PARTIES:	GEOFFREY RAYMOND SMITH v PAUL DESMOND SWEENEY AND ORNAMENTAL CORNICE PTY LTD (ACN 010 318 546)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	63 of 1996
DELIVERED:	13 February 1997
HEARING DATES:	12 February 1997
JUDGMENT OF:	Kearney J

CATCHWORDS:

Practice - Whether an application for a stay is interlocutory in nature - Test for whether an application is interlocutory or final

Ex p Britt [1987] 1 Qd.R. 221, applied.
Southern Cross Exploration NL v Fire and All Risks Insurance Co. Ltd [No.2] (1990) 21 NSWLR 200, applied.

Costs - Interlocutory proceedings - Application to stay execution of consent orders - Circumstances when the Court might 'otherwise order; - Appropriate time for taxation of costs - Discretion to order taxation of costs at "an earlier time" -

Rule 63.03(1), 63.04(3) and (4), 63.18.
TTE Pty Ltd v Ken Day Pty Ltd (1992) 2 NTLR 143, followed.

REPRESENTATION:

Counsel:

Plaintiff:	M.P. Hardie
First Defendant:	-
Second Defendant:	J.C. Kelly

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	-
Second Defendant:	Clayton Utz

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

No. 63 of 1996

IN THE MATTER of
THE CORPORATIONS LAW

AND IN THE MATTER of
CONSTRUCTION ENTERPRISES PTY LTD (ACN 009 615 785)

BETWEEN:

GEOFFREY RAYMOND SMITH
Plaintiff

AND:

PAUL DESMOND SWEENEY
First Defendant

AND:

ORNAMENTAL CORNICE PTY LTD (ACN 010 318 546)
Second Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 13 February 1997)

The application for costs

Yesterday I ordered that the plaintiff's application of 7 January 1997 to stay the execution of consent orders nos.5-9 of 18 April 1996 and the order of 8 November 1996 of Taxing Officer Keyte, be dismissed. I also ordered that the second defendant's application of 5 December 1996 for the payment out of Court of the sum of $7304.10 (plus accrued interest) paid in by the plaintiff as security for the second defendant's costs, be granted.

Ms Kelly of counsel for the second defendant then sought the costs of the joint hearing of the applications of 5 December and 7 January. Mr Hardie of counsel for the plaintiff opposed that application, submitting that the appropriate order should be that the costs should be the second defendant's costs in proceeding no.3 of 1997 (in which the plaintiff seeks to have consent orders nos.5-9 of 18 April 1996 set aside). I rule today on the second defendant's application for costs.

The submissions

Ms Kelly referred to *Cox v Mosman* (1908) St.R.Qd. 210, a case where an unsuccessful defendant obtained a stay on terms, pending appeal. As to the costs of the stay application the Full Court said at 214-5:

> "We also think that as the applicant has come to this Court, asking a favour [that is, a stay], that he ought to pay the costs of this application. That is the practice stated by Lord Selborne L.C. in *Merry v Nickalls* (1873) L.R. 8 Ch. App 205 and followed

> [after the Rules of Court 1875 came into force] in *Cooper v Cooper* (1876) 2 Ch.D. 492, and we would not feel inclined to depart from it, unless, perhaps, an offer, substantially the same as the order we are now making, had been made by the applicant."

Ms Kelly also referred to *J.C. Scott Constructions v Mermaid Waters Tavern Pty Ltd (No.2)* (1983) 2 Qd.R. 255. In that case an unsuccessful defendant unsuccessfully sought a stay of execution pending appeal. As to the costs of the application Derrington J said at 260:

> "As is customary in such an application (*Cox v Mosman & Anor) (supra),* and in any case because the applicant was substantially unsuccessful, it should pay the respondent's costs."

The provisions in the Rules

Rule 63.03(1) of the Supreme Court Rules provides that in general but "subject to these Rules and any other law … the costs of a proceeding are in the discretion of the Court."

A successful party nevertheless usually expects to have its costs paid by an unsuccessful party, when the Court exercises its discretionary power under r63.03(1). However, r63.03(1) applies to the "proceeding" - that is, , the litigation as a whole - and not necessarily to every interlocutory step in that "proceeding" - see *O'Keefe Nominees Pty Ltd v BP Australia Ltd* (1995) 55 FCR 591.

Rule 63.18 provides that each party bears its own costs of an interlocutory application in a proceeding, "unless the Court otherwise

orders." Is an application for a stay an "interlocutory application" within r63.18?

The test for whether an application is interlocutory or final is whether the decision on it will finally dispose of the rights of the parties, not merely as to the subject matter of the particular application, but also as to the ultimate dispute between them - irrespective of whether that is already the subject of litigation, and independently of whether the outcome of the application might in a practical sense spell an end to all prospect of such litigation; see *Ex p Britt* [1987] 1 Qd.R. 221 and *Southern Cross Exploration NL v Fire and All Risks Insurance Co. Ltd [No.2]* (1990) 21 NSWLR 200. Applying this test, it is clear that the present applications - for a stay and for payment out - were interlocutory applications for the purposes of r63.18. The question therefore arises as to whether the second defendant has shown that the circumstances are such that the Court should "otherwise order". Assuming the second defendant surmounts that hurdle, there is the question of *when* its costs should be paid.

Rule 63.04(3) provides that costs awarded under an interlocutory order "shall not be taxed until the conclusion of the proceeding to which they relate." However r63.04(4) provides that a Court may nevertheless order that such costs be taxed "at an earlier stage". Here the interlocutory applications were made in proceeding no.63 of 1996 which was concluded for practical purposes by the consent orders of

18 April 1996. There remains on foot proceeding no.3 of 1997; see p2.

Applying the principles referred to in *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143, I think that the circumstances were such that the Court should "otherwise order" in terms of r63.18, and the successful second defendant should have its costs of the application. Further, bearing in mind both proceedings nos.63 of 1996 and 3 of 1997, I consider that those costs should be taxed "at an earlier stage", in terms of r63.04(4).

Accordingly, the second defendant should recover from the plaintiff its costs of the hearing of both applications, and it may tax those costs forthwith.

Orders accordingly.

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