# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Reihana v Beenleigh Show Society & Ors (No 2)* [2020] QSC 194 |
| PARTIES: | **TONI COLIN REIHANA**<br>(applicant)<br>**v**<br>**QCAT MEMBER FORBES**<br>(first respondent)<br>and<br>**QCAT MEMBER HOWE**<br>(second respondent)<br>and<br>**BEENLEIGH SHOW SOCIETY**<br>(third respondent) |
| FILE NO/S: | SC No 8398 of 2019 |
| DIVISION: | Trial |
| PROCEEDING: | Costs |
| DELIVERED ON: | 26 June 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | Heard on the papers<br>Supplementary submissions received 9 April 2020 (first and second respondents), 17 April 2020 (third respondents) and 11 June 2020 (applicant) |
| JUDGE: | Wilson J |
| ORDER: | **The order of the Court is:**<br>**1. The applicant pay the third respondent's costs of the proceeding on the standard basis.** |
| CATCHWORDS: | PROCEDURES – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant was wholly unsuccessful in an application for a statutory order of review – whether costs should be disposed of in accordance with the general rule that costs follow the event – whether there are special or exceptional circumstances to depart from the general rule<br>*Judicial Review Act* 1991 (Qld), s 49 |

*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 237(1)
*Uniform Civil Procedure Rules* 1999 (Qld), r 681

*Bucknell v Robins* [2004] QCA 474, cited
*Chibanda v Chief Executive, Queensland Health (No 2)* [2018] QSC 143, cited
*Ex parte Blume; re Osborn* (1958) 58 SR (NSW) 334, cited
*Graham v Magistrate Pinder* [2014] QSC 114, cited
*J.B Geraghty & Ors v Dairy Industry Tribunal &* Ors [2000] QSC 144, cited
*Kilvington v Grigg & Ors (No 2)* [2011] QDC 37, cited
*Magistrates' Court (Vic) v Robinson & Anor* [2000] 2 VR 233, cited
*NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328, cited
*Oldfield v Gold Coast City Council* [2010] 1 Qd R 158, cited
*Oshlack v Richmond River Council* (1998) 193 CLR 72, cited
*Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co (No 2)* [1953] 2 All ER 1588, cited
*Reihana v Beenleigh Show Society* [2020] QSC 55, cited
*Whitsunday Residents against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2)* [2017] QSC 159, cited
*Williams v Lewer* [1974] 2 NSWLR 91, cited

COUNSEL: Toni Colin Reihana (self-represented) for the applicant
L E Grayson (*sol*) for the first and second respondent
B M Schefe (*sol*) for the third respondent

SOLICITORS: Toni Colin Reihana (self-represented) for the applicant
Crown Solicitor for the first and second respondent
McCarthy Durie Lawyers for the third respondent

**Introduction**

[1] The applicant applied for judicial review under the *Judicial Review Act* 1991 (Qld) (the "JR Act") of a direction and two decisions made by the Queensland Civil and Administrative Tribunal ("QCAT").

[2] On 1 April 2020, I published my reasons ordering that this application for judicial review be dismissed.[1]

**The question of costs**

[3] I invited the parties to make submissions on the question of costs and set the following timetable:

1. The respondents are required to file and serve short written submissions as to costs by 15 April 2020.

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1 *Reihana v Beenleigh Show Society* [2020] QSC 55.

2. The applicant is required to serve short written submissions as to costs by 1 May 2020.

3. If either party cannot meet this timeframe, then they must inform the Supreme Court Registry by 8 April 2020.

[4] In my reasons I stated that I would deal with the question of costs on the papers, unless any party requested a hearing.

[5] On 9 April 2020, the first and second respondents filed their written submissions on the question of costs.

[6] On 17 April 2020, the third respondents provided their written submissions on the questions of costs.

[7] The applicant was in New Zealand following the delivery of my initial judgment in this matter. As a result of COVID-19 restrictions, the applicant faced difficulties in filling his submissions. I have received the applicant's submissions by email, and they have been marked as an exhibit on the application.

[8] No party requested an oral hearing on the matter of costs.

**The law**

[9] The general rule for costs is r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("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.

(2) Subrule (1) applies unless these rules provide otherwise.

[10] In *Oshlack v Richmond River Council*,[2] ("*Oshlack*") 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)*[3] 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."[4]

[11] The rationale for that statement of general principle was explained by McHugh J in *Oshlack* in the following terms:

> "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

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2 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

3 *Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co (No 2)* [1953] 2 All ER 1588 at 1590 per Devlin J.

4 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 96 per McHugh J, with whom Brennan CJ agreed.

> 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 the costs of unsuccessful litigation.
>
> > As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."[5]

[12] The discretion in awarding costs is a wide one, but it must be exercised judicially and not by reference to irrelevant considerations.[6] The general order that a successful party in litigation is entitled to an order of costs in its favour is grounded in reasons of fairness and policy,[7] and should only be departed from, in the Court's discretion, with "good reason".[8]

[13] There are limited exceptions to the usual order as to costs, which focus on:

1. The conduct of the successful party which disentitles it to the beneficial exercise of the discretion;[9] or
2. The existence of "special" or "exceptional" circumstances.[10]

[14] Conduct of the successful party which disentitles it to the beneficial exercise of the discretion may include:

1. The "lax" conduct of the successful party which invited the litigation;
2. Unnecessary protraction of the proceedings;
3. Success on a point not argued before a lower court;
4. Prosecution of the matter solely for the purpose of increasing the recoverable costs; and

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5 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 per McHugh J, with whom Brennan CJ agreed (footnotes omitted).

6 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Latoudis v Casey* (1990) 170 CLR 534.

7 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 per McHugh J, with whom Brennan CJ agreed.

8 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22] per Chesterman J.

9 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 per McHugh J, with whom Brennan CJ agreed. See also *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158 at [71] per Muir JA, White and Wilson JJ.

10 *Bucknell v Robins* [2004] QCA 474 at [17] per Philippides J, with whom McMurdo P and Williams JA agreed, citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120, 126 per Kirby J.

5. Obtaining relief which the unsuccessful party had already offered in settlement of the dispute.[11]

**First and second respondent's submissions:**

[15] At the hearing on 16 October 2019, the first and second respondent were granted leave to be excused from further appearance save as to any question as to costs, including any allegations of misconduct or bias.

[16] The first and second respondents' initial submissions on costs are outlined in their submissions dated 7 November 2019. In these submissions, the first and second respondents submit that they abide by the order of the Court and do not seek an order for costs against any of the parties to the proceeding. In relation to the applicant's application for costs, the first and second respondents submit that no order should be made against them, regardless of the outcome of the substantive proceedings.

[17] The first and second respondents outline the principle in *Ex parte Blume; re Osborn* (1958) 58 SR (NSW) 334, that costs are not payable by an abiding respondent unless there is evidence of serious misconduct, corruption, gross ignorance or perversity.[12] There is no such evidence in this case.

[18] The first and second respondents also outline s 237(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), which provides that:

(1) A member has, in the performance of the member's functions as a member, the same protection and immunity as a Supreme Court judge has in the performance of a judge's functions.

[19] The first and second respondents submit that while the operation of section 237 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) does not prevent an action being brought against the first and second respondents in relation to costs,[13] in performing their functions as QCAT members, unless their conduct is considered to be serious misconduct, corruption, gross ignorance or perversity, there should be no order as to costs made against them. I agree.

[20] The first and second respondents' further submissions as to costs, filed 9 April 2020, also submit that no order as to costs should be made against them because there has been no finding of serious misconduct, corruption, gross ignorance or perversity against the first or second respondent in this proceeding.

[21] The first and second respondents do not seek an order for costs against any of the parties to the proceeding.

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11 *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158 at [71] per Muir JA, White and Wilson JJ citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-98 per McHugh J, with whom Brennan CJ agreed.

12 This principle was also applied *Graham v Magistrate Pinder* [2014] QSC 114 at 14.

13 *Magistrates' Court (Vic) v Robinson & Anor* [2000] 2 VR 233 at 242 – 243 [15] – [17].

**Third respondent's submissions:**

[22] The third respondent seeks the order that the applicant pay the third respondent's costs of and incidental to the proceedings.

[23] The third respondent cites the following case law:

1. *Oshlack v Richmond River Council* (1998) 193 CLR 72, in that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation; and
2. *Kilvington v Grigg & Ors (No 2)* [2011] QDC 37 at [37], in that costs follow the event and the question is whether there is a sufficient reason to depart from that position to any extent.

[24] In relation to whether section 49 of the JR Act applies to the present proceedings, the third respondent cites the following case law:

1. *Chibanda v Chief Executive, Queensland Health (No 2)* [2018] QSC 143, where it was held that the applicant not having the means to pay the costs order was not a sufficient reason as to why costs should not follow the event; and
2. *Whitsunday Residents against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2)* [2017] QSC 159, where the applicant was unsuccessful in their application for judicial review and was also unsuccessful in its submission that either party should bear their own costs or, alternatively, that the applicant should only be ordered to pay 50% of the respondent's costs.

[25] The third respondent notes that the application for judicial review was dismissed, and that the applicant was not successful on any ground of the application.

[26] Accordingly, by analogy with both the *Chibanda*[14] and *Whitsunday Residents*[15] cases, the third respondent submits that there is no reason for the Court to depart from the principle that costs usually follow the event.

[27] The third respondent submits that the Court should not accept any argument that the third respondent should bear their own costs nor that the costs to be paid by the applicant to the third respondent should be reduced in any way.

[28] Given that the applicant's judicial review application was dismissed and was otherwise wholly unsuccessful, the third respondent submits that costs should follow the event and the Court should make an order that the applicant pay the third respondent's costs of and incidental to the proceedings.

**The applicant's submissions:**

[29] The applicant's submissions are as follows:

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14 *Chibanda v Chief Executive, Queensland Health (No 2)* [2018] QSC 143.

15 *Whitsunday Residents against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection (No 2)* [2017] QSC 159.

> "These submissions come in tandem with an Application to Stay Decision Under Appeal whilst the Queensland Court of Appeal ascertains the correctness of the substantive decision in this proceeding.
>
> Given the contended jurisdictional errors within the above Supreme Court decision, particularly the lack of regard for the applicant's personal / residential circumstances at the time Forbes made his decisions, and the lack of regard for the QCAT registry's influential / parameter setting decisions over the attainment of the documents off the QCAT files, it feels like it would be a wasted exercise to even make submissions as to costs, given that trendsetting lack of regard.
>
> However, there is a current principle that if the "Culprit" Crown or Departmental body, or similar, decides to abide by the decision of the Court, it leaves a non-culprit party (the third respondent) to have to defend against any action that a complainant applicant has launched at said culprit, who has committed the foul deeds.
>
> And that is a buck-passing and even repugnant principle that needs to be ousted once judicial thinking eventually comes around to Joe Citizen's "reasonable man" standards on this point.
>
> The relevance here is that when Crown Law was anchored to this proceeding by my claims of abusive and over-extended use of legislative power by QCAT – the third respondent ought to have been released from "having" to stay in the proceeding when they weren't the culprit party.
>
> Undoubtedly, the onus was more so on the Court to have released the third respondent from this proceeding, than for any other party to have prompted the same.
>
> End result is the Applicant ought not to be made liable for the costs of a party that had no responsibility to be involved in the review of another culprit party, when the principle to abide by the decision of the Court was made redundant."

**Discussion:**

[30] The first and second respondents do not seek an order for costs against any of the parties to the proceeding. I make no order as to the first and second respondents' costs.

[31] In relation to the third respondent's costs, the general rule that costs follow the event[16] should only be departed from, in the Court's discretion, with "good reason".[17] The Court's discretion must be determined "on fixed principles [...] according to rules of reason and justice, not according to private opinion [...] benevolence [...] or sympathy".[18]

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16 UCPR r 681(1).

17 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22] (Chesterman J, as his Honour then was).

18 *Williams v Lewer* [1974] 2 NSWLR 91 at 95 per Rath J.

[32] The applicant raised a number of grounds in his application for a statutory order of review and was wholly unsuccessful.

[33] In relation to costs, I have considered the applicant's submissions, but in my view they do not raise any cogent argument as to why costs should not follow the event.

[34] I note that the applicant is aware that unsuccessful judicial review applications will usually result in the applicant paying the respondents' costs; the Court of Appeal ordered the applicant to pay the respondent's costs of his unsuccessful 2014 judicial review application.[19]

[35] The costs of a proceeding in this Court are in its discretion, but follow the event unless the Court orders otherwise. The third respondent submits that there is no reason that the general rule would not apply and it is appropriate for the applicant to pay the third respondent's costs of the application. I accept the third respondent's submissions.

[36] In particular I note that the third respondent has not engaged in any conduct which would disentitle it to the beneficial exercise of the discretion, such as lax conduct or the unnecessary protraction of the proceedings. The third respondent properly and appropriately responded to the array of issues raised by the applicant. I accept that there is no proper basis upon which the respondent should not be compensated for addressing each issue raised by the applicant.

[37] I do not consider there to be any bases for departing from the general rule that costs follow the event. Accordingly, it is appropriate that the applicant pay the third respondent's costs of the application.

**Order**

[38] The order for costs will be:

1. The applicant pay the third respondent's costs of the proceeding on the standard basis.

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19 *Reihana v Davern & Anor* [2015] QCA 42 at [24].