SUPREME COURT OF QUEENSLAND

CITATION:	*Lynch v Collins* [1999] QCA 445
PARTIES:	**LYNCH, Paul Gerard** (Appellant) v **COLLINS, Sean** (Respondent)
FILE NO/S:	Appeal No 11569 of 1998 SC No 8827 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 1999
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 1999
JUDGES:	McMurdo P, Pincus and Thomas JJA
ORDER:	**Order below varied by setting aside the costs order and referring that question back to the chamber judge for further consideration. Otherwise the appeal is dismissed with costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – TAXATION OF COSTS AND FEES – GENERAL PRINCIPLES – dispute between client and former solicitors over costs – whether chamber judge erred in exercising discretion to order taxation of bills – s 8, s 16 of the *Legal Practitioners Act* 1995 discussed – power of court to make orders referring bills for taxation considered – express prohibition in s 16 inconsistent with exercise of inherent discretion – "special circumstances" under s 16 – costs *Acts Interpretation Act* 1954, s 20 *Legal Practitioners Act* 1955, s 7, s 8 and s 16 *Rules of the Supreme Court* O 40 r 56 *Uniform Civil Procedure Rules* r 765 (1), r 766(1)(c) *In Re A Solicitor* [1961] 1 Ch 491, considered *In Re Norman* (1886) 16 QBD 673, considered *Re John Barry & Co's Bill of Costs* [1975] Qd R 368, considered

COUNSEL:	Mr L D Bowden for the appellant Mr S B Collins (not of counsel) for the respondent
SOLICITORS:	Lynch & Co for the appellant Clarke & Kann for the respondent

[1] **THE COURT**: This appeal concerns a dispute between a client and his former solicitors over costs. The solicitors are appealing against the order of a chamber judge referring three of their bills for taxation. It will be convenient to refer to the parties as the solicitors and the client.

[2] The client originally engaged the solicitors to act for him in bringing an action against a company (Handy Gardeners) based upon allegedly deceptive conduct on the company's part in inducing him to become a franchisee. The instructions which alleged misleading or deceptive conduct under s 52 of the *Trade Practices Act* 1974 (Cth) were given in April 1996. An action was commenced in the Federal Court on 5 July 1996. It was transferred by consent to the District Court two months later.

[3] The following summary prepared by the learned chamber judge presents some idea of the ensuing progress of the claim and of the consecutive bills rendered by the solicitors.

April 1996	Applicant instructs Lynch & Company to act
5 July, 1996	Application and statement of claim filed in Federal Court by Lynch & Company
18 July, 1996	Application and statement of claim served on first respondent
2 August, 1996	Application and statement of claim served on second and third respondents
6 August, 1996	**Applicant receives bill of costs in the sum of $5,699.00**
9 August, 1996	Directions hearing at Federal Court
9 August, 1996	First, second and third respondents file notice of appearance
9 September, 1996	Directions hearing at Federal Court
12 September, 1996	Matter transferred to District Court at Brisbane by consent
10 October, 1996	Entry of appearance and defence filed by first, second and third respondents
16 October, 1996	**Applicant receives bill of costs in the sum of $1,851.10**
18 October 1996	Summons filed by Lynch & Company seeking orders that entry of appearance and defence be struck out

18 October, 1996	Amended entry of appearance and defence filed by defendants
28 October, 1996	Summons dismissed by consent
13 November, 1996	**Applicant receives bill of costs in the sum of $1,546.30**
13 November, 1996	Notice requiring discovery on oath served on defendants
18 November, 1996	Defendants file application seeking orders for parts of statement of claim to be struck out
18 November, 1996	Notice requiring discovery on oath served on plaintiff
26 November, 1996	**Applicant receives invoice in the sum of $53.70**
5 December, 1996	Defendants' affidavit of documents received
6 December, 1996	Lynch & Company file summons seeking orders that amended entry of appearance and defence by struck out and supplementary affidavit of documents be delivered
10 December, 1996	Consent orders made providing timetable for delivery of supplementary affidavit of documents, inspection of documents and delivery of interrogatories
10 December, 1996	Defendants request further and better particulars of statement of claim
13 December, 1996	Plaintiff's affidavit of document served
16 December, 1996	Further and better particulars of statement of claim filed
23 December, 1996	**Applicant receives bill of costs in the sum of $5,928.45**
15 January, 1997	Plaintiff inspects defendants' documents
22 January, 1997	**Applicant receives bill of costs in the sum of $853.39**
4 March, 1997	Plaintiff inspects documents Minter Ellison [sic]
13 March, 1997	**Applicant receives bill of costs in the sum of $1,496.50**
7 May, 1997	Plaintiff inspects documents from the defendants' supplementary affidavit of documents
9 May, 1997	**Applicant receives bill of costs in the sum of $2,990.43**
29 May, 1997	**Applicant receives bill of costs in the sum of $1,062.25**
14 July, 1997	Amended statement of claim delivered
14 July, 1997	**Applicant receives invoice in the sum of $5,275.35**
21 July, 1997	Lynch & Company advise plaintiff (applicant) that statement of claim may require further amendments
24 July, 1997	Lynch & Company forwards certificate of readiness to defendants
18 September, 1997	**Applicant receives bill of costs in the sum of $2,118.00**
15 October, 1997	**Applicant receives bill of costs in the sum of $1,558.57**
16 October, 1997	Further amended statement of claim delivered
13 November, 1997	Defendants serve application to deal with deficiencies in

	further amended statement of claim
3 December, 1997	Aspects of defendants' summons adjourned to 29 July, 1998 together with application filed by Lynch & Company seeking order to dispense with certificate of readiness
16 December, 1997	**Applicant receives bill of costs in the sum of $6,269.44**
8 July, 1998	Clarke & Kann take over conduct of matter
15 July, 1998	**Applicant receives bill of costs in the sum of $558.49."**

[4] All the above bills were paid by the client. He did not apply to refer the bills to taxation until 22 September 1998. The solicitors relied upon s 8 and s 16 of the *Legal Practitioners Act* 1995 which regulates the power of the court to make orders referring bills for taxation. Briefly stated, s 7 gives a client the right to refer a bill for taxation without any order from a judge if the reference is made within one month of delivery of the bill. The court has a wide discretion to order taxation for bills delivered after one month[1], but in the case of bills delivered after the expiration of 12 months, "no such reference ... shall be directed ... except under special circumstances ..."[2]. Furthermore in cases where the client has already paid the bill before applying for a reference, special circumstances are required for an order[3], and such an application must in any event be made within 12 calendar months after payment[4].

[5] The solicitors submitted that s 16 denied power to the court to order taxation of all but the final four bills. His Honour upheld that submission, holding that the express prohibition in s 16(2) is inconsistent with the existence of an inherent power to order taxation. His Honour also upheld the solicitors' submission that since the *Civil Justice Reform Act* 1998 came into force (on 1 July 1998), the power to tax the final bill (delivered after that date) was removed by statute.

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1 Section 8(1).
2 Section 8(3).
3 Section 16(1).
4 Section 16(2).

[6] There is no notice of cross-contention in relation to these findings by which the solicitors succeeded in having the application dismissed with respect to nine of the twelve bills that the client sought to have taxed. It was however submitted on behalf of the client that the court retains an inherent jurisdiction to order taxation of such bills notwithstanding s 16(2). In our view the learned chamber judge was correct in holding that the express prohibition in that section is inconsistent with the exercise of any inherent jurisdiction in such circumstances.

Whether special circumstances shown

[7] The main issue on this appeal is the submission on behalf of the solicitors that his Honour erred in exercising his discretion to order taxation of the three bills dated

respectively 18 September 1997 ($2118), 15 October 1997 ($1558.57) and 16 December 1997 ($6269.44), in that it was not open to him to make a finding of special circumstances under s 16.

[8] It is common ground that s 20 of the *Acts Interpretation Act* 1954 preserves any right that existed in the applicant/client prior to 1 July 1998 to apply to have those bills taxed. The question is whether his Honour erred in finding special circumstances justifying the taxation of these bills notwithstanding that they have been paid.

[9] The arrangement to which the client agreed at the outset was for the rendering of bills based upon a prescribed scale of costs, which may be contrasted with the method of time-costing. The bills, as the learned chamber judge observed, contain items for which apparently modest amounts are charged but they consist of a very great number of items, the bills themselves are prolific and they claim substantial total amounts. In determining whether special circumstances existed it was necessary for his Honour to endeavour to form an opinion on a number of matters including possible overcharge. His Honour, correctly in our view, thought it permissible to look at all the bills for the purpose of deciding whether special circumstances existed and that to do otherwise would present an artificial picture. In coming to any final view it was necessary to see these bills as part of the overall charging conduct of the solicitors in the performance of their retainer.

[10] The client was 22 years old when he first retained the solicitors and the failed gardening franchise was his first essay into the world of business. The learned chamber judge observed that two and a half years after its commencement the action was still not ready for trial and that the bills rendered by the solicitors totalled over $37,000. Those details standing alone of course would not necessarily be suggestive of gross overcharge. For example, if the solicitors for the defendant had impeded reasonable progress in the action by excessive interlocutory applications or other obstructive conduct or the action was one where expensive experts or inquiries were a necessary feature, such a limited progress for such a total sum might not be surprising. However, further examination of the material suggests that there was apparently no excessive difficulty occasioned by the conduct of the defendant's solicitors, and that only a few attendances at court were necessary. There was some activity in relation to particulars and the like, but on the face of it there is nothing that could be described as a "paper war" or unreasonably obstructive conduct.

[11] A primary problem seems to be the undue breadth of allegations in the statement of claim. That document, which was drawn by the solicitors and delivered in that form, was not limited to material allegations. Much of the ensuing lack of progress seems to stem from this. The learned chamber judge was also concerned at the decision of the solicitors to commence the action in the Federal Court where the costs were and are higher than in the District Court. This was of course followed in due course by a transfer to the District Court a few months later. His Honour described the action as a fairly small District Court claim prepared over two and a half years to a stage where it was not ready for trial and the statement of claim may need further alteration. His Honour was also concerned that no early attempt appeared to have been made to assess the amount of loss or damage suffered as a result of the representations, although on

this point the solicitors rejoined that the client had declined to authorise them to retain an investigative accountant. His Honour thought that the absence of such action was thought to lie behind many of the complaints about the statement of claim which in turn delayed the action and multiplied correspondence and was the subject of some interlocutory applications. It should be appreciated that the exercise of the learned chamber judge was one of forming an impression, not of reaching any final conclusions on the validity of the charges or the conduct of the solicitors in question. In turn, in reviewing the evidence and the views of the learned chamber judge, this court similarly performs a limited exercise. The issue is simply whether these bills ought to be taxed despite the client having actually paid the bills.

[12] In our view the evidence was sufficient to raise the concerns expressed by the learned chamber judge. Despite the fact that arguments are available both ways, there remains a prima facie case that despite the reasonable nature of charges for individual items, a significant part of the work was ineffective or unnecessary and that substantial reductions might be appropriate. Only a closer examination, as upon a taxation, would reveal whether this is in fact so. The learned chamber judge's overall impression was of a case which had taken too long, had not been efficiently prepared and had cost a very large amount of money. It was open to the chamber judge to reach that prima facie impression.

[13] Counsel for the appellant solicitors conceded that the law had moved forward from the time when in order to justify taxation of a paid bill an applicant needed to show pressure accompanied by overcharge so gross as to be evidence of fraud. In *In Re A Solicitor*[5] Cross J, having observed that in *In Re Norman*[6] the Court of Appeal rejected the idea that there were any hard and fast rules on the subject of special circumstances, continued:

> "That does not, of course, mean that a judge can properly send a paid bill for taxation without regard to the state of mind of the client when he paid it simply because he thinks it contains or may contain some over-charges. He must take into account the circumstances of the payment on the one hand and the size of the over-charges or possible over-charges on the other hand. Broadly speaking, I think it would be true to say that the more pressure or protest there was at the time of payment the smaller the over-charges need be to justify an order to tax, while conversely the less pressure or protest there was the larger the over-charges or possible over-charges must be".

[14] Attempts in earlier cases to circumscribe the discretion have been disapproved. In *Re Norman* Lord Esher said:

> "It has been argued that an interpretation has been put upon these words, and that at least after payment of the bill these words "special circumstances" must be confined to cases of pressure and overcharge, or

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5 [1961] 1 Ch 491 at 504.

6 (1886) 16 QBD 673.

> overcharge amounting to fraud ... In my opinion no one has a right to put such a limitation upon the meaning of these words ..."[7].

[15] In the same case Lopes LJ, adopting the words of Bowen LJ in *In Re Boycott*[8], said:

> "Special circumstances, I think, are those which appear to the judge so special and exceptional as to justify taxation. I think no Court has a right to limit the discretion of another Court, though it may lay down principles which are useful as a guide in the exercise of its own discretion"[9].

[16] Counsel for the solicitors placed some reliance upon *Re John Barry & Co's Bill of Costs*[10]. Although conceding that that case does not confine the exercise of the discretion to any particular limits he submitted that it lays down a guideline for the principal considerations that the court must look at in determining whether special circumstances exist. He submitted that in the first place the client must show a good reason (such as pressure from the solicitors) why the bill was paid; and that secondly the court must be satisfied of the existence of overcharge. He further submitted that there were only two ways in which a court could be satisfied of overcharge, namely –

1. that it is "redolent of overcharge"; or
2. by expert evidence.

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7 Ibid at 675.
8 (1885) 29 Ch D 571 at 579.
9 In *Re Norman* above at 677.
10 [1975] Qd R 368.

[17] In *Re John Barry* Dunn J (with whose judgment the other members of the court agreed) stated that in the absence of pressure or protest, generally speaking, the making of arguably correct charges cannot be regarded as a circumstance so special as to justify taxation after payment[11]. It is true that in that case a client who had limited his attack before the primary judge to particular items in the bill was not permitted on appeal to attack other items of the bill. However the case is not authority for the proposition that overcharge may be discerned only in the two limited ways that have been submitted by counsel in this case. Indeed, such a proposition would transgress the concerns mentioned earlier in *Re Norman.*

[18] Counsel for the solicitors further submitted that his Honour's analysis in terms of "concern" or "disquiet" was not sufficient to form a basis for the necessary finding. We do not agree. No doubt a question of degree is involved in the level of concern or disquiet which, in the light of other circumstances, may properly justify the exercise of this discretion. But it is not the case that an actual finding of overcharge, or some higher level of mental anguish than disquiet in relation to the bill, is necessary before the court can make such an order. As we have already observed, the question is not whether there has been an overcharge but whether the bill ought to be taxed. We do not consider it desirable to search for other phrases identifying the level of satisfaction or of angst that is necessary before a court may be justified in ordering such a taxation.

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11 Ibid at 374.

There was nothing wrong with his Honour's recourse to concern or disquiet. We note in passing that the phrase used by Kiefel J in *Re Bailey's Bills of Costs*[12] was "some discernible need for taxation".

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12 [1994] 1 Qd R 576, 581.

[19] The evidence capable of explaining why the client paid the bills was sparse but was sufficient to found the learned chamber judge's finding that the client did so in an "unquestioning belief that he was obliged to pay". The evidence supports his Honour's finding that the solicitors did not advise their client at any time of his right to have the bills taxed or the time by which such right should be exercised. Counsel for the solicitors submitted that the blank cover sheet of each bill was sufficient to do this because it suggested that a procedure was available for taxation. It does not seem to us that such coversheets come close to reasonable advice to the client of his rights in these respects. The absence of such advice is a relevant circumstance concerning the making of the payments and is relevant in the ultimate exercise of the discretion. The client's age, lack of experience, naivety and lack of knowledge of his rights reveal further aspects of this.

[20] In all the circumstances we are unable to see any sufficient reason for considering that the learned chamber judge erred in determining that special circumstances existed which justified ordering taxation of these three bills notwithstanding that they had already been paid.

[21] Three further matters remain to be mentioned.

Objection to evidence

[22] Counsel for the appellant solicitors raised objections to the alleged use of hearsay evidence before the learned chamber judge and submitted that it was not an appropriate occasion to admit such evidence under Order 40 Rule 56 of the *Rules of Supreme Court*. In the first place the notice of appeal raises no such ground; in the second place counsel conceded that the learned judge does not appear to have relied on such evidence in the course of reaching his decision; and in the third place it was plainly open to his Honour to make use of the wide discretion conferred by Order 40 Rule 56.

Further evidence on appeal

[23] After counsel for the appellant solicitors had finished his submissions, the solicitor now representing the client read in this court, ultimately without objection, an affidavit. It discloses certain facts which have occurred since the hearing below. It reveals that the District Court case in question was settled two months after the client engaged new solicitors. We do not think that that is of any particular relevance. However the affidavit also reveals that despite the pendency of the appeal, the parties actually proceeded to taxation in May 1999 with the following results.

Date of Bill	Amount of Bill	Amount Taxed off	Short charges allowed

Date of Bill	Amount of Bill	Amount Taxed off	Short charges allowed
18 September 1997	$2118.00	$737.85	Nil
15 October 1997	$1558.57	$1176.09	$154.15
16 December 1997	$6269.44	$443.42	$90.50

[24] After bringing into account both the short charges and the amounts taxed off, the total amount of the three bills ($9946.01) has been reduced by a total of $2,112.71. In short, on taxation the bills as a whole have been reduced by 21.2 per cent. The certificate has not yet issued, and the position should not be regarded as final. Although invited by the solicitor for the client to re-hear this proceeding as an appeal by rehearing de novo under Uniform Civil Procedure Rule 765(1) and to receive this further evidence under Rule 766(1)(c) we are not prepared to dispose of the appeal in this way. On the material before the learned chamber judge we would dismiss the appeal. The additional material is however before us, and for reasons mentioned below it is material to the question of costs. So far as the primary point of the appeal is concerned, the additional evidence may be taken as supplying some comfort in confirming the validity of the judge's concern - not at a gross level, but at a sufficient level to justify the order for taxation.

Costs

[25] Finally the present appeal challenges the order made below in relation to costs of the application. His Honour ordered that the costs of the application before him should be paid by the party found liable to pay the costs of the taxation. On the face of it that seems to be a reasonable order. However the additional material exposes a problem in the order which would not be immediately apparent. The reference to "the costs of the taxation" makes the order unworkable if, as is contended, there are in fact three taxations, on two of which the client may be successful as to costs[13] and on one of which the solicitor may be successful. We were informed that currently further directions are being sought by the taxing master from the chamber judge in order to determine whether the taxation of each bill is to be regarded as a separate taxation. Resolution of that point might require further litigation, and it might not necessarily end in a result consistent with the broad intention of the order.

[26] It is desirable that this court dispose of the matter now and that so far as possible further cost between these parties be avoided. It seems to us that the most satisfactory solution would be to set aside the order for costs so that the learned chamber judge may vary its terms if this seems necessary in the interests of justice. It is fair to say that whilst the general intent of the original order is unexceptionable, in the event that separate orders are made by the taxing officer, some in favour of one party and another in favour of the other, a proportional order might be appropriate. That however will be a matter for his Honour in the light of further developments.

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[13] *Supreme Court Rules* Order 91 Rule 93.

[27] The appeal should be dismissed. It has failed in all respects save for a direction which will permit reconsideration of the costs order. That is of insufficient moment to relieve the unsuccessful appellant from the usual order that he pay the respondent's costs of the appeal to be taxed. Accordingly the order below should be varied by setting aside the costs order and referring that question back to the chamber judge for further consideration. Otherwise the appeal is dismissed with costs.