PARTIES:	PASPALEY PEARLS PTY LTD
	v
	ARTSHEEN PTY LTD PLUMBEACH PTY LTD GEMBROOK PTY LTD DAKIN NOMINEES PTY LTD CHALKFARM PTY LTD NEW BROOME PTY LTD ACADIA BAY PTY LTD BEVERLEY ANN KINNEY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	215 of 1997 (9720472)
DELIVERED:	6 November 1997
HEARING DATES:	6 October 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Plaintiff:	A. Wyvill
Defendants:	H.B. Fraser Q.C., B. Dharmananda

Solicitors:

Plaintiff:	Brian S. Cooney
Defendants:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	kea97038
Number of pages:	10

kea97038

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

No. 215 of 1997 (9720472)

BETWEEN:

PASPALEY PEARLS PTY LTD
Plaintiff

AND:

ARTSHEEN PTY LTD
PLUMBEACH PTY LTD
GEMBROOK PTY LTD
DAKIN NOMINEES PTY LTD
CHALKFARM PTY LTD
NEW BROOME PTY LTD
ACADIA BAY PTY LTD
BEVERLEY ANN KINNEY
Defendants

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 6 November 1997)

The plaintiff's application of 30 September 1997

On 30 September 1997 the plaintiff filed a Summons herein (Document 41) returnable on 1 October seeking an order, inter alia, that:

"1. The defendants be restrained until further order from offering for sale, selling, mortgaging, charging, dealing with, disposing of or creating any third party interest in the live pearl shell presently held by it at Deepwater Point Pearl Farm at King Sound near Broome ("the Farm"), which pearl shell was caught by the plaintiff, operated or reoperated by the plaintiff in 1996 and which is due for harvest in 1998 ("the 1996 Shell").

2. The defendants be restrained until further order from removing the 1996 Shell from the Farm.

3. Until further order, the defendants provide reasonable access to the Farm for the plaintiff's servants or agents to inspect the 1996 Shell from time to time."

In the summons the plaintiff also sought relief relating to the case-flow management of the action; that is of no present relevance. On 6 October, the application of 30 September was resolved by the giving and taking of certain mutual undertakings; see transcript pp457-8. By consent, the hearing of the application was then adjourned sine die, with liberty to apply on 7 days notice; see transcript p458. The defendants opposed the plaintiff's application that the costs of the application be reserved (transcript, p458). Eventually, the question of costs was argued; see transcript pp556-561. I rule on it today.

Background to the application of 30 September (Document 41)

The plaintiff issued its Writ on 15 September 1997. By interlocutory proceedings instituted on 17 September (Document 3) it sought, inter alia, an order by way of a mandatory injunction that the defendants' 1997 harvest of pearls be delivered to it, for marketing. On the same day, 17 September, the defendants applied to have the action cross-vested to the Supreme Court of

Western Australia; see Document 7. On 18 September the defendants unsuccessfully sought to have the hearing of both applications adjourned. The defendants' cross-vesting application was argued on 19 and 20 September; on 22 September, it was refused (see Document 27).

The defendants then sought to have the hearing of the plaintiff's application of 17 September (Document 3) adjourned until 25 September; eventually they succeeded in this (transcript, pp276, 279), subject to giving an undertaking (pp280-1). The question of the costs of the unsuccessful cross-vesting application (Document 2) was argued in part, but adjourned to enable further submissions to be made (transcript, pp285-9); I draw this to the attention of the parties, for action in due course.

On 25 and 26 September the parties had extra-curial discussions on the subject matter of the plaintiff's application of 17 September (Document 3) the 1997 harvest of pearls; this led to the application being resolved by the giving and taking of mutual undertakings (Document 40), the hearing of the application (Document 3) being by consent adjourned sine die, costs being reserved. On Friday 26 September Mr Maurice QC of senior counsel for the plaintiff foreshadowed (transcript p299) that it would apply "early next week for directions" in order to obtain "a very early hearing of some issues the resolution of which is pressing", instancing the question of the 1997 catch of

shell. I note that directions of the type he apparently then was envisaging were set out in pars 4-9 of Document 41, filed on Tuesday 30 September.

I also note then on the same day as Document 41 was filed, 30 September, the defendants instituted writ proceedings No.222 of 1997 and issued a summons (Document 2) therein returnable on 1 October seeking an order that the plaintiff deliver to them the 1997 catch of shell.

The submissions on the costs of the application of 30 September (Document 41)

Mr Fraser QC, of senior counsel for the defendants, conceded that the effect of r63.18 of the *Supreme Court Rules* as it had been interpreted in the Court was that costs were not awarded against a party making an interlocutory application unless that application was unreasonable. Rule 63.18 provides:

> "Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders."

Here Mr Fraser sought that the Court 'otherwise order': he submitted that the plaintiff should pay the defendant's costs of the plaintiff's application of 30 September and, in that regard, that I should certify under r63.72(a) for both senior and junior counsel for the defendants.

The effect of r63.18 was discussed in *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143. In that case an order was made *by consent* that the defendant pay the plaintiff's costs of interlocutory applications made by the defendant on the date of trial, relating to the pleadings, the parties and other matters; they eventually led to the abandonment of the dates fixed for trial. Martin J (as he then was) discussed at 145, obiter, the effect of r63.18, viz:

> "Mention has already been made of *the radical departure from the past practice* introduced by [r63.18 together with r63.04(3) and (4)]. *Such departure implies a distinct reversal of thinking about costs in interlocutory matters* and that leads to the view that *there must be something exceptional about the circumstances of the interlocutory application* under consideration to lead the Court, in the exercise of its discretion, *to make an order as to costs*, taxation and payment.
>
> Given the tenor of the rules, it would not be just to make interlocutory orders for costs, … with a view to punishing the unsuccessful party. To do so may engender a reluctance in parties to properly ventilate their problems during the pre-trial process. *What is required is* an approach which seeks *to have a successful party reimbursed the expense of [its] interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably* or [reimbursed the expense of successfully opposing interlocutory proceedings] which are unnecessarily burdensome or which are made at a time, such as here, when that [opposing] party has been deprived of the value of the work done in preparation of his case for trial. *In such instances*, and the list is not intended to be definitive or complete, *it may well be within the Court's discretion to exercise the power to override the principles established by the rules.*
>
> *Costs in interlocutory matters no longer follow success*. No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the [the unsuccessful party's] application or resistance, as the case may be, are reasonable. However, *if such application or resistance is without real merit*, as it often the case, *the [opposing] successful party should not have to bear his costs*". (emphasis added)

I indicated in *Yow v Northern Territory Gymnastic Assn. Inc.* (1991) 1 NTLR 180 that I agreed with those general observations. Later, in *Guernier v Patterson* (1992) 110 FLR 178 at 187 I said:

> "I apprehend that Martin J in *TTE* [supra]sought to set out some guidelines to be observed when the exercise of the discretionary power in r63.04 [which relates to the *time* at which an order for costs may be made, and the *time* at which costs are to be taxed and paid] is being undertaken. The guidelines there set out may now bear some further consideration, in light of the observations of Mildren J in *Markorp* [(1992) 106 FLR 286 at 292-3, which also related to when costs should be taxed under r63.04(4)], and of Kirby P and Priestley JA in *Wentworth v Rogers (No.3)* [(1986) 6 NSWLR 642 at 644 and 651, dealing with the approach on appeal to a ruling on costs]. In particular, the statement that "there must be something exceptional about the circumstances of the interlocutory application under consideration to lead the Court, in the exercise of its discretion, to make an order as to costs, taxation and payment" may need to be more closely examined. But not in this case." (emphasis added)

Nor, I should say, in this case. I also note that the general approach to r63.18, outlined in *TTE Pty Ltd v Ken Day Pty Ltd* (supra), was applied in *Ravmac Ltd v Darwin Land Services Pty Ltd* (unreported, Supreme Court (Master Coulehan), 6 April 1994).

Mr Fraser founded that his application for costs primarily on the fact that the plaintiff had filed its application in Court on 30 September, specifying 1 October as the return date, at a time when it knew that the defendants and their counsel were not in the Territory, and that the defendants' lawyers would have to obtain instructions; and that the plaintiff had proceeded in this way, *without* first approaching the defendants with a view to obtaining appropriate

undertakings from them in relation to the matters set out in pars1, 2 and 3 on p3. The matter had eventually been resolved by undertakings of that type - after counsel had travelled a long distance to appear in Court, urgently, and had obtained instructions - and this pointed up the fact that the application of 30 September to the Court had been "unnecessary", and had put the defendants to "very considerable and unnecessary expense and inconvenience".

Further, he submitted, the application of 30 September was for an interlocutory injunction - a restraint until trial - and only during the hearing (transcript, 1 October, pp304-306, 311) was it limited to an application for an interim injunction - and then only as regards the subject matter of par1 on p3 - pending the hearing in due course of the application for an interlocutory injunction.

Mr Wyvill of counsel for the plaintiff agreed that undertakings from the defendant had *not* been sought by the plaintiff before it filed in Court its application of 30 September for interlocutory relief. He submitted that the plaintiff's course of action was appropriate: it could have suffered the prejudice which it sought to avoid by making its application to the Court, had the defendants granted interests in the 1996 shell to third parties. This factor pointed to the plaintiff's preferable course being its immediate application to the Court, rather than by raising the issues in pars1, 2 and 3 on p3 in correspondence with the defendants.

He noted that the defendants' counsel did not consent to the interim order ultimately sought (transcript p311), but at that time had opposed the making of *any* order, offered no undertakings, and indicated that he first needed to obtain instructions. I note that this was so (transcript pp312), but that later Mr Fraser stated that he had now obtained instructions, and did not oppose the grant of the interim relief sought by Mr Wyvill.

Mr Wyvill submitted that the plaintiff had substantially succeeded: an undertaking was given by the defendants, at first on an interim basis, and later on the same basis as the plaintiff had sought in its application of 30 September. I noted at pp7-8 that Mr Fraser also relied on this outcome, to support his submission that such undertakings should have been sought by the plaintiff *in the first instance*.

Mr Wyvill submitted that the costs of the application of 30 September should be reserved, to be dealt with following trial. In that connection I note the effect of r63.02(2), subject to r63.20, on an order that costs be reserved.

Mr Wyvill rightly observed that the great majority of time occupied by argument on 1, 3 and 6 October had been devoted to the defendants' application of 30 September for the delivery by the plaintiff of the 1997 shell (Document 2 in proceedings 222 of 1997.

Conclusions

It is frequently a matter of some difficulty to determine the question of costs, when parties resolve an application made to the Court for a mandatory order, by agreeing between themselves to offer and accept undertakings, without reaching agreement on costs. The identity of the "successful" party can be somewhat hazy though, as Martin J said in *TTE* (supra), "costs in interlocutory matters no longer follow success". I also note that in fact the application of 30 September to which the question of costs relates, presently simply stands adjourned sine die. There appears to me to be some practical sense in the rationale advanced by Mr Wyvill for the course of action adopted by the plaintiff. There is not "something exceptional about the circumstances of the interlocutory application". I also note that on 30 September the defendants filed their summons in proceedings no.222 of 1997 returnable on 1 October, in relation to the 1997 shell; clearly, they contemplated appearing before the Court on 1 October in any event, by their own choice.

In all the circumstances, I consider that the appropriate costs order is that the costs of the application of the plaintiff's application of 30 September be reserved. I refuse the defendants' application for the costs thereof , and their request for certification for counsel.
