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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP5 of 1994

BETWEEN:

MANGALA KHADPEKAR
Appellant

AND:

DARWIN BUSINESS MACHINES PTY LTD
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 8 February 1995)

The application

By summons of 17 January 1995 supplemented orally on 27 January 1995, the respondent applied under r84.13(1) and s52(2)(b) of the Supreme Court Act for orders:

- (1) that this Appeal be dismissed for want of prosecution, by the appellant's failure to serve the respondent with a copy of the Appeal Book within the time allowed; and
- (2) that the appellant pay the respondent's costs of this application, assessed on the basis of a contested application.

I ruled on 27 January 1995 that the application for relief sought at paragraph (1) above be dismissed. I reserved on the question of costs and now rule on that aspect.

The background to the application of 17 January

By Notice of Appeal dated 8 April 1994 the appellant appealed against a decision by Gray AJ on 11 March 1994, on 6 grounds. For the purposes of this ruling it is unnecessary to set out the background to the decision or the details of the appeal therefrom. A notice fixing 3 May 1994 at 10.30am as the time at which the parties were to attend before the Registrar to settle the Appeal papers was subscribed to the Notice of Appeal, pursuant to r84.03(3).

On 19 April 1994 the respondent by its solicitors filed a Notice of Appearance.

The parties duly appeared before the Registrar on 3 May 1994. It is clear that the appellant had not complied with r84.07, by filing and serving prior to 3 May a draft index of the papers to be used in the Appeal. The Registrar's note of the outcome is headed "Appeal Index", does not indicate whether the appellant was then ordered to comply with r84.07.

A second appointment was however fixed for 7 June 1994 at 10.45am. The Registrar's note of its outcome states that it was "adjourned to 11.00am on 17 June 1994 for settling [the] Appeal Index if [this] matter is to proceed".

A draft index to the Appeal papers was filed on 16 June 1994; the index was finally settled and filed on 27 June.

It seems that the third appointment before the Registrar in fact took place on 15 June. It was adjourned until 31 August, by consent. On 31 August the Registrar was informed by the appellant, as on 7 June, that the appeal might not proceed.

The fourth appointment took place on 27 October. It will be recalled that the index had been settled four months before, on 27 June. Inter alia, r84.08 provides that when the index is settled, the Registrar may determine when the Appeal Book is to be filed and served and, "if practicable", fix the date on which the appeal is to be heard. On 27 October the Registrar ordered that the "appellant [is] to lodge [the] Appeal Books by 15 December 1994"; the appeal was fixed for hearing on 27 February 1995 at 10.00am. The appeal failed to file the Appeal Book by 15 December; this led to the respondent's application of 17 January 1995.

The fifth appointment took place on 27 January 1995; the Appeal Book was filed on that date at 2.45pm.

I note at this point that:

- (1) At all of the above appointments before the Registrar, except 15 June 1994, Mr Cameron Stuart the solicitor for the appellant was present; and

(2) Unfortunately, due to the unavailability of judges, the date fixed for hearing (27 February 1995) had to be vacated; the parties were advised of this situation by letter from the Court dated 23 January 1995.

The hearings in January 1995

Against this background the respondent's application of 17 January 1995 came on for hearing before me on 19 January 1995. On that occasion, the parties by consent requested that:-

- (1) the hearing of the application be adjourned until 3.30pm on 27 January 1995; and
- (2) I note -
 - (a) the intimation by counsel for the appellant that if the appellant failed to file and serve the Appeal Book on the respondent before 27 January, he could not oppose an application by the respondent for the making of a self-executing order; and
 - (b) the costs of the hearing of 19 January were to be costs on the making of an order.

The hearing resumed before me on the adjourned date, 27 January 1995. I was informed that the Appeal Book had been served that day on the respondent.

(a) The respondent's submissions

The respondent, in essence, made two submissions. First, if the appellant consented to paying the respondent's costs of and incidental to its application of 17 January on the basis that it was a contested application (pursuant to Items 3 & 9 of Part 1 of the Appendix to O.63 of the Rules), the respondent would not press for the relief set out in par (1) on p1. Second, and in the alternative, if the appellant did not consent to paying costs on that "contested" basis, the respondent would press for the relief set out in pars (1) and (2) on p1. In support, Mr Lee of counsel for the respondent relied on his own affidavit of 17 January 1995.

(b) The appellant's submissions

Initially, the appellant opposed the application for the relief sought on p1, on two bases. First, due to the "amorphous nature" of the order of the Registrar on 27 October 1994 (see later, p8), and the effect of r3.04(1) on computation of time in the intervening Vacation period, the appellant was "scarcely out of time" in filing and serving the Appeal Book. Mr Stuart submitted as a "primary argument" that -

"... in those circumstances I'd respectfully ask you to exercise your discretion and to either reduce the costs to nothing, or alternatively to reduce them to a figure appropriate to reflect the circumstances of the particular matter."

Second, and in the alternative, he submitted that "at the very worst your Honour should order costs on the uncontested

scale". It was submitted that if the court had regard to the background to the application of 17 January it would conclude that "this matter has never been contested in any particular and in any way".

However, since the appellant refused to agree to pay costs on the contested basis, and the respondent accordingly pressed for the relief set out in par (1) on p1 as well as par (2) of the summons, Mr Stuart changed his stance: he submitted that if the appellant were successful in resisting the application for the relief sought in par (1) on p1, costs should follow that event; or, alternatively, there should be no order as to costs.

In support of these submissions, Mr Stuart submitted that the events prior to 27 October 1994 before the Registrar were not relevant to the present issue, which was really one of costs.

Rather, the only matters which were presently relevant and to which the court should confine its attention, were the hearing by the Registrar on 27 October 1994 and the events that occurred thereafter.

(c) In reply

Mr Lee relied on the contents of Annexures "A" and "B" and paragraphs 4 and 5 of his own affidavit to support his submissions directed at obtaining the relief sought in pars (1) and (2) on p1. In particular, he submitted that the appellant's failure to serve the respondent with the Appeal

Book by 15 December 1994, as ordered by the Registrar on 27 October, put the respondent -

"... in a very undesirable position [as to] properly defending our client's position because our counsel would not have enough time to read [it]".

Conclusion

I consider that it is relevant to the question of costs to have regard to all the events which occurred between the filing of the Notice of Appeal on 8 April 1994 and the hearing on 27 January 1995. I reject Mr Stuart's submission that events prior to 27 October 1994 are not relevant to that question. To the contrary: the previous events shed light on the reason why the respondent brought its application of 17 January 1995. However, I accept that the events of 27 October 1994 and the events thereafter are the matters of primary concern in resolving the costs dispute.

In my opinion, the events leading up to 27 October 1994 (see pp2-4) show quite clearly that the appellant did not move with due expedition in either settling the index to the Appeal Book, or in pursuing her Appeal. The index was not settled and filed until 16 June. As at 31 August, 2½ months later, the appellant was still indicating that she might not proceed with the Appeal. This position of uncertainty persisted until 27 October 1994, 6½ months after filing the Notice of Appeal.

The Appeal Book was in fact lodged on 27 January 1995, 43 days later than the date ordered by the Registrar, and some 27 days

late even if account is taken of the 16 days "time out" pursuant to r3.04(1) of the Rules, though that "time out" did not apply in the circumstances. And this was notwithstanding the fact that on 27 October 1994 the parties had been informed that the appeal had been set down for hearing on 27 February 1995. The parties were not informed by the Court until 23 January 1995 that the hearing date of 27 February had been vacated.

Further, the contents of the respondent's letters of 14 December 1994 and of 6 January 1995 (annexures "A" and "B" to Mr Lee's affidavit), to which there was no acknowledgment or response by the appellant, clearly indicated Mr Lee's legitimate concern that the presentation of the respondent's case on the Appeal would be prejudiced by the non-compliance by the appellant with the Registrar's order of 27 October 1994.

I should say that Mr Stuart was misled by a mis-statement in Mr Lee's affidavit, into submitting (p5) that the Registrar's order of 27 October 1994 was "amorphous in nature". Mr Lee wrongly deposed in par (3) of his affidavit that the Registrar ordered that the Appeal Book be served by "the middle of December 1994"; in fact, the order was that it be served by 15 December 1994.

In the light of the foregoing, I consider that it was understandable, appropriate and wholly proper for the

respondent to make its application of 17 January 1995. At that stage, there was less than 6 weeks until the appeal was to be heard, and the respondent had not received the Appeal Book it was entitled to have received nearly 5 weeks before. The appellant brought that application upon herself by her non-compliance with the Registrar's order of 27 October, and the failure to respond to Mr Lee's letters of 14 December and 6 January.

It is also clear from the recital of events that although I refused the respondent's application for the relief set out in par (1) on p1, in this case the circumstances are such as to allow the court to depart from the settled practice that costs generally follow the event: see *Ritter v Godfrey* (1920) 2 KB 47 at pp52 and 60. Costs are in the discretion of the court; see r63.03(1). In my opinion, the conduct of the appellant both prior to, and, more importantly, after 27 October 1994, particularly the failure to file the Appeal Book until 27 January 1995, is such that in the interests of justice and notwithstanding r63.18, the appellant should pay the respondent's costs of and incidental to the application of 17 January 1995, pursuant to r63.03(1) of the Rules.

I turn to the question whether those costs should be awarded on a contested or an uncontested basis. It is clear that this matter was really all that was in dispute between the parties - it involves a relatively insignificant amount - when the application of 17 January came on before me on 27 January.

Mr Stuart was clearly quite prepared from the outset to pay the respondent's costs, on an uncontested basis. By 27 January the parties were aware that the Appeal would not be heard on 27 February. The respondent therefore no longer had any real case to obtain the relief sought in par (1) on p1, since the appellant had filed the Appeal Book on 27 January, albeit very late. There was no meaningful substantive matter in contest and while the respondent was clearly entitled to its costs, in my view they could properly be awarded only on an uncontested basis. Considerable heat was engendered on 27 January, and time of the court wasted, on a costs matter which should never have been put in issue, and for that the respondent must bear prime responsibility.

In the result, I order pursuant to r63.07(c) that the appellant pay the respondent's costs of the application of 17 January 1995 which I fix at \$524, that being the amount of costs as per the current Composite Scale in the Appendix to Order 63 for an uncontested application; I also order that the respondent pay the appellant's costs of part of the hearing on 17 January 1995, which I assess at \$250, to take account of time wasted. In the result, the appellant must pay the respondent the balance, \$274.

Order accordingly.