RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

COSTS DECISION

20 NOVEMBER 2017

LICENSEE DARYL CRAPPER

Appellant's application for costs, Cl 19 of the Racing Appeals Tribunal Regulation 2015

DECISION:
APPLICATION DISMISSED

ISSUE

1**.** Whether the appellant is entitled to costs.

BACKGROUND

2. On 11 November 2016 the appellant lodged an application for costs.

3. On 18 November 2016 the Tribunal made by consent orders as follows:

> 1. The appeal is allowed
> 2. The decision of the stewards of 15 June 2015 imposing a conviction and penalty is set aside and the charge is dismissed
> 3. The deposit is ordered to be returned to the appellant.

4. On 15 June 2015 after a plea of guilty the stewards had found the appellant had breached AHR 252C and imposed a period of disqualification of 18 months. 252C makes it an offence for a licensed person to carry on a licensed activity or duties or in the conduct of a race to be, in the opinion of the stewards, under the influence of alcohol or other drugs. The drugs in question were cocaine and amphetamines.

5. On 18 June 2015 the appellant lodged an appeal and stay application. The appellant now denied that he had breached the rule. The appellant raised new evidence. In support of the stay application the appellant maintained, and he has throughout the appeal, that there was no evidence upon which he could be found guilty. On 9 November 2015 a stay order was made.

6. Directions were given for the preparation of evidence and a date fixed hearing in May 2016. That was vacated. A directions hearing was heard in August 2016. The matter was fixed hearing on 18 November 2016 and the orders set out above upholding the appeal were made.

7. On 18 November 2016 directions were given in respect of submissions on a preliminary point of interpretation of clause 19 of the Racing Appeals Tribunal Regulation 2015 (“the regulation”)- the costs provision. There was a delay in the submissions. An interlocutory decision was given on 9 March 2017 and is referred to below. Directions then issued for the filing of submissions on the costs application. Those submissions were delayed.

8. On 31 July 27 the appellant lodged a 32 page 98 paragraph submission with 170 pages of annexures. On 3 October 2017 the respondent lodged a 20 page 75 paragraph submission with 148 pages of annexures. On 1 November 2017 the appellant lodged a reply of 4 pages with 28 paragraphs and 109 pages of annexures. In addition the appellant lodged a 26 page critique of the respondent’s submission.

COSTS POWER

9. Clause 19 0f the regulation is as follows:

> “**19 Costs**

(1) On determining an appeal, the Tribunal may order that a party to the appeal pay all or a specified part of the costs of another party to the appeal (including the payment of costs in respect of the hearing or inquiry by the Appeal Panel, Racing NSW, GRNSW, HRNSW, a racing association, a greyhound racing club or a harness racing club in respect of the decision appealed against).

(2) The Tribunal must not make an order under subclause (1) unless the Tribunal decides:

(a) the appeal is vexatious or frivolous, or

(b) a party has caused unreasonable delay in the conduct of the appeal, or

(c) a party has caused another party unreasonable cost by the manner in which the appeal has been conducted.

(3) On service on a party to an appeal of an order for the payment of costs, the amount of costs specified in the order:

(a) is payable by the party to the person specified in the order as the person to whom the costs are to be paid, and

(b) may be recovered as a debt in a court of competent jurisdiction. "

THE APPLICATION

10. The appellant seeks an order for the whole of his costs of the appeal, alternatively an order for his costs from various dates and further and alternatively for particular costs caused by the respondent's delay in producing documents it had been requested and directed to produce.

INTERLOCUTORY DECISION OF 9 MARCH 2017

11. In this decision the Tribunal ruled that the appellant could not rely on an argument of frivolous or vexatious, under 19(2)(a), as against the respondent. Other statements of principle were made**.**

JURISDICTION

12. The appeal having been allowed it is therefore determined and clause 19 enlivened. An application has been made. The power to order and the making of an order in favour of the appellant is sought. The appellant must overcome the prohibition in 19(2).

THE SUBMISSIONS

GUIDING PRINCIPLES

13. The appellant relies upon McCarthy v NSW Racing Appeals Tribunal [2014] NSWC 798

"……the power conferred by reg 19 should be exercised on the basis that it is just and reasonable that the successful party should be reimbursed for costs incurred, in the absence of grounds connected with the charge or the

conduct of the proceedings which make it unjust or unreasonable that there should be such reimbursement" (*Ohn* at 79) (see [51]). In such cases a successful party does not have an entitlement or right to a costs order, but they do have a reasonable expectation that they will not be deprived of their costs without proper cause (*Latoudis* at 568 per McHugh J). “

14. Therefore it is said that as the discretion is enlivened the power to award is undefined, subject to relevant principle, but governed by 19(2). In particular the power is exercised to compensate the successful party not punish the unsuccessful.

15. There has been an exchange of submissions on the applicability of McCarthy as it looked at the now replaced clause 19 in the 2010 regulation. It is not necessary to examine this issue as the principles set out in the previous paragraph outline the test.

FRIVOLOUS OR VEXATIOUS

16. There is argument on the relevance of frivolous and vexatious. The appellant says it is relevant post the interlocutory decision on the (2)(b) and (c) tests as a possible factual ground. The respondent says there is no separate test and only unreasonable, as fully set out, is to be considered.

17. The Tribunal is satisfied, as it said in the interlocutory decision, that in finding unreasonable actions, they could be said to be based upon a factual finding of frivolous or vexatious conduct by a respondent. It does not raise another test but is a question of fact on the only test. The parties are in agreement as to the meaning of the words frivolous and vexatious.

18. On frivolous and vexatious as supporting unreasonableness the meanings are submitted to be:

bound to fail

unarguable and hopeless

irresponsible pursuit of litigation

productive of serious and unjustifiable trouble and harassment

UNREASONABLENESS

19. Next is the meaning of unreasonableness. The appellant says a broad range of conduct is embraced and gives examples, but says the categories are not closed:

known there was no possibility of success

undue prolongation by groundless contentions

continuing only to pressure an opponent to settle

wilful disregard of known facts or clear law

persisting in allegations of serious misconduct that should not have been made or continued

imprudent refusal of an offer of compromise

20. Fairly the appellant recognises that where there has not been a hearing there should not be a hypothetical trial on the costs issue. Reliance is placed on One.Tel Ltd v Commissioner of Taxation (2000) 101 FCR 548 at [5]:

> "It is accepted that, in a case which terminates before there has been a hearing, the Court should not resolve the issue of costs by engaging in something in the nature of a hypothetical trial: *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194 at 20I; *Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 at 624. But this does not mean that the Court can never make an order for costs. Often, it will be unable to do so; but in other cases an examination of the reasonableness of the conduct of the parties, respectively, may provide the basis of an order ... In my opinion, it is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event or settlement so removes or modifies the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs to the successful party.
>
> And later where Burchett J held (at [7]):
> "...the present matter involves a clear winner. The applicants, by their proceeding, sought to challenge the validity of certain notices, and to have them set aside. The respondent, after initially defending those notices, encountered at least an evidentiary difficulty, and acknowledged that they were to be set aside. That means that the applicants have succeeded ... "

21. It said the facts here are those in One.Tel and that there the conduct was found to be unreasonable and an order for costs made.

22. The respondent says the appellant's construction is too broad and fails to address the tests properly. That is each of the words in (b) and (c) have to be considered not just the word unreasonable. That is it has to be established that either the respondent falls within each of the words"caused unreasonable delay in the conduct of the appeal" or "has caused the appellant unreasonable cost by the manner in which the appeal has been conducted".

MODEL LITIGANT

23. The appellant submits the respondent must conduct itself as a model litigant as it is a public body created by statute for public purposes. The duties of a model litigant are set out, that is act fairly for the public good. Therefore it should give active assistance, not cause unnecessary delay, avoid litigation if possible and not resist appropriate relief.

24. The respondent denies it is a model litigant or that it is subject to a higher duty than that required by clause 19.

25. It is not necessary to determine if the respondent is a model litigant. It is a statutory body with protective functions. It has to act fairly to a standard of fair play. It must not infringe clause 19(2)(b) and (c) principles.

APPELLANT'S ENTITLEMENT TO COSTS

26. The respondent submits that the appellant has not satisfied a right to costs because of various issues about a solicitor's entitlement to recover costs. Challenge is taken to the tax invoice. It is said tit does not comply with the costs agreement rules. It is said there is no evidence of payment.

27. The appellant replies with a series of facts to justify the claim.

28. The Tribunal is satisfied that it is not the forum for determining these issues. It only has to be satisfied that there is a claim for costs and if an order is to be made then how much. It is so satisfied that there is a claim and notes quantum has been specified to an extent that an order can be made.

29. The respondent submits that it was not without a prospect of success. It says its case cannot be classified as;

    not fairly arguable

    was not so lacking in merit as not to be arguable

30. It is said that there were reasonable grounds for holding its opinion objectively

31. The respondent says that the issue does not require that the respondent had to accept the appellant's case as the preferable one or that it was more likely to succeed.

THE FACTUAL ISSUES

THE APPELLANT'S CASE

32. The gravamen of the appellant's case is that the respondent never had a case against him, should have conceded that from the outset and has delayed and put the appellant to expenses he should not have incurred. The need for the respondent to prove a case in a de novo hearing is correctly advanced. The need for the respondent to continuously consider and reconsider its case is correctly advanced, especially because of the seriousness of the allegations.

33. It is submitted that there was no proper basis for the stewards to form an opinion he was under the influence of drugs. It is correctly submitted that the plea of guilty he gave to the stewards can be ignored because it was to a different case than that which the stewards found against him, That is it was guilty to having the drugs in his urine, not to being under the influence.

34. It is said that there was no quantitation of levels of drugs only an estimate and the proponent was not qualified to so express. The limitations the proponent advanced were said to be ignored. Then the appellant in support of the appeal retained an expert who opined that the evidence did not support the charge as impairment could not be determined on that estimate of quantification. The issue being that the proponent advanced an estimate of very high levels at quantification and the finding of under the influence depended on those high levels being found.

35. In October 2015 the appellant raised these arguments and invited the respondent to concede. The grounds of appeal identified the failures.

36. The respondent then retained its own expert in November 2015. From that point cocaine was ruled out but amphetamine remained a cause based upon the proponents estimate and other factors. There was hesitation in the expert opinion for several reasons.

37. It is therefore submitted that the respondent should then have conceded as the proponent's evidence would not be accepted in its then form. Again a detailed challenge to the respondent's case was served. At the same time a range of

documents said to support the respondent's case were called for. There was then a lengthy exchange of correspondence on the provision of, or non-provision, of that material.

38. The appellant served a report in reply in April 2016. The appellant's expert fell in just prior to the May 2106 hearing and the date was vacated solely because of that fact The Tribunal rejects the appellant's submissions that the late service of material was a cause of the vacation of the date.

39. The debate about service of documents continued. A directions hearing was heard in August 2016 and timetables for service given. The respondent conceded the proponent had gone beyond his expertise. Again the appellant pressed for a withdrawal.

40. The proponent became unavailable and another witness was provided on the quantification issue in August 2106. Based on that report the quantification could not be established at a high level that would support the expert opinion of impairment .

41. The respondent now raised with the appellant that the wrong charge had been laid. The respondent sought to resolve the matter by suggestions of compromise on the basis of a plea by the appellant, then conceded that the possible alternate charge was not available. It was suggested the conviction would be withdrawn and there be no order for costs.

42. On 4 October the respondent conceded for the first time that it would not contest the appeal but still opposed costs.

43. In the end the appeal resolved as set out in paragraph 3 above.

44. Accordingly the appellant argues that at various documented times the respondent should have conceded because it could not succeed. Accordingly the respondent is said to have unreasonably delayed the resolution of the appeal and put the respondent to unreasonable costs.

45. The submissions identify each of those stages and the quantum up until each of those points.

THE RESPONDENT'S CASE

46. The respondent strongly argues that delays fall at the feet of the appellant.

47. It refers to the several times on which the Tribunal called on the appellant to file documents and advise availability for a hearing, certainly between June and October 2105. It is said the respondent diligently attended to the timetable imposed on it.

48. The respondent submits that the appellant ignores the fact that the respondent had expert evidence to support its case and accordingly it was not bound to fail.

49. There is much time taken in the submissions on the provision, or lack of it, of documents .The Tribunal determines that fault does not lie with either party on those issues and will not dissect the detailed evidence and lengthy arguments that touch on it. Each has an explanation that they respectively think justifies their own position which may have been misplaced or genuinely believed to be correct.

50. In any event the issue on service of documents by the respondent does not arise at a level of unreasonableness.

51. On the issue of delay in the costs application itself the appellant has no case against the respondent. All of the relevant delays fall at the feet of the appellant.

52. On the issue of its case the respondent says that it had a fairly arguable view and it was based on the evidence it had.

53. In summary it is submitted by the respondent that all of the following are relevant. That the appellant had drugs in him and the allegations were not baseless. The Tribunal finds the submission he pleaded guilty is misplaced. It is submitted the stewards had not dealt with this charge before. It is submitted the expert evidence supported the respondent's case and there were possible other effects that might be considered. The appellant's statements about his drug use were unlikely. Again the expert's strong opinion of under the influence is relied upon and not just on the issue of quantification. That is, there were other reasons why the respondent might establish under the influence, eg symptoms or effects or psychoactive effects. There was therefore a live dispute between experts. There were live issues to be tested at a hearing. There was at least a prima facie case available against the appellant. The evidence was capable of being used and issues of accreditation were not conceded as relevant.

APPELLANT'S REPLY

54. In addition to the issues already determined the reply suggests the respondent is making irrelevant complaints about the appellant's conduct, is trying to re-litigate a case it did not run and tried to succeed when its case had serious defects.

55. The appellant submits the respondent put off dealing with the substance of the case despite requests from the appellant and was therefore unreasonable because its case was paper thin.

CONCLUSION

56. As the appellant said in reply the decisions on unreasonableness involves matters of impression and context.

57. The Tribunal finds that the appellant has been driven by a very strong belief that its criticisms of the respondent's case are correct and its case the only one tenable. There is no doubt that from the outset of the appeal that has been conveyed to the respondent. That opinion has been expressed on numerous occasions.

58. The problem with that opinion however is that it ignores, or gives insufficient weight, to the possible opinions available to the respondent.

59. The Tribunal must not engage in a litigation of the issues that might have arisen if the case had gone to a hearing. It must limit itself to the facts established in the costs application and consider the submissions made and the applicable law.

60. Therefore it would be improper to simply reject the evidence established by the respondent and the submissions as to the reasons it continued to oppose the appeal but simply have regard to the fact that at the end of the process it signed by consent orders that the appeal be allowed and the conviction set aside.

61. The respondent satisfies the Tribunal that it had proper reasons to anticipate that its expert might be accepted on the properly available evidence and that the appeal might fail. As set out above there were facts and opinions that were admissible and capable of acceptance.

62. It is not a factual matter of a party with no case continuing to oppose, or of a party ignoring the expressed failures in its case as identified by its opponent.

63. A separate issue arises about the circumstances after the quantification argument was not available about August 2016 when the respondent raised a possible different charge and sought a plea. Other compromises were raised.

64. Having regard to the short space of time during which these “settlement” issues were discussed as compared to the overall time taken to reach that stage and the fact that this was a typical manner in which litigation might be finalised , the Tribunal finds no criticism of the respondent’s conduct on this issue.

65. Therefore the finding is that the appellant has not established that the respondent did not have a fairly arguable case or that its case was so lacking in merit as not to be arguable. The appellant does not establish that the respondent was bound to fail, had an unarguable and hopeless case, was irresponsible in pursuit of litigation or was productive of serious and unjustifiable trouble and harassment of the appellant.

66. To deal with the appellant’s specific argument, but noting the respondent says it is irrelevant, the Tribunal, accordingly as a particular of unreasonableness, finds the appellant does not establish that the respondent acted frivolously or vexatiously.

67. On the test of unreasonableness the Tribunal finds that the appellant fails to establish that the respondent knew there was no possibility of success, unduly prolongated by groundless contentions, continued only to pressure the appellant to settle, wilfully disregarded known facts or clear law, persisted in allegations of serious misconduct that should not have been made or continued, imprudently refused an offer of compromise.

68. The Tribunal finds that the appellant has failed to establish unreasonable delay in the conduct of the appeal by the respondent.

69. The Tribunal finds that the appellant has failed to establish the respondent caused the appellant unreasonable cost by the manner in which the appeal was conducted by the respondent.

70. Therefore the prohibition in making an order of costs, under 19(1), is enlivened because the appellant has failed to overcome the prohibition in 19(2)(a) and (b).

71. The appellant does not meet the precondition to the exercise of the discretion to make a costs order.

72. Therefore the Tribunal does not have to then consider under 19(1) whether the appellant establishes it is just and reasonable that he should be reimbursed for his costs on the basis he has a reasonable expectation that he should.

QUANTUM

73. The Tribunal would only have to consider the issue of quantum if the appellant had established that an order should be made in his favour. He has not done so.

74. The Tribunal does not therefore assess quantum.

DECISION

75. The application for costs made by the appellant on 11 November 2016 is dismissed.