

PARTIES:

KEITH CORNELIUS
VAN RANGELROOY

v

STEPHEN BADDELEY

AND

STEPHEN JOHN McMAHON

TITLE OF COURT:

SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO:

90 of 1996

DELIVERED:

24 September 1997

HEARING DATES:

2 June, 16 July and 21 August 1997

JUDGMENT OF:

Kearney J

REPRESENTATION:

Solicitors:

Plaintiff:

J. Neill; (later) G. Clift

First Defendant:

M. Michaels; (later) M. Spain

Second Defendant:

D. Farquhar

Judgment category classification:

Judgment ID Number:

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

No. 90 of 1996 (9610361)

BETWEEN:

**KEITH CORNELIUS
VAN RANGELROOY**
Plaintiff

v

STEPHEN BADDELEY
First Defendant

AND

STEPHEN JOHN McMAHON
Second Defendant

CORAM: KEARNEY J

RULING ON COSTS

(Delivered 24 September 1997)

I rule today on the question of costs raised on 16 July and further argued on 21 August. The background is as follows.

The first defendant applied for leave to further amend its Defence by summons and supporting affidavit of 29 May 1997. He also sought an order that the plaintiff pay the costs of the application. The second defendant also applied to further amend its Defence, by a summons and supporting affidavit of 14 July 1997; he also sought an order that the plaintiff pay his costs. The plaintiff concedes that both defendants were informed prior to the hearing of these applications that their applications to amend would be opposed.

At a directions hearing on 2 June, the plaintiff opposed the first defendant's application to amend, and successfully sought that it be deferred, on the basis that the second defendant would be making a similar application. At a directions hearing on 16 July, when applications by both defendants were heard, the plaintiff changed his earlier stance and neither opposed nor consented to these applications, which were granted. I indicated at that time that I would rule on the question of the costs of the applications, at a later date.

At the hearing on 16 July both defendants abandoned their applications that the plaintiff pay the costs of their applications to amend. They sought instead an order that each party bear its own costs of those applications. The defendants submitted that they had been obliged to file their applications and supporting affidavits, and have the applications listed before me as contested applications, solely because of the plaintiff's admitted intention to oppose them. They submitted that the costs thereby unnecessarily incurred could have been avoided, had the plaintiff earlier indicated the position he adopted on

16 July that he neither consented nor opposed. The plaintiff submitted that the proper order was that the costs of the applications be ‘costs in the cause’, so that the costs thereof would be recoverable by the party who succeeded at trial.

Following these costs submissions on 16 July I indicated to the parties that r63.11(7)(b) might determine the issue. Rule 63.11 provides for where the costs fall in certain situations; in those situations no special order for costs is required. Par63.11(7)(b) provides:

“A party who amends ... a pleading ... by leave, *shall* pay the costs of and occasioned by the amendment and the costs thrown away because of the amendment.” (emphasis added)

I requested further submissions on the costs issue.

On 21 August, the costs issue was reagitated, but no party sought to rely on r63.11(7)(b). The plaintiff now submitted that there should be "no order as to costs"; see r63.02(2). In effect, the plaintiff was thereby agreeing to the costs order proposed by the defendants on 16 July. Despite the apparently mandatory terms of par63.11(7)(b) there remains a discretion as to costs of and occasioned by an amendment. For example, in *Public Trustee v Nash* (1920) 38 WN(NSW) 142, where a plaintiff was clearly entitled to amend but the defendant refused to consent to the necessary order, it was held that the defendant should pay the costs of the summons for leave to amend. The overriding consideration here is that the parties are now agreed on the issue of costs.

Accordingly, I direct that each party bear its own costs with respect to the applications of the first and second defendants of 29 May and 14 July, respectively, to further amend their respective Defences.
