DISTRICT COURT OF QUEENSLAND

CITATION:	*MNT v MEE (No 2)* [2020] QDC 100
PARTIES:	**MNT** **v** **MEE**
FILE NO/S:	3759/19
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court Ipswich
DELIVERED ON:	29 May 2020
DELIVERED AT:	Beenleigh
HEARING DATE:	On the papers
JUDGES:	Byrne QC DCJ
ORDER:	**1. The appellant pay the respondent's costs of and incidental to the appeal on the standard basis, as agreed or assessed.**
CATCHWORDS:	MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – COSTS – where the appeal was brought pursuant to section 164(a) of the *Domestic and Family Violence Protection Act* 2012 (Qld) – whether there is power to order costs – whether the respondent is entitled to the whole of the costs on an indemnity basis
	Acts Interpretation Act 1954, s 36, Sch 1, *Domestic and Family Violence Protection Rule*s, r 3 *Domestic and Family Violence Protection Act* 2012, s 142, s 157 s 164 *Uniform Civil Procedure Rules* 1999, r 681, r 766, r 785
	MNT v MEE [2020] QDC 126 *Re Feez Ruthning's Bill of Costs* (1989) 1 Qd R 55 *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 *AVI v SLA (No 2)* [2019] QDC 207 *HZA v ZHA* [2018] QDC 125 *John Urquhart t/as Hart renovations v Partington and Anor* [2016] QCA 199 *Oshlack v Richmond River Council* (1998) 193 CLR 72 *Wright v KB Nut Holdings Pty Ltd* [2013] QCA 153

COUNSEL:	Mr S. Trewavas for the Appellant Mr S. Kissick for the Respondent
SOLICITORS:	Lexsolve Lawyers for the Appellant Hall Payne Lawyers for the Respondent

Background

[1] MNT unsuccessfully appealed against the making of a Protection Order pursuant to s 164 of the *Domestic and Family Violence Protection Act 2012* (DFVP Act).[1] Although error was found in the original reasons, the respondent was wholly successful in the appeal and is seeking her costs of that appeal.

The power to order costs

[2] A court must be empowered by statute to award costs before it can do so.[2] It is therefore necessary to identify a statutory power if the application for costs is to succeed.

[3] Section 157 of the DFVP Act provides:

> "**157 Costs**
>
> (1) Each party to a proceeding for an application under this Act must bear the party's own costs for the proceeding.
> (2) However, the court may award costs against a party who makes an application that the court hears and decides to dismiss on the grounds that the application is malicious, deliberately false, frivolous or vexatious.
> (3) In this section—
> ***party*** includes an aggrieved."

[4] The usual rule prohibiting costs in s 157(1), and the exception in s 157(2) applies only to applications. An appeal under s 164 is not an application; it is an appeal. Moreover, it is an appeal as of right and does not require as prerequisite an application for leave to appeal.

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1 *MNT v MEE* [2020] QDC 126.

2 *Re Feez Ruthning's Bill of Costs* (1989) 1 Qd R 55 per McPherson J at 90; Dal Pont, G. "Law of Costs" 4th Ed LexisNexis Butterworths, 2018 at [6.2]-[6.4].

[5] By dint of r 3(2) of the *Domestic and Family Violence Protection Rule*s, the Rules do not apply to appeals. However, it should be noted that in a note to the Rule reference is made to s 142 of the DFVP Act.

[6] That provision provides:

> "**142 Procedure for proceeding under this Act**
>
> (1) *The Domestic and Family Violence Protection Rules* made under the *Magistrates Courts Act 1921*, section 57C apply for—
>
> (a) a proceeding in a court under this Act; or
>
> (b) the registry of a court in relation to a proceeding under this Act.
>
> (2) The *Uniform Civil Procedure Rules 1999* apply to an appeal under this Act.
>
> (3) To remove any doubt, it is declared that the *Childrens Court Rules 1997* and the *Uniform Civil Procedure Rules 1999* do not apply to a proceeding in a court under this Act."

[7] Rather than removing any doubt, the last two subsections appear to contradict each other if it is accepted that an appeal under the DFVP Act is a proceeding. It seems highly likely that it is given the ordinary usage of the word and given the definition of "proceeding" in the *Acts Interpretation Act 1954*.[3]

[8] One of the objects of statutory interpretation is to allow all provisions, if possible, to have effect. To achieve this it will often be necessary to understand which provision is the leading provision and which is the subordinate provision, and to give each provision a meaning which best achieves the purposes of the statutory scheme.[4]

[9] It seems to me that it is unlikely that the legislature intended that a successful party to an appeal automatically be denied their costs. It is one thing to ordinarily refuse costs on a first instance application, but it is another to deny them to an appellant who has successfully corrected error of some sort, as well as to a respondent who succeeded in an appeal in which he or she was effectively forced to participate by the appellant.

[10] The harmonious effect of the provisions can be achieved if the word "proceeding" in s 142(3) is read as though it said "proceeding other than appeal".

[11] Taking such an approach to the interpretation of the provision gives effect also to the note to rule 3, and is therefore also harmonious with the overall legislative scheme comprising both the Act and Rules.

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3 See s 36 and Sch 1 of the *Acts Interpretation Act 1954*.

4 *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355, [70].

[12] It follows that I conclude there is a power to order costs on the appeal brought under s 164 of the DFVP Act. Although my reasoning differs a little, this conclusion is consistent with the decision of Smith DCJA in *AVI v SLA (No 2)* [2019] QDC 207 and other decisions mentioned therein.

The Parties' Submissions

[13] The respondent submits that the Court has power to award costs and contends that they are awardable under the power in r 681 of the UCPR. The respondent quotes a passage of Devereaux SC DCJ in *HZA v ZHA* [2018] QDC 125 at [10] where his Honour said that "*costs are awarded to indemnify a successful party*" to found a submission that the costs in this matter should be awarded on an indemnity basis.

[14] The respondent seeks costs in the sum of $11,412.95. A document itemising the costs, and attaching Counsel's memorandum of fees was attached to the written submission.

[15] The appellant accepts there is a power to order costs but submits that, given error was found and this Court had to assess the whole of the evidence, it cannot be said that the appeal was brought without merit and given the assessment of the evidence it was more akin to a hearing at first instance, and so the usual rule found in section 157 has bearing. In the circumstances it is submitted that no order should be made as to costs.

[16] In the alternative it is submitted that where a party is seeking to have costs fixed by the Court, that party should usually comply with Practice Direction 3 of 2007, and this has not been done in this instance. Further it is said that in the absence of an affidavit setting out the basis of the costs, their reasonableness cannot be determined. On that basis it is submitted that if costs are to be ordered, they should be ordered on the standard basis.

Consideration

[17] The awarding of costs in an appeal to this Court from the Magistrates Court is not governed by rule 681 of the UCPR but rather rule 766.[5] Rule 766 is made applicable to an appeal to the District Court by virtue of rule 785(1).

[18] Nonetheless, the principle that the successful party is usually awarded costs in its favour remains applicable.[6] Further, I accept that the considerations helpfully summarised by Smith DCJA in *AVI v SLA (No 2)* at [12]-[15] are applicable in an appeal to this Court. I adopt them without repeating them.

[19] In an oft-quoted passage, McHugh J in *Oshlack v Richmond River Council* said:

> "Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had

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[5] *John Urquhart t/as Hart renovations v Partington and Anor* [2016] QCA 199, [8].
[6] *John Urquhart t/as Hart renovations v Partington and Anor, ibid*.

> 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." (footnote omitted)

[20] Although not attributed directly to that source, it is likely that Devereaux SC DCJ had his Honour's words in mind when he referred to indemnifying the successful party. But it is clear that, in the usual case, the award of costs will only partly cover the actual costs incurred. Costs are not ordinarily ordered on an indemnity basis unless there is some unusual circumstance or unreasonable conduct on the part of the unsuccessful party.[7] This was referred to as "relevant delinquency" by Gaudron and Gummow JJ in *Oshlack* at [44]. Accordingly, McHugh J must be understood to have referred to the concept of an indemnity as a partial indemnity only.

[21] Further, a close study of the judgment in *HZA v ZHA* reveals that Devereaux SC DCJ did not in fact award indemnity costs. His Honour decided to award a fixed amount which was substantially less than that claimed on an indemnity basis.

[22] In the present case, the respondent was wholly successful, but there was no unreasonable conduct or relevant delinquency on the part of the appellant in the bringing of or conduct of the appeal. In fact, I found there had been error but in effect determined that on the whole of the evidence the orders made were appropriate. The appellant can't be criticised for bringing an appeal where error is established.

[23] I cannot accede to the appellant's submission that, in effect, given that most of the appeal judgment was occupied with a reconsideration of the evidence, the principle from section 157 of the DFVP Act should operate to conclude there should be no order as to costs. The conduct of the appeal, and its determination, was not so unusual as to justify departing from the usual rule that costs follow the event.

[24] In my view the respondent is entitled to her costs, but there is no feature that justifies a departure from them being awarded on the standard basis. It follows that I need not consider any issues arising from the asserted non-compliance with the Practice Direction.

Order.

[25] The appellant pay the respondent's costs of and incidental to the appeal on the standard basis, as agreed or assessed.

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[7] *Wright v KB Nut Holdings Pty Ltd* [2013] QCA 153. See also *Johnston & Anor v Herrod & Ors* [2012] QCA 361, [6]-[11] and cases referred to in each case.