CITATION:	*JB & Ors v Northern Territory of Australia (No 2)* [2019] NTCA 3
PARTIES:	JB v NORTHERN TERRITORY OF AUSTRALIA
AND:	KW v NORTHERN TERRITORY OF AUSTRALIA
AND:	LO v NORTHERN TERRITORY OF AUSTRALIA
AND:	EA v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NOS:	AP No. 3 of 2017 (21513348); AP No. 4 of 2017 (21510204);

AP No. 5 of 2017 (21508784); and
AP No. 6 of 2017 (21508785)

DELIVERED: 10 April 2019

HEARING DATES: 18 February and 22 March 2019

JUDGMENT OF: Southwood J and Riley and Graham AJ

CATCHWORDS:

COSTS – Discretion to award costs – Costs to follow event unless some special or unusual feature in the case – Whether the litigation is public interest litigation – Whether appeal raises novel questions of much general importance and some difficulty – Majority of issues raised on appeal involved consideration of the relevant evidence and facts – Majority of issues raised on appeal had no special or unusual features and no novel questions of general importance – Majority of issues raised on appeal did not involve issues of public interest or great complexity – Each and every appellant is to pay the respondent's costs of their respective appeal on a standard basis

COSTS – Impecuniosity – Impecuniosity alone of a party opposing a costs order is not a sufficient justification to depart from the ordinary rule that costs follow event – Each and every appellant is to pay the respondent's costs of their respective appeal on a standard basis

Weapons Control Act 2001 (NT) s 12(2)
Youth Justice Act 2005 (NT) s 152(1), s 153(3)

Edwards v Tasker [2014] NTSC 56; 34 NTLR 115; *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355; 31 VR 46; *Oshlack v Richmond River City Council* [1998] HCA 11; 193 CLR 72; *Ritter v Godfrey* [1920] 2 KB 47, 52.3; *Ruddock v Vadarlis (No 2)* [2001] FCA 1865; 115 FCR 229; *Sangare v Northern Territory of Australia* [2018] NTCA 10 – referred to

Attorney-General for the State of Tasmania [1956] HCA 48; 95 CLR 460; *BAE Systems Australia Ltd v Rothwell* [2013] NTCA 3; 275 FLR 244; *Edwards v Stocks* (No. 2) [2009] TASSC 11; 17 Tas R 454; *Milne v*; *State of*

Tasmania v Anti-Discrimination Tribunal [2008] TASSC 23; 17 Tas R 227 – applied

REPRESENTATION:

Counsel:	
Appellants:	K Foley with J Birrell
Respondent:	T Moses
Solicitors:	
Appellants:	North Australian Aboriginal Justice Agency
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Number of pages:	8

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

JB & Ors v Northern Territory of Australia (No 2) [2019] NTCA 3
AP No. 3 of 2017 (21513348); AP No. 4 of 2017 (21510204); AP No. 5 of 2017 (21508784) and AP No. 6 of 2017 (21508785)

BETWEEN:

JB
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

KW
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

LO
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

EA
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: SOUTHWOOD J, RILEY AND GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 10 April 2019))

Southwood J, Riley and Graham AJ

Introduction

[1] On 18 February 2019 the Court dismissed the appeals in these proceedings and stated that the Court would hear the parties further as to costs.

[2] The respondent seeks its costs of each of the appeals on the standard basis. The appellants submit that there should be no order as to costs.

The appellants' submissions

[3] The appellants acknowledge that the ordinary rule is that absent "some special or unusual feature in the case",[1] costs should follow the event. However, the appellants submit there are exceptional categories of cases where the Court may depart from the ordinary rule.[2] One such category of cases is public interest litigation[3] and these appeals fall into that category.

1 *BAE Systems Australia Ltd v Rothwell* (2013) 275 FLR 244 at [26].

2 *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* (2010) 31 VR 46 at [15] (citing Viscount Cave LC in *Ritter v Godfrey* [1920] 2 KB 47, 52-3).

3 *Oshlack v Richmond River City Council* (1998) 193 CLR 72; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229.

[4] The appellants submit that "where an appeal raises a novel question [or questions] of much general importance and some difficulty the appeal court may decline to order costs against the unsuccessful appellant".[4] The fact that an appellant has a personal or private interest in the appeal is not determinative of whether the ordinary rule should apply. The issue is not the subjective motivation of the litigant, but the public or private character of the litigation.[5] The Court may depart from the ordinary rule even if the appellant has a direct pecuniary interest in the outcome of the appeal.

[5] It is submitted by the appellants that these appeals justify a departure from the ordinary rule for the following reasons. First, the appeals raise important and novel legal questions about: (i) the lawfulness of using CS gas in youth detention centres; (ii) the relationship between the maintenance of order and discipline; (iii) the authorisation of and limitations on the use of force in the context of youth detention; and (iv) what constitutes reasonable force in the context of youth detention. Second, the questions raised in the appeals have significance beyond the appellants. The Court's decision affects: (i) the rights of all youths in detention; and (ii) the scope of the powers of the superintendent of youth detention centres, youth justice officers and prison officers in an emergency situation. Third, the Court's decision involved broad issues of public administration.

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4 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 237 [17] (Black CJ and French J).

5 *Oshlack v Richmond River City Council* (1998) 193 CLR 72 at 125 [140].

[6] In addition, the appellants submit that any costs order would be insurmountable for the appellants, and particularly in the context of public interest litigation the Court should not make a costs order that would be futile.

Consideration

[7] The appellants' submissions on costs cannot be sustained.

[8] When considering the appellants' submissions on costs it must be noted that the appeals were brought in respect of only three of the claims that were made in the court below. The first of those claims was for an alleged assault and battery for the use of CS gas on the appellants on 21 August 2014. The second of those claims was for an alleged assault and battery for the appellants being handcuffed while being transported to the Darwin Correctional Centre on 21 August 2014. The third of those claims was a claim made only by EA for an alleged assault and battery on 5 April 2015.

[9] There were four grounds of appeal in respect of the claim for the alleged assault and battery for the use of CS gas on the appellants on 21 August 2014. As to grounds 1 and 3, there was no special or unusual features which suggest that costs should not follow the event. Ground 1 of the appeal was contingent on an application to tender fresh evidence. The application was dismissed on a number of grounds including: (i) by the exercise of reasonable diligence the appellants could have discovered the further evidence in time for it to be used in the trial below; and (ii) it was unlikely

that the further evidence would have produced a different result. The application to adduce further evidence consumed a considerable amount of time during the hearing of the appeal. Ground 3 of the appeal was that the trial Judge erred in finding that Superintendent Caldwell had called upon the prison officers to assist in an emergency situation at the detention centre on 21 August 2014. This ground of appeal largely involved a consideration of the relevant evidence and the facts. It did not involve any issues of public interest or great complexity.

[10] Likewise, there were no special or unusual features raised by the grounds of appeal involving the claim for alleged assault and battery for the appellants being handcuffed while being transported to the Darwin Correctional Centre on 21 August 2014. The first limb of ground 5 was contingent on the application to adduce further evidence which is discussed at [9] above. The second limb of ground 5 largely involved a consideration of the evidence and the facts which were specific to this case.

[11] The appeal brought by EA was dismissed, among other reasons, for the reason that the appellant sought to raise on appeal a matter that had not been agitated in the Court below, and otherwise was resolved on the evidence and the facts. Once again, the appeal raised no novel questions of general importance.

[12] Only grounds 2 and 4 of the appeal regarding the appellants' claim for the alleged assault and battery for the use of CS gas on the appellants at the

detention centre on 21 August 2014 raised the kinds of matters referred to at [5] above. The weight which may be given to those grounds of appeal is not such that the Court should depart from the ordinary rule that costs should follow the event.

[13] Grounds 2 and 4 of the appeal in respect of the claim for the use of CS gas on the appellants at the detention centre on 21 August 2014 were as follows.

(2) The trial Judge erred in finding that the exemption provided by s 12(2) of the *Weapons Control Act* (NT) applied to the deployment of CS gas by a prison officer at the detention centre on 21 August 2014.

(4) The trial Judge erred in holding that the power of the superintendent under s 152(1) of the *Youth Justice Act* (NT) was not limited by s 153(3) of the *Youth Justice Act*.

[14] The above grounds of appeal involved questions of law and the resolution of those questions at an intermediate appellate level was beneficial for the administration of youth detention centres in the Northern Territory. However, the law in relation to ground 4 had already been correctly declared in *Edwards v Tasker*[6]. Further, the court below correctly found that the prison officers only used the CS gas as a last resort to resolve the emergency situation on 21 August 2014. A proclamation was issued before the CS gas was used and the use of the CS gas quickly brought the emergency situation to a halt. None of the appellants was injured. In the context of the whole of

6 [2014] NTSC 56; 34 NTLR 115.

the appeals, the public interest aspects of these two grounds of appeal are not so special as to cause the Court to disapply the ordinary rule as to costs.

Impecuniosity of the appellants

[15] As to the further basis upon which the appellants submitted that there should be no order as to costs, the ordinary rule that costs follow the event will only be departed from if there is sufficient justification to do so.[7] It is well established that impecuniosity alone of a party opposing a costs order is not a sufficient justification.[8] There are three main reasons for this. First, in the vast majority of cases there is no relevant connection between the unsuccessful party's impecuniosity and the litigation or the conduct of the successful party. Second, if impecuniosity were a bar to an order for costs there would be no disincentive for impecunious parties to bring proceedings which lacked merit. Third, such a departure from the ordinary rule would require courts to make an assessment of the level of impecuniosity of the unsuccessful party in order to determine if it was sufficient to justify the Court making no order as to costs. Such a process would be unnecessarily time-consuming and costly. The decision of this Court in *Sangare v Northern Territory of Australia*[9] is inconsistent with a well-established line of authorities to the contrary. That decision is to be considered by the High Court of Australia on appeal on 11 April 2019.

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7 *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477 per Dixon CJ.

8 *Edwards v Stocks (No. 2)* (2009) 17 Tas R 454 at [12] per Blow J; *State of Tasmania v Anti-Discrimination Tribunal* (2008) 17 as R 227 at [21] per Evans J.

9 [2018] NTCA 10.

Order

[16] The Court orders that each and every appellant is to pay the respondent's costs of their respective appeal on a standard basis. The Court also certifies that each of the appeals was sufficiently complex to merit the appearances of both senior and junior counsel.