CITATION:	*Lewis v De Silva & Anor (No 2)* [2024] NTSC 15
PARTIES:	LEWIS, Peter v DE SILVA, David and LAW SOCIETY OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-00135-SC
DELIVERED:	19 March 2024
HEARING DATE:	On the papers
JUDGMENT OF:	Burns J

Legal Profession Act 2006 (NT) s 461, s 512
Supreme Court Counsel's Fees – Guidelines to Taxation of Costs
Supreme Court Rules 1987 (NT) r 63

Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the Australian Charities and Not-for-profits Commission [2021] FCA 435; *Beach Petroleum NL v Johnson* (1995) 57 FCR 119; *Hadid v Lenfest Communications Inc* [2000] FCA 628; *Harrison v Schipp [2002]* NSWCA 213; *Houston v State of New South Wales* [2020] FCA 502; *Latoudis v Casey* (1990) 170 CLR 534; *Lewis v De Silva & Anor* [2023] NTSC 77; *McCasker v OMAD (NT) Pty Ltd (No 4)* [2023] NTSC 89; *Northern Territory v Sangare* (2019) 265 CLR 164; *Oshlack v Richmond River Council* [1998]

HCA 11; 193 CLR 72; *Phillips & Ors v Chief Health Officer & Anor* [2022] NTSC 29; *Wentworth v Wentworth* (CA, 21 February 1996, unreported, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	P Lewis
First Defendant:	C Ford
Second Defendant:	T Liveris

Solicitors:

Plaintiff:	Self-Represented
First Defendant:	De Silva Hebron Barristers and Solicitors
Second Defendant:	Law Society Northern Territory

Judgment category classification:	C
Judgment ID Number:	Bur2404
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lewis v De Silva & Anor (No 2) [2024] NTSC 15
No. 2023-00135-SC

BETWEEN:

PETER LEWIS

AND:

DAVID DE SILVA

AND:

LAW SOCIETY NORTHERN TERRITORY

CORAM: BURNS J

REASONS FOR DECISION

(Delivered 19 March 2024)

[1] On 1 September 2023, I dismissed an application by the plaintiff for judicial review of proceedings in the Northern Territory Legal Practitioners Disciplinary Tribunal ('the Tribunal'). The background to the judicial review proceedings and the proceedings may be found in my earlier judgment.[1]

1 *Lewis v De Silva & Anor* [2023] NTSC 77.

[2] At the time that I dismissed the application for judicial review, I noted that the plaintiff had been wholly unsuccessful in the proceedings. I noted that the usual rule is that an unsuccessful litigant is required to pay the costs of the successful litigants. As the plaintiff was not represented by a legal practitioner, I gave him an opportunity to make submissions in writing relating to the costs orders which I should make. Both the first defendant (De Silva) and the second defendant (the Law Society) seek orders that the plaintiff pay their costs of the application for judicial review.

The plaintiff's submissions

[3] The plaintiff submitted that his application for judicial review was not only a reasonable action with regard to his own personal interests, but also an action brought in the public interest to clarify the powers of the Tribunal in making the costs order against him and determining a gross amount to be paid under the costs order. The plaintiff submitted that he believed that the Tribunal was not legally entitled to conduct a taxation of costs under Rule 63 of the *Supreme Court Rules*.

[4] The plaintiff submitted that he had a right to a review under s 461 of the *Legal Profession Act 2006* (NT) ('*LPA*') of the Law Society's decision to dismiss his complaint against the first defendant. The plaintiff further submitted:

> It is in the public interest to see what can happen when a person reasonably believes the Law Society investigation got it very wrong and then seeks a rehearing of the complaint in the Tribunal. And then challenges the legality of what was supposed to be a taxation of costs

> process under Rule 63 but turned out not to be so. I think the public needs to know what can happen in the circumstances and unfortunately it was me who in a way was a test case.

[5] The plaintiff submitted that my decision of 1 September 2023 has now clarified "those issues". By that, I understand the plaintiff to mean principally the issues of whether the Tribunal was entitled to fix a lump sum as the costs to be paid by the plaintiff to the first defendant, and whether any mechanism existed for enforcement of the order that the plaintiff pay that lump sum costs order to the first defendant.

[6] The plaintiff submitted that the clarification of these issues meant that future litigants will understand that a costs order made by the Tribunal "is not enforceable under the Legal Profession Act but can be enforced through a declaration by the Supreme Court". The plaintiff submitted that it did not appear that this avenue of enforcement of a costs order by the Tribunal had been used in the past. He submitted that my decision has created a precedent clarifying the powers of the Tribunal and also this Court regarding complaints against legal practitioners.

[7] The plaintiff also submitted that I should take into account that he was legally unrepresented throughout the proceedings before the Tribunal and the proceedings for judicial review. He also submitted that he is a "person of limited means receiving a part age pension".

[8] The plaintiff submitted that I should make no order as to costs.

First defendant's submissions

[9] The first defendant submitted that the plaintiff should pay his costs because the plaintiff was wholly unsuccessful and there was no relevant public interest in the proceeding. The first defendant submitted that every argument raised and form of relief sought by the plaintiff was refused. The plaintiff had proposed 13 questions for determination by the Court, most with sub-questions. Each of those was answered contrary to the plaintiff's position. The first defendant submitted that as a wholly successful litigant, he was entitled to an order for costs.[2]

[10] The first defendant accepted that characterisation of proceedings as public interest litigation can be a factor in finding that special circumstances exist to justify a departure from the ordinary rule as to costs. The first defendant submitted that such characterisation by itself is insufficient and that something more is required.[3] Matters which are relevant to assessing whether litigation was in the public interest include the nature of the claim and its underlying merits.[4]

[11] The first defendant drew my attention to the decision of Brownhill J in *Phillips & Ors v Chief Health Officer & Anor*[5] where her Honour listed the

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2 *Northern Territory v Sangare* (2019) 265 CLR 164 at [25]; [36] ('*Sangare*').

3 *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 ('*Oshlack*').

4 *Houston v State of New South Wales* [2020] FCA 502 at [29]; *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of the Australian Charities and Not-for-profits Commission* [2021] FCA 435 at [32].

5 [2022] NTSC 29 at [41].

following as relevant to deciding whether a proceeding is public interest litigation:

a) the public interest served by the litigation;
b) whether that interest is confined to a relatively small number of members concerned with their own private interests, or whether the interest is wider, involving a significant number of members of the public and concern for a wider and significant issue;
c) whether the applicant sought to enforce public law obligations;
d) whether the prime motivation of the litigation is to uphold the public interest and the rule of law; and
e) whether the applicant has no pecuniary interest in the outcome of the proceedings.

[12] The first defendant submitted that in the present case:

a) the plaintiff's prime – if not sole – motivation was his own private interest in not paying costs ordered by the Tribunal. He had an overriding pecuniary interest in the litigation;

b) the claim was exceptionally weak and foredoomed to fail. There could have been no genuine doubt as to the Tribunal's power to order and fix costs;

c) there is no evidence of any doubt in the wider legal or client community as to the Tribunal's power, nor of any other attempts to avoid payment on the failed grounds; and

d) the claimant did not seek to enforce public law obligations.

[13] The first defendant sought an order that the plaintiff pay his costs to be taxed or agreed.

Second defendant's submissions

[14] The second defendant sought an order that the plaintiff pay its costs fixed in the gross sum of $15,840. The order sought relates only to the costs of independent counsel's fees incurred by the Law Society in the judicial review proceedings. The amount sought is supported by fee notes dated 17 April 2023 and 29 June 2023 from Mr Tass Liveris of counsel who was retained in these proceedings by the Law Society.

[15] The second defendant submitted that costs orders are compensatory, not punitive.[6] As the plaintiff had been wholly unsuccessful, the usual rule is that costs follow the event. The second defendant submitted that the most important guiding principle is that a successful party is generally entitled to their costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon them.[7]

[16] The Law Society submitted that its participation in the proceeding was governed exclusively by the aims and objectives of the *LPA* and not any private interest. In the present proceedings, it was submitted that the Law Society had properly limited its involvement to questions and issues relevant to the operation of the *LPA* and the cost regime in appeals to the Tribunal

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6 *Sangare* at [30], citing *Latoudis v Casey* (1990) 170 CLR 534 and *Oshlack*.

7 *McCasker v OMAD (NT) Pty Ltd (No 4)* [2023] NTSC 89 at [14], citing *Sangare* at [25].

which was under challenge in the proceeding. The Law Society noted that I had accepted its submissions regarding the operation of s 512 of the *LPA* – that the Tribunal had implied power to assess or fix the sum of costs paid, that the Tribunal had acted within power in making the costs orders, and that the Tribunal could lawfully adopt its own procedures in doing so.

[17] The Law Society submitted that I should reject the plaintiff's submission that it has benefited from participating in the proceedings. In that regard, the Law Society adopted the first defendant's submissions regarding the appropriate approach to be taken in determining whether proceedings are public interest proceedings.

[18] The Law Society submitted that the plaintiff's submission that he is of limited means is immaterial to the question of whether a costs order should be made. It submitted, generally speaking, that whether a party is rich or poor has no relevant connection with litigation (*Sangare* [32]) and that courts have consistently rejected the suggestion that a costs order should not be made against an impecunious party because it would be futile to do so (*Sangare* [35]).

[19] Turning to the precise order sought by the Law Society, I was referred to the following passage from the decision in *Harrison v Schipp*:[8]

> Of its nature, specification of a gross sum is not the result of a process of taxation or assessment of costs. As was said in *Beach Petroleum NL v Johnson* at 124, the gross sum "can only be fixed broadly having

8 [2002] NSWCA 213 at [22].

> regard to the information before the Court"; in *Hadid v Lenfest Communications Inc* at [35] it was said that the evidence enabled fixing a gross sum "only if I apply a much broader brush than would be applied on taxation, but that … is what the rule contemplates". The approach taken to estimate costs must be logical, fair and reasonable (*Beach Petroleum NL v Johnson* at 123; *Hadid v Lenfest Communications Inc* at [27]). The power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available (*Wentworth v Wentworth* (CA, 21 February 1996, unreported, per Clarke JA).

[20] I was also referred to the decision of *Golden v Anderson & Ors (No 2)*:[9]

> The defendants seek gross sum costs orders pursuant to s 98(4)(c) of the CPA. A gross sum costs order may be ordered in circumstances in which the Court considers that it can be done fairly between the parties and the Court has sufficient confidence in arriving at an appropriate sum on the available materials (see *Harrison v Schipp* [2002] NSWCA 213; (2002) 54 NSWLR 738 at [22]).
>
> Matters which might be taken into account in determining whether to make a gross sum costs order include:
>
> (1) the impecuniosity of the plaintiff;
>
> (2) the likelihood of there being a significant and perhaps insolvable dispute between the parties on the question of costs;
>
> (3) the complexity of the matter;
>
> (4) the difficulties in dealing with the other party on the question of costs or in the proceedings generally; and
>
> (5) whether the amount sought represents an appropriate discount on the actual costs incurred.

[21] The Law Society submitted that this Court has sufficient information to enable it to determine that the amount sought for counsel's fees was reasonable. The Law Society noted that the hourly rate charged by counsel is lower than the allowed hourly rate for junior counsel for court preparation

9 [2023] NSWSC 339 at [11] and [12].

set out in the Supreme Court Counsel's Fees – Guidelines to Taxation of Costs.

Plaintiff's submissions in reply

[22] The plaintiff submitted that the Law Society had played a limited role in the proceeding and that no order for costs should be made in its favour. The plaintiff reiterated previously expressed views about the failure of the Law Society to properly address his complaints. He further submitted that if, as the Law Society had submitted, his application for judicial review had little or no prospect of success, it was unnecessary for the Law Society to retain counsel. The plaintiff also asserted that in the past there had been cases where the Tribunal had declined to make an order for costs in favour of the Law Society.

[23] The plaintiff reiterated his submission that the proceedings were public interest proceedings because, he said, my decision had made it clear that costs orders from the Tribunal were unenforceable without the intervention of the Supreme Court.

Consideration

[24] Dealing with the plaintiff's last submission first, it is not correct to say that my decision of 1 September 2023 was to the effect that costs orders made by the Tribunal were unenforceable except by means of a declaration made by this Court. My judgment at [83] makes it clear that the costs order made by the Tribunal operated of its own force to create a debt owed by the plaintiff

to the first defendant. As I said, the making of the declaration sought by the first defendant was simply to clarify the effect of the Tribunal's orders in any subsequent proceedings to enforce those orders. There was never any doubt that the plaintiff owed the sum of $30,591 to the first defendant.

[25] I do not accept the submission that the application for judicial review prosecuted by the plaintiff should be characterised as public interest litigation. There was never any doubt that the plaintiff owed the sum of $30,591 to the first defendant – the only question was how the payment of the debt was to be enforced. The plaintiff attempted to opportunistically take advantage of what he perceived to be a deficiency in the *LPA*, being the absence of machinery provisions in that legislation for a process of fixing the amount of costs orders and for the enforcement of such orders.

[26] Even if one were to accept that the plaintiff was confused by the form of the order for costs made by the Tribunal on 16 September 2021 (that the first defendant's costs were to be taxed in default of agreement), the issue of taxation became irrelevant after the Tribunal determined on 5 December 2022 to make a lump sum costs order in the sum of $39,591. Notwithstanding this change in the forensic landscape, the plaintiff sought to agitate in the present proceeding the power of the Tribunal to determine the amount of costs payable to the first defendant and multiple other issues of dubious significance.

[27] If, as the plaintiff submits, he is impecunious, this is no reason not to make a costs order in favour of the first defendant or the Law Society. Indeed, it is a circumstance which militates towards making a lump sum costs order as sought by the Law Society.

[28] The fact that the plaintiff's application for judicial review was ill-conceived and had little prospects of success does not mean that the parties were not obliged to take the application seriously. The plaintiff was challenging the interpretation and operation of provisions of the *LPA*, a matter in which the Law Society had a legitimate interest. In addition, the plaintiff not only sought to have the costs order made by the Tribunal in favour of the first defendant set aside, he also sought an order for costs in his favour in relation to the cost proceedings in the Tribunal. The plaintiff cannot now be heard to complain that the defendants took him seriously.

[29] I am satisfied that there is no reason in the present case to depart from the usual rule that the unsuccessful litigant pays the costs of the successful litigants. The proceedings were not properly characterised as public interest proceedings, there was no public law interest involved and the plaintiff was wholly unsuccessful.

[30] With regard to the application made by the Law Society, I am satisfied that it is just and appropriate to make a lump sum costs order in the amount sought by the Law Society. It would simply be a waste of time and productive of further unnecessary cost to have a simple bill of costs

consisting only of counsel's fees referred to taxation. I am in a position to determine that the sum claimed by the Law Society is reasonable.

Orders

[31] I order that the plaintiff pay the costs of the first defendant in the application for judicial review as agreed or taxed.

[32] I order that the plaintiff pay the costs of the second defendant in the application for judicial review fixed in the sum of $15,840.
