Lexcray Pty Ltd v Northern Territory of Australia [1999] NTSC 107

PARTIES:	LEXCRAY PTY LTD
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No 38 of 1993 (9303729)
DELIVERED:	13 October 1999
HEARING DATES:	30 August, 20 and 23 September 1999
JUDGMENT OF:	KEARNEY J

REPRESENTATION:

Counsel:

Plaintiff:	A. J. Lindsay
Defendant:	S. R. Southwood

Solicitors:

Plaintiff:	Cridlands
Defendant:	Solicitor for the Northern Territory

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

Lexcray Pty Ltd v Northern Territory of Australia [1999] NTSC 107
No 38 of 1993 (9303729)

BETWEEN:

LEXCRAY PTY LTD
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: KEARNEY J

RULING ON COSTS
(Delivered 13 October 1999)

[1] I rule today on the award of the costs of the action, a question reserved when judgment in favour of the Defendant was delivered on 30 August 1999. In its written submission of 20 September the Defendant seeks an order that the unsuccessful Plaintiff pay its costs; and in relation to the 17 causes of action abandoned by the Plaintiff during the trial, that those costs be paid on an indemnity basis, pursuant to r63.29. The Plaintiff in its written submissions of 23 September seeks an order that the Defendant pay its costs; alternatively, that there be no order as to costs. It is convenient to deal first with the Plaintiff's application for costs.

The Plaintiff's application for the costs of the action

[2] The award of costs is discretionary, but the discretion must be exercised judicially. The judgment of 30 August (p 91) found that the Plaintiff had failed to establish any of the causes of action on which it relied. In general, costs "follow the event"; it is on this basis that the Defendant founds in pars 1 and 2 of its submission. In par 1 of its submission the Plaintiff advances 3 reasons why this general principle should *not* apply and the Defendant should be ordered to pay the Plaintiff's costs, as follows:

(a) "To the extent that the Defendant represented to the Plaintiff" that what was held at par [35] of the judgment to be the effect of the Calley plan as regards payment of compensation for destocked cattle - that compensation "was payable at rates laid down by the Minister, after consultation with representatives of the cattlemen, and reviewed twice a year" - that representation was false. The basis of this contention by the Plaintiff appears to be the statement in judgment par [62] that "it appears that evidence is lacking" that consultation was made. I note that this was not the way the Plaintiff had argued its case at trail; it had there submitted that there had been a misrepresentation as to compensation, based on par 2.2.5 of the Calley plan. That submission involved a construction of par 2.2.5 which was rejected at judgment par [35]. I consider that there is nothing to support the proposition that the words above, quoted from judgment par [35], constituted a false representation as regards compensation. I do not consider that the fact

that “it appears that evidence is lacking” to support the defendant’s contention that those consultations had been carried out, falsifies the representation in the Calley plan that such consultation was part of the process by which the rates were to be determined.

(b) “[T]o the extent” that par 2.2.5 of the Calley plan “was a representation to the Plaintiff or information as to the basis of compensation payable”, the Defendant had admitted in Schedule 1 of its Defence that it was wrong. I accept that depending on the meaning given to the word “basis”, that appears to be the logical consequence of what the Defendant asserts in its Defence to have been the practical effect of the “Floor Price Scheme” which it says was “in operation at the time [5 January 1984] of the representation alleged” in par 8 of the Statement of Claim. However, as par [35] of the judgment makes clear, par 2.2.5 of the Calley plan has to be construed with the rest of the provisions of the plan as to compensation, and not in isolation.

(c) The evidence established that the Defendant had not taken into account “the on-farm value of an equivalent disease-free animal, in setting compensation rates”; and to the extent that par [66] of the judgment held “that that factor is to be taken into account”, and also to the exten that Part B of the Commonwealth/Northern Territory BTEC Agreement (which required that it be taken into account) was incorporated into the Destocking Compensation Agreement, the failure by the Defendant to take this factor into account was a third reason for it to be ordered to

pay the Plaintiff's costs of the action. As to this submission, it was noted in judgment par [66] that, contrary to the Plaintiff's submission at par 17 of doc 240, Part B did *not* state that the 'compensation payable shall be the on-farm value of an equivalent disease-free animal' but merely that that factor is to be taken into account. It was not part of the Plaintiff's case that the factor was merely required to be taken into account by the Defendant, and that it had failed to do so. Accordingly, no finding was made on that question; it is now too late to asset that "the evidence established that the defendant did not take" the factor into account.

[3] I do not consider that these submissions collectively merit an order that the Defendant pay the unsuccessful Plaintiff's costs of the action. I turn to the Plaintiff's alternative application.

No order as to costs?

[4] The Plaintiff opposes the Defendant's application for costs on 7 general grounds.

[5] First, it submits that the Defendant "invited litigation" by acting in the ways alleged in (a), (b) and (c) in par [2] above. I do not consider that this contention can be sustained, and I reject it.

[6] Second, the Plaintiff refers generally to *Verna Trading Pty Ltd v New India Assurance Co. Ltd* [1991] 1 VR 129, asserting that some of the

circumstances there set out as warranting a successful party being deprived of its costs, were "relevant to this case." This appears to be a reference to observations by Kaye J at pp 152-4, with which McGarvie J agreed, to the effect that exceptional circumstances created by a successful defendant's conduct in relation to the plaintiff's claim and the proceedings, may form a basis for the exercise of the discretion so as to deprive the successful defendant of its costs. Though Ormiston J appears to have doubted this approach at p175 to some degree, I respectfully agree with it. The submission was not developed, and I do not consider that in the absence of particular matters being pointed out, the Defendant's conduct was such as to merit it being deprived of its costs.

[7] Third, the Plaintiff contends that because the defendant here is the Crown, its conduct in the litigation was such as to justify there being no order as to costs. This submission founds on what was said about the Crown as litigant in *Kent v Cavanagh* (1973) 1 ACTR 43 at 55-6, by Fox J. In that case the plaintiffs sought to prevent the erection of a communications tower on Black Mountain, Canberra, on the basis, inter alia, that it would be a public nuisance as being offensive to the sight. The Plaintiff advances 6 reasons why his Honour's observations at p 55 are "particularly apt" to the present case: they were apparently the "broader considerations" which prompted his making no order for costs. His Honour referred inter alia to the plaintiffs being motivated "by deep concern for the welfare of the community". Here, the plaintiff noted that there is no Freedom of Information legislation in the

Territory; it contended that the Defendant had "conducted itself in breach of its representation to and contracts with the Plaintiff"; that it "did not reveal to the Plaintiff" various matters - the existence of the Commonwealth/Northern Territory BTEC Agreement, the fact that at relevant times it "did not consult with [the cattle] industry in setting the [compensation] rates", or "take into account the on-farm value of cattle" when setting those rates, or that Dr Calley's understanding of the meaning of par 2.2.5 of the Calley plan differed from that admitted by the Defandant in its Defence. I note that some of these alleged "facts" were not found by the judgment to have been established. In any event, the "broader considerations" referred to by Fox J in *Kent v Cavanagh* (supra) at 55 have to be read with care; this is a very different type of case to that. I do not consider that the Crown's conduct in this case warranted there being no order as to costs.

[8] Fourth, the Plaintiff listed 9 "significant, time consuming issues" on which the Defendant had been unsuccessful. I note that initially very many issues were raised by the Plaintiff's pleadings. Some ceased to be of importance or relevance when the Plaintiff abandoned parts of its case during the trial. In the context of this course which the trail took, some of the Defendant's arguments now attacked were understandably made. There is however merit in the Plaintiff's point that the Defendant, having initially argued that by 5 January 1984 the Plaintiff was contractually bound to purchase Nutwood Downs, later changed its course 180 degrees and submitted that this was not

so; see judgment pars [39] and [41]. Considering all 9 matters on which the Plaintiff relies, in the context of the litigation I do not consider that they constituted very "time-consuming issues"; certainly not to the extent of an order that there be no order as to costs.

[9] Fifth, the Plaintiff contended that the length and complexity of the trial were "to a significant extent" related to what it alleged was a failure by the Defendant "to devote the resources to prepare its case in a cost-effective way". As to that I recall in particular the failure by the Defendant pre-trial to meet agreed deadlines fixed during the case-flow management process. On the whole, I do not accept this submission; its consideration involves a matter of degree. I should say that I bear in mind and respectfully agree with the observations of King CJ in *Kenny v South Australia* [1987] 46 SASR 268 at 273, as to the special obligations of the Crown in litigation; it bears a special responsibility "for fostering the expeditious conduct of and disposal of litigation" and "it is extremely important that the Crown Solicitor's office set an example to the private legal profession as to conscientious compliance with the procedures designed to minimize cost and delay and to make the maximum use of the resources committed to the Court", as King CJ put it.

[10] Sixth, the Plaintiff contended that the "poor drafting" of the Calley plan and the Commonwealth/Northern Territory BTEC Agreement had encouraged the Plaintiff to litigate. In the circumstances of this case, I do not consider that this is a relevant factor.

[11] Seventh, the Plaintiff contended that there was an element of "public interest" in the action, in view of the effect of the compensation challenged upon other Territory pastoralists in the period 1983-88. In the circumstances of the case, I do not consider that this is relevant.

[12] In sum, I am not persuaded by the Plaintiff's submissions taken collectively that there should be no order as to costs. I consider that the usual approach should apply, and the successful Defendant should have its costs. I turn to the final question - the particular basis upon which the Defendant contends that part of those costs should be paid.

The Defendant's application for costs on an indemnity basis as regards the abandoned causes of action

[13] I note and apply the relevant authorities as to the award of costs on an indemnity basis: *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248, per Sheppard J; and the observations of Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 400-1. The Defendant submitted that 3 matters were "obvious" in relation to the abandoned causes of action listed in the judgment at par [9]. The Plaintiff vigorously contested each of those matters, noting in effect that the Defendant should have 'condescended upon particulars', specifying the facts on which it relied in support. Without discussing the matters further, I agree with the Plaintiff's submissions as to 2 of them, though I consider that the Defendant is correct in contending that

the abandoned causes of action led to some unnecessary prolongation of the trial. On the whole I consider that the Defendant's application for indemnity costs as regards those causes of action, should be refused.

[14] In the result, I consider that the Plaintiff should pay the Defendant's costs of the action, calculated on the usual party-and-party basis; I so order.

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