JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	SEDDON -v- MEDICAL ASSESSMENT PANEL [No 2] [2012] WASC 1 (S)
CORAM	**:**	EDELMAN J
HEARD	**:**	15 DECEMBER 2011 & 22 MARCH 2012
DELIVERED	**:**	10 JANUARY 2012
SUPPLEMENTARY DECISION	**:**	28 MARCH 2012
FILE NO/S	**:**	CIV 2010 of 2011
MATTER	**:**	In the matter of an application for a writ of certiorari against Dr Alexeeff, Dr La Bianca and Dr Brown, members of a Medical Assessment Panel under the *Workers' Compensation and Injury Management Act 1981* (WA)
BETWEEN	**:**	RAOUL THOMAS SEDDON Applicant AND MEDICAL ASSESSMENT PANEL First Respondent SHANE MELVILLE, ACTING DIRECTOR OF DISPUTE RESOLUTION DIRECTORATE Second Respondent MIRVAC (WA) PTY LTD Intervener

Catchwords:

Practice and procedure - Special costs orders - Whether an amount of costs allowable under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter

Legislation:

Legal Practitioners (Supreme Court) Contentious Business Determination 2010 (WA)
Legal Profession Act 2008 (WA)

Result:

Orders made including special costs orders

Category: B

Representation:

Counsel:

Applicant	:	Mr R E Lindsay
First Respondent	:	No appearance
Second Respondent	:	No appearance
Intervener	:	Mr C P Shanahan SC

Solicitors:

Applicant	:	S C Nigam & Co
First Respondent	:	No appearance
Second Respondent	:	No appearance
Intervener	:	Rankin Nathan Lawyers

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

Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122 (S)
Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty ltd (in liq) [2007] WASC 254 (S)
Hodgkinson v Doepel & Associates Architects Pty Ltd [2006] WASC 237 (S)
Margaret River Resources Pty Ltd v His Honour Warden Calder SM [2008] WASCA 238 (S)
Minniti v Motor Vehicle Industry Board [2011] WASCA 275 (S)
SDS Corporation Ltd v Pasdonnay Pty Ltd [2004] WASC 26 (S2)

EDELMAN J:

Introduction

1 The substantive application in this matter was heard on 15 December 2011. My reasons for decision were delivered on 10 January 2012. At the time of delivery of my reasons, the legal representative for Mirvac (WA) Pty Ltd (Mirvac) asked that delivery of orders be adjourned due to the hospitalisation of counsel. Subsequently, submissions have been made concerning the appropriate orders consequent upon my reasons.

2 A difficulty arose in relation to orders. On 1 December 2011, the new WorkCover WA workers' compensation dispute resolution system came into effect by the amendment of s 181 of the *Workers' Compensation and Injury Management Act 1981* (WA) (the Workers' Compensation Act). The difficulty caused by the 1 December 2011 amendments was that the second respondent no longer exists in that capacity.

3 On 22 March 2012, I heard the submissions in relation to appropriate orders, as well as submissions concerning costs and special costs orders. It was common ground that the essence of my reasons was to quash the decision of the Medical Assessment Panel. It was also common ground, and I accept, that orders of mandamus (from Latin meaning 'we command') are necessary in this case. But a letter from the State Solicitor's Office, annexed to an affidavit, indicated that there may be difficulty with the issue of mandamus orders against the second respondent if he were joined in his new capacity.

4 Various concessions were made by both Mr Seddon and Mirvac during or after the 22 March 2012 hearing. Subsequent to that hearing, Mr Seddon, Mirvac, and the State Solicitor's Office agreed that the appropriate orders should be as follows:

> 1. Mr Shane Melville, Registrar Arbitration, having been designated as such by the Chief Executive Officer pursuant to section 182ZP of the *Workers Compensation and Injury Management Act* 1981 (WA) be joined as the Third Respondent in these proceedings.
>
> 2. A Writ of Certiorari be issued directing the First Respondent to remove into this Honourable Court its determination of 10 September 2010 in respect of RAOUL THOMAS SEDDON, and that determination be quashed.
>
> 3. A Writ of Mandamus be issued directing the Third Respondent to refer the Applicant for determination of his degree of disability by

> a medical assessment panel newly constituted by the Third Respondent under the Workers' Compensation and Injury Management Act 1981 (WA) pursuant to the Amended Notice of Referral to a Medical Assessment Panel issued by Arbitrator Spivey dated 6 September 2010 ('the Referral'), and that the Third Respondent give any necessary directions, including the filing of medical reports, for the purpose of such a determination.
>
> 4. Any order relating to the Applicant's costs of this application be determined as this Honourable Court deems fit .
>
> 5. The Applicant's application be otherwise dismissed.
>
> 6. A copy of these Orders be served by the Applicant upon each of the First, Second and Third Respondents and the Intervener within 7 days of these Orders being extracted.

5 I accept that orders 1, 2, 3, 5 and 6 are appropriate. Therefore, the only issue remaining concerns order 4. The costs questions are (1) the costs of the show cause application; (2) the costs of the 15 December 2011 hearing for making of 'orders absolute'; (3) the costs of the 22 March 2012 hearing; and (4) any special costs orders.

Costs

6 Mirvac, as intervener, opposes any order for costs against it. It points to the following:

(1) it did not oppose the show cause order;

(2) it intervened on only three discrete issues (and not on issues involving the privative clause or whether errors were jurisdictional - although the latter might be more properly characterised as a concession rather than limited intervention - see (ts 106));

(3) it conceded that the purported further consideration of issues by the medical assessment panel had no legal status;

(4) it was substantially successful in respect of those issues upon which it sought to be heard; and

(5) discouraging appropriate intervention would be against the public interest.

7 Even where an intervener, or party, declines to participate in a show cause (order nisi) hearing it may be appropriate to order that the costs of a show cause hearing should follow the result of an opposed hearing for

orders absolute. This is because, on the current state of the law, a show cause application can be a necessary step on the path to obtaining orders absolute. Much of the work done in relation to obtaining a show cause order could make unnecessary the work to be done in relation to the orders absolute to be sought.

8 Therefore if it were appropriate to make orders for costs against an intervener at a hearing for absolute prerogative orders then it may also be appropriate to make costs orders in relation to the show cause hearing. Of course, in such a circumstance the applicant should not be able to recover twice for doing the same preparation (ie at the show cause stage and then again at the hearing for the orders absolute).

9 However, in all the circumstances of this case, I consider that the appropriate order in relation to the show cause hearing is that there be no order as to costs. I consider this for four reasons.

10 First, although there was some initial confusion, Mirvac specifically declined to intervene, or to file any evidence or submissions in opposition to the application for show cause orders: see affidavit Maureen O'Connell, 7 February 2012, page 25. It was not required to do so. Mirvac explained that it only wished to have liberty to file affidavit evidence in the event that an order nisi was granted: affidavit of Maureen O'Connell, 8 August 2011, page 9. Mr Seddon did not seek any order that the hearing for show cause orders be adjourned to be heard at the same time as the hearing for orders absolute, at which time Mirvac could be heard. In any event, the show cause hearing enabled some confusion in the submissions to be resolved, and the precise nature of Mr Seddon's arguments to be articulated.

11 Secondly, there was a strong focus at the hearing for show cause orders on the privative clause in s 145E(9) of the Workers' Compensation Act. That section provides that a 'decision of a medical assessment panel or anything done under this Act in the process of coming to a decision of a medical assessment panel is not amenable to judicial review'. At the hearing for orders absolute the intervener declined to intervene on this issue and declined to make any submissions on the point. Consequentially, this issue occupied little time at the hearing for orders absolute.

12 Thirdly, at the show cause hearing there was a significant focus on a matter which was properly conceded by Mirvac at the hearing for orders absolute. That concession was that the further consideration of issues by

the medical assessment panel had no legal status, so that there was no need to consider whether the further consideration could 'cure' a jurisdictional error.

13 Fourthly, as I observed at [136] in my reasons for decision concerning the orders absolute, the arguments and issues raised at that hearing, even in relation only to what became the three essential issues, were substantially different from the manner in which those issues were presented at the show cause stage.

14 There should be no order as to the costs of the show cause hearing. However, although there should not be any order for costs of the hearing for the show cause orders, I consider that Mirvac should pay the costs of the applicant in relation to the hearing for the orders absolute.

15 Mirvac correctly pointed to its intervention as being confined to three issues. Those issues were dominant at the orders absolute hearing. It is true that Mirvac's submissions assisted to clarify the issues involved and to focus attention on the essential issues before the court. However, it is not entirely accurate to say that Mirvac was substantially successful in respect of those issues upon which it sought to be heard. Mirvac was unsuccessful on the second ground which also included the issue of discretionary refusal of prerogative relief (reasons [81] - [113]). And although the third ground failed, this was only because the second ground had succeeded; in other words if Mr Seddon had not been successful on the second ground, then he would have succeeded on the third (reasons [127]).

16 Mr Seddon has been successful in the essence of his application which was for orders quashing the determination of the Medical Assessment Panel. In 'reality' he is the successful party: ***Minniti v Motor Vehicle Industry Board*** [2011] WASCA 275 (S). As with the usual rule, costs will ordinarily follow the event where a person is heard in opposition to a prerogative writ application: ***Margaret River Resources Pty Ltd v His Honour Warden Calder SM*** [2008] WASCA 238 (S).

17 Some limited additional work was done before the orders absolute hearing on matters which did not occupy much time at that hearing. Those matters might include issues which were conceded by Mirvac (such as whether the errors were jurisdictional), or the issue on which Mirvac declined to intervene (the privative clause): see (ts 53). But, unlike the show cause hearing, those matters (particularly the privative clause) did not occupy any significant time at the hearing for orders absolute, and

much work on those matters was done for the show cause hearing, for which Mirvac will not be required to pay Mr Seddon's costs.

18 Subject to any special costs order, the appropriate orders for costs are that Mirvac should pay Mr Seddon's costs of the hearing for the orders absolute and that there should be no order as to the costs of the show cause hearing.

Special costs orders

19 Mr Seddon sought special costs orders that the costs payable by Mirvac be taxed without regard to the limits prescribed by Items 28(b) and (c) of the Supreme Court Scale of Costs contained in *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010* (WA) (the Scale). It is not necessary for me to consider removal of the limits prescribed by Item 28(a) because that item relates to the show cause hearing.

20 Section 280(2) of the *Legal Profession Act 2008* (WA) provides that:

> [I]f 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 all or any of the following -
>
> ...
>
> (c) remove 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.

21 The adverb 'unusual' qualifies only the 'difficulty' of the matter, not its complexity or importance: see in relation to the identical terms of the predecessor to s 280(2): ***Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty Ltd (in liq)*** [2007] WASC 254 (S) [17] (Martin CJ); ***Hodgkinson v Doepel & Associates Architects Pty Ltd*** [2006] WASC 237 (S) [33] (Simmonds J); ***SDS Corporation Ltd v Pasdonnay Pty Ltd*** [2004] WASC 26 (S2) [102] - [106] (Roberts-Smith J).

22 Therefore, before a discretion can be exercised as to whether a special costs order should be made, the court must be of the opinion that (1) the Scale, or a Scale item is inadequate, and (2) that the inadequacy arises because of the unusual difficulty, or complexity, or importance of the matter: ***Heartlink Ltd*** [11].

23 The inadequacy will be demonstrated if Mr Seddon shows that there is a fairly arguable case that the bill to be presented to the taxing officer may tax at an amount which is greater than the limit that would be imposed by the relevant costs determination: ***Heartlink Ltd*** [16].

24 I am satisfied from the affidavit of Ms Maureen O'Connell, sworn on 7 February 2012, and from the issues at the orders absolute hearing, that there is a fairly arguable case that the items in the bill concerning Items 28(b) and 28(c) of the Scale to be presented to the taxing officer may tax at an amount which is greater than the limit that would be imposed by the relevant costs determination. That Scale provision is based upon an assessment of 10 hours of 'getting up for hearing' by a senior practitioner and two days of preparation and one day of hearing at counsel rates.

25 Based upon my experience, impressions gained during the hearing, and issues involved I also consider that the reason why there is a fairly arguable case that these items of a bill to be presented to the taxing officer may tax at an amount which is greater than the limit that would be imposed by the relevant costs determination this case is because this matter was important: see ***Flotilla Nominees Pty Ltd v Western Australian Land Authority*** [2003] WASC 122 (S) [43] (Pullin J).

26 The matter was clearly important to the parties. And it involved important issues including the extent of a medical assessment panel to provide reasons; the extent to which the determination by a medical assessment panel of principles of causation is permissible, and whether a jurisdictional error had occurred in that respect; and questions of discretionary refusal of prerogative relief. Mirvac properly engaged senior counsel to make submissions at the hearing for orders absolute.

27 The appropriate order is that the costs of the hearing for orders absolute be taxed without regard to the limits in Items 28(b) and 28(c) of the Scale.

Conclusion

28 The orders which I make are as follows:

1. Mr Shane Melville, Registrar Arbitration, having been designated as such by the Chief Executive Officer pursuant to s 182ZP of the *Workers Compensation and Injury Management Act 1981* (WA) be joined as the third respondent in these proceedings.

2. A writ of certiorari be issued directing the first respondent to remove into this honourable court its determination of 10 September 2010 in respect of Raoul Thomas Seddon, and that determination be quashed.

3. A writ of mandamus be issued directing the third respondent to refer the applicant for determination of his degree of disability by a medical assessment panel newly constituted by the third respondent under the *Workers' Compensation and Injury Management Act 1981* (WA) pursuant to the amended notice of referral to a Medical Assessment Panel issued by Arbitrator Spivey dated 6 September 2010 (the Referral), and that the third respondent give any necessary directions, including the filing of medical reports, for the purpose of such a determination.

4. There be no order as to costs of the show cause (order nisi) hearing on 9 and 31 August 2011.

5. The intervener pay the applicant's costs of the hearing for orders absolute held on 15 December 2011.

6. The applicant's costs of the hearing for orders absolute on 15 December 2011 be taxed without regard to the limits in Items 28(b) and 28(c) of the Scale.

7. The application be otherwise dismissed.

8. A copy of these orders be served by the applicant upon each of the first, second and third respondents and the intervener within seven (7) days of these orders being extracted.

29 The only matter which remains is the costs of the hearing before me in relation to these orders (the Orders Hearing). I have not had the benefit of any submissions in relation to the costs of the Orders Hearing. It suffices to say that much of the Orders Hearing was occupied by the appropriate prerogative relief orders and the unusual circumstances which arose in relation to these orders. During, or after, the Orders Hearing proper concessions were made by both Mr Seddon and Mirvac and submissions were no longer pressed. This permitted the orders to be agreed yesterday without the necessity of any further submissions. Both parties have also had some degree of success in relation to costs orders sought of the previous hearings.

30 I will hear from the parties if a costs order for the Orders Hearing is not agreed; otherwise the parties can be relieved from attending the delivery of these reasons.