CITATION:	*Martynova v Brozalevskaia (No 3)* [2024] NTSC 59
PARTIES:	MARTYNOVA, Marina Efimovna v BROZALEVSKAIA, Raisa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-02203-SC
DELIVERED:	15 July 2024
HEARING DATE:	Written Submissions
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Costs – General rule that the costs of a proceeding are in the discretion of the Court – Usual rule that costs follow the event – Usual rule for costs of interlocutory applications – Costs of application for pre-action discovery and related stay application – Costs of application for security for costs – Usual rule for costs in pre-action discovery applications – General rule that costs are ordered on the standard basis – Order for costs on an indemnity basis is in the discretion of the Court – Recognised categories justifying indemnity costs – Requirement to otherwise demonstrate special and unusual features to justify indemnity costs.

Supreme Court Rules 1987 (NT) rr 23.01 32.05, 62.02, 63.03, 63.18, 63.28.

Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms.

Groote Eylandt Aboriginal Trust Inc (Statutory Manager Appointed) v Skycity Darwin Pty Ltd (No 2) [2014] NTSC 57.
Oshlack v Richmond River Council (1998) 193 CLR 72 at 97.
Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd (No 3) [2024] NTSC 51.
Reynolds v City of Darwin (Costs) [2022] NTCA 4.
Schmidt v Won [1998] 3 VR 435.
Skycity Darwin Pty Ltd v Groote Eylandt Aboriginal Trust Inc (Statutory Manager Appointed) [2015] NTCA 4.
Trepang Services Pty Ltd v Sodexho Remote Sites Australia Pty Ltd [2014] NTSC 23.

Dal Pont, GE Law of Costs 5th ed, LexisNexis.

REPRESENTATION:

Counsel:

Plaintiff:	Written submissions by Mr M Spain
Defendant:	Written submissions by Mr J Stuchbery

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Ward Keller

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

Martynova v Brozalevskaia (No 3) [2024] NTSC 59
No. 2022-02203-SC

BETWEEN:

MARINA EFIMOVNA MARTYNOVA
Plaintiff

AND:

RAISA BROZALEVSKAIA
Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 15 July 2024)

[1] These reasons concern an application by the Defendant for costs in respect of three applications. Firstly, an application made by the Plaintiff pursuant to rule 32.05 of the *Supreme Court Rules 1987* (SCR) for pre-action discovery (Discovery Application). Secondly, an application by the Defendant pursuant to rule 23.01 of the SCR for a stay of the Discovery Application (Stay Application). Thirdly, an application by the Defendant pursuant to rule 62.02 of the SCR for security for the Defendant's costs of the Discovery Application (Security Application).

[2] The Security Application was the first of the applications determined by the Court. Relevantly, at the hearing of that application the parties agreed

that the costs of the Security Application should fall to be decided with the decision on the costs of the Discovery Application. The Discovery Application and the Stay Application were heard by me together on 29 March 2023.

[3] In reasons delivered 31 May 2023, I dismissed the Discovery Application primarily because I was not satisfied that the Plaintiff had made all reasonable enquiries as required by rule 32.05(b) of the SCR, but also on discretionary grounds. That finding was sufficient to dispose of the matters then before me but nonetheless I went into reasons as to why I would have granted the stay sought by the Defendant had I not dismissed the Discovery Application.

[4] In the course of the hearing I made two orders for costs on a procedural basis. An order was made against each of the parties. In each case the costs of certain affidavits read by the parties were ordered to be costs of the proceedings of the other party.

[5] The Defendant now seeks the costs, on an indemnity basis, of the Discovery Application and the Stay Application. If made, that order will also result in a favourable order for the Defendant in respect of the Security Application by reason of what appears in paragraph 2 above. The Defendant also seeks to set aside the procedural costs orders referred to in paragraph 4 hereof.

[6] The Plaintiff argues instead for a deferral of the costs of the three applications so that those costs are determined by the trial Judge hearing the substantive proceedings.[1] Alternatively, the Plaintiff submits that any order for costs should be on the standard basis. The Plaintiff opposes the Defendant's application to set aside the procedural costs orders.

[7] The general costs rule in any proceeding is that the costs of the proceeding are in the discretion of the Court.[2] As with all discretions, that must be exercised judicially and having regard to all relevant circumstances. It is trite to say that generally costs follow the event[3] unless there is an appropriate reason justifying the exercise of the discretion in favour of a different order.

[8] An application for pre-action discovery is interlocutory in nature.[4] Although the application is necessarily commenced by a form of originating process (as there is no proceeding on foot at the time), unlike a typical interlocutory application the application is not a procedural step in an existing proceeding. Although aspects of a substantive cause of action

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1 That is the putative proceedings contemplated in the Discovery Application which were commenced in this Court on 22 December 2023.

2 SCR, r 63.03(1).

3 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97; see generally Dal Pont, GE Law of Costs 5th ed, LexisNexis at para 6.16 and 7.2.

4 *Skycity Darwin Pty Ltd v Groote Eylandt Aboriginal Trust Inc (Statutory Manager Appointed)* [2015] NTCA 4; *Schmidt v Won* (1998) 3 VR 435 at 445.

are a consideration on such an application,[5] the application itself is a stand-alone proceeding.

[9] The relevance of that is that in the case of interlocutory applications, rule 63.18 of the SCR provides that the costs of an interlocutory application are to be costs in the proceeding unless the Court otherwise orders. In terms of the current application for costs, the reference to the "proceeding" in that rule is a reference to the application for pre-action discovery, not the putative action on which that application is based.

[10] An order for the costs of the pre-action discovery application, and for compliance costs, is customarily made[6] in favour of the defendant to the application. In *Groote Eylandt Aboriginal Trust Inc (Statutory Manager Appointed) v Skycity Darwin Pty Ltd (No 2)*[7] (*Skycity No 2*), I explained that the rationale for that is "… *that an order for pre-action discovery is an indulgence which invades the respondent's private affairs and then only to determine if a subsequent action should be brought. A respondent should not be out of pocket by the requirement to comply*." Also relevant is that a successful application will mean that a non-party is required to produce documents to assist a prospective plaintiff and in a situation where proceedings against that non-party may never be commenced. That

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5 SCR, r 32.05.

6 *Groote Eylandt Aboriginal Trust Inc (Statutory Manager Appointed) v Skycity Darwin Pty Ltd (No 2)* [2014] NTSC 57 at para 25; *Schmidt v Won* (1998) 3 VR 435 at 459.

7 [2014] NTSC 57.

customary order however does not displace the general discretion and in all cases it remains dependant on the particular circumstances of the case.

[11] An alternative costs order, which the Plaintiff now seeks, is for deferral of the costs to the trial Judge hearing the substantive proceedings. The typical problem that arises with that course is that it is usually not known if, and when, the substantive proceedings are commenced. That is not an issue in the current matter as the substantive proceedings were commenced contemporaneously with the filing of the Plaintiff's submissions.

[12] For convenience I will determine firstly whether the question of costs ought be deferred pending the hearing of the substantive proceedings as the Plaintiff advocated for. For the reasons which follow, I decline to defer costs in that way and I will order the Plaintiff to pay the Defendant's costs of the application.

[13] In *Skycity No 2*, I made an order deferring the costs of a pre-action discovery application for determination following the hearing of the substantive proceedings. The plaintiff in that case was almost entirely successful on its application. On the subsequent application for costs by the defendant, much turned on the defendant's very inflexible and overly adversarial approach taken on the application. I found that approach, as well as other reasons such as considerations concerning the application of *Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms* (PD6),

justified the departure from the costs orders usually made in pre-action discovery applications.

[14] There is no evidence before me, nor do I recall that there was any evidence to that effect on the hearing of the Discovery Application, that the Plaintiff sought, or could have sought, all or some of the documents otherwise sought in that application via the disclosure process provided for in (PD6) based on the proposed substantive proceedings. There were submissions to the contrary firstly, by the Plaintiff but that appears to amount to no more than a hypothetical consideration.[8] The Defendant positively asserted that the Plaintiff's solicitors made no attempt to request documents from the Defendant initially or from her solicitors after a Notice of Appearance was filed.[9]

[15] As I said in *Skycity No 2*,[10] and in *Trepang Services Pty Ltd v Sodexho Remote Sites Australia Pty Ltd*[11] (*Trepang*), the application of PD6 is sufficient reason for taking a different approach to costs orders in pre-action discovery applications compared to *Schmidt*[12] where the usual order for costs in such applications was said to be an order in favour of the defendant to the application.

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8 Defendant's submissions filed 22 December 2023, para 10.

9 Defendant's submissions filed 8 December 2023, paras 15 and 16.

10 At para 13.

11 [2014] NTSC 23.

12 At p 459.

[16] I think that in the current case, as the Defendant submitted, another distinguishing consideration is that, unlike in *Schmidt*, *Skycity No 2* and *Trepang* where the plaintiff was successful on the application, the Plaintiff's application was dismissed. No allegation has been made against the Defendant that the approach taken by the Defendant on the application was inappropriate.[13] Although the Plaintiff had success on the Discovery Application in respect of some of the grounds in rule 32.05 of the SCR, the Defendant has been justified in opposing the Plaintiff's application by reason of the ultimate result. I think that in the normal case a Plaintiff will need to have at least partially secured an order for pre-action discovery to enable that party to argue for the deferral of the costs of the application. In the current matter, the Defendant submitted that the case for an order for costs is stronger than in cases where the non-party successfully opposes the application, compared to cases where the applicant was successful in securing preliminary discovery. That was not put simply based on the general rule that costs follow the event, and I agree that is an important consideration.

[17] Accordingly, I intend to order that the Plaintiff pay the Defendant's costs of the Discovery Application. That will also be the case in respect of the Stay Application, following the event, given that in my reasons I indicated

13 Although there was a reference to the whole of the Defendant's conduct being relevant to costs in para 10 of the Plaintiff's submissions, that was only a passing reference and contained no allegation of an inappropriate approach to the Discovery Application.

that, but for the dismissal of the Discovery Application, I would have ordered the stay sought by the Defendant.

[18] I now turn to deal with the basis of costs. The general rule is that, unless otherwise ordered, costs are awarded on the standard basis.[14] As the Defendant submitted, an order for indemnity costs based on other than the established categories[15] requires a favourable exercise of the discretion of the Court and indemnity costs will only be ordered where there are special or unusual features.[16]

[19] In summary, the Defendant proposes, as special and unusual features:-

1. The Plaintiff made no attempt to request any documents from the Defendant or her solicitors before the Discovery Application;

2. The Plaintiff did not refer to proceedings in Panama seeking similar relief to the putative proceedings nor the availability of discovery orders in those proceedings;

3. The Plaintiff misled the Court concerning the extent of her knowledge of the assets of the deceased estate;

4. This Court was a clearly inappropriate forum for the Discovery Application.

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14 SCR, rule 63.28(1).

15 *Reynolds v City of Darwin (Costs)* [2022] NTCA 4 at para 13.

16 Most recently applied in this Court in *Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd (No 3)* [2024] NTSC 51 at para 16; see also *Reynolds v City of Darwin (Costs)* [2022] NTCA 4 at para 13.

[20] As to the first, based on the evidence in the Discovery Application I am satisfied that the Defendant would have declined any request by the Plaintiff for provision of documents so I reject the Defendant's submission. In any case, in my view the failure to make that request is outweighed by the discretionary considerations discussed below.

[21] As to the failure to disclose the proceedings in Panama, that carried the suggestion at least of the attempted concealment of those proceedings. Although those proceedings were highly relevant to two of the grounds in the Discovery Application, the suggestion of attempted concealment by the Plaintiff is not maintainable. That is quite simply because the Defendant, being a party to the proceedings in Panama, obviously knew of them and could, and did, raise them on the Discovery Application. That the Defendant was required to then put the details of those proceedings in evidence on the Discovery Application does not add anything. In doing so, the Defendant was merely advancing her own case on the Discovery Application. That is not justification for an order for indemnity costs.

[22] The third proposed factor is I think the Defendant's strongest point in respect of an indemnity costs order, noting however that I did not make any positive finding of misleading conduct on the part of the Plaintiff, only that I considered that a possibility on my assessment of the evidence.

[23] I do not see how the last of those factors can justify indemnity costs in respect of the Discovery Application. The two applications, although heard

together, are entirely separate and I am not prepared to accept that the Stay Application shores up any entitlement to indemnity costs in respect of the Discovery Application, or vice versa.

[24] Therefore only the third of those factors merits consideration on the question of indemnity costs. As an order for indemnity costs basis is discretionary, that factor remains to be considered with all of the relevant circumstances. In the Plaintiff's favour in that respect, the Defendant's refusal to provide documents which she would otherwise have had to provide as part of the PD6 process, had the Plaintiff adopted that course, evidences a lack of cooperation on her part. Further, notwithstanding the ultimate result in the Discovery Application, I agree with the Plaintiff that the Discovery Application was not doomed to fail. It was not a hopeless case and failed largely because of insufficient evidence to make out one of the grounds in rule 32.05 of the SCR. The Plaintiff had some success in respect of other grounds and other grounds again were conceded by the Defendant. Ordering indemnity costs on account of evidentiary shortcomings would almost routinely open up nearly every case to an order for indemnity costs as it can always be argued that any unsuccessful party failed in their claim due to insufficient evidence. Such a result would run counter to the general rule that costs are awarded on the standard basis.

[25] I therefore intend to order the costs to be assessed on the standard basis.

[26] That then leaves the question of whether the costs orders made on 29 March 2023 should be set aside. I am of the view that I should not set aside those orders. Those orders related to procedural issues which I raised at the commencement of the hearing. The parties then had an opportunity to make submissions concerning those orders. Both parties were represented at that hearing by senior counsel and in the case of the Defendant, by both senior counsel and junior counsel. The Defendant specifically declined to respond and accepted those orders.[17]

[27] The orders that I propose to make are that the Plaintiff pays the Defendant's costs of the three applications to be agreed or taxed on the standard basis.

[28] I will hear the parties as to any ancillary orders and give liberty to apply for that purpose.

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17 Transcript p 4.