IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY No. D11 of 2018

ON APPEAL FROM THE COURT OF APPEAL
OF THE NORTHERN TERRITORY

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

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AND:

SOULEYMANE SANGARE
Respondent

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APPELLANT'S SUBMISSIONS IN REPLY

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PART I: PUBLICATION ON THE INTERNET

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. The Amicus accepts (Submissions of the Amicus Curiae (**ACS**), [9]) the principle which is determinative in this appeal: impecuniosity is not, of itself, a reason to deprive a successful party of their costs. The Respondent's impecuniosity was the only reason identified by the Court of Appeal for depriving the appellant of its costs.[1] It follows that the appeal should be upheld.

3. Notwithstanding its acceptance of that principle, the Amicus submits (ACS [9], [10]) that the principle is not absolute or inflexible. The Appellant agrees that, in limited ways, impecuniosity may be relevant to the exercise of the costs discretion.[2] However, that relevance is only indirect, such as where impecuniosity informs a factor relevant to the litigation or how a costs order should be structured to ensure it indemnifies the successful party. The cases referred to by the Amicus (ACS [22]) regarding lump sum costs orders fall into the latter category. They are not concerned with promoting access to justice; they stand for the proposition that a court will be more willing to make a lump sum costs order against an impecunious unsuccessful litigant because that party would be unlikely to be able to compensate the successful party for the costs of taxation.[3] The focus is on achieving the usual purpose of indemnifying the successful party, not the effect of the award on the unsuccessful party.[4] Nothing in *Dunstan v Seymour* [2006] FCA 917 suggests that "relative disadvantage" is a relevant consideration.[5]

4. To the extent that the Amicus submits impecuniosity may (in combination with other indicia of disadvantage) provide a direct justification for depriving a

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1 Core Appeal Book (**CAB**) 134 at [47](c).
2 See Appellant's Submissions at [16]-[18].
3 See *Hadid v Lenfest Commincations Inc* [2000] FCA 628 at [25]-[26] per Lehane J; *Dunstan v Human Rights and Equal Opportunity Commission (No. 3)* [2006] FCA 916 at [29] per Mansfield J; *Salfinger v Niugini Mining (Aust) Pty Ltd (No. 5)* [2008] FCA 1119 at [15]-[17] per Heerey J.
4 *Sony Entertainment (Australia) Ltd v Smith* (2005) 215 ALR 788 at [195] per Jacobson J.
5 Cf ACS, [22] and fn 25. The reference at [25] of *Dunstan* to "disadvantage" is to any overcompensation as a result of the making of a lump sum costs order rather than proceeding to taxation. See also G Dal Pont, *Law of Costs*, (2013) 3rd Ed, LexisNexis Butterworths Australia, at [8.32] and the authorities there referred to.

successful party of its costs, that submission should be rejected. It is inconsistent with the principle that a successful party should not be deprived of its costs save for some factor relevantly connected with the litigation.[6] The submissions of the Amicus do not engage with that principle or address the incoherence in principle which acceptance of its submissions would create.

5. Against the unanimous intermediate appellate authorities referred to in the Appellant's submissions in chief at [15], the Amicus points to the following three cases to submit that impecuniosity may be a basis on which to deprive the successful litigant of its costs: (a) *WAFU v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 325 (ACS [18]), where a Federal Magistrate considered the futility of a costs order in favour of the Commonwealth against an impecunious visa applicant justified departure from the ordinary rule. That reasoning was expressly rejected in *WAEY v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1314 at [40] per Lander J. (b) *Scott v Secretary, Department of Social Security (No 2)* [2000] FCA 1450 (ACS [15]), where Finkelstein J (in dissent) considered the impecuniosity of the unsuccessful parties justified depriving a successful party of its costs. The majority (Beaumont and French JJ) held (at [4]) that "inability to meet a costs order or the fact that the losing party has limited financial means has never been a sufficient reason to deny a successful party his costs." The reasons of Finkelstein J have never been followed or approved, whereas the decision of the majority has been referred to with approval on many occasions.[7] (c) *Aldridge v Victims of Crime Compensation Fund Corporation (No. 2)* [2008] NSWSC 1040 (ACS [9]), where Rothman J held that an impecunious litigant

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[6] *Oshlack v Richmond River Council* (1998) 193 CLR 72 (***Oshlack***) at [65] per McHugh J; *Latoudis v Casey* (1990) 170 CLR 534 (***Latoudis***) at 568 per Brennan J and at 569 per McHugh J; *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 at 741-2 per Viscount Cave LC; *Hobbs v Marlow* [1978] AC 16 at 39 per Lord Diplock.

[7] See, for example, *Maylord Equity Management Pty Ltd v Nauer* [2017] NSWSC 634 at [45] per Ward CJ in Eq; *GJ v AS (No 4*) [2017] ACTCA 7 at [102] per Refshauge, Rangiah JJ and Walmsley AJ; *MZARS v Minister for Immigration and Border Protection* [2017] FCA 177; *Machado v Underwood (No 2)* [2016] SASCFC 123 at [45] per Kourakis CJ, Gray and Nicholson JJ; *Roe v Western Australia* [2011] WASCA 57 at [112] per Buss JA; *Kennedy v Minister for Planning* [2010] NSWLEC 269 at [17] per Biscoe J; *Smolarek v Roper* [2009] WASCA 124 at [11] per Wheeler, Pullin and Newnes JJA; *Edwards v Stocks* (2009) 17 Tas R 454 at [12] per Crawford CJ, Slicer and Blow JJ; *Board of Examiners v XY* (2006) 25 VAR 193 at [35] per Chernov JA (Nettle and Neave JJA agreeing); *Nair-Marshall v Secretary, Department of Family & Community Services* [2005] FCA 1341 at [10] per Spender J.

should not pay the costs of the Victims of Crime Compensation Fund Corporation. The case is of no assistance, primarily because Rothman J expressly held (at [8]) that "impecuniosity is not a sufficient reason" to deprive a successful party of its costs.[8]

6. The Amicus's submission (ACS [10]) that "the decisions of other intermediate appellate court…are not expressed in absolute terms" cannot be reconciled with the terms of those judgements. In *Marlow v Walsh (No. 2)* [2009] TASSC 40 at [23], the Full Court held the appellant's impecuniosity was "an irrelevant factor" to the exercise of the costs discretion.[9] In *Board of Examiners v XY* (2006) 25 VAR 193, Chernov JA held at [35] that "the financial stress of a party is not a matter relevant to the exercise of the costs discretion" and Nettle JA held at [41] that "the notion that a litigant should be accorded special consideration in relation to costs on the grounds of poverty or financial disadvantage has nothing to commend it."[10] In *Machado v Underwood (No 2)* [2016] SASCFC 123, the majority held at [45] that "impecuniosity will not justify failing to exercise a costs discretion adversely to such a litigant where the judicial exercise of the discretion requires the making of an adverse costs order."[11] In *Sochorova v Commonwealth* [2012] QCA 152 at [17], the Court of Appeal said "the fact that an unsuccessful party is…impecunious or otherwise disadvantaged is not in itself a ground for refusing to make a costs order in favour of the successful party." In *Smolarek v Roper* [2009] WASCA 124, the Court of Appeal held at [11] that "the inability of an unsuccessful party to meet a costs order is not a sufficient reason to deny a successful party their costs." In *Re Felicity (No 3)* [2014] NSWCA 226, the Court of Appeal held at [60] that impecuniosity provided "no ground for resisting an order [for costs]". In *GJ v AS (No 4)* [2017] ACTCA

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[8] The case has not been followed and is also distinguishable. The plaintiff had sought compensation from the Fund following alleged domestic violence assaults. Her application had been refused because of a lack of corroborating material and her subsequent review proceedings were dismissed, but fresh evidence suggested she was in fact eligible. In circumstances where she could then be assessed as likely to have the qualifying factors for compensation, and where the Fund was a public body with a statutory benevolent purpose, Rothman J determined that each party should bear its own costs.

[9] The judgment at [13] summarises the parties' submissions. Cf. Amicus Submissions, [10] and fn 6, suggesting there is no "inflexible rule".

[10] These observations were directed to the financial circumstances of the parties generally and not merely the successful party's impecuniosity. Cf. ACS [10].

[11] The judgment supports the proposition that it is unfair to deprive the successful party of their costs simply because of the financial position of the unsuccessful party. Cf. ACS [10].

7, the Court of Appeal held at [102] that impecuniosity or difficulty in meeting a costs order "has never been a basis for declining to make an order for costs."

7. The Amicus has not identified a single intermediate appellate authority which contradicts the principle accepted in the above authorities, but suggests (ACS [13]) the Respondent's visa and consequent employment status may have justified departure from the usual rule. Neither factor was mentioned by the Court of Appeal in its reasons as to costs.[12] Further, the Respondent's capacity to meet a costs order depends not only upon his income from employment, but also upon his asset position in Australia and overseas. In any event, if these factors were the Court's justification, the result cannot be reconciled with the decisions of this Court in immigration matters where costs are uniformly ordered against unsuccessful visa applicants.[13]

8. The Amicus appears to contend (ACS [16]-[17], [21]) that it was open to the Court of Appeal to refuse to award the Appellant its costs because such an order would have been futile. That is inconsistent with principle (see above) and, in any event, was not a finding reasonably open.[14] There is no analogy, as suggested by the Amicus (ACS [16]), between the discretion as to costs and the discretion to refuse to grant an equitable remedy that would be nugatory or futile, because, where a remedy is justified, the result of the exercise of the discretion is not an absence of relief, but an alternative remedy such as damages. Further, in each of the cases relied on by the Amicus regarding futility, an order for costs was made despite a party's asserted impecuniosity.[15] In any event, the Amicus accepts (ACS [18]) that a costs order could have value to the Appellant as a debt, which denies its futility.

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12 Reasons, [44]-[48]: CAB133-134.

13 See, for example, *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 at [73] per Bell, Gageler and Keane JJ; *The Republic of Nauru v WET040 (No 2)* [2018] HCA 60 at [40] per Gageler, Nettle and Edelman JJ; *Wehbe v Minister for Homes Affairs* [2018] HCA 50 at [27] per Edelman J; *Shrestha v Minister for Immigration and Border Protection* [2018] HCA 35 at [12] per Kiefel CJ, Gageler and Keane JJ; *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 at [38] per Kiefel CJ, Gageler and Keane JJ.

14 See Appellant's Submissions at [19]-[24].

15 *Hamod v New South Wales (No 13)* [2009] NSWSC 756; *Hadid v Lenfest Commincations Inc* [2000] FCA 628; *Dunstan v Human Rights and Equal Opportunity Commission (No 3)* [2006] FCA 916; *Salfinger v Niugini Mining (Aust) Pty Ltd (No 5)* [2008] FCA 1119; *Dunstan v Seymour* [2006] FCA 917. As to *WAFU v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 325, see paragraph 5 above.

9. Proceedings are brought by or against the Crown in right of the Northern Territory in the same way as proceedings between subjects, and the same procedural and substantive law applies.[16] Contrary to the Amicus's submission (ACS [20]), there is no reason in principle for different treatment of the Appellant,[17] and nothing to suggest that the Appellant was seeking to punish, oppress or place barriers upon the Respondent.

10. In accordance with *House v The King* (1936) 55 CLR 499 (at 504-505), the Court of Appeal failed to exercise its costs discretion in accordance with established principle and having regard to only those factors relevantly connected with the litigation, thereby committing an appealable error.[18] In *Maiden v Maiden* (1909) 7 CLR 727 (at 739) (ACS [7]), this Court varied the order as to costs made below in response to such error, and the Court has done so on many occasions since.[19] This Court is in as good a position as the Court below to make the appropriate orders (cf ACS [26]-[27]), and this appeal arose because the Respondent asked the Court not to make a costs order against him (cf ACS [29]-[32]).

11. The appeal should be allowed with the Respondent to pay the Appellant's costs of the appeal.

Dated: 13 March 2019

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16 *Crown Proceedings Act 1993* (NT), s5(1). See also s10(2), which relates to the calculation of costs to which the Crown is entitled.

17 See *Oshlack* at [92] per McHugh J.

18 *Federal Commissioner of Land Tax v Jowett* (1930) 45 CLR 115 at 121 per Isaacs CJ, Gavan Duffy and Starke JJ. See also Appellant's Submissions, [25] and G Dal Pont, *Law of Costs*, (2013) 3rd Ed, LexisNexis Butterworths Australia, at [20.31] and the authorities referred to there.

19 See, for example, *Stewart v Atco Controls Pty Ltd (No 2)* (2014) 242 CLR 331; *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816; *Oshlack*; *Latoudis*; *Gould v Vaggelas* (1984) 157 CLR 215; *Stanley v Phillips* (1966) 115 CLR 470; *Pohlner v Pfeiffer* (1964) 112 CLR 52; *Timbury v Coffee* (1941) 66 CLR 277; *National Trustees Executors and Agency Co v Barnes* (1941) 64 CLR 268; *Glen v Union Trustee Co of Australia* (1936) 54 CLR 463; *Moran v House* (1924) 35 CLR 60; *Lippe v Hedderwick* (1922) 31 CLR 148; *Nock v Austin* (1918) 25 CLR 519; *Kroehn v Kroehn* (1912) 15 CLR 137; *Woolf v Willis* (1911) 13 CLR 23.