Leisure Investments P/L v Bilioara P/L [2001] NTSC 3

PARTIES:	LEISURE INVESTMENTS PTY LTD ACN 009 633 532 v BILIOARA PTY LTD ACN 009 649 389
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	14 of 2000 (20003251)
DELIVERED:	8 February 2001
HEARING DATES:	6 December 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

DISSOLUTION OF PARTNERSHIP – COSTS

Dissolution of partnership – costs – whether to be paid out of partnership assets – or each party bear own costs – disputed claim between partners – unsuccessful litigant pay costs of successful litigant – costs of alternative arguments

Kraft v Kupferwasser (1991) 23 NSWLR 236; *Hamer v Giles* (1879) 11 Ch D 942; *Meekin Enterprises v Gersbach* Unreported SC (NSW) Equity Division 6 August 1997; *Hughes v Western Australian Cricket Association* (1986) ATPR 40-726; *Mengel v Northern Territory* Unreported, Asche CJ 29 January 1993, referred to.

Norton v Russell (1875) LR 19 Eq 343; *Queensland Trustees Ltd v Fawckner* [1964] QdR 153, cited.

REPRESENTATION:

Counsel:

Plaintiff:	L Silvester
Defendant:	A Young

Solicitors:

Plaintiff:	Hunt and Hunt
Defendant:	Ward Keller

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Leisure Investments Pty Ltd v Bilioara P/L [2001] NTSC 3
No. 14/2000 (20003251)

BETWEEN:

LEISURE INVESTMENTS PTY LTD
ACN 009 633 532
Plaintiff

AND:

BILIOARA PTY LTD
ACN 009 649 389
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 8 February 2001)

[1] I refer to my written reasons for judgment delivered on 27 November 2000. On 6 December 2000 after hearing further submissions this Court made a number of formal orders arising from the judgment delivered in favour of the plaintiff on 27 November 2000.

[2] The plaintiff seeks an order that the defendant pay the plaintiff's costs of the proceedings to be agreed or taxed.

[3] The defendant opposes such an order.

[4] It is the submission of Mr Young, counsel for the defence, that the usual practice concerning litigation about the dissolution of a partnership is that

costs are either paid from the partnership assets or each party bears its own costs. It is Mr Young's submission that in this matter there is no justification for a departure from the usual practice.

[5] The alternative argument for the defence is that if there is an order that the defendant pay the plaintiff's costs that should not include that part of the proceedings which were concerned with unnecessary issues raised by the plaintiff. Counsel for the defence had taken objection during the course of the hearing to the presenting of the evidence by the plaintiff which the defence considered to be irrelevant and concerned with unnecessary issues raised by the plaintiff.

[6] In *Kraft v Kupferwasser* (1991) 23 NSWLR 236 Powell J stated at 244:

> ". . . at least since 1878 the rule has been to pay the costs of an action for dissolution out of the partnership asset unless there is good reason to the contrary (*Austin v Jackson* (1878) LR 11 ChD 942n; *Hamer v Giles* (1879) LR 11 ChD 942; *Potter v Jackson* (1880) LR 13 ChD 845) . . ."

[7] In the matter of *Hamer v Giles* (1879) 11 Ch D 942 Jessel MR at 944-5:

> "…. It appears to me that where there is no fault on either side, but the partnership accounts have to be taken in this Court, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, that is, they must come out of the partnership assets. Of course, where an action for dissolution is rendered necessary by the misconduct of a partner – as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so – the Court not only has jurisdiction, but is bound to exercise it, by making that partner pay so much of the costs as are occasioned by his misconduct. But in all other cases there is no difference between the costs of the action for taking the accounts

> prior to the trial and the subsequent costs, and I have always acted on that rule."

[8] In this matter the action was not in respect of the administration of a partnership. I agree with the submission made by Mr Silvester, counsel for the plaintiff, that administration in this sense concerns winding up, receivers, taking of accounts etc. In this matter the plaintiff's primary claim was for declarations upholding the dissolution of the partnership on 31 December 1999 and the validity of the plaintiff's exercise of the option to purchase.

[9] The defendant disputed the validity of the plaintiff's notice dissolving the partnership on 31 December 1999 and contested the plaintiff's right to exercise the plaintiff's option to purchase the defendant's interests in the partnership and the partnership assets.

[10] Accordingly, these proceedings were not proceedings for dissolution of partnership as an administrative exercise and are distinguishable from the decisions relied upon by the defendant of *Hamer v Giles* (supra) *Norton v Russell* (1875) LR 19 Eq 343 and *Queensland Trustees Ltd v Fawckner* [1964] QdR 153.

[11] In the matter of *Meekin Enterprises v Gersbach* unreported judgment of Supreme Court of New South Wales Equity Division dated 6 August 1997 at 2, McLelland CJ in Equity stated:

> "The distinction to be drawn is between proceedings which are necessary for the administration of partnership assets where there is no relevant fault on either side, on the one hand, and proceedings which are rendered necessary by reason of the default of one of the partners, on the other. When the proceedings are caused by such default there is normally good reason not to order payment of costs out of the partnership assets, but rather to order costs against the partner in default, at least up to the conclusion of the hearing, as illustrated by the decision of Jessel, MR in Norton v Russell (1875) 19 Eq 343. I think that the position is accurately summarised in the following passage from Lindley & Banks on Partnership (16th ed) at paragraph 23-112:
>
> > '… it has long been an established role that all the costs of dissolution proceedings should be paid out of the partnership assets, unless there is a good reason for making some other order. Where, however, such proceedings are, in reality, commenced in order to obtain an adjudication on some disputed claim between the partners, the unsuccessful litigant will normally be ordered to pay the costs up to the date of trial."

[12] The action before this Court was not in respect of the administration of a partnership but was in reality commenced to obtain an adjudication on a disputed claim between the partners. In such a case the unsuccessful litigant will normally be ordered to pay the costs of the successful litigant.

[13] I have concluded that there is no reason in this matter why the successful litigant should not be entitled to an order for costs payable by the unsuccessful litigant.

[14] The alternate argument raised by the defendant is that the costs should not include that part of the proceedings which were concerned with unnecessary issues raised by the plaintiff.

[15] In this matter the plaintiffs were successful on their primary argument. This Court did not consider it necessary to rule on the alternative arguments.

[16] In the matter of *Hughes v Western Australian Cricket Association* (1986) ATPR 40-726 at 48,136 Toohey J set out the principles relating to costs in such matters as follows:

> "1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order. *Ritter v. Godfrey* (1920) 2 K.B. 47.
>
> 2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. *Forster v. Farquhar* (1893) 1 Q.B. 564.
>
> 3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. *Cretazzo v. Lombardi* (1975) 13 SASR 4 at p. 12."

[17] In *Mengel v Northern Territory* ruling delivered 29 January 1993, Asche CJ adopted the test applied by Toohey J in *Hughes v Western Australian Cricket Association)* (supra) and stated at p 4:

> "Like his Honour I bear in mind the caution expressed by Jacobs J in *Cretazzo v Lombardi* (supra) at p16:
>
> > 'The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case."

[18] I do not consider there is reason to make any apportionment of the costs. The plaintiff did not fail on the other issues as they were not subject of

determination. I did not agree with submissions of defence counsel at the time certain evidence was led that it was irrelevant. In my opinion, the plaintiff was entitled to present the alternative arguments and to call evidence on these issues. The plaintiff, having been successful in its action, is entitled to an order for costs.

[19] I make the following orders:

1. That the defendant pay the plaintiff's costs of the action as agreed or taxed.

2. I certify the matter as fit for counsel.

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