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Qantas Airways Ltd v Leonie Cameron [1996] FCA 765 (30 August 1996)

CATCHWORDS

PRACTICE AND PROCEDURE - costs - public interest litigation - application brought by representative party on behalf of group members under Part IVA of [Federal Court of Australia Act 1976](#) - applicant successful at first instance but unsuccessful on appeal - purpose of proceeding partly of public interest nature and partly in private interests of ten group members - public interest in fact served to some extent by clarification of nature of duty owed by international airlines such as the respondent to their passengers in respect of environmental tobacco smoke in passengers' cabin on international flights.

QANTAS AIRWAYS LIMITED (A.C.N. 009 661 901) v LEONIE CAMERON

No. NG 521 of 1995

LEONIE CAMERON v QANTAS AIRWAYS LIMITED (A.C.N. 009 661 901)

Matter No. NG 556 of 1995

CORAM: Davies, Lindgren and Lehane JJ

PLACE: Sydney

DATE: 30 August 1996

IN THE FEDERAL COURT OF AUSTRALIA)

NEW SOUTH WALES DISTRICT REGISTRY)

GENERAL DIVISION) Nos. NG 521 of 1995

NG 556 of 1995

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

Matter No. NG 521 of 1995

BETWEEN: QANTAS AIRWAYS LIMITED

(A.C.N. 009 661 901)

Appellant

AND: LEONIE CAMERON

Respondent

Matter No. NG 556 of 1995

BETWEEN: LEONIE CAMERON

Appellant

AND: QANTAS AIRWAYS LIMITED

(A.C.N. 009 661 901)

Respondent

CORAM: Davies, Lindgren and Lehane JJ

PLACE: Sydney

DATE: 30 August 1996

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The appeal in proceeding No NG 521 of 1995 be allowed.
2. The appeal in proceeding No NG 556 of 1995 be dismissed.
3. The orders made by Beaumont J on 16 June 1995 and 10 July 1995 in proceeding No NG 205 of 1993 be set aside, and in lieu thereof the following orders be made:
 - (a) that the respondent pay the applicant the sum of \$200.00 on behalf the group member Francis William Millane in respect of the contravention of [s 52](#) of the [Trade Practices Act 1974](#) by the respondent;
 - (b) that otherwise the application be dismissed;
 - (c) that the applicant pay 75% of the respondent's costs of the application.
4. The respondent in proceeding No NG 521 of 1995 pay 75% of the appellant's costs.

5. The costs of the respondent's motion in proceeding No NG 521 of 1995 brought by notice of motion filed on 24 June 1996 be part of the respective parties' costs of that proceeding.

6. The appellant in proceeding No NG 556 of 1995 pay 75% of the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

IN THE FEDERAL COURT OF AUSTRALIA)

)

NEW SOUTH WALES DISTRICT REGISTRY) No G 521 of 1995

)

GENERAL DIVISION)

On appeal from a single Judge of the

Federal Court of Australia

BETWEEN: QANTAS AIRWAYS LIMITED

ACN 009 661 901

Appellant

LEONIE CAMERON

Respondent

No G 556 of 1995

AND: LEONIE CAMERON

Appellant

QANTAS AIRWAYS LIMITED

ACN 009 661 901

Respondent

Coram: Davies, Lindgren & Lehane JJ.

Date: 30 August 1996

Place: Sydney

REASONS

Davies J: These reasons deal with the issue of the costs of and incidental to the motion that the Court reconsider its orders made on 17 May 1996. The motion was dismissed on 14 August 1996, but the issue of costs was reserved.

In my opinion, although the motion was unsuccessful, the costs relating to it should follow the costs of the appeal. That is because, in the Court's reasons of 17 May 1996, certain issues, including the issue of causation, received closer attention than previously they had had. It was appropriate that, thereafter, counsel for Mrs Cameron should raise with the Court the matters which they wished put in respect thereof. The motion was, in substance, though not in form, a part of the appeal.

I certify that this and the preceding page

are a true copy of the reasons for judgment of

the Honourable Justice Davies.

Associate:

Date: 30 August 1996

IN THE FEDERAL COURT OF AUSTRALIA)

NEW SOUTH WALES DISTRICT REGISTRY)

GENERAL DIVISION) Nos. NG 521 of 1995

NG 556 of 1995

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

Matter No. NG 521 of 1995

BETWEEN: QANTAS AIRWAYS LIMITED

(A.C.N. 009 661 901)

Appellant

AND: LEONIE CAMERON

Respondent

Matter No. NG 556 of 1995

BETWEEN: LEONIE CAMERON

Appellant

AND: QANTAS AIRWAYS LIMITED

(A.C.N. 009 661 901)

Respondent

CORAM: Davies, Lindgren and Lehane JJ

PLACE: Sydney

DATE: 30 August 1996

REASONS FOR JUDGMENT FOR COSTS

LINDGREN and LEHANE JJ: On 17 May 1996, the Court, by majority (Lindgren and Lehane JJ, Davies J dissenting), ordered that the appeal of Qantas Airways Limited ("Qantas") be allowed, that the appeal of Leonie Cameron ("Mrs Cameron") ("the cross appeal") be dismissed, and that the proceedings on the appeal and the cross appeal be listed for the making of such further orders as might be appropriate.

Mrs Cameron moved for leave for the appeal and cross appeal to be re- listed for further argument. Her motion was the subject of reasons for judgment delivered on 14 August 1996 when the Court unanimously ordered that the motion be dismissed and that the matter be listed for further argument on costs.

The present reasons relate to the orders to be made, including orders as to costs, in consequence of the Reasons for Judgment dated 17 May 1996 and 14 August 1996. We will assume a general familiarity with those Reasons.

The parties agree that it is appropriate, in order to give effect to the Reasons for Judgment delivered on 17 May 1996, that orders be made allowing the appeal, dismissing the cross appeal, and setting aside the orders of the trial Judge of 16 June 1995 and 10 July 1995, and that the orders to be substituted for the latter should include an order that Qantas pay Mrs Cameron \$200 on behalf of the group member, Francis William Millane, in respect of Qantas's contravention of [s 52](#) of the [Trade Practices Act 1974](#) ("the [TP Act](#)").

Qantas submits that the costs below and on the appeal should follow the event. Accordingly, it submits that Mrs Cameron should be ordered to pay its costs below and on the appeal and cross appeal subject to this: that it should be ordered to pay Mrs Cameron's costs on the claim by Francis William Millane based on contravention of the [TP Act](#). It submits that the latter order should take the form of an order that Qantas pay Mrs Cameron's costs of the evidence relating to Mr Millane of and incidental to the hearing on 10 April 1995, the date on which he gave evidence.

Mrs Cameron, on the other hand, submits that the litigation was public interest litigation, the purpose of which was, in substance, to establish the nature of the duty owed by Qantas in respect of environmental tobacco smoke on international flights, and that the proceeding should not be seen as having been primarily concerned with the recovery of damages on behalf of the ten group members. In particular, Mrs Cameron submits that regard should be had to the fact that she succeeded in persuading both the trial Judge and all three members of the Full Court, against the opposition of Qantas, that Qantas's duty to take care embraced a duty to warn.

We think that the fact that Mrs Cameron failed on her unconscionable conduct claim, on the group members' propounded causes of action for negligence, and, except in the case of one of the ten group members, on the statutory causes of action for misleading and deceptive conduct in contravention of the [TP Act](#), should produce the general result that she should be ordered to pay Qantas's costs.

In our view, however, some weight should be given to Mrs Cameron's submission that the litigation has served the public purpose of elucidating to some extent the duty owed by international airlines to those peculiarly vulnerable to environmental tobacco smoke.

There has not been a uniformity of judicial view as to whether it is appropriate to take into account on the question of costs, that an unsuccessful plaintiff/applicant has brought the proceeding in question in what he, she or it perceives to be the public interest: see, for example, Kent v Cavanagh, Minister of State for Works (1973) 1 ACTR 43 (Fox J) at 55-56; Arnold (on behalf of Australians For Animals) v Queensland [1987] FCA 148; (1987) 73 ALR 607 (FCA/FC) at 621-622, 635 (Wilcox J and Burchett J respectively, with both of whom Woodward J agreed); Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd (1991) 100 ALR 568 (FCA/Morling J) at 570-572; Re Smith; Ex parte Rundle (No 2) (1991) 6 WAR 299 (WA/FC) at 302-303 (Malcolm CJ, with whom Pidgeon J and Rowland J agreed); Ex parte South West Forests Defence Foundation Inc, unreported, Supreme Court of WA/White J, 7 February 1994; Oshlack v Richmond River Shire Council (1994) 82 LGERA 236 (L & E Ct, NSW/Stein J); Byron Shire Businesses for the Future Inc v Byron Shire Council and Holiday Villages (Byron Bay) Pty Ltd (1994) 83 LGERA 59 (L & E Ct, NSW/Pearlman CJ).

In this Court it has been accepted that at least where the applicant is a body established to pursue or safeguard a particular public interest, and to do so by litigation if appropriate, it should not be exempted from the usual adverse costs order where it has failed in a proceeding brought by it for that purpose: Australian Conservation Foundation v Forestry Commission (1988) 81 ALR 166 (FCA/Burchett J)

at 170-171; Botany Municipal Council v Secretary, Department of the Arts (1992) 34 FCR 412 (Gummow J) at 416-417. Mrs Cameron is an individual and, accordingly, the two authorities to which we have referred are not directly applicable to the present case.

Moreover, and importantly in the present context, the case is not one in which Mrs Cameron sought only injunctive and declaratory relief: she sought damages on behalf of the ten group members under the TP Act and for tortious negligence. On Qantas's appeal, she sought to support the trial Judge's award of damages. A ground of her cross appeal was that the amounts of damages awarded to the ten group members were inadequate. These considerations make it impossible to view the proceedings as having been brought and pursued purely in the public interest.

Section 43 of the Federal Court of Australia Act 1976 places the award of costs in the discretion of the Court. Sub-section 43(1A) provides that in a proceeding commenced under Part IVA, costs may not be awarded against a person on whose behalf a proceeding has been commenced except as authorised by provisions not presently relevant. Otherwise, the Act does not contain any special provision in relation to costs relevant to the present appeal. Section 33ZF provides expressly that in any proceeding, including an appeal, conducted under Part IVA, the Court may make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. We doubt, however, that this provision enlarges that range of appropriate orders as to costs which might now be made as between Mrs Cameron and Qantas.

In our view, the public interest purpose and nature of a proceeding launched by an individual or individuals is not necessarily irrelevant to the issue of costs. In the present case, the relief sought by Mrs Cameron was mixed. The declaratory and injunctive relief was sought in the public interest and the awards of damages were sought in the private interests of the ten group members. The proceeding has in fact served the public interest of establishing that the duty of care owed by international airlines such as Qantas to their passengers in relation to environmental tobacco smoke in the passengers' cabin requires the giving of a warning directed to those travellers whose medical conditions expose them to risk.

It is true that the nature of the duty to warn that we have held is owed by Qantas is quite different from that which was pleaded. It may, therefore, seem odd that Mrs Cameron should, on the issue of costs, be favoured by our holding that Qantas's duty of care required it to give that warning, while she failed on the

group members' causes of action for negligence. Moreover, the proposition that Qantas owed the limited and special duty to warn referred to was rejected, not only by Qantas, but also by Mrs Cameron.

Taking all things into consideration, however, including the fact that, as Qantas concedes, its liability in respect of Mr Millane for \$200 carries with it a liability to pay some of Mrs Cameron's costs, and the achievement of a degree of clarification of what an international airline's duty of care to its passengers in respect of environmental tobacco smoke requires, we think that the appropriate order is that Mrs Cameron pay 75% of Qantas's costs of the proceeding before the trial Judge and of the appeal and cross appeal. The appeal and cross appeal were heard together and raised overlapping issues. It would not be sensible to distinguish between them in the present context.

We agree with Davies J that the parties' costs of Mrs Cameron's motion for leave to make further submissions should be treated as part of their respective costs of the appeal.

I certify that this and the preceding 6 pages is a true copy of the Reasons for Judgment of the Honourable Justices Lindgren and Lehane.

Associate:

Dated: 30 August 1996

Heard: 26 August 1996

Place: Sydney

Decision: 30 August 1996

Appearances: Mr E M Davies solicitor of Dunhill Madden Butler appeared for the appellant on the first appeal, respondent on the second appeal (Qantas).

Mr N F Francey of counsel instructed by Cashman & Partners appeared for the respondent on the first appeal, appellant on the second appeal (Mrs Cameron).