Industrial Relations Court of Australia

[Index] [Search] [Help]

Ian Cameron and Annette Cameron v Warakurna Community Inc. (970198)

DECISION NO:198/97

CATCHWORDS

INDUSTRIAL LAW - application for COSTS against a party's solicitors and/or counsel

Workplace Relations Act 1996 (C'th) (formerly Industrial Relations Act 1988 (C'th)) Ss)

re Bendeich (1994) 126 ALR 643

Canceri v Taylor (1994) 1 IRCR 120

Da Sousa v Minister for State for Immigration, Local Government and Ethnic Affairs (1993) 114 ALR 708

Knight v FP Special Assets Ltd (1992) 174 CLR 178

Lindsay v Associated Furnishers Limited, unreported, IRCA 29/97, Patch JR, 17 January 1997

Myers v Elman [1940] AC 282

Nicholson v Heaven & Earth Gallery Pty Ltd (1994) 1 IRCR 199

Ridehalgh v Horsefield [1994] Ch 205

The Victoria Bar Counsel Consolidated Rules of Practice and Conduct, 24 May 1993

Gowans, Sir Gregory QC, *The Victorian Bar. Professional Conduct Practice and Etiquette*

IAN CAMERON and ANNETTE CAMERON - v -

WARAKURNA COMMUNITY INC.

DI 1029 AND DI 1030 of 1996

Before: RITTER JR

Place: PERTH

Date: 27 MAY 1997

IN THE INDUSTRIAL RELATIONS COURT)

OF AUSTRALIA)

WESTERN AUSTRALIA DISTRICT REGISTRY)

DI 1029 of 1996

B E T W E E N:

IAN CAMERON

Applicant

A N D:

WARAKURNA COMMUNITY INC.

Respondent

DI 1030 of 1996

B E T W E E N:

ANNETTE CAMERON

Applicant

A N D:

WARAKURNA COMMUNITY INC.

Respondent

MINUTE OF ORDERS

27 MAY 1997 PERTH RITTER JR

THE COURT ORDERS THAT :

1. The respondent's application for costs against the applicants' solicitors and counsel for the applicants is dismissed.

NOTE: Settlement and entry of orders is dealt with by Order 36 of the Industrial Relations Court Rules

IN THE INDUSTRIAL RELATIONS COURT)

OF AUSTRALIA)

WESTERN AUSTRALIA DISTRICT REGISTRY)

DI 1029 of 1996

B E T W E E N:

IAN CAMERON

Applicant

A N D:

WARAKURNA COMMUNITY INC.

Respondent

DI 1030 of 1996

B E T W E E N:

ANNETTE CAMERON

Applicant

A N D:

WARAKURNA COMMUNITY INC.

Respondent

REASONS FOR DECISION

27 MAY 1997 RITTER JR

INTRODUCTION

This is an application for costs by the respondent. The respondent seeks a costs order against either the applicants' solicitors or counsel for the costs occasioned by the hearing of this application having to be adjourned from 6 November 1996 to 10 December 1996.

The applications were listed for hearing in Alice Springs commencing on 4 November 1996, by order of Richardson DR on 6 September 1996. By that order the hearing was listed for three days. At an earlier directions hearing before DR Liddle on 12 June 1996, the applicants indicated that they had four witnesses and the respondent seven witnesses including witnesses who may need an interpreter.

At the time of the hearing both applicants were resident in South Australia. The respondent is an aboriginal community situated some 800 kilometres from Alice Springs. Most of the respondent's witnesses were resident at the community. The solicitors for the applicants and the respondent both engaged counsel from Melbourne. I am resident in Perth. Due to the widespread location of those involved in the hearing, it was highly desirable that the hearing of the application be completed within the three days allocated to it. It was extremely regrettable that it did not do so. There was no indication, prior to the hearing, either that the application would take longer than three days to be heard or that there were any difficulties in the availability of counsel for the applicants.

In circumstances which will be fully described later, I ultimately acceded to an application made on behalf of the applicants that the hearing of the application be adjourned part heard on 6 November 1996. It was during the course of the submissions made in relation to the question of the adjournment that the respondent first indicated that it was seeking the costs order now sought. The immediate cause of the adjournment was that the applicants' counsel had left the Court to catch an aeroplane to return to Melbourne to appear as counsel in another matter before the Court on 7 November 1996. I made the order for the adjournment because I thought that if the application continued, in the absence of counsel, it could be productive of an unacceptable injustice to the applicants.

I indicated that it would be appropriate for the respondent to file an affidavit setting out the costs sought. I also indicated that it would be of benefit to have an affidavit from counsel, or his instructing solicitors, detailing the events which led to the adjournment application.

THE AFFIDAVIT EVIDENCE

The respondent filed an affidavit sworn by Mr Goetz, a senior legal officer of the Pitjantjatjara Council and the solicitor of the respondent, dated 20 November 1996. In this affidavit, Mr Goetz estimated that the respondent's costs thrown away by reason of the adjournment totalled $8,455.40. The affidavit contained an itemisation of costs including return airfare for counsel, additional accommodation costs for counsel, additional counsel's fee including travel, additional costs of instructing solicitor, additional return airfares for a witness and the person who was instructing the respondent, and additional accommodation and meals for these people.

An affidavit sworn by Ms Kathryn Perry, a solicitor employed by the solicitors acting for the applicants, was filed on 28 November 1996, in opposition to the application for costs. Despite its length, I think it important to set out the facts deposed to in the affidavit, in their entirety. Ms Perry was present in court, instructing Mr Wood on behalf of the applicants, for the entirety of the hearing. Paragraphs 1 to 30 of the affidavit of Ms Perry depose as follows:-

"1. I am a solicitor in the employ of Messrs McBride & Stirk, solicitors for the Applicants, and have the care and conduct of this matter.

2. Pursuant to the Court order of 6 November, 1996, this affidavit is made in opposition to the Respondent's application for costs thrown away by reason of the adjournment.

3. On 6 September 1996 District Registrar Richardson of the Industrial Relations Court in Perth relisted these proceedings for hearing from 4 November to 6 November, 1996, inclusive.

4. On 7 September 1996 I notified both the Applicants and their Counsel, Mr Stuart Wood, by telephone of the confirmed hearing dates.

5. On 13 September 1996, I wrote to Counsel and confirmed, inter alia, the listing dates, his accommodation and travel itinerary.

6. Counsel was booked on Qantas to arrive in Alice Springs on Sunday 3 November, 1996, and depart Friday 8 November, 1996.

7. Counsel and I had planned to visit Uluru on 7 November 1996, and drive back to Alice Springs early on 8 November 1996.

8. On 16 October 1996 Annette from the Industrial Relations Court in Perth contacted my office to confirm that the Applicants' case was ready and to confirm the hearing dates of 4 November 1996 to 6 November 1996, on behalf of Judicial Registrar Ritter.

9. On 23 October 1996 I spoke to Mr Sherwood of the Industrial Relations Court in Perth and confirmed the booking of video conferencing facilities for the evidence of Dr Skinner to be called by the Applicants between 11.00 pm (sic) *and 1.00 pm on the final day of the hearing, on 6 November, 1996.*

10. On 23 October 1996 I sent a facsimile letter to the Registrar of the Industrial Relations Court in Perth, attention to Mr Clive Sherwood confirming our telephone conversation of that date. A copy of the letter was also faxed to Mr Goetz, at the Pitjantjatjara Council Inc.

11. On 25 October 1996 I had a telephone conversation with Mr Wood. Mr Wood discussed the listing and asked me to confirm that these proceedings were listed for 3 days from 4 November 1996 to (sic) *November 1996, and that it would not go over into Thursday 7 November 1996. Mr Wood informed the reason he wanted me to confirm this was that he had been offered a brief in the Industrial Relations Court of Australia in Melbourne for 7 and 8 November 1996.*

12. On 25 October 1996 I spoke to a person at the Industrial Relations Court Registry in Perth, I believe it may have been Annette, but could have been Melinda. I asked whether there was any chance of the Cameron Industrial Relations hearing going over into Thursday 7 November 1996. I was advised that Judicial Registrar Ritter had a matter listed for 7 and 8 November 1996 and that Judicial Registrar Ritter was the only member of the Court in Alice Springs for the week of 4 November to 8 November 1996 and that our proceeding could not go into 7 November 1996.

13. On 25 October 1996 I telephoned Mr Wood and advised him that Judicial Registrar Ritter was sitting in another matter on Thursday 7 November and 8 November 1996 and thus our clients matter could not proceed on Thursday 7 November 1996. I advised Mr Wood that the latest plane on Wednesday was at 4.45 pm and Mr Wood then asked me to see if we could change his airline booking to enable him to take the Melbourne brief.

14. I was unable to change Mr Woods flight on 25 November (sic) *because the Qantas Corporate Travel Office had closed.*

15. On 28 October 1996 I contacted Moyra at Qantas Corporate Travel Office in Darwin and changed Mr Woods (sic no apostrophe) *departure date from Friday 8 November to Wednesday 6 November 1996. I received a facsimile from Moyra confirming the new itenerary* (sic).

16. Later that day I rang Mr Wood and confirmed his flight out of Alice Springs leaving at 4.45 pm on Wednesday 6 November 1996. Mr Wood advised that he would be accepting the Melbourne brief on 28 October 1996.

17. At approximately 3.30 pm on 1 November 1996 Melinda from the Industrial Relations Court left a message for me with her mobile contact number for the weekend requesting that I provide details with respect to evidence being given by video conferencing facilities.

18. On 1 November 1996 I contacted Melinda regarding her telephone message. I advised Melinda that the video conferencing facilities were at the Sitzler building approximately 10 minutes away from the Court and had been arranged for Wednesday 6 November, 1996, between 11.00 pm (sic) *and 1.00 pm. I further advised that the booking had been made for the final day so it fell within the Applicants* (sic) *case. Melinda confirmed that the time was okay and that Judicial Registrar Ritter was normally accommodating to cases and would not mind the booking being at lunch time.*

19. At the commencement of the hearing the Court was aware that Mr Wood had been briefed in an unrelated matter in Melbourne on 7 November, 1996, and was booked to fly out of Alice Springs at 4.45 pm.

20. Throughout the hearing efforts were made by the Court and both parties to accommodate the completion of the evidence by Wednesday 6 November 1996, and allow for Mr Wood to leave the Court premises at 4.00 pm and the jurisdiction at 4.45 pm.

21. The Applicants (sic) *case was opened in the middle of the Respondents* (sic) *evidence because the Respondent's witnesses were not present to give evidence.*

22. At approximately 3.30 pm on 6 November, 1996, the Court ordered that the hearing should continue until the completion of the Respondents (sic) *evidence and then would hear submissions in respect of the Applicants* (sic) *case and final submissions.*

23. If the Respondent was prepared and in a position to proceed with the hearing the Respondent's evidence would have been completed by 4.00 pm on Wednesday 6 November 1996 and Mr Stern would not have to return to finalise his evidence.

[no paragraph 24]

25. Oral evidence yet to be heard is Re-examination of Mr Cameron, Cross-examination and Re-examination of Mr Stern and Evidence in Chief, Cross-examination and Re-examination of Mrs Cameron, not the Cross-examination of Mr Stern and evidence of Mrs Cameron as indicated by the Respondent's solicitor, Mr Goetz, in his affidavit sworn on 15 November, 1996.

26. The evidence in paragraph 15 would not have been completed on Wednesday 6 November 1996, or Thursday 7 November 1996 even if the Court were minded to sit late into the evening of Wednesday 6 November 1996, particularly given the length of time taken for Evidence in chief and Cross-examination of Mr Cameron, and the fact that both Counsel, particularly Mr Waugh, expressed tiredness toward the end of the first and second day of hearing and indicated a lack of concentration after a full day in Court.

27. I believe that the Applicants (sic) *solicitors and Counsel relied upon the listed hearing dates and confirmation of the same by the Court staff employed at the Industrial Relations Court in Perth.*

28. I believe that Mr Waugh, Counsel for the Respondent, Mr Gary Stevens, Mr Ivan Shepherd and Mr Peter Rapkins, instructing Respondent witnesses, would be required to reattend at a further hearing date as the matter was only listed for 3 days.

29. I believe that Mr Sterns attendance would not be required if the Respondent's case was properly prepared.

30. I know the facts deposed to herein of my own knowledge, information and belief except where otherwise stated, in which case I verily believe the same to be true."

Due to the contents of the affidavit of Ms Perry, I caused District Registrar Richardson to make inquiries of two members of staff of the Industrial Relations Court Registry in Perth of matters referred to in the affidavit of Ms Perry. This led to a statement being signed by each of Ms Annette Prike and Ms Melinda Cahill respectively. Both statements were dated 5 December 1996.

The statement of Ms Prike relevantly said:

"*In reference to the affidavit of Kathryn Anne Perry sworn on 28 November 1996, paragraph 12, at no time at all did I ever discuss the matter of the hearing of Cameron v Warakurna, what day it was listed or not listed or whether it would go over into Thursday 7 November 1996, or any other matters relating to this case, with Kathryn Anne Perry or anybody else.*"

The statement of Ms Cahill relevantly said that:

"In reference to the affidavit of Kathryn Anne Perry sworn on 28 November 1996, paragraph 12:-

1. When asked by Ms Perry in general conversation how long we were going to be in Alice Springs I replied five days as we were hearing another matter.

2. At no time was I asked whether there was a chance of the Cameron matter going over into Thursday, 7 November 1996 and at no time did I say that it would or would not.

3. I do not recall discussing any other matters."

The substantive hearing of the applications was completed on 10 December 1996. During the course of the hearing on that day it was agreed that written submissions would be made in respect of the costs application. I also brought to the attention of the parties the contents of the statements of Ms Prike and Ms Cahill. In light of the contents of the statements, I indicated that further affidavits could be provided

on behalf of the applicants' solicitors and/or counsel. A further affidavit of Ms Perry was sworn on 31 January 1997 and filed at the court. Relevantly, paragraphs 3 - 5 of this affidavit were as follows:

"3. Further to paragraphs 8 and 12 of my Affidavit sworn on 28 November 1996 and in response to Annette Prike's statement of 5 December 1996 I say that on 16 October 1996, when I was contacted by Annette, I wrote a brief file note whilst talking to her. At the conclusion of the telephone conversation I requested her telephone number for future reference, to which Annette replied "(09) 268 7400". I had not spoken to Annette or did not know Annette or her telephone number at the Industrial Relations Court in Perth prior to that date. Accordingly, I believe Annette is mistaken in stating that she never spoke to me on that date.

4. Further to paragraph 12 of my Affidavit sworn on 28 November 1996 and in response to the statement made by Melinda Cahill of the Industrial Relations Court in Perth on 5 December 1996 I say that after the Court adjourned part heard on the 6th of November 1996 I had a conversation regarding my comments to the Court pertaining to my contact with the Industrial Relations Court with Melinda in the presence of John Stirk. When discussing with Melinda whether she recalled my telephone call she replied in words to the effect that "you probably did contact me I make and receive so many telephone calls I cannot remember".

5. As to paragraph 26 of my Affidavit sworn on 28 November 1996 I recall that on 6 November 1996, before the matter was adjourned, the view was expressed that the matter would take a further sitting day. This is my recollection, but the transcript will bear out that actual conversation in this regard."

In addition, an affidavit of Mr Geoffrey John Stirk, a partner in the firm of McBride & Stirk, the solicitors for the applicant, sworn 31 January 1997, was filed at the court. Relevantly, paragraphs 2 - 5 of the affidavit are as follows:-

"2. Kathryn Anne Perry, solicitor in the employ of my firm has the care and conduct of this file under my supervision.

3. Throughout the preparation for the hearing of the abovenamed proceedings Ms Perry has been under my supervision and I have spoken to her in relation to the matter on a regular basis.

4. I recall Ms Perry speaking to me and asking if it was in order for Mr Wood to accept another brief on the 7th of November. I said to her the following:

"That would be OK provided the case is not continued past Wednesday".

Ms Perry said to me:

"The Camerons case is only listed between 4-6 November, but I've spoken to the Registry in Perth and have been told that Judicial Registrar Ritter has another matter listed on Thursday the 7th and Friday

the 8th of November".

And I said:

"That would be OK".

5. On 6 November 1996 after the proceedings had been adjourned part-heard Ms Perry and I had a conversation with Melinda regarding the adjournment and discussion by our office with the Industrial Relations Court in Perth. I recall Melinda saying to Ms Perry:

"I probably did speak to you but I make and receive so many calls I cannot remember"."

The applicants' solicitors and counsel filed a joint outline of submissions in relation to the costs application on 31 January 1997. The respondent's submissions in support of the costs application were filed on 18 February 1997. Joint submissions in reply on behalf of the applicants' solicitors and counsel, were filed on 26 February 1997. Finally, the applicants' solicitors and counsel filed a set of joint submissions dated 13 March 1997 dealing with the judgment of Patch JR in *Lindsay v Associated Furnishers Limited*, unreported, IRCA 29/97, 17 January 1997. This followed an invitation by the Court to provide further submissions in relation to this decision. The respondent did not make any further submissions.

I will deal with the submissions of the parties, insofar as relevant, at a later stage. It is first necessary to record the events that led up to the adjournment application on 6 November 1996.

THE EVENTS LEADING TO THE ADJOURNMENT APPLICATION

As stated earlier, the hearing of the application commenced at Alice Springs on 4 November 1996. At the commencement of the hearing I asked counsel how long the application would take to be heard. The reason for this was that there was another application listed for directions before the Court that morning which was meant to be given a hearing date for later in the week. It had been tentatively listed for 7 and 8 November 1996. Mr Wood indicated that he and Mr Waugh had been having some discussions about that issue. I was advised that the respondent intended to call nine or ten witnesses and the applicants two or three. Mr Wood then said "*If those nine to ten witnesses in the respondent's case are indeed relevant, then I would agree with my learned friend's estimation that three days will not be enough*". This was the first indication that the estimate of three days was not going to be adequate for the hearing of the applications. Mr Wood then continued, "*My problem would be - and I* [sic] *mentioned that you are in similar situation, Judicial Registrar - that I am booked in another court on Thursday in another state*". I indicated that I would be present in Alice Springs on the Thursday, but "*I think dealing with another matter by then, hopefully*". I then had discussions with Mr Waugh about the number of witnesses he would be calling.

I then had further discussions with Mr Wood. He confirmed that he was due to appear as counsel in

another state on Thursday 7 November 1996. I asked what his cut-off point on Wednesday would be. He replied that it was about 4 pm, he having been booked on a plane to leave Alice Springs at 4.45 pm. Mr Wood then indicated that he did not consider that all of the respondent's witnesses could give relevant evidence. He submitted that, at the most, only four witnesses who were proposed to be called on behalf of the respondent, could give relevant evidence.

I then indicated "*we ought to do what we can to try and finish by Wednesday afternoon . . . that being the estimate that was given. Now, if that is* (sic) *unavoidable that we cannot do that, then I suppose we have to deal with that as best we can at the time. . . . I think what we ought to do is if all of the witnesses Mr Waugh wants to call are material and do give relevant evidence, is to try and sit late today and tomorrow to try and accommodate at least completing the evidence. Submissions can always be done in writing. It is not ideal, but it is better I think to try and complete the evidence insofar as we can.*" I then indicated that I thought it appropriate to gauge how things are going "*throughout the day and see how late we might need to sit today and tomorrow to try and complete the evidence and hopefully have you on your 4.45 plane*".

The applications were then adjourned for about 15 to 20 minutes whilst the directions hearing was held in relation to the other matter.

When these applications were reconvened, there was some discussion with counsel as to the nature of the respondent's case. Mr Waugh then opened the case for the respondent. Mr Waugh then called his first witness, Mr Hales. Mr Hales' evidence was not completed prior to the luncheon adjournment. The luncheon adjournment was taken from approximately 1 pm until 1.55 pm. The evidence of Mr Hales, Ms Schultz and Mr Stevens was then completed. The evidence-in-chief of Mr Rapkins commenced. At about 5.10 pm, I asked Mr Waugh how he thought things were progressing in terms of finishing the evidence within "*our timetable*". Mr Waugh said that he was surprised at how quickly the case was proceeding and that his case ought to conclude sometime the following day. I then asked Mr Wood how long his case was going to take to present. Mr Wood replied "*I would not have thought very long at all*". Mr Wood agreed with my suggestion that "*we are going all right at this time in terms of getting you on your plane*". On the basis of the assurances received from counsel, I then adjourned the applications to the following day. The Court adjourned at about 5.16 pm.

It was intended to commence the hearing on the following day at 9.15 am. However, this proved impossible due to an extended directions hearing of the other application listed before the Court that week, which commenced at 9.00 am. As a result, the applications could not recommence until about 10.15 am. Mr Rapkins then completed his evidence. Mr Ivan Shepherd commenced his evidence prior to the luncheon adjournment and then completed it after that. That completed the witnesses who were then available to be called by the respondent. Mr Waugh sought the indulgence of the Court to call a further two witnesses the following day. They were scheduled to be arriving in Alice Springs from the Warakurna Community on the afternoon of 5 November 1996. Mr Wood indicated that he was happy to proceed with his case and then have the other witnesses of the respondent called when they were available.

Mr Wood then called Mr Cameron. Mr Cameron commenced his evidence-in-chief at 2.45 pm. The evidence-in-chief of Mr Cameron proceeded very slowly. To a large extent, this was due to Mr Cameron's very slow, protracted and indirect style in answering questions. The evidence proceeded to about 4.45 pm. At that stage, Mr Cameron had not as yet given evidence about the termination of his employment or the two meetings of the respondent which effected the termination. Mr Wood then asked what time I intended sitting until. I replied that it depended on how far the evidence needed to go "*to make sure that we finish the evidence at least in time for you to leave tomorrow afternoon*". I said that "*I'm really in your hands and Mr Waugh's hands to sit sufficiently long to try and ensure that we finish the evidence by the time we need to tomorrow*". There was then some further discussion with counsel about the time required to dispose of the witnesses. During the course of this, there was discussion about a medical practitioner who may have had to give evidence by video link the following day. Mr Wood advised that whether this person was required to give evidence depended upon whether certain evidence to be given by Mr Cameron was objected to. This related to Mr Cameron's "*post-employment conduct*". Mr Wood indicated that he thought this evidence would only take 15 minutes. After some further discussions about times, Mr Cameron continued with his evidence. This evidence of Mr Cameron took about 50 minutes. After that time, Mr Wood indicated that he would not need to call the medical practitioner to give evidence. The applications adjourned for the day at about 5.40 pm.

The hearings re-commenced the following the morning at about 9.10 am. At the commencement of the hearing I asked Mr Wood "*when do you think your meter runs out in terms of having to leave to catch your plane*". Mr Wood replied "*I assume at 4 o'clock, just before*". The evidence-in-chief of Mr Cameron then continued. During the course of this evidence, Mr Cameron gave evidence relevant to the question of whether reinstatement of employment would have been practicable. This evidence took me by surprise because I had been previously under the impression that reinstatement was not being sought. There was no questioning of the respondent's witnesses about matters relevant to the issue of reinstatement. This was mentioned to Mr Wood. Mr Wood indicated that after the completion of other questioning of Mr Cameron, the proceedings could be adjourned to see whether his instructions were to seek reinstatement. Subject to that issue, Mr Cameron's evidence then continued and was completed. After a short adjournment, Mr Wood indicated that both Mr and Mrs Cameron were prepared to concede that reinstatement was impracticable. I was also advised that some discussions had taken place about the settlement of Mr Cameron's application. Mr Wood advised that there some documents that he needed to see before discussions could continue. However, these documents had to be brought down to the court. In the circumstances, I indicated that cross-examination of Mr Cameron should proceed and if the parties wished to adjourn to pursue settlement discussions, then I could be advised as to that. The cross-examination of Mr Cameron then proceeded. A reasonably short way into the cross-examination, the documents that Mr Wood was seeking arrived at the court and there was a short adjournment. This occurred at 11.14 am.

After the adjournment I was advised that the parties had been unable to settle Mr Cameron's claim. Mr Waugh's cross-examination of Mr Cameron then continued. A little after 1.00 pm the cross-examination had not finalised. Mr Wood then indicated that "*I fear that despite the best efforts of Court* [sic] *we will not finish the evidence today*". I corrected Mr Wood and said that "*it seems unlikely that we will finish at 4 o'clock*". It was agreed that the issue that Mr Waugh was then about to cross examine Mr Cameron on,

would be completed before returning to that subject. This occurred.

There was then some discussion about whether the evidence could be completed by 4 pm. I asked Mr Wood for his submissions as to what should happen. Mr Wood indicated that he was "*in the Court's hands as to that matter*". He indicated that he had made some inquiries about the hearing in Melbourne and that it was still going ahead. Mr Wood then indicated that a possibility was that the Camerons' hearing be adjourned to another time. Mr Waugh objected to this. He submitted that there was an assumption by Mr Wood that "*we should to some extent be subject to his convenience about these matters*". Mr Waugh referred to the inconvenience of the parties having to return to continue the trial. Mr Wood then objected to any "*implications*" being made by Mr Waugh. He indicated that before he accepted the brief in Melbourne on the Thursday, his instructing solicitors had confirmed that the matter was set down for three days. I then said that "*we commenced . . . on Monday with an assessment as to whether or not that was correct. It seemed to be that there were some concerns about it. I said, well, we need to do what we can to get finished within three days. That seemed to be on track until Mr Cameron entered the witness box and since then time has blown out. It seems to me if we do not finish at 4 o'clock, the options are that we adjourn then so that you can return to Melbourne for your brief tomorrow, we carry on, finish the evidence at the earliest time we can today or adjourning at four* [sic] *and reconvening at such other time as may be convenient and appropriate*". I then indicated some resistance to the third proposition that had been put. I indicated that "*I would favour trying to complete the evidence today and sitting on until we do that.*" I put it to Mr Wood that this may place him in a difficult position and indicated that he ought to find out what flights there were that night or early the next day to return him to Melbourne. The Court then adjourned for a luncheon adjournment of about 45 minutes.

After the luncheon adjournment Mr Wood indicated that he had made inquiries with airlines and there were no aeroplanes leaving which could have him returned to Melbourne either late that night or before midday the following day. The options were then further discussed with Mr Wood. Mr Wood made submissions about the prejudice that would be suffered by his clients if the hearing were to continue in his absence that evening. He advised that his instructing solicitor, Ms Perry, could not realistically take over the conduct of the case. This is because she had only just recently completed her articles of clerkship and had not been counsel in any previous hearing.

Mr Waugh strongly urged the Court to finish the evidence. I indicated that I would give the matter some thought and that the issue would be addressed again at about 3.30 pm that day. Mr Waugh then continued with and completed his cross-examination of Mr Cameron. This took a matter of minutes. It was agreed that Mr Cameron's re-examination be postponed so that efforts could be made to at least complete the respondent's witnesses from the Warakurna Community.

Mr Bernard Newberry was then called to give evidence. His evidence commenced at about 2.27 pm. Mr Newberry's evidence was completed at about 3.30 pm. I then indicated that we should progress discussions as to where matters went from then. I indicated my intention that if we could not finish by 4.00 pm, the next best thing was to sit until the evidence was completed. Mr Wood then indicated that he would have to ask the Court to give him leave to withdraw. I said "*that is largely a matter - it is probably a matter for you and your instructors. I'm not going to say that you have to remain, but I was*

moving towards the view of saying that we should not adjourn at 4 o'clock". Mr Wood then made further submissions which were responded to by Mr Waugh. It was during the course of these discussions that the question of an application for costs was first raised.

I then indicated how I thought matters should proceed. I expressed frustration at the fact that no one had checked with me as to what may happen if the evidence had not been completed by 4.00 pm on the third day. I indicated that my view was that if one was sitting in remote areas, cases ought to be completed within the allotted time or one sat on either that day or the next to ensure that the evidence was completed. I indicated that in all the circumstances we ought to complete the evidence from the other witnesses which the respondent wished to call, given that they had travelled from the Warakurna Community, 800 kilometres away, to be present. After that, I said I would consider again the question of an application, if any were made, to then adjourn the case part heard. I appreciated that this would take place after the time when Mr Wood was going to have to decide what he was going to do. The Court then adjourned so that Mr Wood could decide what he was going to do and so Mr Waugh could arrange to call his next witness.

Upon resumption, Mr Stirk announced his appearance for the applicants. He expressed at that stage that he was not sure where Mr Wood was. Mr Stirk indicated that his instructions to Mr Wood were that he should remain in Alice Springs and continue with the trial. I reiterated to Mr Stirk my view that we ought to try and complete the evidence of the witnesses who had travelled from the Community to give evidence. Ms Jorna Newberry was then affirmed to give evidence. Her evidence-in-chief was very brief. After that, Mr Stirk requested a short adjournment so that Ms Perry could appraise him of issues relevant to cross-examination of Ms Newberry. During the adjournment, it was ascertained that Mr Wood had indeed caught the plane back to Melbourne. Ms Newberry was then cross-examined by Mr Stirk. The cross-examination competently covered the issues relevant to both applicants that Ms Newberry could give evidence about.

After Ms Newberry's evidence, Mr Stern was called to give evidence. As can be ascertained from the judgment in the substantive applications in this matter, Mr Stern's evidence was of some importance. After Mr Stern's evidence-in-chief, Mr Stirk renewed the application for adjournment. Mr Stirk expressed his concern that he was not "*across all the material related to Mr Stern*". This was not surprising. Mr Stirk's application was to adjourn the hearings sine die. There was then some discussion with both Mr Stirk and Mr Waugh about the application. Ultimately, I granted the adjournment application. I indicated to the parties that I did not think I had a realistic choice because if the hearings were not adjourned it would be "*too unfair to Mr and Mrs Cameron*". After some further discussions with counsel about logistical matters, the hearing was formally adjourned. The question of the costs application was addressed as indicated earlier. The hearing adjourned that evening at about 6.30 pm.

As indicated earlier, the hearing of the evidence was completed on 10 December 1996 at Alice Springs. The evidence given that day was the cross-examination of Mr Stern, the re-examination of Mr Cameron and the evidence of Mrs Cameron. All of this evidence was completed between 9.05 and 11.30 am. If this evidence was given on 6 November 1996, it is clear that the evidence could have been completed that day, in an extended sitting by the Court. In other words, but for Mr Wood's non-attendance for the

latter part of 6 November 1996, the evidence could have been completed on that day. This is particularly so given the amount of time devoted to discussions with counsel about what should occur if the evidence did not finish by 4 pm, and on the adjournment application after Mr Wood's departure.

Closing oral submissions were made on 10 December 1996. After that, there was some discussion of the costs application including programming orders being made for the filing of affidavits and submissions.

The substantive applications were determined by a judgment that I delivered on 8 April 1997.

THE POWER OF THE COURT

The Court has a general power to make costs orders; *Canceri v Taylor* (1994) 1 IRCR 120. There is a limitation on such powers with respect to inter-parties orders; see section 347 and 170EHA of the *Workplace Relations Act 1996* . The limitation does not extend to third parties. The Court's power to make costs orders extends to the making of orders against third parties; *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 1 IRCR 199, page 202.

In certain circumstances, Courts may make costs orders against solicitors and counsel; see *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 per Dawson J page 199; *Da Sousa v Minister for State for Immigration, Local Government and Ethnic Affairs* (1993) 114 ALR 708; and *re Bendeich* (1994) 126 ALR 643.

The real question in this case is whether there has been any conduct by counsel and/or the solicitors for the applicants which ought to attract the jurisdiction and power of the Court to make costs orders against them. Dawson J in *Knight* at page 119 said that the jurisdiction to order a solicitor to pay costs whether of their own client or the opposite party is a summary jurisdiction to punish for misconduct, and would appear to rest upon the duty of the Court to supervise the conduct of its solicitors. French J in *Da Sousa* indicated that the proper test to apply in considering an application for costs against a solicitor or counsel is whether they have committed a serious dereliction of duty; page 712. In *re Bendeich,* Drummond J indicated that professional misconduct or gross as opposed to mere negligence was required before a costs order would be made (page 648). His Honour also emphasised that an order for costs against a practitioner personally should not be made lightly (page 647-8).

In *Myers v Elman* [1940] AC 282, Viscount Maugham at page 289 said of the jurisdiction to order costs against a solicitor:

"*Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order. The primary object of the Court is, not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured . . . it is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or costs which have proved fruitless by reason of undue delay in proceeding under a judgment or order. The jurisdiction to order the solicitor to pay costs to the opposite party is exercised on similar grounds.*"

In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal considered an application under the *Supreme Court Act* for orders that the opposing party's solicitors pay personally costs wasted in the litigation. The applications were based upon the grounds that the solicitors' conduct had been improper, unreasonable or negligent within the meaning of that Act. During the course of their judgment, the Court of Appeal referred to *Myers v Elman*. The Court at page 227 said that *Myers v Elman* is authority for the following propositions:-

1. The Court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors.

2. Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct, the making of a wasted costs order does not.

3. The Court's jurisdiction to make a wasted costs order against a solicitor is found on the breach of the duty owed by the solicitor to the Court to perform his duty as an officer of the Court in promoting within his own sphere the cause of justice.

4. To show a breach of that duty, it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross.

5. The jurisdiction is compensatory and not merely punitive.

It is with regard to the observations made in the above cases that the present application will be determined.

THE SUBMISSIONS OF THE APPLICANTS' SOLICITORS

AND COUNSEL

The applicants' solicitors and counsel raised a number of issues in opposition to the costs application. (For ease of reference, the applicants' solicitors and counsel will together be referred to as the applicants' representatives.)

The applicants' representatives point to the fact that the issue of counsel's availability was brought to the attention of the Court immediately upon the commencement of the trial. The applicants' representatives point out that counsel for the respondent did not make submissions on the issue at the time and did not criticise the course adopted by the Court of sitting early and late if necessary to try and ensure that the evidence was completed prior to 4 pm on 6 November 1996. The question of what would happen if the evidence could not be completed by that time was not then addressed. The applicants' representatives

submit that it was implicit that the hearings would have to be adjourned to another time, if evidence was not complete. The applicants' representatives submit that "*it is nonsense*" to argue that the solicitors for the applicants could take over the running of the case if the case went beyond the listed period. Further, the applicants' representatives submit that if this was the position of the respondent, then it should have indicated this immediately at the outset of the trial. The applicants' representatives submit that if the respondent had taken this approach at the outset, the applicants' representatives would have had the chance to debate the issue and, if the applicants' representatives' submissions were not upheld, then Mr Stirk could have become the instructing solicitor in place of Ms Perry; Mr Stirk having the experience to properly conduct the case on behalf of the applicants if the hearing had to continue in the absence of Mr Wood.

The applicants' representatives point to the fact that the respondent did not make any submissions about what ought to happen if the evidence was not completed prior to 4 pm on 6 November 1996, on either 4 or 5 November 1996. The applicants' representatives submit that therefore they were entitled to assume that the normal course would apply, that if the case could not be completed within the listed three days, it would have to be adjourned to another time, with the parties bearing their own costs.

In my opinion, these submissions have some force. In particular, the respondent did not make it clear what its position would be if the hearing of the evidence could not be completed by 4 pm on 6 November 1996. This may have contributed to the applicants' representatives having the view that if the evidence could not be completed by that time, the applications would be adjourned part heard without an order for costs. The applicants' representatives also submit that if the respondent's position had been made clear at an earlier stage, they could have opposed attempts by the respondent to "*broaden their case*", or been able to make submissions upon whether certain evidence ought to be admitted, given the time restraints and costs application.

I do not accept the applicants' representatives' submission that the respondent's case significantly broadened during the hearing from what had been indicated in the documents filed at the Court. The parties were not required prior to hearing to file a summary of facts or outline of their case. They were required to file a chronology of events. The chronology filed on behalf of the respondent made reference to the letters of 30 June 1994 and 15 January 1996, which were very relevant to the hearing as it was conducted. With respect to the letter dated 15 January 1996, it was submitted in the respondent's chronology that Mr Cameron had drafted an unauthorised letter and served it upon the Warakurna Community store manager without the knowledge and/or authorisation of the Community Chairman. The chronology alleged that Mr Cameron's employment had been terminated as he had failed to address problems associated with his work performance and had acted without authority. When one compares the chronology of events to the way in which the respondent conducted its case at the hearing, in my opinion there is not a sufficient divergence to make this a particularly relevant consideration to the present application.

In addition to the chronologies, the parties apparently exchanged contentions. These were not filed at the Court. Mr Wood informed me, without objection, that contentions were exchanged on 6 and 22 March 1996. Mr Wood told me that the respondent's contention was that the basis for the termination of Mr

Cameron's employment was that he had dismissed Mr Hales. At hearing, this factual basis was expanded to the four factual bases set out on page 11 of the judgment in the substantive applications. (The applicants' representatives in their written submissions referred to an expansion to five contentions. Apparently the fifth was that Mr Cameron had been given previous warnings about not taking "*such steps*", as contained in the letters of 6 December 1993 and 30 June 1994.) It is a little difficult to assess this point in the absence of seeing the contentions. However, from what I am able to gather, I do not think the relevant evidence would have substantially changed given the so-called broadening of the respondent's case. Substantially the same factual matrix would have to have been presented to the Court.

The applicants' representatives also refer to the estimate of three days being based on six - seven witnesses to be called by the respondent and three - four to be called by the applicants' representatives. The applicants' representatives point out that the respondent's estimated number of witnesses was understated as it called eight witnesses. Whilst this is correct, it was compensated for by the fact that the applicants' representatives had overstated the number of witnesses that they wished to call.

The applicants' representatives also refer to the fact that not all of the respondent's witnesses were available to give evidence at the time when they ordinarily ought to. I have mentioned earlier that the applicants' case was opened before three witnesses had given evidence on behalf of the respondent. However, in my opinion, this did not occasion any delay to the hearing of the matter. When it was apparent that the witnesses were not available, Mr Wood immediately opened the applicants' case by the calling of Mr Cameron to give evidence. The other witnesses of the respondent who had not given evidence were readily interposed at the appropriate juncture. If the witnesses had been available to give evidence at the appropriate time, it is likely that Mr Stern would not have to have returned to give evidence on 10 December 1996, following the adjournment. However, in my opinion, this affects the possible quantum of costs rather than whether the costs order should be made.

The applicants' representatives also refer to undiscovered documents causing a delay in the hearing. In particular, reference is made to the letter dated 6 December 1993. The applicants' representatives submit "*evidence and argument about these pre-30 June 1994 proceedings occupied a substantial amount of the Court's time and is the single most important reason for the trial acceding three days*". I do not accept this submission. I do not accept either that evidence and argument about pre-30 June 1994 issues occupied a substantial amount of the Court's time nor that this was the single most important reason for the trial exceeding three ordinary days.

The applicants' representatives also referred to the adjournment on Wednesday to try and settle the application of Mr Cameron. This adjournment obviously was one of the factors which led to the evidence not being completed by 4 pm on that day.

The applicants' representatives summarise that "*if the respondent had prepared its contentions accurately, made discovery thoroughly, analysed its evidence more carefully, then it would not have agreed to an estimate of three days, or it would have run the case well within the three days.*" In my opinion, this is an overstatement of the situation.

The applicants' representatives submit that if the test for awarding costs against a practitioner is gross negligence, it cannot be correct to characterise the accepting of the brief by Mr Wood for 7 November 1996 in Melbourne in this way. The applicants' representatives point to the following:-

1. The contentions and discovery indicated that the matter would finish well within three days;

2. Normal practice in the jurisdiction is to adjourn part-heard matters;

3. The Court has listed the matter for a finite period of three days;

4. The solicitors checked with officials of the Court that the matter would not be set down for the fourth day and were told that the matter could not proceed on a fourth day because there was only one member of the Court in the jurisdiction and he was listed to hear another case on the fourth day.

I accept the first assertion. I also accept the second assertion, at least insofar as it refers to the jurisdiction in the capital cities of the states of Australia. In more remote areas, and I include Alice Springs within this description, I would have thought that solicitors and counsel would understand the substantial undesirability of part-heard cases. The factual assertion in point 3 is correct. The fourth item refers to the inquiry Ms Perry said that she made of the Court in relation to whether the matter could proceed on Thursday 7 November 1996. On the materials before the Court there is an apparent conflict between the affidavit of Ms Perry and the statements provided by Ms Cahill and Ms Prike. It is undesirable and in my opinion unnecessary to endeavour to resolve this conflict. If one considers the contents of paragraph 12 of the affidavit of Ms Perry, most of what Ms Perry said she was advised by the Court is factually correct. There was a matter tentatively listed before me on 7 and 8 November 1996. I was the only member of the Court in Alice Springs during that week. The main area of contention is whether Ms Perry was advised that the Cameron hearings could not be heard on 7 November 1996. If Ms Perry was conveyed the other information referred to in paragraph 12 of her affidavit, this may have been a conclusion that she reached herself, without having to be specifically told of it. Whether she ought to have relied on this information, without seeking to clarify the same by letter, is another matter.

In addition, it would have been preferable for Ms Perry to have disclosed the reason for her inquiry. This would probably have ensured that only very careful advice was given by Court registry officials, probably after checking with me. In saying this I do not mean to imply that Ms Perry was being deliberately coy or deceptive. However, with the benefit of hindsight, it would have been preferable for her to have been more specific in the information that she sought.

Also, Ms Perry did not obtain any information from the Court on what turned out to be the key issue. The key issue was whether the Court would sit on past 4 pm to complete the evidence if it could be otherwise completed that day. This was the crucial question in terms of whether Mr Wood was able to leave the Cameron hearings in sufficient time to enable him to act as counsel in the Melbourne hearing.

On this issue there was clearly no communication with the Court. There seems to have been simply an assumption that the Court would not sit beyond 4 pm to complete the hearing of the evidence. If so, this was clearly a misplaced assumption given the substantial desirability of not having the case part heard.

The applicants' representatives also submitted that it was not gross negligence for counsel to fail to inquire whether the Court would sit on the evening of Wednesday 6 November 1996. In making this submission, the applicants' representatives rely on the same four assertions as those listed above. Therefore, the observations that I have made above regarding these assertions are all applicable.

As the applicants' representatives accurately point out in their submissions, "*the answer to the question as to whether the Court would sit out of hours assumed some importance*". However, if Mr Wood were to leave Alice Springs to enable him to appear as counsel in Melbourne the following morning, it not only involved the Court not sitting in the evening, but the Court adjourning somewhat early. In my experience in the Court, the earliest ordinary time that the Court adjourns in the afternoon is 4.15 pm or 4.30 pm. For Mr Wood to leave court in time to catch his flight to Melbourne, he needed to leave the court at 4.00 pm. Therefore, the assumption must have been that if the case was still running, the Court would grant Mr Wood the indulgence of leaving 15 minutes early. This was an unsound assumption to make; for example, there could at 4 pm, have been only 15 minutes to half an hour of the evidence left to run.

The applicants' representatives' submission seems to be to the effect that in those circumstances, the Court would have readily adjourned the matter part-heard and reconvened again in Alice Springs at a later date. In my opinion this attitude grossly underestimates the desires of the Court to keep costs to a minimum and expeditiously resolve applications. The former is acute where applications involve participants from various parts of the country.

The applicants' representatives' submissions include that "*practitioners are entitled to assume that the Court will not sit beyond the listed period*". As stated, however, this is not what the applicants' counsel and solicitors were prepared to assume. They were prepared to assume that the Court would, whatever the circumstances, adjourn at least 15 to 30 minutes earlier than an ordinary court day. Further, in all of the circumstances of this case, it would have been at least prudent to have found out what the Court's attitude would be to sitting late on the Wednesday. The applicants' solicitors and counsel should have appreciated, in my opinion, the substantial desirability of the hearing being completed and not part-heard.

In the applicants' representatives' written submissions it is stated, "*that JR Blokland apparently sits late in Port Hedland can hardly change the presumption that practitioners are entitled to assume that a listing for three days means three days: not three days and a night, in the absence of a contrary practice direction*". The reference to late sittings in Port Hedland appears to be a misconstruction of something that I said during the course of oral submissions. I indicated that it was not unknown for Judicial Registrars of the Court to sit late and mentioned an instance that I was aware of of a Judicial Registrar sitting late in Port Hedland. I did not mention Blokland JR. Further, what the submission ignores is that

common sense and the interests of the applicants' representatives' clients dictated that every reasonable effort should have been made to ensure that the case was not part-heard.

The applicants' representatives also submit that there was no gross negligence in counsel leaving the bar table at the time that he did on 6 November 1996. During the course of this submission, mention is made of the fact that Mr Wood's solicitors, in relation to the matter proceeding in Melbourne, would not release him from his commitment to act as counsel. At the same time, as indicated earlier, the applicants' solicitors had not released Mr Wood either. It is appreciated that counsel was then in a difficult position. If he were to remain at the Cameron hearing, as instructed, he would miss the hearing in Melbourne, a commitment he was also being instructed to fulfil.

The applicants' representatives' written submissions say that "*the reason that there was a conflicting engagement was that the respondent did not make clear at the beginning of the trial that it did not support the usual practice for part-heard matters - namely an adjournment without costs until it was too late.*" I do not accept this as a criticism of the respondent. It was not until part way through Wednesday that there seemed to be a likelihood that the hearing of the evidence would take longer than 4 pm on that day. Indeed, earlier in the written submissions the applicants' representatives state that the settlement discussions of Mr Cameron's application on the Wednesday "*may have been crucial, because up until this time both counsel were of the opinion that the case (evidence) would be finished by Wednesday*". The applicants' representatives also submitted that had the respondent made their position clear at the beginning of the trial, then there may have been no conflicting engagement at all, as Mr Stirk may have been able to put himself in a position where he was able to finish the matter. As set out earlier, there is some weight to this submission.

The applicants' representatives' submissions also referred to *The Victoria Bar Counsel Consolidated Rules of Practice and Conduct*, 24 May 1993. Both parties seem to accept that these rules were applicable to the conduct of counsel even though the hearing was in Alice Springs; see Rule 1.8.

Perhaps not surprisingly, the Bar Counsel Rules do not cover the situation that Mr Wood found himself in on the afternoon of 6 November 1996.

Rule 1.7 provides that:-

"*A barrister must take all reasonable and practicable steps to ensure that professional commitments are fulfilled, or that early notice is given if they cannot be fulfilled.*"

This rule is general in nature. On the afternoon of 6 November 1996 it potentially applied to both commitments that Mr Wood then had. It would also have applied at the time when Mr Wood decided to accept the Melbourne brief. In accepting the Melbourne brief, Mr Wood should have had regard to the need to take reasonable and practical steps to ensure that his professional commitment in representing the applicants was fulfilled. In this regard, as outlined earlier, some attempts were made to ensure, through his instructing solicitors, that the two commitments would not clash. However, as mentioned

earlier, there was no checking of whether the commitment to the Cameron case would extend beyond the time when it was possible for Mr Wood to catch a flight necessary to return to Melbourne to appear as counsel in the Melbourne proceeding.

Paragraph 4.6 of the Bar Counsel Rules deal with conflicting engagements. This sub-rule has seven sub-parts. Some of these are not applicable as they refer to barristers accepting more than one brief for the same day. However, Rule 4.6(b) states that briefs are in general accepted on the understanding that the barrister may be unavoidably prevented by a conflicting professional engagement from attending to a case. Sub-rule (c) provides that a barrister must inform the instructing solicitor immediately there is an appreciable risk of inability to undertake a brief which has been accepted. Sub-rule (d) provides that the barrister must in any event return that brief in sufficient time to allow another barrister to be engaged and master the brief. Sub-rule (f) refers to the situation where it appears to a barrister holding two or more briefs that the hearing of proceedings to which they relate may clash in point of time. This rule does not directly apply to the situation of Mr Wood on the afternoon of 6 November 1996. This is because at that time it was not that the hearing of the proceedings may clash in point of time but that if Mr Wood remained in Alice Springs to appear as counsel in this case, he would be unable to get back to Melbourne in time to appear as counsel in the other. However the sub-rule does indicate in circumstances where there may be a clash in point of time that important considerations are whether a brief relates to a part-heard proceeding, running from day to day, at the time when the likelihood of the clash arose and at the time of the clash.

The conduct of Mr Wood in leaving the Cameron trial so that he could fulfil his commitment in Melbourne the following day, was not of itself in breach of the Bar Counsel Rules.

THE RESPONDENT'S SUBMISSIONS

The respondent submitted that the necessity to adjourn on 6 November 1996 and reconvene on 10 December 1996 and the costs of so doing were occasioned directly by the departure of Mr Wood on the afternoon of 6 November 1996.

The respondent referred to the cases of *Da Sousa, re Bendeich, Knight, Myers v Elman* and *Ridehalgh v Horsefield*. The respondent referred to the necessity for there to be a "*serious dereliction of duty*", as noted by French J in *Da Sousa* before a costs order could be made against a solicitor or counsel. The respondent submitted that the applicants' counsel in leaving court during a part-heard case which was still running and against the express wishes of the instructing solicitor was clearly a serious dereliction of duty on the part of a barrister. The respondent submitted that attendance at a hearing until its conclusion is a fundamental and unavoidable part of a barrister's duty to his client. I accept that ordinarily this is so.

The respondent referred to *The Victorian Bar. Professional Conduct Practice and Etiquette* by Sir Gregory Gowans QC. The respondent submitted that this was the leading work on a barrister's professional conduct in Victoria. However, this was disputed by the applicants' representatives in their

submissions in reply. Accordingly, it is difficult to assess what weight can be accorded to it. The respondent refers to page 80 of the work at which it is said that, save in exceptional circumstances, the resumed hearing of a part-heard case must take precedence over all other cases in respect of which the barrister may hold a brief. I have already mentioned that the current Bar Rules also place substantial weight upon a barrister continuing to act for clients in part-heard matters.

The respondent submits that Ms Perry's action in relying solely on a telephone indication from a clerk of the Court was inherently unwise. The respondent submits that the apparent conflict in statements between Ms Perry and Ms Prike and Ms Cahill is illustrative of the problem. As set out earlier, I see some force in this submission. The respondent also refers to the fact that Mr Wood did not seek and obtain from the Court itself any statement that it would not be sitting beyond 4 pm on 6 November 1996. The respondent also submits:

"*If anything the very tyranny of distance would militate against the assumption that the Court would be prepared to adjourn the case part-heard especially if little evidence was remaining to be adduced. It is trite that a Court in the administration of justice must pay due regard to not only public expense but the costs to litigants personally. Without compromising the ends of justice costs should be kept to a minimum. This is a primary concern of the Court - it is not necessarily the aim of every party to litigation. For this reason and others, the Court, and the Court alone, is responsible for the arrangement of its business and the disposal of cases. It decides when and where and at what time it shall sit and what cases shall be heard. The parties cannot dictate this to the Court . . . no barrister assumes, or at least no barrister should assume, that the Court would arrange its business to suit him. In the same Court different Judges adopt different sitting hours. It is a common experience of barristers on circuit to find the Court sitting extended hours to complete business.*"

As has been apparent from what I have set out earlier, I agree with these submissions. I should also indicate that the experience referred to in the final sentence of these submissions accords with my own experience as counsel and Judicial Registrar.

The respondent also refers to the applicants' representatives' submission that the usual rule is that no costs are awarded when a hearing is part-heard. The respondent agrees with that submission but submits that the present are exceptional circumstances.

The respondent "*hotly contests*" the assertions that the respondent's conduct made the hearing take longer than the three listed days. However the respondent submits that these submissions are irrelevant. The respondent submits that any unexpected prolongation of the case was largely occasioned by the unnecessary length of the applicants' (presumably Mr Cameron's) evidence-in-chief. The respondent submits that "*the short answer, however, is that it is common for cases to go longer than predicted but this does not excuse counsel from attending*".

The respondent also refers to the applicants' representatives' submission that practitioners are entitled to assume that the Court will not sit beyond the listed period. The respondent submits that this assertion

reveals a misconception that the Court and not counsel controls its own sitting times. Certainly, with respect to the time when a Court will adjourn for the day, I think that this submission is correct.

THE APPLICANTS' REPRESENTATIVES' SUBMISSIONS IN REPLY

The applicants' representatives' submissions in reply concentrated on the causes of the adjournment on 6 November 1996. The applicants' representatives submitted that there were nine causes of the adjournment. The suggested causes and my observations on each of these is as follows:-

1. Failure by respondent to give proper discovery, detail proper contentions, analyse evidence (number of witnesses) prior to trial.

I have earlier made observations on these assertions. In my opinion, they did not separately or together lead to an elongation of the hearing.

2. The respondent's consequent failure to provide its estimate of three days accurately.

Both parties estimated a hearing length of three days. However, the applicants' representatives submit that if the respondent had paid attention to interlocutory processes, then the estimate given by the applicants' representatives would have been greater than three days; perhaps four - five days. It is asserted that had they been able to properly assess the respondent's case, as they would if proper contentions and discovery had been given, then the latter time estimate would have been given. Again, for reasons set out earlier, I do not accept the submission that there was a failing, solely by the respondent, in providing an estimate of three days. The major reason why the hearing extended beyond three normal days was the length of time it took to receive Mr Cameron's evidence-in-chief. In saying this I do not blame the applicants' representatives or Mr Cameron for this elongation of time; but it is in such circumstances difficult to hold the respondent responsible for the adjournment.

3. Failure by the respondent to stick to its contentions filed some months before trial and the expansion of one to five contentions.

I have also mentioned this matter earlier. The contentions were not filed at the Court although they were exchanged between the parties. I have not seen the contentions so it is a little difficult to comment on the alleged failure by the respondent to stick to its contentions. The applicants' representatives allege that the initial contention made by the respondent was that Mr Cameron had dismissed Mr Hales. The expanded contentions include all of those particulars of conduct of Mr Cameron, set out in the substantive judgment, upon which the respondent relied in claiming that the termination was valid. Accepting this for the purposes of argument, I do not think much additional evidence was led because of the expanded contentions. Even if the contention was solely that Mr Hales was dismissed by Mr Cameron, all of the evidence as to the nature of Mr Cameron's employment, the conditions of employment, the relationship between Mr Hales and Mr Cameron and the two meetings in February 1996, would all have to be have been led. There may have been a restriction upon the evidence relating to the letter dated 6 December

1993. However, this evidence did not, in my view, take up much of the Court's time. Overall, I am of the view that the alleged expanded contentions did not mean that much additional evidence had to be adduced, thereby increasing the length of the hearing.

4. The failure of the respondent to abandon contention one when the evidence proved this contention unsustainable.

It is correct that the evidence of Mr Hales was that he resigned his position and was not dismissed by Mr Cameron. Despite this, the respondent did not concede that Mr Hales had not, as a matter of law, been terminated from his employment by Mr Cameron's actions. The failure of the respondent to abandon this contention did not lead to any evidence having to be adduced which would not have to have been anyway. Therefore I do not think this was a contributing factor to the adjournment being required.

5. The failure by the respondent to be able to complete its case on day two of the trial.

I assume this point relates to the unavailability of respondent witnesses on day two. I have made observations on this earlier. In my opinion, this did not lead to any extra time being involved for the completion of the evidence.

6. The failure by counsel for the applicants to assume that the Court would (rather than adjourning the case without an order for costs - which is the normal practice) sit beyond normal Court hours, if the evidence was not completed within the listed three days.

The applicants' representatives accept that this was one of the causes of the adjournment. However, it is asserted that the assumption made was reasonable.

7. The failure by the respondent to notify the applicants, at all on day one, at all on day two and not until the middle of the last day, that it would oppose an adjournment of the case if the evidence was incomplete.

The fact that the respondent did not at an earlier stage indicate that it opposed an adjournment if the evidence was incomplete at 4 pm on 6 November 1996, was not of itself a factor which caused the adjournment. However, as I have indicated earlier, if this had emerged on day one, the applicants' representatives may have been able to arrange for Mr Stirk to act as instructing solicitor, thereby ensuring that he could have completed the case in the absence of Mr Wood.

8. Failure by the respondent to notify the applicants, at all on day one, at all on day two and not until the middle of the last day, that it would seek an order for costs against the applicants or their representatives if the evidence was incomplete and adjournment of the case (part-heard) was granted.

In my opinion, the same observations apply here as with the last point.

9. Failure by counsel for the applicants to be present for hearing after normal Court hours on Wednesday 6 November 1996.

The applicants' representatives accept that this was a partial cause of the adjournment but submit that the actions of counsel were reasonable.

I have made observations about this point earlier. It is clear that, in the end, the only reason that the adjournment was granted was because of the absence of counsel and the inability of the applicants to be properly represented in his absence. The real question, with respect to counsel, is whether his conduct was such as to invoke the jurisdiction of the Court to award costs against him.

I earlier mentioned that the applicants' representatives also provided submissions upon the decision of *Lindsay v Associated Furnishers Limited*. Having reviewed this decision, I am satisfied that the facts are sufficiently different from the present to make the decision of no particular relevance to this application.

CONCLUSIONS - THE APPLICANTS' SOLICITORS

I have set out earlier the bases upon which costs can be ordered against solicitors. The relevant conduct to examine here appears to be the communications by Ms Perry with the Court, the solicitors agreeing to Mr Wood accepting the Melbourne brief and the failure to ensure that the solicitor instructing Mr Wood was sufficiently experienced to take over the proceedings as counsel if necessary.

I have earlier set out certain criticisms of Ms Perry's contact with the Court. In particular, in my view she ought to have been more direct and specific in her requests for information and confirmed by letter the information that she received. She should have found out the Court's intentions if the hearing extended longer than 4 pm on 6 November 1996. However, I do not think this conduct is such that it warrants a costs order being made against the applicants' solicitors. I also do not think that the applicants' solicitors should be subject to a costs order in indicating to Mr Wood that he could accept the Melbourne brief. Again, before doing so, it would have been prudent to have checked whether the Court could possibly sit after 4 pm on 6 November 1996, to complete the evidence. Again, however, I do not regard the failure of Ms Perry to do this as being conduct sufficient to warrant a costs order being made. Finally, it could be said that if Mr Stirk had been the instructing solicitor throughout the proceedings then he could have concluded the taking of the evidence in the absence of Mr Wood on 6 November 1996. However, I am not satisfied that the solicitors failing to take this action was conduct which would warrant a costs order being made against them. The attitude that I conveyed to the parties at the commencement of the hearing was that the Court would sit long hours on Monday and Tuesday to ensure that the evidence would be completed by 4 pm on the Wednesday. This did not eventuate. However, the failure of the solicitors to allow for this contingency by making sure that Mr Stirk could act as counsel in Mr Wood's absence, does not involve either gross negligence or a serious dereliction of duty.

CONCLUSIONS - COUNSEL

Counsel quite properly discussed with his instructing solicitors the issue of accepting the Melbourne brief before he did so. He also caused the solicitors to make the inquiries that they did of the Court. However, as set out above, these details were lacking in relevant information. Further, I do not think it was sound of counsel to have assumed that the Court would simply adjourn at 4 or 4.15 pm on 6 November 1996, in the circumstances of this case, if the evidence could otherwise be completed that day by an extended sitting of the Court. The remote location of the hearing and the widespread residence of the participants made this assumption unsound.

At the commencement of the hearing, counsel properly informed the Court of his situation. At that stage, I indicated my attitude that all steps ought to be taken to try and ensure that the evidence was completed by 4 pm on the Wednesday. The question of what would happen if this did not occur was not addressed. I accept that it would have been better if it had. Counsel for the respondent did not indicate that he would oppose an adjournment or if an adjournment was granted, seek costs against counsel or the applicants' solicitors, if the evidence could not be completed by 4 pm on Wednesday. The combination of these factors, it seems, and perhaps not without justification, emboldened counsel to think that firstly, the Camerons' hearing would be over in sufficient time for him to return to Melbourne on the afternoon of 6 November 1996; and secondly, if this did not occur, then an adjournment would be granted. The fact that the hearing of the evidence was not completed by 4 pm on the Wednesday was not in any way the fault of counsel for the applicants. As late as, at least, Tuesday afternoon it still appeared that the evidence would be completed by that time. When the evidence did not complete by the relevant time, counsel was faced with a difficult situation. Both sets of instructing solicitors would not release him from his commitment.

In all the circumstances, I am not satisfied that the conduct of counsel in leaving the Court on the afternoon of 6 November 1996 was conduct of a sufficient character to warrant an order of costs being made against him. I think that counsel could have been more careful to ensure that there was no potential difficulties of the type that eventuated. This could have included making more precise inquiries of the Court prior to accepting the Melbourne brief, having a contingency plan with the solicitors in Melbourne in case the Alice Springs trial did not complete in time for counsel to return, or ensuring that the instructing solicitor in Alice Springs was able to take over the Alice Springs hearing if necessary. Not accepting the Melbourne brief would have been an even safer course, and perhaps prudent given the distances involved and the tight deadlines involved, if counsel were to fulfil his responsibilities to both clients. However, the test in awarding costs is not that counsel could have been more careful to avoid a situation leading to costs being thrown away. The test is much higher, as set out earlier. In these circumstances I am not satisfied that an order for costs should be made against counsel.

CONCLUSION

For the above reasons, the respondent's application for costs against the applicants' solicitors and counsel for the applicants is dismissed.

I certify that this and the preceding forty-three (43) pages

are a true copy of the reasons for decision of

Judicial Registrar Ritter.

Associate:

Date: 27 May 1997

APPEARANCES

Counsel for both Applicants Mr S. Wood / Mr J Stirk

Solicitor for both Applicants McBride & Stirk

Counsel for the Respondent Mr M. Waugh

Solicitors for the Respondent Legal Department of

Pitjantjatjara Council Inc.

Dates of hearing: 4, 5 and 6 November 1996 and

10 December 1996

Date of judgment: 27 May 1997