

CITATION: *James v North Star Pastoral Pty Ltd
(Costs of Settlement Conference)*
[2019] NTSC 74

PARTIES: CARINA JAMES

v

NORTH STAR PASTORAL PTY LTD

FILE NO: 93 of 2018 (21838827)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

DELIVERED: 20 September 2019

HEARING DATES: Written Submissions concluding 26 June
2019.

JUDGMENT OF: LUPPINO AsJ

CATCHWORDS:

PRACTICE AND PROCEDURE – Costs – Costs in respect of a settlement conference held pursuant to Rule 48.12 – Usual position is that costs are costs of the proceedings – Circumstances by which a party may be liable for costs of a settlement conference – Failure of the Defendant’s director to attend the settlement conference.

Supreme Court Rules, rr 48.12(1), (9), 48.14, 63.03(1)

LO v Northern Territory of Australia, JA v Northern Territory of Australia, KT v Northern Territory of Australia, LB v Northern Territory of Australia (Costs of Settlement Conference) [2017] NTSC 24.

REPRESENTATION:

Counsel:

Plaintiff: Ms Stephenson
Defendant: Ms Hourdas

Solicitors:

Plaintiff: De Silva Hebron
Defendant: Ward Keller

Judgment category classification: B

Judgment ID Number: Lup1905

Number of pages: 10

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

James v North Star Pastoral Pty Ltd (Costs of Settlement Conference)
[2019] NTSC 74

BETWEEN:

CARINA JAMES
Plaintiff

v

NORTH STAR PASTORAL PTY LTD
Defendant

93 of 2018 (21838827)

CORAM: LUPPINO AsJ

REASONS

(Delivered 20 September 2019)

- [1] On 16 July 2019 I dismissed an application for costs made by the Plaintiff in respect of a Settlement Conference held on 17 April 2019. However, I withheld publication of these Reasons until decision in the trial of the matter to avoid any possible compromise of the trial. The matter having been finally decided on 18 September 2019,¹ I now provide my reasons.
- [2] The background facts commence with orders that I made on 11 February 2019 pursuant to Rule 48.12(1) of the *Supreme Court Rules* (“SCR”). I then ordered the parties to attend a Settlement Conference fixed for 17 April

¹ *Carina James v North Star Pastoral Pty Ltd* [2019] NTSC 72.

2019 and, as the Defendant is a Corporation, pursuant to Rule 48.12(4)(b), I ordered that Mr Colan Ross, the Director of the Defendant attend the Settlement Conference in person.

- [3] Two days before the appointed date for the Settlement Conference the Defendant's solicitors sought that Mr Ross be excused from attending the Settlement Conference, citing family commitments interstate. An alternate with authority to settle on behalf of the Defendant, Mr Daniel Sedon, was proposed to attend in place of Mr Ross.
- [4] The Plaintiff refused to consent to the Defendant's request but I directed that the Settlement Conference would nonetheless proceed and that I would deal with the non-attendance of Mr Ross at the conclusion of the Settlement Conference if that became necessary.
- [5] At the commencement of the Settlement Conference, the Defendant's counsel elaborated on the reasons for the inability of Mr Ross to attend, succinctly, that Mr Ross was unexpectedly required to travel urgently to Perth to collect his daughter from school.
- [6] A resolution of the matter was not able to be achieved at the Settlement Conference and the Plaintiff sought costs on the basis of the failure of Mr Ross to attend as ordered. At the time the Plaintiff alleged that Mr Ross had wilfully refused to attend the Settlement Conference and that the explanation offered in relation to his daughter was not genuine.

[7] I therefore made directions requiring firstly, that the Defendant file and serve an affidavit of Mr Ross deposing to the reasons and circumstances surrounding his inability to attend the Settlement Conference. I then provided for the Plaintiff to file and serve any answering affidavits. Lastly, I set a sequence for written submissions commencing with the Plaintiff on the understanding that I would then decide the question of costs on the papers.

[8] The Defendant filed an affidavit of Mr Ross made 1 May 2019. Therein Mr Ross deposed:

1. That he had a 14-year-old daughter who attended school in Perth;
2. That he and the mother of his daughter were divorced;
3. That he had contact with his daughter during every second school holidays;
4. That at the time that the Settlement Conference date was fixed, he was not aware that it would clash with his contact time;
5. That he flew to Melbourne on Friday, 12 April 2019 to meet his daughter;
6. That if he did not have contact with his daughter during the April school holidays his next contact would not have been until the school holidays in September 2019.

- [9] The Plaintiff did not put on any affidavit evidence and without that, I consider that the affidavit of Mr Ross was, prima facie at least, sufficient explanation to excuse his non-attendance.
- [10] In her submissions however, the Plaintiff raised some good points regarding omissions and inconsistencies in Mr Ross's affidavit evidence. Specifically the Plaintiff complained that Mr Ross did not provide details of the urgency referred to by the Defendant's counsel at the commencement of the Settlement Conference, that it did not explain why Mr Ross could not have had contact with his daughter in Darwin and that it did not explain why Mr Ross's attendance at the Settlement Conference would have necessitated the total cancellation of his contact time with his daughter during the April school holidays.
- [11] The submissions also raised a related credit issue namely that Mr Ross's attendance at the Settlement Conference had been confirmed as late as 11 April 2019. Complaint was made that Mr Ross's affidavit did not explain when travel arrangements were made for him and his daughter to fly to Melbourne. Likewise, that despite the fact that Mr Ross was apparently in Melbourne on 12 April 2019, the Court was not notified of Mr Ross's inability to attend until 15 April 2019.
- [12] The Plaintiff relies on the forgoing to challenge the veracity of Mr Ross's explanation for his non-attendance, no doubt suggesting that I draw adverse inferences against the Defendant as a result. However, notwithstanding the

serious allegation made at the Settlement Conference that Mr Ross had wilfully failed to attend, the Plaintiff did not take the opportunity to put on evidence to support that, or to apply to cross-examine Mr Ross. As I said, prima facie Mr Ross's explanation is sufficient. That it does not go into greater detail, or that the Plaintiff has some suspicions concerning the veracity of Mr Ross's explanation, does not translate to positive evidence to the contrary when considered alone.

[13] If I were inclined to consider that further, that would now require me to embark on further affidavit evidence and/or to convene a hearing for cross examination of witnesses. I am not prepared to do that given that the Plaintiff declined the opportunity to provide evidence of the allegation made at the Settlement Conference, thereby failing to take advantage of the specific directions that I made for that purpose. I will therefore decide the matter based on the evidence that has been submitted, which is limited to the affidavit of Mr Ross and any inferences that can be drawn from that.

[14] On that basis, and notwithstanding the valid points made by the Plaintiff as to omissions in Mr Ross's affidavit, I accept his explanation for his non-attendance.

[15] As to the balance of the Plaintiff's submissions, it was asserted that the Settlement Conference was rendered ineffective due to Mr Ross's absence as he was only the person on behalf of the Defendant with knowledge of all the relevant background. There was no direct evidence to support that. The

Plaintiff submitted that attendance by anyone other than Mr Ross was “inadequate, counter-productive and defeated the intended purpose of the Settlement Conference”. That however is not a view I share given that the alternate apparently had full authority and, from my observations of him at the Settlement Conference, I thought that he was sufficiently aware of the issues and had a good knowledge of the facts.

[16] The Defendant argued that notwithstanding Mr Ross’s failure to attend personally, it could not be said that the Defendant thereby failed to attend the Settlement Conference. Secondly, that the Defendant meaningfully participated in the Settlement Conference. The Defendant argued that the failure of the Settlement Conference to resolve the matter was not evidence of the Defendant’s refusal to participate in the Settlement Conference. That relies on *LO v Northern Territory of Australia, JA v Northern Territory of Australia, KT v Northern Territory of Australia, LB v Northern Territory of Australia (Costs of Settlement Conference)*² (“*LO v NTA*”) and in principle, I agree

[17] The issue here however is purely the failure of Mr Ross to attend and the costs application was made on that basis, not on any suggestion that the Defendant failed, in the corporate sense, to attend the Settlement Conference, or to participate within the meaning of Rule 48.12(9)(b)(i) of the *SCR*. Noting that the *SCR* specifically empowers the Court to order a

2 [2017] NTSC 24.

specific person to attend on behalf of a corporate party,³ the suggestion made by the Defendant that it was sufficient for an alternate to attend after the order was made specifically for Mr Ross's attendance is clearly wrong. I accept however that the question of participation remains relevant to discretionary considerations.

[18] With that background, the relevant costs rules in the *SCR* are firstly, Rule 63.03(1), the general discretion on costs, secondly, Rule 48.14, the default costs provision in respect of Settlement Conferences, and Rule 48.12(9), the specific rule dealing with costs of Settlement Conferences. The relevant parts of those Rules are now set out namely:-

48.12 Settlement conference

(1) If a Judge or an Associate Judge is of the opinion that a proceeding is capable of settlement or ought to be settled, the Judge or Associate Judge may direct that the matter be set down for a settlement conference for the purpose of exploring the possibility of settlement.

(2-3) Omitted

(4) The Judge or Associate Judge:

(a) may direct that the parties attend the settlement conference in person; and

(b) if a party is a corporation – may order that the settlement conference be attended by an agent of the corporation who is familiar with the substance of the issues in the proceeding and has unqualified authority either to settle the proceeding or to make recommendations to the corporation that are likely to result in the settlement of the proceeding.

(5-8) Omitted

³ Rule 48.12(4)(b) of the *SCR*.

- (9) If a party (*the party at fault*):
- (a) fails to attend a settlement conference after having been notified of the conference under subrule (3); or
 - (b) having attended a settlement conference:
 - (i) refuses to participate in the settlement conference; or
 - (ii) applies (other than with the consent of the other parties) to adjourn or further adjourn the settlement conference and the adjournment is granted by an Associate Judge;

the party at fault must pay the costs of the other parties thrown away as a result, which costs may (despite rule 63.04(3)) be taxed immediately by the Taxing Master.

(10-12) Omitted

48.14 Costs of directions hearings, settlement conferences and mediations

Subject to this Order, as between the parties, the costs of and incidental to attending a directions hearing, settlement conference or mediation are to be costs in the proceeding unless the Court orders otherwise.

63.03 General rule

- (1) Subject to these Rules and any other law in force in the Territory, the costs of a proceeding are in the discretion of the Court.
- (2) Omitted

[19] Notwithstanding the language of rule 48.12(9), I do not consider that it displaces the general discretion in Rule 63.03(1). I consider that the question of costs in the current case turns on the exercise of the general discretion.

[20] I consider the following matters relevant to the exercise of that discretion namely:-

1. Notwithstanding Mr Ross's non-attendance, the Settlement Conference was able to proceed and I am satisfied that the Defendant participated in the Settlement Conference within the meaning of Rule 48.12(9). As I said in *LO v NTA*, even if a party had a preconceived view of the merits of the other party's case (and that can equally be based on law as is the position in the current case, or on the available evidence), it can nonetheless be said that there has been participation in the Settlement Conference if the that party attends to better ascertain the merits and nature of the other party's case and to attempt to demonstrate the strength of its own case. If, as occurred in *LO v NTA* and in the current matter, that party fails to persuade the other party of the strength of its case, that does not automatically render that a failure to participate within the meaning of Rule 48.12(9) of the *SCR*;
2. I am satisfied that Mr Sedon was a suitable alternate, that he had the necessary authority to bind the Defendant and that he was sufficiently aware of the background and the issues;
3. The Settlement Conference proceeded for a considerable period of time, indicative of a full discussion of relevant issues;
4. A number of offers and counter-offers were exchanged, indicative of an adequate consideration of all issues;

5. I noted nothing in the conduct of the Settlement Conference sufficient for me to decide that the failure of the Settlement Conference was due to the absence of Mr Ross.

[21] Moreover, I am satisfied that the failure to achieve a settlement was due to the entrenched positions of the parties, particularly the Defendant in respect of the application of the relevant law, including the law relating to remedies. I am satisfied that the offers made by the Defendant reflected that position and that Mr Ross's attendance would not have changed that.

[22] Therefore, for these reasons, I dismissed the Plaintiff's application for costs. I was not prepared to make any order for costs regarding the Settlement Conference. Absent an order pursuant to Rule 48.12(9), the effect of Rule 48.14 of the *SCR* is that the costs of and incidental to the settlement conference are costs in the proceeding⁴.

⁴ Rule 48.14 of the *SCR*.