

PARTIES: BATEMAN PROJECT ENGINEERING PTY
LTD (ACN 056 741 596) AND OTHERS

v

JOVISTA PTY LTD (ACN 009 171 420)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY

FILE NO: 136 OF 1997 (9714637)

DELIVERED: 23 SEPTEMBER 1999

HEARING DATES: 10 SEPTEMBER 1999

JUDGMENT OF: BAILEY J

REPRESENTATION:

Counsel:

Plaintiff L. Silvester

Second, Third and Fourth:
Defendants S. Porter

Solicitors:

Plaintiff: Cridlands

Second, Third & Fourth
Defendants De Silva Hebron

Judgment category classification: C

Judgment ID Number: bai99014

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

Bateman Project Engineering Pty Ltd & Ors v Jovista Pty Ltd [1999] NTSC 101

No. 136 of 1997 (9714637)

BETWEEN:

JOVISTA PTY LTD (ACN 009 171 420)
Plaintiff

AND:

**PEGASUS GOLD AUSTRALIA PTY LTD
(ACN) 009 628 924)**
First Defendant

AND

**BATEMAN PROJECT ENGINEERING
PTY LTD (ACN 056 741 596)**
Second Defendant

AND

**KINHILL PACIFIC PTY LTD
(ACN 010 241 620)**
Third Defendant

AND

**KILBORN ENGINEERING PACIFIC PTY
LTD (ACN 000 864 353)**
Fourth Defendant

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 23 September 1999)

- [1] This is an application by the second, third and fourth defendants for costs thrown away to be taxed forthwith pursuant to Order 63.04 (4) of the Supreme Court Rules.
- [2] The background to the application may be stated briefly for present purposes. On 24 June 1997, the plaintiff filed a writ in the present proceedings. The fourth defendant filed an appearance on 7 July 1997, and the second and third defendants filed an appearance on 9 July 1997. Following several applications to extend time, the plaintiff filed its statement of claim on 2 Friday 1998. On the plaintiff's oral application, leave was granted on 11 December 1998 for the plaintiff to amend its statement of claim. The effect of the amendments was a significant reduction of the plaintiff's claim against the second, third and fourth defendants ("BKK") from approximately \$8.9 million to approximately \$2.9 million.
- [3] It is common ground between the parties that the plaintiff ("Jovista") is required to pay the costs of and occasioned by the amendment and the costs thrown away because of the amendment [r 63.11 (7)].
- [4] Order 63.04 (3) provides that subject to subrule (4), where costs are payable by virtue of the Supreme Court Rules without an order for costs, those costs shall not

be taxed “until the conclusion of the proceedings to which they relate”. Subrule (4) provides:

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

[5] This Court has on a number of occasions commented upon the approach to be adopted in exercising the discretion granted by r 63.04 (4).

[6] *In TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143 Martin J (as he then was) observed at p.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 manners 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”.

[7] His Honour also suggested at p.145:

“As to taxation and payment of interlocutory costs ordered to be paid by one part to another, a just approach to take is to consider whether the successful part ought to have reasonably anticipated interlocutory proceedings of the kind in question. If so, then he should have anticipated bearing the expense, at least to the conclusion of the proceedings, and not reckoned on having it paid for by the other party. If however, the kind of interlocutory application or the number of them could not have been so anticipated, then there may be a better case for ordering that the successful party’s costs be taxed and paid earlier”.

[8] In later cases, other members of the Court have adopted a somewhat broader approach to the exercise of discretion pursuant to r 63.04 (4). In *Markorp v King* (1992) 106FLR 286 at 293, Mildren J held:

“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 decision in *TTE Pty Ltd v Ken Day Pty Ltd*. 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 repayments 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".

[9] The above passage from the judgement of Mildren J was cited with approval by Kearney J in *Guernier v Patterson* (1992) 110 FLR 178 at 187. I also would respectfully agree with the observations of Mildren J in *Markam*, namely that exercise of the discretion in r 63.04 (4) is not dependent upon the existence of "exceptional circumstances".

[10] While the cases to which reference has been made were concerned with exercise of the discretion in r 63.04 (4) to order immediate taxation of interlocutory orders for costs, [r 63.04 (3)(a)], I consider that the applicable principles are the same in determining whether to order taxation forthwith of costs payable by virtue of the Supreme Court Rules without an order for costs [r 63.04 (3)(b)].

[11] In the present case, Ms Porter for BKK submits that it was not foreseeable that Jovista would abandon two thirds of its claim having had seven months to formulate its statement of claim. Ms Porter places particular emphasis on the magnitude of the amendments, which Mr Silvester on behalf of Jovista concedes were substantial, and the correspondingly substantial costs that BKK incurred in

preparing its defence (filed on 1 June 1998). The only evidence as to the size of the costs thrown away by BKK in preparing its defence is an unparticularised estimate of \$303,720 prepared on a solicitor and client basis.

[12] Mr Silvester for Jovista, submits that the size of BKK's costs cannot be sufficient of itself to justify departure from the general rule that costs are to be taxed at the conclusion of the proceedings. He submits that little or no weight should be given to BKK's unparticularised estimate prepared on a solicitor and client basis rather than a standard basis. Mr Silvester also submits that amendment of a statement of claim in proceedings of the present scale is to be expected and that Jovista's amendments demonstrate the responsible and appropriate conduct of the plaintiff in significantly reducing not only the amount of the claim but the number and complexity of issues for trial. Finally, Mr Silvester submits that it would be oppressive for a plaintiff pursuing a claim for some \$2.9 million to be further out of pocket to the defendants before trial.

[13] In the present case, I consider the considerations for and against exercising the discretion to order taxation forthwith are finely balanced. I agree that there is a good deal of force in submissions on behalf of Jovista that it has acted responsibly to limit its claim and refine the issues for trial. However, I also agree that BKK could not reasonably have anticipated the scale of the amendments to the statement of claim, involving the complete abandonment of several areas of claim. I accept that the costs thrown away in preparing BKK's defence are substantial, although I place little weight on the unparticularised estimate of solicitor and client costs provided by BKK. In the particular circumstances, I

accept generally the submissions of Ms Porter. Having regard in particular to the scale of the amendments and the consequent size of the costs thrown away, I do not consider that the general rule in r 63.04(3) should apply in the present circumstances. For these reasons, I order that the costs of and occasioned by the amendment to Jovista's statement of claim and the costs thrown away because of that amendment are to be taxed forthwith.