PARTIES:	NHR FORSTER PTY LTD (ACN 000 041 734) v PATRICIA MACMICHAEL and: ANTHONY JOHN MACMICHAEL
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	TERRITORY JURISDICTION
FILE NO:	AP 29 of 1997 (133 of 1996) (9615279)
DELIVERED:	30 July 1998
HEARING DATES:	6 July 1998
JUDGMENT OF:	Kearney A/CJ, Thomas J & Gray AJ

REPRESENTATION:

Counsel:

Appellant:	J. E. Hebron
Respondent:	J. McCormack

Solicitors:

Appellant:	DeSilva Hebron
Respondent:	Geoff James

Judgment category classification:	C
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kea98016

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

No. AP29 of 1997
(9615279)

BETWEEN:

NHR FORSTER PTY LTD
(ACN 000 041 734)
Appellant

AND:

PATRICIA MacMICHAEL
First Respondent

and:

ANTHONY JOHN MacMICHAEL
Second Respondent

CORAM: KEARNEY A/CJ, THOMAS J AND GRAY AJ

REASONS FOR JUDGMENT

(Delivered 31 July 1998)

KEARNEY A/CJ:

The appeal was allowed on 21 April. At the request of the solicitor for the respondents, no consequential orders were then made, in order that counsel could address further on what their content should be. Submissions were eventually made on 6 July; Mr Hebron of counsel for the appellant

asked for orders in terms of those proposed at p19 of the judgment of 21 April, while the submissions of Mr McCormack of counsel for the respondents were directed at the question of costs.

I have had the benefit of reading the opinions of Thomas and Gray JJ, with which I agree. It is vital to recall that on 11 August 1987 it was ordered pursuant to r47.04(b) that there be separate trials of the 2 different questions raised in proceedings No.133 of 1996. The first involved the respondents' claim, as pleaded, in relation to the property No 62 East Point Road; the second involved the second respondent's claim for commissions and retainer fees. Only the first question, on the property claim, has been tried. The issue on that question, from the pleadings, was whether the respondents as purchasers were entitled to specific performance of the contract in the terms they alleged. The respondents succeeded on the separate trial of that issue, but lost on appeal. This Court held that the appellant as vendor had never agreed to provide finance. This was the vital point. It is clear that the question of the credit of $90,000 against the purchase price, on account of commissions due to the second respondent, has no relevance to the question of costs, for the reasons stated by Gray J (p7).

As to the costs of the separate trial below, it will be a matter for the Master on taxation to determine which parts of the costs of proceedings No.133 of 1996 are properly referable to that trial. That is a taxation issue.

I agree with Gray J that the orders proposed by the Court on 21 April should now be affirmed; the appellant should have its costs on this issue of costs.

THOMAS J

This is an application for costs following a decision of the Court of Appeal on 21 April 1998 which allowed an appeal from the trial judge, set aside his orders, and substituted judgment for the defendant.

The application in relation to costs made by Mr McCormack of counsel for the first respondents is that each party bear its own costs of the appeal, and that the costs of the trial be referred to the trial judge. He further submitted that the behaviour of the appellant has been such that no order should be made as to the costs of the trial, and each party should pay its own costs thereof. Alternatively, he submitted that the *second* respondent should have an order that the appellant pay his costs of trial, because his entitlement to the $90,000 was vindicated by this Court, and because the appellant appealed in order to set aside the order for specific performance obtained by the *first* respondent.

Mr Hebron of counsel for the appellant resists this application, and submits that the appellant is entitled to the costs of the appeal and the costs of the trial.

The appellant succeeded before this Court in overturning the decision of the trial judge who had ordered specific performance of the contract in favour of the first respondent.

The question of costs is a matter for the discretion of the Court; Order 63.03(1). Order 63.04(5) provides that 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.

There is a well established principle, when a court exercises its discretion to award costs, that an order for costs be made in favour of the successful party and that the onus is on the unsuccessful party to show why the ordinary rule that costs follow the event should be displaced (*Nikolaou v Papasavas, Phillips & Co* (1988-89) 166 CLR 394; see also *Tenthy v Curtis* (1988) 55 NTR 1).

Mr McCormack argues that the settlement proposed by the appellant in its letter dated 14 August 1997 annexed to the affidavit of Mr Hebron sworn 30 June 1998, did not comply with the Rules of Court in respect of time limits that apply to offers for consent judgment. I do not accept that this argument is relevant, in view of the orders sought and obtained by the respondents from the trial judge.

Mr McCormack also referred to the aborted settlement of the sale of No. 62 East Point Road on 2 July 1996 and the manner in which the

appellant has subsequently behaved in refusing to admit a claim for commission in the sum of $79,500, and the respondents' claim for $90,000.

The respondents have not put forward any reasons which would persuade me to depart from the normal principle that costs should follow the event, in respect of the costs of the appeal.

With respect to the costs before the trial judge, I accept the submission by Mr Hebron that the trial which was the subject of the appeal was in respect of a discrete issue, namely, were the respondents entitled to specific performance of the contract in the terms alleged in their Amended Statement of Claim. The trial judge made an order for the specific performance of that contract in those terms. This Court overturned the trial judge's finding of a contract in the terms alleged by the respondents. The claim made by the respondents for specific performance of the contract in those terms, ultimately failed. Whilst there are other issues between these parties outstanding before the trial judge, his Honour did not, in giving his decision on the claim for specific performance, deal with these other issues. There is no basis for distinguishing between the costs of the trial and the costs of the appeal. The question of costs of the trial having been raised before this Court, it should be dealt with and disposed of by this Court. I do not accept the submission by Mr McCormack which would effectively mean that in deciding the question of costs of the trial this Court should have regard to matters that were not raised or argued either at trial or on appeal (*Banque Commerciale SA (En Liquidation) v Akhil Holdings Ltd* (1989-90) 169 CLR

279; *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373). It is irrelevant that other things may have occurred if the respondents had alleged a different contract. The trial judge was bound by the pleadings and the evidence before him.

Finally, Mr McCormack submitted that if costs were to be awarded against the respondents there should be an apportionment of costs between them; he points out that the contract was between the appellant and the first respondent.

I do not accept this submission. All the negotiations up to the time of signing the contract were carried out by the second respondent. The first respondent was named as the purchaser in an effort to avoid the second respondent's creditors. The second respondent gave evidence at the trial. The first respondent did not. The second respondent gave a guarantee in respect of the contract and was intrinsically involved in the contract between the appellant and the first respondent. I consider the order for costs should be in respect of both respondents.

The order I would propose is as follows:

1. That the respondents pay the appellant's costs of the appeal including the argument on the question of costs.
2. That the respondents pay the appellant's costs before the trial judge.
3. Such costs to be taxed or agreed.

GRAY J:

The Court has before it a question of what costs orders should be made following an appeal in which the appellant was wholly successful.

The proceedings below raised a number of issues between the parties, one being the first respondent's claim for specific performance of a contract for the sale of a house property in East Point Road. The dispute in relation to that issue was as to the terms of the contract. It was alleged by the first respondent, and denied by the appellant, that the contract contained a provision for vendor finance. There was a sub-issue as to whether the contract required the appellant to give a credit of $90,000 to be deducted from the purchase price. This sub-issue is not relevant to the question of costs, because it was made clear by the appellant, both in correspondence and in open Court, that the appellant was prepared to give the $90,000 credit at settlement if vendor finance was not required.

With the consent of the parties, the learned trial Judge ordered that the dispute concerning the contract of sale be tried first as a separate issue.

The trial, as limited by the learned Judge's order, went ahead. As I say, the only live issue was whether the contract provided for vendor finance. The learned trial Judge decided that it did and made orders accordingly. Upon the appeal, the Court took a different view. It allowed the appeal and set aside the order for specific performance.

The judgements in the Court of Appeal were delivered on 21 April 1998. The written reasons proposed that the appeal be allowed with costs including the costs of the proceedings below.

However, when the judgments were delivered, the solicitor for the respondents said that he wished to argue that the question of the costs of the trial be referred to the trial judge. At the time the members of the Court were not all present. The matter was mentioned again on 22 May, when certain directions were given. Ultimately, on 6 July, all the members of the Court assembled to hear argument.

Mr McCormack, of counsel, now appeared for the respondents. He put a number of arguments which by now embraced a contention that there should be no order as to the costs of the appeal. He also argued that the costs of the trial be referred to the trial Judge.

I must confess to having some difficulty with Mr McCormack's submissions. He contended that both parties argued for an interpretation of the contract that was held to be erroneous by the Court of Appeal. This argument was based on the question of the $90,000 which I have already referred to. It was further put that the second respondent should not have a costs order made against him because he was only a minor figure. However, the evidence shows that the second respondent was very much a central figure in the transaction. He was not a party to the contract because he did

not want the asset to be the subject of attachment by his creditors. The order for specific performance required him to give a guarantee. He acted as his wife's agent in all the negotiations leading to the contract. There is no substance in this point.

The balance of Mr McCormack's argument was based on various hypotheses that might have happened but did not.

The bald fact is that the learned trial Judge, by his order, isolated a discrete issue to be tried. The respondents pressed the learned trial Judge to make an order for the specific performance of a contract which included a term for vendor finance. That contention succeeded at trial but failed on appeal. As I see it, the situation is entirely free from complications. Costs should follow the event and the orders initially proposed by the Court should be affirmed.

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