SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Barnes & Anor* [2014] QCA 152
PARTIES:	**ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND** (applicant/appellant) **v** **MICHAEL BARNES** (first respondent) **ALAN NOEL THOMAS LEAHY** (second respondent)
FILE NO/S:	Appeal No 10046 of 2013 Appeal No 10047 of 2013 SC No 135 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	24 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2014
JUDGES:	Fraser and Gotterson JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time in which to lodge an appeal refused.** **2. Appeal against costs allowed only to the extent of ordering the State of Queensland to pay 70 per cent of the second respondent's costs of the judicial review application on the standard basis.** **3. The State of Queensland pay the second respondent's costs of the application for an extension of time to this court on the standard basis.** **4. The second respondent pay the appellant's costs of the appeal against the costs order on the standard basis, with liberty to the second respondent to make an application for an indemnity certificate under the *Appeal Costs Fund Act* 1973.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the first respondent conducted an inquest into the deaths of two women – where the second respondent was committed to stand trial on

a charge of unlawful killing – where the decision to commit the second respondent to stand trial was set aside on judicial review – where the applicant/appellant intervened in the judicial review proceeding – where the applicant/appellant seeks an extension of time to appeal against the substantive decision on the ground that the trial judge erred in his analysis of the first respondent's findings regarding the admissibility of lies – where there was some explanation for the delay – where there was no real prejudice to the respondent – where there were no real prospects of success on appeal – whether an extension of time should be granted

APPEAL AND NEW TRIAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF THE COURT – COSTS – where the applicant/appellant intervened in the judicial review proceeding overturning the first respondent's decision to commit the second respondent to stand trial – where costs were awarded against the applicant/appellant – whether the trial judge erred in applying irrelevant criteria in exercising his discretion as to costs – whether the trial judge erred in awarding costs against the applicant/appellant rather than the State – whether the appeal against costs should be allowed

Judicial Review Act 1991 (Qld), s 49, s 51(2)(b)
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684 r 748

Anghel v Minister for Transport (No 2) [1995] 2 Qd R 454; [1994] QCA 232, cited
Attorney-General of Queensland v Holland (1912) 15 CLR 46; [1912] HCA 26, considered
Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd (1986) 10 FCR 177; [1986] FCA 85, cited
Beil v Mansell (No 1) [2006] 2 Qd R 199; [2006] QCA 173, applied
Creswick v Creswick; Tabtill Pty Ltd v Creswick [2011] QCA 66, considered
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, applied
Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10; [1986] FCA 357, cited
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59, cited
Leahy v Barnes [2013] QSC 226, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Spencer v Hutson [2007] QCA 178, cited
Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156, cited
West v Blackgrove [2012] QCA 321, followed
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL:	P J Davis QC, with M A Jonsson, for the applicant/appellant M A Wickramasinghe *(sol)* for the first respondent P J Callaghan SC, with A P J Collins, for the second respondent
SOLICITORS:	Crown Law for the applicant/appellant Crown Law for the first respondent Lilley Grose & Long for the second respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Atkinson J. I agree with those reasons and with the orders proposed by her Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Atkinson J and with the reasons given by her Honour.

[3] **ATKINSON J:** On 9 August 1991, the bodies of Julie-Anne Margaret Leahy and Vicky Sarina Arnold were found in rugged bushland between Atherton and Herberton in a 4 wheel drive vehicle owned by the Leahy family. Their disappearance had been reported to the police in Atherton by Julie-Anne's husband, Alan Leahy, at about 8.00 am on 26 July 1991. It was apparent from the condition of the bodies when they were found that they had both died violent deaths. Two inquests and various enquiries into the deaths had concluded that Ms Arnold had killed Mrs Leahy and then taken her own life. Another inquest was held before the State Coroner, Michael Barnes, commencing on 19 July 2011.

[4] On 1 March 2013 the Coroner delivered his findings that Ms Arnold and Mrs Leahy both died of intentionally inflicted gun shot wounds to the head. He also found that Alan Leahy should be committed to stand trial on a charge of unlawfully killing Ms Arnold and Mrs Leahy.

[5] Mr Leahy successfully sought judicial review of the decision of the Coroner to commit him for trial and that decision was set aside by the Supreme Court on 27 August 2013. The appellant intervened in the judicial review proceeding under s 51 of the *Judicial Review Act* 1991 ("JR Act") and thereby became a party to the proceeding. On 25 September 2013 after hearing submissions from the parties the learned judge at first instance ordered that the Attorney-General pay Mr Leahy's costs of the application to be assessed on the standard basis. On 23 October 2013, the judge gave the Attorney-General leave to appeal against the costs order.

[6] On 23 October 2013, the Attorney-General filed both an appeal against the costs order and an application for an extension of time in which to lodge an appeal against the order made by the judge on 27 August 2013 setting aside the decision of the Coroner.

[7] The application for an extension of time was necessary as, pursuant to r 748(a) of the *Uniform Civil Procedure Rules* 1999 (UCPR), a notice of appeal must be filed within 28 days after the date of the decision appealed from. In this case that means that the notice of appeal should have been filed before 25 September 2013.

[8] On 13 February 2014, the second respondent, Mr Leahy, filed a notice of contention. This was amended by leave on the hearing before the court. There are therefore four distinct, although related, matters before this court. They are the

application for an extension of time in which to appeal the order made on 27 August 2013; and, if that be successful, an appeal against the order made on 27 August 2013 and the matters raised in the second respondent's amended notice of contention; and the appeal against the costs order made on 25 September 2013.

[9] In order to deal with each of these matters it will be necessary to refer to the relevant findings by the Coroner and by the judge on the judicial review of the Coroner's findings.

[10] The Coroner wrote a long and comprehensive report only parts of which were subject to the application for judicial review by the second respondent. Only some of the decision by the judge who heard the judicial review application is the subject of the proposed notice of appeal and notice of contention, so it is only those matters to which reference may be made. The first relevant subject matter is the use made by the Coroner of what he determined were lies told by the second respondent, Mr Leahy. The second, which was the subject of the original notice of contention, concerned the judge's finding that the coroner's decision should not be set aside on the ground of apprehended bias. The third, the subject of the amended notice of contention, concerned whether or not the decision of the coroner as to whether a person should be committed for trial is discretionary or mandatory.

Application for extension of time

[11] The appellant submitted that an extension of time ought be granted in the absence of any identified prejudice to the second respondent, Mr Leahy, because there was a reasonably arguable case that the learned primary judge erred in his substantive decision to set aside the decision to commit Mr Leahy to stand trial, and because the proposed appeal raised questions of general importance upon which further argument, and a decision of this court, would be of general public interest.

[12] The respondent submitted that there was no suggestion during the 28 days after the primary judgment was handed down that it would be appealed. No explanation was offered at the time the application for an extension of time was filed as to why the appellant had decided to apply for leave to extend time at such a late stage. None had been offered since. Assuming the appellant complied with the model litigant principles, the respondent submitted that the only conclusion reasonably open was that the appellant intentionally elected not to file a notice of appeal within the prescribed time.

[13] As to prejudice, the respondent submitted that he was entitled to proceed on the assumption, after 28 days had passed, that the application for judicial review finalised matters. Further, he suffered prejudice by having to meet a full appeal. He is a small businessman, had expended considerable sums in respect of applying for judicial review and was now subject to a matter that would incur significant time and costs.

Considerations relevant to the application to extend time

[14] There is an important public policy which underlies the time limits for filing an appeal. These were set out by Keane JA in *Spencer v Hutson*:[1]

> "The prescribed time limits for appeals serve the important purpose of bringing finality to litigation. They are not lightly to be ignored. An applicant for an extension of time for bringing an appeal must

[1] [2007] QCA 178 at [28] citing the judgment of Muir J in *Beil v Mansell (No 1)* [2006] 2 Qd R 199.

> show that there is good reason for the court to relieve that party of the consequences of the expiration of the prescribed period for bringing an appeal. A demonstration that there is a good reason to extend time will usually involve an explanation for that party's delay."[2] (citations omitted)

[15] The criteria the court will have regard to on an application to extend time were summarised by Muir J in *Beil v Mansell (No 1)*.[3] His Honour observed that the discretion is unfettered but must, like any discretion, be exercised judicially. The factors that may be taken account of include:

- the length of time that has elapsed since the notice of appeal should have been filed;
- a satisfactory explanation for the delay;
- any prejudice suffered by the respondent; and
- the merits of the substantive appeal.[4]

[16] The effect of these considerations on the application to extend time was set out by Fraser JA in *Creswick v Creswick*; *Tabtill Pty Ltd v Creswick* as follows:[5]

> "An applicant for such an extension must show that strict compliance with the rules will work an injustice, having regard to the circumstances including the history of the proceedings, the conduct of the parties, the nature of the litigation, the consequences for the parties of the grant or refusal of the application, and the prospects of the applicant succeeding in the appeal".

Delay

[17] The affidavit filed in support of the application for an extension of time wrongly referred to the judge's decision which set aside the Coroner's decision to commit as having been made on 5 August 2013. It appears from the title page of the judgment that this was the date of hearing and the date of the decision was 27 August 2013. It is sworn that Crown Law gave advice to the appellant about an appeal from that date. Crown Law also gave advice about the costs order dated 25 September 2013. Instructions were then given by the appellant to appeal the costs order and to seek leave to appeal the order made on 5 [*sic*] August 2013.

[18] A further affidavit was filed at the hearing of the appeal giving a more detailed explanation. In that affidavit a solicitor from Crown Law deposed that the appellant announced to the media his decision to appeal against the decision on costs on 27 September 2013. Instructions, she said, were received from the Attorney-General's office on or around 27 August 2013 to obtain advice as to the prospects of appealing the judge's decision handed down on that day. She deposed that dissatisfaction with the result of the decision made on 27 August 2013 was "compounded" when

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2 See also *Jopar v The Queen* (2013) 275 FLR 454 at [56]-[60].

3 [2006] 2 Qd R 199 at [40] citing *Chapman v State of Qld* [2003] QCA 172 at [3] and *Queensland Trustees Ltd v Fawckner* [1964] Qd R 153.

4 See also *Di Iorio v Norris* [2010] QCA 191 at [4].

5 [2011] QCA 66 at [15] citing *Gallo v Dawson* (1990) 93 ALR 479 per McHugh J (affirmed in *Gallo v Dawson (No 2)* (1992) 109 ALR 319.

the decision on costs was delivered. The Crown Solicitor received instructions from the office of the Attorney-General on 3 October 2013 to appeal both the decision made on 27 August 2013 and the costs order. After various pieces of advice were obtained and research conducted, Crown Law sent an email to the second respondent's solicitor on 16 October 2013 advising her that Crown Law was still waiting on instructions on making an application to the judge at first instance for leave to appeal the costs order but "in all likelihood will be appealing the costs order and substantive ruling". On 23 October 2013, after being given leave to appeal the costs decision, the notice of appeal against the costs decision, an application for leave to file an appeal against the substantive decision out of time and an affidavit exhibiting a draft notice of appeal were filed.

[19] There is some explanation for the delay which, while not completely satisfactory, would not of itself be a reason to refuse the application.

Prejudice

[20] The issue of prejudice in this case is complicated by the fact that notwithstanding the decision of the Coroner to commit, the decision of the judge at first instance on the application for judicial review of that decision, and indeed the decision of this court on this appeal, the decision on whether or not to present an indictment is ultimately a decision of the Director of Public Prosecutions or the appellant.

[21] The prejudice of having to meet a full appeal would have been suffered by the respondent in any event if the appeal had been filed within time. There cannot be said to be any real prejudice suffered by the respondent by the appellant seeking leave to file an appeal after a delay of about a month from when the appeal should have been filed.

Merits

[22] An applicant for an extension of time must show that the applicant has prospects of succeeding on the appeal. Otherwise, there is no point in granting an extension of time. The ground of appeal that the appellant wishes to agitate is that the judge at first instance erred in setting aside the Coroner's decision to commit in the following way:

> "(a) Having found that:
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> (i) (at para [89] of his Honour's reasons) the First Respondent did not recite and apply the correct test for admissibility of lies as evidence of guilt; and
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> (ii) (at para [90] of his Honour's reasons) in deciding to commit the Second Respondent, the First Respondent relied upon his finding that the Second Respondent had told lies in circumstances where those alleged lies could not be admissible in criminal proceedings;
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> the learned primary Judge erred in concluding that:
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> (iii) (at paras [83] and [90] of his Honour's reasons) the First Respondent thereby took into account an irrelevant consideration in making his decision to commit the Second Respondent;
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> (iv) (at para [90] of his Honour's reasons) the First Respondent thereby improperly exercised his power to commit the Second Respondent to trial;

(v) (at para [145] of his Honour's reasons) the First Respondent's decision to commit the Second Respondent for trial should be set aside.

(b) The learned primary Judge thereby erred by applying a principle of flexible application born out of logic which has developed to guide and control fact finding as if it were a mandatory and inflexible rule of law.

(c) The learned primary Judge ought to have found that:

(i) it was a matter for the First Respondent as to the relevance he might attribute to such evidence, as bearing upon consciousness of guilt, and as to the weight he might impute to such evidence;

(ii) the First Respondent did not thereby take into account an irrelevant consideration in the making of his decision to commit the Second Respondent for trial;

(iii) the First Respondent did not thereby improperly exercise his power in the making of his decision to commit the Second Respondent for trial."

[23] This ground of appeal concerns the Coroner's findings as to the admissibility of lies in his decision to commit the respondent for trial.

[24] The Coroner dealt at the beginning of his report with the legal principles which governed his enquiry. He identified that so far as the admissibility of evidence was concerned, that what evidence was admissible depended on what role he was exercising. He correctly identified the requirements when determining whether to commit a person for trial:[6]

> "… when considering whether to commit a person to stand trial, a coroner will only consider evidence that would be admissible in criminal proceedings because the test applied to resolve that question is whether a properly instructed jury could convict the person."

[25] He repeated this observation and added that he "must of course apply the criminal standard of proof. In cases dependent upon circumstantial evidence, that requires that all hypotheses reasonably consistent with innocence are able to be dismissed".[7]

[26] Under the heading "Consciousness of guilt",[8] the Coroner listed five lies[9] said to have been told by the respondent. The distinction between lies going only to credit and lies showing consciousness of guilt was described by the Coroner in the following way:

> "The courts have repeatedly warned of the care that needs to be taken when drawing inferences from a finding that a witness has been untruthful. In most cases, the telling of lies by a witness can be used to suggest the witness' evidence on other matters may also be unreliable, but not that he necessarily committed the crime in question - there may be other explanations for the lie. However, in limited circumstance, lies told by a witness can be used to prove

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6 *Inquest into the Deaths of Julie-Anne Leahy and Vicki Arnold* delivered on 1 March 2013 at [3.2].

7 Ibid at [12.4.10].

8 Ibid at [12.4.9].

9 These five lies are listed at Appeal Book 221.

> allegations against the witness. So called 'probative lies' are those for which the most likely explanation is that the witness knows the truth would implicate him in the matters alleged against him."

[27] Of the five lies he listed, the Coroner said four were not just lies going to credit but were capable of demonstrating consciousness of guilt and therefore were part of the circumstantial case against the respondent.

[28] Of this reasoning, the learned judge at first instance held:[10]

> "[89] In summary his Honour did not recite the correct test of admissibility for lies as evidence of guilt and his findings show he did not apply the correct test. To the contrary, his findings suggest he elevated his adverse opinion of the applicant's credibility to providing evidence going to guilt rather than merely credibility - the very mischief which the correct test is calculated at avoiding.
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> [90] The applicant has made good his complaint that the Coroner's decision to commit was informed by reference to his opinion the applicant had told lies in circumstances where those alleged lies could not be admissible in criminal proceedings as positive evidence of guilt and were thus irrelevant. These were errors of law and involved an improper exercise of power in that irrelevant considerations were taken into account when making the decision to commit.
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> [91] This Court has a discretion to refuse relief notwithstanding that a case for relief has been shown. In this context it is important to bear in mind the general reluctance of civil courts to grant relief under Judicial Review in respect of committal proceedings in the absence of exceptional circumstances.
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> [92] However, the approach of the learned Coroner involved [an] exceptional deviation from legal principle in respect of an aspect of the evidence which must have had a significant bearing upon the question of whether there was sufficient evidence to commit the applicant for trial. It cannot be said the use of alleged untruths as evidencing implied admissions of guilt, would have made no difference to the decision. It was obviously material to it. The decision that the applicant be committed to stand trial should be set aside." (citations omitted)

[29] Much of the argument on the hearing of the appeal was spent on whether the Coroner's finding that the second respondent "had been untruthful about key aspects of closely related issues could involve a consciousness of guilt" was a proposition capable of being sustained.

[30] A lie told by a defendant is admissible as part of the prosecution case to show that a defendant is guilty of the offence of which the defendant is charged only when the following criteria are met:[11]

> (1) the jury must be satisfied that the defendant has not only told an untruth, it must be a **deliberate** lie;

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10 *Leahy v Barnes* [2013] QSC 226 at [89]-[92].

11 *Edwards v The Queen* (1993) 178 CLR 193 at 211; *The Queen v Zoneff* (2000) 200 CLR 234 at [17].

(2) the jury must be satisfied that the lie reveals a knowledge of the offence or some aspect of it;

(3) the jury must be satisfied that the defendant lied because he knew that the truth of the matter would implicate him in the commission of the offence i.e. that he was conscious that the truth could convict him; and

(4) the jury must exclude that there is any other reason for the telling of the lie.

Further, if the alleged lie is the only evidence against a defendant or a critical fact in a circumstantial case against the defendant, the jury must be satisfied beyond reasonable doubt not only that the defendant lied, but also that he lied because he realised the truth would implicate him in the offence.

[31] Senior Counsel for the appellant advised that he would provide the court with a note setting out how each of the alleged lies told by the respondent could amount to a lie showing consciousness of guilt otherwise referred to as "forensic lies". The court received a note from counsel on the following day advising "that the Attorney-General does not contend that there is evidence upon which any of the five untruths identified at AB 221 could be found to be 'forensic lies'."

[32] The appellant also submitted that the Coroner did not base his decision to commit on the basis that these were lies that were capable of showing consciousness of guilt.

[33] The learned judge at first instance held that it could not be said that the use of alleged untruths as evidencing implied admissions of guilt, would have made no difference to the decision. The appellant has been unable to show that the learned judge at first instance erred in so holding. It is apparent that the Coroner's view that there were lies capable of showing consciousness of guilt was material to his decision that there was admissible evidence on which a properly instructed jury could convict. In his conclusion he listed as evidence of the circumstantial case against the second respondent "he has been untruthful about key aspects of closely related issues that could involve a consciousness of guilt." Accordingly, there was no error made by the judge in setting aside the decision to commit.

[34] As the appellant has not been able to show that he has any prospect of succeeding on appeal, it would be pointless to allow the application for an extension of time in which to appeal and the extension of time should therefore be refused. It is not necessary therefore to decide the matters raised in the notice of contention.

Costs

[35] As mentioned earlier, the learned judge who made the costs order against the appellant gave the appellant leave to appeal the costs order.

The appellant's submissions

[36] The appellant submitted in his written outline that the judge asked the wrong question or applied the wrong test by applying to the proceeding and substantive outcome before him the usual rule as to costs; and that the judge based his discretionary decision as to costs upon a mistaken view of the facts insofar as he characterised the proceeding before him as civil in character; and that he thereby failed to have regard to a relevant circumstance, namely the long-standing convention that costs should neither be awarded to, nor against, the Crown in criminal proceedings.

[37] The appellant argued that there should be no order as to costs in this case. He submitted that it was reasonable for him to intervene, because of the public interest in the issue which arose under s 41 of the *Coroners Act* 1958, namely, whether that section gave a discretion to the Coroner as to whether or not the Coroner should commit a person for trial once the Coroner formed the opinion that the evidence taken at the inquest was sufficient to put the person on the person's trial; because of the public interest in the inquest, being the third inquest into "notoriously controversial circumstances of two violent deaths" and that otherwise there would be no contradictor.

The respondent's submissions

[38] The respondent submitted that the appellant elected to intervene and be taken as a "party" to, and to defend, the proceedings. Section 51(2)(b) of the JR Act granted the judge a particularly broad discretion to make such order as to costs against the State as the court considered appropriate. In the costs judgment, the judge carefully considered all arguments by the appellant and ordered the appellant to pay the second respondent's costs on a standard basis.

[39] These were civil proceedings not criminal proceedings. Even if one accepted that there is some force in the argument that the civil proceedings had an "essential criminal quality", there was no attempt by the appellant to submit how such a quality would override the broad discretion on costs expressly granted by s 51 of the JR Act.

Discussion

[40] The section of the JR Act which enabled the Attorney-General on behalf of the State, to intervene in this proceeding and become a party is s 51. Section 51(2)(b) makes specific provision for the awarding of costs against the State as the court considers appropriate. This is not an award of costs against the Attorney-General, but rather the State which the Attorney-General represents.

[41] Section 51(2)(b) of the JR Act makes it clear that any common law rule that would act to ensure that the State is not liable for costs, such as that referred to by the High Court in *Attorney-General of Queensland v Holland*,[12] has no application to the intervention by the Attorney-General in a judicial review application. There was nothing at all improper in the intervention of the Attorney-General. It was extremely useful to the court to have the benefit of the Attorney-General's intervention. Nevertheless the court must have regard to the statutory regime with regard to the costs of a judicial review application.

[42] The primary judge relied at least in part in his decision to award costs on s 49(2) of the JR Act. That subsection sets out the matters to which a court is to have regard when considering a costs application. They are:

- The financial resources of the applicant for judicial review (s 49(2)(a));
- Whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the applicant (s 49(2)(b));
- Whether the proceeding discloses a reasonable basis for the review application (s 49(2)(c) and (d)).

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12 (1912) 15 CLR 46.

[43] However those criteria only apply when the court is considering a costs application made under s 49(1) of the JR Act. Section 49(1)(d) and (e) set out the orders the court may make on such an application. They are:

- That another party to the review application indemnify the applicant in relation to costs incurred **from the time the costs application was made**;
- That a party is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.

[44] A costs application for another party to pay the applicant's costs under s 49(1)(d) is prospective only and does not apply to a situation such as the present case where the application for costs was made only after the substantive decision allowing the application for judicial review was handed down and the costs had been incurred before the costs application was made.[13]

[45] In such a case, s 49(4) of the JR Act applies so that the rules of the court in relation to awarding of costs apply to a proceeding arising out of an application for a statutory order for review, whether at first instance or on appeal.

[46] In spite of the fact that the Coroner's decision may have led to criminal proceedings, these were civil proceedings and the awarding of costs is governed to the JR Act and the UCPR.

[47] The relevant rules of court are found in Chapter 17A of the UCPR. Rule 681(1) provides that:

> "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."

[48] Rule 684 may also be relevant to the disposition of costs in this case. It provides that the court may make an order which attributes a percentage of costs attributable to a particular question in, or a particular part of, a proceeding.

[49] The second respondent was entirely successful in having the decision of the Coroner that he should be committed for trial set aside. He did not however succeed on all of the grounds argued. The number of grounds argued increased the complexity of the case, however, the argument in the whole of the case still took less than one day.

[50] On the question of the apportionment of costs the learned trial judge held:[14]

> "… 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 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.

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13 cf *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454.

14 *Leahy v Barnes (No 2)* [2013] QSC 263 at [10]-[13].

> 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. Even in litigation 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.
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> 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.
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> 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."

[51] Unfortunately it appears that the judge's decision on this aspect of the case was also infected by his reliance on s 49(2)(c) which, for the reasons already given, was irrelevant to the costs decision before him.

[52] The awarding of costs against the State is designed not to punish the Attorney-General for intervening but rather to compensate the successful applicant for judicial review. This conforms with the principles set out by Muir JA in *West v Blackgrove*[15] citing a number of High Court authorities as to the application of r 681(1) of the UCPR:

> "The general rule is that costs of a proceedings are in the discretion of the Court but follow in the event unless otherwise ordered.[16] McHugh J identified the principles underlying provisions such as r 681(1) of the *Uniform Civil Procedure Rules* as follows:[17]
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> > 'The expression the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness

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15 [2012] QCA 321 at [47]-[51].

16 *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).

17 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97.

> 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.[18] If the litigation had not been brought, or defended, by the unsuccessful party 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 the unsuccessful litigation.'
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> As is implicit in r 681(1), the Court has a discretion to make another order if that is required in the interests of justice, where, for example, '… the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; … or obtains relief which the unsuccessful party had already offered in settlement of the dispute'.[19]
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> Another obvious circumstance justifying departure from the general rule is where a party has succeeded on its claims only to a limited extent.[20]
>
> A judge has a discretion as to costs which has sometimes been referred to as "unfettered".[21] The discretion, however, must be exercised judicially, without caprice and having regard only to relevant considerations. An exercise of such a discretion having regard to its unfettered nature, is not to be readily or lightly disturbed.[22]

[53] The judge's discretion can be seen to have miscarried in two respects: firstly that he awarded costs against the appellant rather than against the State; and secondly that he applied the criteria set out in s 49(2) of the JR Act which were irrelevant in this instance. The appellant has therefore established appellable error on the part of the learned judge and it therefore falls to this court to exercise the discretion afresh.

[54] Applying s 49(4) and s 51(2)(b) of the JR Act and r 681(1) and r 684 of the UCPR, the order as to the costs should reflect the fact that, importantly, the second respondent was successful in having the Coroner's decision to commit him set aside, but also to take account of the fact that he was successful on only one of the grounds on which he sought to do so. This is not a mathematical exercise. A fair apportionment would suggest that the State should pay 70 per cent of the respondent's costs of the judicial review application.

[55] I would make the following orders:

1. Application for an extension of time in which to lodge an appeal refused;
2. Appeal against costs allowed only to the extent of ordering the State of Queensland to pay 70 per cent of the second respondent's costs of the judicial review application on the standard basis;

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18 *Latoudis v Casey* (1990) 170 CLR 534 at 543, per Mason CJ; at 562-563, per Toohey J; at 566-567, per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

19 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [69].

20 See e.g. *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 60-61; and *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10.

21 *Australian Transport Insurance Pty Ltd v Graeme Phillips Road Transport Insurance Pty Ltd* (1986) 10 FCR 177; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 121.

22 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 at 207.

3. The State of Queensland pay the second respondent's costs of the application for an extension of time to this court on the standard basis;
4. The second respondent pay the appellant's costs of the appeal against the costs order on the standard basis, with liberty to the second respondent to make an application for an indemnity certificate under the *Appeal Costs Fund Act* 1973.