

CITATION: *Kellie v Northern Territory of Australia (Costs)* [2026] NTCA 6

PARTIES: KELLIE, Tahnee Lee

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: NORTHERN TERRITORY COURT OF APPEAL

JURISDICTION: APPEAL from SUPREME COURT exercising Northern Territory jurisdiction

FILE NO: AP 9 of 2024 (22428372)

DELIVERED: 2 July 2026

HEARING DATE: On the papers

JUDGMENT OF: Grant CJ, Blokland & Brownhill JJ

CATCHWORDS:

COSTS – Party/party – General rule that costs follow the event

Whether successful respondent entitled to costs orders against appellant — Whether respondent disentitled to costs in relation to unsuccessful notice of contention – Whether respondent disentitled to costs in relation to ground dealing with respondent’s failure to appeal within time – Whether appeal raised important questions of broader significance – Whether application of ordinary rule might work unfairness on the appellant – Ordinary rule not displaced – Appellant to pay respondent’s costs of proceedings on a standard basis and certified fit for the retainer of more than one counsel.

Allplastics Engineering Pty Ltd v Dornoch Ltd [2006] NSWCA 33, *Northern Territory v Sangare* (2019) 265 CLR 164, *Ohn v Walton* (1995) 36 NSWLR 77, *Oshlack v Richmond River Council* (1998) 193 CLR 72, *Waters v PC Henderson (Australia) Pty Ltd* (Unreported, CA(NSW), 6 July 1994), referred to.

REPRESENTATION:

Counsel:

Appellant:	K Foley SC with B Seignior
Respondent:	T Moses

Solicitors:

Appellant:	Top End Women's Legal Service Inc
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	C
Number of pages:	8

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

Kellie v Northern Territory of Australia (Costs) [2026] NTCA 6
No. AP 9 of 2024 (22428372)

BETWEEN:

TAHNEE LEE KELLIE

Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**

Respondent

CORAM: GRANT CJ, BLOKLAND & BROWNHILL JJ

REASONS FOR JUDGMENT

(Delivered 2 July 2026)

THE COURT:

- [1] On 29 April 2026, this Court dismissed an appeal brought by the appellant from a decision of the Supreme Court.¹ The respondent seeks an order that the appellant pay the respondent's costs of the appeal on the standard basis in accordance with the usual rule that costs follow the event. The respondent submits that neither the nature of the appeal nor the matters in issue justifies any departure from the ordinary rule. Conversely, the appellant submits that on a number of grounds this

¹ *Kellie v Northern Territory of Australia* [2026] NTCCA 7.

case is one of the unusual or special cases which warrant the Court exercising its discretion to make no order for costs.

The nature and subject matter of the appeal

- [2] The proceedings involve a civil claim for battery brought by the appellant against the respondent. The battery was alleged to have occurred during a ‘pat down’ search at a police station. The Local Court found for the appellant and awarded her damages in the sum of \$120,000.
- [3] The respondent brought an appeal to the Supreme Court in relation to both liability and quantum. The Supreme Court found that the Local Court’s reasons for decision were inadequate, ordered that the judgment of the Local Court be set aside, and remitted the matter to the Local Court differently constituted for a rehearing.
- [4] The appellant brought an appeal to this Court on the grounds that the Supreme Court erred in granting the respondent leave to appeal; and the Supreme Court erred by ordering the matter to be remitted to the Local Court differently constituted for rehearing, by failing to provide the appellant with sufficient opportunity to be heard on that question, and by failing to give any reasons for that order.
- [5] In response, the respondent filed a notice of contention asserting that the Supreme Court erred in finding that the respondent required leave to appeal. That contention was addressed to the appeal against the

Supreme Court's finding of 'exceptional circumstances' for the purpose of granting leave to appeal outside the limitation period.

- [6] This Court ultimately dismissed all four grounds appeal and the notice of contention. The disposition in relation to the grounds of appeal meant it was strictly unnecessary to consider the respondent's notice of contention. However, this Court determined the contention because if accepted it would have provided a complete answer to the appeal against the Supreme Court's finding of 'exceptional circumstances'.

Consideration

- [7] The purpose of a costs order is to compensate the person in whose favour it is made, rather than to punish the person against whom the order is made.² The general rule is to order that the costs follow the event unless it appears that some other order should be made having regard to the circumstances.³ That general rule is based on the principle that justice is not achieved if the party who is responsible for others incurring the costs of litigation does not bear those costs. The respondent had a substantive legal right to vindicate in its defence of the appeal. Where, as in this case, the respondent has been successful in that defence, it is the appellant who has been responsible for the costs

2 *Northern Territory v Sangare* (2019) 265 CLR 164 at [25]; *Ohn v Walton* (1995) 36 NSWLR 77 at 79; *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34].

3 This general rule has been said to found a 'reasonable expectation' on the part of a successful party of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67], [134]; *Northern Territory v Sangare* (2019) 265 CLR 164 at [25].

incurred by seeking to impugn decisions made validly by the Supreme Court.

- [8] Against that background, the first ground on which the appellant says that the ordinary rule should not apply is that the respondent was not wholly successful in the appeal because the respondent's notice of contention was dismissed. It is argued that the contention was a discrete point on which the appellant succeeded such that she is entitled to her costs of and incidental to that part of the appeal proceeding or, in the alternative, the respondent should be disentitled to costs referable to the losing contention.
- [9] The general rule that the successful party should ordinarily be awarded its costs may be departed from in circumstances where a differential costs order is appropriate.⁴ The circumstances in which such an order may be appropriate include where a particular issue or group of issues is clearly dominant or separable, and the application of the general rule may involve hardship on a losing party which has nevertheless succeeded on that issue or group of issues⁵. However, that result will not follow in relation to every disputed issue of fact and law. In *Waters*

⁴ See, for example, *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd* [2008] NSWSC 1423; *Short v Crawley (No 40)* [2008] NSWSC 1302 at [25]–[32]; *Lavender View Regency Pty Ltd v North Sydney Council (No 2)* [1999] NSWSC 775; *Uniline Australia Ltd v SBriggs Pty Ltd* (2009) 82 IPR 56; *Leallee v Commissioner of the NSW Department of Corrective Services* [2009] NSWSC 518; *Sahab Holdings Pty Ltd v Registrar-General (No 3)* [2010] NSWSC 403 at [36].

⁵ See, for example, *Waters v PC Henderson (Australia) Pty Ltd* (Unreported, CA(NSW), 6 July 1994); *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373.

*v PC Henderson (Australia) Pty Ltd*⁶, Mahoney JA (with whom Kirby P and Priestley JA agreed) stated:

Where the proceedings involve multiple issues the application of the rule that costs follow the event may involve hardship where a party succeeds on some issues and yet fails on others. Particularly is this so where, for example, a defendant succeeds on issues that occupied the bulk of the time taken by the proceedings. Nevertheless, unless a particular issue or group of issues is clearly dominant or separable, it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed.

[10] The appellant's submission that some form of differential costs order is appropriate in these circumstances because it succeeded in resisting the notice of contention must be rejected. The notice of contention related to the same issue as the first ground of appeal, i.e. the competency of the appeal to the Supreme Court. The notice of contention raised a disputed issue of law concerning competency and the filing of the notice was occasioned solely by the appellant's prosecution of the first ground of appeal. In any event, the issues raised by the notice were purely of statutory construction and did not significantly compound or expand the issues to be decided on the appeal.

[11] Second, the appellant submits that the first ground of appeal only arose because of the respondent's default in lodging its appeal to the Supreme Court within time. That is said to attract the principle that 'where a party is in default and seeks an indulgence of the court it is

⁶ *Waters v PC Henderson (Australia) Pty Ltd* (Unreported, CA(NSW), 6 July 1994).

usual that the other party is not required to pay the costs of that application'.⁷ The appellant submits that the principle has even greater force in the present circumstances because the first ground of appeal, together with the related issue arising in the notice of contention, occupied a large part, if not the greater part, of this Court's consideration of the appeal. As the respondent submits, although that principle may have had some operation in relation to the appeal before the Supreme Court it does not bear on the exercise of the discretion at this stage. That is because the respondent had the benefit of the Supreme Court's grant of leave. The appellant's challenge to that grant of leave was the operative reason why costs were incurred by the parties in this proceeding, and there was no relevant default on the part of the respondent in the appeal proceedings.

- [12] Third, the appellant submits that the appeal raised important questions that will have ongoing relevance outside the scope of the appellant's own case. They include matters such as whether the decision to grant leave is interlocutory or final in nature, whether the 'correctness standard' applies to any challenge to a decision to grant leave to appeal out of time, whether the general provisions of the *Supreme Court Rules* concerning the calculation of time within which to appeal have application to appeals under the *Local Court (Civil Procedure) Act*, and the considerations which govern whether remittal should be ordered to

⁷ *Northern Territory of Australia v Kellie* [2026] NTSC 41 at [19].

a differently constituted tribunal. While it is no doubt true that the decision in relation to the ‘correctness standard’ has broader relevance and application, the determination does not rise to the level of, for example, resolving significant and arguable issues concerning the interpretation and administration of a statutory scheme. This provides no basis for a departure from the ordinary rule.

[13] Fourth, it is submitted that the appellant is an Aboriginal woman of limited means with a meritorious claim. The basis on which the Supreme Court set aside the decision of the Local Court did not involve any element of fault on the part of the appellant, and in those circumstances it is said that the application of the ordinary rule may work unfairness if the appellant is ultimately successful in her claim at trial. The respondent submits that neither the appellant’s race nor means are relevant to the determination of costs. While it is no doubt true that an adverse costs order against her may effectively reduce the quantum of any award of damages the appellant might subsequently secure, that is not enough in itself to warrant a departure from the ordinary rule. As the High Court has made plain, a party’s financial situation has no relevant connection with the litigation or the exercise of the costs discretion, except to the extent that it may bear on the structure of a costs order.⁸

⁸ *Northern Territory v Sangare* (2019) 265 CLR 164 at [28], [32].

[14] There is no basis which warrants a departure from the ordinary rule that costs should follow the event in the appeal. There is also no warrant to depart from an award of costs on the standard basis, and nor does the respondent seek an order in those terms. The matter was clearly one in which it was appropriate to brief two counsel, and both parties did so. The appeal involved several relatively complex issues. A significant level of research and analysis was necessary to prepare the respective cases for presentation. Accordingly, the matter is properly certified fit for the retainer of more than one counsel.

Disposition

[15] For those reasons, we make the following orders:

1. The appellant is to pay the respondent's costs of and incidental to the appeal on the standard basis.
2. The respondent's costs are certified fit for the retainer of more than one counsel pursuant to rule 63.72(9) of the *Supreme Court Rules 1987*.
