Lawrie v Lawler (No 2) [2016] NTCA 04

PARTIES:	LAWRIE, Delia Phoebe v LAWLER, John
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP5, AP6 and AP8 of 2015 (21434660)
DELIVERED:	9 September 2016
HEARING DATES:	1 and 2 March 2016 and 8, 9 and 10 March 2016
JUDGMENT OF:	DOYLE, DUGGAN & HEENAN AJJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

COSTS – Whether costs to be awarded on indemnity or standard basis — departure from *Hardiman* Principle — effect on costs

Supreme Court Rules 1987 (NT) r 63.03, r 63.04(5), r 63.05.

Fagan v Crimes Compensation Tribunal [1982] HCA 42; (1982) 150 CLR 666, *Griffith v Australian Broadcasting Corporation* (No 2) [2011] NSWCA 145, *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15, *Muin v Refugee Review Tribunal* (2002) 190 ALR 601; [2002] HCA 30, *R v Australian Broadcasting Tribunal; Ex Parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13, *TXU Electricity Ltd v The Office of the Regulator-General* (2001) 3 VR 93; [2001] VSC 4, applied.

Viscariello v Legal Profession Conduct Commissioner [2015] SASC 132, distinguished.

REPRESENTATION:

Counsel:

Appellant: on 1 and 2 March 2016	A Scott
on 8 – 10 March 2016:	P Davis QC and A Scott
Respondent: on 1 and 2 March 2016	D McLure SC and G O'Mahoney
on 8 – 10 March 2016	D McLure SC and G O'Mahoney
Applicant to Intervene – on 1 and 2 March 2016 -	W Sofronoff QC and D Skennar

Solicitors:

Appellant:	Ward Keller Lawyers
Respondent:	Paul Maher Solicitors
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Judgment category classification:	A
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lawrie v Lawler (No 2) [2016] NTCA 04
No. AP5, AP6 and AP8 of 2015 (21434660)

BETWEEN:

DELIA PHOEBE LAWRIE
Appellant

AND:

JOHN LAWLER
Respondent

CORAM: DOYLE, DUGGAN AND HEENAN AJJ

REASONS FOR JUDGMENT

(Delivered 9 September 2016)

DOYLE AND DUGGAN AJJ:

[1] What follows are our reasons for our orders as to costs.

[2] There is no reason why Mr Wyvill SC should not pay the costs of his application to be joined or heard on the appeal by Ms Lawrie. The application was unsuccessful. There are no circumstances justifying the departure from the usual order that costs follow the event on the standard basis.

[3] There is no reason why Ms Lawrie should not pay the costs of her application for the trial Judge to disqualify himself. In our opinion the submissions on that matter had limited prospects of success. However, the

submissions were not so lacking in merit as to justify a departure from the standard basis for costs.

[4] Mr Lawler should pay Ms Lawrie's costs of the appeal against the order for costs. The central issue was whether Mr Lawler was entitled to costs on an indemnity basis. We have found that he was not so entitled. In substance, Ms Lawrie has succeeded. Mr Lawler should pay the costs of that appeal on the standard basis.

[5] We turn to the costs of the trial and the costs of the substantive appeal. Mr Lawler has succeeded on both matters. Granted, he introduced the issue of waiver which had little prospect of success. But it is not uncommon for a successful party to fail on some issues, but recover the costs of the trial or appeal as the case may be. A failure to succeed on some issues does not ordinarily, of itself, mean that the successful party should suffer in costs.

[6] The trial was not a lengthy one. The issue of waiver did not occupy a disproportionate or inordinate amount of time. In our judgment we said at [264]:

> Mr Lawler has failed on the alternative defence of waiver. That defence generated a number of contested applications leading up to the trial, and occupied considerable time at trial and on appeal.

[7] A closer inspection of the transcript calls for a revision of that comment. The issue of waiver occupied about one half of the Judge's reasons. But the

transcript indicates that, at trial and on appeal, the issue of waiver occupied considerably less than half of the total sitting time.

[8] Moreover, some of the evidence tendered on the issue of waiver was relevant to the argument on procedural fairness. In our reasons at [232] we said:

> One can be confident, in our opinion, that if Mr Lawler had informed Ms Lawrie that he no longer intended to follow the procedure outlined in his letter, Ms Lawrie would not have made further submissions to him. She would have said nothing. She would have waited until the Report was published, and then would have mounted a complaint about the failure to disclose draft findings. That is the strategy that she and her advisers had adopted.

[9] We consider that there was no reason for the Judge to explore the motives and strategies behind the conduct of Ms Lawrie and her advisers, but we did not find that the material introduced under this head was entirely irrelevant.

[10] Taking all those matters into account, our conclusion is that the raising of the issue of waiver, and the time spent on it, does not call for a departure from the usual order that costs follow the event on the standard basis.

[11] That leaves the question of whether the suggested departure by Mr Lawler from the so-called *Hardiman* principle (*R v Australian Broadcasting Tribunal; Ex Parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13) calls for some departure from the usual order.

[12] The case has some unusual features. For the Attorney-General to have undertaken the defence of the proceedings, displacing Mr Lawler, might

have given rise to its own complications, having regard to the issues raised in Mr Lawler's report and in the proceedings. We are not prepared to find that Mr Lawler was wrong to undertake the defence of the proceedings, in the circumstances. Nor do we attach any improper motive to his decision to raise the issue of waiver. The findings by Heenan AJ that in raising the issue of waiver his approach was "decidedly not neutral" does not, in our opinion, call for "an appropriate corrective", as Heenan AJ has found. We respectfully differ. As the substantive defendant, Mr Lawler raised an alternative defence that failed. We would go no further than that. We are not persuaded that it was inappropriate for him to do so, and accordingly there is no cause for a corrective order.

[13] Ms Lawrie should pay Mr Lawler's costs of the appeal, subject to the orders made in appeal No AP5 of 2015 and appeal No AP6 of 2015, on the standard basis.

HEENAN AJ

[14] The costs of any proceedings are in the discretion of the Court *Supreme Court Rules 1987* (NT) r 63.03 – including, when on appeal, the costs of the proceedings below – r 63.04(5). The Court may make an order for costs in relation to a particular question, or a particular part of, a proceeding – r 63.05.

[15] Here the appellant submits that although her principal appeal was dismissed, she should not be obliged to pay all the respondent's costs of that appeal or

of the case at first instance because this Court has rejected the alternative plea of waiver and held that the trial judge should not have upheld that plea. This has led the appellant to submit that the respondent should only be awarded his costs relating to the question of whether or not procedural fairness was observed by the respondent during his Inquiry and Report and not in relation to any other question either on this appeal or on the judicial review. Further, the appellant submits that disregard of the *Hardiman* principle means that the respondent should not receive his costs on the waiver issue.

[16] In his written submissions, the respondent contends that the appellant should be ordered to pay his costs of the principal appeal and the proceedings before the Primary Judge on the indemnity basis; and the appeal from the Primary Judge's decision to refuse to disqualify himself from deciding the question of costs based on an apprehension of bias (the recusal appeal) on the indemnity basis; and of the appeal from the decision on costs insofar as it held that the respondent had incurred costs that were capable of being indemnified on the standard basis.

[17] This Court unanimously held that the finding at first instance of waiver and the associated findings adverse to the integrity and honesty of the appellant and others should not have been made. In the judgment of the majority, this did not, however, affect the outcome of the principal appeal. Nevertheless, it removed all grounds for contending that the appellant should pay costs on an indemnity basis for any part of the proceedings and, consequently, on

these appeals. For these reasons, the respondent's submissions that awards of costs in his favour should be made on an indemnity basis, cannot be accepted.

[18] The considerations noticed by courts when awarding a successful party less than all their costs, or by excluding any costs for a particular question or issue on which that party failed, have been closely examined in *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [63] - [66] and *Griffith v Australian Broadcasting Corporation* (No 2) [2011] NSWCA 145 and need not be repeated. These authorities stress that, generally, there is a disinclination to refuse or restrict costs of a successful party by reference to certain issues upon which that party failed but, in the end, that it is always a matter for discretion in each individual case. Some of the reasons for this initial disposition have to do with the need to assess the position of the parties fairly, having regard to the case as a whole and to the prominence or influence of the issue on which the successful party failed. Other reasons include the frequent difficulty of determining how prominent or time consuming that particular issue was and the risk of making an arbitrary assessment in cases where even approximate estimates of its significance are scarcely possible.

[19] One factor is, however, clear. It is that where the successful party failed on an issue which was dominant and severable, that party may be deprived of costs on that issue. In this present case, the waiver issue was:

- clearly distinct and severable from the issue of whether procedural fairness had been accorded during the Inquiry;

- newly introduced on the judicial review proceedings and then suddenly at a late stage;

- one which raised issues of gravity concerning the appellant's integrity and reputation which inevitably were very contentious and time consuming;

- not an issue affecting any personal or other interest of the respondent;

- one which considerably prolonged the review proceedings and the appeal and, in particular, caused the costs appeal.

The *Hardiman* principle

[20] The *Hardiman* principle must be adapted to the circumstances. This is clear from the formulation of the principle in the original decision (at [54]). There the High Court explained that the presentation of a case by the Tribunal should be regarded as exceptional and where it occurs it should, in general, be limited to submissions going to the powers of the Tribunal. This admits of occasions where a Tribunal or administrative officer subject to judicial review may appear and assist the court, although the emphasis is plainly on playing a neutral role. If there is no intervention by an Attorney General and no other contradictor, the Tribunal or officer may appear by counsel as a party to respond substantially to the application - see Brennan J

in *Fagan v Crimes Compensation Tribunal* [1982] HCA 42; (1982) 150 CLR 666, and generally per Ashley J in *TXU Electricity Ltd v The Office of the Regulator-General* (2001) 3 VR 93; [2001] VSC 4 - but in such cases there is nothing to suggest that any departure from neutrality in presenting that party's case has been contemplated.

[21] None of the cases in which *Hardiman* has been discussed and which have been cited to this Court or discovered by such research as has been possible go so far as to consider or envisage the situation which occurred in this case. Here, the respondent introduced and advanced with relentless vigour the waiver issue which had never been raised at the original Inquiry and which was never considered by the respondent in the Report which he presented. Not only was this an issue never raised before, it was also accompanied by grave allegations impeaching the integrity and honesty of the appellant and her counsel and solicitor. It is difficult to identify what interest, if any, the respondent had in raising these fresh and collateral issues for they had nothing to do with the procedure which he had followed in his Inquiry or the contents of his Report. If it be said that it was the preservation of the Commissioner's Report from successful challenge on judicial review by these new issues because of public interest grounds, that was not an interest for the Commissioner to advance.

[22] The purpose of the *Hardiman* principle is to avoid any risk that by actually engaging in the contest reviewing its decision a tribunal or administrative officer might endanger the impartiality which it is expected to maintain in

subsequent proceedings which may take place if and when relief is granted. This has given rise to submissions by the respondent that adherence to the principle is not necessary if there is no likelihood of subsequent proceedings before the Tribunal or officer and that none are possible in the present case. There is some authority to that effect - *Viscariello v Legal Profession Conduct Commissioner* [2015] SASC 132 at [61] - but I do not, with respect, consider that that is necessarily so. Neither that case, nor any other cited to us, has considered the position where a tribunal or administrative officer participates actively in review proceedings and contests them aggressively by attacking the credit and integrity of the applicant on grounds never before raised or relied upon. Such an attack on the party made for the first time after the decision under review is capable of causing retrospective speculation about its motive and the earlier objectivity of the decision maker before those attacks had been made. Such a retrospective possibility of perception of bias or lack of impartiality by the decision maker is just as inimical to the role of the tribunal or decision maker as would be the case if a cause were to be remitted for further decision. The very possibility that this might occur in such a case is another reason illustrating the desirability of adherence to the *Hardiman* principle.

[23] In *Muin v Refugee Review Tribunal* (2002) 190 ALR 601;[2002] HCA 30, when considering the scope of the *Hardiman* principle, the High Court said (at [25]) that it has taken pains to discourage tribunals and members from endangering their impartiality by pursuing the role of protagonist in

proceedings challenging their decision. That on some occasions active participation by the tribunal or member in opposing the case for review may be justifiable where there is no other contradictor, does not diminish the importance of confining that role to defending the published reasons for decision and making submissions going to the powers and procedures of the tribunal or administrative officer.

[24] The authorities provide very little guidance about the consequences of disregarding the *Hardiman* principle. Possibly this is because the many strictures about the need for its observance have generally been effective. It is unlikely that failure to observe the principle would result in the tribunal or administrative officer being restrained or prevented from taking that unusual active role. Because the effects of non-observance are, in some cases, likely to cast a cloud over the perceived impartiality of the tribunal or officer, it would appear to follow that in such cases relief involving remitter to the same tribunal would become excluded or even, in extreme cases, leave as the only appropriate remedy the making of an order for rehearing before a differently constituted tribunal or by a different officer. That does not exclude decisions by the reviewing court to quash the decision and substitute its own decision in cases where that may be possible. As in this case, where the *Hardiman* principle is not observed, the reviewing or appellate court will give close scrutiny to the submissions advanced by a tribunal or officer who adopts the role of an active protagonist.

[25] Non-observance of the *Hardiman* principle is not a reason to apportion costs against the decision maker but it is a reason to depart from the convention of not awarding costs against a decision maker who simply submits or adopts a neutral position. This respondent's stance on waiver and associated issues was decidedly not neutral. However, where non-observance of the *Hardiman* principle involves the introduction of a substantial collateral issue on which the Tribunal or officer fails, it means that there may be even less justification for introducing that issue.

[26] Returning to the appellant's submission that the respondent should not be awarded any costs in relation to the issue of waiver, the principles so far discussed can now be applied. Apportionment of costs in relation to the waiver issue can be done in this case with a high degree of clarity and precision. The issue of waiver and its associated questions accounted for about half or more of the time, effort and attention of the Court in the review proceedings and on the principal appeal. The fate of the principal appeal did not depend on the waiver defence, nor did the waiver defence bear on the content of the obligation of procedural fairness required of the respondent. To award the respondent the whole of the costs in the review proceedings and the principal appeal would be to disregard his failure on this significant issue and leave that part of the decision below and the respondent's arguments on the principal appeal without an appropriate corrective. Put another way, the waiver defence was separate and

unnecessary, and occupied a considerable part of the proceedings and it has now been entirely rejected.

[27] For these reasons, the appellant should be awarded only 50 per cent of his costs on the principal appeal and the review before Southwood J in both cases on the standard basis.

Costs of the recusal appeal

[28] This appeal by the appellant entirely failed. I see no reason why the appellant should not be ordered to pay the respondent's costs of that appeal and of the application before Southwood J to recuse himself. That is only the application of the general rule and there is no reason to depart from it. In both instances, those costs should be taxed on the standard basis.

Costs of the costs appeal

[29] The appellant has succeeded in this appeal in having the order for indemnity costs set aside. This entitles her to at least some of the costs of this appeal and of the costs application before the Primary Judge - again on the standard basis. Her appeal was not, however, completely successful as she did not obtain all the relief which she had sought. However, comparatively little time was spent on the costs appeal and the results, on issues where the appellant failed, were largely determined by the results of the principal appeal and of the recusal appeal without adding materially to the requirements of the costs appeal. For these reasons, I agree with Doyle and

Duggan AJJ that the appellant should have the costs of this costs appeal and the costs of the application before Southwood J on the standard basis.

Wyvill application

[30] Mr Wyvill SC applied on motion for leave to be added as a respondent to these appeals or, alternatively, to be granted leave to be heard on them either as an *amicus curiae* or otherwise. That motion was heard before the commencement of the hearing of the appeals and for reasons which have been included in the final reasons of the court, his application was refused. The respondent has applied for an order that Mr Wyvill should pay his costs in relation to that motion. There is no reason why an order for costs should not follow that event and I consider that Mr Wyvill should pay the respondent's costs of that motion to be taxed on the standard basis.
