Lexcray Pty Ltd v NT of Australia [2000] NTSC 63

PARTIES:	LEXCRAY PTY LTD
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	AP22 of 1999 (9303728)
DELIVERED:	4 August 2000
HEARING DATES:	12 May 2000
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	A. Lindsay
Respondent:	S. Southwood

Solicitors:

Appellant:	Cridlands
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID Number:	tho20019
Number of pages:	7

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Ltd v NT of Australia [2000] NTSC 63
No. AP22 of 1999 (9303728)

BETWEEN:

LEXCRAY PTY LTD
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 4 August 2000)

[1] I refer to my reasons for judgment in this matter dated 19 April 2000. I dismissed an application made by the respondent that the appellant provide a security for costs of the appeal. I made no orders as to costs of the application that the appellant provide the sum of $224,000 security for the costs of the respondent.

[2] At the request of the parties this matter was listed again before me on 12 May 2000. By agreement between the parties they sought to put forward arguments in respect of the issue of costs on the application for security for

costs of the respondent on the appeal. The question of costs on the application for security for costs had not been previously argued.

[3] I have now had the opportunity to consider the merits of the application for costs made by the appellant.

[4] The application for security for costs was an interlocutory application pending the hearing of the appeal.

[5] The question of costs on an interlocutory application is provided by *Supreme Court Rules 1978* (NT) Rule 63.18:

> "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."

[6] The principles in respect of costs on interlocutory application have been established in *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143 at 145:

> "Mention has already been made of the radical departure from past practice introduced by these particular rules. Such a departure implies a distinct reversal of thinking about costs in interlocutory matters and that leads to the view that there must be something exceptional about the circumstances of the interlocutory application under consideration to lead the Court, in the exercise of its discretion, to make an order as to costs, taxation and payment.
>
> Given the tenor of the rules, it would not be just to make interlocutory orders for costs, or if made to order that they may be taxed earlier than completion of the proceedings, with a view to punishing the unsuccessful party. To do so may engender a reluctance in parties to properly ventilate their problems during the pre-trial process. What is required is an approach which seeks to have a successful party reimbursed the expense of interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably or which are unnecessarily burdensome or which are made at a time, such as here, when that

> party has been deprived of the value of the work done in preparation of his case for trial. In such instances, and the list is not intended to be definitive or complete, it may well be within the Court's discretion to exercise the power to override the principles established by the rules.
>
> Costs in interlocutory matters no longer follow success. No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the application or resistance, as the case may be, are reasonable. However, if such application or resistance is without real merit, as is often the case, the successful party should not have to bear his costs."

[7] This principle applies equally to interlocutory proceedings in appeals as to trials (*Ayyoush v Samin* No. 204 of 1993, decision of Kearney J delivered 18 May 1994).

[8] Mr Lindsay, counsel for the appellants who were successful on the interlocutory application, seeks an order that the respondent pay on an indemnity basis the costs of the appellant on the application for security for costs.

[9] Mr Lindsay argues that the respondents had the information prior to making the application for security for costs as to the value of the appellant's assets. It was the value of the appellant's assets that was the crucial issue on the application for security for costs – Rule 62.02(1)(b) and (f). It is Mr Lindsay's assertion that the respondent ignored the information made available to them as to the appellant's assets in the Northern Territory but chose to focus on the appellant's cash flow rather than the valuation of the assets. Mr Lindsay referred to the affidavit of Philip John Timney sworn 22 March 2000 and noted that no reference was made to the valuation of the

assets carried out by Mr Keim and contained in the affidavit of Josephine Christmas sworn 30 March 2000.

[10] It is the contention on behalf of the appellant that prior to bringing the application for security for costs the respondent had the information that the assets of the appellant company were in the region of $6 million and the liabilities amounted to something over $3 million and that it could not succeed on the application for security for costs.

[11] Counsel for the appellant argues the respondent proceeded with the application in disregard of the known facts and the law.

[12] Counsel for the respondent, Mr Southwood, argues that the affidavit material provided by the appellant did not clearly specify the assets of the company. It is the respondent's submission that the appellant did not tell them about the real position of the company. Mr Southwood argues that the information provided about the position of the company was ambiguous. Further it is asserted for the respondent that if the appellant company had clearly specified their position with respect to their asset holding then the application could have been avoided.

[13] Following these arguments I have analysed the history of the application from the affidavit material before the Court.

[14] On 28 March 2000 the respondent filed a summons seeking an order for security for costs pursuant to Rule 62.02(1)(b) and (f) and Rule 85.13. An

affidavit in support of the summons sworn 22 March 2000 by Philip John Timney was also filed.

[15] This application was heard on 3 April 2000. On 19 April 2000 the application was dismissed and written reasons for decision were delivered.

[16] The details as to the appellant's assets and liabilities were essentially contained in the affidavit of Josephine Christmas sworn 30 March 2000 and the affidavit of Claire Dorothy Miller sworn 22 March 2000.

[17] The appellant in this matter filed a Notice of Appeal in respect of the substantive hearing on 24 September 1999.

[18] Almost five months later the respondent advised the appellant they were seeking security for costs of the appeal in the sum of $218,450. This request was made by letter dated 11 February 2000, annexure "PJT4" to the affidavit of Philip John Timney sworn 22 March 2000.

[19] As at 11 February 2000, the appeal had been listed for hearing on 5 June 2000 and allocated 15 days.

[20] There followed a series of letters between solicitors for the appellant and the respondent copies of which are annexed to the affidavit of Philip John Timney sworn 22 March 2000. Further correspondence between solicitors for the appellant and the respondent dated 22 March 2000 and 27 March 2000 are annexed to the affidavit of Alan John Lindsay sworn 30 march 2000.

[21] In letters dated 17 February, 2 March and 7 March 2000, annexures "PJT5", "PJT7" and "PJT8" to the affidavit of Philip John Timney, sworn 22 March 2000, solicitors for the appellant provided considerable details as to the appellant's financial position including details of assets and liabilities.

[22] In a letter dated 22 March 2000, annexure "A" to the affidavit of Alan John Lindsay sworn 30 March 2000, solicitors for the appellant sought to ascertain the grounds for the respondent's belief that the appellant would not be able to satisfy an order for costs.

[23] There was apparently no response to this letter by solicitors for the respondent and the matter proceeded to hearing on 3 April 2000.

[24] In perusing the affidavit material including the correspondence between solicitors for the appellant and the respondent, the respondent had in fact been provided with or had the opportunity to obtain all the material that would enable them to calculate the appellant's assets. If the respondent had undertaken this exercise prior to the hearing then the application to the Court could well have been avoided and the resultant costs not incurred.

[25] I appreciate that the respondent was under pressure to have the application dealt with as soon as possible in view of the pending appeal. However, this pressure was to a great extent brought about by the respondent's somewhat belated application for security for costs, issued almost five months after the Notice of Appeal had been filed and approximately four months before the appeal was to be heard.

[26] In all the circumstances I consider there are reasons to grant the application by the solicitors for the appellant for costs of the respondent's application for security for costs.

[27] The order I make is that the respondent pay the appellant's costs of the application for security for costs and the appellant's costs on the application for costs of such application. Such costs to be either agreed or in default of agreement taxed.

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