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Griffith C.J.

stances, supposing that we have jurisdiction to review the refusal of the County Court Judge to enlarge the time, I think we ought to have regard to the apparent facts of the case, and that, if the appellant would have only a problematical and infinitesimal hope of success in the event of a new trial, we ought in mercy to the parties to refuse to enlarge the time. For myself, I doubt whether a verdict for the appellant could have stood. I can see no ground, therefore, for reviewing the discretion of the Judge of the County Court, if we have power to do so. I think the appeal should be dismissed.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion.

Appeal dismissed with costs.

Solicitors, for the appellant, *Murphy & Connolly.*
Solicitors, for the respondents, *Madden & Butler.*

B. L.

[HIGH COURT OF AUSTRALIA.]

O'SULLIVAN . . . . . APPELLANT;
PLAINTIFF,

AND

MORTON . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1911.

MELBOURNE, *June* 15.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Appeal from Supreme Court of State—Appeal as to costs only—Special leave—Trial by jury—Action for several causes of action—Plaintiff succeeding on some and failing on others — Costs of issues —Rules of the Supreme Court of Victoria 1906, *Order LXV., r.* 1.

An action for damages amounting to £4,500, in which several causes of action were joined, was tried before a jury who, after a hearing of 17 days, found for the plaintiff on one of the causes of action with £200 damages, and for the defendant on the others. The Supreme Court ordered that the plaintiff should recover nothing in respect of the issues on which the defendant succeeded, and that the defendant should recover the taxed costs of those issues; that the plaintiff should recover the £200 damages, and the taxed costs of the issue on which those damages were awarded; that the damages and costs awarded to the plaintiff should be set off against the costs awarded to the defendant; that the costs of each issue should be taxed as nearly as possible as if each issue had been the subject matter of a separate action; and that costs which were common to issues on which the plaintiff and defendant had succeeded should be apportioned rateably between such issues. On an application for special leave to appeal to the High Court,

Held, that as the question of costs was one of discretion, the amount involved was not substantial, and the order made was manifestly just, leave to appeal should be refused.

Special leave to appeal from the Supreme Court: *O'Sullivan* v. *Morton*, (1911) V.L.R., 249; 32 A.L.T., 198, refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Edward Francis O'Sullivan, a medical practitioner, against David Murray Morton, also a medical practitioner, to recover damages amounting to £4,500 in respect of false and fraudulent representations alleged to have been made by the defendant whereby the plaintiff was induced to enter into an agreement to purchase from the defendant a medical practice, and also in respect of alleged breaches by the defendant of certain covenants in the agreement. The action was tried before *à Beckett* J. and a jury, and the hearing occupied seventeen days. The jury found for the defendant in respect of the representations and all the alleged breaches of covenant except one, and for the plaintiff in respect of that one breach of covenant, as to which they awarded the plaintiff £200 damages.

An application was made to *à Beckett* J. on behalf of the defendant for a special order as to costs under Order LXV., r. 1, of the *Rules of the Supreme Court* 1906. The learned Judge, however, stated that, while desiring to enter judgment for the plaintiff on the branch of the action on which he succeeded, and

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for the defendant on those branches on which he succeeded, the fact that he thought it would be fairer to exclude the general rule as to costs than to apply it did not, in his opinion, constitute "good cause" for making a special order as to costs. He therefore ordered that judgment should be entered for the plaintiff for £200 with costs of action to be taxed, except the costs of the issues on which the defendant succeeded, which latter costs should be taxed and paid by the plaintiff to the defendant, and that, when the costs respectively payable by the defendant to the plaintiff and by the plaintiff to the defendant were so taxed, one set of costs should be set off against the other so as to ascertain by whom the balance should be paid.

From this decision as to costs the defendant appealed to the Full Court, which ordered that the plaintiff should recover nothing against the defendant in respect of the issues on which the defendant succeeded, and that the defendant should recover against the plaintiff the costs of those issues, such costs to be taxed; that the plaintiff should recover against the defendant £200 in respect of the issue upon which he succeeded and the costs of such issue, such costs to be taxed; that the £200 and the costs taxed to the plaintiff should be set off against the costs taxed to the defendant; and that the costs of each issue should be taxed as nearly as possible as if such issue had been the subject matter of a separate action, and that such costs as should be common to issues on which the plaintiff and the defendant had succeeded should be apportioned by the taxing master rateably between such issues: *O'Sullivan* v. *Morton* (1).

Application was now made on behalf of the plaintiff for special leave to appeal to the High Court against this decision.

Bryant (with him *Cohen*), for the appellant. The order made by *à Beckett* J. as to the costs is the proper one. Under it the general costs of the action would go to the plaintiff: *Myers* v. *Defries* (2); *Jones* v. *Curling* (3). There was no "good cause" which would justify the making a special order as to costs under Order LXV., r. 1 of the *Rules of the Supreme Court* 1906. The

(1) (1911) V.L.R., 249; 32 A.L.T., 198. (2) 5 Ex. D., 15, 580.
(3) 13 Q.B.D., 262, at p. 270.

order made by the Full Court is a violent departure from the order hitherto made in such a case and it will be followed as a precedent. The difference between the amount of costs which the plaintiff would recover under the order of *à Beckett* J. and that which he would recover under the order of the Full Court is substantial.

The judgment of the Court was delivered by—

GRIFFITH C.J. It is not the practice of the Judicial Committee of the Privy Council to grant leave to appeal as to costs. It is said in the books that that is only done when the Court below has no jurisdiction. In any case it is a matter of discretion, and, as I at present interpret the two orders, the difference between them will in the result only come to some £50. So that the matter in dispute is not substantial.

If, on the other hand, there is a substantial matter in dispute, as contended for by Mr. *Bryant*, then another aspect of the case presents itself. *à Beckett* J. made what he thought a just order and what undoubtedly would have been a just order, but he thought that he could not do so. The Full Court, however, thought that he could. Under these circumstances, the order made by the Full Court being manifestly just, I think it would be very unusual to grant special leave to appeal unless for something more than a mere technical error. Special leave to appeal will therefore be refused.

Special leave to appeal refused.

Solicitor, for the appellant, *A. J. Mollison.*

B. L.