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File J 4

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

M.120/84

IN THE MATTER of the Law Practitioners  
Act 1982

443

AND

IN THE MATTER of CORTEZ INVESTMENTS  
LIMITED of Wellington

hearing on Appeal  
11/1/84

CA 01/84

Appeal reported  
[1984] 2 NZLR.

Applicant

AND

WYBRANTS OLPHERT and DAVID  
BRIAN COLLINS of Wellington  
Solicitors

9/10

Respondents

Hearing 11 April 1984

Counsel K. S. Miliszewski for Applicant  
P. F. Boshier for Respondent

Judgment 11/5/84

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JUDGMENT OF ONGLEY J

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This is an application for an order under Section 146 of the Law Practitioners Act 1982 referring a practitioner's bill of costs to the Wellington District Law Society for revision by its District Council.

The application is made by the party chargeable with the bill of costs. The bill has already been revised by the District Council of the Wellington Law Society under Section 145 of the Law Practitioners Act on the reference of the same party. On that reference the costs were reduced by various amounts totalling \$1,415.00 resulting in a revised bill of costs amounting to \$5,975.00. Notice of the District

Council's decision dated 21 December 1983 was received by the directors of the company on 23 December 1983. They were dissatisfied with the revision and according to affidavits filed by them in support of the present application instructed the solicitor then acting for them to appeal to the Registrar under the provisions of Section 148 of the Act. Subsection 2 of that section requires an appeal to be commenced within 14 days after the date of the District Council's decision by notice in writing lodged with the Registrar. The affidavits do not disclose when the instructions were given to the solicitor but I was informed from the bar that it was on the last day before the legal offices closed for the Christmas vacation. It is suggested that the practitioner who was so instructed may have taken the view that the time for appeal did not run during the vacation but I have no confirmation of that having been the case. For whatever reason no notice of appeal was given in terms of the subsection until 27 January 1984. I have not heard argument on the question as to whether time continued to run during the vacation as counsel for the applicant has adopted the view that the time for appeal expired 14 days after 21 December 1983.

On that view therefore the applicant lost the right to appeal to the Registrar under Section 148 and was denied the opportunity of applying to this Court for review of the decision of the Registrar under Section 149 of the Act had he been dissatisfied with it.

The present application seeks an order under Section 146 of the Act referring the bill of costs for revision by the Council of the District Law Society. Section 146 is subject to sections 150 and 151. It is section 151 that is relevant here. It reads as follows:

"151. Where revision allowed only in special circumstances - (1) In any case to which this section applies, -

- (a) A bill of costs shall not be revised by District Council of its own motion, or referred for revision except by order of a Court; and
- (b) The Court shall not make an order for the reference of a bill for revision except in special circumstances.

(2) This section applies in every case (not being a case to which section 159 of this Act applies) where -

- (a) The bill has been previously revised under this Part of this Act, or taxed before the commencement of this Act under Part IV of the Law Practitioners Act 1955; or
- (b) A verdict or judgment has been obtained in an action for the recovery of the amount of the bill; or
- (c) The bill has been paid otherwise than by deduction or set-off; or
- (d) One year has elapsed since the date of the delivery of the bill."

That section applies to this case by virtue of subsection (2)(a) by reason of the bill having been previously revised by the District Council under Part VIII of the Act. An order may not be made therefore except in special circumstances. Section 151 of the present Act is in much the same terms as Section 66 of the Law Practitioners Act 1955 which required there to be special circumstances before the

Court was empowered to refer a bill for taxation in certain specified classes of cases. One of those classes consisted of bills which had been previously taxed. Although that provision was in force for many years there do not appear to be reported any cases dealing with the question of what may constitute special circumstances. Counsel have not cited any such cases and I am not aware of there being any. There are a number of English decisions under the Solicitors Act 1975 and its statutory predecessors on applications for taxation orders made after twelve months have expired from the delivery of the bill; when a judgment has been obtained for the recovery of costs covered by the bill; or the bill has been paid. In those situations an order to tax the bill cannot be obtained except in special circumstances. Three of those categories are the same as those which appear in Section 151 of our present Law Practitioners Act. Examples of what may constitute special circumstances in such situations are collected in Halsbury's Laws of England 4th Edition paragraphs 188-191. The English legislation does not, however, deal with the class of case contemplated by Section 151(2)(a) because of the different taxation procedures in that country and so no direct guidance can be obtained from the decided cases as to what may constitute special circumstances in relation to cases falling within subsection (2)(a). It may however be said that the English courts have tended more readily to find that special circumstances exist when a risk of injustice would arise if the bill were not to be taxed. I believe that that should be the primary concern

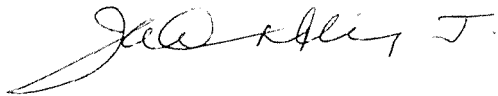
of the Court in determining cases under Section 151 (2) (a). There will be other factors to be considered, of course, but unless an applicant is able to show that there is a serious risk of injustice to him if the bill is not referred for revision I think it would be difficult for him to make out a case under Section 151 where the bill had been previously revised. An order for reference to the District Council in those circumstances is in effect an order for re-hearing and the approach of the Courts to the grant of a rehearing is relevant. In relation to an application for rehearing under the Domestic Proceedings Act Cooke J. in delivering the judgment of the Court of Appeal in Campbell v Pickles [1983] 1 NZFLR 97, at page 98 said:

"In our view the over-riding consideration when a rehearing is applied for under ... the Family Proceedings Act must be whether there is shown to be in all the circumstances of the particular case such a serious risk of injustice if a hearing is refused as to outweigh the ordinary public and private interest in the finality of litigation. Beyond that obvious enough test we think that any judicial narrowing of the discretion would be wrong."

The reference of a bill of costs for revision under Section 146 is a matter of discretion, in which the Court's discretion must be limited by consideration of Sections 150 and 151. If the present applicant was to persuade the Court that the discretion should be exercised in its favour I am of the opinion that the first step should have been to endeavour to show there was at least an arguable case that the District Council was in error in its revision of the bill. No attempt was made to do that. Instead, the applicant placed reliance wholly upon the loss of its right of appeal through the alleged fault of its solicitor. On the evidence before me it has not been shown that the District Council

might be persuaded to alter its decision and the only purpose of again invoking its power to revise the bill would be, as I apprehend the position, to obtain renewed access to the right of appeal. I do not think that that is a legitimate purpose. It is clear from the appeal and review procedures provided for in the Act that it was not intended that there should be any extension to the limitation of time for the taking of any necessary step, either by application to the Court or otherwise. The applicant being unable to obtain such an extension under the express provisions of the Act can revive a right to appeal only by going back to the District Committee pursuant to an order of the Court. In order to obtain such an order it must be shown that there are special circumstances which justify that course. In my view the applicant has not succeeded in doing so.

This application will therefore be dismissed. The respondents are allowed the sum of \$200.00 for costs on this application plus disbursements.



Solicitors:

Johnson & Miliszewski, Wellington, for the Applicant  
Macalister Mazengarb Parkin & Rose, Wellington, for the Respondents