[HIGH COURT OF AUSTRALIA.]

HALLY . . . . . APPLICANT;
DEFENDANT,

AND

DENNIS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1955.

BRISBANE, *Aug.* 2, 3.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

High Court—Special leave to appeal—From order imposing costs on successful defendant—Order based upon determination of question of fact and introducing a discretion—Costs Act of 1867 (*Q.*).

A client's summons against a solicitor for delivery of a bill of costs and delivery up of the client's documents on payment of the amount found due on taxation was dismissed by the Supreme Court but an order was made that the solicitor should pay the client's costs of the proceedings.

Held that prima facie such an order infringed the rule that a successful defendant or party in that position ought not to be ordered to pay the unsuccessful party's costs of the proceedings but that if the fact was, as alleged, that the solicitor succeeded in the proceedings only by abandoning at the hearing a claim to charge disbursements, that might be enough to take the case out of the rule. The Court refused special leave to appeal on the issue whether this was so.

Special leave from the decision of the Supreme Court of Queensland (Full Court) *Re Hally*; *Ex parte Dennis* (1955) Q.S.R. 451, refused.

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

This was an application by Thomas Joseph Hally, a solicitor, for special leave to appeal from so much of the order of the Full Court of the Supreme Court of Queensland (1) as awarded to the plaintiff, Irene Mary Dennis her costs of the original proceedings before the primary judge though the decision of that judge in favour of the plaintiff was reversed by the Full Court.

The facts sufficiently appear in the judgment of the Court hereunder.

(1) (1955) Q.S.R. 451.

H. C. OF A. 1955. HALLY v. DENNIS.

M. F. Loxton Q.C. (with him *T. R. Morling*), for the applicant. The appeal is on the question of costs. Such an appeal does not lie to this Court without special leave: *Glen* v. *Union Trustee Co. of Australia Ltd.* (1). The granting of such leave requires extreme circumstances: *Jenkins* v. *Lanfranchi* (2). This Court has held that a failure to give effect to a settled rule of practice is a circumstance warranting the granting of special leave: *Glen* v. *Union Trustee Co. of Australia Ltd.* (1). In this case the Court will not be asked to review the exercise of discretion but to hold that in law no discretion existed. It is submitted this is a stronger case than *Glen's Case* (1). The order appealed from is not irregular but unlawful, and this is a more important matter than the erroneous exercise of a lawful power: *O'Sullivan* v. *Morton* (3). The order appealed from is made under O. XCI., r. 1. This order gives to the court a discretion as to costs. It governs the mode of exercising the statutory power to order costs. It does not extend that power where none had previously existed. The Supreme Court has upheld the appellant's contention that the judge of first instance had no jurisdiction. The appellant is thereby made a wholly successful defendant. The applicant on the summons had no title to bring him before the court and the court had therefore no basis on which to rest its statutory power by ordering him to pay the applicant's costs: *Re Foster* v. *Great Western Railway Co.* (4). The order can only stand if it can be based on the inherent power of the court to discipline its officers. No such case is made out. [He was stopped by the Court.]

W. J. Cuthbert, for the respondent. The correct interpretation of the judgment of the majority in the Full Court is that the applicant abandoned his claim for professional disbursements at the hearing before the learned primary judge. In such event the learned primary judge had jurisdiction up till abandonment by the applicant and could award costs against him. If this interpretation is wrong and *Sheehy* J. never had jurisdiction at any stage then the applicant subjected himself to costs by his conduct: *Dufaur* v. *Sigel* (5). In any event the proper inference from the evidence before *Sheehy* J. is that the applicant abandoned his claim for professional disbursements at the hearing before *Sheehy* J. and if special leave is granted it will be submitted that this Court should so hold: *Rules of Court*, O. LXX, r. 13 (3). [He referred to the

(1) (1935) 54 C.L.R. 463.
(2) (1910) 10 C.L.R. 595.
(3) (1911) 12 C.L.R. 390, at p. 393.
(4) (1882) 8 Q.B.D. 515.
(5) (1853) De G. M. & G. 520 [43 E.R. 610].

following cases: *King* v. *Kirkpatrick* (1); *O'Sullivan* v. *Morton* (2); *Ogier* v. *Booth* (3).]

M. F. Loxton Q.C., in reply. The facts of this case distinguish it from *In re Landor* (4). The Supreme Court found upon the facts there was no jurisdiction. The applicant's attitude has been consistent throughout. The appeal is on a matter of substance not form. The applicant was not heard upon the matters relied upon by the majority of the Supreme Court as the basis of their order as to costs.

The judgment of the Court was delivered by DIXON C.J.:—

This is an application for special leave to appeal from so much of an order made by the Full Court of the Supreme Court of Queensland (5) on appeal as dealt with the costs of the proceedings before the primary judge. The Full Court awarded the costs to the applicant in those proceedings notwithstanding that the applicant failed. The application was by way of summons under the *Costs Act of* 1867 by a client against a solicitor for the delivery of a bill of costs and the delivery up of documents on payment of what was found on taxation to be due under such bill of costs. At the hearing of the summons the solicitor made it clear that he did not claim any professional costs against his client and in the end that he did not claim any disbursements. The learned primary judge, notwithstanding the solicitor's disclaimer, made an order in the terms of the summons. The Full Court, on appeal, discharged that order on the ground that once it appeared that no claim was made by the solicitor for professional costs or disbursements made in his professional character the order ought not to have been made or, as the Full Court expressed it, that there was not jurisdiction to make it. In allowing the appeal and discharging the order the Full Court nevertheless directed that the client should recover against the solicitor her costs of and occasioned by the order of the learned judge. The application for special leave to appeal is made against that part of the order. It is in that manner that it was opened and we think that it must be confined to that question.

We heard a full discussion in support of the application because we thought as the application was opened that the order of the Full Court infringed the rule which I shall read from the judgment of *Swift* J. delivered on behalf of himself and *Macnaghten* J. in *London Welsh Estates Ltd.* v. *Phillip* (6): "There is no power in the court

(1) (1917) 22 C.L.R. 552.
(2) (1911) 12 C.L.R. 390.
(3) (1883) 9 V.L.R. 160.
(4) (1899) 1 Ch. 818.
(5) (1955) Q.S.R. 451.
(6) (1931) 144 L.T. 643.

H. C. OF A. 1955.

HALLY v. DENNIS.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

to make a successful defendant pay the costs of an unsuccessful plaintiff. The reason is obvious: it is the plaintiff who brings the defendant into court. The authority of the proposition, I have stated, is to be found in the judgment of *Brett* L.J., in the case of *Re Foster* v. *Great Western Railway Co.* (1)" (2). To that decision may be added the authority of *Dicks* v. *Yates* (3).

The discussion of the present case showed that there was a real question of fact as to the stage at which it was made clear by the solicitor that he made no claim, at all events, to disbursements. We have gone through, with the aid of counsel, the passages in the transcript which show how the question developed. We think we ought not to grant special leave on such a matter of fact. The importance of that matter of fact is this: if the sole ground for holding that an order under the *Costs Act of* 1867 ought not to have been made was that at the hearing of the summons the solicitor disclaimed the intention to charge, then it might have been open to the learned judge at that hearing to require him to pay the costs of the summons. It would be otherwise if antecedently there was no retainer or employment at all for remuneration and no liability in the client to repay disbursements. But if it rested on the solicitor's disclaimer or abandonment during the proceedings and on nothing more, then it might have been competent to dismiss the summons on payment of costs. There is in the material which we have examined a great deal of room for the view that it was not until a very late stage in the proceedings that a complete abandonment was made of an intention to make any charge in any circumstances and for the view that it was only then that nothing remained that would justify the judge's order which was discharged in the Full Court. The learned judges in the Full Court exercised their discretion in the manner which we have stated on their view of the various steps which the solicitor had taken or omitted. We do not think that it would be right to grant special leave to review either against the determination of the question of fact or the exercise of that discretion.

I need not refer to the principles upon which we exercise the power to grant special leave. It is, of course, well known that special leave is not readily granted to review any order in relation to costs, let alone one which depends in any way upon discretion.

But there is one matter to which their Honours referred in exercising their discretion which we think should be mentioned. In the judgment of *Matthews* and *Townley* JJ. there is a reference to

(1) (1882) 8 Q.B.D. 515.
(2) (1931) 144 L.T., at p. 644.
(3) (1881) 18 Ch. D. 76.

the affidavit made on 24th May 1954 to the effect that it appears to be deliberately phrased to hide the true position. An examination of the affidavit leaves us with a strong impression that that statement has no sufficient justification and that the affidavit does not bear that complexion. But, putting that matter aside, there was ample material in the failure to answer letters and otherwise for the exercise of a discretion and in any case we would not grant special leave to examine such a question.

On a review of the whole circumstances of the case we think that the case is not one in which we should grant special leave, notwithstanding the prima-facie impression which led us to allow a very full argument of the matter.

Special leave should therefore be refused.

Special leave to appeal refused.

Solicitor for the applicant, *Thomas J. Hally*, Rockhampton, by *Newman & Co.*, Brisbane.

Solicitors for the respondent, *Daniel P. Carey & Co.*, Rockhampton, by *Henderson & Lahey*, Brisbane.

J. M. M.