SUPREME COURT OF QUEENSLAND

CITATION:	*Leahy v Barnes (No 2)* [2013] QSC 263
PARTIES:	**ALAN NOEL THOMAS LEAHY** (applicant) **v** **MICHAEL BARNES** (respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervener)
FILE NO/S:	SC No 135 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	25 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Henry J
FURTHER ORDER:	**The intervener pay the applicant's costs of the application to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where the applicant applied for a statutory order of review to set aside the decision of the respondent Coroner that he be committed to stand trial – where the respondent Coroner's decision to commit the applicant to stand trial was set aside – where the applicant seeks an order for costs – where the intervener contends there should be no order as to costs because of the number and proportion of issues upon which the applicant was unsuccessful, the extent of amendment to the case for relief progressively presented on the applicant's behalf and the character of the decision under review – whether costs should follow the event – whether the applicant is entitled to costs *Judicial Review Act* 1991 (Qld) s 49(2), s 49(2)(c), s 49(4), s 51, s 51(2)(a), s 51(2)(b), *Uniform Civil Procedure Rules* 1999 (Qld) r 681, r 684 *Allianz Australia Insurance Ltd v Swainson* [2011] QCA 179,

cited
Anghel v Minister for Transport (No 2) [1995] 2 Qd R 454; [1994] QCA 232, cited
Colburt v Beard [1992] 2 Qd R 67, cited
Leahy v Barnes [2013] QSC 226, cited
Theiss v TCN Channel Nine (No 5) [1994] 1 Qd R 156, cited

COUNSEL: P J Callaghan SC with A Collins for the applicant
R G Marsh (*sol*) for the respondent
M Hinson QC for the intervener

SOLICITORS: Lilley Grose & Long Solicitors on behalf of the applicant
Crown Law on behalf of the respondent and the intervener

[1] The applicant applied for a statutory order of review seeking to set aside a decision of the respondent Coroner that the applicant be committed to stand trial. The applicant also sought an order for costs.

[2] On 27 August 2013 I set aside the Coroner's decision to commit the applicant for trial and invited submissions as to costs.[1]

[3] It is common ground that if any order for costs is made it ought only be made against the Attorney-General who took carriage of resistance of the application pursuant to his power to intervene under s 51 of the *Judicial Review Act* 1991 (Qld). Section 51(2)(b) provides that if the Attorney-General intervenes "the court may ... make such order as to costs against the State as the court considers appropriate".

[4] The provision does not fall to be considered in isolation. Pursuant to s 51(2)(a) the intervener "is taken to be a party to the proceeding". Considerations which inform any decision to order a party to a review application to indemnify another party in relation to costs are set out in s 49(2) of the Act which relevantly provides:

> "(2) In considering the costs application, the court is to have regard to—
> (a) the financial resources of—
> (i) the relevant applicant; or
> (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding;
> (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
> (c) if the relevant applicant is a person mentioned in subsection (1)(a)—whether the proceeding discloses a reasonable basis for the review application; ..."

[5] These considerations all weigh favourably in support of the applicant. There is no evidence to suggest he is so well resourced financially that his costs of the proceeding are easily borne by him. Such evidence as there is on the subject

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1 *Leahy v Barnes* [2013] QSC 226.

suggests to the contrary. The proceeding generally affected the public interest in that it related to the outcome of the third inquest into the notoriously controversial circumstances of two violent deaths. The determination of whether the Coroner was "obliged" to commit the applicant on finding a prima facie case or whether there remained a discretion to exercise was a sufficiently important legal issue as to be regarded as affecting the public interest. Further, there was undoubtedly a reasonable basis for the review application – it was successful.

[6] That the applicant was in the event successful is impliedly relevant by virtue of s 49(2)(c) and is, in any event, relevant to a determination of what order is considered "appropriate" pursuant to s 51(2)(b).

[7] Section 49(4) provides:

> "(4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application."

[8] The import of this provision, like its predecessor, O 29 of the *Supreme Court Rules*, is that relevant provisions of the *Uniform Civil Procedure Rules* apply "subject to" s 49. This may have the consequence, depending on the circumstances, that s 49 allows costs consequences more favourable to an applicant than are ordinarily appropriate under the *Rules.*[2] However, the circumstance that the applicant has here succeeded in obtaining the order sought means that the general rule, embodied in r 681 of the *UCPR*, that costs should ordinarily follow the event, is not excluded by s 49(4) and supports the outcome, which is also supported by the application of the relevant considerations in s 49(2), that the applicant should have his costs.

[9] The intervener submits there should be no order as to costs because of:

> (a) the number and proportion of issues upon which the applicant was unsuccessful;
> (b) the extent of amendment to the case for relief progressively presented on the applicant's behalf; and
> (c) the character of the decision under review.

[10] As to the first submission, it is emphasised by the intervener that the applicant only succeeded on one of a multiplicity of arguments advanced. It is true there were a number of grounds, which, with the benefit of particulars and amended particulars, took the form of nine distinct arguments[3] as to why the decision to commit should be set aside. However, all arguments advanced were advanced in support of the same single outcome – the setting aside of the decision committing the applicant for trial. This is not a case in which each party enjoyed mixed success in the outcome sought, such that the mixed outcome should be reflected in some apportionment of costs ordered as between the parties.[4]

[11] It cannot be doubted that, as the *UCPR* expressly allows, a court may attribute a proportion of costs to a particular question or part of proceedings.[5] Even in litigation

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2 *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454.
3 Identified in the nine sub-headings in the reasons between [17]-[144].
4 Compare *Colburt v Beard* [1992] 2 Qd R 67, *Theiss v TCN Channel Nine (No 5)* [1994] 1 Qd R 156.
5 See *UCPR* r 684.

that can ultimately only have a single outcome the case may have been conducted in such a way that there ought be a departure, in whole or in part, from the general rule that costs should follow the event. However the circumstances in which that course ought be followed will usually have some special feature warranting such a departure.[6]

[12] Here the argument advanced essentially relies on the mere fact that the applicant advanced a multiplicity of grounds only one of which was successful. It is an essentially mathematical argument – that if costs were apportioned on an individualised basis, given the number of arguments in which each party succeeded, the applicant would be liable to the intervener.

[13] Of itself the weight of numbers of unsuccessful arguments does not present, in the circumstances of this case, as a particularly special or determinative circumstance. The most time consuming aspect of the case would inevitably have been the mastery of the whole of the facts of the case and the successful argument required an understanding of the whole of those facts. The unsuccessful arguments were specific and would not of their nature have required significant additional preparation to that which was in any event required to meet the ultimately successful argument. The only arguments likely to have required materially additional preparation were those going to the appearance of impartiality. However, it appears the parties narrowed and largely reached factual common ground in respect of the evidentiary basis for those arguments. Moreover while those arguments were ultimately unsuccessful it is a relevant consideration per s 49(2)(c) that the proceeding disclosed a reasonable basis for them. Further, as already mentioned, one of the more significant unsuccessful arguments was of sufficient legal importance to potentially affect the public interest.

[14] The only special feature advanced by the intervener, beyond the numerical, is his second argument, namely that there were extensive changes in the arguments to be advanced by progressive amendments to particulars. In fact the relevant variations were to particulars sought in advance by the intervener and they were variations of a kind that tended to clarify and narrow the issues that were to ultimately be pressed in argument. The process appears to have been beneficial rather than disadvantageous in focussing the parties' preparation for the review hearing, a hearing that was aided by the preparation of outlines of argument exchanged in advanced and which proceeded by way of argument only.

[15] The intervener finally relies upon the general pattern that decisions relating to the administration of criminal justice are not ordinarily attended with costs orders. Exceptions to that pattern abound and it would be a curious result in those areas of the criminal jurisdiction where there does exist a power to award costs if that power were ignored because it is not encountered in other areas of the criminal jurisdiction. In any event, this is not a proceeding in the criminal jurisdiction. It is a proceeding in a jurisdiction where statute specifically confers a power to award costs. Costs are a creature of statute. If the discretion to award costs is conferred by statute, whether in the criminal or other jurisdictions, that discretion falls to be exercised judicially by reference to the circumstances of the case.

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6 *Allianz Australia Insurance Ltd v Swainson* [2011] QCA 179, [4]-[5].

[16] The circumstances of this case do not support the conclusion contended for by the intervener that there should be no order for costs. To the contrary it is a case in which it is appropriate that costs follow the event.

[17] I order that the intervener pay the applicant's costs of the application to be assessed on the standard basis.