

SUPREME COURT OF QUEENSLAND

CITATION: *Flori v Winter & Ors* [2020] QCA 115

PARTIES: **RICKY ANTHONY FLORI**
(appellant)
v
DAVID BRETT WINTER
(first respondent)
PETER DOYLE
(second respondent)
DIRK PETERSEN
(third respondent)
STATE OF QUEENSLAND
(fourth respondent)

FILE NO/S: Appeal No 5689 of 2019
SC No 4178 of 2017

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane – [2019] QSC 106 (Bowskill J)

DELIVERED ON: 29 May 2020

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser JA and Buss AJA and Henry J

ORDERS: **1. The respondents pay the appellant’s costs of and incidental to the appeal.**
2. There be no order as to the costs of the question posed for separate determination heard before Bowskill J on 28 February 2019.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – GENERALLY – where a separate question for determination was set down in the proceeding for hearing in the Trial Division – where the question was set down for determination with the appellant’s consent – where the primary judge answered that question adversely to the appellant and dismissed his proceeding – where, on appeal, the appellant succeeded to the extent that the Court found the question was inappropriate as it was premised upon an incorrect construction of statutory provisions – where the appellant did not raise the argument upon which he succeeded on appeal at the hearing before the primary judge – whether the respondents should be required

to pay the appellant's costs of the hearing before the primary judge

COUNSEL: G J Rebetzke for the appellant
K A Mellifont QC, with S A McLeod, for the respondents

SOLICITORS: Roberts & Kane Solicitors for the appellant
Crown Law for the respondents

- [1] **FRASER JA:** Pursuant to leave granted when the appeal in this matter was allowed¹ the parties have exchanged submissions about the appropriate costs orders. The appellant contends that the costs of the appeal and of the hearing before Bowskill J should follow the event of the appeal. The respondents accept that they should be ordered to pay the appellant's costs of the appeal but they argue that there should be no order as to the costs of the hearing before Bowskill J.
- [2] On 13 May 2019 Bowskill J answered adversely to the appellant a question which on 6 December 2018 Ryan J had set down for separate determination in the appellant's proceeding against the respondents. As a result of that answer Bowskill J ordered that the appellant's proceeding be dismissed. On appeal the court held that the question was inappropriate to answer because it was premised upon an incorrect construction of provisions of the *Whistleblowers Protection Act 1994* (Qld). The unsuccessful respondents argue that they should not be required to pay the appellant's costs of the hearing before Bowskill J because the question was set down for separate determination with the appellant's consent and the arguments upon which the appellant succeeded on appeal were not addressed to her Honour.
- [3] The effect of the appellant's first argument about those costs is that the respondents had more responsibility than the appellant for the order setting down the inappropriate question for separate determination. The appellant makes the following contentions. The respondents applied for an order setting down a different question for separate determination. The appellant initially opposed the application on the ground that the question required resolution of disputed facts upon which the appellant would have to give evidence. At the hearing of the application the respondents argued that a separate question could be answered without the need for any evidence. Counsel for the appellant fulfilled his duty to assist the court, with some encouragement by Ryan J, by proposing a different form of words which would enable determination of the question which, he submitted, "we understand the defendant really wants determined", whilst observing that it was "of course ... the defendant's application".
- [4] Those considerations do not justify an order that the appellant have his costs of the subsequent hearing before Bowskill J in circumstances in which before that hearing the appellant had consented to the question being separately determined and at that hearing the appellant did not raise the issue upon which he succeeded on appeal.
- [5] The appellant's second argument is to the effect that he should have the costs of the hearing before Bowskill J upon the footing that he should have succeeded at that hearing. This argument is based upon the court's conclusion in the appeal that the answer to the question as it was framed should have been favourable to the appellant. The court found that this conclusion favoured permitting the appellant to

¹ [2019] QCA 281.

raise the issue upon which he succeeded on appeal even though he had not raised it when the question was set down by Ryan J or at the hearing before Bowskill J. In that way the conclusion contributed to the appellant's success in the appeal, in relation to which the appellant is to obtain a favourable costs order.

- [6] Unlike the appeal, the hearing before Bowskill J did not advance the litigation towards a conclusion. Unfortunately, this is yet another example of an inappropriate separate question producing only avoidable delay and expense. It would be artificial to treat the appellant as a successful party for the purposes of a decision about the costs of that hearing merely because he should have obtained a favourable answer to an inappropriate question, particularly in circumstances where he had joined with the respondents before and at that hearing in promoting the determination of that question. Those costs should lie where they fall.
- [7] The respondents challenge the order made by Ryan J reserving the costs of their application for an order setting down a question for separate determination. The respondents seek an order that there be no order as to the costs of that application. The appellant submits that the order reserving costs remains appropriate. I agree. The court's judgment in the appeal did not expose any injustice in the costs order. This issue should be left to the trial judge to determine in light of the relevant considerations, which seem likely to include the considerations mentioned in [3] of these reasons and the result of the litigation.
- [8] In my view the appropriate costs orders are:
- (a) The respondents pay the appellant's costs of and incidental to the appeal.
 - (b) There be no order as to the costs of the question posed for separate determination heard before Bowskill J on 28 February 2019.
- [9] **BUSS AJA:** I agree with Fraser JA.
- [10] **HENRY J:** I agree with the reasons of Fraser JA and the orders proposed by his Honour.