PARTIES:	TENNANT CREEK TRADING PTY LTD & ORS
	v
	LIQUOR COMMISSION OF THE NORTHERN TERRITORY OF AUSTRALIA & ANOR
TITLE OF COURT:	Supreme Court of the Northern Territory
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE NO:	SC 179 of 1994
DELIVERED:	29 June 1995
HEARING DATES:	
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Procedure - Costs - General rule - Costs follow the event - Costs lie with party seeking indulgence, discontinuing or withdrawing proceedings - In the absence of special circumstances a successful litigant should receive his costs - No special circumstances

Supreme Court Rules 1987 (NT) O56
Liquor Act (NT) s33

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13
Australian Conservation Foundation Inc & Ors v Forestry Commission of Tasmania & Ors (1988) 81 ALR 166
R v Racing, Gaming & Liquor Commission; ex parte Tangentyere Council Inc (No 2) (1988) 91 FLR 62
Council of the Municipality of Botany v Secretary, Department of the Arts, Sport, the Environment, Tourism and Territories (1992) 34 FCR 412
Finnane v Ortman & Ors (SC (NT) - 9 December 1992)

REPRESENTATION:

Counsel:

First Plaintiff:	Mr Stirk
Second Plaintiff:	Mr Whyte
Third Plaintiff:	Mr Stirk
Fourth Plaintiff:	No appearance
First Defendant:	Mr Tiffin
Second Defendant:	Ms Ditton

JUDGMENT CATEGORY:	C
JUDGMENT ID NUMBER:	tho95010
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(tho95010)

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

SC No. 179/94

BETWEEN:

TENNANT CREEK TRADING PTY LTD
First Plaintiff

and:

WHYTEROSS PTY LTD
Second Plaintiff

and:

CHARLES KEITH HALLETT
Third Plaintiff

and:

TENNANT CREEK HOTEL PTY LTD
Fourth Plaintiff

AND:

THE LIQUOR COMMISSION OF THE NORTHERN TERRITORY OF AUSTRALIA
First Defendant

and:

JULALIKARI COUNCIL ABORIGINAL CORPORATION

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 29 June 1995)

I refer to my decision in this matter delivered on 7 April 1995. Leave was granted to the parties to make application on the issue of costs.

This matter to deal with the question of costs was listed before the Court in Alice Springs on 25 May 1995 on the application of Ms Ditton, counsel for the second defendant.

Mr Stirk appeared as counsel for the first and third plaintiffs. Mr Whyte appeared representing the interests of Whyteross Pty Ltd, the second plaintiff. There was no appearance on behalf of the fourth plaintiff. Mr Tiffin, counsel for the first defendant, had previously sought and been granted leave not to attend Court in respect of the application by the second defendant as the orders sought do not affect the first defendant.

I was referred to a notice of discontinuance filed by the second plaintiff, Whyteross Pty Ltd, dated 20 February 1995. At the time of discontinuing proceedings against the second defendant, the second plaintiff through their solicitors Philip and Mitaros had signed an agreement to pay 25% of the second defendant's party and party costs to 7 February 1995.

I considered it was not appropriate for the Court to look behind the agreement signed by all parties. At the request of counsel for the second defendant, I made an order in terms of the agreement already signed by the parties and filed on the 20 February 1995. The order made on 25 May 1995 was as follows:

1. Order that the second plaintiff, Whyteross Pty Ltd, pay 25% of the second defendant's party and party costs to 7 February 1995.

2. These costs to be taxed or agreed.

The second defendant, through its counsel Ms Ditton, seeks a further order:

1) That the first, third and fourth plaintiffs pay between them 75% of the second defendant's costs to 7 February 1995.

2) That the first, third and fourth plaintiffs pay 100% of the second defendant's costs from 8 February 1995.

The fourth plaintiff did not attend this hearing, nor was it represented at the hearing, which commenced on 20 February 1995 and concluded on 22 February 1995. The first and third plaintiffs were represented at this hearing.

As an alternative to the above, the second defendant seeks an alternative order:

1) The first, third and fourth plaintiffs pay 75% of the second defendant's costs up to 7 February 1995.

2) The first, third and fourth plaintiffs pay 100% of the second defendant's costs from 8 February 1995 to 20 February 1995 inclusive.

3) The first and third plaintiffs pay 100% of the second defendant's costs from and including 21 February 1995.

It is relevant to the issue of costs to briefly summarise the history of this matter.

On 24 August 1994, the four named plaintiffs in this matter filed a summons on originating motion against the first defendant, seeking a judicial review in the Supreme Court and an order for certiorari quashing certain decisions of the first defendant.

On 6 September 1995, the second defendant filed an application to be added as a second defendant in the proceedings.

On 15 September 1995, the Master ruled in favour of the Julalikari Council Aboriginal Corporation being added as a second defendant to the proceedings.

At the hearing of the proceedings before the Supreme Court, Mr Tiffin appeared as counsel for the first defendant and indicated that in accordance with the principle established

in *R v Australian Broadcasting Tribunal* ex parte, Hardiman (1980) 144 CLR 13, the Liquor Commission appeared to abide the decision of the Supreme Court and to render such assistance to the Court as required. A statement of agreed facts was tendered. The first defendant submitted three affidavits and one witness being the chairman of the Liquor Commission was called and gave oral evidence. Other than that the first defendant took a largely passive role in the proceedings and the essential argument for the defence was carried by Mr Basten QC representing the second defendant.

The well established principle on the question of costs is set out in *Williams Civil Procedure of Victoria* page 5603.6 at paragraph 63.02.80:

> "The settled practice is that in the absence of special circumstances a successful litigant should receive his or her costs. As stated by Lord Sterndale MR in *Ritter v Godfrey* [1920] 2 KB 47 at 52, and quoted with approval by Viscount Cave LC in *Donald Campbell & Co v Pollak* [1927] AC 732 at 809, 811; [1927] All ER Rep 1 at 39, 40, 41, "there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial". See also *Gladstone Park Shopping Centre Pty Ltd v Wills* (1984) 6 FCR 496; 49 ALR 109; *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd (No 2)* (1988) 77 ALR 190 at 191; 62 ALJR 151 at 152; *Asia Securities Ltd v Tonkin* (SC (Vic), McDonald J, Folio No 3101, 16 March 1992, unreported)."

A departure from the settled practice that costs follow the event may be justifiable as a proper exercise of discretion where there are special circumstances.

I adopt with respect the comments Birchell J in *Australian Conservation Foundation & Ors v Forestry Commission & Ors* 81 ALR 166 at 169:

> " For the applicants, it was urged that the first respondent need not have incurred costs in respect of the main argument since the Commonwealth was capably

> representing its cause. This proposition has a hollow ring. A respondent with a real interest in the issue an applicant chooses to contest is not disentitled from incurring the expense of appearing to defend the matter because someone else also appears. Nor could it be said that the interests of the Commonwealth and the Forestry Commission were bound to be identical, notwithstanding the concordance which in the event manifested itself between their submissions. ...."

I agree with the submission made by Ms Ditton for the second defendant that in this matter the first defendant did not raise an active argument in these proceedings. Apart from the second defendant who may have a different interest to that of the first defendant there was no other party to raise an active argument to the plaintiffs' claim.

The *Victorian Civil Procedure* states at paragraphs 63.02.130:

> **"Costs follow event - judicial review**. The general rule that the losing party pay costs applies in a proceeding for judicial review under O56. See, for instance, *R v Racing, Gaming and Liquor Commission; Ex parte Tangentyere Council Inc (No 2)* (1988) 91 FLR 62 (SC (NT))."

The general rule that the losing party pay costs applies in a proceeding for judicial review . . . Ex parte *Tangentyere Council Inc* (No. 2) (1988) 91 FLR 62 (SC (NT)).

I accept the second defendant had an interest in the issues raised and argued before the Court in the application for judicial review. As a result of the decision in *Australian Broadcasting Tribunal ex parte Hardiman* (supra) the second defendant had a basis for genuine concern that there would be no one else to counter the arguments raised by the plaintiff.

Mr Stirk, counsel for the first and third plaintiffs, submitted that the second defendant's involvement, in respect of the application pursuant to Supreme Court Rules order 56, was not warranted because whatever the result of the argument before the Supreme Court the issue in relation to the variation of licences would have had to come back before the Liquor

Commission. The second defendant could then have raised their concerns about the proposed variation to conditions of licences before the Liquor Commission. I do not accept this submission. The same argument could equally be made in respect of the plaintiffs. However, instead of pursuing their rights under the *Liquor Act* the plaintiffs chose to seek judicial review before the Supreme Court. The plaintiffs, having initiated the action for judicial review, it could not be taken for granted that all parties would necessarily come back before the Liquor Commission in the same way as if the plaintiffs had sought to pursue their rights pursuant to s33 of the *Liquor Act* before proceeding to seek judicial review.

I accept the submissions made on behalf of the first and third plaintiffs that the fact the Master made an order allowing the joinder of the second defendant does not mean the second defendant has an automatic entitlement to his costs.

"It is by no means to be assumed that an intervener will have his costs" Gummow J, *Council of the Municipality of Botany & Ors v the Secretary of the Department Arts, Sports and Environment Tourism & Territories & Ors* 34 FLR (1992) 412 at 47.

It is the submission for the first and third plaintiffs that the second defendant did not have a competing interest as was the position in *R v Racing & Gaming & Liquor Commission ex parte Tangentyere Council Inc* (No. 2) (supra) and matter of *Kieran May Finnane & Maxwell Henry Ortman The Minister for Lands for the Northern Territory and Northern Territory Planning Authority and Denis Anthony Hornsby* a decision of Asche CJ unreported, Northern Territory Supreme Court, No. 72 of 1991. The submission for the plaintiffs is that the Liquor Commission was seeking to vary the terms and conditions of licences held by the respective plaintiffs under the *Liquor Act*. There was not really an opposing party per se to this decision.

I do not agree with this submission. Members of the Julalikari Council Aboriginal Corporation make up a substantial

portion of the persons who patronise the plaintiff's liquor outlets in Tennant Creek and who would be affected by the variation in terms and conditions of the plaintiffs' licences.

Mr Stirk argued that the three issues which were raised by the plaintiffs in the hearing before the Supreme Court namely; (1) procedural fairness; (2) unreasonableness; (3) apprehension of bias were all matters of practice and procedure which could have been responded to by the first defendants without involving a breach of the principle established in *Australian Broadcasting Tribunal v Hardiman* (supra). Mr Stirk argues the role played by the second defendant was a luxury not a necessity and the plaintiffs should not be required to pay the second defendant's costs. Whether Mr Stirk is right or wrong on that issue the reality is that from the outset of these proceedings, counsel for the first defendant indicated the first defendant would abide the decision of the Court and counsel for the first defendant would render such assistance as the Court required. All of the plaintiffs' arguments were essentially responded to solely by the second defendant. One of the arguments raised by the plaintiff was the question of unreasonableness. I do not consider that can be characterised as a matter of practice and procedure.

Alternately, the submission on behalf of the first and third plaintiffs is that any order for costs should be limited to the time between the date the second defendant was joined as a party to the proceedings to the date that the issue which involved the intervention of the Human Rights and Equal Opportunity Commission and the Anti Discrimination Commission of the Northern Territory was stayed. The basis of this submission is that thereafter it was really a practice and procedure matter before the Supreme Court rather than an issue which involved discrimination against aboriginal people.

For the reasons already stated, I do not accept this submission. The fact is the second defendant did control the running of the argument in response to the plaintiffs' application on the three substantial issues argued before the

Supreme Court. The issue of unreasonableness is not a matter of practice and procedure.

I agree with the submission made on behalf of the plaintiffs that the Court does have a discretion on the issue of costs and the fact that the second defendant was joined as a party does not automatically give the second defendant a right to costs.

However, in this matter the second defendant was a successful party. They are entitled to costs on the principle that in the absence of special circumstances a successful litigant should receive his or her costs. I do not consider there are special circumstances in this matter which would entitle the plaintiffs to an exercise of a discretion in their favour.

The fourth plaintiff did not appear at all at the hearing. The fourth plaintiff had not filed a notice of discontinuance or advised the first and second defendant it would not be participating in the trial. I consider the fourth plaintiff is responsible for costs up to and including the first day of the hearing, that date being 20 February 1995. It seemed apparent after the commencement of the trial that the fourth plaintiff would not be appearing to take part in the proceedings and I consider in fairness the fourth plaintiff's liability should be limited to the conclusion of the first day of the hearing.

Accordingly, I make the following orders:

1) The first, third and fourth plaintiffs pay 75% of the second defendant's costs up to and including 7 February 1995.

2) The first, third and fourth plaintiffs pay 100% of the second defendant's costs from 8 February 1995 to 20 February 1995 inclusive.

3) The first and third plaintiffs pay 100% of the second defendant's costs from and including 21 February 1995.

4) I allow costs for senior counsel in respect of the substantive hearing.

5) I certify for counsel in respect of the argument on the question of costs.