O'Brien v Nicholas [2015] NTSC 87

PARTIES:	O'BRIEN, Edward
	v
	NICHOLAS, Sally
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 34 of 2014 (21347423)
DELIVERED:	31 DECEMBER 2015
WRITTEN SUBMISSIONS:	28 AUGUST 2015, 11 SEPTEMBER & 23 SEPTEMBER 2015
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

PRACTICE AND PROCEDURE – Costs – Indemnity costs – Case manifestly foredoomed to fail – Consideration of the complexity of the case – Foredoomed to fail does not inevitably mean respondent should have known there was no chance of success – Indemnity costs refused.

PRACTICE AND PROCEDURE – Costs – Reduction of costs – Consideration of role of the appellant – Costs reduced by 30 percent.

PRACTICE AND PROCEDURE – Costs – Court of Summary Jurisdiction – Indemnity costs – Supreme Court not constrained by *Justices Act* and *Justices Regulations*.

PRACTICE AND PROCEDURE – Costs – Court of Summary Jurisdiction – Costs in excess of prescribed scale – reg 14 *Justices Regulations* – Rarity of application not an exceptional circumstance pursuant to reg 14(2) *Justices Regulations* – Complexity of case relevant – Not a mere technical matter.

Justices Regulations, reg 14
Supreme Court Rules, r 63.03

Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd [2013] NTSC 62; *Ballard v Brookfield Australia Investments Ltd* [2013] NSWCA 18; *DPP v Batich* [2013] VSCA 53; *Carroll v Alcan Gove Pty Ltd* [2008] NTMC 007; *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397; *Latoudis v Casey* (1990) 170 CLR 534*; Nitschke v Medical Board of Australia (No.2)* [2015] NTSC 50; *O'Brien v Nicholas* [2015] NTSC 5, referred to.

REPRESENTATION:

Counsel:

Appellant:	R Murphy
Respondent:	D Walters

Solicitors:

Appellant:	Murphy and Associates
Respondent:	Office of the Director of Public Prosecutions

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

O'Brien v Nicholas [2015] NTSC 87
No. 21347423

BETWEEN:

EDWARD O'BRIEN
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: BLOKLAND J

REASONS FOR DECISION ON COSTS

(Delivered 31 December 2015)

Background

[1] On 21 January 2015 orders were made allowing an appeal against a refusal to stay proceedings in the Court of Summary Jurisdiction. The order of the Court of Summary Jurisdiction dismissing the application for a stay was quashed. Rather than remitting the matter to the Court of Summary Jurisdiction, after hearing the merits of the stay application, the prosecution of the complaint was permanently stayed by this Court pursuant to s 21 of the *Criminal Code*.[1]

[1] *O'Brien v Nicholas* [2015] NTSC 5 at [41].

[2] The parties have been unable to agree on costs. Written submissions on the question of costs have now been filed and considered.

[3] The appellant seeks indemnity costs for and incidental to the appeal as well as the proceedings giving rise to the appeal in the Court of Summary Jurisdiction. In the alternative, the appellant seeks costs calculated at 100 percent of the Supreme Court scale in both proceedings.[2]

[4] The respondent submits that each party should bear their own costs. Alternatively, it is submitted costs should be dissected to reflect the failure of one ground of appeal in this Court. In respect of costs in the Court of Summary Jurisdiction, the respondent submits that not more than 30 percent of the costs on the prescribed Court of Summary Jurisdiction scale should be allowed. Alternatively, it is argued if an order for costs is to exceed the Court of Summary Jurisdiction scale, it should not exceed 50 percent of the Supreme Court scale.

Costs of the appeal - indemnity costs

[5] The discretion to award indemnity costs is enlivened when an action is commenced or continued in circumstances where a properly advised litigant should have known he or she had no chance of success.[3]

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[2] Appellant's Summary of Submissions as to Costs at [8].
[3] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at [401] per Woodward J; *Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd* [2013] NTSC 62 at [32] per Kelly J; and *DPP v Batich* [2013] VSCA 53 at [55]-[61] per Warren CJ, Redlich and Whelan JJA.

[6] In this case, it was found that the prosecution was manifestly foredoomed to fail. As a consequence the permanent stay was granted.[4] Additionally, one of the successful grounds of appeal was the failure to give adequate reasons in the Court below. The merits of the appellant's application for a stay were considered afresh on appeal.

[7] In this particular case, the finding that the prosecution was foredoomed to fail does not inevitably mean that there must be a finding that the respondent should have known that it had no chance of succeeding. Although the ultimate conclusion of the Court required the high threshold of "manifestly foredoomed to fail" to be established in order to enliven s 21 of the *Criminal Code*, the reasoning required to reach the ultimate conclusion in this particular case was not so clear that it could be said the respondent should have known there was no chance of success in responding to the appeal.

[8] As submitted on behalf of the respondent, it is also relevant to consider the context and the degree of difficulty inherent in the reasoning and final decision.[5] This appeal succeeded largely on administrative law principles that required balancing of certain factors that will not be repeated here. Reasonable minds may have differed about the ultimate relief granted in the circumstances. There were potentially broader implications of a favourable decision for the appellant beyond the immediate parties. Even if the

[4] *O'Brien v Nicholas* [2015] NTSC 5 at [9].
[5] Respondent's Summary of Submissions as to Costs at [29], citing *O'Brien v Nicholas* [2015] NTSC 5 at [39].

respondent had conceded the appellant was correct at the commencement of the appeal, proper grounds or arguments would still need to be made out for this Court to justify overturning the decision of the Court of Summary Jurisdiction and finding the issue of the purported licence to be void *ab initio*. Further, the conduct of the respondent on appeal could not be characterised as unreasonable such as to provide an additional basis for awarding indemnity costs.[6]

[9] This is not a proper case in which to award indemnity costs. The application for indemnity costs will be refused.

Costs of the appeal – costs on the standard basis

[10] Ordinarily costs follow the event and the successful party is entitled to an order for costs. Costs are in the discretion of the Court.[7] The discretion must be exercised judicially. Recently in *Nitschke v Medical Board of Australia (No.2)*,[8] Hiley J considered r 63.03 of the *Supreme Court Rules* when awarding costs of an appeal and at first instance. His Honour stated the position as follows:

> "It is well established that the costs of a proceeding are in the discretion of the Court and that, subject to certain limited exceptions, the successful party to litigation is entitled to an award of costs in its favour. Where an appellant is successful in its appeal the Court should ordinarily order the unsuccessful respondent to pay the costs of the appeal and the proceeding at first instance". (footnotes omitted)

[6] *Ballard v Brookfield Australia Investments Ltd* [2013] NSWCA 18 per Ward JA at [7], [8].
[7] *Supreme Court Rules* r 63.03.
[8] [2015] NTSC 50.

[11] I proceed broadly on this basis. As with any successful party, the appellant is ordinarily entitled to costs and should not readily be deprived of an order for costs in his favour; however, in my view there are reasons why this matter should be considered exceptional, leading to a reduction in the amount of costs ordered.

[12] The purported licence that was found to be invalid was issued after the appellant filled out an application described in paragraph [19] of the Reasons for Judgment.[9] The application filled out by the appellant was confusing. Objectively it is difficult to see with clarity whether this represented a corporate application or that of an individual for a "Dealer's Licence". In any event, despite being issued with an invalid licence, the appellant was carrying on the business of a Firearms Dealer.

[13] The *Firearms Act* and *Firearms Regulations* set up a regulatory scheme "to ensure that firearms are only placed in the hands of those people who should be legitimately authorised to possess or use a firearm".[10] Although the responsibility for its effective operation lies primarily with the Commissioner of Police, as a regulatory scheme it relies also on those who would hold licences of various kinds to provide information and otherwise comply with the machinery of the *Firearms Act* and *Regulations*. The information provided by the appellant was confusing.

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[9] *O'Brien v Nicholas* [2015] NTSC 5.
[10] Second Reading Speech, Minister for Police, Fire and Emergency Services, when introducing the *Firearms Amendment Bill* (No 2) of 2000.

[14] Looking at the matter from the appellant's perspective as is required by *Latoudis v Casey*,[11] and the overall justice of the situation, the appellant suffered the expense of defending a charge that was ultimately stayed. However, the appellant also had the benefit of the invalid Dealer's Licence to conduct business. On appeal the licence was found to be invalid in the context of defending a charge that was brought as part of the enforcement machinery pursuant to the *Firearms Act*. The appellant provided at least some of the information on which the invalid Dealer's Licence was issued. The overall circumstances of the case were unusual. There will be some reduction in the costs awarded to the appellant.

[15] In my view this is not an appropriate case, as argued by the respondent, to dissect the award for costs for the reason that the one ground of appeal was not made out. The appellant's stay application relied on two alternative bases: (1) that the licence was not issued to the appellant; and (2) that the licence was void *ab initio* as it did not satisfy the requirements of s 12 of the *Firearms Act*. The first basis was unsuccessful on appeal.

[16] Ground one did not form a significant part of the appellant's case on appeal. Its importance lay in the context of providing background information regarding the proceedings in the Court of Summary Jurisdiction. It was a minor part of the appeal proceedings. It certainly did not add to the length of the argument. Lack of success in respect of an issue that did not assume significance would not ordinarily lead to a reduction of costs.

[11] (1990) 170 CLR 534 at 542.

[17] Because of some of the unusual aspects of the case I expressed some hesitation in the Reasons for Judgment about whether a stay was appropriate.[12] On reflection, for the reasons given, it is appropriate the appellant be awarded costs on the standard basis but that the award of costs be reduced by 30 percent. With respect to the costs of the Appeal, it is not necessary to specify a percentage of the scale in the Order as, unless otherwise specified, costs in this Court are set at 100 percent of the Supreme Court scale.

Costs in the Court of Summary Jurisdiction - indemnity costs

[18] Much of the argument in support of the application for indemnity costs in the Court of Summary Jurisdiction relied on the conduct of the prosecution.

[19] The appellant submitted the respondent caused considerable delay and complication to the prosecution in the Court of Summary Jurisdiction by:

- electing to jointly charge three defendants with the offence where only one could be the holder of the licence at the relevant time;
- never replying to the appellant's written submissions of 22 January 2014;
- seeking five adjournments between 13 December 2013 and 21 March 2014;[13]
- refusing to elect who it was alleging was the actual licence holder until forced to do so by the stay application.[14]

[12] *O'Brien v Nicholas* [2015] NTSC5 at [39].
[13] Appellant's Summary of Submissions as to Costs at [10.1]; Appellant's Submissions in Response at [25].
[14] Appellant's Summary of Submissions as to Costs at [10.1]-[10.1.2].

[20] Further, it is clear that the arguments in the Court of Summary Jurisdiction were the same as those on appeal. It was pointed out the respondent had been on notice of the issue of the invalidity of the licence from 22 January 2014 onwards. Consequently, it was argued indemnity costs should be recoverable from at least that date, as this was when the respondent, properly advised, should have known that it had no chance of success. Further, as the charge was vexatious in that it was doomed to fail, it was argued indemnity costs should be awarded not only for the appeal but also for the proceedings at first instance.

[21] The appellant fully disclosed the argument he was relying on to the prosecution. The delays in responding and withdrawing the complaint against some of the defendants were unfortunate. The names of those defendants appear to be the names provided on the application for the Dealer's Licence.

[22] For similar reasons given already with respect to costs on the appeal, notwithstanding that ultimately the matter was stayed, the process of reasoning required was not clear cut and the result potentially had significant consequences. This was not a simple case of demonstrating the prosecution was unable to prove an element of the charge. A preliminary conclusion of invalidity was required by the prosecution before the question of whether the charge was foredoomed to fail could be determined. The argument required consideration of substantive legal issues, with potentially significant consequences. Although the prosecution commenced and

continued with some significant confusion, I would not characterise the conduct as “plainly unreasonable”.

[23] The delays occasioned by adjournments in the Court of Summary Jurisdiction are more appropriately dealt with by costs in the ordinary course on the standard basis.

[24] Although I agree with the appellant’s argument that this Court is not constrained by the *Justices Act* in terms of costs and that there is power to order indemnity costs, this is not an appropriate matter in which to award indemnity costs in respect of the proceedings in the Court of Summary Jurisdiction.

Costs in the Court of Summary Jurisdiction - costs on the standard basis

[25] Under reg 14(2) of the *Justices Regulations*, an award of costs can exceed the prescribed scale where the circumstances of the case or the legal issues involved in the case are of an exceptional nature.

[26] This Court is not bound by reg 14; it has unfettered discretion to award costs. The *Justices Regulations* apply only to the Court of Summary Jurisdiction. Some of the issues raised in the context of the applicability of reg 14(2) are also relevant for determining costs overall.

[27] The appellant argued that even if this Court was to consider the summary nature of the proceedings, in particular reg 14(2) of the *Justices*

Regulations, the stay application had some exceptional features. The appellant submitted the following features were exceptional matters:[15]

- the dominant issue was the s 21 application for a permanent stay;
- the Director of Public Prosecutions is supposed to conduct itself as a model litigant and as such ought not to have commenced or continued with vexatious proceedings;
- the dearth of any authority pertaining to s 21 applications; and
- the respondent was put on notice of the invalidity of the licence on 14 January 2014 (It may be that the correct date is January 2014, that is when the written representations were said to have been made).

[28] As to the exceptional nature of the legal issues, the appellant argued with respect to reg 14(2)(b) of the *Justices Regulations*:[16]

- the appellant mounted a collateral challenge based on administrative law to a criminal charge;
- the appellant and two others were jointly charged; and
- section 21 applications have only been ventilated on 2 prior occasions.

[29] As pointed out by the respondent, the fact that a particular application is rare has been held not to be an exceptional circumstance for the purposes of reg 14(2) of the *Justices Regulations*. In *Carroll v Alcan Gove Pty Ltd*,[17] Luppino SM (as the Master then was) considered reg 14 and held that "the number of previous prosecutions under the Acts referred to cannot impact on

[15] Appellant's Submissions in Response at [19.2].
[16] Appellant's Submissions in Response at [17].
[17] [2008] NTMC 007.

the complexity of this matter".[18] I agree with his Honour's conclusion. Similar reasoning applies to the question of costs generally, unconstrained by reg 14(2).

[30] The respondent argued the appellant succeeded on a technical point which should limit any award of costs. The respondent submitted the "technical nature" of the appellant's success was a relevant circumstance to refuse or qualify any order for costs in accordance with the criteria set out in *Latoudis v Casey*.[19] Further, it was said the technical nature of the defence would qualify as a "limited exception" to the general rule under r 63.03 of the *Supreme Court Rules* that the successful party is entitled to an award of costs in its favour.

[31] In some respects the appeal had the characteristics of highly technical argument but overall the relevant law concerned substantive issues and the consequences of resolution of those issues. It would be wrong to characterise the appellant's success as being based on a merely technical defence as that term is usually understood in order to reduce the award of costs.

[32] Even if this Court were bound by the *Justices Act* and the *Justices Regulations,* in my view this is an appropriate case to depart from that scale. The substance of the stay application was the same in both courts. The significance of the argument should be dealt with in the same manner in

[18] *Carroll v Alcan Gove Pty Ltd* [2008] NTMC 007 at [15].
[19] (1990) 170 CLR 534.

both courts. The argument was complex. The intellectual endeavour employed to construct the ultimately successful argument was first generated in the proceedings before the Court of Summary Jurisdiction. The argument was fully disclosed to the respondent.

[33] Costs will be ordered in respect of the Court of Summary Jurisdiction proceedings in accordance with 100 percent of the Supreme Court scale on the standard basis; however for the reasons given in respect of the discussion of costs in this Court, the award of costs will be reduced by 30 percent. In my view it is an appropriate case for the same approach to be taken in both courts with respect to costs.

[34] On the issue of apportionment of costs between parties initially involved in the proceedings, it must be appreciated costs are being ordered here in favour of the appellant only. In respect of any apportionment by virtue of other parties, that is a matter more appropriately dealt with at taxation.

[35] As neither party has been wholly successful in respect of their arguments for costs, each party will bear their own costs in relation to the application for costs.

[36] **Orders**:

1) The respondent is to pay the appellant's costs of and incidental to the appeal on the standard basis to be agreed within 28 days or taxed and reduce the amount so taxed by 30 per cent.

2) The respondent is to pay the appellant's costs of and incidental to the hearing in the Court of Summary Jurisdiction on the standard basis to be agreed within 28 days or taxed and reduce the amount so taxed by 30 per cent. Costs in the Court of Summary Jurisdiction are to be calculated at 100 percent of the Supreme Court scale.

3) The parties are to bear their own costs in respect of the application for costs.

[37] By prior arrangement with the parties these reasons will be forwarded by email. The orders will be effective from 31 December 2015.

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