JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	WAINWRIGHT -v- BARRICK GOLD OF AUSTRALIA LIMITED [2014] WASCA 15 (S)
CORAM	**:**	PULLIN JA NEWNES JA MURPHY JA
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	21 AUGUST 2014
FILE NO/S	**:**	CACV 92 of 2012
BETWEEN	**:**	SHEILA WAINWRIGHT Appellant AND BARRICK GOLD OF AUSTRALIA LIMITED Respondent

ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	BOWDEN DCJ
Citation	**:**	WAINRIGHT -v- BARRICK GOLD OF AUSTRALIA LIMITED [2012] WADC 79
File No	**:**	CIV 1291 of 2007
Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	BOWDEN DCJ
Citation	**:**	WAINRIGHT -v- BARRICK GOLD OF AUSTRALIA LIMITED [2012] WADC 79 (S)
File No	**:**	CIV 1291 of 2007

Catchwords:

Costs - Slip case - Special costs order - *Legal Profession Act 2008* (WA), s 280(2) - Whether applicable costs determinations inadequate - Whether unusual difficulty, complexity or importance - Complexity in relation to issues lost at trial

Legislation:

Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010 (WA)
Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012 (WA)
Legal Profession Act 2008 (WA), s 280(2)

Result:

Application for special costs order dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr D R Clyne
Respondent	:	Mr B L Nugawela

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Greenland Legal Pty Ltd

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

Atwell v Roberts [2013] WASCA 37 (S)
Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd [2013] WASCA 66(S)
O'Rourke v P & B Corporation Pty Ltd [2008] WASC 36 (S)
Red Hill Iron Pty Ltd v API Management Pty Ltd [2012] WASC 323 (S)
Town of Port Hedland v Hodder [No 2] [2012] WASCA 212 (S)
Wainwright v Barrick Gold of Australia Ltd [2012] WADC 79
Wainwright v Barrick Gold of Australia Ltd [No 2] [2012] WADC 126

JUDGMENT OF THE COURT:

Introduction

1 The appellant suffered an injury at work when she slipped and fell as she descended from the tray of a stationary 'ute', onto the A-frame of a trailer which was attached to the 'ute'. She sued her employer, the respondent, in the District Court. Liability and quantum were in dispute and the respondent also alleged contributory negligence. The primary judge found for the appellant on liability, dismissed the claim in respect of contributory negligence, and awarded damages to the appellant in the sum of $211,148.88. The appellant appealed to this court on the question of quantum and succeeded on some of the grounds of appeal. As a result, this court varied the quantum of the appellant's verdict to $266,574.

2 Following delivery of this court's reasons, on 17 February 2014 the appellant obtained orders to the effect that the principal costs orders made by the primary judge be set aside, that the respondent pay the appellant's costs of the action below and of the appeal to be taxed, and that the appellant have liberty to apply for special costs orders in relation to the appeal and in relation to the proceedings below.

3 The appellant has now applied for certain special costs orders in relation to both the appeal and the primary proceedings.

4 In relation to the primary proceedings, the appellant seeks orders to the effect that:

1. The appellant's costs in the District Court action be taxed without regard to the limits as to the number of hours in relation to scale items 17 (getting up for trial) and 20(b) (senior counsel fee on brief) of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010* (WA) (the 2010 determination).

2. The costs payable by the respondent include the reasonable costs of preparation for and attendance at the taxation and settlement negotiations relating to the parties' costs on 28 November 2012.

5 In relation to the appeal, the appellant seeks an order that her costs of the appeal be taxed without regard to the limits in scale in items 23(b) of the 2010 Determination and item 23(g) of the *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2012* (WA).

6 The appellant filed an affidavit in support by her solicitor sworn 23 April 2014. The parties filed written submissions. In submissions

filed 30 June 2014, the respondent conceded, with respect to proposed order 2 in relation to costs of the primary proceedings, that the appellant 'is entitled to the [costs of the taxation] proceedings on 28 November 2012 on the basis that these have now been thrown away'. Otherwise the appellant's application was contested.

The statutory and regulatory framework

7 In ***Atwell v Roberts*** [2013] WASCA 37 (S), the court said ([7] - 15]):

> Section 37(1) of the *Supreme Court Act 1935* (WA) provides:
>
> > '(1) Subject to the provisions of this Act and to the rules of court and to the express provisions of the *Magistrates Court (Civil Proceedings) Act 2004*, or any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom or out of what estate, fund, or property, and to what extent such costs are to be paid.'
>
> Section 37(1) confers a broad discretion on the court in relation to costs with full power to determine, relevantly, to what extent such costs are to be paid. This discretionary power enables the court to make orders with respect to the allowance of costs generally. See also O 66 r 1(1) of the *Rules of the Supreme Court 1971* (WA), which should be read together with s 37(1).
>
> By O 66 r 10(2) of the *Rules of the Supreme Court*, relevantly, in the case of an appeal, the costs of the proceedings giving rise to the appeal, as well as the costs of the appeal and of the proceedings connected with it, may be dealt with by the court hearing the appeal.
>
> Rule 5(1) of the *Supreme Court (Court of Appeal) Rules 2005* (WA) provides that the *Court of Appeal Rules* must be read with the *Rules of the Supreme Court*.
>
> Section 280(1) of the *Legal Profession Act 2008* (WA) (the Act) provides, relevantly, that the taxation of bills of law practices and any other aspect of the costs charged by law practices is regulated by an applicable costs determination.
>
> Section 275(1) of the Act empowers the Legal Costs Committee (established under s 310) to make legal costs determinations regulating the costs that may be charged by law practices in respect of, relevantly, contentious business before the Supreme Court.

Section 280(2) of the Act provides:

> '(2) Despite subsection (1), 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 all or any 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 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.'

By s 280(3) of the Act, nothing in s 280(1) is to be construed as limiting the power of a court, a judicial officer or a taxing officer of a court to determine in any particular case before that court or judicial officer the amount of costs allowed.

In ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** [2013] WASCA 66(S) [3], Martin CJ, McLure P and Buss JA said in relation to s 280(2):

> 'The section requires that before making an order pursuant to its terms the court must form an opinion which has two components. First, the court must determine that the amount of costs allowable in respect of a matter under a legal costs determination is inadequate. Second, the court must conclude that the inadequacy arises because of the 'unusual difficulty, complexity or importance of the matter' (***Heartlink Ltd v Jones as Liquidator of HL Diagnostics Pty Ltd (in liq)*** [2007] WASC 254 (S) [11]). Having heard the matter and being familiar with the way in which the case was conducted and the issues which were litigated, the court is in a position to form the opinions required under the section as matters of impression rather than science or mathematics: ***EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd*** [2008] WASC 275 (S) [7]; ***Verdell Pty Ltd v F & G Nominees Pty Ltd*** [2002] WASC 58 (S2) [14].'

8 Also, in ***Town of Port Hedland v Hodder [No 2]*** [2012] WASCA 212 (S) the court said:

> The relevant principles to be applied in resolving this question are not contentious. Special costs orders can be made either pursuant to s 280(2) of the *Legal Profession Act 2008* (WA), or pursuant to s 37(1) of the *Supreme Court Act 1935* (WA). In either case, before the power will be exercised, the court must form the view that the maximum amount allowable under the relevant scale item is inadequate in the sense that there is a fairly arguable case that the bill to be presented to the taxing officer may properly tax at an amount which is greater than the limit which would be imposed by the relevant costs determination (see ***Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty Ltd (in liq)*** [2007] WASC 254 (S) [11]). If that threshold is crossed, under s 280(2) other questions arise for determination. However, until that threshold is crossed, the power will not ordinarily be exercised.
>
> Issues of the kind which arise when special costs orders are sought are addressed as matters of impression, rather than as matters of detailed evaluation, precision or science [14] - [15].

9 The word 'unusual' in s 280(2) of the Legal Profession Act 2008 (WA) (2008 Act) qualifies only the 'difficulty' of the matter and not its complexity or importance: ***Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*** [2013] WASCA 66(S) [5]. The word 'unusual' in this context means unusual having regard to what one might describe as the usual run of civil cases determined in the Supreme and District Courts. That essentially involves the making of a value judgment by the court, having regard to the court's experience of the particular case when compared with the usual run of cases: ***O'Rourke v P & B Corporation Pty Ltd*** [2008] WASC 36 (S) [23] - [25]; ***Red Hill Iron Pty Ltd v API Management Pty Ltd*** [2012] WASC 323 (S) [8].

The costs of the primary proceedings

10 All references to paragraph numbers below are references to the paragraph numbers in the primary judge's reasons for judgment, unless otherwise indicated: ***Wainwright v Barrick Gold of Australia Ltd*** [2012] WADC 79.

The parties' contentions

11 In relation to 'getting up' (item 17), the appellant submits that the scale limit under the 2010 Determination is $51,480 based on 120 hours by a senior practitioner at $429 per hour, and that the actual time spent in getting up totalled $159,107.30. In relation to counsel's fee on brief, the appellant contends that the relevant scale limit is $27,225, whereas senior counsel briefed for the appellant actually charged $35,090 for the fee on brief. This fee comprised 48 hours' preparation (at $550 per hour plus

GST) and the first day of trial ($5,500 plus GST). The appellant annexed a draft bill of costs, showing a total claim for costs of $362,374.41.

12 The appellant's solicitor deposed (pars 90 - 91) that the maximum allowances 'were inadequate due to the unusual difficulty, complexity or importance of the matter resulting from' the following matters:

(a) the nature and complexity of injuries suffered by the appellant, all of which were at issue in the proceedings;

(b) the respondent's denial of liability which caused 'substantial consideration and investigation';

(c) the complex issues surrounding the appellant's claim for loss of earnings;

(d) substantial time was spent in obtaining the evidence necessary to prove the appellant's claim, which was made unusually difficult due to the respondent being in default of its discovery obligations throughout the duration of the appellant's claim and of the orders in that regard made by the primary judge on 15 December 2011;

(e) the respondent's allegations of contributory negligence required substantial extra work;

(f) the costs of the appellant's future medication, medical treatment, hospitalisation and medical reviews needed to be calculated after seeking advice from relevant specialists and service providers and then converting those costs to a weekly cost and then applying the 6% discount table of multipliers;

(g) the appellant called 10 witnesses, including herself, and the respondent called 14 witnesses at trial;

(h) the trial lasted 11 days and, after the delivery of decision, the action was listed for hearing over two days.

13 The accident occurred in November 2003. In relation to the matters in (b) and (d) of the preceding paragraph, the evidence of the appellant's solicitor included evidence to the following effect (pars 13 - 84). There were disputes in 2008 as to discovery by the respondent and expert evidence, and certain orders were made in relation to expert evidence by consent; there was a failed mediation following which the respondent made an O 24A offer of $241,387.44 which the appellant rejected; in 2011 the appellant sought specific discovery of certain documents and

issued a subpoena to an individual described as 'President, Australia-Pacific' of the respondent in relation to minutes of safety meetings and records relating to subsequent modifications to the vehicle and trailer after the appellant's accident; there was a further application to issue a subpoena which was determined by Registrar Kingsley to be oppressive; the appellant issued what was described as a 'notice to admit facts' (although it was in the form of two questions) in relation to which the respondent said that the facts were not admitted; one of the two questions related to modifications to trailers in a period some four months prior to the appellant's accident, and the other concerned modification after the accident; on 22 November 2011 the respondent provided an inspection of the 'ute' allegedly of the type from which the appellant fell, although the appellant disputed that the vehicle was of that type; the inspection took two hours and was attended by, relevantly, the appellant's senior counsel and expert witness on liability.

14 The appellant's solicitor also deposed that:

(a) on 26 October 2011 the respondent's solicitors advised, in effect, that the respondent's witness, Mr Fallon, would admit, if questioned in cross-examination, that certain modifications had been made to the trailers after the accident;

(b) late in the trial, on 12 December 2011, the respondent, in effect, informally discovered certain minutes of safety meetings for the 2003 year;

(c) on 15 December 2011 the primary judge made certain orders for further discovery against the respondent, pursuant to which the respondent produced further documents in relation to safety meetings in 2004 (the accident occurred in November 2003); and

(d) the appellant subsequently alleged that the judge's order of 15 December 2011 had not been properly complied with and made an application dated 12 March 2012 for judgment by default on the basis of a failure to provide adequate discovery [317].

15 The appellant's application dated 12 March 2012 was dismissed [326], although the appellant was subsequently awarded the costs of the application: ***Wainwright v Barrick Gold of Australia Ltd [No 2]*** [2012] WADC 126 [22] ('primary supplementary reasons'). This order for costs in favour of the appellant subsists - it has not been disturbed as a result of the appeal.

16 The appellant also said that the inadequacy of the maximum allowable under the scale was further demonstrated by the claims for costs which the respondent had made in the proceedings below. The respondent had alleged, in effect, that the actual time it had spent in getting up totalled 265.4 hours in the period from 21 December 2010 onwards. (The respondent's claim was made in the context of the appellant having an adverse costs order made against her by the primary judge in relation to the period after the rejection of the O 24A offer on the basis that the ultimate verdict obtained at trial was less than the amount of the O24A offer.)

17 The respondent contended, in relation to getting up, that:

(a) the appellant's claim was not legally or factually complex in nature and was no more important than any other personal injury claim of this type;

(b) the appellant's evidence as to costs and the draft bill lacked sufficient specificity in the particular circumstances of this case to justify special costs orders;

(c) the primary judge found that the allegation of contributory negligence did not take up much time;

(d) the appellant contributed to the length of the trial in that surveillance evidence made available by the respondent was not disclosed by the appellant to her medical witnesses, and that the appellant's medical witnesses did not see the surveillance evidence until it was shown to them at trial by the respondent's counsel;

(e) the appellant contributed to the costs of getting up by the late delivery of medical reports with ensuing legal arguments;

(f) one of the days of the hearing in fact only lasted for three hours; and

(g) the appellant's draft bill of costs has, in effect, been prepared on an indemnity basis - for example, the draft bill claims in excess of 66 hours in preparing the appellant's proof of evidence and a 12 page chronology (par 87 of the solicitor's affidavit), plus another 152.8 hours for the appellant to attend at the solicitor's office to 'give instructions and/or prepare the action for trial' (par 86 of the solicitor's affidavit). There is, in addition,

unspecified 'other work of the nature of getting up' totalling 180.7 hours (par 86.6 of the solicitor's affidavit).

Disposition

18 The appellant slipped whilst descending from a stationary vehicle at work. Her account of the accident was the only one available; there were no witnesses [24].

19 The length of the trial was undoubtedly increased by the appellant's allegations as to the nature and extent of her injuries allegedly caused by the respondent's negligence and her alleged total incapacity for work. She alleged, amongst other things, that the accident had caused her shingles, shoulder pain, abdominal pain, loss of libido and a general pain syndrome described as fibromyalgia. She also alleged that she had suffered a psychiatric condition which meant that she was totally incapacitated for work. The judge rejected all those allegations [484] - [489], [498] - [520]. The judge found that the appellant had been capable of doing light duty work since April 2005. His Honour found that the extent and effect of the appellant's alleged injuries were contradicted by the surveillance evidence and had been exaggerated [515]. He also found that she had not accurately described her injuries and alleged limitations to her psychiatric expert [516].

20 The appellant's evidence, including the draft bill of costs, does not identify how much of the getting up item of approximately $159,000 was spent on all the issues as to the appellant's alleged medical condition and her alleged total incapacity, on which she did not succeed at trial. Even though the appellant has been awarded costs of the proceedings below without discrimination as to the issues on which she succeeded and those on which she did not, the court may take into account, in relation to the exercise of discretion in favour of a party seeking special costs orders pursuant to s 280(2) of the 2008 Act, that any unusual difficulty or complexity relied upon to justify the order has arisen in the ventilation of issues upon which that party has failed at trial.

21 Dealing specifically with the matters referred to by the appellant in [12] above, we are not satisfied on the evidence that the matters in (a), (c) and (f) would justify the grant of a special costs order when it would appear that much of the complexity and extent of the medical evidence appears to have arisen in relation to issues on which the appellant did not succeed.

22 In relation to the matter in (b) of [12] above, the question was essentially whether the respondent had exposed the appellant to an unnecessary risk of injury. The judge found that it had, in that the respondent had failed to instruct the appellant not to climb onto the A-frame of the trailer attached to the 'ute' for the purpose of ascending into or descending from the tray of the 'ute' when stationary [88] - [94]. The matter does not appear to us to have been one of unusual difficulty or complexity in terms of liability.

23 Although, particularly as it emerged on appeal, the matter raised some significant points concerning the interaction between mitigation (on which the defendant/respondent bore the onus) and proof of damage (on which the plaintiff/appellant bore the onus), overall its importance in that regard is not sufficient to warrant a special costs order in favour of the appellant in the particular circumstances of this case.

24 In relation to the matter in (d) of [12] above, it may be accepted that the respondent's discovery was unsatisfactory insofar as certain categories of documents sought by the appellant did not emerge until very late in the litigation. Nevertheless, we are not persuaded that these deficiencies in giving discovery are sufficient, on their own or with any other factors relied on by the appellant, to indicate that the 120 hours allowed for getting up in the 2010 determination is 'inadequate' for the purposes of s 280(2) of the 2008 Act.

25 In relation to (e) of [12] above, the judge observed that the amount of time occupied by the claim of contributory negligence was relatively minimal: primary supplementary reasons [18]. In a slip case it is not unusual for a plaintiff to have to address the allegation that he or she was partly responsible for the fall. Nor does the appellant's evidence allow any real view to be formed that 'substantial extra work' was undertaken with respect to the allegation of contributory negligence. Overall, we are not satisfied that this matter would justify a special costs order in favour of the appellant.

26 As to the matters in (g) and (h) of [12] above, the trial does seem to have taken a very long time. However, as indicated earlier, much of the time involved, and the complexity of the matter, appears to have arisen in relation to a number of issues on which the appellant did not succeed. Further, we would not regard the amount which the respondent had claimed in relation to getting up as of any real relevance to the appellant's claim for special costs orders. The getting up undertaken by the

respondent covered a variety of matters which the appellant had raised at the trial, and upon which the appellant had failed.

27 Also, in relation to (h) of [12] above, it appears from the evidence of the appellant's solicitor that there were two further occasions on which the matter came before the primary judge after his Honour had delivered his reasons for judgment. One was on 8 June 2012 and the other was on 13 August 2012. The first occasion involved an application by the appellant under the 'slip rule' to correct certain matters arising from his Honour's reasons for judgment. The appellant was largely, but not wholly, successful in that application. However, we would not see that application as 'getting up for trial' within the meaning of item 17 of the 2010 determination. The other occasion, on 13 August 2012, involved an application for costs and ancillary matters. Again, we would not see those matters as 'getting up for trial' within the meaning of item 17. In any event, the appellant was awarded costs in relation to those matters: primary supplementary reasons [36]. That order for costs has not been disturbed. Nor are we satisfied that the subject matters of either application point to the inadequacy of the limit in item 17 in the particular circumstances of this case.

28 Accordingly, we would not make a special costs order in relation to item 17 of the 2010 determination.

29 Item 20(b) of the 2010 determination provides for a fee on brief for senior counsel of $27,225. That sum is based on 3.5 days' preparation and the first day of trial. We are not persuaded that the relevant scale is inadequate having regard to the factual and legal nature of the case. Also, even if the scale were thought to be inadequate in light of the complexity of the medical evidence, for the reasons given earlier we are not persuaded that in the particular circumstances of this case that consideration would lead to the grant of a special costs order.

30 In relation to the taxation proceedings on 28 November 2012, it appears that the respondent does not take issue with this part of the appellant's application. We are satisfied that the appellant should have the costs sought in that regard.

Costs of the appeal

31 In relation to item 23(b) (appellant's case), the appellant submits that the scale limit is $24,200 and her actual costs were $26,711.10 in relation to that item. In relation to item 23(g) (counsel's fee on hearing including preparation), the appellant's actual costs total $19,250, whereas the

amount allowed under the scale is $10,890. The scale amount for item 23(g) is based on two days preparation and a day hearing.

32 We have considered carefully the appellant's evidence and submissions in relation to the scope of the work done in relation to the appeal. Nevertheless, we are of the view that having regard to the limited issues in the appeal, the scale limits are not inadequate in this particular case. We would not grant the appellant the special costs orders sought in relation to the appeal.

Conclusion

33 It is apparent that the appellant has largely failed in her application for special costs orders. The appropriate orders are as follows:

1. In relation to order 4 of the orders made by this court on 17 February 2014, the costs of the action below payable by the respondent include the reasonable costs of preparation for and attendance at the taxation and settlement negotiations relating to the parties' costs on 28 November 2012.

2. The appellant's application for special costs orders dated 28 April 2014 otherwise is and be dismissed.

3. The appellant do pay the respondent 90% of the respondent's costs of the appellant's application for special costs orders dated 28 April 2014, such costs to be taxed if not agreed.