SUPREME COURT OF QUEENSLAND

CITATION:	*BB v Liebsanft & Ors* [2003] QSC 389
PARTIES:	**BB** (applicant) **v** **RH LIEBSANFT (Acting Magistrate)** (first respondent) **SC JOHNSTONE (Magistrate)** (second respondent) **DF WILKINSON (Magistrate)** (third respondent) **AB** (fourth respondent)
FILE NO:	S4921 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application – Further orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2003
JUDGE:	Mackenzie J
ORDER:	**The applicant pay the fourth respondent's costs of and incidental to the application including reserved costs, if any, on the standard basis**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where judgment delivered against applicant – where costs submissions sought – where submitted applicant unreasonably subjected fourth respondent to proceedings and associated costs – whether costs should be awarded on indemnity basis PROCEDURE – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY– where proceedings disclosed no basis for review application – where applicant submitted he bear only his own costs under s 49 *Judicial Review Act* 1991 (Qld) or pursuant to exercise of inherent jurisdiction of Court – where whether costs should follow the event or some other order appropriate

R v Australian Broadcasting Tribunal &Ors; Ex parte Hardiman & Ors (1980) 144 CLR 13
Re: Fettell (1952) 54 SR (NSW) 221
Wheeler v War Veterans' Homes (153) 89 CLR 353

Judicial Review Act 1991 (Qld), s 49
Supreme Court Act 1995 (Qld) s 253
Uniform Civil Procedure Rules 1999 (Qld) , r 689

COUNSEL: The applicant appeared on his own behalf
No appearance for the first, second and third respondents, who abide by the order of the Court
R V Bowler for the fourth respondent

SOLICITORS: The applicant appeared on his own behalf
No appearance for the first, second and third respondents, who abide by the order of the Court
Shera Jones Paras for the fourth respondent

[1] **MACKENZIE J:** When the decision in this matter was delivered on 26 September 2003 leave was given to the parties to make submissions in writing with respect to costs. Written submissions were received from the applicant and the fourth respondent. The first to third respondents (judicial officers involved in the underlying proceedings) had from an early stage indicated that they would abide the order of the court. That stance accords with that endorsed by the High Court in *R v Australian Broadcasting Tribunal and Others*; *ex parte Hardiman and Others* (1980) 144 CLR 13.

[2] The applicant was unsuccessful in all respects on his application. The fourth respondent seeks costs on an indemnity basis. The applicant seeks an order under s 49(1)(e) of the *Judicial Review Act* 1991 (Qld); or alternatively that there be no order as to costs; or in the further alternative that the question of costs be reserved to the Court of Appeal since the applicant has appealed against the decision. The basis of the last mentioned proposition seems to be that the applicant believes that an order for costs made by me would only be appellable with my leave. That is only partly true. If the applicant were to be successful in his appeal, the costs order made in the Trial Division would ordinarily be liable to be set aside or varied without leave. Section 253 of the *Supreme Court Act* 1995 (Qld) imposes a requirement of leave to appeal only if the appeal is against costs only. In any event the notion is not a cogent reason why the question of costs of the application should not be resolved at this point.

[3] With regard to costs on the indemnity basis it was accepted by counsel for the respondent, on the basis of his comprehensive analysis of principle in his written submission, that the fourth respondent would have to show the following if the application for indemnity costs was to be successful:

(a) Some unreasonable conduct on the part of the applicant;
(b) That the particular facts and circumstances of the case warrant an exercise of the discretion to make an order for costs other than on the standard basis; and
(c) That the discretion should be exercised in that way.

[4] It was submitted that it was appropriate for an order for costs on an indemnity basis to be made because the fourth respondent had been unreasonably subjected by the applicant to the proceedings and the costs associated with it. Stripped to its essentials the argument contained the following elements:

(a) The applicant has engaged in legal studies and should have realised that the application could not succeed;

(b) He had deliberately avoided the alternative relief of an appeal to the District Court in relation to the individual decisions now complained of;

(c) An inference should be drawn that the proceedings were high handed, reckless, irresponsible, containing groundless allegations and vexatiously conducted, either with the ulterior purpose of harassing the fourth respondent or with wilful disregard of the facts and the law;

(d) Failure to join the fourth respondent (who was joined by an order of a Trial Division judge at an early stage of the proceedings), caused delay and unnecessary expense to her, especially since legal aid was withdrawn on the morning of the hearing.

[5] It may be discerned from my reasons for judgment that I was satisfied that while the matters argued by the applicant varied in weight and were ultimately unsuccessful, they were not frivolous or pursued without any discernable cause. So far as failure to appeal to the District Court is concerned, the likelihood that any such appeal would not be heard before the next hearing date of the protection order proceedings is a somewhat mitigating factor.

[6] I am satisfied that the case is not an appropriate one for a costs order to be made on an indemnity basis. The remaining question is whether the costs order should follow the event or some other order should be made.

[7] Section 49(1) enables a person who has made a review application to apply for an order either that another party to the application indemnify him in relation to costs properly incurred by him in the review application on a party and party (now the standard) basis from the time the application under s 49 was made, or that he bear only his own costs regardless of the outcome of the proceedings. In his written submissions the applicant says the following:

> "If the enactment applies, then the principles it expounds in Section 49 regarding costs must also apply. I formally here, apply for a determination pursuant thereto that the applicant is to pay only his own costs 'regardless of the outcome of the proceeding'. This application is made inter alia for the real merit and the public interest issues disclosed in the application."

[8] In the alternative, he seeks an order in the exercise of the "inherent jurisdiction" of this Court departing from the "protocol of usual practice" that costs follow the cause. Subject to s 49, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application (s 49(4)). The applicant relies on *Re: Fettell* (1952) 54 SR (NSW) 221 in support of his case. Whatever the intended scope of reliance on *Re: Fettell* is, the case is no more than an example of the application of the proposition that where a statute prescribes for an order to be made in the exercise of discretion if a proper case exists, the order should be made if it is found that a proper case exists. But the court has a discretion to determine what is a proper case (*Wheeler v War Veterans' Homes* (1953) 89 CLR 353, citing, inter alia *Re: Fettell*).

[9] Leaving aside the informality of the request for an order under s 49(1)(c), it is difficult to see what substantial benefit will accrue to the applicant by applying for an order at this point. It would not relieve him from costs already incurred by the fourth respondent to the time of the application. If he proceeds on appeal, he would in the ordinary course, be relieved of any adverse order for costs made in the Trial Division. If he appeals unsuccessfully, there is no reason why he should not pay costs. Section 49(2) prescribes matters to which the court is to have regard in connection with an application under s 49. When an applicant applies at this point of proceedings, and a determination has been made that the proceeding discloses no basis for the review application, that finding weighs heavily against making an order even if the matters referred to in s 49(2)(a) and (b) were to be found in an applicant's favour. In the circumstances I refuse the application for an order under s 49(1)(e).

[10] With regard to the second basis upon which the applicant seeks a favourable costs order if an order under s 49 is not made, r 689 *UCPR* provides that the costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event unless the court considers another order is more appropriate. That principle applies unless the rules otherwise provide. In the applicant's written submissions he appealed to the notion that there was a discretion to ensure that justice is done between the parties and "…concurrently, the principles of Equity can quite properly be considered and given weight on the question of costs. In support of the submission that there is good reason to apply that jurisdiction to make no order for costs or a Section 49(1)(c) order *(sic)*, the following is submitted and the case of *Re Fettell* cited in support of the submission that such discretion ought now be applied for the Applicant's benefit."

[11] The first of the submissions that follow is essentially a complaint that the decision was erroneous. The second is that the fourth respondent should have abided the order of the court without incurring costs to support the decision in respect of which review was sought. He characterised this course as "reckless and legally inappropriate" because no benefit was likely to be derived by her. He then made a number of submissions about her motives and other conduct. It is not difficult to see why, having been joined as a party, which is not surprising, the fourth respondent chose to actively support the validity of the proceedings before the Magistrates. She had a clear interest in doing so. *Hardiman* is of no relevance; it is not concerned with a private litigant. It is concerned with participation of a decision maker in supporting its own decision.

[12] The third matter argued was essentially directed towards the proposition that the conduct of the Magistrates was unjustifiable. It was submitted that therefore his application was appropriate.

[13] In the response to the fourth respondent's submissions the applicant raises a number of issues about the bona fides of the fourth respondent. He repeats the point that he did not proceed against her and that she chose to appear by a legal representative. Some of the matters raised by him have already been the subject of analysis earlier in these reasons. One particular aspect of the incurring of costs by the fourth respondent appears in the last section of his submissions. It is that the withdrawal of legal aid to the applicant was contributed to by the applicant causing Legal Aid to come into possession of the "pleadings before this Court", accompanied by a request that they review the merit of the fourth respondent's application especially

when his own had been refused. The proposition is that in the circumstances, and particularly because of his allegation that Legal Aid must have been misled in giving assistance to the applicant, she should pay the price of not having an award of costs in her favour. No evidence was placed before me about the reason for withdrawing legal aid at the last minute. Whatever the reason, the almost inevitable consequence was that the fourth respondent would incur private legal expense out of necessity, because of the fact of and the timing of the withdrawal of legal aid. In the absence of any evidence as to what prompted Legal Aid to act in the way that it did, I am not prepared to accept the applicant's invitation to treat the fact that the fourth respondent chose to engage private legal representation as a disqualifying factor in relation to a costs order. In any event, a costs order would most likely be made whether she was represented through Legal Aid or privately.

[14] The consequence of the orders made on 26 September 2003 is that the application was dismissed. In those circumstances the principle in r 689 *UCPR* applies. It is for the applicant to positively satisfy me that another order other than that the costs follow the event is more appropriate. I am not so satisfied, for the reasons given.

Order

[15] I order that the applicant pay the fourth respondent's costs of and incidental to the application including reserved costs, if any, on the standard basis.