Lees & Anor v Angell & Anor [2006] NTSC 37

PARTIES:	LEES, Michael FRONTLINE TRANSPORT (ACN 635 424 72) v ANGELL, Michael MARATHON TYRES (WA) PTY LTD t/as FENNELL TYRES (ACN 009 130 858)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	78/02 (20208463)
DELIVERED:	19 May 2006
HEARING DATES:	21 March 2006
JUDGMENT OF:	THOMAS J
ON APPEAL FROM:	MASTER COULEHAN

REPRESENTATION:

Counsel:	
Appellants:	B McManamey
Respondents:	R Bruxner
Solicitors:	
Appellants:	Cridlands
Respondents:	Ward Keller
Judgment category classification:	C
Judgment ID Number:	tho200606
Number of pages:	22

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

Lees & Anor v Angell & Anor [2006] NTSC 37
No. 78/02 (20208463)

BETWEEN:

LEES, Michael
First Appellant

FRONTLINE TRANSPORT
(ACN 635 424 72)
Second Appellant

AND:

ANGELL, Michael
First Respondent

MARATHON TYRES (WA) PTY LTD
t/as FENNELL TYRES
(ACN 009 130 858)
Second Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 May 2006)

[1] This appeal from a decision of the Master was scheduled for hearing on 21 March 2006. As it transpired, the only issue for determination by this Court is an application made by Mr Bruxner, counsel for the respondents, for costs of the appeal and the hearing before the Master.

[2] On 21 July 2005, the Master delivered reasons for his decision. He found as follows:

> "The second plaintiff has, in effect, failed to make discovery in accordance with rules 29.03 and 29.04. It will be ordered that the second plaintiff file and serve a further list of documents, verified by affidavit, after making all due and proper enquiries."

[3] From this decision, the second plaintiff, Frontline Transport (ACN 635 474 72) lodged a notice of appeal. The respondents were the first and second defendants.

[4] At the outset of the hearing of this appeal, Mr Bruxner on behalf of the respondents, stated that because of developments over the previous few days the respondents no longer required the order made by the Master. The reason for this was, in the last few days, solicitors for the appellants had taken steps in terms of ascertaining or looking at further documents that had come to their attention and advised the respondents those documents did not contain anything that was discoverable.

[5] Mr Bruxner stated that at the time the Master made the order, it was clearly correct. Mr Bruxner informed the Court that as the respondents no longer required the order, the only issue from the respondents' perspective was the question of costs, which are quite substantial, in relation both to the proceedings before the Master and the proceedings on appeal.

[6] Mr McManamey, counsel for the appellant, submitted that from the appellant's point of view, the basis on which the Master made his order

miscarried. On the appellant's argument the Master pointed to a single fault which related to whether the liquidator got all the documents from the receiver. That was a finding that was not available to the Master on the evidence that was before him. It is conceded by Mr Bruxner, for the respondents, that the Master's order was made on an incorrect basis. It is Mr McManamey's submission that the order made by the Master on 21 July 2005 must be quashed.

[7] Mr Bruxner, counsel for the respondents, submits the appeal from the Master is by way of rehearing. He argues it is not an appeal in the strict sense. The respondents' position is that the Master made the correct order. The respondents concede that the order was reached in the wrong way. It was submitted on behalf of the respondents that because this is a rehearing, this Court is entitled to receive material that has come into existence after the hearing, before the Master, and to consider that material both in the context of the hearing before this Court and the hearing before the Master, in order to determine the correctness or otherwise of the order made by the Master and the disposition of this Court.

[8] Mr Bruxner submits the key difference between the process that has now been undertaken by solicitors for the appellants with respect to discovery, and the process previously undertaken, is that the later process was not by remote control. It was the solicitor with the conduct of the matter that undertook the review, not only of the documents that had already been reviewed by her Perth agent, but also a later raft of documents that had come

to her attention. The respondents argue these documents should have come to the attention of the solicitor for the appellants some considerable time earlier.

[9] At the hearing before the Master, a letter from the liquidator was produced. All parties overlooked at that time the statement in the letter to the effect that there were 380 boxes of documents in the possession of the liquidator. The respondents concede this oversight to be a problem for both the appellants and the respondents. However, the respondents assert that it is a greater problem for the appellants because the obligation for discovery falls upon them. The respondents' position is that they are entitled to have the appellants comply with their obligations with respect to discovery. The fact the appellants, being a company in liquidation, may have been dealing with a liquidator who had no interest in the litigation, and was not being cooperative, is not the respondents' problem. The respondents' problem is the costs they have been put to in attempting to have solicitors for the appellants apply the proper rigor to the discovery exercise.

[10] It was agreed between the parties that, because the substantive argument between them was the respondents' application for costs, Mr Bruxner should proceed first.

[11] It was agreed between the parties that the order of the Master was no longer required, it was also agreed that the Master's order was made on an incorrect basis. The appellants are pursuing the appeal.

[12] The chronology of the application for discovery can be summarised as follows:

[13] The respondents' summons dated 10 December 2004 was heard on 16 December 2004. On that date the Master made an order by consent that "the second plaintiff make further and better discovery".

[14] On 31 March 2005, the Master made an order that: The second plaintiff file and serve an affidavit of documents by 9.30am on 14 March 2005 (I assume that should read 14 April 2005).

[15] By summons dated 15 April 2005, the respondents sought an order: "That the second plaintiff's claim be dismissed pursuant to Order 24.02 of the Supreme Court Rules". This summons was adjourned on a number of occasions. It was argued before the Master on 14 July 2005. On 21 July 2005 the Master made an order that the second plaintiff file and serve a further list of documents, verified by affidavit, after making all due and proper enquiries.

[16] The Master had before him a number of affidavits including an affidavit of Allison Margaret Robertson sworn 14 July 2005. This was served by the appellant on the morning of the hearing before the Master. Annexure "D" to the affidavit of Ms Robertson is a letter dated 13 July 2005 to Ms Robertson as solicitor for the second plaintiff, from the liquidator. In answer to question number 5, the liquidator states:

> "I have over 380 archive boxes which contain records of Frontline Transport in my possession."

[17] Annexure "G" to the affidavit of Allison Robertson sworn 7 July 2005, is a list of books and records reviewed by Ms Robertson to ascertain which may be discoverable. The list refers to something less than 100 boxes.

[18] In his affidavit sworn 20 April 2005, the liquidator, Mr Clifford Rocke, deposes to the fact that Annexure "A" is a copy of the supplementary list of documents dated 2 March 2005 and filed herein. Mr Rocke then deposes to the fact that the documents in that list are derived from the records of Frontline Transport held by the liquidator. He states that to the best of his knowledge and belief, those are all the documents in the second plaintiff's custody, control, possession or power which are relevant to the issues between the parties.

[19] It is Mr Bruxner's submission that at that time the respondents did not know what the process was that had led to the production of that list of documents.

[20] In her affidavit sworn 13 April 2005 and 7 July 2005, Ms Robertson does describe the process. I agree with the submission made by Mr Bruxner that the affidavits convey the clear impression that when Ms Robertson went through the boxes of documents she was reviewing a comprehensive list. It would appear that the liquidator contributed to this misapprehension and had not advised Ms Robertson there were other boxes of documents that had not been listed.

[21] On 9 March 2005, the respondents wrote to solicitors for the appellants giving notice pursuant to Order 29.03(5) of the Supreme Court Rules requiring the appellant to make an affidavit verifying its supplementary list of documents and specifically requiring that the liquidator provide the affidavit.

[22] On 14 April 2005, the appellant made an informal application to the Master to be excused from the requirement of providing the affidavit of discovery. On the same date, the respondents foreshadowed an intention to apply under the Rules for an order dismissing the proceeding, on the basis of the continuing failure to provide the affidavit of discovery which had been the subject of the earlier consent order.

[23] On 6 July 2005, solicitors for the respondents wrote to solicitors for the appellants which facsimile, omitting formal parts, reads as follows (Court Book page 249):

> "We refer to your letter dated 27 June 2005.
>
> The protracted proceedings before the Master have lately been adjourned on several occasions, and at your request, in order to enable you to obtain from the Liquidator the straightforward detail requested in our letter dated 22 April 2005 – namely, an indication from Mr Rocke of the information, if any, upon which he based the belief expressed in paragraph 3 of his affidavit of 20 April 2005.
>
> As we indicated in our letter of 22 April 2005 that detail was necessary in order for us to form a view whether the affidavit was in fact an affidavit that verified the discovery process, as was ordered (by consent) on 31 March 2005.
>
> Ms Robertson's affidavits of 15 December 2004 and 13 April 2005 had provided some insight into the process that led to the delivery of

> the Supplementary List of Documents dated 2 March 2005. It appeared from those affidavits that the Liquidator and his office had had a very limited role in the process. Indeed, it appeared that his office's role was at best passive, and at worst uncooperative.
>
> Moreover, it appeared from the 13 April 2005 affidavit that the process adopted (as between your firm and its Perth agents) involved only a selective review of the Liquidator's documents by someone whose association with the proceeding was tenuous.
>
> In the circumstances, we are unpersuaded that the second plaintiff has complied with its discovery obligations, including the obligations it assumed when it consented to the orders dated 16 December 2004 (for the provision of further and better discovery) and 31 March 2005 (for the provision of the affidavit).
>
> As to the numbered requests in your letter we respond as follows:
>
> 1. until we are satisfied that the orders of 16 December 2004 and 31 March 2005 have in fact been complied with, there is no occasion for us to identify documents that we say remain undiscovered; and
>
> 2. similarly, the orders we may seek on 14 July 2005 will depend upon the sufficiency of the discovery exercise to date. If, as appears strongly arguable, the affidavit of documents does not verify the Supplementary List of Documents, we will seek orders in the terms of the summons dated 15 April 2005."

[24] Ms Robertson as solicitor for the appellants, then filed and served an affidavit sworn 7 July 2005. Further affidavits were filed and served being affidavit of Clare Lynette Mould sworn 7 July 2005 concerning inspection of documents that took place, and affidavit of Allison Robertson sworn 8 July 2005 referring to enquiries she had made on 5 July concerning certain documents that had originally been in Darwin.

[25] Mr Bruxner then made reference again to the letter from the liquidator Cliff Rocke dated 13 July 2005, to solicitors for the appellants which is Annexure "D" to the affidavit of Allison Robertson sworn 14 July 2005. Mr

Bruxner described this as a most important letter because of the response in the letter at point 5 on page 2 which is page 272 of the Court Book:

> "5. I have over 380 archive boxes which contain records of Frontline Transport in my possession."

[26] It was submitted on behalf of the respondents that this statement in the letter exposed the insufficiency of the discovery process up to that time because there were only about one third of the 380 boxes of documents which had been discovered.

[27] Mr Bruxner stated that the Master's attention was not drawn to this particular statement and its significance escaped the attention of solicitors for the respondents when the matter was before the Master. It is the respondents' position that, as at the day of the hearing before the Master, the respondents' interest in the letter from the liquidator was in terms of it being a response to the respondents' request for the indication of the basis of the information and belief. The respondents maintain they were not looking at the letter from the point of view whether it, in fact, put a big question mark over the comprehensive status of the earlier list that had been provided and that had been the subject of the discovery exercise.

[28] In the proceedings before the Master, counsel for the respondents had indicated that although the summons of 15 April 2005 sought dismissal of the plaintiffs' claim, in fact, they would be content with an order for further and better discovery.

[29] The substance of the respondents' concern is about the remote control approach that Ms Robertson had adopted to the identification of the boxes which might contain the discoverable documents. It was put to the Master that the Court could have no confidence on the basis of the procedure that Ms Robertson had undertaken which involved an agent with only a very peripheral understanding of the matter actually looking at the documents.

[30] At the hearing before the Master, the solicitor for the appellants had stated inter alia "There are no other documents, there will never be any other documents … . We have complied with the requirements of discovery in the fullest sense."

[31] The respondents' case is that the appellants had not fully complied because there were additional boxes as disclosed in the liquidator's letter dated 13 July 2005 that had not been discovered.

[32] The Master delivered his decision on 21 July 2005. In his reasons for decision, he stated at paragraph [5] and [6]:

> "[5] Ms Robertson has, by affidavit, explained the methodology in preparing the supplementary list of documents. It appears that most of Frontline Transport's documents were kept at the head office in Perth. Those left in Darwin had been destroyed. Documents were provided to the Liquidator by the Receivers, but it is not clear that these comprised all the documents in the possession of Frontline Transport. Ms Robertson was provided with a copy of a list of the documents prepared by the Receivers. In broad terms, this list identifies various folders and boxes. Ms Robertson examined the list and, by reference to their descriptions, identified folders and boxes that may have contained relevant documents. She then instructed a solicitor in Perth to examine these and identify and copy

relevant documents. Ms Robertson was provided with copies of these documents and she prepared the supplementary list of documents. The documents discovered included documents in the possession of the insurer and its solicitors.

[6] In the normal course, it would not be expected that the affidavit of the liquidator would be challenged (see *Mulley v Manifold*103 CLR 341, 343 and *Beechham Group v Bristol Myers* (1979) VR 273, 278) but, in this case, the evidence reveals an insufficiency. It is not clear that all of Frontline Transport's documents came into the possession of the Receivers. In these circumstances, the first and second defendant's can have no confidence that all the relevant documents have been discovered. The second plaintiff has, in effect, failed to make discovery in accordance with rules 29.03 and 29.04. It will be ordered that the second plaintiff file and serve a further list of documents, verified by affidavit, after making all due and proper enquiries."

[33] It is conceded by the respondents that the basis upon which the Master made the order is not something that was argued before him. The Master made a finding that there was a basis for doubting that all of the documents of the company had found their way ultimately into the possession of the receivers. No submission had been put to him to that effect. The second plaintiff did not have the opportunity of putting evidence going to that particular question, which the Master regarded as an insufficiency in the discovery process. The respondents' concede that on this basis the Master's order cannot be supported. However, it is the respondents' position that the order itself was correct, albeit for the wrong reason.

[34] The respondents' maintain that there are matters that have subsequently come to light which show that the discovery process conducted by the second plaintiff, and which led to the supplementary list of documents, was

fundamentally flawed. The respondents' maintain it is purely coincidental that subsequent investigations revealed no further discoverable documents. The respondents' argument is that the exercise that led to the production of the list of documents, which happens to be correct because no further discoverable documents were located, was a flawed exercise because it did not involve any consideration of a great many documents that the liquidator held. The respondents' position is based upon an analysis of a list of only about a third of those documents. It was not, in fact, proper discovery.

[35] Mr Bruxner then referred to an affidavit of Allison Margaret Robertson sworn 21 March 2006, in particular, to paragraph 6 which reads as follows:

> "On 15 February 2006 I received by fax a letter from PPB. Attached to this letter were two lists of documents. The first list entitled 'Frontline Transport Books and Records' was the same list of books and records which is annexed to my affidavit of 7 July 2005. The second list, itemising some 269 boxes, had not been disclosed to me previously by the liquidator. Annexed hereto and marked with the letter "C" is a copy of the letter dated 15 February 2006 and lists received from PPB."

[36] The affidavit then sets out the further steps that were taken with respect to the issue of discovery and inspection of documents in the additional boxes. Ms Robertson deposed to the fact that the inspection of these boxes disclosed no additional items of relevance to any issue in the proceedings between the appellants and respondents.

[37] Annexure "F" to this affidavit is a letter dated 20 March 2006 forwarded by solicitors for the appellants to solicitors for the respondents referring to the additional boxes of documents that had been inspected and advising that:

> "The inspection disclosed no new items of relevance to any issue between the second plaintiff and the defendants."

[38] This affidavit sworn 21 March 2006 was provided to the Court and a copy given to solicitors for the respondents on the day of the hearing of the appeal, which was 21 March 2006.

[39] On 8 March 2006, solicitors for the appellants wrote to the liquidator requesting retrieval of both lists of box numbers for inspection by Ms Robertson when she travelled to Perth on 17 March 2006.

[40] Mr Bruxner stated that the respondents did not find out about this list until 20 March 2006, the day before the hearing of this appeal.

[41] The submissions of the appellant are dated 15 March 2006. There is no mention in these submissions of the further boxes of documents possessed by the liquidator.

[42] On 16 March 2006, solicitors for the respondents forwarded a letter to solicitors for the appellants, copy of which is Annexure "E" to the affidavit of Allison Robertson sworn 21 March 2006. In this letter solicitors for the respondents referred to the letter from the liquidator, Annexure "D" to the affidavit of Allison Robertson sworn 14 July 2005, in which the liquidator

makes reference to "over 380 archive boxes". In their letter dated 16 March 2006, solicitors for the respondent state:

> "A count of the number of boxes listed in the "Books and Records" list annexed to Ms Robertson's affidavit dated 7 July 2005 reveals that *less than 100 boxes* are listed.
>
> A central theme in the second plaintiff's submissions before the Master, repeated in its outline of appeal submissions, is that the process undertaken by Ms Robertson (with the assistance of Ms Mould) was sufficient in order to identify the boxes in the list provided by the Liquidator that might contain discoverable documents. In the hearing before the Master the defendants submitted that the process was flawed. The defendants will make similar submissions at the appeal.
>
> Assuming that Ms Robertson's methodology was sufficient, it can only have led to the identification of discoverable documents located in the boxes *identified in the Liquidator's list*. It is plain from the Liquidator's letter that there are hundreds of boxes of documents, presumably regarded as irrelevant to his investigations, that have not been reviewed, or even considered, in the context of the discovery exercise.
>
> Does the second plaintiff maintain in the circumstances that it has provided sufficient discovery?
>
> In the circumstances, will the second plaintiff consent to an order that its appeal from the master's order be dismissed with costs?
>
> We seek your urgent response. Owing to the late delivery of your client's submissions, it is not possible for us to instruct the defendant's counsel to defer preparation of the submissions in reply.
>
> If the second plaintiff proceeds with its appeal and is unsuccessful, the defendants will rely upon this letter in support of an application for costs on an indemnity basis".

[43] Counsel for the respondents stated they were not aware that on 17 March 2006, Ms Robertson was inspecting the documents in Perth until they received the letter from solicitors for the appellants dated 20 March 2006.

[44] Mr Bruxner submitted that had Ms Robertson undertaken the exercise of inspecting the documents back in December 2004, after consenting to further and better discovery, the existence of the extra boxes would have been discovered and the respondents would have no cause for complaint. He stated that the respondents did not appreciate the significance of the reference by the liquidator to "over 380 archive boxes" when the matter came before the Master for hearing on 14 July 2005. There was little opportunity to read the letter prior to the hearing before the Master. As the respondents obtained the order they sought at the hearing before the Master, there was no need to pay further attention to the matter.

[45] It is the respondents' position that the real difficulty was between the liquidator and the appellants' solicitors. This, it was argued, should not be a reason to deprive the respondents an order for costs. The respondents seek orders that the appeal be dismissed, an order in their favour for costs before the Master and costs on the appeal and that these costs be on an indemnity basis for work done since 16 March 2006. The 16th March 2006 is the date of the letter on behalf of the respondents to solicitors for the appellants, pointing out the discrepancy in the list of discoverable documents.

[46] The information that there were 380 boxes is only of significance when there is a comparison made with what had actually been discovered. It was only in the course of preparation for this appeal that the respondents picked up on the discrepancy and notified solicitors for the appellants accordingly.

I accept this involved solicitors and counsel for the respondents in a substantial amount of work.

[47] Mr McManamey on behalf of the appellants, submitted that the Master's order cannot stand for the reasons relied upon by the Master. From the Master's reasons, the sole basis was that he could not be satisfied the liquidator got all the documents from the receiver.

[48] Mr McManamey referred to the notice of contention by the respondents contained in letter dated 10 January 2006. Mr McManamey submits this notice of contention is vague and does not point to any particular matter on which they could contend discovery was inadequate.

[49] Mr McManamey referred to a decision of *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 in support of the principle that the respondents to this appeal are restricted to those matters it argued before the Master. The principle was affirmed in *Water Board v Moustakas* (1988) 180 CLR 491.

[50] Mr McManamey states that the respondents can have no complaint about the fact that a lawyer in Perth carried out the first inspection as distinct from Ms Robertson. He points to the fact that when the matter was before the Master, the respondents were complaining to the effect that it should have been a person in the liquidator's office who inspected the documents for the purpose of discovery. Now the respondents are complaining that it should have been Ms Robertson who carried out the inspection in the first place.

[51] Mr McManamey argues that there was evidence before the Master sufficient to alert the parties to the discrepancies in the number of boxes inspected. He points to the fact that this information was in an affidavit which was tendered. There was no objection to the tender of the affidavit of Ms Robertson sworn 14 July 2005, Annexure "D" was the letter from the liquidator dated 13 July 2005. Mr McManamey states the respondents did not seek an adjournment to consider the affidavit, even though they had only received the affidavit on the morning of the hearing before the Master. A forensic decision was made to allow the affidavit of Ms Robertson, sworn 14 July 2005, to form part of the evidence before the Master.

[52] It is submitted on behalf of the appellants that had the respondents raised the matter of the further documents before the Master, it could have been met with the evidence that was ultimately brought to the attention of the appellants on 16 March 2006. Mr McManamey submits this is not fresh evidence, it is evidence that was contained in a letter from the liquidator stating there were "over 380 archive boxes". That letter was before the Master.

[53] Mr McManamey referred to the affidavit of Ms Robertson sworn 21 March 2006 in which she states at paragraph 8:

> "On 16 March 2006, I received a facsimile from Ward Keller, a copy of which is annexed hereto and marked with the letter "E". It was only on receipt of this letter that I was alerted to and noted the fact of a discrepancy between the information provided by Mr Rocke in his letter dated 13 July 2005 (which was annexure D to my affidavit of 14 July 2005), regarding the extent of documents in his

possession, and the number of boxes itemised in the list 'Frontline Transport Books and Records' previously provided."

[54] The appellants' primary position is that the appeal should be allowed, the Master's orders quashed and the respondents to pay the appellants' costs.

[55] In reply, Mr Bruxner maintained his submission that on her own affidavit sworn 21 March 2006, Ms Robertson must have known, following receipt of letter to her dated 15th February 2006 Annexure "C", that there were additional documents to be inspected. Having read that letter, I do not agree that it is necessarily inconsistent with Ms Robertson's statement in paragraph 8 of her affidavit. Ms Robertson was not cross examined on her affidavit. I accept that it was not until receipt of letter form the respondents' lawyer dated 16 March 2006 that she was alerted to the discrepancy in the information provided to her with regard to the extent of the documents in the liquidator's possession.

[56] This Court has heard a great deal about the consequences of the parties failing to appreciate the significance of the statement by the liquidator Mr Rocke, in his letter dated 13 July 2005, that he was in possession of "over 380 archive boxes".

[57] It was not until counsel for the respondents was preparing for this appeal that the significance was identified and relayed to solicitors for the appellants in letter dated 16 March 2006.

[58] A subsequent inspection of these documents by the solicitor for the appellants revealed there were no further documents that were discoverable.

[59] The respondents now accept that full discovery has been made in compliance with the order made by the Master on 21 July 2005. The respondents seek costs on the basis of the failure by the appellants to provide full discovery at a much earlier time in the proceedings.

[60] I do not propose to make an order for costs as sought by the respondents for the following reasons.

[61] The respondents have conceded the Master's reasons for the order he made on 21 July 2005 were not based on evidence and had not been the subject of argument before him.

[62] Accordingly, I consider the appeal must be allowed and the order of the Master quashed.

[63] I note that the respondents, being satisfied they have received full discovery, no longer require the Master's order.

[64] The letter from the liquidator dated 13 July 2005 was in evidence before the Master and was tendered without objection at the hearing on 14 July 2005.

[65] The significance of the statement in the liquidator's letter dated 13 July 2005 that he had "over 380 archive boxes' which contained records of Frontline Transport in his possession, was first identified by the respondents

shortly before the hearing of this appeal. The respondents notified the appellants' solicitor of this by letter dated 16 March 2006.

[66] By coincidence, the solicitor for the appellants had arranged to inspect the documents the following day when she visited the offices of the liquidator in Perth on 17 March 2006. The solicitor for the appellants promptly notified the respondents by letter dated 20 March 2006 that "the inspection disclosed no new items of relevance to any issue between the second plaintiff and the defendants". The hearing of the appeal on 21 March 2006 did not proceed. The substantive argument was the application by the respondents seeking an order for costs resulting from the appellants' failure to complete the discovery process at an earlier time.

[67] In the circumstances I am not persuaded this is a basis for making an order for costs in favour of the respondents.

[68] I do not propose to make an order for costs as sought by the appellants for the following reasons.

[69] The appellants have been successful on the appeal. The appellants seek costs of the appeal. Costs usually follow the event. However, this was an appeal from an interlocutory order. There are rules which apply to the applications for costs. In particular Order 63.18 which states as follows:

> "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."

[70] Rule 63.04(1) states as follows:

> "The Court may exercise its power and discretion as to costs at any stage of a proceeding or after the conclusion of the proceeding."

[71] Although they have sought an order for costs, the appellants did not seek to argue that there were exceptional circumstances as to why the Court should depart from the normal practise which is to make no order for costs on interlocutory applications.

[72] Accordingly, I make no order for costs in favour of the appellant.

[73] The other matter raised by Mr Bruxner is the nature of this appeal. Mr Bruxner submits that appeals from the Master are by way of rehearing. Mr Bruxner put forward a number of arguments in support of his position that an appeal from the Master is not an appeal in the strict sense. He referred to the decision of *Territory Insurance Office v Kouimanis Enterprises Pty Ltd & Anor* (2002) 171 FLR 425. Mr Bruxner submits the appeal is by way of a rehearing during which the Court can receive further evidence.

[74] I do not propose to rule on this submission. I agree with the statement made by Mr McManamey that however you categorise this appeal, the Master's order cannot stand. It is conceded by the respondents that the reasons delivered by the Master, disclose the basis for the order was flawed. Accordingly, the appeal must be allowed whether it is categorised as a rehearing or an appeal in the strict sense.

[75] The Court has not heard any argument to counter Mr Bruxner's submissions on this issue. The substantive argument before the Court was not the appeal itself but the respondents application for costs. The affidavits of Allison Robertson sworn 21 March 2006 and the affidavits of Nicole Suzanne Dunn sworn 20 and 21 March 2006, were tendered by consent on the basis that they were relevant to the issue of costs.

[76] Accordingly, I do not consider it appropriate to make a ruling in this case as to the nature of the appeals to this Court from the Master. I note there is a decision on this issue in the matter of *Territory Insurance Office v Kouimanis Enterprises Ltd & Anor* (supra) which Mr Bruxner referred to in the course of argument.

[77] I summarise the orders as follows:

1. Appellants' appeal.
    a. I allow the appeal.
    b. The order made by the Master on 21 July 2005 is quashed.
    c. I make no order as to costs.
2. Respondents' application for costs.
    d. The respondents' application for costs on this appeal, and before the Master, is refused.