

22/09; [2009] VSC 359

SUPREME COURT OF VICTORIA

TAB LTD v GREYHOUND RACING VICTORIA (No 2)

Davies J

20 August 2009

CIVIL PROCEEDINGS – PRACTICE AND PROCEDURE – COSTS – WHETHER COSTS SHOULD BE APPORTIONED ACCORDING TO ISSUES UPON WHICH THE PARTIES SUCCEEDED – WHETHER SEPARATE AND DISTINCT ISSUES – WHETHER GENERAL RULE SHOULD APPLY.

In proceedings against GRV, there were seven issues for determination by the Court. TAB was successful on three of those issues and GRV successful on three of the issues. On the remaining issue there was a partial win and a partial loss for both sides. GRV submitted that it should only bear the costs in respect of those issues on which TAB were successful.

HELD: GRV ordered to pay TAB's costs including reserved costs.

1. The Court has a discretion about what costs order should be made and whilst the authorities make it clear that there are no hard and fast rules the discretion must be exercised judicially. That means there must be some identifiable and proper basis which supports the exercise of discretion. The general rule is that the successful party should be awarded costs and the general rule ought not to be displaced unless there is good reason.

2. Good reason may be found in inappropriate or unreasonable conduct on the part of the party in relation to the conduct of the hearing. However, there is no basis for such a contention in this case. Another basis is where it is possible to identify separate and distinct issues. The courts have recognised that in certain circumstances it may be appropriate to award costs based on issues won and lost and that it may be appropriate to do so without taking into consideration any issue of unreasonableness or any inappropriate behaviour on behalf of the successful litigant.

3. Although the grounds on which TAB relied to contest the validity of the fee condition were separate and distinct grounds, nonetheless each of those grounds related to the one issue. In other words, this was not a case where any of the grounds on which TAB were unsuccessful were grounds relating to some different matter for determination by the court. Each and every one of them was a ground of legal principle which TAB contended supported the invalidity of the fee condition. For that reason this is not a case where the court's discretion should be exercised to apportion costs referable to the success and failure of TAB on the grounds on which it relied.

DAVIES J:

1. The plaintiff, TAB Limited ("TAB"), seeks an order in each of the proceedings that Greyhound Racing Victoria ("GRV") pay its costs of the proceeding. Counsel for GRV submitted that there should be no order as to costs. That submission was put on the basis that there were seven issues for determination by the court; that GRV was successful on three of those issues; TAB was successful on three of those issues; and on the remaining issue there was a partial win and a partial loss for both sides. In the alternative it was submitted on behalf of GRV that there should be issue-based costing. What is meant by that is that GRV should only bear the costs in respect of those issues on which TAB was successful.

2. I do of course have a discretion about what costs order should be made and the authorities make it clear that there are no hard and fast rules. Although there are no hard and fast rules the discretion must be exercised judicially. That means there must be some identifiable and proper basis which supports the exercise of discretion. The general rule is that the successful party should be awarded costs. The general rule ought not to be displaced unless there is good reason.

3. Good reason may be found in inappropriate or unreasonable conduct on the part of the party in relation to the conduct of the hearing. There is no basis for such a contention in this case. Another basis is where it is possible to identify separate and distinct issues. The courts have recognised that in certain circumstances it may be appropriate to award costs based on

issues won and lost and that it may be appropriate to do so without taking into consideration any issue of unreasonableness or any inappropriate behaviour on behalf of the successful litigant. There may well be other factors as identified by Justice Newnes in *Mickelberg v State of Western Australia*.^[1] His Honour stated:

Where it is appropriate to consider the outcome of particular issues in the case, it will be relevant to consider whether there has been any unreasonable or inappropriate conduct on behalf of the successful litigant in relation to that issue, the relative merits or strengths of that party on the issue, whether the length of the hearing was greatly increased by the issue, and whether the issue otherwise was of sufficient significance in proportion to the whole case to warrant an order depriving that party of the costs of that issue.^[2]

However, as Justice Goldberg observed in *Dr Martens Australia Pty Ltd v Figgins Holdings Pty Ltd (No 2)*:^[3]

... a court should be reluctant to embrace the proposition that, as a general rule, it is appropriate to undertake an enquiry as to who was successful in relation to particular issues in a case to determine whether there should be an apportionment of costs against a successful party. A court should not be too ready to disallow costs simply because a party has failed upon an issue, unless it be quite a separate and distinct issue from the issues in respect of which it succeeded ...^[4]

Such a case was *McFadzean v Construction, Forestry, Mining and Energy Union (No 2)*.^[5] At first instance the trial judge made an order for costs against the plaintiffs, although the plaintiffs were successful. The order for costs was an overall award to the defendants of 40 per cent of their costs. The reasoning was that 40 per cent of the defendants of their costs represented the trial judge's:

... best attempt at synthesis of a series of considerations pertinent to the plaintiffs' claim: The success of some plaintiffs on some causes of action; the failure of some plaintiffs altogether; the success of some defendants altogether; the fact that even the successful plaintiffs failed upon many causes of action; the fact that the causes of action upon which some plaintiffs succeeded represented only a small fraction of the causes of action which were pleaded; the fact that there were very many issues joined upon which the plaintiffs failed, including issues pertinent to most of the causes of action upon which some plaintiffs ultimately succeeded; the fact that the plaintiffs succeeded upon some issues joined even though that did not always mean that a cause of action was established.^[6]

The Court of Appeal upheld the assessment of costs.^[7]

4. This case is an entirely different kind of case to that considered in the *McFadzean* decision. Although the grounds on which TAB relied to contest the validity of the fee condition were separate and distinct grounds, nonetheless each of those grounds related to the one issue. In other words, this is not a case where any of the grounds on which TAB were unsuccessful were grounds relating to some different matter for determination by the court. Each and every one of them was a ground of legal principle which TAB contended supported the invalidity of the fee condition. For that reason I am not satisfied that this is an appropriate case where the court's discretion should be exercised to apportion costs referable to the success and failure of TAB on the grounds on which it relied.

5. It was also submitted on behalf of GRV that GRV should only be required to pay a portion of TAB's costs because part of the hearing was taken up with argument on issues that did not concern GRV. That occurred because the GRV proceedings were heard concurrently with the proceeding that TAB brought against Racing Victoria Limited ("RVL") as they involved common issues of law. Although some of the hearing time was taken up with matters that did not relate to the GRV claim, it is not appropriate in my view to give any discount to GRV. An order for costs will relate only to TAB's costs in the GRV proceedings. Insofar as some time may have been taken up with matters peculiarly relating to the RVL case, the costs referable to that time will be costs referable to the RVL proceeding.

6. Accordingly the order that I will make is that in each of the GRV matters the defendants pay the plaintiff's costs, including reserved costs, to be taxed in default of agreement.

[1] [2007] WASC 140 (Unreported, Newnes J, 29 June 2007).

[2] *Ibid* [44].

[3] [2000] FCA 602 (Unreported, Goldberg J, 10 May 2000).

[4] Ibid [54].

[5] [2004] VSC 480 (Unreported, Ashley J, 25 November 2004);

[6] Ibid [32].

[7] [2007] VSCA 289 [159] – [167]; (2007) 20 VR 250 (Warren CJ, Nettle and Redlich JJA, 13 December 2007).

APPEARANCES: For the plaintiff TAB Ltd: Mr G Harris, counsel. Freehills, solicitors. For the defendant Greyhound Racing Victoria: Mr J Davis, counsel. Minter Ellison, solicitors.
