

PARTIES: Yeperenye Pty Ltd and
Loechel Management Pty Ltd

v

Alice Springs Town Council

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 13 of 2009 (20934588)

DELIVERED: 20 MAY 2011

HEARING DATES: 16 DECEMBER 2010

JUDGMENT OF: KELLY J

CATCHWORDS:

Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1998) 81 ALR, considered

REPRESENTATION:

Counsel:

Plaintiff: R Webb QC
Defendant: A Wyvill SC

Solicitors:

Plaintiff: Povey Stirk
Defendant: Chris Turner

Judgment category classification: C

Judgment ID Number: KEL11013

Number of pages: 4

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

Yeperenye Pty Ltd & Anor v Alice Springs Town Council [2011] NTSC 38
No. 13 of 2009 (20934588)

BETWEEN:

YEPERENYE PTY LTD
First Plaintiff

AND:

LOECHEL MANAGEMENT PTY LTD
Second Plaintiff

AND:

ALICE SPRINGS TOWN COUNCIL
Defendant

CORAM: KELLY J

REASONS FOR DECISION

(Delivered 20 May 2011)

- [1] The plaintiffs' application for indemnity costs is denied.
- [2] The principles to be applied are uncontroversial. The Court has an unfettered discretion in relation to costs which must be exercised judicially. Ordinarily costs will follow the event and, if the quantum of those costs is not agreed, they will be taxed on the standard basis. The Court may award indemnity costs to a successful litigant (inter alia) if proceedings have been continued by the other party in wilful disregard of the known facts or clearly

established law, or if the litigant, properly advised, should have known that he had no chance of success.¹

- [3] In this case the plaintiffs applied for a declaration that a liquor litter charge purportedly levied by the defendant Council was invalid, and they were successful in obtaining such a declaration.
- [4] The plaintiffs put the defendant on notice of their intention to apply for such a declaration and supplied the defendant with a copy of an advice from Ms Raelene Webb QC setting out why the declaration was invalid.
- [5] The Council apparently had its own advice from senior counsel to the effect that, in order to support the validity of the liquor litter charge, the Council would have to run a novel argument about the benefit which would accrue to the occupiers of the land subject to the charge which, if it were successful, would extend the concept of “benefit” beyond that considered in the case law to date, from something which was direct, tangible and measurable to something which was more incidental and unquantifiable. The argument which the defendant ran was to the effect that by cleaning up liquor litter from the public areas of Alice Springs, the Council was fulfilling a moral obligation which lay with the occupiers of the land subject to the charge (which were take away liquor retailers) and incidentally benefiting their businesses by fostering and preserving community and business tolerance for those take away liquor outlets. That argument was unsuccessful.

¹ *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1998) 81 ALR per Woodward J at [15]-[20].

[6] It must be accepted that the defendant's prospects of success were limited to say the least. However I am not prepared to say that the Council's case was completely unarguable or that its actions should be characterised as continuing the litigation in wilful disregard of known facts or clearly established law. Nor do I think there is anything in the defendant's conduct of the case at trial which warrants the imposition of an order for indemnity costs against it.

[7] The plaintiffs also sought to justify an order for indemnity costs on the basis that the litigation had an element of public interest. While there is always an element of public interest in actions of this nature where it is sought to establish that a public authority has acted beyond its powers, I do not think that public interest was a dominant factor in this particular litigation. The purported charge was to be imposed upon a small number of parcels of land occupied by liquor retail outlets and was challenged by the owners of the land which would have been subject to the charge.

[8] In defending the application for indemnity costs the defendant has sought an order in the following terms:

“The defendant is to pay the plaintiffs' costs of the proceedings save in relation to the costs of the plaintiffs' application for indemnity costs in respect of which there shall be no order as to costs.”

[9] I decline that application as well. Although I have refused to award indemnity costs, given the weakness of the defendant's case, it was not unreasonable for the plaintiffs to seek an order for indemnity costs.

[10] I order that the defendant pay the plaintiffs' costs of and incidental to this proceeding to be taxed on the standard basis in default of agreement.