Lexcray Pty Limited v Northern Territory of Australia (No 3)
[2015] NTSC 83

PARTIES:	LEXCRAY PTY LIMITED
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	33/93 (9303729); AP 22 of 99 (9303729)
DELIVERED:	10 December 2015
HEARING DATES:	18 and 27 November 2015 and 4 December 2015
JUDGMENT OF:	MARTIN (BR) J

REPRESENTATION:

Counsel:

Appellant:	J Rowland QC
Respondent:	G Parker SC and T Anderson

Solicitors:

Appellant:	Clayton Utz Lawyers
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Mar1502
Number of pages:	4

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

Lexcray Pty Limited v Northern Territory of Australia (No 3)
[2015] NTSC 83
No. 33/93 (9303729); AP 22 of 99 (9303729)

BETWEEN:

LEXCRAY PTY LIMITED
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: MARTIN (BR) J

REASONS FOR JUDGMENT

(Delivered 10 December 2015)

Introduction

[1] On 9 October 2015 I dismissed two applications by the plaintiff that there be a "permanent stay, strike out or dismissal" of two summonses for taxation of costs filed by the defendant on 16 May 2002. Reasons for judgement were published on 14 October 2015 which set out the lengthy history of this matter.

[2] Subsequently the defendant sought an order that the plaintiff pay the costs of the applications. In response the plaintiff sought costs against the defendant or, in the alternative, an order that there be no order as to costs.

Written submissions were filed on 18 and 27 November 2015 and 4 December 2015.

[3] For the reasons that follow I order that the plaintiff pay the defendant the costs of the applications which were suitable for senior counsel. These brief reasons should be read in conjunction with the detailed reasons for judgement published on 14 October 2015.

[4] The unsuccessful applications were interlocutory applications. Rule 63.18 of the *Supreme Court Rules 1987* (NT) provides that each party shall bear their own costs of an interlocutory application "unless the Court otherwise orders". The parties agree that this Rule is intended to deny costs on interlocutory applications "in the usual run of cases".[1]

[5] The applications were well beyond the boundaries of the usual run of cases. If successful they would have denied the defendant the opportunity of recovering costs in excess of $1m. As the defendant has submitted, the proceedings were more akin to a substantive trial than an average interlocutory application. The affidavit evidence was extensive and included significant expert evidence. Cross – examination occupied a number of days.

[6] In all respects the applications were "exceptional" when measured against the usual run of interlocutory applications. An order for costs is appropriate.

[1] *TTE Pty Ltd v Ken Day Pty Ltd* (199) 2 NTLR 143, p 145; cited in *Johnson v Northern Territory of Australia* [2015] NTSC 15, par [7].

[7] The plaintiff submitted that the conduct of the defendant and its solicitors warrants departure from the general rule that costs follow the event. I do not agree. As I have explained in the reasons for judgement, while the defendant's solicitors were in breach of their duty to their client, they were not in breach of their duty to the court. Further, the plaintiff was content to allow time to pass and, in this sense, acquiesced in the long periods of inactivity brought about by the failure of the defendant's solicitors to pursue negotiations with reasonable diligence.

[8] The plaintiff submitted that in view of the defendant's failure to pursue "the claim" diligently, the application for a permanent stay was "a reasonable step for the plaintiff to take and one which was brought on by the conduct of the Northern Territory".

[9] Again, I do not agree. The lapse of time to which the plaintiff acquiesced worked to the financial advantage of the plaintiff. In the period 2012-2014 when the defendant re-activated the negotiations, it was open to the plaintiff to confirm its earlier agreement to pay $800,000 and to re-enter negotiations concerning the terms of payment and security. Instead, the plaintiff chose to ignore the defendant's offer and, after the defendant applied to relist the summonses for taxation, chose to institute the current applications.

[10] In my view the application for a permanent stay was not "a reasonable step". Nor was it brought about by the conduct of the defendant.

[11] The plaintiff has failed to make out a case that the defendant should be denied the costs of the applications.

[12] Prior to the hearing of the applications the plaintiff unsuccessfully sought discovery of various documents. Barr J ordered that each party bear their own costs.

[13] During the hearing the defendant produced documents which the plaintiff submitted should have been discovered earlier. The documents concerned the Cabinet decision, information provided to Cabinet and the authority of the SFNT to negotiate terms of payment and security.

[14] The plaintiff contended that the late discovery caused the plaintiff to "re-develop its case". The contention was not supported by an explanation of the redevelopment and I am unable to discern why the documents in question would have had that effect.

[15] Finally, the plaintiff submitted that it should have the costs of the application before Barr J. I have no power to make such an order.

[16] I order that the plaintiff pay the defendant costs of the applications heard and determined by me, which applications were suitable for senior counsel. In addition, the plaintiff is to pay the defendant's costs of the applications for costs.
