SUPREME COURT OF QUEENSLAND

CITATION:	*Walters v Drummond & Ors* [2019] QSC 322
PARTIES:	**DARREN LESTER WALTERS** (Applicant) **v** **SHAUN DRUMMOND, HEALTH SERVICE CHIEF EXECUTIVE PURSUANT TO THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (First Respondent) AND **METRO NORTH HOSPITAL & HEALTH SERVICE** (Second Respondent) AND **ANDREW HOWARD, INVESTIGATOR PURSUANT TO S. 190 OF THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (Third Respondent) AND **ADAM FAIRHURST, INVESTIGATOR PURSUANT TO S. 190 OF THE HOSPITAL & HEALTH BOARDS ACT 2011 (QLD)** (Fourth Respondent)
FILE NO/S:	BS 14221/18
DIVISION:	Application for Costs
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers, without oral hearing
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** 1. **The first and second respondents pay 85 per cent of the applicant's costs of the applicant's claim against the first and second respondents on the standard basis.**

2. **The third and fourth respondents pay the applicant's costs of the applicant's claim against the third and fourth respondents on the standard basis.**

COUNSEL:	J E Murdoch QC with S T Farrell for the applicant A L Wheatley QC for the first and second respondents R P S Jackson QC for the third and fourth respondents
SOLICITORS:	Franklin Athanasellis Cullen Lawyers for the applicant Clayton Utz for the first and second respondents McInnes Wilson for the third and fourth respondents

[1] Orders were made in the principal decision[1] for the parties to provide further submissions as to costs and any further relief sought. No orders for any additional relief have been sought.

[2] The applicant seeks costs on the basis that it was successful overall and, therefore, the general position that costs should follow the event should be adopted. The first and second respondents contend that costs should be determined on an issue by issue basis, given the fact that only one ground of review was successful in the applicant's case against them and some grounds of the original application were not pursued. Alternatively, they contend that there should be no order as to costs, given the mixed success of the parties. The third and fourth respondents do not oppose an order that they pay the applicant's costs for the claim against them.

[3] In reply to the first and second respondents, the applicant contends that if partial costs are awarded, the applicant should be indemnified for the remaining portion of its costs by the third and fourth respondents. The starting point is the general rule, now expressed in r 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) ("the UCPR"), that costs follow the event. However, the Court retains a general discretion. Under r 684, an order may be made for costs in relation to a particular question in, or a particular part of, a proceeding and a court may declare what percentage of the costs of the proceeding is attributable to that question or part.

[4] In *BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2)*,[2] McMurdo J, as he then was, stated at paragraph 7:

> "……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

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1 *Walters v Drummond & Ors* [2019] QSC 290.

2 [2009] QSC 64.

themselves but also from the recognised purposes for it. In *Oshlack v Richmond River Council*, McHugh J explained the basis for the usual order as to costs as follows:

> 'The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party, the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for costs of the unsuccessful litigation….'" (footnotes omitted)

[5] His Honour further stated:[3]

> "…[O]rdinarily 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 the matter is definable and severable and occupied a significant part of the trial."

[6] In *Day v Humphrey & Ors*,[4] the Court of Appeal stated that:

> "Costs can also be awarded on a differential basis depending on the degree of success, and whether the success was only on issues that occupied an identifiable proportion of the time. Other bases for departing from the general rule include where the successful party was seeking an indulgence from the court, where the successful party had excessively delayed the prosecution of the case or where a successful party's interests were conducted jointly with that of an unsuccessful party." (footnotes omitted)

[7] However, as was stated by Jackson J in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd (No 2)* [2019] QSC 249 at [15] :

> "…Where…the plaintiff runs its case on alternative bases and a significant amount of the time is taken and significant costs are incurred in the proceeding with the pleading, interlocutory steps such as disclosure, and expert evidence and other witness evidence given at trial on a basis that is ultimately unsuccessful, the question 'what is it about the present case which warrants a departure from the general rule?' is answered, *prima facie*. But that does not foreclose the exercise of

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3 At [8]; see also *Johnston v Brisbane City Council (No 2)* [2019] QSC 193.

4 [2018] QCA 321 at 9; see also *Kosho Pty Ltd v Trilogy Funds Management Ltd (No 2)* [2013] QSC 170.

> discretion as to an order for costs having regard to the wider considerations identified in *Oshlack*."

[8] The present case, however, is quite different to that considered by his Honour in *Aurizon*. The applicant raised a number of grounds in the present matter, but they generally involved different contentions based on largely the same facts in relation to the BDO Report. The contentions as to bias, however, were more broad-based, although the factual evidence in relation to that issue was not extensive. It may be accepted that the contentions as to bias did raise some matters separate from the remainder of the case but the issue did not occupy significant time. The case was a confined one with evidence on affidavit and the hearing occupied two days. It was not a case which involved pleadings (although it is one which could have benefitted from it). The issues between the parties were not clearly defined. In a case such as this, the fact that there was a narrowing of the issues by the applicant by the time of hearing did not, in my view, contribute significantly to costs.

[9] While a number of the grounds the applicant raised against the first and second respondents were ultimately found to not be established, none of the grounds were unreasonably raised. The Court nonetheless determined that the decision of the first and second respondents should be set aside, given their reliance on the impugned findings in the BDO Report. That required the Court to consider many of the same factual matters that were raised in relation to the grounds which were unsuccessful and occupied a significant portion of the argument. That had been contested by the first and second respondents. The contention that the applicant did not articulate the ground upon which it ultimately succeeded is of little significance. The level of reliance by the first respondent on the BDO Report was a matter which was always going to be in issue in the proceedings. In light of the interrelationship of the issues in this case, I do not consider that it is appropriate or warranted by the circumstances of this case for the Court to carry out the apportionment exercise that the first and second respondents propose in their primary submissions on costs.[5]

[10] The circumstances of the present case do warrant an order that the first and second respondents pay at least a significant part of the applicant's costs of the proceedings, given that the applicant did succeed against the first and second respondents. I do not consider that they should pay all of the applicant's costs in light the lack of success by the applicant in relation to the matter of bias. However, the reduction should not be significant, given that issue played a relatively small part in the case as a whole.

[11] In the circumstances, it is appropriate for the Court to adopt a broad-brush approach and reduce the applicant's costs to a specified percentage of assessed costs, rather than making an order for the assessment of costs on separate issues and separate orders as to the payment of costs on those issues. I therefore consider that it is appropriate in the exercise of the court's discretion to order that the first and second respondents pay 85 per cent of the applicant's costs.

[12] I do not consider that it would be appropriate for the third and fourth respondents to be ordered to indemnify the applicant's costs in relation to the 10 per cent of the costs that the

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[5] First and Second Respondents' Costs Submissions, p 5.

applicant cannot recover against the first and second respondents. The issue of bias was an issue separate from any matter involving the third and fourth respondents. It would not be fair to make such an order for costs against the third and fourth respondents.

Orders

[13] The orders of the Court are that:

1. The first and second respondents pay 85 per cent of the applicant's costs of the applicant's claim against the first and second respondents on the standard basis.

2. The third and fourth respondents pay the applicant's costs of the applicant's claim against the third and fourth respondents on the standard basis.