SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston v Brisbane City Council & ors (No 2)* [2019] QSC 193
PARTIES:	**NICOLE JOHNSTON** (applicant) **v** **BRISBANE CITY COUNCIL** (first respondent) and **DAVID GILL** (second respondent) and **GAIL HARTRIDGE** (third respondent) and **GRAHAM MATHEWS** (fourth respondent)
FILE NO:	SC No 4803 of 2018
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	9 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions of the applicant and the first respondent received 26 June 2019
JUDGE:	Wilson J
ORDERS:	**The orders of the Court are:** **1. The first respondent pay the applicant 75% of her costs on the standard basis to be agreed between the parties and, failing agreement, to be assessed.** **2. There be no order for costs between the applicant and the second, third and fourth respondents.**
CATCHWORDS:	PROCEDURES – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant succeeded in an application for judicial review pursuant to the Court's inherent jurisdiction – where the applicant made an argument that the *Judicial Review Act* 1991 (Qld) applied and privative clauses did not exclude the jurisdiction of the Court – where judgment was given that the *Judicial Review Act* 1991 (Qld) did not apply– whether costs should be

disposed of in accordance with the general rule – whether there are special or exceptional circumstances to depart from the general rule

Uniform Civil Procedure Rules 1999 (Qld) r 681, 684,

BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, applied
Oshlack v Richmond River Council (1988) 193 CLR 72, followed

COUNSEL: S J Keim S.C. for the applicant
M S Trim for the first respondent

SOLICITORS: Reveal Legal for the applicant
City Legal for the respondents

[1] On 30 May 2019 I published my reasons for ordering that the decision and orders made by the first respondent's Councillor Conduct Review Panel ("CCRP") in its report dated 16 March 2018 be declared void and set aside: *Johnston v Brisbane City Council & ors* [2019] QSC 130 ("the reasons").

[2] Nicole Johnston, the applicant, sought judicial review of the decision of the first respondent's CCRP. On 16 March 2018, the CCRP found that the applicant had engaged in misconduct within the meaning of section 178(3)(v) of the *City of Brisbane Act* 2010 (Qld) ("the *COBA*") and ordered the applicant to pay to the first respondent an amount equal to the monetary value of 50 penalty units ("the decision").

[3] The application was made pursuant to the Court's inherent jurisdiction and statutory provisions including section 10 of the *Civil Proceedings Act* 2011 (Qld) ("the *CPA*") and the *Judicial Review Act* 1991 (Qld) ("the *JRA*").

[4] The applicant contended that the *JRA* applied to the application and argued that the privative clauses in the *COBA* (sections 178(8) and 226(1)) did not exclude the jurisdiction of the Court pursuant to the *JRA*. The applicant regarded this as a "secondary issue" and it was conceded that ultimately this may have no practical bearing on the outcome of the proceeding, as the Court's inherent jurisdiction and powers enable the Court to make orders having the same practical effect as orders which could be made under the *JRA*. However, the applicant submitted that this issue may affect some aspects of the proceeding, including whether a costs order under section 49 of the *JRA* can be made.

[5] On 30 May 2019, I delivered judgment and published my reasons. I made the following orders:

a. The Decision and Orders made by the Councillor Conduct Review Panel in its Report dated 16 March 2018:

    i. that the complaint was proven;

ii. that the applicant is found under section 183(1) of the *City of Brisbane Act* 2010 (Qld) to have engaged in "misconduct" within the meaning of section 178(3)(v) of the *City of Brisbane Act* 2010 (Qld);

iii. that the parties to the complaint be advised accordingly

iv. that the applicant pay to the first respondent an amount equal to the monetary value of 50 penalty units;

be declared void and set aside.

b. The question of costs is adjourned to a date to be fixed.

[6] In making these orders, I found that the decision exceeded the CCRP's jurisdiction because:

i. by virtue of section 178(2) of the *COBA*, Chapter 6, Part 2, Division 6 of the *COBA* does not apply, with the result the CCRP has no jurisdiction in respect of the conduct of councillors at a meeting of the first respondent except for a councillor's failure to comply with a direction to leave made by the Chairperson of the meeting; and

ii. a jurisdictional fact, namely that the applicant had failed to comply with a direction of the Chairperson to leave the meeting the subject of the decision did not exist because the Chairperson's purported direction to leave was not made in accordance with any power of the Chairperson to direct the applicant to leave;

b. further, in respect of the decision, the CCRP failed to exercise its jurisdiction because it failed to inquire into the presence of a jurisdictional fact, namely whether the applicant had failed to comply with a direction of the Chairperson to leave the meeting the subject of the decision.

[7] I also found, relevantly, that the *JRA* did not apply to the application, and that orders pursuant to the *JRA* were not available.

The question of costs

[8] I invited the parties to make written submissions on the question of costs. By 10 June 2019, the parties had agreed between themselves to provide me with written submissions as to costs by 26 June 2019. On that date, I received the applicant and the first respondent's submissions on costs. The second, third and fourth respondents provided no submissions as to costs.

Applicant's submissions on costs

[9] The applicant submits that the Court should dispose of costs in accord with the general rule, such that the costs should follow the event. As such, the applicant seeks an order that the first respondent pay all of her costs on the standard basis to be agreed between the parties and, failing agreement, to be assessed.

[10] The first respondent accepts the general rule but submits that the appropriate order for costs, in light of the orders and reasons for those orders, is that the first respondent pay 50% of the applicant's costs on the standard basis, to be agreed or assessed.

The law

[11] The general rule for costs is r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the *UCPR*"), which provides that:

> "(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise."

[12] There must be "special or exceptional circumstances" to depart from this rule, see, for example, *Oshlack v Richmond River Council*,[1] where McHugh J (with whom Brennan CJ agreed) endorsed a statement of Devlin J in *Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co. (No. 2)*[2] that:

> "Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure."

[13] I note also that r 684 of the *UCPR* provides:

> "(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.
>
> (2) The court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."

[14] In *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2),*[3] McMurdo J (as his Honour then was) stated the following with respect to the interpretation of r 684:

> "The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule? That this remains the approach under r 681 and r 684 comes not only from the terms of the rules themselves but also from the recognised purposes for it.
>
> ...
>
> Thus in *Todrell Pty Ltd v Finch & Ors*, Chesterman J approved this passage from the judgment of Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd*:

---

1 (1998) 193 CLR 72 at 66.
2 [1953] 1 WLR 1481 at 1484; [1953] 2 All ER 1588 at 1590.
3 [2009] QSC 64 at [7] and [8], citations omitted.

> "Notwithstanding that the court has power to deprive a successful party of costs, or even order a successful party to pay costs, that is a course to be taken in unusual cases and with a degree of hesitancy."
>
> I adhere to the view I expressed in *Australand Corporation (Qld) Pty Ltd v Johnson& Ors* that ordinarily the fact that a successful plaintiff fails on particular issues does not mean that the plaintiff should be deprived of some of its costs, although it may be appropriate to award costs of a particular question or part of a proceeding where that matter is definable and severable and has occupied a significant part of the trial."

[15] Thus the question is whether there are exceptional circumstances to depart from r 681, and the enquiry must be whether the present case warrants such a departure. Rule 684 provides for a mechanism for such a departure, but does not fetter my discretion.

[16] The issue of whether the *JRA* applied to the application is pertinent to this enquiry.

The *JRA* issue

[17] I dealt with the issue of whether the *JRA* applied to the application at [42] to [63] of my reasons.

[18] I found that the issue of whether the *JRA* applied to the application was of little relevance. Counsel for the applicant stated that whether this Court has jurisdiction pursuant to its inherent jurisdiction, or pursuant to the *JRA,* is only relevant to the special costs order pursuant to section 49 of the *JRA,* and then only if the applicant lost.

[19] Once the applicant raised this issue, the first respondent, understandably, went to considerable lengths to respond in their written submissions. The applicant and first respondent both provided written submissions on this issue, and a significant amount of time was spent dealing with this issue at the hearing.

[20] The applicant, despite agreeing in *Johnston v Brisbane City Council & Ors* [2014] QSC 268 ("*Johnston*") that the only source of review for jurisdictional error can be under the Court's inherent supervisory jurisdiction or statutory provisions like section 10 of the *CPA*, submitted that this concession was wrongly made and Alan Wilson J's decision is wrong.

[21] Ultimately, I found that as agreed by the applicant in *Johnston* and so determined, the only source of review for jurisdictional error can be under the Court's inherent supervisory jurisdiction or statutory provisions like section 10 of the *CPA*.

Exceptional circumstances?

[22] With respect to the relevance of the question of whether the *JRA* applies to costs of the application, the applicant submits:

a. Although the applicant was unsuccessful on her argument that the privative clauses in the *COBA* did not exclude the jurisdiction of the Court pursuant to the *JRA*, this matter was of no relevance to the result.

b. Rule 684 has not broadened the discretion in respect of costs from the traditional view that a departure should be made from the general rule only in special or exceptional circumstances. The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily, the circumstances which would engage r 684 are exceptional circumstances and the enquiry must be what is it about the present case which warrants a departure from the general rule.

c. The lack of success on the jurisdictional question (with respect to the *JRA*) does not amount to exceptional circumstances so as to justify departure from the general rule. It was an issue of relatively small compass and did not impact upon the degree of substantive success enjoyed by the applicant.

[23] The first respondent submits:

a. There were two key issues pursued by the applicant, namely:

i. First, whether the applicant ought to obtain the orders sought in the Originating Application, including costs orders, because the *JRA* applied to the proceedings. The Originating Application was largely framed on that basis; and,

ii. Second, whether the *JRA* did not apply, there had been any "jurisdictional error" such that the Court should make some or all of the orders sought by the applicant within the inherent jurisdiction of the Court.

b. The applicant persisted with the first of the issues in written submissions and in oral submissions at the hearing. It occupied a significant part of the submissions made in the proceeding: as noted by paragraph [45] of the reasons.

c. The applicant persisted in the argument as to the application of the Act notwithstanding the earlier judicial determination to the contrary between the same parties which is ultimately been accepted by this Honourable Court (and that is a factor that ought weigh against the Applicant). The applicant's persistence with the argument made it necessary for the first respondent to deal with the previous decision and other grounds upon which the *JRA* did not apply: including on the basis of an issue estoppel (it was still necessary to do the work on all the reasons it did not apply and put on evidence and submissions in that regard).

[24] I accept the respondent's submissions.

[25] The issue, as the applicant submitted, was whether the jurisdiction exists pursuant to the *JRA*, or only in the Court's inherent jurisdiction unaffected by the *JRA*.

[26] The issue of this Court's jurisdiction to review decisions of the CCRP had already been determined in *Johnston*.

[27] Alan Wilson J noted that section 226(1)(a) of the *COBA* speaks in clear terms to exclude appeals of any kind against decisions including, specifically, review under the *JRA*. It is noted that the applicant in *Johnston* agreed that the *JRA* did not apply.[4]

[28] However, the applicant persisted in this argument as to the application of the *JRA* notwithstanding the earlier judicial determination in *Johnston*.

[29] Once the applicant raised the issue, the first respondent appropriately provided comprehensive submissions on why the *JRA* did not apply, including on the basis of an issue estoppel.[5]

[30] Further, this issue took up a significant portion of the hearing and as I noted in my judgment:[6]

> "Once the applicant raised this issue, the first respondent, understandably, went to considerable lengths to respond in their written submissions. The applicant and first respondent both provided written submissions on this issue, and a significant amount of time was spent dealing with this issue at the hearing. The applicant describes this issue as a secondary issue, and it is. Especially so, since I find ultimately in favour of the applicant."

[31] I accept that the applicant's persistence with the argument made it necessary for the first respondent to deal with the issue in the way it did.

[32] As such, in these circumstances, I consider the progression of this inherently flawed argument to constitute exceptional circumstances to depart from the general rule that costs follow the event.

The order for costs

[33] I note the first respondent contends for an order that the first respondent pay 50% of the applicant's costs in the application.

[34] Rule 684(2) of the *UCPR* provides:

a. First, the power to make an order for costs in relation to a particular question in or a particular part of a proceeding with power to declare what percentage of the costs of the proceeding is attributable to the question.

b. Second, the power to make an order for costs in relation to a particular question in, or a particular part of, a proceeding with the power to declare what part of the proceeding to which the order relates.

---

4 [2014] QSC 268 at [17].

5 The issue of estoppel was not ultimately dealt with in the judgment, see [2019] QSC 130 at [55] to [56] (footnotes omitted): [55] The first respondent submits that this Court ought to follow its previous ruling as it is not clearly wrong and the applicant's submissions do not demonstrate that it is clearly wrong. [56] The first respondent also contended that as the applicant and the Council were both parties in Johnston an issue estoppel arises; the issue having been raised and decided in the earlier proceeding the applicant cannot raise it again in this proceeding.

6 [2019] QSC 130 at [45], footnotes omitted.

[35] As it is not clear whether the *JRA* issue is severable from the other issues in the application, including whether the costs are easily discernible between each of the issues, I am inclined to adopt the first approach which is consistent with the first respondent's contention. That is, to make an order declaring costs as an attributable percentage (as opposed to making an order that relates only to a certain part of the proceeding, i.e. the *JRA* issue).

[36] In the circumstances, there is a strong basis for departing from the general rule so far as the costs of the application are concerned.[7] The *JRA* issue was inherently flawed and it did occupy a significant part of the hearing. In my conclusion some allowance for this should be made by reducing the costs otherwise recoverable by the applicant.

[37] However, I am not satisfied that half of the costs in this matter are attributable to the *JRA* issue. In my view, it is appropriate that the first respondent pay 75% of the applicant's costs. Such an order, in my view, appropriately recognises the time and effort taken up in dealing with this issue.

[38] I note that the applicant submits the following in relation to the first respondent's conduct:

a. The first respondent argued every possible point some of which were weak. While the first respondent's role as the local government for the local government for the area made it appropriate to raise the question of the CCRP's jurisdiction to inquire into the validity of the Chairperson's direction (especially, where the CCRP had taken a view that it had no jurisdiction so to inquire), it was clear on the facts that none of sections 178 and 186A *COBA* or sections 22 and 53 *Meetings Local Law* 2001 (Qld) lawfully underpinned the Chairperson's actions.

b. Rather than argue just the substantive question that required determination, the first respondent pursued what were, ultimately, spurious arguments on the lawfulness of the Chairperson's actions most of which had not been subjectively relied upon by the Chairperson.

[39] It was reasonable, in my view, for the first respondent to pursue these lines of argument. This is particularly so considering the relative lack of jurisprudence on the interpretation of these individual sections.

[40] Separately, I note the second, third and fourth respondents abided the orders of the court. The first respondent submits that it would not be appropriate to make any such costs orders and that, if any were proposed, the second, third and fourth respondents would all need a fair and proper opportunity to respond to any submission made in that regard. I agree, and note that the applicant has not submitted that the second, third and fourth respondents be subject to any costs orders. In the circumstances, I will make no order for costs between the applicant and the second, third and fourth respondents.

---

7 *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)* [2009] QSC 64 at [16].

[41] The orders for costs will be:

a. The first respondent pay the applicant 75% of her costs on the standard basis to be agreed between the parties and, failing agreement, to be assessed.

b. There be no order for costs between the applicant and the second, third and fourth respondents.