CITATION: *[2006] NTMC 079*

PARTIES:	RICHARD LIM Plaintiff v AUSTRALIAN BROADCASTING CORPORATION FIRST DEFENDANT & CLARE MARTIN SECOND DEFENDANT & FRANCES KILGARIFF THIRD DEFENDANT
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	20516102
DELIVERED ON:	26.9.06 (by posting)
DELIVERED AT:	DARWIN (by posting)
HEARING DATE(s):	4.8.06
JUDGMENT OF:	DAYNOR TRIGG SM

CATCHWORDS:

Costs in interlocutory Application to strike out

REPRESENTATION:

Counsel:

Plaintiff:	Mr Christrup
1st Defendant:	Mr Dawson
2nd Defendant:	Mr Anderson
3rd Defendant:	Ms Spurr

Solicitors:

Plaintiff:	Morgan Buckley Lawyers
1st Defendant:	ABC Legal Services
2nd Defendant:	Solicitor for the NT
3rd Defendant:	Halfpennys Lawyers

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 079
Number of paragraphs:	32

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

No. 20516102

[2006] NTMC 0

BETWEEN:

Richard Lim
Plaintiff

AND:

Australian Broadcasting Corporation
1st Defendant
Clare Martin
2nd Defendant
Frances Kilgariff
3rd Defendant

REASONS FOR JUDGMENT

(Delivered 29 September 2006 by posting to solicitors)

Mr TRIGG SM:

1. This proceeding commenced on 28 June 2005 when the plaintiff filed a Statement of Claim in the Local Court in Alice Springs. The plaintiff claims that he was defamed in a radio broadcast on the morning of 12 April 2005 (the first broadcast), in a radio broadcast in the afternoon of 12 April 2005 (the second broadcast), and in a television broadcast at 7pm on 12 April 2005 (the third broadcast).

2. The first broadcast allegedly involved an exchange with the second defendant that was allegedly broadcast during a programme entitled “morning programme with Meredith Campbell”. The second broadcast allegedly involved an exchange with the third defendant that was allegedly broadcast during the “PM” programme. The third broadcast allegedly

involved an exchange with both the second and third defendants which was allegedly broadcast during the 7pm television news.

3. The second defendant filed a Notice of Defence on 22 September 2005. The third defendant filed a Notice of Defence on 23 September 2005, but this was then soon replaced by an Amended Notice of Defence filed on 10 October 2005.

4. The plaintiff filed an Amended Statement of Claim on 12 April 2006.

5. The first defendant (the applicant in the current interlocutory application) has not filed a Defence, but no point was taken in this regard before me.

6. On 26 April 2006 the plaintiff filed an interlocutory application seeking the following orders:

> 1. That, pursuant to Rule 10.04, the plaintiff's claim be struck out, or alternatively that the following paragraphs of the plaintiff's Amended Particulars of Claim be struck out: paragraphs 6, 8, 9, 10, 11, 14.3, 15.3, 15.4 and 16.
>
> 2. Further or in the alternative, that, pursuant to Rule 28.02, the following paragraphs of the plaintiff's Amended Particulars of Claim be struck out: paragraphs 6, 8, 9, 10, 11, 14.1, 14.2, 14.3, 15.1, 15.2, 15.3, 15.4 and 16.
>
> 3. Such further or other orders as the Court sees fit.
>
> 4. Costs.

7. Although this application was filed in Alice Springs and was sought to be heard in Alice Springs it was administratively transferred to Darwin and allocated to me by the former Chief Magistrate.

8. The matter proceeded before me in Darwin on 4 August 2006, and I delivered my decision by posting the same on 29 August 2006. My decision was noted in paragraph 39 of my reasons as:

> I strike out paragraphs 14.2 and 15.2 of the Amended Particulars of Claim. But apart from this the application by the first defendant is refused.

9. In paragraph 40 of my reasons I went on to add:

> If any party is seeking any order for costs other than costs in the cause I will receive and consider any written submissions in this regard, but only if such submissions are received by this court within 14 days after the date of my decision herein. Upon receipt of any such submissions I will then consider them and publish my decision on costs also by mailing it to the solicitors for the parties.

10. It is on the question of costs that I now turn.

11. I received written submissions from the plaintiff on 12 September 2006 (within the 14 days), and from the first defendant on 22 September 2006 (outside the 14 days). I have received no submissions from either the second or third defendants.

12. In his written submissions the plaintiff is seeking orders that:

> (a) the first defendant pay the costs of the plaintiff at 100% of the Supreme Court scale;
>
> (b) the application is certified fit for counsel.

13. In it's written submissions the first defendant is seeking orders that:

> Costs be in the cause, and the matter be certified fit for counsel.

14. No party is asking for any cost order as between the second and third defendants and either the plaintiff or the first defendant. The second and third defendants were represented at the

argument before me on 4 August 2006, but took little part in the proceeding, other than to support the application of the first defendant. In those circumstances it is appropriate that any costs between the second and/or third defendants and any other party in relation to the application filed on 26 April 206 be costs in the cause.

15. The remaining issue is the costs as regards the plaintiff and the second defendant.

16. Pursuant to *r. 38.03 of the Local Court Rules*:

> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.
>
> (2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.

17. Accordingly, the court has a wide discretion on the question of costs. In addition, *r. 38.02 of the Local Court Rules* states:

> Subject to the Act, these Rules and practice directions issued by the Chief Magistrate, *Order 63 of the Supreme Court Rules* applies with the necessary changes to this Part.

18. *Order 63.18 of the Supreme Court Rules* states:

> Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders.

19. In addition, *r. 38.06 of the Local Court Rules* states:

> Where the Court orders that a party be paid the costs of an interlocutory application, the party is not entitled to have those costs taxed until after the final disposition of the proceeding unless the Court orders otherwise.

20. These provisions set out the general philosophy that the court should not have to make a cost order in respect to every interlocutory matter that comes before it, but that costs should normally be determined at the end of the proceedings. There needs to be good reason to make a separate cost order prior to the conclusion of a matter, and if one is made, good reason to order it to be taxed and payable prior to the conclusion of the matter.

21. In the case of *TTE Pty Ltd & Anor v Ken Day Pty Ltd* (1992) 2 NTLR 143, His Honour Martin J said at pages 144-5:

> "Those sub-rules together with r63.18, which provides that each party shall pay his own costs of interlocutory proceedings, unless the Court otherwise orders, mark a radical departure from practice relating to costs prior to the commencement of the rules.....
>
> Experience shows that in many, if not most, actions which are contested, there are likely to be interlocutory applications on both sides. More often than need be those applications are opposed, whereas with just a little thought and reasonable concessions, the terms of appropriate orders might well be able to be negotiated and resolved by consent. That would avoid the expense to the parties attendant upon a contested hearing and, I might add, the substantial expense to the public purse arising from unnecessarily wasted court time.
>
> Except in extraordinary cases it is more likely than not that during the pre-trial processes each side will have obtained interlocutory orders against the other, either by consent or otherwise. The policy behind the rules seems to acknowledge those probabilities. That is, at the end of the day it is likely that in the ordinary course of events each side would have obtained and been obliged to comply with such orders. <u>The object of the rule is to discourage unnecessary applications and promote agreement</u>. It acknowledges that orders for costs may be used oppressively.
>
> Given the tenor of the rules, it would not be just to make interlocutory orders for costs, or if made to order that they may that they may be taxed earlier than completion of the proceedings, with a view to punishing the

unsuccessful party. To do so may engender a reluctance in parties to properly ventilate their problems during the pre-trial process. What is required is an approach which seeks to have a successful party reimbursed the expense of interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably or which are unnecessarily burdensome or which are made at a time, such as here, when that party has been deprived of the value of the work done in preparation of his case for trial. In such instances, and the list is not intended to be definitive or complete, it may well be within the Court's discretion to exercise the power to override the principles established by the rules.

Costs in interlocutory matters no longer follow success. No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the application or resistance, as the case may be, are reasonable. However, if such application or resistance is without real merit, as is often the case, the successful party should not have to bear his costs". (emphasis added)

22. The plaintiff contends that the application was "unnecessarily burdensome and/or of no real merit" because:

- At the outset, the first defendant abandoned its application as it applied to paragraphs 9, 10 and 11 of the plaintiff's claim. It limited its opposition to the issues raised in relation to paragraph 6 of the claim. None of those intentions were communicated to the plaintiff prior to the application. Accordingly, the plaintiff prepared submissions in relation to a number of the matters that were not pressed by the first defendant. Had the defendant acted reasonably then time and expense could have been saved.

- The first defendant failed entirely to comply with the Local Court Rules as it failed to file and serve a notice pursuant to Rule 10.04. Without such a notice, there is no right to seek a remedy striking out the claim. There is therefore no basis at all for seeking the first order of the application. The application had no merit whatsoever and was misconceived.

23. Both of these submissions have some force. It is however to be noted, in respect to the second point, that the application to strike out was in the alternative to other relief sought on which the first defendant has been partly successful.

24. It appears that the case of *TTE Pty Ltd* (supra) raises the following questions that a court should ask itself before deciding to order costs in relation to an interlocutory application:

- Was the application without real merit?
- Was there something "unreasonable" in the actions of the first defendant in bringing the interlocutory application?
- Was the application unnecessary, to such a degree that a cost order should follow in order to discourage the same?

25. As I decided in my earlier decision, the application was without substantial merit. It was not wholly unsuccessful in that it was successful in part. However, it was more unsuccessful than it was successful.

26. Having considered the matter I consider that I would answer "yes" to each of the three questions that I have posed in paragraph 24 hereof. The application to strike out the plaintiff's claim was misconceived. The application to strike out portions of the Amended Particulars of Claim was (with two exceptions) unsuccessful and without much merit. The application would appear to have been more tactical than practical.

27. In the exercise of my discretion I order that the first defendant pay the plaintiff's costs of and incidental to the application filed on 26 April 206 to be agreed or taxed. I certify the matter fit for counsel.

28. It is necessary to set a rate upon which the costs should be taxed. The plaintiff seeks the Supreme Court scale, even though

the matter was heard in the Local Court. I note from the Amended Particulars of Claim that the plaintiff is seeking "damages", but he does not state the amount of the same. I therefore do not know if the claim herein is for an amount in excess of $50,000, such that *r 38.04(3)(b)(iii) of the Local Court Rules* would be applicable as a guide. Presumably he is not seeking anything in excess of the jurisdictional limit, otherwise the action is in the wrong court.

29. A further relevant consideration is the complexity of the matter (r38.04(3)(a)(i) of the Local Court Rules). Defamation is not a simple area of the law. The argument took one whole day (albeit that some time was lost due to the plaintiff's unsuccessful application for me to disqualify myself).

30. Taking account of the time lost due to the plaintiff's unsuccessful application, and the fact the first defendant's application was at least partly successful, in the exercise of my discretion I order that the costs herein are to be agreed or taxed at 75% of the Supreme Court scale.

31. I do not consider this to be an appropriate case for these costs to be taxed or recovered prior to the conclusion of the matter.

32. I would now expect the first defendant to file and serve it's Defence as a matter of urgency, and without any further delay.

Dated this 26th day of September 2006

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DAYNOR TRIGG SM