Ayers Rock Resort Corp v VIP Travel Aust P/L [2001] NTSC 104

PARTIES:	AYERS ROCK RESORT CORPORATION v VIP TRAVEL AUSTRALIA PTY LTD (Formerly known as BRIGHT CAST PTY LTD) (ACN 009 635 385)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	72 of 1994 (9408697)
DELIVERED:	23 November 2001
HEARING DATES:	15 June 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPLICATION FOR COSTS

Application for costs of substantive action – consequent upon order that plaintiff's claim be dismissed – amendments to legislation rendered plaintiff's claim futile – whether costs follow the event – whether defendant did nothing to incur further costs – defendant successful in substantive action and entitled to costs

Application for costs of interlocutory application – no reasons as to why Court should depart from usual order

Yulara Tourist Village (Management) Act 1984 (NT), s 19; *Ayers Rock Resort Corporation Act 1992* (NT), s 5 and s 12; *Ayers Rock Resort (Sale) Act 1997* (NT); *Statute Law Revision Act 2001* (NT); *Protection of Trading Interests Act 1980* (UK), s 5(1)

Trade Practices Commission v Australian Meat Holdings & Ors [No 2] [1988] ATPR 49,642 (¶40-893), distinguished

REPRESENTATION:

Counsel:

Plaintiff:	G Wilson
Defendant:	C Yuen

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Ward Keller

Judgment category classification:	C
Judgment ID Number:	tho200128
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ayers Rock Resort Corp v VIP Travel Australia Pty Ltd [2001] NTSC 104
No. 72 of 1994 (9408697)

BETWEEN:

AYERS ROCK RESORT CORPORATION
Plaintiff

AND:

VIP TRAVEL AUSTRALIA PTY LTD (Formerly known as BRIGHT CAST PTY LTD) (ACN 009 635 385)
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 November 2001)

[1] This is an application by the defendant for costs, commenced by summons dated 1 June 2001. The defendant sought the following orders:

> "1. The Plaintiff's claim be struck out for want of prosecution and judgment entered for the Defendant:
>
> 2. Costs of the action to the Defendant including the costs of the interlocutory proceedings by Summons dated 17 June 1996 all such costs to be taxed within 21 days if not agreed;
>
> 3. The Plaintiff to apply for taxation of any previous interlocutory costs orders in its favour within 21 days unless agreed in the interim with the Defendant."

[2] This application was heard on 15 June 2001. On that date I made the following orders:

> "1. By consent, the plaintiff pay the defendant's costs of the interlocutory proceedings commenced by summons dated 17 June 1996, those costs to be agreed or taxed.
>
> 2. By consent, the plaintiff's claim is dismissed for want of prosecution."

[3] Mr Yuen, counsel for the defendant, then sought an order for costs against the plaintiff consequent upon the order that the plaintiff's claim be dismissed. The plaintiff's substantial claim was an application on originating motion dated 5 May 1994 seeking an injunction restraining the defendant from carrying on the business at Yulara in respect of certain activities.

[4] The plaintiff subsequently filed a statement of claim dated 26 May 1994 seeking a similar injunction.

[5] The defendant filed a defence to the statement of defence on 16 August 1994. Since that time there have been numerous interlocutory proceedings between the parties which for the purpose of these reasons for judgment do not need to be enumerated.

[6] The two outstanding issues which this Court was asked to decide arising from the summons filed 1 June 2001 and heard on 15 June 2001 are as follows:

1) The defendant's claim for costs against the plaintiff on the substantive action consequent upon the order made by consent that the plaintiff's claim be dismissed.

2) An order for costs in favour of the defendant with respect to interlocutory proceedings before Kearney J on 24 June 1994.

[7] Ms Wilson, counsel for the plaintiff, opposed both applications for costs.

[8] With respect to the costs of the substantive action the plaintiff's essential argument is that there should be no order for costs because various amendments to the legislation rendered the plaintiff's action futile and it would be unfair to penalise the plaintiff by making an order for costs against the plaintiff.

[9] The plaintiff commenced proceedings pursuant to s 19 of the Yulara Tourist Village (Management) Act 1984 (NT), it being a corporation established by the Ayers Rock Resort Corporation Act 1992 (NT) which was amended in 1997. On 8 December 1997, the Ayers Rock Resort (Sale) Act 1997 (NT) came into force. The Ayers Rock Resort (Sale) Act repealed sections 5 to 12 of the Ayers Rock Resort Corporation Act and substantially changed the plaintiff's functions. This had an affect on these proceedings, as the plaintiff was constrained by the legislation which created it.

[10] On 22 March 2001, the Statute Law Revision Act 2001 (NT) repealed the Ayers Rock Resort Corporation Act, the Ayers Rock Resort (Sale) Act and the Yulara Tourist Village (Management) Act.

[11] The plaintiff argues that the circumstances of this case are such that this Court should not make the usual order that costs follow the event. Ms Wilson on behalf of the plaintiff advanced a number of reasons in support of this submission.

[12] Ms Wilson, on behalf of the plaintiff, referred to the decision of *Trade Practices Commission v Australian Meat Holdings Pty Ltd & Ors [No 2]* [1988] ATPR 49,642 (¶40-893) as authority for her submission that when during the course of the litigation there has been a change to the law then it is not always appropriate to order that costs follow the event. Ms Wilson referred to the fact that the plaintiff had been awarded costs in respect of certain interlocutory proceedings and the defendant awarded costs in other interlocutory proceedings. It is the submission on behalf of the plaintiff that the parties are "all square" on costs in the sense that this term was used in the aforementioned authority referred to above.

[13] I do not accept this submission. Wilcox J in *Trade Practices Commission v Australian Meat Holdings Pty Ltd & Ors [No. 2]* (supra) at 49,648:

> "…. Where a party fails in litigation by reason of some event which occurs during the course of the litigation, particularly where it involves a change in the relevant law, it may not be appropriate simply to apply the 'loser pays' principle."

[14] However, in the authority referred to, the applicant seeking costs had persisted with a course of action after being made aware of the futility of proceeding further with the action against the respondent; because of the order obtained by the respondent under s 5(1) of the Protection of Trading Interests Act 1980 (UK) on 23 March 1988 read with the resolutions of the boards of the three Borthwick respondents of 18 March 1998 "which effectively destroyed any prospects of the enforcement of any order which this Court might make" Wilcox J at 49,648.

[15] Having been advised of the situation on 23 March 1988, the applicant proceeded with the hearing of the action Wilcox J stated they were "all square on costs by the time of the completion of the evidence led on behalf of the respondent on 25 March 1988". Wilcox J made no order for costs between the applicant and the Borthwick respondent for anything done up to the adjournment of the hearing on Friday 25 March 1988.

[16] In relation to the subsequent hearing dates, Wilcox J made an order that the applicant pay a proportion of the respondent's costs incurred during the hearing on and after 28 March 1988.

[17] The situation in the matter before this Court is distinguishable on its own facts. In the action before this Court, the defendant has not done anything to incur unnecessary costs. The plaintiff issued proceedings on originating motion and subsequent statement of claim. This put the defendant in the position that if it wished to defend the action it was required to file a

defence and subsequently to become involved in other pleadings. The various interlocutory applications have all been dealt with and orders for costs made on the merits or otherwise of the application.

[18] What the defendant now seeks is the costs of the substantive action. The defendant did no more than respond to an action initiated by the plaintiff. This action could not proceed on the plaintiff's argument because of the subsequent amendments to legislation to which I have already referred. The defendant did nothing to incur further costs after the legislation was amended and the plaintiff's action rendered futile. It does not seem to me a fair exercise of the Court's discretion on the issue of costs to deny the defendant the costs of an action the plaintiff initiated and now submit would be futile for them to pursue.

[19] The plaintiff took no step in these proceedings after 15 May 1997 when Martin CJ in the Court of Appeal (file No. AP 2/1997) stated:

> "I would just like to suggest that, say within 3 months from now the parties return before His Honour and get directions, final directions with a view to setting down for trial."

[20] I agree with Mr Yuens' submission on behalf of the defendant that the defendant had no alternative other than to bring an application that the plaintiff's claim be dismissed for want of prosecution to enable the defendant to seek costs of the substantive action.

[21] I consider the defendant is entitled to an order for costs on the basis of the normal rule that costs follow the event. The defendant has ultimately been successful in the substantive action and is entitled to costs.

[22] The defendant did raise a further issue and that was the question of costs with respect to an application brought by the defendant to strike out the proceedings or alternatively the statement of claim. This application came before Kearney J on 24 June 1994. Kearney J made certain orders and adjourned the question of costs to a date to be fixed with liberty to apply. As a consequence of the defendant's application, the plaintiff was required to file an amended the statement of claim and the defendant's application for summary dismissal was adjourned to a date to be fixed with liberty to apply.

[23] I am not persuaded that there has been any reason put forward as to why the Court should depart from the usual order on an interlocutory application that there be no order for costs. Accordingly, with respect to the interlocutory application made by the defendant to strike out the plaintiff's statement of claim, which application was heard by Kearney J on 24 June 1994, I propose to make no order as to costs.

[24] I summarise those orders as follows:

1. With respect to the substantive action in which the plaintiff's claim has been dismissed I order that the plaintiff pay the defendant's cost.

2. With respect to the interlocutory application heard by Kearney J on 24 June 1994, I make no order as to costs.

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