

DARWIN REGISTRY

BETWEEN:



THE NORTHERN TERRITORY OF AUSTRALIA

Appellant

and

SOULEYMANE SANGARE

Respondent

AMICUS CURIAE OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

***The costs discretion*¹**

1. A costs order is a discretionary order which can only be disturbed for an established error of principle.
2. Appellate courts retain a function to guide those who are obliged to exercise costs discretions, for the avoidance of undesirable arbitrariness and inconsistency.
3. While there are “rules” or ordinary principles, they cannot extinguish the element of discretion.

¹ *Oshlack v Richmond River Council* (1998) 193 CLR 72 per Kirby J at [133], [134] (CJBA Tab 18; ACS [6] – [11])

Impecuniosity

4. The relevance of impecuniosity of the unsuccessful party requires the decision-maker to take the following particular considerations into account:
 - a. Cost orders generally are intended to be compensatory, not punitive;²
 - b. Cost orders should be based upon matters connected with the proceedings;³
 - c. Practically, it can be difficult to determine the financial position of an unsuccessful party.

The cost order was not arbitrary

5. The Respondent's impecuniosity was the consequence of him being unemployed and unemployable.
6. The loss of employment followed a publication by the Appellant containing three defamatory imputations and formed part of the Respondent's claim.
7. The effect of a cost order in favour of the Appellant, in light of the circumstances which were known to the Court at the time, would not have been compensatory but instead would have been punitive.

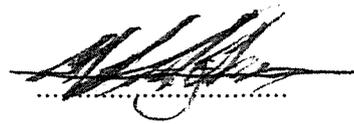
The cost order was not inconsistent

8. While some intermediate jurisdictions have expressed the relevance of impecuniosity in absolute terms, others qualify the limitations on the exercise of the discretion by references to flexibility and fairness.⁴

Dated: 09 April 2019



Miles A Crawley SC



Matthew J M Littlejohn

² *Latoudis v Casey* (1990) (1990) 170 CLR 534 at 543 per Mason CJ; at 562-3 per Toohey J; at 567 per McHugh J (CJBA Tab 13; ACS [18])

³ *State of Tasmania v Anti-Discrimination Tribunal* (2008) 17 Tas R 227 at [18], [20] (CJBA Tab 24, Appellant's submissions at [12])

⁴ *Aldridge v Victims Compensation Fund Corporation (No 2)*[2008] NSWSC 1040 at [8] (CJBA Tab 4); *Board of Examiners v XY* [2006] VSCA 190 at [34] and *Frugtniet* at [16] (referred to in *Board of Examiners* at [28] (CJBA Tab 5); *Edwards v Stocks (No 2)* (2009) 17 Tas R 454 at [13] (CJBA Tab 9); ACS [10]