

CITATION: *Laminex Group Pty Ltd v Catford (Costs)* [2019] NTSC 03

PARTIES: LAMINEX GROUP PTY LTD

v

CATFORD, Joanne

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: LCA 43 of 2018 (21748195)

DELIVERED ON: 9 January 2019

WRITTEN SUBMISSIONS: 6 September 2018; 10 September 2018

JUDGMENT OF: BLOKLAND J

CATCHWORDS:

PROCEDURE – Costs – whether appropriate to order indemnity costs where appeal was dismissed as incompetent and Supreme Court lacked jurisdiction to hear appeal – principles regarding award of indemnity costs – relevant law not clearly established – no wilful disregard of known facts or clearly established law – indemnity costs refused – costs ordered on ordinary basis.

Return to Work Act (NT) s 116(3)

BAE Systems Australia Ltd v Rothwell (2013) 275 FLR 244; *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225; *Laminex Group Pty Ltd v Catford* [2018] NTSC 56, referred to.

Michael Grant, Presidian Legal Publications, *Civil Procedure Northern Territory*, (at Update 14).

REPRESENTATION:

Counsel:

Appellant:	B O'Loughlin
Respondent:	M Grove

Solicitors:

Appellant:	HWL Ebsworth Lawyers
Respondent:	Ward Keller

Judgment category classification:	C
Judgment ID Number:	BLO1901
Number of pages:	6

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

Laminex Group Pty Ltd v Catford (Costs) [2019] NTSC 03
No. 21748195

BETWEEN:

LAMINEX GROUP PTY LTD
Appellant

AND:

JOANNE CATFORD
Respondent

CORAM: BLOKLAND J

DECISION ON COSTS

(Delivered 9 January 2019)

BLOKLAND J:

- [1] On 16 August 2018 the appeal which was filed on 11 July 2018 was dismissed as incompetent. The Court found the Notice of Appeal was filed before the proceeding was finally determined by the Work Health Court, in contravention of s 116(3) of the *Return to Work Act* (NT).¹
- [2] The respondent seeks an order that the appellant pay indemnity costs. The appellant does not oppose an order for costs on the standard basis; however, an order for costs on an indemnity basis is opposed.

¹ *Laminex Group Pty Ltd v Catford* [2018] NTSC 56.

[3] The awarding of costs is a matter of discretion. The discretion must be exercised judicially. The respondent submits indemnity costs should be awarded for the following reasons.² The appeal was dismissed as incompetent. The decision to dismiss the appeal acknowledged the Supreme Court lacked jurisdiction to hear the appeal. The appellant should not have persisted with the appeal. The appellant would have sustained no prejudice from withdrawing the appeal. The appellant therefore put the respondent to unnecessary cost, expense and inconvenience. The respondent alerted the appellant to the apparent issue under s 116(3) of the *Return to Work Act*.³

[4] More broadly the respondent also argues that the particular nature of litigation under the *Return to Work Act*, a statutory scheme, means it is not feasible to make offers of compromise. It was pointed out the appellant has twice been ordered to pay costs on an indemnity basis in the Work Health Court.⁴ Additionally it was said to be notorious that an insurer or the Nominal Insurer stands behind an employer in proceedings under the *Return to Work Act*, and that actions under the *Return to Work Act* stand apart from other common forms of litigation. This is because actions under the *Return to Work Act* are based wholly in statute. It was also submitted the question in the appeal concerned statutory interpretation and was a matter of public interest.

2 Respondent's submission on costs, dated 6 September 2018.

3 Email of 20 July 2018, Michael Grove to Reinis Dancis.

4 On 9 June 2017 and 14 June 2018.

- [5] The respondent submitted that there existed an inherent and institutional mismatch in the resources between the parties, and even if a worker is successful, the worker may be required to utilise any compensation received to pay legal fees. It was argued the mismatch between the parties constitutes a basis on which to extend the categories where the justice of the case warrants an order for costs on an indemnity basis.
- [6] While the background and potential disadvantages of the mismatch in terms of resources between the parties in cases of this kind is acknowledged, that is not a factor that is persuasive, without some further feature to justify an exercise of the discretion to order costs on an indemnity basis. In my view the appellant's assumption of a right to appeal, although incorrect, did not possess the hallmarks of conduct in litigation that would attract an exercise of the discretion to award costs on an indemnity basis.
- [7] The appeal involved a novel point. Although there may be said to be something of a public interest in deciding the point, the issue the subject of appeal is rarely raised. The decision acknowledged respectable arguments were made by both counsel.⁵ The law was not clear. If a mechanism had been available to cure the defect in the proceedings, it was acknowledged in the decision that a different approach may have been preferred.⁶ Further, the respondent was not successful on various alternative or additional grounds which were argued.

⁵ *Laminex Group Pty Ltd v Catford* [2018] NTSC 56 at [8].

⁶ *Laminex Group Pty Ltd v Catford* [2018] NTSC 56 at [19].

[8] In *BAE Systems Australia Ltd v Rothwell* (“BAE”),⁷ Riley CJ confirmed that for costs to be taxed on an indemnity basis there must be some special or unusual feature in the case. His Honour reviewed the authorities relevant to the exercise of the discretion including *Colgate-Palmolive Company v Cussons Pty Ltd* (“Colgate”)⁸ in which Sheppard J held indemnity costs may be awarded in a variety of circumstances. The categories in which such orders may be made are not closed or rigid. In *BAE* Riley CJ gave a number of examples of the circumstances in which indemnity costs may be ordered including where a party has pursued a matter which, on proper consideration, should have been seen to be a hopeless case or where there was undue prolongation of the case by groundless contentions.

[9] Mildren J in *BAE* said:

The exercise of the discretion to order costs over and above the ordinary is exceptional, usually reserved for cases where the losing party has been engaged in unmeritorious, or deliberate or high-handed or other improper conduct, such as to warrant the Court showing its disapproval and, at the same time, preventing the successful party being left out of pocket.⁹

[10] In *Colgate*,¹⁰ Shepherd J gave the following examples that may warrant the exercise of the discretion:

Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud

7 [2013] NTCA 3; 275 FLR 244 at 252.

8 [1993] FCA 801; 46 FCR 225 at 231-4.

9 (2013) 275 FLR 244 at 264.

10 (1993) 46 FCR 225 at 233-234.

(both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp* (supra)); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson* (1987) 10 NSWLR 525; *Maitland Hospital v Fisher* (No 2) (1992) 27 NSWLR 721 at 724 (Court of Appeal); *Crisp v Keng* (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) and an award of costs on an indemnity basis against a contemnor (eg *Megarry V-C* in *EMI Records* (supra)). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.

[11] The commentary in *Grant on Civil Procedure*¹¹ refers to the circumstances in which a Court may award indemnity costs including situations where proceedings have been continued by a party in wilful disregard of the known facts or clearly established law, or if a litigant, properly advised, should have known that it had no chance of success. Further, the discussion stresses that in circumstances where defences are very unlikely to succeed, it will not necessarily mean that it must have been obvious from the outset that the defence was manifestly hopeless or that there had been wilful disregard of the known facts and clearly established law.

11 Michael Grant, Presidian Legal Publications, *Civil Procedure Northern Territory*, (at update 14) [5.63.2403].

[12] In this matter, it could not be said that the relevant law, or at least its application to the particular circumstances, was clearly established. It follows the appellant could not be said to have filed or pursued the appeal in wilful disregard of the known facts or clearly established law.

[13] Having considered all of the matters raised by the appellant, I am not persuaded it would be a proper exercise of the discretion to award costs on an indemnity basis.

Orders

1. The appellant is to pay the respondent's costs of and incidental to the appeal on the ordinary basis as agreed, or failing agreement, to be taxed.
2. The application on summons is certified for Senior/Junior counsel.
3. The parties are to bear their own costs in respect of the costs application.
