HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

NORTHERN TERRITORY OF AUSTRALIA APPELLANT

AND

SOULEYMANE SANGARE RESPONDENT

Northern Territory v Sangare
[2019] HCA 25
14 August 2019
D11/2018

ORDER

1. *Appeal allowed.*

2. *The respondent pay the appellant's costs of and incidental to the proceedings in the Supreme Court of the Northern Territory and the Court of Appeal of the Northern Territory.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of the Northern Territory

Representation

S L Brownhill SC, Solicitor-General for the Northern Territory, with L S Peattie for the appellant (instructed by Solicitor for the Northern Territory)

Submitting appearance for the respondent

M A Crawley SC with M J M Littlejohn appearing as amicus curiae (instructed by Miles Crawley, SC)

CATCHWORDS

Northern Territory v Sangare

Practice and procedure – Costs – Where respondent commenced defamation proceedings against appellant – Where appellant wholly successful on appeal and at first instance – Where appellant sought order that respondent pay its costs – Where Court of Appeal made no order as to costs because respondent's impecuniosity would likely render order futile – Whether appellant entitled to order for costs – Whether impecuniosity of unsuccessful party can alone justify decision to deny successful party its costs.

Words and phrases – "award", "costs", "discretion as to costs", "futility", "impecuniosity", "indemnity", "litigant-in-person", "litigation", "matters relating to costs", "successful party", "unmeritorious litigation", "unsuccessful party".

Northern Territory Supreme Court Act 1961 (Cth), s 18.
Supreme Court Act 1979 (NT), ss 14(1), 55(1), 71.
Supreme Court Rules 1987 (NT), r 63.03.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND NETTLE JJ. At issue in this appeal is whether, in the exercise of the judicial discretion as to costs at the conclusion of litigation, the impecuniosity of the unsuccessful party is a consideration that, without more, may justify a decision to deny the successful party its costs. The Court of Appeal of the Supreme Court of the Northern Territory resolved this issue in the affirmative, in favour of the respondent.

2 The appellant submitted that the Court of Appeal erred in principle in treating the respondent's impecuniosity, without more, as sufficient reason to deny the appellant an order for its costs of the litigation, in which it had been wholly successful, so that the Court of Appeal's exercise of the discretion as to costs miscarried[1]. The appellant also submitted that it was not open to the Court of Appeal to refuse to award the appellant its costs on the ground that such an order would be futile.

3 The appellant's submissions should be accepted. Accordingly, the appeal to this Court must be allowed.

Background

4 The respondent is a citizen of Guinea who arrived in Australia in May 2011 under a Belgian passport belonging to his brother. He applied for a protection (Class XA) visa under the *Migration Act 1958* (Cth) in June 2011. His application was refused by a delegate of the Minister for Immigration and Citizenship, and that decision was affirmed by the Refugee Review Tribunal on 22 October 2012[2].

5 Between 20 June and 28 August 2014, the respondent was employed on a temporary basis as a civil engineer with the Northern Territory Department of Infrastructure ("the Department"). On 28 August 2014, the Department offered the respondent a permanent position on the footing that it would sponsor him under a skilled migration scheme run by the Commonwealth Government. As part of that scheme the respondent was required to apply for and obtain the appropriate visa[3].

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1 *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40.

2 *Sangare v Northern Territory* [2018] NTCA 10 at [4].

3 *Sangare v Northern Territory* [2018] NTCA 10 at [5].

6 In November 2014, the respondent was advised by the Commonwealth Government that his application for a temporary work visa was invalid because he had previously been refused a protection visa. The respondent sought expressions of support for his visa application from the Minister of the Department. The Minister, in turn, requested that officers of the Department brief him in relation to the respondent's request[4].

7 The Chief Executive of the Department provided the Minister with a briefing note. The respondent alleged that the briefing note contained material defamatory of him, and instituted proceedings against the appellant for damages. In particular, the respondent complained that the briefing note contained material fabricated by the Department to make it appear that the respondent had provided false and misleading information in relation to his immigration status, and to make it appear that the respondent was a dishonest person and of bad character[5].

The proceedings

8 The respondent commenced proceedings in the Local Court of the Northern Territory against the appellant. He sought damages in the sum of $5 million. Because of the amount of damages claimed by the respondent, the proceeding was transferred to the Supreme Court of the Northern Territory[6].

9 On 6 February 2018, the trial judge, Grant CJ, dismissed the respondent's action[7]. His Honour found that the publication attracted protection from liability under s 27 of the *Defamation Act 2006* (NT) and the general law defence of qualified privilege[8]. His Honour indicated that he would hear the parties as to costs[9], but the respondent filed a notice of appeal before that could occur. As a result, no order as to the costs of the trial was made by the trial judge.

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4 *Sangare v Northern Territory* [2018] NTCA 10 at [6]-[7].

5 *Sangare v Northern Territory* [2018] NTCA 10 at [7]-[8].

6 See *Local Court Act 2015* (NT), ss 12 and 13(1)(b).

7 *Sangare v Northern Territory* [2018] NTSC 5.

8 *Sangare v Northern Territory* [2018] NTSC 5 at [124].

9 *Sangare v Northern Territory* [2018] NTSC 5 at [126].

10 The respondent's appeal to the Court of Appeal (Southwood, Kelly and Blokland JJ) was unsuccessful[10]. On that basis, the appellant sought an order that the respondent pay its costs. That order was refused for reasons that will be discussed in due course.

11 The respondent did not contest the appellant's application for special leave to appeal to this Court, and did not participate in the appeal beyond filing a submitting appearance. In consequence, an amicus curiae was appointed to assist this Court ("the amicus"). At the hearing in this Court, Mr Crawley SC appeared with Mr Littlejohn of counsel as amicus to make submissions in support of the order made by the Court of Appeal.

The power to award costs

12 The power of the Court of Appeal to award costs is a creature of statute[11]. The Solicitor-General for the Northern Territory, in response to a suggestion by the amicus that a statutory power to award costs was lacking, helpfully explained the statutory basis of the power of the Court of Appeal in relation to costs. The Supreme Court of the Northern Territory was established by s 10 of the *Supreme Court Act 1979* (NT). It replaced the Supreme Court of the Northern Territory previously established by the *Northern Territory Supreme Court Act 1961* (Cth) ("the Commonwealth Act"). The Supreme Court, by virtue of s 51(2) of the *Supreme Court Act*, is known as the Court of Appeal of the Northern Territory of Australia when exercising appellate jurisdiction. By virtue of s 55(1) of the *Supreme Court Act*, the Court of Appeal may exercise every "power, jurisdiction and authority" of the Supreme Court under any law in force in the Northern Territory.

13 Section 14(1)(c) of the *Supreme Court Act* confers on the Supreme Court "such jurisdiction ... as was, immediately before the commencement of this Act,

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10 *Sangare v Northern Territory* [2018] NTCA 10. An application by the respondent for special leave to appeal to this Court from that decision was dismissed on 5 December 2018: see *Sangare v Northern Territory* [2018] HCASL 386.

11 *Latoudis v Casey* (1990) 170 CLR 534 at 557; [1990] HCA 59; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 182-183; [1992] HCA 28; *Cachia v Hanes* (1994) 179 CLR 403 at 410; [1994] HCA 14; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 85-86 [33]-[34], 120 [134]; [1998] HCA 11; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 64 [30]-[31]; [2007] HCA 56.

vested in or conferred on the former Supreme Court". As to the "former Supreme Court"[12], s 18(1) of the Commonwealth Act provided relevantly that "[t]he Supreme Court or a Judge has jurisdiction to award costs in all matters brought before the Court". Section 18(2) provided relevantly that "[s]ubject to Rules of Court ... the costs of and incidental to all proceedings in the Supreme Court ... are in the discretion of the Court or Judge".

14 In addition, it may be noted that the *Supreme Court Rules 1987* (NT) are made under s 71 of the *Supreme Court Act*, which provides that "[e]xcept as provided by this Act or by any other law in force in the Territory, the practice and procedure of the Court shall be as provided by the Rules". "Practice and procedure" is defined in s 9(1) of that Act to include "matters relating to costs".

15 Finally, r 63.03 of the *Supreme Court Rules* relevantly provides:

> "(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."

The reasons of the Court of Appeal

16 The Court of Appeal accepted that the appellant in this Court (the respondent in the Court of Appeal) had been "wholly successful" on appeal and at trial, and that the appeal was "without merit" and "doomed to fail"[13]. Their Honours acknowledged that[14]:

> "Customarily, in circumstances such as this the Court will make an order for costs on the basis that costs should follow the event. However, the legislative intention is plainly to confer on courts and judges an unfettered discretion as to costs and a construction of a rule of court which practically negates the statutory provision is not lightly to be adopted. Nonetheless, the discretion must be exercised judicially."

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12 Section 9(1) of the *Supreme Court Act* defines "former Supreme Court" to mean "the Supreme Court of the Northern Territory of Australia as established by law immediately before the commencement of this Act".

13 *Sangare v Northern Territory* [2018] NTCA 10 at [44].

14 *Sangare v Northern Territory* [2018] NTCA 10 at [46] (footnote omitted).

17 Having acknowledged the manner in which the discretion is "customarily" exercised, their Honours went on to say[15]:

> "In this case the relevant factors are as follows:
>
> (a) The respondent has been wholly successful and has been brought to court not once but twice.
>
> (b) The purpose of an award of costs is not to punish the unsuccessful party but to compensate the successful party.
>
> (c) The appellant is most unlikely to be able to pay any costs that are awarded against him."

18 Their Honours held[16]:

> "The respondent is most unlikely to be compensated even if an award of costs was made in its favour. In the circumstances, it seems to us that the Court should not make a futile order or orders as to costs."

19 The Court of Appeal then concluded[17]:

> "Both as to the costs below and the costs of the appeal the Court makes no order as to costs."

20 It is apparent from the reasons of the Court of Appeal that the sole consideration which led their Honours to depart from the "customary" rule that costs follow the event, and to make no order as to costs of both the trial and the appeal, was the circumstance that the order which it would otherwise have made was likely to be futile because of the respondent's impecuniosity.

The appeal to this Court

21 As noted at the outset of these reasons, the appellant argued that the discretion of the Court of Appeal miscarried in point of principle. It also argued

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15 *Sangare v Northern Territory* [2018] NTCA 10 at [47] (footnote omitted).

16 *Sangare v Northern Territory* [2018] NTCA 10 at [48].

17 *Sangare v Northern Territory* [2018] NTCA 10 at [48].

that if the futility of an order for costs were a relevant consideration, the Court of Appeal erred in two respects in reaching the conclusion that the order would be futile. First, the Court made its determination without any evidence of the respondent's present or future capacity to pay the appellant's costs. Secondly, the Court did not indicate to the appellant that it intended to decide the question of costs by reference to the respondent's financial circumstances and did not invite submissions from the appellant in response to what the respondent had said about his employment or the perceived futility of making an order. Because the appellant's primary submission must be accepted, it is unnecessary to deal with this alternative submission or with the submissions advanced by the amicus in response to it.

22 In this Court, the amicus submitted that although impecuniosity is not of itself a sufficient reason to deprive a successful party of its costs, it may be sufficient when combined with other factors. It was said that there should be no inflexible rule that a party's financial position is always irrelevant, and that it would be wrong to place a fetter on the exercise of the costs discretion.

23 The submission of the amicus in relation to the fettering of the costs discretion will be addressed in due course, but it may be said immediately that it is apparent from the reasons of the Court of Appeal that the respondent's impecuniosity was treated, without more, as a sufficient reason to deprive the appellant of its costs of the litigation in which it had been successful.

The discretion as to costs

24 It is well established that the power to award costs is a discretionary power, but that it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation[18]. While the width of the discretion "cannot be narrowed by a legal rule devised by the court to control its exercise"[19], the formulation of principles according to which the discretion should be exercised does not "constitute a fetter upon the discretion not intended by the legislature"[20]. Rather,

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18 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811-812; *Latoudis v Casey* (1990) 170 CLR 534 at 539-540, 557, 561-562, 569; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96 [65], 120-121 [134].

19 *Norbis v Norbis* (1986) 161 CLR 513 at 537; [1986] HCA 17. See also at 533.

20 *Latoudis v Casey* (1990) 170 CLR 534 at 541-542, see also at 558-559; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96 [65], 121 [134].

the formulation of principles to guide the exercise of the discretion avoids arbitrariness and serves the need for consistency that is an essential aspect of the exercise of judicial power[21].

25 A guiding principle by reference to which the discretion is to be exercised – indeed, "one of the most, if not the most, important" principle – is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party[22]. The application of that principle may be modified or displaced where there is conduct on the part of the successful party in relation to the conduct of the litigation that would justify a different outcome. For example, a successful defendant may be refused its costs on the ground that its conduct induced the plaintiff to believe that he or she had a good cause of action[23]. But in the present case, there was nothing of this kind in the conduct of the appellant in relation to the litigation that might have weighed against the exercise of the discretion in its favour[24]. There was no suggestion of any conduct on the part of the appellant, whether by unreasonable delay or a want of the cooperation required of litigants to ensure the "just resolution of the real issues in civil proceedings with minimum delay and expense"[25], that might have been taken into account to justify refusing the appellant an order for its costs.

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21 *Norbis v Norbis* (1986) 161 CLR 513 at 519; *Latoudis v Casey* (1990) 170 CLR 534 at 541-542, see also at 558; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96 [65], 121 [134].

22 *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co [No 2]* [1953] 1 WLR 1481 at 1484; [1953] 2 All ER 1588 at 1590. See also *Harold v Smith* (1860) 5 H & N 381 at 385 [157 ER 1229 at 1231]; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96-97 [66]-[67], see also at 86 [35], 120-121 [134].

23 See, eg, *Bostock v Ramsey Urban District Council* [1900] 2 QB 616 at 622, 625, 627; *Ritter v Godfrey* [1920] 2 KB 47 at 53, 60, 66; *Scottish Gympie Gold Mines Ltd v Carroll* [1902] St R Qd 311 at 315-316; *Stewart v Moore* [1921] St R Qd 182 at 190; *Redden v Chapman* (1949) 50 SR (NSW) 24 at 25.

24 *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 at 874; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-98 [69].

25 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 210 [90]; [2009] HCA 27. See *Supreme Court Rules*, r 1.10.

Impecuniosity

26 Prior to the decision of the Court of Appeal in this case, the proposition that the impecuniosity of an unsuccessful party, without more, is not a sufficient reason for depriving a successful party of its costs had been accepted in every other Australian jurisdiction[26]. On 10 April 2019, the day before the hearing of the appeal in this Court, the Court of Appeal of the Northern Territory (Southwood J, Riley and Graham A-JJ) decided *JB v Northern Territory [No 2]*[27]. The Court noted that the Court of Appeal's decision in the present case is inconsistent with the authorities referred to above, and declined to follow it[28].

27 In *Board of Examiners v XY*[29], Chernov JA, with whom Neave JA agreed, identified difficulties of practice and principle that beset the approach of the Court of Appeal in the present case. As a practical matter, difficulties arise in determining the level of impecuniosity at which it would become a relevant consideration. There would also be substantial practical difficulties in determining, after the conclusion of the litigation, the unsuccessful party's financial standing. In point of principle, it is basic justice that a successful party should be compensated for expenses it has incurred because it has been obliged to litigate by the unsuccessful party. That consideration of basic justice does not lose its compelling force simply because the successful party happens to be wealthy: the successful party, whether rich or poor, did not ask to be subjected to the expense of unmeritorious litigation. The statutory power to order costs affords the successful party necessary protection against unmeritorious litigation;

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26 See, eg, *Hollier v Australian Maritime Safety Authority [No 2]* [1998] FCA 975 at 3; *Yilan v Minister for Immigration and Multicultural Affairs* [1999] FCA 1212 at [5]; *Scott v Secretary, Department of Social Security [No 2]* [2000] FCA 1450 at [4], cf at [8]; *Board of Examiners v XY* (2006) 25 VAR 193 at 206-209 [31]-[43]; *Edwards v Stocks [No 2]* (2009) 17 Tas R 454 at 460-461 [12]; *Marlow v Walsh [No 2]* [2009] TASSC 40 at [23]; *Smolarek v Roper* [2009] WASCA 124 (S) at [11]; *Sochorova v The Commonwealth* [2012] QCA 152 at [17]; *Sassoon v Rose* [2013] NSWCA 220 at [10]; *Chapple v Wilcox* (2014) 87 NSWLR 646 at 652 [24]; *Machado v Underwood [No 2]* [2016] SASCFC 123 at [45]; *GJ v AS [No 4]* [2017] ACTCA 7 at [102].

27 [2019] NTCA 3.

28 *JB v Northern Territory [No 2]* [2019] NTCA 3 at [15].

29 (2006) 25 VAR 193 at 206-207 [33]-[34].

and unmeritorious litigation is no less unmeritorious because it is pursued by a person who is poor or who is a litigant-in-person.

28 The circumstance that the appellant is a public authority is likewise irrelevant. As McHugh J said in *Oshlack v Richmond River Council*[30]:

> "The law judges persons by their conduct not their identity. In the exercise of the costs discretion, all persons are entitled to be treated equally and in accordance with traditional principle. The fact that a successful [party] is a public authority should not make a court less inclined to award costs in its favour. Gone are the days when one could sensibly speak of a public authority having 'available to them almost unlimited public funds.'[31]"

29 McHugh J dissented in the result in *Oshlack*, but those observations were not contrary to the reasoning of the majority in that case.

30 The amicus submitted that orders for costs are intended to be compensatory, not punitive. As a general proposition, so much must be accepted[32]. The amicus went on to submit that the respondent's impecuniosity was a consequence of his being unemployed and that this followed the publication of the defamatory matter in respect of which the respondent brought these proceedings. It was then argued that the effect of a costs order in these circumstances would not be compensatory, but punitive.

31 This submission cannot be accepted. The very point decided by the Court of Appeal was that the respondent's action was not justified in law. In these circumstances, there can be nothing punitive in an order that the appellant be compensated for having been unsuccessfully sued. No conduct on the part of the appellant in the course of the litigation caused or contributed in any way to the respondent's impecuniosity.

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30 (1998) 193 CLR 72 at 107 [92].

31 *Kent v Cavanagh* (1973) 1 ACTR 43 at 55.

32 *Latoudis v Casey* (1990) 170 CLR 534 at 543, 562-563, 567; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 75 [1], 89 [44], 97 [67], 102 [80], 103-104 [82], 121 [134].

32 Whether a party is rich or poor has, generally speaking, no relevant connection with the litigation[33]. It may be said, by way of qualification to that general proposition, that a party's financial position may be relevant to the extent that it may inform the structure of a costs order. For example, impecuniosity may justify providing for the payment of costs over time in order to avoid inflicting unnecessary hardship while at the same time improving the likelihood of compliance with the order. That said, any such qualification was not invoked in the present case.

33 For the sake of completeness, it may be observed that in *Oshlack* this Court, by majority (Gaudron, Gummow and Kirby JJ, Brennan CJ and McHugh J dissenting), set aside the decision of the Court of Appeal of the Supreme Court of New South Wales and restored the decision of the Land and Environment Court of New South Wales that there be no order as to costs in respect of the appellant's unsuccessful challenge to the local authority's consent to a development application. The majority in this Court held that it was open to the Land and Environment Court to conclude that the litigation was motivated by a desire to ensure obedience to environmental law and to preserve the habitat of endangered fauna, and that there was, objectively speaking, a '"public interest' in the outcome of the litigation"[34]. It could also be said in favour of the order made by the Land and Environment Court that it was not unfair to require the local authority to bear its own costs of litigation where it had an interest in resolving uncertainty attending the valid exercise of its powers, and wide standing provisions facilitated the bringing of such litigation. None of these considerations can be said to be relevant in this case. The litigation here was brought to vindicate the respondent's private interest in his reputation by the recovery of damages.

Futility

34 It was erroneous for the Court of Appeal to decline to make the order sought because it perceived that the award would be futile. The making of an order for costs is no occasion to invoke the concern of the Court of Chancery that

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33 *Hollier v Australian Maritime Safety Authority [No 2]* [1998] FCA 975 at 3; *Scott v Secretary, Department of Social Security [No 2]* [2000] FCA 1450 at [4]; *Board of Examiners v XY* (2006) 25 VAR 193 at 207-208 [35], 209 [41]; Dal Pont, *Law of Costs*, 4th ed (2018) at [8.30].

34 (1998) 193 CLR 72 at 80-81 [20], 91 [49], 126-127 [143]-[144].

equity not act in vain[35]. That concern is a consideration attending the exercise of the discretion to grant equitable remedies[36]. In stark contrast, the courts do not regard the impecuniosity of a defendant wrongdoer as a reason for declining to order the payment of damages found to be due to an injured plaintiff. Likewise, the favourable exercise of the statutory power to award costs is not the grant of an equitable remedy in respect of which a likely failure of compliance is a relevant consideration.

35 In any event, as a matter of authority, the courts have consistently rejected the suggestion that a costs order should not be made against an impecunious party because it would be futile to do so[37]. The circumstance that a person may not presently, or even foreseeably, be able to meet an order for costs has not been regarded as a reason to regard the creation of the debt as an exercise in futility. The very existence of the debt created by the order is a benefit to a creditor. The successful party is better off with the benefit of the order than without it. It simply cannot be assumed that the respondent will never have the means to pay the debt in whole or in part or that it might not otherwise be turned to valuable account by the appellant[38].

Conclusion and orders

36 The respondent's impecuniosity was the only reason identified by the Court of Appeal for depriving the appellant of its costs. That consideration was not relevant to the proper exercise of the Court's discretion as to costs. The Court of Appeal's decision cannot be supported as an exception to the general principle

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35 See, eg, *Benson v Benson* (1710) 1 P Wms 130 at 131 [24 ER 324 at 325]; *New Brunswick etc Co v Muggeridge* (1859) 4 Drew 686 at 699 [62 ER 263 at 268].

36 For example, specific performance of an agreement to execute a partnership deed will not be ordered where the partnership to be constituted by the deed might lawfully be dissolved forthwith by the defendant: see *Hercy v Birch* (1804) 9 Ves Jun 357 at 360 [32 ER 640 at 641].

37 See *Selliah v Minister for Immigration and Multicultural Affairs* [1998] FCA 469 at 4; *MZARS v Minister for Immigration and Border Protection* [2017] FCA 177 at [36]-[37]; *Graham v Minister for Immigration and Border Protection [No 2]* [2018] FCA 1116 at [16]-[17].

38 *Tozier v Hawkins* (1885) 15 QBD 680; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 535; [1997] HCA 29.

that a wholly successful party should be entitled to an order for costs. It follows that the appeal must be allowed.

37 The appeal should be allowed. The respondent should pay the appellant's costs of and incidental to the proceedings in the Supreme Court of the Northern Territory at first instance and in the Court of Appeal. The respondent should pay the appellant's costs of the appeal to this Court.