SUPREME COURT OF QUEENSLAND

CITATION:	*Crew & Anor v Mitchell & Anor* [2004] QSC 307
PARTIES:	**WAYNE LAWRENCE CREW** (applicant) **JUDITH ANN CREW** (applicant) v **IAN MITCHELL** (first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO:	SC No 3064 of 2004
DIVISION:	Trial Division
PROCEEDINGS:	Costs Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Mackenzie J
ORDER:	**No order as to costs**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – OTHER CASES – Where application made for order that applicants bear only their own costs – whether costs should follow the event – where deprivation of a significant asset in considerable excess of profit from offence – where Crown did nothing positive to formalise the forfeiture for almost five years – where liabilities considerably outweigh income – where option of negotiations mentioned at sentence never taken up – whether relevant to public interest *Crimes (Confiscation) Act* 1989 (Qld), s 25 *Judicial Review Act* 1991 (Qld), s 49(1)(a), s 49(1)(d), s 49(1)(e), s 49(2), s 49(2)(a), s 49(2)(b), s 49(2)(c) *Vosmaer v DPP* [2004] QSC 032; SC No 4997 of 1998, 2 March 2004, distinguished
COUNSEL:	D C Andrews SC for the applicants M D Hinson SC for the respondents

SOLICITORS: Gilshenan and Luton Lawyers for the applicants
Crown Law for the respondents

[1] **MACKENZIE J:** The applicants' application for judicial review of the decision of a Deputy Registrar of this Court to issue a certificate certifying that the applicants' house and land were forfeited to the State of Queensland pursuant to s 25 of the *Crimes (Confiscation) Act* 1989 was dismissed. Immediately after pronouncement of the order dismissing the application they applied under s 49 of the *Judicial Review Act* 1991 for an order that they bear only their own costs of the proceedings. The application is resisted by the respondent who submits that costs should follow the event.

[2] The applicants are in the category described in s 49(1)(a) of the *Judicial Review Act*. Section 49(1)(e) allows an order of the kind they seek to be made having regard to the criteria in s 49(2)(a), (b) and (c). For the purposes of this case, they are the financial resources of the applicants (since there is no evidence of anyone else with a relevant interest in the outcome of the proceedings), whether the proceeding involves an issue that affects or may affect the public interest in addition to any personal right or interest of the applicants and whether the case can be supported on a reasonable basis.

[3] As a result of the automatic forfeiture of the house and land used in connection with the growing of cannabis, the applicants have suffered deprivation of a significant asset, probably of a value considerably in excess of the profits that would have been made as a result of the offences. In addition, since nothing positive was done by the Crown to formalise the forfeiture for almost 5 years, improvements to the property were effected, apparently under the misapprehension or in the hope that nothing further was going to happen.

[4] The affidavits by the applicants disclose that sources of income available to them are modest in comparison with their liabilities. The issue of financial resources is in their favour. Indeed, the overall result for them may have been worse than may otherwise have been the case, since the option of negotiations mentioned at sentence by the Crown Prosecutor was never taken up.

[5] With respect to whether the proceeding involves an issue that affects or may affect the public interest in addition to any personal right or interest of the applicants, the function of a Deputy Registrar, when asked to issue a certificate, which was not raised by either side, was determined as a critical issue. The other main issue was whether the case fell into a category discussed in *Vosmaer v DPP* [2004] QSC 032 which might have entitled the applicants to relief by way of a declaration that the property was not automatically forfeited. On the facts it was held that the case did not fall within the principle discussed in *Vosmaer*.

[6] If the phrase "public interest" in s 49(2)(b) extends to determination of questions of principle which, as far as research indicates, have not been determined before, this would also assist the applicant. However, I would prefer not to decide that issue in the absence of more detailed argument, since in my view, the applicants have otherwise made out a basis for the order sought. Even at worst, this aspect of the matter is neutral. The application of established principles to the facts of a particular case would not, in my view, be relevant to the public interest in the sense in which the phrase is used in s 49(2)(b).

[7] The main basis upon which the matter was disposed of was a fundamental one, not raised by the parties. The basis originally relied on involved a determination of whether the particular facts fitted an existing principle. The factual aspects of the case were somewhat complex, notwithstanding the ultimate conclusion that the argument was untenable. The phrase "reasonable basis for the review application" cannot in my view be construed to exclude cases merely because the application does not succeed. Otherwise, s 49(2)(c) would be devoid of practical application in a wide range of situations despite the premise being that a party otherwise at risk of paying another party's costs may be relieved of that liability.

[8] It should also be mentioned that there seems to be a distinction in s 49(1)(d) and (e) between the degree of benefit that can be obtained in a case where the applicant seeks indemnity for costs against another person and a case where a party makes an application for an order that he, she or it bear only their own costs. The former order operates only from the time of the application being made (s 49(1)(d)). While the phrase "regardless of the outcome of the proceeding" is not unambiguous, there seems to be no clear reason why it should not allow an application to be made at the conclusion of the proceedings at which point the question of costs is to be determined, as well as at some earlier point of the proceedings before judgment is given.

[9] Viewed in this way, the principle is merely a variation of the ordinary rule that costs follow the event. Presumably, the philosophy underlying it is that a person affected by an administrative decision made under an enactment should not be deterred by the fear of ruinous liability for costs from seeking relief on reasonable grounds in a case where it is alleged that the decision-making process was flawed. Where the particular application displays some or all of the characteristics listed in s 49(2)(b), there is a discretion to deprive the successful party of costs that would otherwise be awarded, in an appropriate case when they are weighed together.

[10] I am satisfied that taking into account the criteria in s 49(2), particularly that in s 49(2)(a) in the context of the case, the case is one where an order should be made that there be no order as to costs.