SUPREME COURT OF QUEENSLAND

CITATION:	*Stenner v Crime and Corruption Commission & Ors (No 2)* [2019] QSC 242
PARTIES:	**MICHELLE STENNER** (applicant) **v** **CRIME AND CORRUPTION COMMISSION** (first respondent) and **CHAIRMAN OF THE CRIME AND CORRUPTION COMMISSION** (second respondent) and **STATE OF QUEENSLAND** (third respondent)
FILE NO:	BS 2947 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	27 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Ryan J
ORDER:	**The applicant pay the first, second and third respondents' costs of and incidental to the application on a standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – COSTS OF AND INCIDENTAL TO PROCEEDING – where analogous issue to be argued in the District Court *Statham v Shephard* [1974] 23 FLR 244 *The Queen v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13
COUNSEL:	JR Hunter QC and AD Scott for the applicant JG Rennick SC and R Withana for the first and second respondents JM Horton QC for the third respondent

SOLICITORS: Creevey Russell for the applicant
Crime and Corruption Commission for the first and second respondent
Crown Solicitor for the third respondent

[1] For the reasons which follow, I order that the applicant pay the first, second and third respondents' costs of and incidental to the application on the standard basis.

Background

[2] The applicant, Ms Stenner is charged on an indictment, which is before the District Court of Queensland, with three counts of perjury under section 123(1) of the *Criminal Code*. Proof of the offence of perjury requires proof that a defendant knowingly gave false testimony *in a judicial proceeding*. The Crown alleges that the relevant judicial proceeding in the applicant's case is a Crime and Corruption Commission hearing.

[3] On Ms Stenner's application, her criminal trial was adjourned to enable her to apply to this court for declarations, including a declaration that the CCC hearing was not a section 123 "judicial proceeding". Such a declaration would have effectively ended the prosecution.

[4] An alternative to the application to this court was a pre-trial application to the criminal court, under section 590AA of the *Criminal Code*, for a ruling that the hearing was not a judicial proceeding.

[5] The applicant's argument to this court was that the CCC hearing had not been lawfully authorised by the Chairperson of the CCC because, in making the decision to authorise the hearing, he failed to have regard to up-to-date information in accordance with the principle in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

[6] The first and second respondents responded to the substance of the applicant's application (arguing essentially that the up-to-date information principle did not apply to the Chairperson's decision to authorise the hearing). The first and second respondents also submitted that, even if I were persuaded to make the declarations sought, I ought to refuse to make them in the exercise of my discretion, having regard to the anti-fragmentation principle. That principle is to the effect that the administration of the criminal law should be left to the criminal courts and, other than in exceptional cases, the civil courts should refrain from interfering in criminal matters.

[7] The third respondent, representing the interests of the Office of the Director of Public Prosecutions, made no submissions on the substance of the application, but submitted that I should decline the declaratory relief sought having regard to the anti-fragmentation principle.

[8] Each respondent provided written submissions on the anti-fragmentation principle, but only the third respondent made oral submissions about it.

[9] At the hearing, I asked the parties whether I ought to consider the substance of the application if I were to apply the anti-fragmentation principle and dismiss the application. The applicant asked me to do so. The third respondent submitted that I ought not to express an opinion on the substance of the application. Counsel for the first and second respondent could see some benefit in my considering the substance of

the application (if there were to be an appeal) but ultimately submitted that his instructions were that I ought to say nothing about the substance of the applicant's argument.

[10] On 22 August 2019, I delivered my reasons in the matter: see *Stenner v Crime and Corruption Commission & Ors* [2019] QSC 202.

[11] I declined to grant the applicant the declaratory relief she sought – relying on the anti-fragmentation principle and finding that there was nothing about the matter which warranted the intervention of this court in the criminal proceedings in the District Court.

Submissions as to costs

[12] After delivering my reasons, I invited written submissions from the parties as to costs.

[13] Each of the respondents sought costs from the applicant, submitting, in effect, that there was no reason why costs in this matter ought not to follow the event.

[14] The applicant submitted that I ought to order that she pay the third respondent's costs of the hearing of 22 July 2019 but that otherwise there ought to be no order as to costs.

Approach

[15] Costs are in the discretion of the court, but follow the event, unless the court orders otherwise (rule 681(1), *Uniform Civil Procedure Rules* 1999). The court's discretionary power to award costs is wide but the discretion must be exercised judicially and not against a successful party without good reason.

The third respondent's costs

[16] I will deal briefly with costs in so far as they concern the third respondent.

[17] The applicant accepts that she must pay the third respondent's costs.

[18] She does not submit that there should be a limit to the costs she has to pay the third respondent, nor do I consider there to be any basis for a limit on the costs she has to pay the third respondent. The work the State was required to do for the Director of Public Prosecutions in the matter before me could not be used in an analogous application in the District Court.

[19] I order the applicant to pay the third respondent's costs.

The first and second respondents' costs

[20] The applicant submitted that she ought not to be ordered to pay the first and second respondents' costs because:

- the proceedings were criminal in nature.

- there are no costs in criminal proceedings and it would be "a gross unfairness" for the applicant to bear the respondents' costs of the pre-trial hearing (at which, the argument went, the respondents submissions could be re-used);

- the "proper approach", which the first and second respondent ought to have adopted, was that of a submitting party, consistent with the principle in *Hardiman* (*R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, [54]).

  - The first and second respondent ought not to have made submissions on the substance of the matter before me; or

- if I did not accept that the participation of the first and second respondents was contrary to the *Hardiman* principle, I should exercise my discretion to make no order in favour of the first and second respondents under the principles in *Statham v Shepherd (No 2)* [1974] 23 FLR 244.

Authorities relied upon by the first and second respondents

[21] The *Hardiman* principle is taken from the following passage of the judgment in that case:[1]

> "[Counsel for the Tribunal] was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for the tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court was not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is a the risk that by doing so it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited by submissions going to the powers and procedures of the Tribunal."

[22] In *Statham v Shepherd* the court said (as summarised in the headnote):[2]

> "In general, two sets of costs will not be allowed to defendants between whom no conflict of interest could arise in the presentation of their cases. If such conflict is possible but unlikely the defendants should try to resolve that conflict by inquiring how the plaintiff will put his case, if that may resolve the possibility of conflict. The defendants, although united in their opposition to the plaintiff, may be acting reasonably in remaining at an arm's length in the general course of litigation; but defendants so acting may be acting unreasonably by duplicating costs on particular matters at particular times."

Argument that the proceedings are criminal in nature

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1 *The Queen v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, 35-36.
2 *Statham v Shephard* [1974] 23 FLR 244, 248.

[23] In support of her argument that the proceedings were criminal in nature and that the cost (or no cost) rules applying to criminal matters should apply, the applicant submitted that –

(a) she could not be criticised for bringing her application to this court: the Director of Public Prosecutions himself acknowledged "the high importance of the point to be determined and its centrality to the matters [the] subject of the applicant's criminal trial";

(b) my reasons "acknowledged … that the substantive application will, in effect, be reargued before the District Court on a pre-trial hearing … and that the work of the parties (including the first and second respondents) will be substantially, if not entirely, utilised in that argument";

(c) it would be "grossly unfair" for the applicant to bear the costs of the first and second respondents' "preparation" for the pre-trial hearing: most of the work done by the first and second respondents to the applicant's application should be treated as work done in a criminal matter and should be governed by the no-costs rule in criminal matters;

(d) the application concerned a matter of "wide" public interest; and

(e) the applicant had taken steps to ventilate the matter (the subject of the application) as soon as she became aware of it.

[24] As to (a): Queen's Counsel for the applicant explained to the District Court that it was after "anxious consideration" that a decision was made to bring the application before this court as the "better venue" for the resolution of the issue raised in the application. Thus, the applicant *chose* to invoke the civil, supervisory jurisdiction of the Supreme Court, in which costs orders are made, rather than to pursue the issue through the criminal courts in which they are not.[3]

[25] While the Director himself appeared at the application for the adjournment of the criminal trial for the purposes of bringing the application in the Supreme Court, the Director did not *encourage* the applicant's choice of forum. Nor did the Director actively support the applicant's application to this court.

[26] With respect, the applicant has overstated the Director's position in (a) above. The Director acknowledged that the outcome of the application *could* determine the criminal proceedings (depending on what the outcome was) but he did not suggest that it was a matter of such importance that it was in any sense "beyond" the criminal courts or that an application to this court was preferable to a pre-trial application to the criminal court.

[27] As to (b) and (c): With respect, the applicant's points in (b) and (c) above overstate the position.

[28] While it is reasonable to expect the applicant to now bring a pre-trial application to the criminal court for a ruling that the hearing is not a judicial proceeding – the first and second respondent will not be a party to such an application. The only respondent to the

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[3] Or "generally" they are not: I say "generally" having regard to the decision in *R v Mosely* (1992) 28 NSWLR 735 which concerned a condition and stay order pending the payment of costs "thrown away".

pre-trial application will be the Director of Public Prosecutions on behalf of the Crown. While the work of the first and second respondent *may* be consulted by the Director, that is a matter of good fortune from his perspective.[4] In that sense, the work done by the first and second respondent will not (or more accurately, may not) go to waste but the work they put in to this application is of no further use to them in the criminal proceedings.

[29] My reasons did not suggest that the first and second respondent's submissions would be "substantially if not entirely utilised at any pre-trial application". I suggested that the submissions were available for consultation by the Director "should he wish to consult them" (see footnote 4 below).

[30] Further, my consideration of the applicant's argument that this court was the "better" forum for the resolution of the issue required me to understand the nature of the argument on both sides. In other words, I was required to consult the submissions of the first and second respondents on the substantive issue to evaluate one of the applicant's arguments. Indeed, the applicant asked me to consider and determine her substantive argument whether or not I decided to dismiss the application in the exercise of my discretion.

[31] As to (d): Again, with respect, the applicant's argument overstates the position. The issue raised is of importance to the applicant, obviously. But it arose in unique circumstances which are unlikely to be repeated as I explained in my reasons at [127]. It does not involve a matter of wide public interest.

[32] As to (e): In the circumstances of this case, I do not consider the question of the applicant's delay or lack of delay to be relevant to the question of costs.

[33] In summary, nothing warrants my treating the applicant's application to this court as a criminal matter. Nor should the work of the first and second respondents in this application be seen as work which had to be done by the first and second respondents for the purposes of the pre-trial application. The first and second respondents will not be respondents to that application.

[34] In my view, there is nothing unfair about requiring the applicant to pay the first and second respondents' costs of the civil application which she made after the anxious consideration of her lawyers and in which she did not succeed.

Argument that the first and second respondents should have been submitting parties only

[35] I agree with the submissions of the first and second respondents that they properly participated in the proceedings as full contradictors concerning the construction of s 176 of the *Crime and Corruption Act* without being in breach of the *Hardiman* principle.

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[4] In my reasons, I said this: "The work done on the substantive part of this matter will not go to waste. The applicant's work is done and the filed submissions of the first and second respondents will be available to the Director of Public Prosecutions should he wish to consult them for the purposes of an analogous application in the District Court".

[36] I agree with the interpretation of the principle as set out in the submissions of the first and second respondents and in particular its submissions that the arguments raised by the applicant went to the powers and procedures of the first and second respondents and for that reason its role as full contradictor was appropriate.

[37] Also, as noted above, in evaluating whether the District Court was a singularly inapt forum for the determination of this issue, as submitted by the applicant, I was required to consider the substantive arguments of the parties: see paragraph [135] of my reasons.

The Statham principle

[38] There was nothing unreasonable in the respondents separate representation and division of labour as to the issues raised in the proceedings.

[39] While there might have been some overlap in the arguments on the discretion between the submissions of the first and second respondents and the submissions of the third respondent, I did not consider that to be in any way unreasonable particularly having regard to the fact that counsel for the first and second respondents did not make further oral submissions on the discretion.

Conclusion re costs of first and second respondents

[40] None of the arguments made by the first and second respondents persuade me that I ought to do other than to give effect to a costs order which follows the event.

Summary

[41] The appropriate order is that the applicant pay the costs of each of the respondents, of and incidental to the application, on the standard basis.