QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Queensland Racing Integrity Commission v Vale [2017] QCATA 110
PARTIES:	**Queensland Racing Integrity Commission (Applicant/Appellant)** **v** **Ricky Vale (Respondent)**
APPLICATION NUMBER:	APL213-16
MATTER TYPE:	Application and Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody**
DELIVERED ON:	10 October 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**THE APPEAL TRIBUNAL ORDERS THAT:** **The applicant pay the respondent's costs of and incidental to the appeal proceedings within 30 days, to be agreed, or failing agreement to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – COSTS – DISCRETION TO AWARD COSTS – where the respondent was successful on appeal – whether the presumptive position in s 100 of the *Queensland Civil and Administrative Tribunal Act* is displaced because the interests of justice call for costs to be ordered against a wholly unsuccessful applicant – where the applicant was a publicly-funded regulatory body – where such a body is not immune from an adverse costs order – where consideration given to factors listed is s 102(3) of the Act Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 100, 102 *Ascot v Nursing & Midwifery Board of Australia*

[2010] QCAT 364
AT v Commissioner of Police, NSW
[2010] NSWCA 131
Baxendale-Walker v The Law Society [2007] EWCA Civ 233, [2007] 3 All ER 330
Beasley v Department of Education and Training [2006] VCAT 2044
Bode v Queensland All Codes Racing Industry Board (No. 2) [2017] QCAT 84
Delekta v Moorabool SC & Ors [2003] VCAT 30
Dennis Family Corporation Pty Ltd v Casey CC (Red Dot) [2008] VCAT 691
Fast Access Finance (Beaudesert) Pty Ltd and Anor v Charter and Anor (No. 2) [2012] QCAT 172
Filippou Management Pty Ltd v MREEF Project Company No. 11 Pty Ltd & Ors [2010] VCAT 1261
Frugtniet v Law Institute of Victoria Ltd [2012] VSCA 178
Hili v The Queen (2010) 242 CLR 520
Kapadia Pty Ltd v Trust Company of Australia Ltd [2012] QCAT 194
Lacey v Attorney-General (Qld) (2011) 242 CLR 573
Latoudis v Casey (1990) 170 CLR 534
Lewis Constructions Pty Ltd v Pollock and Anor (No. 2) [2012] QCAT 398
Mahanthirarasa v State Rail Authority of New South Wales (2008) 72 NSWLR 273
Maylor (No 2) v Mid North Coast Area Health Service [2001] NSWADT 118
McEwen v Barker Builders Pty Ltd [2010] QCATA 49
Medical Board of Australia v Wong
[2017] QCA 42
Oshlack v Richmond River Council
(1998) 193 CLR 72
Nikolic v Racing Victoria Ltd [2012] VCAT 1954
Queensland All Codes Racing Industry Board v Abbott [2015] QCATA 92
Queensland All Codes Racing Industry Board v Abbott (No. 2) [2016] QCATA 49
Queensland Racing Integrity Commission v Vale [2017] QCATA 46
R v Pham (2015) 256 CLR 550
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No. 2) [2010] QCAT 412
Solid Investments Australia Pty Ltd v Greater Geelong CC [2005] VCAT 244

Sweetvale Pty Ltd v Minister for Planning [2004] VCAT 2000
Tamawood Ltd & Anor v Paans [2005] 2 Qd R 101
Vero Insurance Ltd v Gombac Group Pty Ltd [2007] VSC 117
Warren v Queensland Law Society Incorporated (No. 2) [2013] QCAT 234
Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492
Wolfgram v Racing Queensland [2012] QCAT 44
Wong v The Queen (2001) 207 CLR 584

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REASONS FOR DECISION

[1] This is a defended application for professional costs of $25,445.21 by the successful party in a penalty appeal in disciplinary proceedings.

[2] The applicant[1] (in the appeal) is a regulatory body funded by its members with the main purpose of ensuring the integrity of the racing industry by, among other functions, making and enforcing control rules.

[3] The respondent (in the appeal) pleaded guilty to a charge of improper or insulting behaviour contrary to r 175 of the Australian Rules of Racing and was disqualified by QRIC officials for 18 months.

[4] The Queensland Racing Disciplinary Board (QRDB or Board) set the disqualification aside on appeal and re-exercised the penalisation discretion, imposing a six-month suspension instead.[2]

[5] The QRIC unsuccessfully appealed the QRDB decision on the grounds that the penalty imposed was manifestly inadequate.[3]

[6] The central issue is whether having regard to the totality of all relevant considerations the interests of justice require the making of an order for the reasonable cost of successfully opposing the appeal.

The rival submissions

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1 Queensland Racing Integrity Commission (‘QRIC’) or Commission.
2 Queensland Racing Disciplinary Board decision dated 2 June 2016.
3 Applicant’s submissions (on appeal), 30 September 2016, [16].

[7] The respondent submits the costs in issue were necessarily and unavoidably incurred in responding to the appeal and “constitute a significant burden” for a self-employed horse trainer.[4] He concedes that a reasonable regulator is often immune from an adverse costs order but one that takes unnecessary action or brings a marginal, unmeritorious or barely arguable case should not be so immune. His claim is that it was inappropriate that he be required to persuade the tribunal of the correctness of the QRDB decision.

[8] The respondent further asserts that the QRBD penalty was reasonably open on the material before it and plainly well within the available discretionary range. He emphasizes that QRIC:

- lodged an appeal with doubtful or speculative prospects of success;
- initiated the appeal on a misconceived or untenable basis;
- assumed the exacting task of attacking the reasonableness of a discretionary decision;
- completely failed in its contentions on appeal; and
- is in a relatively stronger financial position than he is.

[9] He adds that nothing he did contributed to QRIC’s lack of success on appeal or unreasonably added to the costs incurred.

[10] The Commission’s primary response is that “the default position under the QCAT Act has not been displaced and, (therefore), the appropriate order is that there be no order as to costs”.[5] It also opposes Mr Vale’s application on the alternate grounds that:

- the appeal was not complex in nature – it merely involved an assessment of whether the Board erred in law in setting aside the previous decision and imposing a less severe penalty;[6]
- the fact that legal representation was granted is not determinative of whether the dispute was complex;[7]
- its case, which was limited solely to penalty, was not so palpably weak, unreasonable or devoid of merit that the Commission should not have appealed simply to avoid the costs the applicant incurred in resisting it;[8]
- the claim that the applicant will suffer a significant economic loss if not compensated by a costs order has not been substantiated by

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4 Respondent’s submissions (on costs), 23 May 2016, [11].
5 Applicant’s submissions (on costs), 16 June 2017, [27].
6 Applicant’s submissions (on costs), 16 June 2017, [8]-[10].
7 Applicant’s submissions (on costs), 16 June 2017, [7].
8 Applicant’s submissions (on costs), 16 June 2017, [15].

any evidence of his financial position and, in any case, impecuniosity itself does not support a costs order;[9]

- a significant factor against awarding costs in racing matters is that the Commission's main purpose is to ensure the integrity of all persons involved with racing under the Racing Act.[10] Awarding costs against such a body may act as a deterrent to it fulfilling its duties;[11]

- the quantum sought has not been verified by an itemised account of solicitor and counsel fees.

Costs in court proceedings compared

[11] Subject to any statutory modifications, in most categories of common law-based civil litigation conducted in the regular courts, costs follow the event. The rationale for the 'usual order as to costs' is that fairness typically requires that the unsuccessful party bears the successful party's costs of bringing or defending an action in court. On this basis, a successful respondent is prima facie entitled to reasonable actual or assessed costs.

[12] The recognised exceptions to the usual costs order focus on the conduct of the successful party. There are few, if any, that fall outside of a successful party engaging in disentitling conduct. They include:

> … when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; prosecutes the matter solely for the purpose of increasing the costs recoverable; or obtains relief which the unsuccessful party had already offered in settlement of the dispute … .[12]

[13] A substantially different approach to costs has traditionally been adopted by the courts in proceedings where a regulator is exercising its powers in the public interest. The ambit of the regulator is far greater than it would be for a litigant deciding whether to bring civil proceedings. Protection from costs is intended to ensure regulators are not inhibited from authorising or taking enforcement action[13] where there is a reasonable belief that the evidence justifies doing so.

[14] Even so, a successful respondent ordinarily has a powerful argument that costs should follow the event in disciplinary proceedings that are unreasonably or inefficiently prosecuted or are mounted with good intentions but on inadequate evidence.

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9 Applicant's submissions (on costs), 16 June 2017, [16]; *Queensland All Codes Racing Industry Board v Abbott (No 2)* [2016] QCATA 49, [21].

10 *Racing Act 2002* (Qld).

11 Applicant's submissions (on costs), 16 June 2017, [21]-[22]; *Wolfgram v Racing Queensland* [2012] QCAT 44, [26].

12 *Lewis Constructions Pty Ltd v Pollock and Anor (No. 2)* [2012] QCAT 398, [8] citing *Oshlack v Richmond River Council* (1998) 193 CLR 72, per McHugh J.

13 *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233, [2007] 3 All ER 330.

[15] In *Oshlack v Richmond River Council*,[14] a member of the public unsuccessfully opposed a development approval by a local council in an attempt to preserve a fauna habitat near the site. The council was initially denied its costs because of the level of public interest in the outcome of the objection, and the challenge had resolved significant statutory interpretation issues. The costs discretion under the relevant legislation was unconfined and its terms gave no positive indication of the relevant considerations for determining which party, when, and in what amount costs were payable. Nonetheless, the decision was reversed by the Supreme Court of New South Wales on appeal.

[16] On appeal to the High Court, a three-two majority agreed that the costs refusal should be reinstated because the Land and Environment Court had not taken account of any extraneous considerations and made no other discernible error. The High Court used the "… subject matter, scope and purpose" of the legislation to decide the issue.[15] Giving due weight to the countervailing interest of the successful party in obtaining compensatory costs the court ultimately concluded that there was no miscarriage of justice in the exercise of the discretion to leave the costs where they fell.

[17] Gaudron, Gummow and Kirby JJ disavowed any absolute rule that, in the absence of disentitling conduct, a successful party is to be compensated by the losing side.[16] Their Honours also discounted the need to protect public monies where a public authority has successfully defended litigation on the basis that the council chose to assume the position of a protagonist in the litigation, instead of leaving it to the developer to act as contradictor.

[18] In dissent Brennan CJ and McHugh J refused to depart from the principle in *Latoudis v Casey*[17] (a summary justice case) to the effect that the protection of public interests did not provide a sufficient reason by itself for depriving an official body of its costs in the event of success in the proceeding.[18]

[19] This means that even in the regular court system something more than the mere categorisation of proceedings as public rather than private is required to deprive a successful respondent costs. Thus, a losing public interest litigant will not necessarily be shielded from an adverse costs order just because the case was reasonably brought and conducted for proper motives on solid grounds if the same can also be said of the successful party.

[20] The relative financial positions of litigants is generally irrelevant to the 'usual order as to costs' principle because it has no logical nexus with the

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[14] (1998) 193 CLR 72.

[15] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505.

[16] (1998) 193 CLR 72, [49] per Gaudron and Gummow JJ, [134] per Kirby J.

[17] (1990) 170 CLR 534, 544-45.

[18] (1998) 193 CLR 72, [70]-[72] per McHugh J (Brennan CJ agreeing).

proceeding. Thus, an impecunious loser will still usually have to reimburse a wealthier victor.

[21] Consequently, unsound points of law falling well short of their stated ground represent a high risk factor for costs being awarded against a regulator, unless it was defeated by a technicality, was goaded into action or was legally or morally obliged to take action and did so responsibly.

[22] Conversely, almost – but not quite – making out an appeal tends to mitigate the costs risk.

Costs in tribunal proceedings

[23] The power to order tribunal costs is a question of jurisdiction and depends entirely on the interpretation and application of the express or implied conferral of power to award costs in the QCAT Act or any enabling Act. The *Racing Act 2002* (Qld) makes no provision for the award of costs following an appeal. Therefore applications for tribunal costs are decided by reference solely to the QCAT Act.

[24] It has been repeatedly noted that unlike the common law courts QCAT is intended to be a 'no-costs' jurisdiction[19] and, unless an enabling Act provides otherwise, that the statutory default position is that each party to tribunal proceedings meets their own costs.[20]

[25] However, s 102 QCAT Act provides that the tribunal may make an order requiring one party to a proceeding to pay all or a stated part of another party's costs of the proceeding if it considers the interests of justice **require** it.

[26] Where, as here, the governing statute creates a presumption that each party will pay his or her own costs[21] but also grants the tribunal power to make a contrary order if the interests of justice require it,[22] the principles in *Murtough v New South Wales Bar Association*[23] apply.

[27] Firstly, the discretion to award costs must be exercised judicially. No authority or rule can determine whether in any particular case an order should be made.

[28] Secondly, previous cases relating to costs can only provide a rough indication of the kinds of circumstances that may attract a costs order and those that usually will not.

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19 *McEwen v Barker Builders Pty Ltd* [2010] QCATA 49, [17]; *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364, [8]-[9]; *Bode v Queensland All Codes Racing Industry Board (No. 2)* [2017] QCAT 84, [30], [33].

20 QCAT Act s 100.

21 QCAT Act s 100.

22 QCAT Act s 102.

23 [2008] NSWADT 166, [20]-[24].

[29] The language in s 100 QCAT Act is designed to discourage untenable claims and spare the scarce resources of the tribunal the burden of supporting avoidable litigation.

[30] The statute does not protect parties who abuse this statutory privilege by acting unreasonably, unfairly or oppressively towards their opponents. From an objective standpoint an adverse costs order is a natural consequence of such behaviour.

[31] Importantly, however, the direction that each party must bear the party's own cost for the proceeding is qualified by the phrase "[o]ther than as provided under this Act or an enabling Act."[24] The qualification recognises the importance of the tribunal being accessible to the community that funds it and that parties "…with arguable (contested) cases should not be dissuaded from making applications out of fear of costs".[25]

[32] This is a matter capable of being resolved either way without legal error and there will seldom be a uniquely right or wrong answer.

[33] Within its statutory bounds and subject to the basic no cost principle the power is a "broad and sweeping" discretion.[26]

Displacing the presumption against tribunal costs

[34] While the general rule that parties bear their own costs should not be disturbed without good cause, it must yield to the discretion to make a costs order if after consideration of criteria in s 102(3)(a)-(e) and "anything else considered relevant" in s 102(3)(f),[27] the tribunal is reasonably satisfied that the overall interests of justice require it (not merely justify it).

[35] If the tribunal makes a costs order it must fix the costs having regard to the nature of the proceeding, if possible. If it is not possible for costs to be fixed the tribunal may make an order for the costs to be assessed under the rules by reference to the appropriate scale.

[36] In deciding whether, and to what extent, the overall interests of justice displace the no costs presumption, the tribunal **may** have regard to:[28]

> a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);
>
> b) the nature and complexity of the dispute the subject of the proceeding;
>
> c) the relative strengths of the claims made by each of the parties to the proceeding;

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24 QCAT Act s 100.

25 *Kapadia Pty Ltd v Trust Company of Australia Ltd* [2012] QCAT 194, [13].

26 *Solid Investments Australia Pty Ltd v Greater Geelong CC* [2005] VCAT 244, [4].

27 Obviously, what the tribunal considers to be relevant must be legally capable of being so.

28 QCAT Act s 102(3).

d) for a proceeding for the review of a reviewable decision—

(i) whether the applicant was afforded natural justice by the decision-maker for the decision; and

(ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;

e) the financial circumstances of the parties to the proceeding;

f) **anything else the tribunal considers relevant**.

[37] These factors are not grounds for awarding costs; but factors to be considered[29] within the context of the facts and circumstances of each case.[30]

[38] The considerations in s 102(3) should be considered globally or in a cumulative way. Their mutually reinforcing effect might lead to a different conclusion than considering each of them in isolation.[31]

[39] Section 102(3)(f) is not to be read *ejusdem generis* with the (a)-(e) factors. It no doubt encompasses legally relevant considerations such as the nature of the jurisdiction engaged; the identity and litigation conduct of the parties; the main objects of the QCAT Act[32] including pursuing the appeal to finality; the control body's regulatory role and responsibilities and showing due respect for the integrity of internal control procedures.

[40] The "interests of justice" criterion is analogous if not exactly the same as the "fairness" test that governs costs in the tribunal's counterparts in New South Wales and Victoria.[33] The word "fair" in the context of s 109(3) *Victorian Civil and Administrative Tribunal Act*, for instance, has been interpreted as meaning "just or appropriate in the circumstances"[34] and is not "qualitatively different from the exercise of an unfettered discretion".[35] It has been described as a "relatively low hurdle for an applicant seeking an order" for costs[36] and includes contemplation of the compensatory purpose of a 'usual' costs order, which logically favours the successful party.[37]

[41] Whether costs should be awarded requires a balance to be struck between the "chilling effect" of too readily ordering costs against regulatory

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29 *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364, [9].

30 *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49, [8].

31 *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117, [22].

32 *AT v Commissioner of Police, NSW* [2010] NSWCA 131.

33 *Administrative Decisions Tribunal Act 1997* (NSW) s 88(1) (repealed); *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 109(1), (3).

34 *Filippou Management Pty Ltd v MREEF Project Company No. 11 Pty Ltd & Ors* [2010] VCAT 1261, [20].

35 *AT v Commissioner of Police, NSW* [2010] NSWCA 131, [26].

36 Ibid [33].

37 Ibid.

complainants[38] and the need to ensure that parties conduct their cases in such a way that costs are not needlessly incurred or forced on others. Individual justice is the paramount concern.

[42] It has been held in previous cases where costs were sought that the correct question for the tribunal to ask itself is "… whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice'" and the totality of the considerations stated in s 102(3) of the QCAT Act "point so compellingly to a costs award that they overcome the strong contra-indication against costs."[39]

[43] However, as Member Dr J Forbes rightly pointed out in *Fast Access Finance (Beaudesert) Pty Ltd and Anor v Charter and Anor (No. 2)*:[40]

> The circumstances of cases in which s 102 has been applied are many and various, and a finding that any particular set is "compelling" is a matter of judgment and degree. (footnotes omitted).

[44] Thus, a costs order in favour of a successful party to tribunal litigation is the exception rather than the rule and it would be wrong in principle to refuse to make a costs order if the interests of justice so demanded, simply because it has been said that in enacting s 100 "the legislature has turned its face against awards of costs in this tribunal … (unless) … circumstances relevant to the discretion inherent in the phrase 'the interests of justice' have arisen and … point to a costs award in a sufficiently compelling way to overcome the statutory hurdle".[41]

[45] There is no legal principle or tribunal policy shielding QRIC from costs orders. It is open to the tribunal to adopt a general approach or non-binding guidelines for 'public interest litigation'. Such an approach would be subject to change so that the discretion conferred by s 102(1) is not disabled and can still be exercised judicially on a case by case basis. However the importance of certainty and predictability in tribunal decision-making should not override the overall interests of justice, even in disciplinary or regulatory contexts.

Grounds of appeal

[46] The main three grounds the applicant relies on in his claim that he is entitled to costs are:

a) the nature and complexity of the dispute – s 102(3)(b) QCAT Act;

b) the relative strength of the claim – s 102(3)(c) QCAT Act; and

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38 See *Maylor (No. 2) v Mid North Coast Area Health Service* [2001] NSWADT 118, [23].

39 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No. 2)* [2010] QCAT 412, [29]; *Bode v Queensland All Codes Racing Industry Board (No. 2)* [2017] QCAT 84, [34]; *Warren v Queensland Law Society Incorporated (No. 2)* [2013] QCAT 234, [11].

40 [2012] QCAT 172, [11]-[13].

41 *McEwen v Barker Builders Pty Ltd* [2010] QCATA 49, [17].

c) the financial circumstances of the party in responding to the appeal – s 102(3)(e) QCAT Act.

Nature and complexity of the dispute

[47] The nature of a proceeding could warrant a costs order even if it was not complex;[42] but complexity alone will seldom suffice. Nonetheless, it has been held in a comparable context that barring the successful party from recovering costs that were reasonably necessary to achieve a satisfactory outcome[43] would not usually be in the interests of justice.

[48] The applicant relies heavily on the permission to obtain legal representation as evidence of the complexity of case. Just because the granting of legal representation for an appeal was reasonable, desirable or beneficial does not make a case complex or of itself justify costs. The comparative complexity, circumstances and consequences of each case must be considered.[44]

[49] The nature and complexity potentially cuts both ways and refers to the novelty of the issues; the level of public interest; the potential consequences; the degree of difficulty; how costs in the particular class of case has been dealt with historically; the purpose of the proceeding; whether there is a remedial or social aspect rather than purely commercial objective to the proceeding; how adversarial or *inter partes* the procedures were;[45] and the subject matter and its value. Where disciplinary proceedings succeed and were brought to redress improper conduct, protect the public or by reason of a statutory duty, costs will generally follow the event.

The relative strength of the parties' claims

[50] The expression "relative strength" contemplates a "substantial disparity between the strength of one claim and the weakness of its competitor".[46] A high level of un-tenability rather than mere tenuousness is envisaged.

[51] It is unlikely that this criterion alone would call for a costs order where there was a real issue to be tried and real justification for the claims made on either side,[47] however the ultimate test is still whether justice requires the costs order or not.

[52] A party is clearly not entitled to costs merely for succeeding in an appeal.[48]

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42 *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178, [39].

43 *Tamawood Ltd & Anor v Paans* [2005] 2 Qd R 101 (Tamawood).

44 *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49 [11]-[14].

45 *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000, [18]-[19].

46 *Beasley v Department of Education and Training* [2006] VCAT 2044, [20].

47 *Dennis Family Corporation Pty Ltd v Casey CC (Red Dot)* [2008] VCAT 691, [14].

48 *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49 [10].

[53] No issues of considerable significance or general public importance were involved. The decision concerned a straightforward overview of the principles and comparable cases. On the other hand, there is a public interest in encouraging finality and discouraging misconceived or needless appeals. Persisting with weak or losing cases with decreasing chances of success on appeal (due to the requirements for leave to be granted and the existence of an arguable error) can cause practical injustice to the opposing party and strains limited judicial and administrative resources.

[54] Thomas J decided the QRDB penalty was "comfortably" within the range of penalties available, having regard to comparable past cases, and was neither unreasonable nor manifestly unjust.[49]

Financial hardship

[55] The applicant's limited means is also a significant factor in the decision to award costs.[50]

[56] A party is not entitled to costs simply for experiencing financial hardship generally or as a result of proceedings.[51] Costs were awarded in *Wolfgram v Racing Queensland*[52] partly because the applicant had multiple mortgages, a business overdraft, two dependent children, and staff members,[53] but "complex IT matters" were also involved and Racing Queensland's arguments were comparatively weak.[54]

[57] Of course, the publicly-funded protective role the QRIC has been assigned also plays in its favour. Nevertheless, even where the anti-cost rule prevails it may be relevant to consider the practical justice of depriving a poor respondent of the costs of successfully defending his position from attack by a publicly-funded regulator.

Other relevant considerations

[58] While the conduct of the successful party is the most relevant cost consideration in regular court cases, the reasonableness of the unsuccessful party may be more pertinent as to whether costs of tribunal proceedings will be granted.

[59] Generally speaking, a finding that the opposing party acted unreasonably in bringing or prosecuting a defended claim, or conducted the proceeding vexatiously or in a way that unnecessarily disadvantaged the applicant, will imply that a compensatory order for costs is called for.

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49 *Queensland Racing Integrity Commission v Vale* [2017] QCATA 46.
50 Tamawood.
51 *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49, [21].
52 [2012] QCAT 44.
53 *Wolfgram v Racing Queensland* [2012] QCAT 44 [21].
54 Ibid [11], [15].

[60] There was no suggestion that the QRIC acted capriciously, arbitrarily or unnecessarily to disadvantage the applicant in appealing.[55]

[61] However, it may also be sufficient if the losing party pressed a clearly implausible, manifestly weak or incredible case.[56]

[62] The liability of regulatory bodies for costs is governed by the same rules as apply to all other parties to tribunal proceedings. Their public functions are relevant under s 102(3)(e), and it would be an error not to give due recognition to this factor. For example, in *Medical Board of Australia v Wong,* the mandatory nature of the Board's statutory referral obligation was relevant to the question of whether judicial proceedings had been properly brought, where there was no finding that the characterisation of the conduct in issue as professional misconduct was not only wrong, but unreasonable.[57]

[63] A regulator is expected to be a 'model litigant' in dealing with the profession it oversights.[58] Like any other administrative body, it is obliged to try to avoid rather than pursue litigation wherever possible. The expectation is that it will err on the side of caution when reviewing penalty discretions exercised by its own experts, and give proper consideration to whether the grounds of an appeal have substantial, not barely arguable, merit. That is not to say that QRIC is not entitled to maintain parity or argue for stiffer penalties in appropriate cases, but failure in a marginal case is a relevant costs factor against applying s 100 QCAT Act.

[64] QRIC's statutory responsibility for the protection of the public means the tribunal should not unreasonably (or unjustly) burden it with an order for costs. In principle, it will not usually be ordered to pay the costs of another party unless it has been unreasonable in performing its roles and functions.[59] While the role and responsibilities of QRIC are plainly relevant under s 102(3)(b) and (f), these considerations are offset by the argument that its losing appeal case was a relatively weak one, and meeting it put the applicant to ultimately needless time and financial costs.

[65] Here, the sole error of law asserted by QRIC was that the Board was wrong in imposing a manifestly inadequate penalty.[60]

[66] Appellate intervention on the ground manifest insufficiency is not warranted unless, having regard to all relevant factors including the degree of disparity with comparable cases, the appellant tribunal is driven to conclude that there must have been some significant misapplication of principle or wrong turning.[61]

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55 QCAT Act s 102(3)(a).
56 *Delekta v Moorabool SC & Ors* [2003] VCAT 30, [12].
57 *Medical Board of Australia v Wong* [2017] QCA 42.
58 *Mahanthirarasa v State Rail Authority of New South Wales* (2008) 72 NSWLR 273.
59 *Bode v Queensland All Codes Racing Industry Board (No. 2)* [2017] QCAT 84.
60 *Queensland Racing Integrity Commission v Vale* [2017] QCATA 46, [20].
61 cf *Barbaro v The Queen* (2014) 253 CLR 58, 79.

[67] Demonstrating an error of law in the making of a discretionary judgment is a demanding onus to discharge. To meet that challenge QRIC had to persuade the appeal tribunal that the penalty was either unreasonable or plainly unjust, decided on the wrong principle, or imposed because material considerations were not taken into account.[62]

[68] The Commission sought a more severe penalty in reliance on the precedent value of *Nikolic v Racing Victoria Ltd*[63] as the closest comparable case. Nikolic involved a licensed jockey who was charged with "improper or dishonourable action in connection with racing" and "conduct prejudicial to the image, interests or welfare of racing"[64] for abusing the Chairman of RVL Stewards, including describing him on multiple occasions as a 'cunt' and threatening to the safety of his family.[65]

[69] Nikolic, therefore, involved serious threats as well as abuse, compared with the "very intemperate language" used by the respondent here.[66]

[70] The charges were denied but were found to be proved on the faith of the Chairman's evidence which was preferred over the respondent's in all material respects.

[71] No remorse or contrition was shown and the respondent had falsely suggested that the allegations against him had been fabricated.

[72] In concluding that the QRDB penalty was plainly not unreasonable or manifestly unjust, and not due to the application of a wrong principle, nor affected by allowing extraneous matters to guide or effect its decision, Thomas J[67] noted that the Board rightly took into account a lack of relevant history of offending, an early plea of guilty, the respondent's health and medical history, the economic consequences of disqualifying a person from earning a livelihood, that the conduct was out of character and the respondent regretted it, and that the respondent had already served a period of 7 weeks disqualification which equates to 14 weeks (or 3 and a half months) of suspension.

[73] As Thomas J found the circumstances in Nikolic were much more severe than the current case and no mitigating factors were relevant.[68] Even so, Nikolic's two year disqualification for his threatening behaviour was later halved on appeal to VCAT on 19 February 2013.[69]

Conclusion

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62 *Queensland All Codes Racing Industry Board v Abbott* [2015] QCATA 92, [49].

63 Victorian Racing Disciplinary Board, 21 September 2012 and 2 October 2012; affirmed in [2012] VCAT 1954.

64 *Australian Rules of Racing* r 175(a), 175A.

65 *Nikolic v Racing Victoria Ltd* [2012] VCAT 1954, [28]-[30].

66 *Queensland Racing Integrity Commission v Vale* [2017] QCATA 46, [14].

67 Ibid at [21] – [27], [30] – [40], [47] – [49].

68 *Queensland Racing Integrity Commission v Vale* [2017] QCATA 46, [34]-[37].

69 Brendan Cormick, 'Danny Nikolic ban cut to 12 months', *Sport, The Australian,* 19 February 2013.

[74] Previous penalty decisions do not give rise to binding precedent, but may be followed by tribunals deciding factually similar cases, unless plainly wrong.[70]

[75] The point of having regard to what was done in past comparable cases is to ensure that similar principles are consistently applied, so as a matter of systemic fairness[71] like cases are predictably treated alike, and different cases are distinguished. Past decisions merely serve to illustrate but not define patterns, trends or upper and lower limits as a yardstick for the purpose of comparing and contrasting prosed penalties with.[72] They help parties predict a penalty range when deciding whether to defend or plead.

[76] The penalisation assessment process is much more sophisticated and inevitably more complex than simply correlating variables. Consistency and parity are achieved by taking account of the multitude of conflicting and contradictory aggravating and mitigating features not found in graphs or the statistical details of penalty outcomes in other cases.[73]

[77] In my opinion, the nature and outcome of the appeal, in conjunction with the remarks of Justice Thomas in dismissing the appeal, suggest that the appeal proceeding was not worth the candle and, on balance, should not have been pursued in light of the limited prospects of success, the likely cost to both sides, the lack of any important question of principle, and the overreliance on Nikolic as a yardstick.

[78] The respondent's submissions, therefore, should be accepted. The "contra-indication" that the no cost presumption should not be applied to deny the successful respondent the cost he expended to uphold the QRBD's decision is strong enough. The overall interests of justice require him to have his costs of the proceedings to be paid by the QRIC.

[79] The applicant quantifies his reasonable actual costs as $21,705.21 for solicitor's charges and $3,740.00 for counsel's fees but there is nothing on the file to substantiate that the claimed costs were actually incurred or for what itemised particulars.[74]

[80] In these circumstances, the applicant is ordered to pay the respondent's costs of and incidental to the appeal proceedings within 30 days, to be agreed, or failing agreement to be assessed on the standard basis.

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70 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 596.
71 *Wong v The Queen* (2001) 207 CLR 584, 591.
72 *Hili v The Queen* (2010) 242 CLR 520, 537.
73 *R v Pham* (2015) 256 CLR 550, 559.
74 Respondent's submissions (on costs), 23 May 2016, [11].