CITATION:	*Outback Ballooning Pty Ltd v Work Health Authority & Anor* [2018] NTCA 2
PARTIES:	OUTBACK BALLOONING PTY LTD v WORK HEALTH AUTHORITY AND DAVID BAMBER SM
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING NORTHERN TERRITORY JURISDICTION
FILE NO:	21562815 (AP No. 7 of 2017)
DELIVERED ON:	28 March 2018
DELIVERED AT:	DARWIN
HEARING DATES:	WRITTEN SUBMISSIONS
JUDGMENT OF:	SOUTHWOOD, BLOKLAND JJ & RILEY AJ

CATCHWORDS:

COSTS – Costs of appeal and proceedings below – Appellant successful –Whether costs should be taxed on an indemnity basis – Appellant sent '*Calderbank*' letter seeking first respondent concede appeal – Whether reasonable not to concede appeal – Costs to be taxed on the usual basis.

COSTS – Costs of appeal – Whether matter should be certified for two counsel – Subject matter and complexity considered appropriate for certification for two counsel.

BAE Systems Australia Ltd v Rothwell (2013) 275 FLR 224; *Calderbank v Calderbank* [1975] 2 All ER 333; *Central Australian Aboriginal Congress Inc v CGU Insurance* (2009) 24 NTLR 222; *Colgate Palmolive Co v Cussons Pty Ltd* (1993); *Joondanna Investments Pty Ltd v Minister for Lands, Planning and Environment* [2015] NTSC 54; *Hunter v Nursing and Midwifery Board of Australia* (2017) NTSC 64; *Kroehn v Kroehn (1912)* 15 CLR 137; *MGICA* (1992) *Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236; *Outback Ballooning Pty Ltd v Work Health Authority and Bamber* [2017] NTCA 7; *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323; *Work Health Authority v Outback Ballooning Pty Ltd* [2017] NTSC 32; referred to.

REPRESENTATION:

Counsel:

Appellant:	J Gleeson SC, T Brennan
Respondents:	T Moses

Solicitors:

Appellant:	Povey Stirk Lawyers & Notaries
Respondents:	Solicitor for the Northern Territory

Judgment category classification:	C
Number of pages:	6

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

Outback Ballooning Pty Ltd v Work Health Authority & Anor [2018] NTCA 2
21562815

BETWEEN:

OUTBACK BALLOONING PTY LTD
Appellant

AND:

WORK HEALTH AUTHORITY
First Respondent

AND:

DAVID BAMBER SM
Second Respondent

CORAM: SOUTHWOOD, BLOKLAND JJ & RILEY AJ

DECISION ON COSTS

(Delivered 28 March 2018)

The Court

Introduction

[1] On 19 October 2017 this Court allowed an appeal reversing a decision of the Supreme Court that held certain offence provisions in the *Work Health Safety (National Uniform Legislation) Act* (NT) were not inconsistent with the Commonwealth legislative and regulatory scheme for air safety.[1] The

[1] *Outback Ballooning Pty Ltd v Work Health Authority and Bamber* [2017] NTCA 7.

decision of the Supreme Court[2] had overturned a decision of a Magistrate made on 6 November 2015 dismissing a complaint against the appellant. The Magistrate found that the Commonwealth legislation covered the field of air safety navigation. This Court found inconsistency between the Commonwealth legislative and regulatory scheme and the Northern Territory law, with the consequence that the Territory law is inoperative to the extent of the inconsistency.

[2] The appellant seeks costs on an indemnity basis for part of the proceedings and certification for both senior and junior counsel. Although the first respondent agrees there should be an order that it pay the appellant's costs of this appeal and costs of the proceeding in the Supreme Court, the first respondent opposes an order for taxation of costs on an indemnity basis and opposes certification for both senior and junior counsel.

[3] In our view the Court should not make an order for costs taxed on an indemnity basis. Costs are in the discretion of the Court and the discretion must be exercised judicially. It is well recognised indemnity costs may be awarded in a variety of circumstances, and the categories in which such orders may be made are not closed or rigid.[3] The exercise of the discretion to order costs on an indemnity basis is usually reserved for cases where the losing party has been engaged in unmeritorious, deliberate or high-handed, or other improper conduct such as to warrant the Court showing its

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2 *Work Health Authority v Outback Ballooning Pty Ltd* [2017] NTSC 32.

3 Shepperd J reviewed the relevant authorities in *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 231; discussed in *BAE Systems Australia Ltd v Rothwell* (2013) 275 FLR 224 at [26] per Riley J at [85] per Mildren J.

disapproval of the conduct while simultaneously preventing the successful party being left out of pocket. Other examples noted in the authorities may be where a party has pursued a matter which on proper consideration should have been seen to be a hopeless case, and where there was undue prolongation of a case by groundless contentions.[4]

[4] The appellant drew our attention to a letter its solicitors forwarded to the first respondent's solicitor on 14 August 2017. The letter purports to make an offer in the terms of *Calderbank v Calderbank*.[5] The 'offer' was that the first respondent concede the appeal before this Court, otherwise it would suffer the prospect of bearing more significant costs than would ordinarily be ordered. The appeal was successful, however there was nothing in the conduct of the first respondent that would justify departure from the ordinary rule.

[5] The appellant suggests the decision of *Hunter v Nursing and Midwifery Board of Australia*[6] supports its position, as in that matter, an order for indemnity costs was made after a party was in the position to consider properly and respond to the compelling arguments made by the eventually successful party. A feature of the circumstances in *Hunter v Nursing and Midwifery Board of Australia* was that the unsuccessful party did not concede the appeal until the morning of the oral hearing despite nothing changing in the position of either party between considering the appellant's

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4 *BAE Systems Australia Limited v Rothwell* (2013) 275 FLR 224 at [26] per Riley J.
5 [1975] 2 All ER 333.
6 (2017) NTSC 64.

written submissions on the relevant point and the oral hearing. In *Hunter* the unsuccessful party's conduct, together with the strength of the appellant's case, enlivened the discretion to order costs be taxed on an indemnity basis, covering a short period in the lead up to the hearing. The appellant cannot draw support from the decision in *Hunter*.

[6] There is no presumption that a party who rejects a *Calderbank* offer should pay the more successful party's costs on an indemnity basis if the unsuccessful party receives a less favourable result.[7] The principal consideration is whether in all of the circumstances of the litigation, the rejection of the offer was unreasonable.

[7] It may be noticed the letter of 14 August 2017 does not offer a compromise of the kind generally anticipated in a *Calderbank* offer. Although the letter warns the first respondent "may be liable to pay a higher degree of our client's costs", it does not clearly state that unless the appeal is conceded, costs will be sought on an indemnity basis. In any event, it was not unreasonable for the first respondent to decline to concede the appeal. It is a significant consideration that the first respondent was successful in the Supreme Court. The first respondent is a statutory authority responsible for a range of public interest functions under the *Work Health and Safety (National Uniform Legislation) Act* (NT). To concede an appeal in circumstances where the subject matter was central to the question of the

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7 *MGICA* (1992) *Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236 at 239; *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37].

lawfulness of some of its significant functions was not a reasonable nor realistic position for it to take. This is especially so when decision of the Supreme Court was favourable to its position.

[8] There was nothing about the conduct of the first respondent that would justify an order for costs to be taxed on an indemnity basis.

[9] We agree with the appellant that this is a proper case for certification for two counsel. The prudent litigant would understand that the subject matter broadly concerned two significant, specialist areas of law: constitutional law and aviation regulation, including matters arising under the Chicago Convention. Both areas required significant expertise. The subject of the appeal that involved two significant areas of law was a feature sufficient to warrant a prudent litigant to employ two counsel consistent with the authorities on this point.[8]

[10] In terms of the factors readily apparent that justified two counsel, first, the case was obviously important to the appellant.[9] The outcome of the appeal may have determined whether the appellant was prosecuted. The case was serious as well as be attended by technicality. The subject matter of the two principal areas of law could readily be divided between two counsel. The range of subordinate legislation dealing with the Commonwealth regularity scheme was voluminous and complex. While the case was not lengthy,

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8 *Central Australian Aboriginal Congress Inc v CGU Insurance* (2009) 24 NTLR 222; *Kroehn v Kroehn* (1912) 15 CLR 137.

9 Summarised by Master Luppino in *Joondanna Investments Pty Ltd v Minister for Lands, Planning and Environment* [2015] NTSC 54.

given it was an appeal, it is apparent proper and efficient representation required substantial preparation and research.

[11] It is accepted the issues, arguments and relevant materials were the same as those presented in the Supreme Court. It is also the case that the first respondent was represented by a single junior counsel. While counsel for the first respondent presented its case admirably, our view remains it was prudent on the part of the appellant and not a luxury to retain two counsel, with one being senior counsel.

[12] The orders will be:

1. The first respondent is to pay the costs of and incidental to the appeal and the proceeding below in the Supreme Court as agreed or to be taxed on the standard basis at 100% of the Supreme Court scale.

2. The appeal is certified fit for two counsel, with one being senior counsel.

3. The parties are to bear their own costs of and incidental to the application for costs.
