

CITATION: *Diah (NT) Pty Ltd as Trustee for the Airport Hotel Trust v Darwin International Airport Pty Ltd (Costs)* [2024] NTSC 54

PARTIES: DIAH (NT) PTY LTD AS TRUSTEE  
FOR THE AIRPORT HOTEL TRUST

v

DARWIN INTERNATIONAL AIRPORT  
PTY LTD

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 2021-02785-SC

DELIVERED: 21 June 2024

HEARING DATES: 20 May 2024

JUDGMENT OF: Blokland J

**CATCHWORDS:**

COSTS – costs of appeal – costs of proceedings appealed from – costs of interlocutory proceedings which were not the subject of appeal.

Statutes

*Local Court (Civil Procedure) Act 1989*, s 19(6).

*Supreme Court Rules 1987 (NT)*, rule 63.03.

**REPRESENTATION:**

*Counsel:*

Appellant: A Harris KC/ D Lorbeer  
Respondent: T Silvester

*Solicitors:*

Appellant: HWL Ebsworth Lawyers  
Respondent: Mills Oakley

Judgment category classification: C  
Judgment ID Number: BLO2408  
Number of pages: 9

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Diah (NT) Pty Ltd as Trustee for the  
Airport Hotel Trust v Darwin International Airport  
Pty Ltd (Costs) [2024] NTSC 54  
No. 2021-02785-SC*

BETWEEN:

**DIAH (NT) PTY LTD AS TRUSTEE  
FOR THE AIRPORT HOTEL TRUST**  
Appellant

AND:

**DARWIN INTERNATIONAL  
AIRPORT PTY LTD**  
Respondent

CORAM: BLOKLAND J

### **Decision on Costs**

(Delivered 21 June 2024)

### **Background**

- [1] The appellant was successful on appeal from the Local Court.<sup>1</sup> Upon the appellant being successful on two grounds relevant to the fairness of the proceedings, I reviewed the material before the Local Court, found for the appellant and made orders on that basis, rather than remitting the matter to

---

<sup>1</sup> *Diah (NT) Pty Ltd as Trustee for the Airport Hotel Trust v Darwin International Airport Pty Ltd* [2023] NTSC 19.

the Local Court.<sup>2</sup> Before the hearing of the appeal the appellant had vacated the premises which was the subject of the litigation.

[2] The decision of this Court has been appealed to the Court of Appeal.

Nevertheless, the issue of costs should be resolved as far as is reasonable and can be adjusted accordingly if the appeal is successful.

[3] Costs are in the discretion of the Court.<sup>3</sup> The discretion must be exercised judicially. While the discretion must be exercised judicially, in the usual course, costs follow the event. In this case the respondent submits the appellant should not be awarded costs of the appeal nor costs of the proceedings successfully appealed from. In terms of the Local Court proceedings, counsel for the respondent submitted either costs should not be awarded to the appellant, or the Local Court costs order amended so that each party bear their own costs.

### **Costs of the appeal**

[4] The respondent argued costs should not follow the event because the underlying event, the subject of the dispute had been determined or resolved by the time the appeal was heard in this Court. The appellant had already vacated the premises before the appeal was heard, consequently, it was argued that the purpose of the appeal was solely for the appellant to secure its costs.

---

<sup>2</sup> *Local Court (Civil Procedure) Act 1989*, s 19(6).

<sup>3</sup> *Supreme Court Rules 1987 (NT)*, rule 63.03.

[5] It was submitted the appellant did not respond appropriately to the respondent's letter of 11 January 2021 terminating the subject lease with two months' notice. There was no counter position put by the appellant which would have advised the respondent of how much further time was required in the context of the appellant's understanding that it would be granted plenty of notice before the termination of the lease. Neither did the appellant respond to the respondent's letter with the notice to quit of 12 February 2021, advising how much further time was required. It was submitted that rather than take a constructive approach, the appellant attacked the timeframes in its response of 24 February 2021, arguing that they were not reasonable. Further, that the appellant, even after more than six months, had written to the respondent on 28 July 2021, offering a walkaway deal on the basis that the respondent's application for possession of the premises was withdrawn. The appellant did not commit to a date on which it would deliver up possession.

[6] Before the substantive hearing in the Local Court the appellant brought an interlocutory application to have the application for possession summarily set aside. That application was dismissed. The respondent submitted the following exchange before the Local Court demonstrated the unreasonable course taken by the appellant before the Local Court:<sup>4</sup>

---

<sup>4</sup> Transcript, Local court, 23-25.

HIS HONOUR:

Accordingly, the costs I order is that, the respondent pay the applicant's costs of and incidental to the interlocutory application of 30 July 2021, fixed at the rate for a contested interlocutory application and certified to counsel. All right, so we'll now, move onto the main game.

MR HARRIS: And before I sit down your Honour: and hopefully I'll not take too much of your Honour's time, but I feel bound to raise this matter. And this touches now on the other affidavit, Ms Maclean; that's the one that annexes the photographs.

HIS HONOUR: Yes, let me just turn to that. I have that in my hands.

MR HARRIS: Now, in light of an observation your Honour made right at the start of this morning - I don't want to take too much time with this - but I think there was an affidavit filed by Mr Baynes last week with some photographs in it. These photographs were taken this morning.

HIS HONOUR: By way of comparison, it'll show that a lot has been done to remove chattels from the - whether the chattels otherwise - -

MR HARRIS: All the transport; all of the buildings have gone.

HIS HONOUR: Yes.

MR HARRIS: What is left is effectively tidying up. There is an issue in relation to some make good obligations of an existing building, but that's a matter that will be dealt with under the terms of the lease. But the matter that I wish to raise now, in light of the failure of our summary dismissal application, is the complete lack of utility of this court's time being taken up to have a merits argument, in relation to something that is really only now about costs. The application for possession ---

HIS HONOUR: Now, I am aware of some of the difficulties which arise when the subject matter of litigation has completely disappeared, and costs are the only issue remaining.

MR HARRIS: Yes.

HIS HONOUR: But we're not quite there are we?

MR HARRIS: Your Honour, that's true and that's why I don't want to take too much time up for this. But one has to actually take a position of practical view of the world. If one looks at what this infrastructure was, how it was described and where we are now, we are measured in a short number of days away from the parties being no longer in a position of requiring an order for possession.

HIS HONOUR: I would have hoped that that state of affairs might have led to a negotiated resolution of these proceedings. The parties have tried?

MR HARRIS: Yes.

HIS HONOUR: And it hasn't and the court remains required I think to exercising control.

MR HARRIS: Your Honour, to assist your Honour, and perhaps because we'll probably be adjourning shortly, I'm happy on an open basis to make it very clear that the applicant is happy to accept a grant of possession and an order for possession delayed for two to three weeks so as to ensure that - - -

HIS HONOUR: Well, I understand. But I presume something along those lines will have been discussed. I don't ask anybody to tell me precisely what's discussed. And I presume that the question of costs might be, the tail might be wagging the dog here.

MR HARRIS: Yes. Hence I rise, your Honour. I mean, barristers don't often appear at the front end of arguments about saving costs. I readily appreciate that but here we are in a situation where these are two large commercial entities. This project is almost demobilised and we are here to have a contested hearing on affidavits about costs.

HIS HONOUR: And I understand that that's almost a correct statement of affairs but it's not absolutely that given that your client still is in possession however vestigially and for however a shorter time.

MR HARRIS: I'm happy to take an open position in court; your Honour, myself which is that a delayed possession order is not something my client would resist as long as it has the ability to argue at some point convenient to your. Honour the question of costs.

HIS HONOUR: Yes, but we can't argue the question of costs effectively in the absence of a ruling on the variation of lease point.

MR HARRIS: Well, with respect that is possible, your Honour. If the parties took up what appears to be an open position - - -

HIS HONOUR: If there were agreed facts before me including that issue of course we can have an argument on costs but we're not in that position. All the other facts might be agreed but that central one will not be.

MR HARRIS: I've been involved in some futile litigation, your Honour, but this one's starting to get right up there into the top ten. ,

HIS HONOUR: Mr Harris, I'm well aware you've done a great deal of mediation in your time and I'm sure that what you say is correct but that's not going to be sufficient.

MR HARRIS: Very well.

- [7] The appellant submits that the appeal was not a cost shifting exercise. Until the hearing of the costs argument, I was unaware that substantive litigation had commenced in this Court. That action may ultimately sound in damages on the basis of loss said to have been incurred by the appellant, connected with being obliged to vacate the subject premises. While I was not aware of financial consequences to the appellant at the time of hearing the appeal, it would be unsurprising if there were not such consequences. The respondent is hard pressed to suggest that the appellant was not entitled to rectify the unjust consequences of being forced to vacate the premises in an

unreasonable timeframe and contrary to what had been agreed, albeit not expressed in the formal lease.

- [8] It must also be noted in the context of a suggestion that the appellant failed to engage in negotiation, that the respondent maintained and continues to maintain that it was entitled to vacant possession in March 2021.
- [9] Overall I am not persuaded the appeal was run solely for cost shifting purposes. Even if the appellant theoretically could or should have consented to an order for possession at some earlier stage, the appellant through counsel made an open offer during the course of the hearing below to the effect that in certain circumstances there would be consent to an order for possession some three weeks after the initial date proposed by the respondent. In as much as futility may be drawn from the above extract of transcript at a point of time in the litigation, an open offer can also be drawn. No response was made to that offer. True it is that the open offer was made after dismissal of the interlocutory proceedings, but that does not reflect on whether the offer was genuine. It was made in open court.
- [10] I do not characterise the bringing of the appeal as mere cost shifting. There were financial consequences which potentially flowed and may be the subject of further relief. The appellant should not be penalised for vindicating its rights after an unfair process as it perceived the lead up to the proceedings and the hearing itself.

[11] There will be a costs order in favour of the appellant for costs of the appeal. Both the appellant and respondent were represented by senior counsel. The costs order will include certification for senior counsel.

### **Costs in the Local Court**

[12] Two costs orders were made in the Local Court.

[13] The first was made on 3 August 2021 when the Court dismissed the appellant's interlocutory application. The second was made on 23 August 2021 after reasons were published following the hearing in the Local Court.

[14] I do not agree with the appellant's submission that a costs order should be made in its favour incorporating costs of the failed interlocutory application. Summary dismissal requires consideration in large part of factors which are not relevant to the final hearing. Although it may be somewhat inconsistent with the final ruling made on appeal the costs order made on 3 August 2021 should not be disturbed. While the dismissal of the interlocutory order could not realistically be the subject of appeal, it has not been set aside and the respondent should retain the benefit of the costs order associated with it.

[15] The appellant should be awarded costs for the substantive hearing in the Local Court. The appellant has been successful on appeal which dealt with the merits. The Local Court decision was reversed. As above, even if the respondent is correct that the open offer made on behalf of the appellant was late in the day and the appellant should have cooperated well before the litigation commenced, such a state of affairs is not so substantially to the

detriment of the respondent to justify depriving the successful appellant of its costs.

## **Orders**

1. The respondent pay the appellant's costs of and incidental to the appeal heard in this Court on the ordinary basis, as agreed or failing agreement to be taxed. Certified for senior counsel.
2. The costs order made by the Local Court on 23 August 2021 is set aside.
3. In place of the costs order of 23 August 2021 the applicant (respondent in this Court) pay the respondent's (appellant in this Court) costs of and incidental to the substantive hearing in the Local Court on the ordinary basis as agreed or failing agreement to be taxed.
4. The costs order of 3 August 2021 is to remain undisturbed.

-----