CITATION:	*Randazzo Investments (NT) Pty Ltd v City of Palmerston* [2018] NTSC 6
PARTIES:	RANDAZZO INVESTMENTS (NT) PTY LTD v CITY OF PALMERSTON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	87 of 2017 (21745729)
DELIVERED ON:	9 February 2018
DELIVERED AT:	Darwin
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:

Plaintiff:	H Baddeley
Defendant:	S Cleveland

Solicitors:

Plaintiff:	HWL Ebsworth
Defendant:	MinterEllison

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Randazzo Investments (NT) Pty Ltd v City of Palmerston [2018] NTSC 6
No. 87 of 2017 (21745729)

BETWEEN:

RANDAZZO INVESTMENTS (NT) PTY LTD
Plaintiff

AND:

CITY OF PALMERSTON
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 9 February 2018)

Background

[1] The plaintiff, Randazzo Investments (NT) Pty Ltd ("Randazzo") is the registered proprietor of two properties within the local government area of the City of Palmerston ("the Randazzo Properties").

[2] On 25 July 2017, by a resolution purportedly pursuant to s 156 of the *Local Government Act* (NT) ("LGA"), the defendant, City of Palmerston, ("the Council") declared a special rate called the City Centre Improvement Special Rate ("the Special Rate"). The Special Rate was to be imposed on ratepayers to contribute to improvements

to the city centre. The resolution declaring the rate recited that it was the opinion of the Council that such improvements would be of special benefit to the ratepayers of the city centre. However, it was to be levied only on "all rateable land assessed to have a parking shortfall in the City Centre".

[3] On or about 13 September 2017, the Council issued rates notices to Randazzo requiring payment of the Special Rate in respect of the Randazzo Properties. Those rates notices were received by Randazzo on 15 September 2017.

[4] Following discussions between a representative of Randazzo and a representative of the Council, on 20 September 2017, Randazzo sent an email to the Council in which it identified concerns about the validity of the Special Rate as well as providing further information which had been requested by the Council. In that email, Randazzo advised that due to the impending expiry of the relevant limitation period, Randazzo would file court proceedings seeking determinations that the Special Rate was invalid, or, in the alternative did not apply to the Randazzo Properties, if the Council did not provide certain acknowledgments by 12 noon on 22 September 2017. (Essentially what was requested was a written acknowledgment that the Randazzo Properties should not be subject to the Special Rate.)

[5] On 22 September, the Council confirmed receipt of Randazzo's email but did not provide any substantive response.

[6] Accordingly, on the afternoon of 22 September 2017 (the day before the expiration of the relevant limitation period), Randazzo filed an originating motion seeking an order quashing or setting aside the declaration of the Special Rate and the rate notices applying the Special Rate to the Randazzo Properties and in the alternative, a declaration that the Special Rate and the rate notices were invalid and of no effect; and seeking an order that the Council pay Randazzo's costs of and incidental to the proceeding.

[7] Further correspondence followed. Randazzo advised the Council that it had commenced proceedings but did not serve the originating motion because it was hoping to reach a negotiated settlement without incurring unnecessary costs.

[8] On 18 October 2017, the Council wrote to Randazzo advising that it had resolved to grant a concession of 100% of the Special Rate to all properties within the City Centre that had a parking shortfall due to waivers granted by the Development Consent Authority before 1 July 2017. These letters did not respond to the matters raised in the Plaintiff's letter dated 20 September 2017.

[9] A directions hearing was held on 23 October 2017 at which counsel for Randazzo advised the Court that it had not yet served originating

motion because Randazzo was corresponding with the Council and hoped to settle the proceedings without service being necessary. The Court made orders, inter alia, that Randazzo file a summons in support of the originating motion and serve both summons and originating motion on the Council with a return date of 30 November 2017.

[10] On 31 October 2017 Randazzo complied with that direction by filing a summons in support of the originating motion and serving the originating motion and summons on the Council under cover of a letter from its solicitors dated 31 October 2017.

[11] In the letter of 31 October 2017, Randazzo's solicitors further outlined the reasons why the Special Rate was invalid and liable to be set aside. Randazzo offered to settle on the basis that the Council consent to orders that the declaration of the Special Rate be set aside and the Council pay Randazzo's costs of and incidental to the proceedings on an indemnity basis. The letter asked for a response (including consent to the proposed orders if such consent was given) by 27 November 2017.

[12] On 7 November 2017, the Council filed an appearance.

[13] The Council did not respond to the letter of 31 October 2017 by 27 November 2017 (as requested) or at all. Instead, at the directions hearing on 30 November 2017, the Council indicated (for the first

time) that it consented to an order being made setting aside the declaration of the Special Rate, and sought an order that Randazzo pay the Council's costs of the proceeding.

[14] The Council agreed to a consent order being made setting aside the Declaration, without insisting that such consent would only be given if attended with a costs order in the Council's favour. That order was made and directions were made for the parties' submissions on costs. The parties have agreed that the question of costs can be determined on the basis of those written submissions and the affidavits filed in support.

[15] Randazzo seeks an order that the Council pay its costs of and incidental to the proceeding. It does not press its earlier claim for indemnity costs.

[16] The Council seeks an order that Randazzo pay its costs or, alternatively, an order that each party bear its own costs.

The parties' submissions

[17] Essentially, the Council submits that it was not necessary for Randazzo to institute the present proceeding. Discussions were underway and the Council had granted a 100% "Special Rate concession" for the 2017/18 year to affected ratepayers "to enable the Council to further investigate" what it described as "an anomaly"

in relation to the Special Rate. This, Council contends, meant that Randazzo would not have been obliged to pay the Special Rate.

[18] Randazzo contends that the 100% concession was vague and unclear in its meaning and in any event, did not bar the application of the Special Rate to the Randazzo Properties because the alleged shortfall of car parking spaces provided at each of the Randazzo Properties was not wholly a result of "waivers granted by the Development Consent Authority before 1 July 2017" as specified in the resolution granting the 100% concession. (The situation in relation to the number of parking spaces required for each of the Randazzo Properties is complicated. Randazzo provided details in its submissions and supporting evidence in the affidavit in support of its costs application. The details were not disputed and are not relevant to this costs determination.)

[19] Further, the Council complains that the time given by Randazzo for the Council to respond was unreasonably short and its conduct in instituting proceedings when it did unreasonable as a consequence. Randazzo responds that it was obliged to issue when it did because the limitation period would have expired on the following day. (That also is not disputed.)

Principles

[20] Order 63.03 of the *Supreme Court Rules* provides an unfettered discretion in relation to costs which must be exercised judicially. Ordinarily, the successful party to litigation is entitled to an award of costs in its favour.[1] To justify departing from this principle, the circumstances must be exceptional.[2]

[21] In cases such as the present, in which there has been no hearing on the merits and the proceedings have been settled or discontinued prior to trial, the Courts have drawn a distinction between cases where one party "effectively surrenders to the other" such that it is possible to discern which party has succeeded and "cases where some supervening event or settlement so removes or modifies the subject of the dispute so that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs".[3]

[22] In cases where one party has effectively surrendered, there will usually be no basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party.

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1 *Nitschke v Medical Board of Australia (No 2)* [2015] NTSC 50 per Hiley J at [3]; *Matzat v Gove Flying Club Incorporated* [1998] NTSC 36 per Mildren J.

2 *Wormald International (Aust) Pty Ltd v Aherne* [1995] NTSC 137 at [18]

3 *One.Tel Ltd v Deputy Commissioner of Taxation* (2000) 101 FCR 548 (***One.Tel***) at [6], which was referred to with approval in *United Super Investments Pty Ltd v Randazzo Investments Pty Ltd* [2010] NTSC 31 at [33]-[37]

Randazzo contends that that is the case here. I agree. There would seem to be no other explanation for the Council's decision to consent to an order in the terms sought by Randazzo on the originating motion.[4]

[23] In the second category of cases, where proceedings have been compromised in such a manner that it is difficult to determine which party succeeded, or where a supervening event has changed the subject matter, there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs and in those circumstances the courts may be reluctant to make a costs order, but this is not such a case.

[24] The Council contends that Randazzo should be deprived of a costs order, and indeed ordered to pay the Council's costs, relying on the statement of principle by the High Court in *Re Minister for Immigration & Ethnic Affairs (Cth); Ex Parte Lai Qin*[5] where it said (adopting *Australian Securities Commission v Aust-Home Investments Ltd*):

> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving

[4] It does seem that the conclusion that the declaration of the Special Rate was not validly made under s 156 and was liable to be set aside was inevitable in light of the decision in *Yeperenye Pty Ltd v Alice Springs Town Council* [2011] NTSC 6 (referred to in the Plaintiff's solicitor's letter to the Defendant dated 31 October 2017). In summary, if a special rate is to be declared for an identified purpose which is intended to benefit all of the land in a particular area, LGA s 156 does not permit a Council to levy the rate on some only of the land in the area intended to benefit. *Yeperenye Pty Ltd v Alice Springs Town Council* referred to a special charge under LGA s 157, but the considerations are not materially different. See for example *Shanvale Pty Ltd v Council of the Shire of Livingstone* (1999) 105 LGERA 380; [1999] QCA 483.

[5] (1997) 186 CLR 622, 624

> party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. (emphasis added)

[25] The answer to that contention is that Randazzo cannot be said to have acted unreasonably in the circumstances. It gave clear notice to the Council of the reasons why the declaration of the Special Rate was invalid – reasons that were clearly correct, as was ultimately conceded by the Council in (quite properly) consenting to the declarations sought in the originating motion. It took reasonable steps to contain costs, only issuing proceedings on the last day before the limitation period expired, and refraining from serving the originating motion while negotiations continued in an effort to contain costs. That is not to say that the Council acted unreasonably in taking time to receive appropriate legal advice before consenting to the orders, but it does mean that Randazzo, as the successful party, is not to be deprived of its costs for having acted unreasonably.

Orders:

[26] The defendant is to pay the plaintiff's costs of and incidental to the proceeding to be taxed on the standard basis in default of agreement.
