in acting upon a wrong principle, or giving way to extraneous or irrelevant matters, or failing to give weight or sufficient weight to the relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable. But, even so, it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there's been a failure properly to exercise the discretion in which the law reposes in the court at first instance.*

For which his Honour cited *House v the King* (1936) 55 CLR 499. His Honour continued at 627 to 628:

> *Where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the court is generally unwilling to interfere with the judgment of its officer whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed.*

His Honour was there quoting from *Hill v Peel* (1870) LR 5 CP 172 at 180 and 181.

The first of the remaining items which is challenged is number 129, in which it is said that Mr Wright's firm simply used the work of a firm that had acted for some of the other respondents prior to the trial in what it did ahead of seeking security for costs of the appeal.

The work which had been done by that firm, whatever it was, could hardly have been applied simply to the context of security for costs on the appeal. The amount sought was not so large as to be obviously unreasonable. And there is no basis for interfering with the exercise in Mr Walter's discretion. In this respect, there was an objection to items 241, 254 and 257 on the basis that they involved claims for amounts which had been claimed elsewhere in the cost statement. That was a matter for the assessor to consider. And there is no demonstrated basis of error in his consideration of that point in relation to any of those items.

Item 246 was challenged on the basis that this was a wrongly claimed amount for inquiring about the compilation of the respondent's copies of the appeal record. Again, that was a matter for the assessor to consider. He made a reduction, but there is no error demonstrated in his not disallowing the entire sum. Lastly in this list there is item 333. This was for the cost of preparing the cost statement, for which $9520 was claimed. It was reduced to an amount of $2308.50 by the assessor. The applicant's present complaint seems to be that this was work which should have been described as a disbursement, rather than an item of costs. That is not conceded by Mr Wright, who told me that the work was performed by someone engaged, effectively, in-house. It is unnecessary to resolve that question. There is no challenge to the adequacy of the reduction affected by the assessor, and whether it was properly characterised as a cost or a disbursement does not seem to be of any present relevance.

Therefore, none of the challenges to the assessment in CA 260 of 2013 should succeed. And the application in respect of that cost statement should be refused.

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