

PARTIES: FAMILY PLANNING ASSOCIATION
OF THE NORTHERN TERRITORY INC

v

HALFPENNY AND EWENS PTY LTD
(ACN 009 623 894) TRADING AS
HALFPENNYS

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NOS: 141 of 1996

DELIVERED: 14 October 1997

HEARING DATES: 14 October 1997

JUDGMENT OF: Kearney J

REPRESENTATION:

Counsel:

Applicant:	J.E.Hebron
Respondent :	G.M. Berner

Solicitors:

Applicant:	De Silva Hebron
Respondent:	Cridlands

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kea97030

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

No. 141 of 1996

BETWEEN

**FAMILY PLANNING
ASSOCIATION OF THE
NORTHERN TERRITORY INC.**
Plaintiff

AND

**HALFPENNY AND EWENS PTY
LTD (ACN 009 623 894) TRADING
AS HALFPENNYS**
Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 14 October 1997)

Following the ruling this morning refusing the interlocutory application by the plaintiff for the consolidation of these proceedings with proceedings no.47 of 1988, Mr Berner of counsel for the defendant sought the costs of that application.

Mr Hebron of counsel for the plaintiff opposed this application for costs. He did not rely on r63.18, conceding that his application of 3 October for consolidation of the 2 proceedings was “exceptional”. However, he submitted that nevertheless the costs of that application should be ‘costs in the proceeding’ (r63.02(2)), for the following reasons: the plaintiff was an incorporated association which provides a valuable community service; it has limited (if any) funds; it is not in a financial position to meet any order for the payment of costs, at this time; it is currently seeking to recover against its insurer in proceedings no.47 of 1988; and against the defendant (who had been its solicitors in proceedings no.47 of 1988) in these proceedings for their alleged professional negligence in the conduct of its case in proceedings no.47 of 1988. He submitted that if at trial the defendant was successful the costs order he proposed would enable it to recover, as part of its costs, the costs of the consolidation application of 3 October, and that meanwhile the plaintiff should not have to bear those costs.

Mr Berner submitted that the defendant had been served late with the application of 3 October for consolidation; he had had to appear on 8 October; the plaintiff had then successfully applied to have the hearing of its application to consolidate, postponed (with Mr Berner’s consent) until the resolution of the application by the first defendant and third party in proceedings 47 of 1988 to vacate the trial date of 28 October in those proceedings. The application to consolidate had now been held to have been brought too late, in view of the pending trial of proceedings 47 of 1988; it had been doomed to failure.

Mr Berner also sought an indication that the defendant's costs should include its costs for the time he had spent in court on 8 October, awaiting the determination of the applications by the first defendant and third party in proceedings 47 of 1988. As to this, Mr Hebron submitted that whether those costs should be included was purely a matter for the Taxing Master to decide.

Conclusions

I consider that no case has been made out by the unsuccessful plaintiff to resist an order for costs in favour of the successful defendant on the plaintiff's application of 3 October. This is a suitable case for an "order otherwise", in terms of r63.18. Accordingly, I consider that the successful defendant should recover its costs of the plaintiff's application of 3 October 1997 for consolidation, in any event.

I see no reason why those costs should extend to Mr Berner's attendance at the hearing of the applications by the first defendant and third party in proceedings 47 of 1988, on 8 October. The defendant was not (and is not) a party to those proceedings. Upon the hearing of the consolidation application being adjourned, appropriate arrangements could readily have been made for Mr Berner's attendance at the adjourned hearing, after the applications in proceedings 47 of 1988 had been determined.

The defendant should have its costs of the contested hearing on costs this morning. Rule 63.04(3) applies, there having been no application under r63.04(4).

Orders accordingly.
