

CITATION: *Sherrington v Fleming & Anor*
[2024] NTSC 18

PARTIES: SHERRINGTON, Jennifer

v

FLEMING, Kenneth

and

NORTHERN TERRITORY OF
AUSTRALIA

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2021-03792-SC

DELIVERED: 26 March 2024

HEARING DATE: 19 February 2024

JUDGMENT OF: Burns J

Independent Commissioner Against Corruption Act 2017 (NT) s 155(4)
Supreme Court Rules 1987 (NT) r 63(9)

Sherrington v Independent Commissioner Against Corruption & Ors [2022]
NTSC 67; *Sherrington v Independent Commissioner Against Corruption &
Ors* [2023] NTCA 11, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	B Piper
Defendants:	L Spargo-Peattie

Solicitors:

Plaintiff:	Piper Grimster Jones Lawyers
Defendants:	Hutton McCarthy

Judgment category classification:	C
Judgment ID Number:	Bur2406
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sherrington v Fleming & Anor [2024] NTSC 18
No. 2021-03792-SC

BETWEEN:

JENNIFER SHERRINGTON
Plaintiff

AND:

KENNETH FLEMING
First Defendant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Second Defendant

CORAM: BURNS J

REASONS FOR DECISION

(Delivered 26 March 2024)

- [1] On 9 September 2022, I refused an application by the plaintiff for leave under s 155(4) of the *Independent Commissioner Against Corruption Act 2017* (NT) for her to bring civil proceedings against the first defendant, the former holder of the office of Independent Commissioner Against

Corruption, alleging that he had acted in bad faith in his official capacity in that office.¹

[2] That decision was upheld on appeal.²

[3] The defendants' now apply for an order that the plaintiff pay their costs of the unsuccessful application for leave. They also seek an order, if their application for costs is successful, under r 63(9)(b) of the *Supreme Court Rules 1987* (NT) ('the Rules') that the Court certify that two counsel were warranted on the application for leave.

[4] The plaintiff opposes the application for costs, but in the event that costs are ordered, she does not oppose the certification for two counsel.

[5] The starting point is r 63.18 of the *Rules* which provides that costs of an interlocutory or other application in a proceeding are to be costs in the proceeding unless the Court otherwise orders. The parties agree that the application for leave was an application to which r 63.18 applies. The effect of this Rule is that the party who succeeds on the proceeding brought by the plaintiff will be entitled to the costs of the application for leave unless the Court makes a different order at that time.

[6] The defendants submitted that the default position found in r 63.18 has two broad purposes, neither of which are applicable to the present proceeding. The first purpose, the defendants' submitted, is that interlocutory

¹ *Sherrington v Independent Commissioner Against Corruption & Ors* [2022] NTSC 67.

² *Sherrington v Independent Commissioner Against Corruption & Ors* [2023] NTCA 11.

applications usually do not conclude the proceedings so that a court is often not in a position at that stage of the proceedings to determine where the justice lies between the parties for the purpose of making a costs order.

- [7] The second broad purpose of r 63.18, the defendants submitted, is that it may be expected that throughout the course of civil litigation, parties will engage in minor interlocutory applications, some of which they may win and some of which they may lose. The costs of those applications are likely to be relatively small, and it is more efficient to deal with the issue of costs at the end of the proceeding. This has the added benefit of encouraging the parties to agree on interlocutory issues.
- [8] The plaintiff opposed the defendants' application for costs on the basis that the application for leave was reasonably brought. In the alternative, the plaintiff submitted that the defendants' application for costs should not be granted at this time because:
- a) there is an application for special leave to appeal from the decision of the Court of Appeal pending in the High Court; and
 - b) material may emerge during the hearing of the plaintiff's remaining claim that will put the Court in a better position to determine the justice of any costs order in the application for leave.

[9] I am satisfied that it was not reasonable for the plaintiff to have brought the application for leave against the second defendant. The material upon which the plaintiff relied required a process of speculation to be engaged in before it could found any case of bad faith against the second defendant. The material simply could not support a determination that there were substantial reasons for believing that the second defendant acted in bad faith in the manner alleged by the plaintiff. In addition, the application for leave was based on a misunderstanding of the test to be applied.³ The application for leave also incorrectly asserted that “bad faith” could be established on an objective basis.

[10] The application for leave brought by the plaintiff differed substantially from most interlocutory applications. This was a substantial application which effectively brought an end to a part of the plaintiff’s case. I accept the defendants’ submission that the ultimate result of the plaintiff’s litigation will not change the merits of the application for leave advanced by the plaintiff. The same may be said regarding the unlikely proposition that facts may emerge during the hearing of the remainder of the plaintiff’s case that may bear upon the justice of the costs claim. That is simply speculative.

[11] The fact that the decision of the Court of Appeal is subject to an application for leave to appeal in the High Court is not a good reason to delay consideration of making a costs order as sought by the defendants. If the

³ See [82] of my original decision.

plaintiff were to succeed in the High Court (or in the Court of Appeal on any remitter from the High Court), the appropriateness of a costs order in favour of the defendants could be addressed at that time.

[12] I am satisfied that there are good reasons to depart from the usual course found in r 63.18. The plaintiff was wholly unsuccessful in her application for leave; it was a substantial application, the refusal of which brought an end to a part of the plaintiff's case; and it would be unjust to simply leave the costs of the application for leave to follow the event of the outcome of the remainder of the plaintiff's litigation. I note that the defendants accept that any costs order I make cannot be assessed by taxation or enforced until the conclusion of the plaintiff's litigation.

[13] The formal orders I make are:

1. The plaintiff pay the defendants' costs of and incidental to the plaintiff's application for leave pursuant to s 155(4) of the *Independent Commissioner Against Corruption Act 2017* (NT), to be taxed if not agreed.
2. Pursuant to r 63.72(9) of the *Supreme Court Rules 1987* (NT), that application be certified fit for two counsel.
