

CITATION: *Castronova v Tjung & Ors (No 2)* [2024] NTSC 105

PARTIES: CASTRONOVA, Margaret Lesetta

v

TJUNG, Fatima

and

DANIUM INVESTMENTS PTY LTD
(ACN 108 393 817) ATF THE DANIAM TRUST

and

DANIUM, Danny

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2022-021412-SC

DELIVERED: 12 December 2024

HEARING DATES: 2 May 2024 to 8 May 2024

JUDGMENT OF: Burns J

G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 4th ed, 2018)
Supreme Court Rules 1987 (NT) r 4.06

Castronova v Tjung & Ors [2024] NTSC 55; *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	H Baddeley
Defendants:	A McLaren

Solicitors:

Plaintiff:	HWL Ebsworth Lawyers
Defendants:	Kelly & Partners Lawyers

Judgment category classification:	C
Judgment ID Number:	Bur2411
Number of pages:	15

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

Castronova v Tjung & Ors (No 2) [2024] NTSC 105
No. 2022-021412-SC

BETWEEN:

MARGARET LESETTA CASTRONOVA
Plaintiff

AND:

FATIMA TJUNG
First Defendant

AND:

DANIUM INVESTMENTS PTY LTD
(ACN 108 393 817) ATF THE DANIMUM
TRUST
Second Defendant

AND:

DANNY DANIMUM
Third Defendant

CORAM: BURNS J

REASONS FOR JUDGMENT

(Delivered 12 December 2024)

Introduction

- [1] On 28 June 2024, I gave judgment for the plaintiff on her claim against the defendants and also in her favour on the defendants' Counterclaim and

Setoff.¹ I made orders that the plaintiff may, within 14 days of delivery of judgment, file and serve written submissions as to the costs orders sought in these proceedings. The defendants were permitted 14 days from receipt of the plaintiff's submissions to file and serve written submissions as to the costs orders that the defendants submit should be made.

[2] The plaintiff has sought the following orders:

- An order that the defendants pay her costs of the proceedings on an indemnity basis; or
- In the alternative, an order that the defendants pay her costs on the usual basis (on a party/party basis to be taxed if not agreed).

[3] The defendants accept that an order should be made that they pay the plaintiff's costs on the usual basis but resist an order for indemnity costs.

The plaintiff's submissions

[4] The plaintiff accepted that for an indemnity costs order to be made there must be some "special or unusual feature" justifying a departure from the usual rule that costs are awarded on a party/party basis.² The categories of cases in which an indemnity costs order may be made are not closed.³ The Court has a discretionary power to award indemnity costs "as and when the

¹ *Castronova v Tjung & Ors* [2024] NTSC 55 ('the principal judgment').

² *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233-234 ('*Colgate-Palmolive*').

³ G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 4th ed, 2018) [16.45]-[16.46].

justice of the case might so require”.⁴ The object in ordering indemnity costs is compensatory, not penal.

[5] In the present case, the plaintiff submitted that there are two main reasons which either individually or collectively justify an order for indemnity costs. These reasons are:

(a) The claims made by the defendants, both in defence of the plaintiff’s claim and in their own Counterclaim and Setoff, were hopelessly lacking in merit.

(b) The defendants acted unreasonably in refusing to accept offers of compromise made by the plaintiff.

[6] Regarding the second matter relied upon by the plaintiff, the affidavit of Thomas Alexander Walker affirmed on 9 July 2024 was read in the plaintiff’s case on costs. Mr Walker is a solicitor in the firm acting on behalf of the plaintiff. Mr Walker deposed that on 10 August 2023, a letter was sent to the solicitors for the defendants offering to resolve the proceedings on the following basis:

(a) Judgment against the defendants in favour of the plaintiff in the amount of \$500,000.00 including prejudgment interest.

(b) The plaintiff to have immediate possession of both the Muirhead and Acacia Hills properties.

⁴ *Colgate-Palmolive* at 233-234.

(c) The defendants to pay the plaintiff's costs of and incidental to the proceedings on "the standard basis".

[7] This offer was expressed to be open for acceptance until close of business on 21 September 2023.

[8] A spreadsheet accompanying this offer calculated the plaintiff's loss as \$669,952.94 and was based upon interest on the sum outstanding under the contract calculated at 5%, rather than the contractual rate of 12%, and allowing the defendants credit for their alleged expenditure during the period that they occupied the Fannie Bay premises under licence. The offer included provision for the defendants to pay the plaintiff's cost on a "standard basis" despite the relevant mortgages entitling the plaintiff to recover her costs incurred in recovering payment on an indemnity basis.

[9] The defendants did not accept the plaintiff's offer. The defendants' lawyers made a counter-offer by letter dated 8 December 2023. The terms of that counter-offer were:

(a) Each party to sign and exchange a deed of release discharging each other of all liability arising out of the cause of action, "including the claim or counterclaim", forming part of the present proceedings "as well as gagging disclosure of the terms of settlement among others".

- (b) The defendants would pay the plaintiff \$250,000.00 in exchange for the plaintiff discharging the mortgages over the Muirhead and Acacia Hills properties.
- (c) The plaintiff would discharge the second defendant company from its obligations under the Deed of Performance Guarantee.

[10] In support of this counter-offer, in the letter of 8 December 2023 the defendants advanced the following propositions:

- (a) The failure of the plaintiff to provide a discharge of mortgage for the Muirhead property resulted in the first defendant being unable to complete the sale of that property, causing loss to the first defendant.
- (b) If the first defendant had been able to complete the sale of the Muirhead property, the first defendant “would have been in a financial position to promptly rectify the loss suffered by the plaintiff of the \$550,000 in respect of” the Fannie Bay property.
- (c) The plaintiff was claiming interest on the shortfall of the sale of the Fannie Bay property at 12% which the defendants asserted was “penal/unfair”.
- (d) The plaintiff “had failed to fix her debt in a timely manner”.
- (e) There was an issue as to whether the plaintiff was entitled to the sale shortfall of \$550,000.00 “because of her failure to mitigate”.

[11] That counter-offer was expressed as being open for acceptance for 14 days.

It was not accepted by the plaintiff.

[12] By letter dated 29 January 2024, the plaintiff made a second offer of settlement. That offer was in the following terms:

(a) Judgment against the defendants in favour of the plaintiff in the amount of \$650,000.00 including prejudgment interest.

(b) The plaintiff to have immediate possession of both the Muirhead and Acacia Hills properties.

(c) The defendants to pay the plaintiff's costs of and incidental to the proceedings on "the standard basis".

[13] That offer was expressed to be open for acceptance until close of business on 16 February 2024. It was not accepted by the defendants.

[14] A spreadsheet accompanying this offer calculated the plaintiff's loss as \$864,913.25 and was based upon interest on the sum outstanding under the contract calculated at 5%, rather than the contractual rate of 12%, and allowing the defendants credit for their alleged expenditure during the period that they occupied the Fannie Bay premises under licence. The offer included provision for the defendants to pay the plaintiff's cost on a "standard basis" despite the relevant mortgages entitling the plaintiff to recover her costs incurred in recovering payment on an indemnity basis.

The defendants' submissions

[15] The defendants submitted that they had conducted the proceedings properly and with propriety, doing nothing to unnecessarily delay or prolong them.

The defendants advanced the following reasons in opposing the application for indemnity costs:

- (a) In September 2022, the plaintiff filed an Originating Motion seeking judgment for \$1,070,668.90 plus interest at 12% per annum, possession of the Muirhead and Acacia Hills properties, and costs on an indemnity basis. The defendants claimed that the proceedings were defectively commenced and, on the application of the defendants, consent orders were made on 15 December 2022 for the matter to proceed as if initiated by writ. Costs of that application were ordered to be costs in the cause. The defendants submitted that there is no basis upon which they ought to be ordered to pay costs of and incidental to that application on an indemnity basis.
- (b) The plaintiff unsuccessfully disputed claims of legal professional privilege in respect of certain documents produced by Tschirpig Conveyancing under subpoena. The defendants filed an application on 2 April 2024 seeking various orders regarding their claims of privilege over the documents. Orders were made by the Court including an order that the plaintiff deliver up the privileged documents to chambers. Costs of the application were ordered to be costs in the cause. The defendant submitted that there is no basis upon which they ought to be

ordered to pay costs of and incidental to that application on an indemnity basis.

- (c) The plaintiff originally claimed damages for breach of contract in the sum of \$1,106,298.90 plus interest at the rate of 12% per annum or according to statute for the period from 22 December 2022 onwards. The defendants submitted that the defence of these proceedings was justified as the plaintiff subsequently amended her claim reducing it to \$550,000 a matter of days before the commencement of the trial in May 2024.
- (d) The defendants denied liability for the plaintiff's claim for \$550,000.00 on the basis, inter alia, that the plaintiff had refused to discharge the mortgage over the Muirhead property to enable the first defendant to proceed with a sale of that property. The defendants submitted that the issue of whether the plaintiff had refused to provide the discharge of mortgage depended upon whether the court accepted the plaintiff's or the first defendant's version of a telephone conversation between them on 9 December 2020. The defendants noted that in the principal decision I had accepted that it was possible that there was some confusion between the parties in that conversation such that the first defendant may have come away from that conversation with the impression that the plaintiff was not prepared to discharge the Muirhead mortgage. The defendants submitted that in those

circumstances it was entirely proper for the defendants to maintain their defence to the plaintiff's claim and to advance a counterclaim.

- (e) Whether the plaintiff was entitled to recover default interest at the rate of 12% per annum depended upon the interpretation of clause 17.1(a) of the Contract. The defendants submitted that the words of this clause were open to differing interpretations. The defendants submitted that their case in that regard was not obviously untenable.
- (f) The defendants accepted that payment of the sum of \$90,000.00 was made on various dates in instalments on account of the purchase price under the Contract. The defendants claimed at trial that that sum should have been accounted for under clause 20.3 of the Contract. The defendant submitted that this approach was not untenable.
- (g) Each of the offers of settlement made by the plaintiff included a requirement that the defendants give immediate possession of both the Muirhead and Acacia Hills properties to the plaintiff. The plaintiff was not successful in her claim for possession of both properties. The plaintiff was given possession of the Muirhead property only. The defendants therefore submitted that the judgment for the plaintiff was not better than the offers of settlement made by the plaintiff.

Plaintiff's submissions in reply

- [16] The plaintiff disputed the defendants' submission that these proceedings were commenced defectively. The plaintiff submitted that the proceedings

were properly commenced by Originating Motion as per r 4.06 of the *Supreme Court Rules 1987* (NT) in circumstances where, at the time, it seemed unlikely that there would be any substantial dispute of fact.

However, in the light of arguments and factual assertions advanced by the defendants, orders were made on 15 December 2022 to continue the proceedings by way of pleadings.

[17] Regarding the submission made by the defendants concerning a claim for legal professional privilege, the plaintiff submitted that these documents were produced under subpoena without any claim for privilege, and it was not until the documents were in the possession of the plaintiff's lawyers that the defendants sought to make a belated claim for privilege. The plaintiff submitted that these circumstances are not relevant to a determination of whether indemnity costs should be ordered.

[18] The plaintiff submitted that any argument by the defendants that their defence and claims were justified because the plaintiff reduced the amount of her claim prior to trial does not make sense. The plaintiff submitted that the issues raised by the defendants in their defence and counterclaim were all found to be lacking in merit. The plaintiff submitted that it does not follow from the fact that she reduced the amount of her claim prior to the trial, that if the defendants had not defended the matter as they did the plaintiff would have received a judgment in excess of what was properly owing to her.

[19] The plaintiff disputed that the resolution of the issue relating to the plaintiff's alleged failure to provide a discharge of mortgage for the Muirhead property depended on the determination of what was said in the telephone conversation on 9 December 2020. There was ample other evidence to support the proposition that the plaintiff had not refused to provide a discharge of mortgage and that the reason the sale of the Muirhead property did not proceed to completion had nothing to do with the alleged failure to provide a discharge of mortgage.

[20] The plaintiff rejected any assertion that the defendants did not accept the plaintiff's settlement offers because of the inclusion of a term that the defendants give the plaintiff possession of the Acacia Hills property. The plaintiff also rejected any submission that prior to trial she had reduced her claim to below the level of her settlement offers, pointing to the fact that she obtained judgment of \$962,017.29 inclusive of prejudgment interest.

Consideration

[21] The defence advanced by the defendants to the plaintiff's claim was manifestly hopeless. The same may be said regarding their Counterclaim and Setoff. The proceedings taken by the plaintiff to recover the shortfall on the sale of the Fannie Bay property should have proceeded quickly and inexpensively.

[22] If there was some genuine issue about the amount claimed by the plaintiff being greater than her actual loss, this could have been quickly resolved.

The plaintiff has taken an extremely reasonable approach throughout these proceedings and I have no doubt would have done so if some genuine attempt had been made by the defendants to resolve the issue of her losses. There could have been no genuine fear that the plaintiff would be overcompensated for her loss; certainly not one that would justify the meritless arguments advanced by the defendants.

[23] The reasonable approach taken by the plaintiff is demonstrated by her attempts to settle the proceedings on terms generous to the defendants. Each of the offers made by the plaintiff involved a genuine compromise of her claim. The approach taken by the defendants was the polar opposite, advancing specious claims with a view to avoiding all liability. The claim relating to the alleged failure of the plaintiff to provide a discharge of the mortgage over the Muirhead property is a clear example.

[24] Contrary to the defendants' submission, the resolution of this issue did not turn upon a determination of what was said in the phone call on 9 December 2020. There was compelling evidence that prior to that phone call the plaintiff engaged a lawyer, Ms Papazoglou, to prepare the discharge of mortgage. Ms Papazoglou communicated to Ms Lenz, the conveyancer retained by the first defendant, that Ms Papazoglou was preparing the discharge of mortgage for the sale by the first defendant. As I said in the principal judgment, the reason the sale of the Muirhead property did not proceed was not because of any belief on the part of the first defendant that the plaintiff would not discharge the mortgage, but because the first

defendant did not maintain contact with Ms Lenz and provide her with the necessary instructions, and execute the necessary documents, to allow the sale to proceed.

[25] I am satisfied that the defendants were not in any doubt as to the operation of the provisions of the Contract regarding default interest. They simply did not want to pay it. There is nothing in the contemporaneous communications between the purchasers, the plaintiff and the plaintiff's lawyers suggesting any misapprehension on the part of the purchasers. In any event, the offers of settlement made by the plaintiff were based on calculations using 5% interest, and not the contractual rate of 12%.

[26] The defendant's submission that the judgment obtained by the plaintiff was not more favourable than the terms of her offers of settlement must be understood in context. It is true that the plaintiff's offers included a provision that the defendants give her immediate possession of the Acacia Hills property, a matter which was not pressed by the plaintiff at trial. The probable reason for the plaintiff's approach at trial is that the plaintiff only held a second mortgage over that property, with NAB holding a first mortgage.

[27] It is important to note that the mortgages held by the plaintiff over the Muirhead and Acacia Hills properties only secured the losses sustained by the plaintiff arising out of the failure of the purchasers to complete the Contract. This was not a case where there was a dispute as to who held the

title to the Acacia Hills property. The claim by the plaintiff to a right of possession of that property was solely for the purpose of satisfying any judgment entered in the plaintiff's favour for breach of contract. The plaintiff was entirely successful in that claim.

[28] The offer made by the defendants to settle these proceedings was unrealistic. There is also no merit in the submissions by the defendants that the plaintiff improperly commenced the proceedings or engaged in unnecessary interlocutory disputes.

[29] A combination of the utter lack of legal and factual merit in the defendants' case and the failure of the defendants to accept the plaintiff's offers of settlement justify a departure from the usual approach to costs in these proceedings. The trial of these proceedings commenced on 2 May 2024. By that time, the defendants were aware of the evidence that Ms Papazoglou would give regarding the instructions given by the plaintiff for preparation of the discharge of mortgage on the Muirhead property. Ms Tjung, at least, was aware that the collapse of the sale of the Muirhead property was not because of any failure or refusal by the plaintiff to provide a discharge of mortgage. By that date, the utter hopelessness of the defendants' case must have been obvious. In my opinion the appropriate orders are:

- (a) The defendants are to pay the plaintiff's costs of the proceedings on a party/party basis up until 1 May 2024.

- (b) The defendants are to pay the plaintiff's costs on an indemnity basis from 2 May 2024 onwards.
- (c) Such costs are to be taxed in default of agreement by the parties.
