RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

4 JULY 2022

APPELLANTS JADE MURRAY, DAWN BARNETT and ANNETTE YARNOLD

RESPONDENT GWIC

GRR14(1)(c)

CLAUSE 15 RACING APPEALS TRIBUNAL REGULATION 2015

APPLICATIONS FOR LEAVE TO WITHDRAW APPEALS ON CONDITION THAT THE RESPONDENT PAY THE APPELLANTS' COSTS ON AN INDEMNITY BASIS

DECISION:

1. **Applications for a condition as to costs dismissed**
2. **Orders made as to further directions on withdrawal application and appeal deposit**

INTRODUCTION

1. The appellants Jade Murray, Dawn Barnett and Annette Yarnold make application to the Tribunal pursuant to clause 15 of the Racing Appeals Tribunal Regulation 2015 for leave to be granted to withdraw their appeals on condition that the respondent pay their costs on an indemnity basis.

2. The respondent opposes the imposition of conditions as to its paying the appellants' costs on an indemnity basis.

3. Neither party made substantial submissions on the issue of the granting of leave to withdraw the appeals if the condition as to costs is not imposed.

4. By agreement of the parties, the application has been dealt with on written submissions. The appellants submitted on 3 May 2022, the respondent on 31 May 2022, and the appellants replied on 1 June 2022

LEGISLATION

5. Section 15A of the *Racing Appeals Tribunal Act 1983* provides for the right of each of the appellants to appeal to the Tribunal.

6. Section 17A of the Act provides for orders that may be made by the Tribunal on determination of the appeal and they are, in summary form, dismiss the appeal, confirm the decision or vary it and "make such other order in relation to the disposal of the appeal as the Tribunal thinks fit."

7. Clause 15 of the Racing Appeals Tribunal Regulation 2015 provides:

> "An appeal duly lodged may not be withdrawn except with the leave of the Tribunal. In granting such leave, the Tribunal may impose such conditions as to the payment of costs or otherwise as it thinks fit."

8. Clause 19 of the Regulation provides, in summary terms, that on determining an appeal, the Tribunal may order a party to the appeal to pay costs of another party, but must not make such an order unless it decides the appeal is vexatious or frivolous, a party has caused unreasonable delay in the conduct of the appeal, or a party has caused another party unreasonable cost by the manner in which the appeal has been conducted.

RULES

9. The appeals relate to the suspension of greyhounds owned or trained by the appellants and the respondent exercised its power under GRR14(1)(c), which provides:

> "prohibit any greyhound from competing in any event if, in its opinion, that action is necessary for the proper control and regulation of greyhound racing."

FACTS

10. In support of their applications, the appellants rely upon documents filed in the appeal and in the submission for the appellants set out documents numbered (a) to (m). The key parts are the grounds of appeal, various reports, a paper, and submissions.

11. On 2 August 2021, the respondent suspended the greyhounds of Murray and Barnett, and at or about that time the greyhound of Yarnold. That was exercising power under GRR14(1)(c) and, in very summary terms, on the basis that their subject greyhounds had been subject to pin-firing contrary to s21A of the *Prevention of Cruelty to Animals Act 1979*.

12. On 10 August 2021, the appellants appealed to the Tribunal. On 24 September 2021, the Tribunal stayed the decision so far as it affected Barnett. And on 28 September 2021, stayed the decision so far as it affected the greyhound of Yarnold, the Tribunal having refused an initial stay application on 12 August 2021.

13. In very summary terms, the issue to be dealt with on appeal was the question whether the greyhounds had been subject to pin-firing contrary to s21A, such that it was proper that Rule 14(1)(c) should be implemented.

14. Each party provided evidence and expert reports to support their respective cases.

15. On 31 January 2022, the respondent enacted a new Local Rule 37A which, and it is not in dispute in the proceedings, when read in conjunction with the new definition of firing, was sufficient to cover the actions of the veterinarians who treated each of the greyhounds of the appellants, such that the greyhounds would be subject to the new local rule and therefore liable to suspension.

16. It is the position of the appellants, therefore, that the enactment of the new local rule has made the continuation of their appeals otiose.

SUBMISSIONS

Appellants

17. The submission for the appellants commences by setting out the matters summarised above and then turns to the applicable law.

18. It is said that the regulation which provides for power to award costs "as it thinks fit" gives rise to an unfettered discretion and that it is open to the Tribunal to make an order on an indemnity basis.

19. The submission then deals with the factual background in considerable detail. The Tribunal only summarises it.

20. Each of the greyhounds was lame and subject to what the appellants described as a Thermal Capsular Shrinkage Procedure which enabled the greyhounds to return to racing. It is said this process is designed to treat lameness by the application of heat. A result of the treatment is hypopigmentation and alopecia at the incision site.

21. A regulatory vet on inspection determined that the skin site was an indication of pin-firing. The greyhounds were stood down, an inquiry was held and the suspension order of the greyhounds made.

22. It is the case for the appellants to be dealt with in the appeal that the procedure was not pin-firing. Various expert reports were called for that purpose. An explanation for the hypopigmentation and alopecia was given, which was said to be not consistent with pin-firing.

23. The appellants rely upon concessions made by a veterinarian for the respondent, and it is apparent from that veterinarian's report that there are some qualifications in belief. Accordingly, the respondent obtained a report from another expert who performed an exercise of statutory interpretation to come to the conclusion that s 21A had been breached.

24. The submission then continues on dealing with the introduction of LR37A and the rendering otiose of the appeals and thus the making of this application.

25. The submission strongly argues that the appellants had arguable cases on appeal and the submission canvasses various points contained in the expert reports to support this submission.

26. In particular, the submission deals with the failure of the respondent's evidence to actively address issues of welfare by reason of the efficacy of the procedures actually used.

27. The submission continues that if a purposive approach was adopted by the Tribunal in determining the matter, that a conclusion will still have been reached that it was not pin-firing.

28. The submission continues that there is a power imbalance between the parties and that the making of the local rule for unexplained reasons has shut them out of this appeal process. The submission continues that the

only reason for the new local rule was to overcome the possibility of success on this appeal. Otherwise it is submitted the local rule would have no purpose.

29. Therefore, it is submitted that an inference can be drawn that the only reason a local rule was introduced by the respondent was that it had a belief it would not succeed on the appeal.

30. Finally, it is submitted that the appellants would not have brought these proceedings if the local rule had been in force.

31. It is then conceded that the Tribunal does not have to decide the ultimate issue if the appellant proceeded, that is, whether pin-firing had occurred or not.

32. Therefore, it is said that the appellants have thrown costs away because of the circumstances in which the new local rule has been introduced after the parties had completed their evidence and were otherwise ready for a hearing date.

33. Therefore, it is said that it is just and appropriate that the appellants be granted leave to withdraw their appeals on conditions that they receive costs on an indemnity basis.

Respondent

34. The respondent does not join issue with the majority of the submissions made by the appellants.

35. It is the position of the respondent that the powers in clause 15 are not engaged.

36. The respondent says, and there is no dispute about this, that clause 19 which otherwise deals with costs has no application to these proceedings.

37. It is said that the Tribunal does not have power to make the costs orders.

38. That is said to arise because there is no empowerment to make the order against a putative respondent and an order can only be made against an appellant as a condition of leave being granted. That is said to arise because the appellants are the parties seeking leave.

39. The submission concluded by stating “Should the Tribunal require any further submissions by the Respondent, it is requested this be done via audio visual software”. No submission was made that should the Tribunal not find the limited submission made in favour of the respondent that leave

was sought to address the remainder of the appellant's submission. No such request was made after the appellant's reply submission identifying that the respondent did not submit on the facts.

Appellants in reply

40. The appellants rely upon the fact that the respondent has not challenged the majority of the appellants' submissions and in particular, on an arguable case, the rendering of the appeal as otiose, the strong inference that the respondent would not be successful on the appeal and therefore made the new local rule, the imbalance between the parties and the fact that the appellants would not have appealed if the local rule had been in force.

41. The submission then sets out substantial legal principles that are said to arise from a reading of clause 15 and case law on comparable provisions.

42. It is said that the respondent's submission does not explain why the cost powers should be confined in the way the respondent has submitted and that that would require an imputing of words into the text.

43. The submission continues that there is nothing novel about a discontinuing party seeking costs, and in support of that submission, case law is set out.

44. The Tribunal accepts the submissions for the appellants on the interpretation of clause 15 and the principles that flow from the case law cited and therefore will not analyse the submissions, as they have not been the subject of contrary submissions by the respondent (acknowledging that no further response submission was sought from respondent) and they are, in any event, correct principles. They will be summarised below.

45. The submission finalised by suggesting impliedly that the appellants may well continue with their appeal if this condition is not imposed. This is particularly so as the respondent has not challenged the submissions for the appellants and it is an exceptional case.

DISCUSSION

46. As stated, the Tribunal accepts the submissions for the appellants as to the legal principles to be applied to this application and clause 15 generally.

47. The Tribunal determines it has jurisdiction to consider the application for the imposition of a condition as to costs as a condition of the withdrawal of the appeals.

48. Clause 15 is silent as to by whom and to what extent costs are able to be ordered.

49. Clause 15 is silent on other matters to be considered.

50. It is therefore determined that the application requires the exercise of a judicial discretion which must not be exercised for arbitrary or capricious purposes.

51. Therefore, there is an unconfined and unfettered discretion, subject only to taking into account the context of the rule in respect of the Racing Appeals Tribunal Act, the Regulation, the Greyhound Racing Rules, the Greyhound Racing Act and the necessary facts.

52. The Tribunal can consider the behaviour of parties and the reason for the withdrawal of the appeals by this application as relevant matters.

53. There is no presumption in favour of either party.

54. As set out above, the Tribunal accepts the appellants' quoted case law and precedents in other jurisdictions which have considered other legislation and rules and applicable facts to those cases, such that a discontinuing party can receive costs.

55. The Tribunal does not accept the respondent's submissions as to how clause 15 should be interpreted.

56. Specifically, the Tribunal does not accept the respondent's submissions that there is no power to make an order against a putative respondent to an application for leave to withdraw an appeal. The Tribunal does not accept that the Tribunal can only make an order for costs against the appellants.

57. It is also noted that as part of the unfettered discretion, the fact that costs are to be compensatory and not punitive is to be applied.

58. As set out above, the parties do not submit that the clause 19 cost provision is applicable and the Tribunal agrees. The determination of the subject application does not lead to a determination of the appeal as it is meant to be determined under s 17A of the Act.

59. Accordingly, the Tribunal does not analyse whether s 17A(1)(c) might otherwise have been activated on a withdrawal application because it might be considered to fall within the words "make such other order in relation to the disposal of the appeal as the Tribunal thinks fit."

60. The parties have not referred the Tribunal to any case law on clause 15, and to the Tribunal's knowledge there is none. However, the Tribunal notes that clause 19 was the subject of a determination by Justice Beech-Jones in

the Supreme Court of New South Wales in McCarthy v Racing Appeals Tribunal [2014] NSWSC 798.

61. There, His Honour determined that an appellant who has succeeded on an appeal was entitled to his costs under clause 19 because he had a reasonable expectation that he would receive costs and that expectation could not be defeated in the absence of grounds connected with the conduct of the proceedings which would make it unjust or unreasonable that the award be made. Further, that such an expectation will not be defeated by a mere finding that the respondent acted reasonably in its defence and conduct of the appeal.

62. Obviously, McCarthy can be distinguished because it was dealing with a different provision and a case where an appeal had been concluded and the appellant was successful.

63. However, in determining an issue of materiality in that appeal, which was said to arise because there the respondent had submitted there was no determination of the appeal on the merits, he rejected that issue. However, at 71 he did refer to the case of Lai Qin, which is Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin [1997] HCA 6; 186 CLR 622. At 624 to 625, Justice McHugh said:

> "In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.
> In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. In administrative law matters, for example, it may appear that the defendant has acted unreasonably in exercising or refusing to exercise a power and that the plaintiff had no reasonable alternative but to commence a litigation.
> Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. ... But such

> cases are likely to be rare.
> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases."

64. His Honour noted in McCarthy at 75:

> "…In Lai Qin the party seeking costs had discontinued after the respondent Minister had advised her that he proposed to issue her visa by the exercise of a different power to that which was the subject of challenge in the proceedings (at 623)…"

65. The Tribunal notes that in this matter there has been no hearing on the merits and neither party has been successful in the substantive appeal. Therefore, the Tribunal is deprived of the factors of success that usually assist in determining a costs order.

66. In particular in this case, each party's arguable case remains intact and undetermined.

67. The Tribunal declines to engage in the exercise of the determination whether the appellants' appeal would have been successful or not. The facts going to the expert reports and the conclusions to be drawn from them were not the subject of submissions by the respondent on this application. Therefore, the appellants say that the Tribunal should accept the appellants' submissions going to the weight of their case.

68. However, the Tribunal is of the opinion that this application is not the vehicle to analyse, criticise and make conclusions on whether Rule 14(1)(c) should have been used and whether the greyhounds should have been suspended.

69. The Tribunal accepts that the appeals legitimately raised arguable issues to justify the appellants' continuation of the appeals and the reasons why such continuation became otiose.

70. The Tribunal, unaided by the respondent's submissions, notes that the respondent did have detailed experts' reports, although qualified in cases, and were such that it may have been able to rely on those in its belief that it could defeat the appellants' case.

71. That is further reinforcement for the conclusion that on the face of the record available to the Tribunal in these applications, each party had an arguable case.

72. The Tribunal is not able to conclude that either party was almost certain to have succeeded.

73. The facts are silent on the background to the respondent's introduction of the new Local Rule 37A. Suffice it to say that the new local rule clearly did defeat the appellants' case and made the appeals otiose.

74. The Tribunal is not able to conclude that the respondent has acted unreasonably in introducing the local rule, or in its conduct of this case at any time.

75. However, the fact that the appellants had arguable cases is but one factor for consideration in the unfettered discretion.

76. The fact that there may be a power imbalance, and this was not otherwise the subject of evidence, but if it is assumed to be a correct submission, of itself is not determinative of a factor in this decision. That is because there is no suggestion on the evidence that any power imbalance has been used by the respondent at all, let alone unfairly, or let alone creating unnecessary costs in the appellants or delay in the conduct of the proceedings. That is not to impose the clause 19 tests in this unfettered discretion, but to see what, if anything, might arise from the power imbalance which is not otherwise expressly set out by the appellants.

77. The fact that the appellants submit that the new local rule does not achieve any other outcome than what has been sought to be achieved by the respondent in this appeal was not addressed by the respondent. It is said to be a factor because if the Commission was successful in the appeal, and believed it could be, the new local rule would have no work to do. The strong inference is that the respondent did not believe it could succeed on the appeal.

78. However, there was no evidence about these matters and there are other possible explanations, such as, and this is not a submission of the parties, but speculation, it was felt it would be more financially expeditious to put the appeals to one side by introducing the local rule.

79. The Tribunal is not persuaded that the fact that the appellants would not have brought these proceedings if the local rule had been in place has any weight in this application. It is self-evident. Looking retrospectively does not add weight to that fact.

80. The Tribunal has determined that having a mere arguable case is not sufficient to establish that the judicial unfettered discretion should be exercised in favour of the appellants. That particularly being the case where it is not necessary to determine whether pin-firing had occurred or not.

81. The various other submissions for the appellants do not, when considered individually or collectively, or when added to the earlier considered factors, persuade the Tribunal to exercise its discretion in favour of the condition ordering costs. This finding is made absent any submissions by the respondent on these and other issues. That is, for example, the fact the appeals have been rendered otiose, that was an intended outcome introducing the new local rule, costs have been thrown away and the evidence had been completed.

82. The Tribunal does not determine it is just and appropriate that an order for costs be made in the exercise of an unfettered judicial discretion.

83. Accordingly, the appellants fail to establish that the unfettered judicial discretion is enlivened by any action or non-action of the respondent or by the reasons that the appellants have determined to seek to withdraw their appeals.

84. The appellants fail to establish that they should be compensated for their costs.

85. Accordingly, it is not necessary to determine whether any order for costs should be on an indemnity basis.

ORDERS

86. The costs application for a condition as a component of the application under clause 15 is dismissed.

87. The withdrawal application of the appellants appears to be conditional on a costs order being made.

88. Therefore, the Tribunal defers further consideration of the applications to withdraw the appeals for seven days from the date upon which the appellants receive a copy of these written reasons for decision.

89. The appellants are to advise the respondent and the Tribunal after seven days of receipt of these written reasons for decision whether they wish the Tribunal to give further consideration to the application to withdraw the appeals, and if so, whether further submissions are to be made, and if further submissions are to be made, a suggested timetable.

90. In addition, if the appeals are to be withdrawn the appellants should make any applications in respect of the appeal deposits with that notification.