SUPREME COURT OF QUEENSLAND

CITATION:	*Scriven v Queensland Rural and Industry Development Authority (No 2)* [2019] QSC 263
PARTIES:	**SAM CHESTER SCRIVEN** (applicant) **v** **QUEENSLAND RURAL AND INDUSTRY DEVELOPMENT AUTHORITY** (respondent)
FILE NO:	SC No 11058 of 2018
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	31 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions of the respondent filed 31 July 2019, written submissions of the applicant filed 26 August 2019
JUDGE:	Wilson J
ORDER:	**The order of the Court is:** **1. The applicant pay the respondent's costs of the proceeding on the standard basis.**
CATCHWORDS:	PROCEDURES – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant was wholly unsuccessful in an application for a statutory order of review – whether costs should be disposed of in accordance with the general rule that costs follow the event – whether there are special or exceptional circumstances to depart from the general rule *Uniform Civil Procedure Rules* 1999 (Qld) r 681(1) *Bucknell v Robins* [2004] QCA 474, cited *Garnaut v Child Support Registrar* [2004] FCA 1303, cited *Hytch v O'Connell (No 2)* [2018] QSC 99, followed *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328, cited *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158, followed *Oshlack v Richmond River Council* (1988) 193 CLR 72, followed *Rintoul v State of Queensland* [2018] QCA 20, followed

Williams v Lewer [1974] 2 NSWLR 91, cited

COUNSEL: Sam Chester Scriven (self-represented) for the applicant
M A Eade for the respondent

SOLICITORS: Sam Chester Scriven (self-represented) for the applicant
Crown Law for the respondent

[1] The applicant is a farmer who had a loan default and outstanding debt with Rural Bank Ltd ("the Bank").

[2] The applicant applied for judicial review of the Queensland Rural and Industry Development Authority's ("the respondent") decision exempting the Bank from the statutory obligation to offer mediation under the Act before taking enforcement action in relation the applicant's default under the farm mortgage.

[3] On 24 July 2019 I published my reasons ordering that this application for judicial review be dismissed.[1]

The question of costs

[4] I invited the parties to make submissions on the question of costs and set the following timetable for same:

1. By 7 August 2019, the respondent is to file and exchange short written submissions on the question of costs.

2. By 21 August 2019, the applicant is to file and exchange short written submissions on the question of costs.

[5] In my reasons I stated that I would deal with the question of costs on the papers, unless either party requests a hearing.

[6] On 31 July 2019, the respondent's written submissions on the question of costs were filed.

[7] On 26 August 2019, the applicant's written submissions on the question of costs were filed.[2]

[8] Neither party requested an oral hearing on the matter of costs.

The law

[9] The general rule for costs is r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the *UCPR*"), which provides that:

> "(1) 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."

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1 *Scriven v Queensland Rural and Industry Development Authority* [2019] QSC 176.

2 It is noted that the applicant emailed a copy of his written submissions on the question of costs to the Client Communications Unit of the Court on 21 August 2019.

[10] In *Oshlack v Richmond River Council*,[3] ("*Oshlack*") McHugh J (with whom Brennan CJ agreed) endorsed a statement of Devlin J in *Smeaton Hanscomb & Co. Ltd v Sassoon I Setty, Son & Co (No 2)*[4] that:

> "... Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure."

[11] The rationale for that statement of general principle was explained by McHugh J in *Oshlack* in the following terms:

> "... The principle is grounded in reasons of fairness 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. 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 unsuccessful litigation.
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> As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."[5]

[12] The discretion in awarding costs is a wide one but it must be exercised judicially and not by reference to irrelevant considerations.[6] The general order that a successful party in litigation is entitled to an order of costs in its favour, is grounded in reasons of fairness and policy[7] and should only be departed from, in the Court's discretion, with "good reason".[8]

[13] There are limited exceptions to the usual order as to costs, which focus on:

1. the conduct of the successful party which disentitles it to the beneficial exercise of the discretion; or,[9]

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3 (1998) 193 CLR 72 (McHugh J, with whom Brennan CJ agreed) at 96.

4 [1953] 1 WLR 1481 at 1484 (Devlin J); [1953] 2 All ER 1588 at 1590 (Devlin J).

5 (1998) 193 CLR 72 (McHugh J, with whom Brennan CJ agreed) at 97; footnotes omitted.

6 *Bucknell v Robins* [2004] QCA 474 at [17] (Philippides J, with whom McMurdo P and Williams JA agreed), citing *Latoudis v Casey* (1990) 170 CLR 534.

7 *Bucknell v Robins* [2004] QCA 474 at [17] (Philippides J, with whom McMurdo P and Williams JA agreed), citing *Oshlack.*

8 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22] (Chesterman J, as his Honour then was).

9 *Bucknell v Robins* [2004] QCA 474 at [17] (Philippides J with whom McMurdo P and Williams JA agreed), citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 98 (McHugh J, with whom Brennan CJ agreed). See also *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158 at [71] (Muir JA, White and Wilson JJ).

2. the existence of "special" or "exceptional" circumstances.[10]

[14] Conduct of the successful party which disentitles it to the beneficial exercise of the discretion may include:[11]

1. the "lax" conduct of the successful party which invited the litigation;

2. unnecessary protraction of the proceedings;

3. success on a point not argued before a lower court;

4. prosecution of the matter solely for the purpose of increasing the recoverable costs; and

5. obtaining relief which the unsuccessful party had already offered in settlement of the dispute.

Applicant's submissions

[15] The applicant requests that no costs be awarded against him as he has no ability to pay; and a demand for payment of costs would cause him great hardship. In support of this submission, he says:

1. He is 75 years old and has a dependent wife.

2. Over the past 11 years his land has been subject to severe drought and otherwise below average rainfall, essential for the sustainable upkeep of his pastures.

3. He has been under considerable financial strain and is very much in arrears with repayments to Rural Bank, who hold a Property Mortgage over Meribah, his home block, and also a Stock Mortgage over his livestock.

4. He has no financial resources left to him, the result of droughts, age and ill-health.

5. Age, accompanied by many years of stress, has resulted in severe health issues.

6. He is waiting on operations on his hip, back and knees and is unable to work.

7. He was not legally represented in the application as he has no resources to pay for legal representation and was only able to pursue that action with assistance from some legally-minded friends.

[16] The applicant also raised other issues including:

1. "Although mediation with the bank on 24 January 2018 was very unsatisfactory, QRIDA nevertheless decided to grant an Exemption Certificate to the bank, which

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10 *Bucknell v Robins* [2004] QCA 474 at [17] (Philippides J, with whom McMurdo P and Williams JA agreed), citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120, 126 (Kirby J).

11 *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158 at [71] (Muir JA, White and Wilson JJ) citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-98 (McHugh J, with whom Brennan CJ agreed).

has already indicated its intention of proceeding to foreclosure in the Supreme Court."

2. "For 3 years I was eligible to receive Farm Household Allowance, a Government Drought payment which ended 30.07.2017. However, the Government extended that to four years from August 2018 – July 2019."

3. "After I was convicted of the crime of feeding my cattle - on my property, with my vegetation - I spent 8 years in the Courts seeking justice. This led to the present situation where I have an outstanding debt to SPER, arising from my conviction for that "offence". A very heavy monetary penalty of $141,823.59 (including costs) was imposed and, although it was subsequently reduced to $63,823.59, it has caused great hardship for me."

4. "I previously had the highest Health Care benefits but, due to my present circumstances, my wife and I are now reduced to Health Care Cards."

Respondent's submissions

[17] The respondent submits that costs should follow the event and there is no countervailing factor that would operate so as to deny the operation of the ordinary rule. The respondent sets out eight factors to support such a submission:

1. The applicant was wholly unsuccessful on each of the (extensive number of) grounds upon which he relied, and also with respect to what can be categorised as more interlocutory matters with respect to the admissibility of certain material.

2. Whilst the issues raised in the application filed 10 October 2018 were "relatively focussed", the applicant's affidavit and (multiple) written submissions raised a number of additional grievances or issues that formed a "patchwork of mounting complaints". The respondent submits that each of those matters were required to be addressed by the respondent, and the process required significant time and resulted in the unnecessary incurring of costs. The respondent submits there is no proper basis upon which it should not be compensated for addressing each issue raised by the applicant.

3. The respondent submits that a number of the allegations made by the applicant were serious, and wholly without foundation, and that these allegations should never have been made:

    a. the allegation of fraud against the Bank which was said to have induced or affected the respondent's decision-making;

    b. the allegation that the mediator contravened the Act;

    c. that the respondent was actually biased against the applicant;

    d. that the respondent displayed apprehended bias against the applicant; and

    e. that the respondent exercised its power to sanction alleged bad faith on the part of the Bank.

The respondent also says other issues propounded by the applicant were also entirely misconceived:

b. that the decision-makers were not accredited mediators;

c. that the chief executive officer had no power to delegate; and

d. that the respondent improperly exercised its powers.

4. The respondent submits it has not been guilty of any relevant misconduct that would otherwise justify a different costs order being made, such as lax conduct or the unnecessary protraction of the proceedings.[12]

5. Whilst it may be accepted that a part of the application involved the consideration of the proper construction of (primarily) section 21 of the Act, that does not of itself constitute a special or exceptional circumstance which would displace the general rule, even if it be assumed the applicant's arguments as to construction were reasonable. The respondent cites the following observations of Applegarth J in *Hytch v O'Connell (No 2)*:[13]

> "... The fact that the first limb of the argument involved an important issue of statutory construction and the applicant had reasonable arguments does not necessarily displace the rule that costs should follow the event. Many parties who unsuccessfully argue points of statutory construction or contractual construction have reasonable arguments. The ordinary rule that costs should follow the event and thereby partially indemnify a successful party has an important basis in fairness and public policy. The fact that the first limb of the applicant's argument involved a matter of public interest about the proper construction of s 100 of the *Coroners Act* 2003 does not mean that the applicant should not have to pay the successful party's costs of arguing such a point. Civil litigation of different kinds often involve issues about the proper construction of statutes and, in that sense, affect the public interest."

6. The respondent submits that relatedly, on no view could the applicant be said to have brought the application to advance a legitimate public interest. The application was actuated by only the advancement of the applicant's private interests and his own private gain underpinned entirely by his contentions that the Bank failed to disclose a so-called "liability account".[14] The respondent submits that in any event, even if contrary to the above there is an element of public interest, that does not of itself justify a different costs order. The usual costs order in alleged public interest litigation is that costs follow the event.[15] Furthermore, this

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12 The respondent cites *West & Ors v Blackgrove & Anor* [2012] QCA 321 at [49] (Muir JA, with whom Holmes JA and Daubney J agreed), citing *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97-98 (McHugh J), as an example.

13 *Hytch v O'Connell (No 2)* [2018] QSC 99 at [7].

14 The respondent cites *Graham v Legal Services Commissioner* [2015] QCA 6 at [3] (Fraser JA, with whom Gotterson JA and Philippides J agreed).

15 The respondent cites *South-West Forests Defence Foundation (Inc) v Lands and Forest Commission (No 2)* (1995) 86 LGERA 382 at 384 (Kennedy, Anderson and Steyler JJ) as an example.

Court was required to resolve an extensive number of issues which are not of general application as to the proper operation of the Act.

7. The respondent submits that although there is no evidence before the Court as to the applicant's inability to pay any costs order due to his personal circumstances, even if that was the case that provides no sufficient reason to depart from the general rule.[16]

8. Because a costs order is compensatory, not punitive, the fact the applicant is self-represented, and may otherwise be disadvantaged, is not a ground for refusing to make a costs order.[17] Rather, such matters are irrelevant to the question of costs, and do not warrant there existing any immunity from an adverse costs order.[18]

Discussion

[18] The general rule that costs follow the event[19] should only be departed from, in the Court's discretion, with "good reason".[20] The Court's discretion must be determined "on fixed principles ... according to rules of reason and justice, not according to private opinion ... benevolence ... or sympathy".[21]

[19] The applicant raised a number of grounds in his application for a statutory order of review and was wholly unsuccessful.

[20] The applicant submits that no costs should be awarded against him as he has no ability to pay. He has provided some detail, in his submissions, as to his financial circumstances where he sets out that he has no income, is unable to work and is in considerable debt.

[21] The costs of a proceeding in this Court are in its discretion, but follow the event, unless the Court orders otherwise. The respondent submits that there is no reason that the general rule would not apply and it is appropriate for the applicant to pay the costs of the application. I accept the respondent's submissions.

[22] The lack of capacity, or limited capacity, of a party to pay costs is not normally a sufficient reason to displace the usual position that costs should follow the event.

[23] As noted by Applegarth J in *Rintoul v State of Queensland*:[22]

> "[40] ... This usual order as to costs embodies the principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an

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16 The respondent cites *Rintoul v State of Queensland* [2018] QCA 20 at [40] (Applegarth J, with whom Morrison and Philippides JJA agreed).

17 The respondent cites *Sochorova v Commonwealth of Australia* [2012] QCA 152 at [17] (Margaret Wilson J, with whom Muir and Fraser JJA agreed).

18 The respondent cites G E Dal Pont, Law of Costs (3rd ed.), at [8.34], citing (*inter alia*) *Bhagat v Royal & Sun Alliance Life Assurance Australia Ltd* [2000] NSWSC 159 at [13] (Hodgson CJ in Eq); *Garnaut v Child Support Registrar* [2004] FCA 1303 at [5] (Spender J).

19 *UCPR* r 681(1).

20 *NJF Holdings Pty Ltd v De Pasquale Bros Pty Ltd* [1999] QSC 328 at [22] (Chesterman J, as his Honour then was).

21 *Williams v Lewer* [1974] 2 NSWLR 91 at 95 (Rath J).

22 [2018] QCA 20 at [40]-[42] (Applegarth J, with whom Morrison and Philippides JJA agreed); footnotes omitted.

award of costs in its favour. As McHugh J stated in *Oshlack v Richmond River Council*:

> "The principle is grounded in reasons of fairness 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. 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.
>
> As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."

[41] The applicant's limited capacity to pay a costs order is not a sufficient reason to depart from the usual order that costs follow the event. It is a matter for the respondents as to whether the applicant's limited resources and her other personal circumstances, including the ill-health of her husband, provide reasons as to why a costs order should not be enforced.

[42] I would order the applicant to pay the respondents' costs of and incidental to the application."

[24] In my view, the applicant's limited capacity to pay a costs order is not a sufficient reason to depart from the usual order that costs follow the event.[23]

[25] Further, in all of the circumstances, I accept the respondent's submissions as to why it is appropriate for the applicant to pay the respondent's costs of the application. In particular I note that:

1. The respondent has not engaged in any conduct which would disentitle it to the beneficial exercise of the discretion, such as lax conduct or the unnecessary protraction of the proceedings. The respondent properly and appropriately responded to the array of issues raised by the applicant. I accept that there is no proper basis upon which the respondent should not be compensated for addressing each issue raised by the applicant.

2. Part of the application involved a statutory construction point. However, the determination of a statutory construction issue, even if it is an important issue of statutory construction, does not of itself constitute a special or exceptional

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[23] *Rintoul v State of Queensland* [2018] QCA 20 at [41] (Applegarth J, with whom Morrison and Philippides JJA agreed). At [41] it was remarked that it would be a matter for the respondents whether the applicant's limited resources and personal circumstances provide reasons as to why a costs order should not be enforced by the respondent. Those remarks are apposite here.

circumstance which would necessarily displace the general rule of costs following the event.[24]

[26] I do not consider there to be any bases for departing from the general rule that costs follow the event. Accordingly, it is appropriate that the applicant pay the respondent's costs of the application.

Order

[27] The order for costs will be:

1. The applicant pay the respondent's costs of the proceeding on the standard basis.

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24 *Hytch v O'Connell* (No 2) [2018] QSC 99 at [7].