Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) (No 2)
[2015] NTSC 51

PARTIES:	COMPLETE CRANE HIRE (NT) PTY LTD v MARCHETTI AUTOGRU SPA (ITALY)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	157 of 2011 (21143306)
DELIVERED:	27 August 2015
HEARING DATES:	By Written Submissions
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Costs – Costs of interlocutory applications – Usual rule that no costs are ordered in interlocutory applications – Principles for the exercise of the discretion to award costs in interlocutory applications – Requirement of special or exceptional circumstances – Requirement for parties to act reasonably – Novel application.

Supreme Court Rules rr 29.02(1), 31.02(1), 63.03, 63.04, 63.18, 63.72(9)

TTE Pty Ltd v Ken Day Pty Ltd (1990) 2 NTLR 143.
Hodge v Kimber [1995] NTSC 111.
Yow v NT Gymnastic Association (1991) 1 NTLR 180.
Otter Gold NL v Barcon (NT) Pty Ltd (2000) 10 NTLR 189.

Milingimbi Educational and Cultural Association Inc v Davis [1990] NTSC 35.
Johnson v Northern Territory of Australia [2015] NTSC 15.
Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd [2013] NTSC 16.
Lexcray v Northern Territory of Australia (No 3) [2015] NTSC 41.
United Super Investments Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors [2010] NTSC 31.
Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) [2015] NTSC 32.

Grant M, *Civil Procedure Northern Territory*.

REPRESENTATION:

Counsel:

Plaintiff:	Mr C Harding
Defendant:	Mr M Wilson

Solicitors:

Plaintiff:	Paul Maher
Defendant:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	LUP1502
Number of pages:	11

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

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No. 157 of 2011 (21143306)

BETWEEN:

COMPLETE CRANE HIRE (NT) PTY LTD
Plaintiff

AND:

MARCHETTI AUTOGRU SPA (ITALY)
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 27 August 2015)

[1] These reasons deal with applications for costs by each party in respect of the interlocutory applications to which my Reasons for Decision dated 19 March 2015 relate.

[2] The orders sought in those interlocutory applications were, firstly by the Plaintiff, an order for particular discovery and secondly, by the Defendant, an order for oral examination and leave to interrogate in the alternative, as well as an order for particular discovery of certain classes of documents. There were a number of other orders sought by the Defendant but they are inconsequential for current purposes.

[3] Applicable rules from the *Supreme Court Rules* ("the SCR"), omitting parts not relevant to the current application, are as follows:-

63.03 General rule

(1) Subject to these Rules and any other law in force in the Territory, the costs of a proceeding are in the discretion of the Court.

(2) Omitted

63.04 Time for order for costs, taxation and payment

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

(2) Subject to this rule, the costs a party is required to pay under these Rules or an order of the Court shall be paid immediately.

(3) Subject to subrule (4), where:

(a) the Court makes an interlocutory order for costs; or

(b) costs are payable by virtue of these Rules without an order for costs,

those costs shall not be taxed until the conclusion of the proceeding to which they relate.

(4) If it appears to the Court when making an interlocutory order for costs or at a later time that all or a part of the costs ought to be taxed at an earlier stage, it may order accordingly.

(5) In the case of an appeal, the costs of the proceeding giving rise to the appeal, as well as the costs of the appeal, may be dealt with by the Court hearing the appeal.

63.18 Interlocutory application

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.

63.72 Counsel's fees

(1)-(8) Omitted

(9) No fee shall be allowed:

(a) for counsel attending on an interlocutory application, unless the Court otherwise certifies; and

(b) for more than one counsel, unless the Court certifies that the retainer of more than one counsel was warranted.

(10) Omitted

[4] The specific order sought in the Plaintiff's summons was for an affidavit regarding documents held by the Defendant in respect of fire incidents in all other cranes manufactured by the Defendant similar to the crane the subject of this action.

[5] Shortly before, and on the day of, the hearing of the summonses, the Defendant apparently provided an affidavit to the Plaintiff which satisfied the Plaintiff's summons, such that there was no need for the Plaintiff to proceed with its application.

[6] An examination of the evidence before me reveals that there was correspondence preceding the filing of the Plaintiff's summons requesting discovery of the documents referred in the Plaintiff's summons.[1] An examination of that correspondence leads inevitably to a conclusion that the Defendant was evasive in its response to the Plaintiff's request. The Defendant complained that the request was too wide and that the requested documents did not relate to a question in the proceedings as required by rule 29.02(1) of the SCR. I do not agree with the latter at least and that view could not be genuinely expressed, except on the basis of an unnecessarily

[1] Annexures F to L of the affidavit of Michelle Chiu Lin Tseu sworn 16 March 2015.

restricted reading of that rule. The correspondence culminated in a letter from the Plaintiff's solicitors dated 20 February 2015 which sought clarification from the Defendant as to whether the Defendant disputed the relevance of those documents or that the Defendant was asserting that there were no such documents. That letter also threatened an interlocutory application failing a response and flagged an intention to seek indemnity costs in that event. The Defendant did not respond. That the Defendant ultimately provided an affidavit addressing the Plaintiff's request, after filing of the summons and immediately before the hearing, leads me to doubt the bona fides of the position initially taken by the Defendant.

[7] Notwithstanding the foregoing, in the written submissions the Defendant claims that the Plaintiff had been previously advised that there were no such documents. However no evidence to substantiate that has been referred to, nor can I see any evidence of that. The Defendant goes on to submit that the Plaintiff was wholly unsuccessful in its application, presumably because the Plaintiff did not press the orders sought. On the other hand the Plaintiff submits that its interlocutory summons would have been unnecessary had the Defendant not ignored the preceding requests. I agree with the Plaintiff.

[8] The object of rule 63.18 of the SCR is to avoid unnecessary applications by encouraging resolution of interlocutory issues by agreement and without recourse to the courts.[2]

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[2] Grant M, *Civil Procedure Northern Territory* at 5.63.1703.

[9] By reason of rule 63.18 of the SCR, the usual position in respect of interlocutory costs is that, unlike the usual order made in the exercise of the Court's discretion in substantive proceedings, a party does not recover costs simply by reason of being successful on an interlocutory application. Some special circumstances are required to warrant the making of an order for costs irrespective of the outcome of the application.[3]

[10] The application of rule 63.18 of the SCR was discussed by the Court of Appeal in *Johnson v Northern Territory of Australia*[4] where the Court approved of the following passage from the judgment of Martin J in *TTE Pty Ltd v Ken Day Pty Ltd*[5]:

> 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.
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> 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

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3 See *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143, *Hodge v Kimber* [1995] NTSC 111, *Yow v NT Gymnastic Association* (1991) 1 NTLR 180, *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189, *Milingimbi Educational and Cultural Association Inc v Davis* [1990] NTSC 35.

4 [2015] NTSC 15.

5 (1990) 2 NTLR 143.

> 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.[6]

[11] That is not to say that the general discretion provided for in rule 63.03(1) of the SCR does not apply, [7] rather the effect of rule 63.18 of the SCR in an interlocutory matter is a departure from the usual reliance on the result and the principle usually applied that costs usually follow success.

[12] As I said in *Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd*[8] although the discretion of the Court is unfettered, the Court is concerned with whether the parties acted reasonably in relation to an interlocutory application and I noted that consideration as to the merits of the application and the merits of the resistance to the application were relevant factors.

[13] Identified instances of special or exceptional circumstances for the purposes of rule 63.18 of the SCR are:-

1. where a successful application would conclude the action;[9]

2. where an application would not have been reasonably anticipated;[10]

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6 (1990) 2 NTLR 143 at 145.
7 *Yow v NT Gymnastic Association* (1991) 1 NTLR 180
8 [2013] NTSC 16 at para 9
9 *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189; *Johnson v Northern Territory of Australia* [2015] NTSC 15.
10 *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189.

3. where the general interests of a party beyond the proceedings, and generally, were served by having a superior Court decide a novel issue;[11]

4. where an application is a significant one and not "run-of-the-mill".[12]

[14] Applying the foregoing principles to the facts of the current case firstly, in respect of the Plaintiff's summons, I do not think that it is proper to characterise the result as the Plaintiff being wholly unsuccessful as the Defendant has submitted. Certainly the matter did not need to proceed to hearing but that was only due to the late provision of the requested material by the Defendant and in circumstances when the Defendant had not made any meaningful response to the preceding requests for that material in the lead up to the application. In those circumstances it is more correct to describe the Defendant's actions as a complete capitulation.[13] The Defendant acted unreasonably in refusing to comply with the Plaintiff's request in the lead up to the application and that necessitated the application made by the Plaintiff.

[15] For that reason, I order the Defendant to pay the Plaintiff's costs of its application.

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11 *Johnson v Northern Territory of Australia* [2015] NTSC 15.

12 *Lexcray v Northern Territory of Australia (No 3)* [2015] NTSC 41.

13 This is akin to the approach taken in *United Super Investments Pty Ltd & Ors v Randazzo Investments Pty Ltd & Ors* [2010] NTSC 31, albeit that involved an application for leave to discontinue without liability for costs following a settlement of the litigation. The relevant party was found to have taken an unreasonable position in the lead up to the settlement and in settling the proceedings it was found to have totally capitulated. As a result that party was required to pay costs as a condition of leave to discontinue as a result.

[16] In respect of the Defendant's summons, the order for an oral examination was clearly a novel one. In Australia orders for oral examination can only be made in the Northern Territory and in Victoria. In Victoria orders can only be made with the consent of the parties. It is only in the Northern Territory that the Court can order an examination notwithstanding the absence of consent. As a result, this case appears to be the only instance where a Court in Australia has considered the issue. It is clearly not "run-of-the-mill".

[17] Ordinarily, in respect of that order at least, I would not consider it unreasonable for the Plaintiff to have resisted the application. However as I set out in my Reasons for Decision the Plaintiff had in many respects thwarted the Defendant's attempts to obtain information it relevantly required. I was satisfied that it was information that was necessary to achieve fairness between the parties and to enable the Defendant to properly conduct its defence.

[18] That information was requested a number of times before the interlocutory application was filed and in a number of alternative forms,[14] one of which was a request for a statement of Mr Sutherland regarding various identified topics or matters. As I set out in my Reasons, initially the Plaintiff's solicitors agreed that the Defendant could interview the Plaintiff's director (Mr Sutherland). When Mr Sutherland was approached for that purpose he

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[14] *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)* [2015] NTSC 32 at paras 33-39.

declined.[15] Thereafter the Plaintiff's solicitors (the Plaintiff's solicitors had changed in the interim) refused to allow the Defendant's solicitors to contact Mr Sutherland for reasons that I considered to be untenable,[16] and consequently unreasonable.

[19] In my view the circumstances are such that the Plaintiff acted unreasonably in refusing the various requests made by the Defendant. Although it could be said that this was not a run-of-the-mill application by reason of the novel nature of the order sought, the application was very directly linked to the question of leave to interrogate. Indeed the SCR provide that an order for an oral examination can only be made if the Court would in any event have given leave to interrogate.[17] Applications for leave to interrogate, although not common, are certainly not novel.

[20] I discussed the principles relevant to leave to interrogate in the Reasons for Decision[18] and I will not repeat them here. Needless to say however that although the Plaintiff indicated that if faced with a choice between an oral examination and leave to interrogate, it preferred the latter, that was the Plaintiff's alternative position as it nonetheless opposed an order for leave to interrogate and argued against that at the hearing. The circumstances the

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15 *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)* [2015] NTSC 32 at para 34.

16 *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)* [2015] NTSC 32 at paras 34-35.

17 SCR r 31.02(1).

18 *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy)* [2015] NTSC 32 at paras 13-48.

Defendant found itself in rendered the making of an order, at least for leave to interrogate, largely inevitable.

[21] In light of the fact that the Defendant had no other means of obtaining the available information, in my view the overall position taken by the Plaintiff was unreasonable.

[22] In all the circumstances I order that the Plaintiff pay the Defendant's costs in respect of the order for oral examination and leave to interrogate.

[23] In respect of the Defendant's application for particular discovery I am also of the view that the Plaintiff's opposition to that was unreasonable. I therefore order the Plaintiff to pay the Defendant's costs in respect of that application but with the exception of any costs relative to the application in respect of the insurance documents. The Plaintiff was not on notice of that part of the application, nor is there any evidence that the Defendant had previously requested those documents. It was only argued before me with the indulgence of the Plaintiff and with my leave, including leave to amend the Defendant's summons, as it had not been claimed in the summons.

[24] I think the usual rule should apply in respect of all other orders sought in the summonses.

[25] Although neither party has submitted that an order should be made certifying the application as fit for counsel I think that such an order is appropriate given that both parties engaged counsel and given the nature of

the arguments and, importantly, given the novel nature of the application for oral examination. That is notwithstanding that I did not consider the novel nature of the application to be sufficient reason to deny the Defendant its costs of the application for that order.