

SUPREME COURT OF QUEENSLAND

CITATION: *Leahy v Brisbane City Council & Ors (No 2)* [2022] QSC 218

PARTIES: **RICHARD JOHN LEAHY**
(applicant)
v
BRISBANE CITY COUNCIL
(first respondent)
REINET INVESTMENTS PTY LTD
(ACN 641 633 267)
(second respondent)
KEYSER ISLAND PTY LTD
(ACN 606 498 917)
(third respondent)

FILE NO/S: BS No 13261 of 2021

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 October 2022

DELIVERED AT: Brisbane

HEARING DATE: Orders made on written submissions

JUDGE: Davis J

ORDERS: **1. The first respondent pay the applicant's costs of the application on the standard basis.**
2. There be no order as to costs as between the applicant and the second respondent.
3. There by no order as to costs as between the applicant and the third respondent.

CATCHWORDS: PROCEDURE - CIVIL PROCEEDINGS IN THE STATE AND TERRITORY COURTS - COSTS - where the applicant challenged a decision of the first respondent Council to approve the construction of an advertising sign - where the second respondent owned the sign - where the first respondent defended the application with substantial arguments - where the second respondent supported the first respondent - where the second respondent advanced no arguments beyond those made by the first respondent - where the second respondent tendered no evidence beyond that tendered by the first respondent - where the second

respondent had a legitimate interest in the application - where the real combatants were the applicant and the first respondent - where the application was successful - where the first respondent was found to be at fault - where the first respondent ought pay the applicant's costs - whether the second respondent ought pay the applicant's costs

Judicial Review Act 1991, s 26

Leahy v Brisbane City Council & Ors [2022] QSC 200, related

Thiess Watkins White Construction (in liq) v Witan Nominees (1985) Pty Ltd [1992] 2 Qd R 452, cited

COUNSEL: MT Brady KC with DC Fahl made written submissions for the applicant
 No submissions were made on behalf of the first respondent
 The solicitors for the second respondent made written submissions on costs
 No written submissions were made on behalf of the third respondent

SOLICITORS: Cochrane Leahy Litigation for the applicant
 Norton Rose Fulbright Australia for the second respondent

[1] On 20 September 2022, I made orders¹ setting aside the decision of the first respondent, the Brisbane City Council, to permit an advertising sign on the western boundary of 43 Musgrave Road, Red Hill, which is owned by the third respondent, Keyser Island Pty Ltd. The western boundary of 43 Musgrave Road is shared with the eastern boundary of the applicant's property at 51 Musgrave Road, Red Hill.

[2] On the same day I made directions for the exchange of written submissions on costs as follows:

- “3. The applicant file and serve upon any respondent, against whom he seeks costs, by 27 September 2022 any written submission on costs of the application.
4. Any respondent upon whom the applicant serves costs submissions may file and serve upon the applicant by 4 October 2022 any written submission on costs of the application.
5. Each party have leave to file and serve by 11 October 2022 any application for leave to make oral submissions on costs.
6. In the absence of any application to make oral submissions on costs of the application being filed by 11 October 2022, the question of costs will be decided on any written submissions and without further oral hearing.”²

¹ *Leahy v Brisbane City Council & Ors* [2022] QSC 200.

² Orders 1 and 2 set aside the decision and direct Brisbane City Council to further consider the

- [3] Written submissions were filed on behalf of Mr Leahy and the second respondent, Reinet Investments Pty Ltd.
- [4] Mr Leahy seeks costs of the application against both the Council and Reinet who appeared on the application in support of the Council's position. No costs orders are sought against the third respondent, Keyser Island, who indicated it would abide the order of the court and then took no further part in the proceedings.
- [5] No written submissions on costs were filed by the Council. I have been advised that the Council sent an email to Mr Leahy's solicitors on 23 September 2022 in the following terms:
- “Having reviewed the Judgment, the Council would not argue against an order that obliged it and the second respondent to pay the Applicant's costs of and incidental to the proceeding to be assessed on the standard basis and it is unnecessary, from the Council's point of view, for the Applicant to prepare submissions that contend for that outcome.”
- [6] Usually, the effect of an order that two respondents pay an applicant's costs of an application would be that both respondents are jointly and severally liable for the costs.³ In the absence of any order as between respondents, the costs would be borne equally.
- [7] By taking the approach that it has in not filing written submissions, the Council runs the risk that no order for costs will be made against Reinet, therefore leaving the Council to pay all the costs of the application.
- [8] Reinet has filed submissions, the effect of which is that it ought not pay Mr Leahy's costs given the very limited part it played in the application.
- [9] No party made application by 11 October 2022 to make oral submissions on the question of costs.
- [10] The application for the approval of the sign was made by Great Site Pty Ltd. Reinet owns the sign now erected by authority of the decision which, by the orders of 20 September 2022, has been set aside.
- [11] There were three broad issues for consideration on the application. These were:
1. The Council's submission that Mr Leahy's application should be summarily dismissed because it was not made within a reasonable time after the decision.⁴
 2. Mr Leahy's submission that the Council owed Mr Leahy a duty of procedural fairness and that was not afforded to him.

application to erect the sign.

³ *Thiess Watkins White Construction (in liq) v Witan Nominees (1985) Pty Ltd* [1992] 2 Qd R 452 at 453.

⁴ *Judicial Review Act 1991*, s 26(3).

3. Mr Leahy's further submission that the Council committed various reviewable errors in the making of the decision.

- [12] The two principal combatants in the application were Mr Leahy and the Council.
- [13] It was the Council's decision that was under attack. Reinet had no part in the making of the decision. Any error in the making of the decision had to be an error by the Council. There was no suggestion that Reinet in any way contributed to any error made by the Council.
- [14] However, Reinet had a real interest in the proceedings. It had the benefit of the permit in that it owned the sign which had been erected and presumably was receiving some financial return from the sign.
- [15] Reinet therefore had a legitimate interest to protect. It did that by engaging solicitors and an experienced barrister to represent it, but took no real active role in the proceedings. It took the same position as the Council, namely that the decision ought to stand.
- [16] There were no pleadings in the matter as it was commenced by application. However, directions were given for the exchange of statements of facts, issues and contentions (SOFIC).
- [17] In response to Mr Leahy's SOFIC, Reinet made some admissions, and in relation to some matters "generally adopt[ed] the contentions made ... [by the Council]". There is not one positive allegation or assertion in Reinet's response.
- [18] The parties exchanged outlines of submissions on the application. Reinet adopted the Council's outline of submissions and said that it did "not make any further submission at this stage with respect to the operation of s 26 of the *Judicial Review Act* 1991 in this matter". That related to the Council's assertion that Mr Leahy's application should be summarily dismissed as not having been made within a reasonable time.
- [19] Otherwise, Reinet only made written submissions on costs saying that:
1. if Mr Leahy was successful in the application, then Reinet wished to be heard in relation to costs; and
 2. if Mr Leahy was unsuccessful, Reinet should have its costs of the application.
- [20] When the matter was heard, substantial submissions were made on behalf of Mr Leahy and the Council. Mr McMillan, for Reinet, made clear that Reinet made no opposition to the application based on the time that it had been filed.⁵
- [21] When called on to make submissions on the application, Mr McMillan said:
- "Your Honour, as in writing, we adopt the oral submissions made by my learned friend, Mr Beacham.⁶ I don't have anything to add."⁷

⁵ T 1-5.

⁶ Mr Beacham KC appeared for the Brisbane City Council.

⁷ T 1-79.

[22] Reinet:

1. had a real interest in the outcome of the application;
2. had a right to defend that interest; but
3. recognised that the real combatants were Mr Leahy and the Council;
4. did not engage in the argument.

[23] Reinet's lawyers effectively held a "watching brief". They did not participate in a practical way, but were ready to protect Reinet's legitimate interests if necessary.

[24] That was a sensible approach. Reinet had been drawn into a controversy in which it had an interest but in respect of which it had no fault. It did nothing more than take reasonable steps to protect its interests.

[25] In my judgment, the Council, who lost on every argument and whose decision was set aside, should pay Mr Leahy's costs and there should be no order as to costs between Mr Leahy and Reinet.

[26] The orders are:

1. The first respondent pay the applicant's costs of the application on the standard basis.
2. There be no order as to costs as between the applicant and the second respondent.
3. There be no order as to costs as between the applicant and the third respondent