

SUPREME COURT OF QUEENSLAND

CITATION: *Caltabiano v Electoral Commission of Queensland & Anor (No 5)* [2009] QSC 341

PARTIES: **ANDREA MICHELE CALTABIANO**
(applicant)

v

ELECTORAL COMMISSION OF QUEENSLAND
(first respondent)

STEVEN ANDREW KILBURN
(second respondent)

FILE NO/S: BS 3921 of 2009

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Court of Disputed Returns at Brisbane

DELIVERED ON: 30 October 2009

DELIVERED AT: Brisbane

HEARING DATE: 17 September 2009

JUDGE: Atkinson J

ORDER: **1. The applicant pay the respondents' costs of and incidental to the application including reserved costs to be assessed.**

2. The deposit paid to the Court by the applicant be paid out of Court in equal portions to the first and second respondents towards payment of this costs order.

CATCHWORDS: CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTIONS AND RELATED MATTERS – DISPUTED ELECTIONS – DISPUTED ELECTION COURTS OR TRIBUNALS – COSTS – where the applicant's challenge to the result in an electoral district was unsuccessful – whether costs should follow the event

Electoral Act 1992 (Qld), s 140

Caltabiano v Electoral Commission of Queensland & Anor (No 4) [2009] QSC 294, cited

Free v Kelly (1996) 185 CLR 296; [1996] HCA 42, applied

McClure v Australian Electoral Commission (1999) 73 ALJR 1086, followed

COUNSEL: P J Dunning SC, with P Baston, for the applicant
M D Hinson SC for the first respondent
D C Rangiah SC for the second respondent

SOLICITORS: RiverLegal for the applicant
Crown Law for the first respondent
Carne Reidy Herd for the second respondent

- [1] The first and second respondents have applied for orders that the applicant pay their costs of and incidental to the proceedings including reserved costs on a standard basis.
- [2] An application for costs under the *Electoral Act* 1992 (Qld) is governed by s 140(1) of the Act which provides that:
- “The Court of Disputed Returns may order an unsuccessful party to the application to pay the reasonable costs of the other parties to the application.”
- [3] The circumstances in which an unsuccessful applicant may be required to pay a respondent Commission’s costs were set out by Brennan CJ in *Free v Kelly* (1996) 185 CLR 296 at 305; [1996] HCA 42 at [13]. The Chief Justice discussed the role of the Commission in that case in which it was a respondent party and its submissions had largely been accepted. However his Honour said that an order for costs should depend not on the deemed status of the Commission as a party but on the function which the Commission performs in being represented and heard on the trial of such an application. His Honour said:
- “The Commission may be represented and heard under s 359 [of the *Commonwealth Electoral Act* 1918 (Cth)] in at least four categories of case: cases where the Commission seeks to defend the conduct of an election or the conduct of an officer of the Commission in relation to an election; cases in which the Commission intervenes for the purpose of advancing a proposition for which it seeks curial confirmation to assist it in the discharge of its statutory functions; cases where the Commission adopts a partisan stance supporting one party or another; and cases where the Commission merely makes appropriate reference to the Act and to authority in order to assist the Court to determine a petition. It may be appropriate to make an order [for costs] for or against the Commission in the first three categories of case, but in the fourth category the Commission is engaged in the proper performance of a statutory function in the public interest.” (citation omitted)
- [4] This case was an example of the first category of case: that is, where the Commission defended its conduct of the election. The case concerned the applicant’s challenge to the Commission’s conduct of the election which, as I found, was carefully and competently conducted: *Caltabiano v Electoral Commission of Queensland & Anor (No 4)* [2009] QSC 294 at [790]. The Commission’s defence of its conduct was not only necessary but justified.

- [5] This is a case where what was referred to in another electoral case as the ordinary rule, that costs follow the event, should be followed: see *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1092 [35]. There is no reason to depart from the ordinary rule.
- [6] The second respondent was also a successful party in this application and in the absence of any special circumstances should obtain an order for the payment of his costs. There are no special circumstances justifying any departure from ordinary rule.
- [7] I order that the applicant pay the respondents' costs of and incidental to the application including reserved costs to be assessed. Pursuant to s 140(2) of the Act, the deposit paid to the Court by the applicant should be paid out of Court in equal portions to the first and second respondents towards payment of this costs order.