JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL
CITATION	:	PRIEST -v- CENTRAL NORSEMAN GOLD CORPORATION PTY LTD [No 2] [2023] WASC 385
CORAM	:	HOWARD J
HEARD	:	2 OCTOBER 2023
DELIVERED	:	5 OCTOBER 2023
FILE NO/S	:	SJA 1030 of 2020
BETWEEN	:	KRISTIN PRIEST Appellant AND CENTRAL NORSEMAN GOLD CORPORATION PTY LTD Respondent

ON APPEAL FROM:

For File No	:	SJA 1030 of 2020
Jurisdiction	:	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	:	MAGISTRATE HILLS-WRIGHT
File Number	:	KA 3098 OF 2018

Catchwords:

Practice and procedure - Costs - Special costs order - Extension of time required - Whether the number of hours allowable should be lifted - Whether extension

of time should be granted - Whether the Appeal was unusually difficult, complex and/or important - Application dismissed

Legislation:

Legal Profession Act 2008 (WA)
Legal Profession Uniform Law Application Act 2022 (WA)
Mines Safety and Inspection Act 1994 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr T Bishop
Respondent	:	Mr D J Garnsworthy

Solicitors:

Appellant	:	State Solicitor's Office
Respondent	:	Holman Fenwick Willan

Case(s) referred to in decision(s):

Bartlett v Roffey [2023] WASC 3 (S)
C H Leaman Investments Pty Ltd v Tuesday Enterprises Pty Ltd as trustee for The Steele investment Trust [2022] WASC 447 (S)
City of Bayswater v Viva Energy Australia Pty Ltd [No 2] [2022] WASC 384 (S)
Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd [No 2] [2023] WASCA 108(S)
Hartlink v Jones [2007] WASC 254 (S)
Wilson v McDonld [2009] WASCA 39 (S)

HOWARD J:

The Appeal

1 In this Single Judge Appeal, on 24 March 2022 Curthoys J made the following Orders:

> (1) Leave to appeal is granted on ground 1.
>
> (2) Leave to appeal is refused on grounds 2 and 3.
>
> (3) The appeal is dismissed.
>
> (4) The appellant pay the respondent's costs of the appeal to be taxed if not agreed.

2 His Honour delivered reasons on the same day which are [2022] WASC 99.

3 Significantly for present purposes, his Honour said:

> [2] The appellant appeals against the acquittal on three grounds. These grounds essentially allege that the magistrate erred in fact and law in his construction of s 15C of the *Mines Safety and Inspection Act 1994* (WA).
>
> [3] The parties agree that this appeal turns on the issue of statutory construction alone. (footnotes omitted)

4 By an Application dated 11 August 2023, the respondent has applied for special costs orders (**Special Costs Application**).

Statutory framework

5 The Court has the power to make a special costs order under *Rules of the Supreme Court 1971* (WA) O 66 r 51(1)(b). Currently that Rule provides:

> (1) In a particular action or matter the Court may, instead of making an order for taxation of costs -
>
> …
>
> (b) make an order under the *Legal Profession Uniform Law Application Act 2022* (WA) (***Application Act***) section 141(3).

6 The parties are agreed that a party must apply for a special costs order within 30 days after the date of the relevant judgment *or* another time fixed by a Court.[1] The parties commonly took the position that because this Application was made after the commencement of the new regime, it ought be considered under that regime notwithstanding that the original costs Order (on 24 March 2022) was made under the previous regime.

7 Section 141(3) of the *Application Act* is identical to the now repealed s 280 of the *Legal Profession Act 2008* (WA). The same principles continue to apply.[2]

8 In those circumstances, I have also proceeded on the basis that this Application is under the *Application Act*.

9 Section 141(3) of the *Application Act* provides:

> … if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, the court or officer may do any or all of the following -
>
> (a) order the payment of costs above those fixed by the determination;
>
> (b) fix higher limits of costs than those fixed in the determination;
>
> (c) remove any limits on costs fixed in the determination;
>
> (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or assessed.

10 The respondent is seeking an increase to the ceilings or total number of hours allowable under Items 25(b), (f), (i), (g) and (l) of the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2022*.

Extension of time

11 The respondent first seeks that the time for making the Application be extended to and including the date this Application was heard (subject to the further Orders 2 - 5 sought).

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[1] *Rules of the Supreme Court 1971* (WA) O 66 r 51(3)(a) or (b).

[2] ***City of Bayswater v Viva Energy Australia Pty Ltd [No 2]*** [2022] WASC 384 (S) [25]; ***C H Leaman Investments Pty Ltd v Tuesday Enterprises Pty Ltd as trustee for The Steele investment Trust*** [2022] WASC 447 (S) [9].

12 The respondent requires leave to extend the time in which to bring this Application. The appellant does not oppose an order extending the respondent's time to apply.[3]

13 Nonetheless, the Court must be satisfied that such an extension should be granted; the parties' position does not determine this Court's discretion.

14 The respondent's solicitor made an affidavit on 9 August 2023[4] in which he 'deposed' to the following:

> [3.4] The Respondent seeks an extension of time within which to pursue its application for special costs orders on the basis that:
>
> [3.4.1] the Respondent is not seeking interest on costs taxed;
>
> [3.4.2] the Appellant will not suffer any detriment if time is extended;
>
> [3.4.3] the Respondent has an arguable case on the merits;
>
> [3.4.4] the distress suffered by Counsel Mr David Garnsworthy due to his hip replacement surgery, followed by his wife's illness and death on 20 November 2022;
>
> [3.4.5] the parties have been in negotiations; and
>
> [3.4.6] the justice of the application supports an extension of time.

15 It may be observed that [3.4.1], [3.4.2], [3.4.3] and [3.4.6] of Mr Billing's affidavit are submissions and not evidence. That was accepted by the respondent's counsel at the hearing.

16 Sub-paragraph [3.4.4] of Mr Billing's affidavit quoted above is not in admissible form and, with respect, is at a high level of generality. That was accepted by the respondent's counsel at the hearing.

17 Sub-paragraph [3.4.5] of Mr Billing's affidavit quoted above, again, is at a very high level of generality. That was accepted by the respondent's counsel at the hearing.

18 The respondent's Submissions signed by Mr Garnsworthy 'submit':

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[3] Appellant's Submissions [30].
[4] Affidavit of Simon Michael Billing sworn 9 August 2023.

> [3.5] After judgement [sic] was handed down counsel was briefed to prepare a draft bill of costs in the Magistrates Court and this court [sic].
>
> [3.6] Unfortunately, counsel broke his hip in May 2022 and his wife died in November 2022.
>
> [3.7] Discussions followed between the parties trying to settle costs without success.

19 The above quoted [3.5] - [3.7] from the Submissions are assertions for which there is no admissible evidence.

20 The respondent cited the recent decision of Solomon J in ***Bartlett v Roffey***[5] to suggest that the 30-day limit is essentially concerned with avoiding prejudice to the other side. That is only partly correct. I am confident that his Honour was in no way setting out the metes and bounds of this Court's relevant considerations. The limit is also there to promote finality and the parties promptly agitating issues: see [46(d)(e)]. It may be noted, for example, that the Judge who heard this Appeal no longer sits in this Court's general division.

21 While wishing to express an appropriate level of understanding and sympathy towards the respondent's counsel, in my view there is no cogent or persuasive evidence to support the extension of time from 24 March 2022 to 11 August 2023, a delay of over 15 months.

22 It may be noted that, for example, Mr Garnsworthy's hip injury occurred more than 30 days from the judgment date, and it is entirely unexplained why a transnational firm needed to wait passively as it appears it did for more than 15 months.

23 I would not grant the respondent leave to make the Special Costs Application out of the 30 days' limit. In refusing that leave, I have taken into account the merits of the Special Costs Application, which I discuss below.

The merits of the Application

24 For the reasons which follow, I do not consider that the respondent would have made out any ground for a special costs award.

25 The respondent contended by its written Submissions that the matter was unusually difficult, complex and/or important.

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[5] ***Bartlett v Roffey*** [2023] WASC 3 (S) [46(a)(b)(c)].

26 At the commencement of the hearing, counsel for the respondent said that the respondent no longer pressed its Application on the basis of 'unusual difficulty'. I think, with respect, that was proper.

27 The respondent at the hearing also did not push 'complexity'. Again, I think that was correct.

28 As Curthoys J found, consistently with the parties' positions before him, the unsuccessful appeal turned on a question of statutory construction.

29 With respect, it is very difficult to imagine that a construction exercise before this Court on one section of the *Mines Safety and Inspection Act* could answer the description of being unusually difficult or complex such that a special costs order should be made.

30 The Court of Appeal in ***Wilson v McDonald*** [2009] WASCA 39 (S) [16] (Martin CJ; Wheeler JA & Beech AJA agreeing) said, analogously:

> … the construction of a particular statutory provision, involving an issue with no implications beyond that particular provision could not be said to be exceptional. To the contrary, it is the ordinary course in this court.

31 Turning then to 'importance', which was the focus at the hearing. Counsel for the respondent at the hearing articulated this on the basis that if there had been a finding against the respondent then it would have bought 'other issues into play' - principally of an industrial relations nature.

32 The appellant, submitted that there was no evidence before this Court as to what those issues were and why they were particularly important.

33 I accept that it is unclear from the evidence put on by the respondent as to what the 'other issues' were and what their implications may have been for the respondent.

34 The appellant further submitted that any determination in this Appeal would not obviously determine any of the 'other issues'. By that I took it to mean that there would be separate statutory regimes, most likely, and that this Court's determination in the Appeal would not be determinative of some other statutory regime. I accept that submission.

35 The appellant brought to the Court's attention the decision of the Court of Appeal from last week in ***Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd*** [No 2] [2023] WASCA 108 (S) at [20] where the Court of Appeal stated:

> The question of whether the appeal is properly characterised as complex, unusually difficult or important is concerned with the issues raised by the parties and arising in the course of the hearing of the appeal. In other words, the inquiry as to whether the appeal has the requisite character is directed to the issues with which the successful party was required to deal, and did deal, in the appeal.

36 It was submitted by the applicant that the 'consequences' for which the respondent contended to support its Application were 'outside' this Appeal (as put by the Court of Appeal) and so would not fall within 'important'.

37 With respect, I consider that is likely to be the case. However, given the other bases on which I would dismiss the respondent's Special Costs Application, I do not need to reach a final view about that.

38 The respondent cited ***Hartlink v Jones*** [2007] WASC 254 (S) [19] where the notion of importance in this context was discussed by Martin CJ.

39 It is the norm that parties who come before this Court in single judge appeals from convictions or acquittals in the Magistrates Court regard the matter as being of great significance and importance to them personally.

40 This Court would no doubt resist awarding costs to each and every one of those litigants on the basis of how they perceive the importance of the litigation.

41 For example, single judge appeals from the Magistrates Court concerning whether or not a spent conviction order should have been granted provide a class of cases where the importance to the individual is effectively hard baked into the appeal via s 45(1)(b) of the *Sentencing Act 1995* (WA).

42 I am not persuaded that the respondent as a 'not insignificant participant in the gold mining industry' (as per its written Submissions) obviously falls into any different category.

43 In my view, there was nothing generally or specifically important about this Appeal.

44 The appellant further submitted that the respondent had not established that the relevant costs determination would be inadequate.

45 Looking at the material filed by the respondent, only Item 25(g) of the relevant determinations was addressed in the draft Bill annexed as 'SMB-2' to Mr Billing's affidavit. This Court had no other material before it as to why it was said that the allowance in relation to the other items would be inadequate.

46 In those circumstances, it is difficult to see that the relevant costs determination was inadequate. I do not find that it would be.

Disposition

47 If I had been minded to extend the time (which I am not), I would not have granted the respondent's Special Costs Application in any event as I do not consider this Appeal answered any of the descriptions of unusual difficulty, complexity or importance. Further, I would not have been persuaded that the relevant costs determination was inadequate.

48 Accordingly, I do not grant the respondent leave and I dismiss the respondent's Special Costs Application. I will hear the parties as to the costs of the Application.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JC
Associate to the Honourable Justice Howard

5 OCTOBER 2023