Groote Eylandt Aboriginal Trust Inc & Anor v Deloitte, Touche Tohmatsu & Ors [No 3] [2017] NTSC 30

PARTIES:	GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (NT 00142C) THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY v DELOITTE TOUCHE TOHMATSU (A Firm) and KPMG (A Firm) and MINTER ELLISON (A Firm)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	89 of 2014 (21441221)
DELIVERED:	13 April 2017
HEARING DATES:	Written Submissions
JUDGMENT OF:	HILEY J

CATCHWORDS:

PROCEDURE – Costs – Costs in relation to the determination of a separate question in a proceeding – Courts power to award costs by reference to discrete issues

PROCEDURE – Costs – *Supreme Court Rules* (NT), r 63.29(2) – Presumption of indemnity costs for a party who sues as, or is sued as, trustee – Costs taxed on an indemnity basis

Johnson v Northern Territory of Australia [2015] NTSC 15, applied

Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2003] FCA 325; *Carter v Brine (No 2)* [2016] SASC 36; *Groote Eylandt Aboriginal Trust Incorporated v Deloitte Touche Tohmatsu & Ors* [2016] NTSC 39; *Groote Eylandt Aboriginal Trust Incorporated v Deloitte Touche Tohmatsu & Ors (No 2)* [2017] NTSC 4; *Hockey v Fairfax Media Publications Pty Ltd* (2015) [2015] FCA 750; 237 FCR 127; *Mickelberg v Western Australia* [2007] WASC 140; *Nitschke v Medical Board of* Australia (No 2) [2015] NTSC 50; 36 NTLR 98; *State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174, referred to

G E Dal Pont, Law of Costs (Lexis Nexis, 3rd ed, 2013)

Supreme Court Rules (NT) r 47.04, r 63.04, r 63.18, r 63.29, r 63.3, r 63.3, r 63.03(1), r 63.04(1)

REPRESENTATION:

Counsel:

1st Plaintiff:	R Whitington QC B Doyle D McConnel
3rd Defendant:	T Anderson

Solicitors:

1st Plaintiff:	Roussos Legal Advisory, town agents for Johnson Winter & Slattery
3rd Defendant:	Halfpennys, town agents for Lander & Rogers

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

Groote Eylandt Aboriginal Trust Inc & Anor v Deloitte, Touche Tohmatsu & Ors [No 3] [2017] NTSC 30
No. 89 of 2014 (21441221)

BETWEEN:

GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (NT 00142C)
First Plaintiff

AND:

THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
Second Plaintiff

AND:

DELOITTE TOUCHE TOHMATSU (A FIRM)
First Defendant

AND:

KPMG (A FIRM)
Second Defendant

AND:

MINTER ELLISON LAWYERS
Third Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 13 April 2017)

Introduction

[1] On 20 January 2017 the Court answered an important threshold question that was raised by the third defendant in its Defence filed 29 January 2016.[1] The question was whether or not the Groote Eylandt Aboriginal Trust (**the Trust**) was a valid charitable trust at law (**the charitable trust question**). Shortly prior to the hearing the third defendant abandoned a contention that gave rise to a second question, whether the plaintiff had standing to bring these proceedings. The process of answering the charitable trust question involved the assembly and production of evidence including expert evidence, statements of facts issues and contentions, and detailed submissions both written and oral.[2] The Court held that the Trust was a valid charitable trust.[3]

[2] The First Plaintiff seeks orders that: [4]

1. The third defendant pay the plaintiff's costs of and incidental to the determination of the questions fixed for separate hearing and determination by the orders of the Court on 11 August 2016.

2. Such costs be taxed (if not agreed):

    a. on an indemnity basis; and

[1] Defence of the Third Defendant to the Amended Statement of Claim.
[2] Oral submissions were heard on 5-8 December 2016.
[3] *Groote Eylandt Aboriginal Trust Incorporated v Deloitte Touche Tohmatsu & Ors (No. 2)* [2017] NTSC 4 (***GEAT No 2***).
[4] Plaintiff's Submissions on Costs.

b. payable forthwith.

Costs and their immediate taxation

[3] The Court has the power to order costs at any stage of a proceeding, including in relation to a particular question in a proceeding.[5] In most cases costs are to be paid immediately.[6]

[4] The general rule is that costs follow the event. However there has developed an increasing preparedness to award costs by reference to particular issues in appropriate cases, especially where the issue is in fact separate and distinct from other important issues, and has involved a significant cost to the party who succeeded on that issue.[7]

[5] Specifically, in relation to the determination of a separate question under rule 47.04 of the SCR, the following observations of Finkelstein J in *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd*[8] are apposite:

> Furthermore, in a case where there has been a split trial of disputed questions of fact or law and it is possible at each stage of the case to identify the successful party, the ordinary rule which is applied after a final hearing should also be applied to the split trial. That is, there is no justification for implying to the discretionary power to award costs a limitation to the effect that costs should only be ordered once the outcome of the whole action is known.

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[5] *Supreme Court Rules* (NT) rr 63.04(1) and 63.03(1) (**SCR**).
[6] SCR r 63.04(2).
[7] See for example *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 127 at [88]; *Mickelberg v Western Australia* [2007] WASC 140 at [30] – [35]; and *Carter v Brine (No 2)* [2016] SASC 36 at [5] – [14].
[8] [2003] FCA 325 at [5].

[6] The third defendant has not challenged any of these propositions. Rather, the third defendant contends that "it would be unfair to it to determine the costs issue at this time."[9] This is because the plaintiff might eventually fail in the main action against the third defendant and thus be liable to pay the third defendant's costs of the whole proceeding, or at least a substantial part of those costs even if the plaintiff was nevertheless entitled to its costs of the separate questions. In that case, it may come to pass with the benefit of hindsight that the third defendant has been effectively punished for raising a reasonably arguable defence to proceedings against it that were without any merit whatsoever, contrary to the approach of the Full Court in *State of Victoria v Sportsbet Pty Ltd (No 2)*[10] and this Court in *Nitschke v Medical Board of Australia (No 2)*[11]. The third defendant contends that a relevant and potentially very significant factor is whether the third defendant "unreasonably pursued" these questions at the preliminary hearing,[12] and that "the decision of the Court of Appeal may well shed light on this question (even assuming the appeal is unsuccessful)."[13]

[7] The third defendant also submits that "whilst the third defendant may suffer considerable prejudice if an order is now made and it is deprived of the opportunity to have the costs issue considered in the context of

[9] Submissions of the Third Defendant on Costs of the Preliminary Determination at [1]
[10] [2012] FCAFC 174.
[11] [2015] NTSC 50; 36 NTLR 98.
[12] Referring to *Carter v Brine (No 2)* [2016] SASC 36 at [11].
[13] Submissions of the Third Defendant on Costs of the Preliminary Determination at [2] – [6].

the proceedings as a whole, the plaintiff will suffer no prejudice if the issue is deferred."[14]

[8] I reject these contentions.

[9] The two issues raised by the third defendant in its Defence and determined at the separate hearing were discrete issues that were able to be separately and distinctly identified. Indeed those two issues were only raised by the third defendant in its Amended Defence filed 29 January 2016, it having previously responded to the allegations in the Statement of Claim on the assumptions that the plaintiff had standing and the Trust was a valid charitable trust.[15] The second defendant has always accepted that the plaintiff has standing and that the Trust was a charitable trust and the first defendant did not admit those aspects but did not play any active role in the trial of the separate questions.

[10] It was common ground that if either question had been answered adversely to the plaintiff, the plaintiff's actions against all three defendants would fail. That was an important factor that I took into account when I made the orders under rule 47.04 of the SCR for those questions to be heard and determined ahead of the main trial.[16]

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[14] Submissions of the Third Defendant on Costs of the Preliminary Determination [7].
[15] *Groote Eylandt Aboriginal Trust Incorporated v Deloitte Touche Tohmatsu & Ors* [2016] NTSC 39 (***GEAT No 1***) at [9] and [51].
[16] *GEAT (No 1)* See for example [10], [48] – [50], [54], [94], [104] – [105].

[11] It also transpired, contrary to concerns expressed by the third defendant when it opposed the making of the orders for the separate hearing[17] that there were no significant contested factual issues that had to be determined at the separate hearing and no factual findings had to be made that might be re-agitated at the trial. The submissions before the Court and the answer to the charitable trust question were essentially based upon the proper construction of the relevant trust deed and the application of the law relating to charitable trusts. Although evidence was led concerning the poverty of people at Groote Eylandt, that evidence was of little if any relevance to answering the question, there being no issue that there were and are potential "beneficiaries" who could benefit from a trust for the relief of poverty. However that evidence may well be relevant to questions at trial concerning alleged breaches of trust, as distinct from the charitable nature of the Trust.

[12] I do not consider that the third defendant "may suffer considerable prejudice if an order is now made", or that the plaintiff will suffer no prejudice if the issue is deferred.[18]

[13] As I have noted the third defendant contends that it will be prejudiced because it will be denied the opportunity of arguing against a costs

[17] *GEAT (No 1)* at [23] – [24]. See too [53], [70] – [76] and [78] – [83].
[18] Submissions of the Third Defendant on Costs of the Preliminary Determination [7]

order at some later stage, particularly if it was successful in the main proceedings.

[14] If the Court of Appeal upholds the third defendant's appeal against my determination that the Trust was a valid charitable trust one would normally expect that it would also overrule any costs order that I now make against the third defendant. However I consider it idle to speculate what if anything one or more members of that Court might say about the reasonableness of the third defendant having raised and pursued these defences if the appeal is unsuccessful.

[15] The third defendant also contends that the costs in relation to the separate questions will be "relatively small" compared to the costs involved in preparing and litigating the main action, and that taxation of the costs is likely to be time-consuming; time better spent by the parties preparing for the trial and the appeal. The practical reality is that the costs are unlikely to be taxed before the trial has been completed due to the competing demands on the parties' time. In these circumstances, an order for taxation forthwith would have no practical utility.[19]

[16] I do not consider that these matters constitute relevant prejudice to the third defendant. Rather, it is the third defendant that has brought about this whole situation by pleading these defences which I have held to be

[19] Submissions of the Third Defendant on Costs of the Preliminary Determination [19] - [20].

untenable, resulting in the plaintiff incurring costs which it would not otherwise have had to incur. Even if the costs in issue are relatively small I would still expect them to be substantial and thus worthy of pursuing now rather than later.

[17] The plaintiff has expended a considerable amount of money on issues, particularly the charitable trust question, raised by the third defendant well after the commencement of the proceedings. Assuming that the current determinations survive the appeal to the Court of Appeal, that expenditure will have been a cost to the plaintiff over and above the other costs being incurred in prosecuting the proceedings. The plaintiff is and will remain prejudiced for so long as it is out of pocket for that cost.

[18] I do not consider the situation is any different if the plaintiff can recover all of its costs from the Trust. Either way, the plaintiff and or the Trust would be out of pocket in respect of costs payable by the third defendant, and the defendant would have the use of that money for so long as it does not to pay those costs. There is no suggestion that an immediate order would prejudice the third defendant's financial position.[20] On the other hand, any the depletion of the Trust funds could detrimentally affect potential beneficiaries, particularly those who are living in poor conditions.

[20] Cf *Baulderstone Hornibrook Pty ltd v Qantas Airways Ltd* [2003] FCA 325.

[19] The rationale behind rules such as rule 63.04(3) and rule 63.18 of the SCR which attempt to discourage multiple applications of an interlocutory nature and numerous costs orders and taxations, does not apply in the present matter.[21] The costs sought relate to what were, in effect, two questions of law, the affirmative answers to which are likely to have no further relevance to the main proceeding. Moreover, the costs relate to only one of the three defendants, namely the third defendant, and thus should be capable of being assessed and taxed simply as between the plaintiff and that defendant.

[20] To apply some of the factors identified by the Full Court in *Johnson v Northern Territory of Australia*,[22] notwithstanding that that case concerned the kind of special or exceptional circumstances relevant for the purposes of rule 63.18 of the SCR:

(a) either of the defences raised by the third defendant would have concluded the action of the plaintiff, not only against the third defendant but also against the other defendants;[23]

(b) the questions involved discrete issues that have thus been resolved;[24]

[21] See for example *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143, *Johnson v Northern Territory of Australia* [2015] NTSC 15 and *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)* [2015] NTSC 51.
[22] [2015] NTSC 15 (***Johnston***).
[23] *Johnson* [9]
[24] *Johnson* [13(a)]

(c) the hearing of the separate questions involved a significant amount of work for the parties, which will not be relevant in the substantive proceedings;[25]

(d) the principal proceedings are not likely to be resolved for some time so that, in the absence of a costs order, the successful plaintiff will not enjoy the fruits of the determination of the questions for a long time;[26]

(e) the answers have had the effect of removing two defences in their entirety.[27]

[21] I consider that a costs order should be made now and the costs to be payable immediately as is contemplated by rule 63.04(2) of the SCR.

Basis for taxation

[22] Rule 63.29(2) of the SCR provides that:

> Where the Court makes an order for:
>
> (a) the payment to a party of costs of a fund; or
>
> (b) the payment of costs to a party who sues as or is sued as trustee,
>
> subject to rule 63.30, the costs shall be taxed on the indemnity basis.

[23] Rule 63.30 of the SCR provides that:

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[25] *Johnson* [15]
[26] *Johnson* [13(b)]
[27] *Johnson* [13(c)].

> Where a party who sues or is sued as trustee is entitled to be paid costs out of a fund which he holds in that capacity, the costs shall, unless the Court otherwise orders, be taxed on the indemnity basis.

[24] As the third defendant correctly points out, rule 63.30 of the SCR and the policy underlying that rule relates to a trustee's entitlement against the fund, not a third party.

[25] However the third defendant did not address the clear requirement in rule 63.29(b) of the SCR that costs shall be taxed on an indemnity basis where the Court orders the payment of costs to a party who sues as trustee, subject to rule 63.30 of the SCR. Rather, the third defendant raises questions about the entitlement of the plaintiff to recover its costs from the Trust fund, whether under the 2008 Trust Deed or by some other means. I do not consider this relevant. If the plaintiff has no such entitlement, rule 63.30 of the SCR would not apply and rule 63.29(b) would operate so as to entitle the plaintiff to indemnity costs. If the plaintiff does have such an entitlement, rule 63.30 of the SCR would still entitle the plaintiff to indemnity costs unless the Court otherwise orders.

[26] Rule 63.29(2)(b) of the SCR is consistent with the following passage in *Law of Costs*,[28] at [16.35]:

> If a costs order is made in a trustee's favour, whether pursuant to the court rules or the general law, a trustee … merits a costs

[28] G E Dal Pont, *Law of Costs* (Lexis Nexis, 3rd ed, 2013).

> award on a basis more generous than the party and party basis. To this end the courts variously have made orders on solicitor and client or indemnity bases (termed "special costs orders") in this context. In the words of an English judge: "no costs shall be disallowed, except in so far as those costs or any part of their amount should not, in accordance with the duty of the trustee or personal representative as such, have been incurred or paid, and should for that reason be borne by him personally".[29]

[27] Although the third defendant responded to a number of criticisms by the plaintiff of its conduct in relation to the separate hearing, it did not advance any reason why rule 63.29(2)(b) of the SCR does not apply or why the Court should make some other order for example under rule 63.30.

[28] I find no reason to depart from the presumption of indemnity costs, such as is expressed in rule 63.29 of the SCR and also to be found in the general law.

Disposition

[29] Accordingly I make the orders sought by the plaintiff.

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[29] *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59 at 64 per Megarry VC.