SUPREME COURT OF QUEENSLAND

CITATION:	*State of Qld v Nixon & Ors* [2002] QSC 296
PARTIES:	**STATE OF QUEENSLAND** (plaintiff) **EILEEN RUTH NIXON** (first defendant) **DALLAS OSWALD NIXON** (second defendant) **JOHN NIXON** (third defendant) **ROGER SPENCER** (fourth defendant)
FILE NO:	167 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application for Summary Judgment
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2002
JUDGE:	Muir J
ORDER:	**That the costs of and incidental to the application for summary judgment be reserved.**
CATCHWORDS:	COSTS – reserved costs – where application for summary judgment dismissed *Uniform Civil Procedure Rules* rr 299, 689 *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 *Oshlack v Richmond River Council* (1988) 193 CLR 72 *State of Queensland v Litz* [1993] 1 Qd R 343
COUNSEL:	Hanson QC for the plaintiff/applicant Griffin QC and D Morzone for the defendants/respondents
SOLICITORS:	Crown Solicitor for plaintiff/applicant Paul Williams & Associates for defendants/respondents

[1] When I delivered reasons on 24 April 2002 on an application by the plaintiff State of Queensland for summary judgment against the defendants, the parties requested, and I accepted, that they have the opportunity of delivering written submissions on costs. The application was refused on the grounds that I was not satisfied that the

defendants had no real prospect of successfully defending all or part of the plaintiff's claim. In that regard, I remarked –

> "I am unable to be so satisfied. In my view it cannot be said that the defendants have no real prospect of successfully defending the plaintiff's claims on grounds that they were denied natural justice in respect of their application to renew the lease or to have a new lease granted in its place and in respect of the termination of the occupation licence.
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> The basis of the arguable denial of natural justice is not that communications and negotiations did not take place. It is that it is arguable that the defendants were not acquainted in more than a vague and general way with the matters and considerations material to the Minister's determination and, further, that the defendants were unaware of the existence of documents and opinions material to the Minister's determination and adverse to the defendants' interests. In those circumstances it is arguable that any opportunity to be heard afforded the defendants was illusory."

[2] The defendants rely, in part, on r 299(1) of the *Uniform Civil Procedure Rules* which provides –

> "If it appears to the court that a party who applied under this part of a judgment was or ought to have been reasonably aware that a party relied on a point that would entitle that party to have the application dismissed, the court may dismiss the application and order costs to be paid within a time specified by the court."

[3] They also seek to derive support from the approach taken by the Court in *State of Queensland v Litz*[1] at which, on appeal, costs were awarded in favour of the party who successfully resisted summary judgment.

[4] There is "a general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary".[2] That principal is enshrined in r 689(1) of the *Uniform Civil Procedure Rules* which provides –

> "Costs of a proceeding are in the discretion of the court but follow the event, unless the court considers another order is more appropriate."

[5] In *Oshlack v Richmond River Council*,[3] McHugh J, in the context of a discussion about the basis on which costs are awarded and the statutory power to award costs said –

> "Although the discretion is broadly stated, it is not unqualified. It clearly cannot be exercised capriciously. Importantly, the discretion must be exercised judicially in accordance with established principle and factors directly connected with the litigation …

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1 [1993] 1 Qd R 343.

2 *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477.

3 (1988) 193 CLR 72.

> By far the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation. The successful litigant is generally entitled to an award of costs."

[6] The position in relation to summary judgment applications though, as r 299(1) recognises, is somewhat different. Such an application may fail even though that applicant may have good prospects of ultimately succeeding in the action. The party seeking to resist the application may rely on evidence which may not be accepted on the final hearing and the applicant may be obliged to proceed on the basis that the respondent's version of the facts be accepted for the purposes of the application.

[7] Because of considerations such as these, costs of summary judgment applications are something reserved or made the parties' costs in the cause. It is otherwise where it appears, for example, that the applicant for summary judgment ought reasonably to have appreciated that the application would fail or is applying primarily with a view to securing a forensic advantage.

[8] The application for summary judgment was refused because of an argument based on an amendment to the defence made after the bringing of the application. The hearing took place on Monday, 15 April and the amended defence was served, initially by facsimile transmission, at about midday on Friday, 12 April. It is argued on behalf of the defendants that the plaintiff could have considered the new defence and avoided a hearing. I regard that as a little unworldly. The die had been cast, travel arrangements made and accommodation booked. The applicant needed time to consider the new point and obtain advice on it. Whether the new point had merit is not something capable of determination on the face of the pleading. A careful review of the underlying evidence was required. In those circumstances, if the applicant can be criticised at all, it is on the basis that it did not concede a triable issue on the morning of the hearing. But, by that time all the costs of the hearing had been incurred.

[9] The defendants further submit that there were other grounds relied on by them to resist the application and that the merits of those grounds were not fully ventilated on the hearing. The merits of those grounds were not immediately apparent, hence the emphasis on the natural justice point. In those circumstances, it is desirable that the question of costs await the outcome of the proceedings. Accordingly, I propose to order that the costs of and incidental to the application for summary judgment be reserved.