Milatos & Anor v Clayton Utz & Ors [2006] NTSC 47

PARTIES:	MILATOS, George MILATOS, Colleen Mary v CLAYTON UTZ NORTHERN TERRITORY OF AUSTRALIA JAMES NAIRN & COMPANY PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	184/02 (20219346) 83/03 (20308935)
DELIVERED:	15 June 2006
HEARING DATES:	2 March 2006
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:	
Plaintiffs:	G James
First Defendant:	R Bruxner
Second Defendant:	M Grant
Third Party:	R Millar
Solicitors:	
Plaintiffs:	Geoff James
First Defendant:	Paul Maher
Second Defendant:	Solicitor for the Northern Territory
Third Party:	Cridlands

Judgment category classification:	C
Judgment ID Number:	tho200609
Number of pages:	13

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

Milatos & Anor v Clayton Utz & Ors [2006] NTSC 47
Nos. 194/02 (20219346) 83/03 (20308935)

BETWEEN:

MILATOS, George
First Plaintiff

MILATOS, Colleen Mary
Second Plaintiff

AND:

CLAYTON UTZ
First Defendant

NORTHERN TERRITORY OF AUSTRALIA
Second Defendant

JAMES NAIRN & COMPANY PTY LTD
Third Party

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 15 June 2006)

[1] On 2 March 2006, I made orders in accordance with the first defendant's summons dated 22 December 2005. Order number 1 reads as follows:

> "1. On defendant summons filed 22 December 2005, by consent:

(a) the affidavit of George Milatos sworn 17 November 2005 and titled 'Fifth Affidavit of George Milatos';

(b) the 4 affidavits of George Milatos sworn 17 November 2005 and titled 'Clayton Utz Sequenced Paginated File' volumes 1 - 4, including the annexures to those affidavits; and

(c) the affidavit of George Milatos sworn 21 November 2005 and titled 'Sixth Affidavit of George Milatos'

be struck out and removed from the court file."

[2] On the same date I made a number of other orders including the following order by consent "On the plaintiff's summons filed 23 February 2006 plaintiff to pay first and second defendant's costs thrown away by virtue of the withdrawal of the affidavits of the plaintiff".

[3] Mr Bruxner, for the first defendant, seeks further orders in accordance with paragraphs (7) and (8) of the first defendant's summons filed 22 December 2005:

(7) An order that the plaintiffs pay the first defendant's costs of this application on the indemnity basis, taxable immediately.

(8) An order that the plaintiffs pay the first defendant's costs thrown away arising from Order (1) on the indemnity basis taxable immediately.

[4] On 8 February 2006, Mr James representing the plaintiffs, formally conceded substantially all of the orders sought on the first defendant's summons filed 22 December 2005, except for the orders as to costs. This is in the form of an e-mail to solicitors for the first defendant which is Annexure AGJ9 to the affidavit of Mr James sworn 28 February 2006.

[5] Mr Bruxner outlined in some detail the history of these proceedings that have culminated in the plaintiffs deciding to withdraw all of their affidavit material. The affidavit material is extremely extensive. The plaintiffs, with the consent of the defendants, have decided to proceed to a hearing of this matter on the basis of oral evidence to be presented at trial. See letter dated 24 February 2006 from Mr James to Mr Maher, solicitor for the first defendant, copy of which is Annexure AGJ11 to the affidavit of Mr James sworn 28 February 2006.

[6] Mr Bruxner submitted that the first affidavits numbered (5) and (6) together with the annexures are very substantial. I accept this submission. The first affidavits numbered (5) and (6) comprise some 60 pages each and there are four lever arch folders that were delivered with these affidavits. Mr Bruxner submits that the first defendant consented to the withdrawal of the affidavit material and the matter proceeding to a hearing date on the basis that there would be oral evidence presented at the trial. He stated the context of this consent was that the plaintiffs would pay the first defendant's costs thrown away as a result of the withdrawal of the affidavits.

[7] It was argued on behalf of the first defendant that the failure of the plaintiffs' approach in filing affidavit material was the fault of the plaintiffs. Mr Bruxner maintained that the submission which had been made on behalf of the plaintiffs, that the plaintiffs feared further delay by reason of continued interlocutory action, was wholly without substance. I agree with Mr Bruxner's submission that there is no reason for the Court to find either of the defendants have been pursuing unmeritorious interlocutory applications.

[8] I accept the reason the defendants have consented to the plaintiffs' application to withdraw the affidavit material, comes from an acceptance that the quickest path to fixing a trial date is to rely on oral evidence to be given at trial. That this is so, is no fault of the defendants.

[9] Mr Bruxner stated he was seeking costs on an interlocutory matter for which the normal rule is that each party bears their own costs. Order 63.18 of the Supreme Court Rules 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."

[10] It is Mr Bruxner's submission, that this is clearly a case where there are circumstances which justify a departure from the ordinary rule and that in this matter the plaintiffs should pay the defendants' costs on the summons filed on 22 December 2005 on an indemnity basis taxable immediately.

[11] Mr Bruxner referred to authorities, in support of his argument, that the basis on which indemnity costs orders are often made is that a party properly advised would never have commenced or defended the proceedings which have occasioned the costs – see *Kama v Wong No 2* [2005] NSWSC 428.

[12] The submission on behalf of the first defendant is that there is irrefutable evidence in this case that the first affidavits numbered (5) and (6) were so bad, the plaintiffs properly advised, should never have filed them. This was based on two facts:

(i) The plaintiffs conceded the application in relation to those two affidavits.

(ii) The plaintiffs have gone so far as to file affidavits purporting to replace the first two affidavits numbered (5) and (6).

[13] Mr Bruxner then moved to the further submission that these indemnity costs should be taxable immediately.

[14] Order 63.04 of the Supreme Court Rules provides as follows:

> **"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."

[15] I was referred to the decision of Mildren J in *Markorp Pty Ltd v King* (1992) 106 FLR 286 at 292-293:

"The final question is whether I should order that these costs be taxed pursuant to r 63.04(4) of the Supreme Court Rules. Rule 63.04(3) provides that subject to subr (4), where the Court makes an interlocutory order for costs, those costs shall not be taxed until the conclusion of the proceedings to which they relate. Subrule (4) provides that the Court may order that the costs be taxed at an earlier time, if it appears to the Court that the costs ought to be taxed at an earlier time. Subrule (3) is the general rule, but subr (4) provides a wide discretion in the Court to depart from that general rule. There is nothing in subr (4) to indicate that that discretion is constrained by any particular circumstances or considerations. To the extent that it may have been thought otherwise, following Martin J's unreported decision in *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, Supreme Court, NT, 29 May 1990), I respectfully disagree with that approach. The purpose of subr (3) is not specified, but presumably it was designed to reduce the administrative burden of having to tax orders for costs made in interlocutory matters, which may in the end become unnecessary, as well as to obviate the need for the payment of costs by one party, and the repayment of costs by the same party, who may well have had both favourable and unfavourable cost orders made as a result of interlocutory proceedings over the lifetime of the action. Although interlocutory orders for costs may involve relatively large sums of money, in the vast majority of cases, the amounts involved are relatively small, and it seems to me that subr (3) is primarily directed towards cost orders involving relatively small sums of money. However, that is not to say that an order to tax might not be made in respect of a relatively small sum in an appropriate case. In

> this case, the amounts involved would not be small and are not as likely to be set off against future cost orders that may be made in the plaintiff's favour on interlocutory applications. In these circumstances, and as there is no suggestion that such an order, if made, would be unfair or oppressive, and bearing in mind that part of the costs involved include the costs of the trial thrown away as a result of the adjournment of the trial, (a factor which Martin J thought sufficient to warrant such an order in *TTE Pty Ltd v Ken Day Pty Ltd* (supra)); and see also *Milingimbi Educational and Cultural Association Inc v Davies* (unreported, Supreme Court, NT, Kearney J, 12 October 1990) I consider that the defendants are entitled to an order that they may now tax the orders for costs which I have made, …"

[16] Mr Bruxner submits there are two similarities, upon which he intends to rely, between the decision of Mildren J in *Markorp Pty Ltd v King* (supra) and the case before this Court. These are:

(1) The first defendant's costs in digesting all the material contained in the first numbered affidavits (5) and (6) was substantial, involving as it did close and careful consideration by the defendant's representatives.

(2) There is no likelihood that these costs will be offset by costs orders against the first defendant that the plaintiff may seek to tax.

[17] On the aspect of whether such an order for costs would be unfair and oppressive upon the plaintiffs, Mr Bruxner made further submissions. He stated that if the plaintiffs proceeded to file the affidavits, being the first numbered (5) and (6), in the face of advice that they should not do so, then they could not be heard to complain of oppression as a result of a cost order that might be made in relation to those affidavits.

[18] It is the submission on behalf of the first defendant that these affidavits led to the suspension of the timetable towards a hearing date; they were a colossal waste of time and money and there is no reason why the first defendant should have to wait until the end of the matter in order to be compensated for the time and money spent in dealing with them.

[19] Mr James, on behalf of the plaintiffs, submitted that I should look at the first two affidavits numbered (5) and (6), to determine for myself whether they were a waste of the Court's time, or that the plaintiffs had done something which, no-one properly advised, would have done. Mr James submitted that the plaintiffs' approach was to disclose as much of the plaintiffs' case "as humanly possible". He stated the affidavits did contain argument and commentary. He agreed the affidavits had been prepared in a manner that was not appropriate but stated that had the matters been contained in a letter it could have been very useful to the parties and come under the heading of full and open disclosure.

[20] Mr James stated he had received advice from senior counsel to withdraw the original affidavits (5) and (6).

[21] An e-mail dated 8 February 2006 from Mr James to solicitors for the first defendant, copy of which is Annexure AGJ9 to the affidavit of Mr James sworn 28 February, omitting formal parts, states as follows:

> "I confirm indications given from the Plaintiffs' Senior Counsel to your Senior Counsel to the effect that there will be no need for the First Defendant to pursue orders 1(a)-(c), 2, 3, 4, 5 or 6 of the

summons issued 22 December 2005. These matters will be attended to by the Plaintiffs on a conceded basis.

To begin that process, I now serve a pdf copy of an affidavit sworn 8 February 2006 by Mr Milatos to substitute for his Fifth Affidavit sworn 17 November 2005. A similar document to substitute for the affidavit sworn 21 November 2005 will be available by next Monday or Tuesday.

Please provide me with a letter addressed to the NT Supreme Court Registry to authorise uplift and withdrawal of the original affidavits plus the four coversheet affidavits of 17 November and I will withdraw those documents."

[22] Mr James stated in his submissions the original affidavits (5) and (6) were withdrawn to keep a harmonious balance. He argued that the plaintiffs should not be punished by an order against them for costs to be paid on an indemnity basis and taxable immediately.

[23] I have perused the first affidavits (5) and (6). As they have been withdrawn, it is not necessary for me to make a detailed comment. It is sufficient to say that they each go well beyond the purpose of such affidavit material, which is to provide the evidence in chief of Mr Milatos. If they had not been withdrawn, substantial portions would have been ruled as inadmissible or unnecessarily repetitive.

[24] Mr James referred to the letter he received from Mr Maher dated 22 February 2006, Annexure AGJ10 to the affidavit of Mr James sworn 28 February 2006, in which Mr Maher writes inter alia:

> "You have not made clear what you intend to do about the George Milatos affidavits number 1 to 4 inclusive."

[25] This letter was received after the e-mail forwarded by Mr James consenting to the withdrawal of affidavits (5) and (6).

[26] Mr James submitted that the letter from Mr Maher was a clear demonstration that no matter what the plaintiffs did in terms of pre-trial preparation, they would be faced with application after application. This was the reason for Mr James' summons filed on 23 February 2006 for leave to withdraw all the affidavit material, start again and rely on oral evidence.

[27] Mr Bruxner stated in reply, and it appears to be common ground, that early in December 2005, not long after the directions hearing on 5 December 2005, there was some communication between Mr Maurice QC for the first defendant and Mr Williams SC for the plaintiffs. This communication was with regard to the plaintiffs' affidavits, that led Mr Williams SC to say to Mr Maurice QC, "Yes we do need to withdraw the affidavits".

[28] Mr James apparently made the assumption that Mr Williams SC had advised Mr Maurice QC that such concession would be made by the plaintiff. The matter was further complicated by the fact that Mr James went on leave on 12 December 2005. When he returned on 13 January 2006, the first defendant had already issued summons dated 22 December 2005, seeking orders with respect to matters that the plaintiffs had already decided to concede.

[29] I am informed Mr Maurice QC was involved in settling the summons dated 22 December 2005. It would appear Mr Williams SC had not advised

Mr Maurice QC of the plaintiffs' concession or alternately, such advice came after Mr Maurice QC's involvement in the settling of the summons dated 22 December 2005. The solicitors for the first defendant were not made aware of the concession made on behalf of the plaintiffs. Whatever may have occurred, there was a breakdown in communication between the plaintiffs' legal representatives and the legal representatives for the first defendant. Whether or not the fault for this breakdown in communication was all one way I am not able to ascertain.

[30] The unfortunate consequence of this was that it was not until 8 February 2006 that solicitors for the first defendant became aware that the plaintiffs were proposing in any event to withdraw the affidavits numbered (5) and (6) and there would be no contest about the matter.

[31] Mr James stated himself, it would have been prudent if he had advised solicitors for the first defendant immediately after his conversation with Mr Williams SC in December 2005 that the affidavits would be withdrawn.

[32] Solicitors for the first defendant became aware on 8 February 2006, some weeks before the return date on the summons issued on 22 December 2005, that there would not be a contest. This meant they had over three weeks notice that they would not be required to argue the matter on 2 March 2006.

[33] There may be other interlocutory matters to be dealt with prior to the hearing of this matter. Dates for further directions have been scheduled and trial dates reserved for the period 30 October 2006 to 22 December 2006.

[34] The plaintiffs have agreed to pay the first defendant's costs thrown away with respect to the now withdrawn affidavits. I accept the first defendant's costs, involving a consideration of the first two affidavits (5) and (6), are substantial. However, despite their deficiencies, the affidavits are not completely devoid of information which would be of assistance to the defendants when this matter is heard. In other words, the time spent reading them may not be entirely wasted. To make orders for immediate taxation of these costs could be counter productive in the sense described by Mildren J in *Markorp Pty Ltd v King* (supra).

[35] Whilst I understand why there may be a considerable level of frustration on the part of the first defendant with the way in which the plaintiffs have gone about preparing their claim, I also consider to make the costs order on an indemnity basis, payable immediately, could be oppressive. There is affidavit material before the Court pertaining to the plaintiff's difficult health and financial circumstances.

[36] Taking into account all the matters I have referred to, I am not persuaded it would be an appropriate exercise of my discretion to make an order in favour of the first defendant with respect to paragraph (7) or (8) in the first defendant's summons filed 22 December 2005, for these costs to be paid on an indemnity basis taxable forthwith.

[37] Accordingly, the application is refused.

[38] I consider the order already made that the plaintiffs pay the defendants' costs thrown away, with respect to the withdrawal of the affidavits, is sufficient to do justice between the parties.

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