Central Australian Aboriginal Congress Inc v CGU Insurance Ltd
[2009] NTCA 2

PARTIES:	CENTRAL AUSTRALIAN ABORIGINAL CONGRESS INC v CGU INSURANCE LIMITED (ABN 20 004 478 371)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP16 of 2008 (20303381)
DELIVERED:	25 June 2009
HEARING DATES:	20 May 2009
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ
APPEAL FROM:	JUDGMENT OF JUSTICE THOMAS IN PROCEEDING NO 61 OF 2003

CATCHWORDS:

PRACTICE AND PROCEDURE – COSTS – successful claim against insurer for indemnity under policy – whether claimant entitled to indemnity costs of trial and of appeal – whether appeal succeeded on point not raised at trial – whether appellant should be deprived of its costs – whether fit for two counsel

Supreme Court Rules (NT) O 63.03(1); O 63.29(1); O 63.72(9)(b)

Williams, *Civil Procedure Victoria*, Butterworths, Sydney

Kroehn v Kroehn (1912) 15 CLR 137; applied

Carrazzo v Weyman [1944] VLR 207; *Ralston v Burkinshaw* (2002) 12 ANZ Insurance Cases 61-531; *State Government Insurance Commission v Lane* (1997) 68 SASR 257; *Tanevski v Trenwick International Limited & Ors* [2003] NSWCA 374 (unreported); followed

Armstrong v Boulton [1990] VR 215; *Colgate Palmolive v Cussens* (1993) 46 FCR 225; *Malick v Lloyd (Official Assignee)* (1913) 16 CLR 483; *Road Chalets Pty Ltd v Thornton Motors Pty Ltd (In liquidation)* (1986) 47 SASR 532; *Stanley v Phillips* (1966) 115 CLR 470; referred to

REPRESENTATION:

Counsel:

Appellant:	A Wyvill
Respondent:	J Kelly SC

Solicitors:

Appellant:	Collier Lawyers
Respondent:	Minter Ellison

Judgment category classification:	B
Judgment ID Number:	mil09446
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Central Australian Aboriginal Congress Inc v CGU Insurance Ltd
[2009] NTCA 2
No. AP16 of 2008 (20303381)

BETWEEN:

CENTRAL AUSTRALIAN ABORIGINAL CONGRESS INC
Appellant

AND:

CGU INSURANCE LIMITED (ABN 20 004 478 371)
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 25 June 2009)

Martin (BR) CJ:

[1] I agree with the orders proposed by Mildren J and with his Honour's reasons.

Angel J:

[2] I agree with Mildren J.

Mildren J:

[3] On 29 April 2009 the Court delivered judgment allowing an appeal by the defendant in the principal action against the respondent which was the third party insurer in the action.

[4] The Court has now received written submissions from the parties concerning costs. The successful appellant seeks an order for costs against the respondent of and incidental to the third party proceedings at first instance and the appellant's costs of the appeal on an indemnity basis.

[5] The respondent does not oppose an order for costs of the third party proceedings below on a standard basis. However, the respondent submits that the appropriate order for costs of the appeal is that the appellant pay the respondent's costs of the appeal, or alternatively, that each party bear its own costs.

The Costs of the Proceedings Below

[6] The appellant's submission is that, under the terms of the policy, the respondent was liable to indemnify it against costs. Clause 3.1 of the policy provided that the respondent would provide cover up to the "Policy Limit" for "Claims for Civil Liability". Clause 3.3 also provides for an indemnity for "Claims Investigation Costs" (if the insurer incurs them, or the insured incurs them with its written consent) which is defined by Clause 11.3 to include "the legal costs and expenses of investigating, defending or settling any claim…" The insurer had the right under the policy to take over and

defend or settle the plaintiff's claim (clause 7.5). However, it did not do so and required the appellant to both defend the proceedings and take third party proceedings to enforce its indemnity.

[7] Counsel for the appellant submitted that in those circumstances the appellant should be awarded its costs on an indemnity basis. In *State Government Insurance Commission v Lane*[1] the Full Court upheld a trial Judge's order to award costs on a solicitor and client basis. A similar result was reached in *Ralston v Burkinshaw*[2] where the trial Judge, Dunford J, found that the insurer should have either taken over the defence of the proceedings or given written consent for the defendant to defend the proceedings. The Court of Appeal of New South Wales made an order against an insurer on an indemnity basis in similar circumstances, following *State Government Insurance Commission v Lane*,[3] in *Tanevski v Trenwick International Limited & Ors*.[4]

[8] Counsel for the respondent submitted that orders for indemnity costs require the establishment of some special or unusual feature to depart from the usual practice of awarding costs on a party/party basis, citing *Colgate Palmolive v Cussens*,[5] per Sheppard J. It was submitted that in *State Government Insurance Commission v Lane*,[6] Debelle J (with whom Cox and Millhouse JJ agreed) observed that an action to enforce an entitlement to an indemnity

[1] (1997) 68 SASR 257.
[2] (2002) 12 ANZ Insurance Cases 61-531.
[3] (1997) 68 SASR 257.
[4] [2003] NSWCA 374 (unreported).
[5] (1993) 46 FCR 225 at 232-234.
[6] (1997) 68 SASR 257 at 265.

under a policy may not, standing alone, be sufficient to justify such an order. It was submitted that there were no special or unusual features identified which justified the making of such an order.

[9] Costs, including indemnity costs, are in the discretion of the Court.[7] There is no rule that merely because a party has successfully sued its insurer for indemnity under a policy that the Court will order indemnity costs. It is relevant to consider the terms of the policy and the conduct of the parties. However, where the policy provides an indemnity for costs, in my opinion, the insured should ordinarily be awarded indemnity costs for the reasons given in the cases already cited, viz that had the appellant treated the respondent's denial of liability to indemnify as a repudiation of the contract, the appellant would ordinarily have recovered as damages their costs on a solicitor and own client basis.[8] As there are no other circumstances to be considered in this case, I would order that the respondent pay the appellant's costs of the third party proceedings in the Court below to be taxed on an indemnity basis.

[10] I note that the learned trial Judge did not make any order for costs in the Court below but gave liberty to apply. The result is that there is no order for costs against which to appeal. If that had been the only issue before us, there may have been difficulty in making an order.[9] However, the appellant's

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[7] *Supreme Court Rules* (NT) O 63.03(1)and O 63.29(1).
[8] See *State Government Insurance Commission v Lane* (1997) 68 SASR 257 at 265; *Tanevski v Trenwick International Limited & Ors* [2003] NSWCA 374 (unreported) at [14]-[15].
[9] See *Road Chalets Pty Ltd v Thornton Motors Pty Ltd (In liquidation)* (1986) 47 SASR 532 per Zelling ACJ at 538.

notice of appeal sought costs orders and I do not consider that there is any difficulty arising from the fact that no order has yet been made by the trial Judge.

The Costs of the Appeal

[11] Counsel for the respondent submitted that the costs of the appeal gave rise to different considerations. Ms Kelly SC submitted that the appellant succeeded on appeal on a point not argued before the learned trial Judge. There is authority to the effect that a successful party to an appeal may be refused costs in these circumstances.[10]

[12] The principal point on which the appeal was allowed was that the exclusion clauses upon which the respondent relied had no application to the facts of this case. Ms Kelly SC submitted that this was a new issue not raised before the learned trial Judge. Although no submission was made by counsel for the appellant in relation to this contention in the written submissions, the issue was debated before us during the hearing of the appeal. At first instance, counsel for the appellant submitted that negligent administrative action by medical practitioners was not excluded by the terms of the policy. It was also submitted that any loss caused by the medical practitioners was not the proximate cause of the loss. Submissions were also directed towards an argument that the exclusions did not apply absent a finding of medical malpractice. The arguments of the appellant in the Court below may not

[10] See Williams, *Civil Procedure Victoria*, para 64.24.5 and cases there cited; *Malick v Lloyd (Official Assignee)* (1913) 16 CLR 483 at 492; *Armstrong v Boulton* [1990] VR 215 at 223.

have precisely been the same as the argument which succeeded before us, but I do not consider that the arguments were so different as to warrant an order depriving the appellant of its costs.

[13] There is also the consideration that the respondent's written submission in the Court below did not analyse the provisions of the policy and develop fully a reasoned argument that the exclusion clauses applied. I have read the transcript of the oral submissions which expanded upon the issues somewhat, but I am still of the view that the submissions lacked detailed analysis such as to provide real assistance to the learned trial Judge.

[14] Further, the respondent having received the appellant's submissions continued to vigorously oppose the appeal. In all the circumstances I think it would be wrong to deprive the appellant of its costs of the appeal. I would order that the respondent pay the appellant's costs of the appeal to be taxed on an indemnity basis.

Costs for Two Counsel

[15] The appellant seeks an order that costs for two counsel on the hearing of the appeal be allowed. It was submitted by counsel for the appellant that it was reasonable to engage two counsel because Mr Wyvill, who appeared as leading counsel, was not counsel at trial and it would otherwise have been necessary for him to have familiarised himself with all of the arguments and submissions made at first instance. Further, it was submitted that it was reasonable to brief new counsel experienced in insurance matters.

[16] Counsel for the respondent submitted that it was not reasonable for the appellant to instruct two counsel. Order 63.72(9)(b) provides that no fee shall be allowed for more than one counsel unless the Court certifies that the retainer of more than one counsel was warranted.

[17] The question as to whether more than one counsel should be allowed in an appellate court must be determined in each case on its own particular circumstances and in accordance with the principles which would be applied in a court of first instance.[11]

[18] The standard test is "would a prudent person not compelled by poverty come into Court in such a case without two counsel".[12] Various factors have been considered relevant to the exercise of the discretion, including the weight of the case and the need for special skill[13] and the complexity of the issues.[14] In any event, there must be some feature of the case which would warrant a prudent litigant to employ two counsel. The test is no different if two juniors are employed.

[19] I do not consider that this case warranted two counsel. The appellant engaged a different counsel to lead the counsel who appeared at trial. The issues, both factual and legal, were not so complex as to warrant two counsel to divide the labour. It was put that there was time and labour saved in that the leading counsel did not have to familiarise himself with all of the

[11] *Carrazzo v Weyman* [1944] VLR 207 at 209.
[12] *Kroehn v Kroehn* (1912) 15 CLR 137 at 141, 144 and 147.
[13] *Stanley v Phillips* (1966) 115 CLR 470 at 489 per Menzies J.
[14] *Stanley v Phillips* (1966) 115 CLR 470 at 480 per Barwick CJ.

arguments put at first instance, but this was not a burdensome task. The appeal book included the oral submissions and written arguments of counsel in the Court below and were not so extensive that more than one counsel was necessary. I would not grant a certificate for two counsel.

Orders

[20] I would order that the respondent is to pay the appellant's costs of the appeal and of and incidental to the third party proceedings in the Court below to be taxed on an indemnity basis.
