

PARTIES: NITSCHKE Philip  
v  
MEDICAL BOARD OF AUSTRALIA

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO: LA 1 of 2015 (21502811)

DELIVERED: 26 August 2015

JUDGMENT OF: HILEY J

**CATCHWORDS:**

COSTS – appeal from Health Professional Review Tribunal – appellant successful on main grounds of appeal – appellant did not succeed on some grounds – notice of appeal amended prior to hearing – no reason to depart from usual order as to costs – appellant also to have normal costs of appeal to the Tribunal – *Supreme Court Rules* (NT) r 63.03.

*Supreme Court Rules* (NT) rr 63.03; 63.09.

*Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2007] FCAFC 119, distinguished.

*Oshlack v Richmond River Council* (1998) 193 CLR 72; *Ruddock v Vadarlis (No 2)* [2001] FCR 229; *State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174, referred to.

**REPRESENTATION:**

*Solicitors:*

Appellant: Fitzpatrick Legal  
Respondent: Australian Government Solicitor

Judgment category classification: C  
Judgment ID Number: Hil1508  
Number of pages: 6

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

*Nitschke v Medical Board of Australia (No 2)* [2015] NTSC 50  
No. LA 1 of 2015 (21502811)

BETWEEN:

**NITSCHKE Philip**  
Appellant

AND:

**MEDICAL BOARD OF  
AUSTRALIA**  
Respondent

CORAM: HILEY J

RULING ON COSTS

(Delivered 26 August 2015)

- [1] On 6 July 2015 I allowed the appeal and requested the parties to provide draft orders. I indicated that I would rule on costs after receiving written submissions.
- [2] While conceding that it should pay some of the appellant's costs of the appeal in this Court and of the proceeding in the Health Professional Review Tribunal ('the Tribunal') the respondent submitted that it should only have to pay 75% of those costs.

[3] It is well established that the costs of a proceeding are in the discretion of the Court and that, subject to certain limited exceptions, the successful party to litigation is entitled to an award of costs in its favour.<sup>1</sup> Where an appellant is successful in its appeal the Court should ordinarily order the unsuccessful respondent to pay the costs of the appeal and the proceeding at first instance.<sup>2</sup>

[4] In relation to the costs of the appeal in this Court the respondent relied on two points: one being that the appellant was not successful on all of its grounds of appeal; the other, that the original notice of appeal was amended following the respondent's objections to competency.

[5] Although the respondent recognises that the Court has a wide discretion in relation to costs, it points out that there have been numerous occasions where courts have declined to award complete costs to a successful appellant where the appellant has not succeeded on all of its grounds.

[6] The respondent referred to observations by the Full Federal Court in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)*<sup>3</sup> at [11]:

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<sup>1</sup> Order 63.03 of the Supreme Court Rules, and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67] and 120-122 [134].

<sup>2</sup> *Ruddock v Vadarlis (No 2)* [2001] FCR 229 at 237 [16].

<sup>3</sup> *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2007] FCAFC 119.

It is appropriate that, where one party, although successful overall, raised and pursued unsuccessful grounds or abandoned grounds that the other party was expected to meet in preparation of and in the course of the hearing, and as a consequence costs have been thrown away or incurred, such costs should be paid by the successful party.

[7] It is also is well established that:

The mere fact that a court does not accept all of a successful party's arguments does not make it appropriate to deal with costs on an issue by issue basis. It cannot be supposed that the issue in question was unreasonably raised at trial or on appeal. There is nothing else disclosed in the circumstances of the case that would support the proposition that the court should depart from the usual order as to costs.<sup>4</sup>

[8] The respondent pointed out that in the present matter the Court found in favour of the appellant in relation to grounds 1, 2.1 and 4 and dismissed grounds 2.2, 2.3, 3.1 and 3.2. The respondent added that on a numerical basis the appellant only succeeded on 3 of its 7 grounds.

[9] In broad terms, grounds 1 and 4 concerned the construction and proper application of s 156 of the National Law<sup>5</sup> and of the Code of Conduct. The issues raised by these grounds were very much the main focus of the submissions before the Court and of my reasons for decision. Ground 2, and each of the 3 sub grounds, concerned questions of procedural fairness. It was ground 2.1 that was the main focus of that allegation. The two parts of ground 3 were “no evidence” grounds,

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<sup>4</sup> *State of Victoria v Sportsbet Pty Ltd (No 2)* [2012] FCAFC 174 at [8].

<sup>5</sup> The *Health Practitioner Regulation National Law* is the Schedule to the *Health Practitioner Regulation National Law Act (Qld)* 2009.

each of which was dealt with rather quickly after the respondent was able to identify evidence in relation to those matters.

[10] Although it is correct to say that the appellant did not succeed on every ground, the appellant was successful on those grounds which were most important and which took up most of the time spent in relation to the appeal. The present situation is quite different to that in the *Cadbury* case.

[11] Although the respondent did challenge the competency of the original notice of appeal, this issue was resolved by agreement between the parties before that challenge was to be heard. This resulted in the grounds being narrowed and better defined so as to more clearly demonstrate that they were based upon alleged errors of law. Although I did not get to hear submissions concerning the challenge I did form a tentative view that some at least of the original grounds did raise errors of law and that the challenge would not result in the appellant doing any more than it did, namely amending the notice of appeal. It is not unusual for grounds of appeal to be refined as a matter is prepared for hearing.

[12] I do not consider that the circumstances advanced by the respondent are such that the appellant should not have all of his party / party costs paid by the respondent.

[13] In relation to the proceeding in the Tribunal, the respondent points out that Order 63.09 of the Supreme Court Rules recognises that it will not always be appropriate that the costs of proceedings before a tribunal be assessed on the Supreme Court's scale of costs provided for in the Appendix to Order 63.

[14] Whilst I agree that this may well often be the case where the jurisdiction of the relevant tribunal or the issues before it are limited and not as extensive as may usually be the case for matters in the Supreme Court, the present matter involved complex issues and concerned the appellant's right to continue practicing as a medical practitioner. Amongst other things, the appellant was required to deal with a wide range of matters at very short notice, the hearings in the Tribunal extended for 3 days and the respondent was represented by senior counsel. I see no reason for confining the appellant's costs to something different to those normally applicable to costs in this Court.

[15] I also agree to certify the appeal fit for Senior Counsel. The facts and issues were complex and warranted the involvement of senior counsel on both sides.

[16] I therefore make the following orders:

1. The appeal is allowed.
2. The respondent is to pay the appellant's costs of the appeal in this Court.

3. The Court certifies that the appeal was a proper matter for the engagement of Senior Counsel.
4. The decision of the Health Professional Review Tribunal (the Tribunal), dated 22 December 2014, is set aside.
5. In lieu thereof it is ordered that:
  - (a) The appeal from the Immediate Action Committee of the Medical Board of Australia brought by the appellant to the Tribunal is allowed.
  - (b) The decision of the Immediate Action Committee of the Medical Board of Australia, dated 23 July 2014, is set aside.
  - (c) The Medical Board of Australia pay the appellant's costs of the proceeding in the Tribunal assessed on the amounts permitted in Appendix A of Order 63 of the Supreme Court Rules.

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