Johnson v Northern Territory of Australia [2015] NTSC 15

PARTIES:	JOHNSON, Stuart Douglas v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 22 of 2013 (21310090)
DELIVERED:	18 March 2015
HEARING DATES:	Written Submissions
JUDGMENT OF:	RILEY CJ, BLOKLAND AND BARR JJ

CATCHWORDS:

PROCEDURE – Interlocutory Applications – Costs– *Supreme Court Rules* (NT), r 63.03 – Costs order – Discretion to depart from general rule – Exceptional circumstances

PROCEDURE – Interlocutory Applications – Costs – Taxation - *Supreme Court Rules* (NT), rr 63.04 – Early taxation – Broad discretion to depart from general rule

TTE Pty Ltd v Ken Day Pty Ltd (1990) 2 NTLR 143; *Markorp Pty Ltd v King* (1992) 106 FLR 286; *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189; *Alstom Power Ltd v Yokogawa Australia Pty Ltd (No2)* [2006] SASC 87, applied.

Milingimbi Educational and Cultural Association Inc v Davis [1990] NTSC 35; *Yow v Northern Territory Gymnastic Association Inc* (1991) 1 NTLR 180; *Brasington v Overton Investments Pty Ltd* [2001] FCA 571; *Courtney v Medtel Pty Ltd (No 3)* [2004] FCA 347, referred to.

Supreme Court Rules (NT), rr 63.03, 63.04.

REPRESENTATION:

Counsel:

Plaintiff:	M Johnson
Defendant:	J Ingrames

Solicitors:

Plaintiff:	Midena Lawyers
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Johnson v Northern Territory of Australia [2015] NTSC 15
No. 22 of 2013 (21310090)

BETWEEN:

STUART DOUGLAS JOHNSON
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: RILEY CJ, BLOKLAND AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 18 March 2015)

THE COURT:

[1] The following question was referred to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT):

> Can the two month time limit specified in s 162(1) of the *Police Administration Act 1978* (NT) be extended by a court pursuant to s 44(1) of the *Limitation Act1981* (NT)?

[2] On 23 May 2014 the Full Court answered the question in the affirmative. At the time reasons for decision were delivered the parties anticipated that they would be able to agree on the issue of costs. Agreement has not been reached and parties have now made written submissions as to appropriate costs orders.

The history of the proceedings

[3] On 8 March 2013 the plaintiff commenced proceedings against the defendant seeking damages for assault and battery allegedly committed against him by two police officers in July 2005. The proceedings were commenced against the defendant pursuant to s 148F(1) of the *Police Administration Act.*

[4] In December 2013 the defendant filed a strikeout application in relation to the proceedings. During those proceedings the defendant identified as an issue whether the cause of action had been extinguished by operation of s 162 (1) of the *Police Administration Act*. This section provides that an action against the defendant "must be commenced within two months after the relevant act or omission complained of was committed". In the interlocutory application, it was contended that the extinguished cause of action was not capable of revival by way of an extension of time under s 44 of the *Limitation Act*.

[5] If the argument of the defendant had been successful the proceedings and the claim of the plaintiff would have come to an end. However the argument did not succeed and the proceedings continue.

The making of an interlocutory order for costs

[6] Rule 63.03 of the *Supreme Court Rules* provides that, as a general rule, "the costs of a proceeding are in the discretion of the Court". In relation to interlocutory orders r 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.

[7] The application of this provision was discussed by Martin J in *TTE Pty Ltd v Ken Day Pty Ltd*[1] where his Honour said:

> Mention has already been made of the radical departure from past practice introduced by these particular rules. Such a 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, or if made to order that they may be taxed earlier than completion of the proceedings, 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 interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably or which are unnecessarily burdensome or which are made at a time, such as here, when that 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 application or resistance, as the case may be, are reasonable. However, if such application or resistance is without real merit, as is often the case, the successful party should not have to bear his costs. [Italics added]

[8] In *Otter Gold NL v Barcon (NT) Pty Ltd*[2] Thomas J held that "exceptional circumstances" justifying an award of costs for an interlocutory application to the successful party arose where:

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[1] (1990) 2 NTLR 143 at 145. See also *Milingimbi Educational and Cultural Association Inc v Davis* [1990] NTSC 35; *Yow v Northern Territory Gymnastic Association Inc* (1991) 1 NTLR 180; *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189.

a) the application would have concluded the action of the plaintiff, if successful; and

b) the application was not one that would have been reasonably anticipated by the plaintiff.

[9] In our opinion the circumstances of the present case are exceptional and warrant a departure from the general rule that each party bear its own costs of an interlocutory application. If the argument of the defendant had been successful the plaintiff would not have been able to pursue his cause of action. The proceedings would have been brought to an end. Further, it was in the general interests of the defendant, beyond these proceedings, to have the question answered by the Full Court. This was a test case to clarify the application of s 44 (1) of the *Limitation Act* to the time limit provided by s 162 (1) of the *Police Administration Act*. The defendant will necessarily be involved in all cases brought under that provision and therefore it was in the interests of the defendant to have the issue settled.

[10] In the circumstances we order that the defendant pay the plaintiff's costs of and incidental to the interlocutory application.

The time for taxation

[11] Rule 63.04(3) of the *Supreme Court Rules* provides that where the Court makes an interlocutory order for costs, those costs "shall not be taxed until the conclusion of the proceeding to which they relate". Subrule (4) then

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[2] (2000) 10 NTLR 189, pp 192-193.

provides that, "if it appears to the Court when making an interlocutory order for costs that all or a part of the costs ought to be taxed at an earlier stage, it may order accordingly".

[12] One rationale for the provision would seem to be that an interlocutory proceeding does not finally resolve the issues between the parties and therefore it may be inappropriate for a party to be required to pay costs immediately as that party may ultimately be entitled to an order for costs in the substantive proceeding.[3] In considering the equivalent rule of the Federal Court of Australia, Sackville J noted in *Courtney v Medtel Pty Ltd (No 3)*[4] that the policy reasons underlying such a provision included:

(a) discouraging interlocutory applications;

(b) avoiding the inconvenience and possible oppression involved in a series of taxations where there are successive interlocutory applications; and

(c) the fact that it is usually inappropriate to require the unsuccessful party to interlocutory proceedings to pay costs immediately, since that party might ultimately succeed in the substantive proceeding in which case a set off can be made to reflect the ultimate costs orders.

[13] In *Alstom Power Ltd v Yokogawa Australia Pty Ltd (No2)*[5] Debelle J referred to the following factors identified by the Federal Court as justifying a departure from the general rule :

[3] *Brasington v Overton Investments Pty Ltd* [2001] FCA 571 at para [13].
[4] [2004] FCA 347 at para [20]; see also *Alstom Power Ltd v Yokogawa Australia Pty Ltd (No2)* [2006] SASC 87.
[5] [2006] SASC 87 at para [8].

(a) where an interlocutory proceeding involving a discrete issue has been resolved;

(b) where the principal proceedings are not likely to be resolved for some time so that, in the absence of an order, the successful party will not enjoy the fruits of the interlocutory order for a long period;

(c) where the interlocutory application has had the effect of removing one of several causes of action in its entirety; and

(d) where the application is an unsuccessful application for leave to appeal on an interlocutory matter of practice and procedure given the strong public policy against the proliferation of such applications.

[14] In the present case the plaintiff made no submission regarding the basis upon which early taxation should be directed other than to assert that "it is likely that the final issues, relevant to the claim by the Plaintiff, will not be determined for a considerable time".

[15] Rule 63.04(4) of the *Supreme Court Rules* provides a wide discretion to the Court to order that the costs be taxed at an earlier stage. There is nothing "to indicate that that discretion is constrained by any particular circumstances or considerations".[6] The present case is unusual in that the matter was referred to the Full Court for determination of an interlocutory issue of significance to these proceedings and to other proceedings of a similar kind. As the defendant submitted, the outcome of the application was that the plaintiff was able to apply for an extension of time under s 44 of the

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[6] *Markorp Pty Ltd v King* (1992) 106 FLR 286 at 293.

Limitation Act in order to pursue a cause of action against the defendant. If the defendant had been successful, the proceedings would have come to an end. The issue was a discrete question of statutory interpretation resolved in the Full Court. It involved a significant amount of work for the parties, which will not be relevant in the substantive proceedings.

[16] There is no challenge to the assertion of the plaintiff that the claim will not be determined for a considerable time. It was not submitted on behalf of the defendant that an order for early taxation would, if made, be unfair or oppressive.

[17] In all the circumstances we order that the costs be taxed and payable forthwith.

[18] The order of this Court is that the defendant pay the plaintiff's costs of and incidental to the interlocutory proceeding heard by the Full Court, to be taxed and payable forthwith.