SUPREME COURT OF QUEENSLAND

CITATION: *Austin BMI Pty Ltd v Deputy Premier (No 2)* [2023] QSC 162

PARTIES: **In Matter No 2105 of 2022**

AUSTIN BMI PTY LTD (ACN 164 204 308)
(applicant)

V

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT, LOCAL GOVERNMENT AND PLANNING AND MINISTER ASSISTING THE PREMIER ON OLYMPICS INFRASTRUCTURE
(first respondent)

AND

WANLESS RECYCLING PARK PTY LTD (ACN 623 407 081)
(second respondent)

AND

IPSWICH CITY COUNCIL
(third respondent)

In Matter No 2198 of 2022

VEOLIA ENVIRONMENTAL SERVICES (AUSTRALIA) PTY LTD (ACN 051 316 584) AND (AUSTRALIA) PTY LTD (ACN 100 535 751) trading as TI-TREE BIO-ENERGY (ABN 67 450 387 919) an unincorporated joint venture
(applicant)

V

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT, LOCAL GOVERNMENT AND PLANNING AND MINISTER ASSISTING THE PREMIER ON OLYMPICS INFRASTRUCTURE
(first respondent)

AND

WANLESS RECYCLING PARK PTY LTD (ACN 623 407 081)
(second respondent)

AND

IPSWICH CITY COUNCIL
(third respondent)

In Matter No 2192 of 2022

CAROL ASHWORTH
(first applicant)

AND

CORNELIA TURNI
(second applicant)

AND

ROSEMAREE THOMASSON
(third applicant)

AND

KERRY MAREE BUTLER
(fourth applicant)

AND

KERRI ANNE LYNCH
(fifth applicant)

AND

MARK MEIER
(sixth applicant)

V

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT, LOCAL GOVERNMENT AND PLANNING AND MINISTER ASSISTING THE PREMIER ON OLYMPICS INFRASTRUCTURE
(first respondent)

AND

WANLESS RECYCLING PARK PTY LTD (ACN 623 407 081)
(second respondent)

AND

IPSWICH CITY COUNCIL
(third respondent)

FILE NOS:	2105 of 2022; 2192 of 2022; 2198 of 2022
DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 July 2023
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Freeburn J

ORDERS:

1. **In proceeding No. 2105 of 2022:**
    a. **the applicant pay the costs of the first and second respondents;**
    b. **the third respondent pay the costs of the second respondent, but limited to 10% of those costs;**
2. **In proceeding No. 2198 of 2022:**
    a. **the applicant pay the costs of the first and second respondents;**
    b. **the third respondent pay the costs of the second respondent, but limited to 10% of those costs;**
3. **In proceeding No. 2192 of 2022 the applicant pay the costs of the second respondent.**

CATCHWORDS: PRACTICE AND PROCEDURE – COSTS – where the proceeding involved three separate applications – where applicants in two of the three proceedings conducted the litigation jointly – where the applications were dismissed – where the joint applicants argue that they should not pay both of the successful respondents costs on the basis that there was duplication in the way the litigation was conducted – whether the applicants should pay the costs of two respondents – whether it was reasonable for the respondents to be at arm's length during the litigation

PRACTICE AND PROCEDURE – COSTS – where the third respondent to the proceeding supported the applicants – where one of the successful respondents seeks cost against the third respondent – where the third respondent argues that their role in the proceedings was limited – whether the third respondent should pay the costs of the successful respondent in full or in part

Authorities
Uniform Civil Procedure Rules 1999 r 681

Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965
Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95
Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina [2009] 2 Qd R 356; [2009] QSC 084
Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [No 2] [2023] QCA 140
Commonwealth of Australia v Gretton [2008] NSWCA 117
Donald Campbell & Co v Pollak [1927] AC 732
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
HP Mercantile Pty Ltd v Hartnett [2017] NSWCA 79
Local Democracy Matters Inc v Infrastructure NSW (No 2) [2019] NSWCA 118
Oshlack v Richmond River Council (1998) 193 CLR 72
QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 15
South Sydney District Rugby League Football Club Ltd v News Ltd [2001] FCA 384
Statham v Shepard (No 2) (1974) 23 FLR 244
Taylor v Owners — Strata Plan No 11,564 (No 2) [2013] NSWCA 153
Verduci v Catanzarita (1981) 53 FLR 156
Waterfront Place Pty Ltd v Minister for Planning (No 2) [2019] VSCA 166

COUNSEL: S Holt KC, with S Spottiswood, for the applicant in proceeding No 2105 of 2022
J Underwood, for the applicant in proceeding No 2198 of 2022
D O'Brien KC, with N Loos, for the first respondent in all proceedings
R Traves KC, with SJ Webster, with S Marsh, for the second respondent in all proceedings
S McLeod KC, with D Chesterman, for the third respondent in all proceedings

SOLICITORS: McCullough Robertson for the applicant in proceeding No 2105 of 2022
Ashurst for the applicant in proceeding No 2198 of 2022
Herbert Smith Freehills for the first respondent in all proceedings
Gadens for the second respondent in all proceedings
McInnes Wilson for the third respondent in all proceedings

REASONS

[1] This proceeding concerned three separate applications:

(a) an application by Austin BMI Pty Ltd (2105/22) (**Austin**);

(b) an application by Veolia Environmental Services (Australia) Pty Ltd and JJ Richards Ti Tree Pty Ltd trading as Ti Tree Bioenergy (2198/22) (**Veolia**); and

(c) an application by Carol Ashworth and a number of other local residents of Ipswich (2192/22) (the **Ashworth applicants**).

Austin and Veolia made submissions jointly. For convenience, they are referred to as the Joint Applicants.

[2] The three groups of applicants sought a statutory order for review of a decision made by the first respondent to the proceedings, (the **Deputy Premier**) on 27 January 2022 to "call in" a development application made by the second respondent, Wanless Recycling Park Pty Ltd (**Wanless**). One peculiarity of the case was that the three applications were supported by the third respondent, Ipswich City Council (the **Council**).

[3] This application came before me on 28 September 2022 with further hearings and submissions in October 2022. On 5 May 2023, I delivered my reasons dismissing the applications.[1] The parties have now provided written submissions on the costs of the applications.

[4] The submissions concern the costs payable to the successful parties, Wanless and the Deputy Premier. The Deputy Premier and Wanless took different approaches to the costs payable by the Joint Applicants and the Council. A differing approach has also been taken as to the costs payable in the Ashworth proceeding. For those reasons, it is appropriate to deal with each position separately. However, there are two major controversies to resolve first.

Two Full Sets of Costs

[5] The Joint Applicants accept the burden of the general rule in rule 681 of the *Uniform Civil Procedure Rules 1999* (**UCPR**) that costs ought to follow the event. However, they submit that requiring the Joint Applicants to pay two full sets of costs – the Deputy Premier's costs and Wanless' costs is not reasonable. They submit:

> … [I]t was reasonable for Wanless to appear and be separately represented in proceedings 2105/22 and 2198/22. But it was neither necessary nor reasonable for it to participate in the proceedings as if it were, in effect, the only respondent.[2]

[6] The Joint Applicants contend that by Wanless participating in the proceedings "as if they were the only respondent", there was duplication in the way the proceedings

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1 *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95.

2 Joint Applicants' submissions filed 19 May 2023 at [6].

were conducted. Their position is that they should only be liable for 50% of Wanless' costs as a result of the duplication.

The *Statham* Principles

[7] It is necessary to set out the relevant principles. Firstly, it is useful to explain the wider context where parties on the same side of the court record are separately represented. Dal Pont explains the wider context in this way:

> If there is no conflict of interest, litigants on the same side often elect to be represented by the same lawyer if for no other reason than to reduce cost. This does not mean that they must be jointly represented, even if their cases and interests are identical; litigants may choose their own lawyers, meaning that joint plaintiffs or joint defendants may elect to be represented by the same or different lawyers. Where the same lawyer represents them, the usual order is that only one set of costs is allowed unless some separate work is required. If separate representation is chosen, the litigants cannot assume that, should they be successful, the court will direct the unsuccessful parties to indemnify each of them for their costs. The policy is that a desire to be represented separately by a lawyer of one's own choice cannot be indulged in at another's expense without good reason. **Therefore, the court will not normally allow more than one set of costs to successful litigants where there was no possible conflict of interest between them in the presentation of their cases.**
>
> It follows that lawyers should, in proceedings where other litigants share the same interest, seek to reduce the costs and arrange between themselves which firm should pursue the necessary proceedings. This carries a duty to inform multiple parties that, assuming they share the same interest, only one set of costs may be allowed, rather than costs for all the lawyers. Against the backdrop of a statutory mandate 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings', the New South Wales Court of Appeal remarked that, in exercising its costs discretion, 'the court should only do so in a way which accepts double representation where the requirements of justice require that to be done', so that such cases will arise 'rarely'. It added that a court should exercise its costs discretion 'so as to create an incentive to ensure that only one set of legal representatives are appointed to represent an individual party who appears in a dual capacity as a plaintiff and a defendant'. Equivalent statutory or rule-based mandates thereafter in most other jurisdictions, and indeed the modern trend to confine the costs of litigation, make these remarks of broader application.[3] [emphasis added; citations omitted]

[8] The authority cited for the proposition in bold is *Statham v Shepard (No 2),*[4] a case relied on by the Joint Applicants here. In that case, after a survey of the authorities, Woodward J said:

> The principle which I deduce from these authorities, and which I believe I should follow in spite of the two cases earlier cited, is that the court will not normally allow two sets of costs to defendants where there is no possible

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3 Dal Pont, *Law of Costs*, 5th ed 2021 at [11.52].

4 (1974) 23 FLR 244 at 246–247.

> conflict of interest between them in the presentation of their cases. I would add to this basic proposition three provisoes. In the first place, if a conflict of interest appears possible but unlikely, the defendants should make any necessary inquiries from the plaintiff as to the way in which his case is to be put if this would resolve the possibility of conflict between defendants. (See *In re Lyell*)
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> Secondly, there could be circumstances in which, although the defendants were united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation.
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> Thirdly, even if defendants are acting reasonably in maintaining separate representation for some time or for some purposes, they may still be deprived of part of their costs if they act unreasonably by duplicating costs on any particular matter or at any particular time.

[9] Finn J acknowledged the *Statham* principles in *South Sydney District Rugby League Football Club Ltd v News Ltd.*[5] His Honour took this view:

> With Souths challenging the very basis of the peace deal that ended the "Super League war", it was proper and reasonable for all of the first four respondents to be represented at the hearing to ensure the protection of their several interests in the matter.
>
> Even if it could be said that in the end no actual conflict of interests actually emerged at the hearing, the case was one in my view in which the respondents reasonably could have apprehended that possible conflicts could have arisen. In this I agree with the News and ARL submissions. It is not to the point that my findings in the end may have negatived the bases for such apprehensions. **In quite a variety of ways Souths called into question the actions inter se and the relationships of not only the News interests (i.e. News and NRLI) and ARL but also of the News/ARL interests and NRL**. This was done, moreover, in a fashion that could have given the respective respondents concerned in a particular claim potentially differing interests despite their joining to secure a common outcome by way of defence to that particular claim by Souths.[6] [emphasis added]

[10] His Honour concluded:

> I am far from satisfied that the case was one in which it could properly be said that there was no possibility of conflict of interest between the News interests and ARL. Moreover, against the background (i) of these parties' relationships during and in the aftermath of the Super League war; (ii) of the factual subject matter inquired into, its complexity and its evolution during the trial; and (iii) of the several claims made against these respondents, **I am satisfied that it would have been reasonable in any event for these parties to have remained "at arm's length during the general course of litigation" even**

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5 [2001] FCA 384.

6 [2001] FCA 384 at [6]-[7].

> **though they were united in their opposition to Souths' application**. [emphasis added]

[11] Blackburn CJ applied the *Statham* principles in *Verduci v Catanzarita*:

> If there are differences in the facts or law relating to the several defendants, or if they have different interests, or if there is a reasonable difference of opinion about the conduct of the defence, then the costs of separate representation may be allowed…
>
> Different considerations apply to the costs of the club. In my opinion it was entirely proper and reasonable that the club should be separately represented by counsel at the hearing. The order is that the plaintiffs should pay such costs of the club as were incurred separately from those of the first defendants; such costs to be taxed.[7]

[12] In *Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina*[8] Martin J set out the *Statham* principle, and the three provisos. Then, on the basis of both the *South Sydney* case and *Verduci v Catanzarita*, Martin J summarised this further element to the *Statham* principles:

> If there are differences in the facts or law relating to the several defendants, **or if they have different interests**, or if there is a reasonable difference of opinion about the conduct of the defence, then the costs of separate representation may be allowed.[9] [emphasis added]

[13] The *Statham* principle was applied and explained in *Taylor v Owners — Strata Plan No 11,564 (No 2).*[10] There the NSW Court of Appeal considered that the question was whether the respondents had demonstrated a sufficient reason for the appellant to be burdened with more than one set of costs. That burden is not discharged merely by pointing to factors which explained their decision to have separate representation.

[14] There are three overlapping rationales underlying the *Statham* principles.[11] The *first* was explained by Hodgson JA in *Commonwealth of Australia v Gretton*:

> underlying both the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs.[12]

[15] The *second* was explained by the NSW Court of Appeal in *HP Mercantile Pty Ltd v Hartnett* at [14] this Court said that:

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7 (1981) 53 FLR 156.
8 [2009] 2 Qd R 356; [2009] QSC 084 at [34].
9 *Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina* [2009] 2 Qd R 356; [2009] QSC 084 at [34].
10 [2013] NSWCA 153 at [6].
11 The first two rationales are identified in *Local Democracy Matters Inc v Infrastructure NSW (No 2)* [2019] NSWCA 118 at [21]- [22].
12 [2008] NSWCA 117 at [121].

> the ultimate question is not (as the respondents submit) whether they have acted reasonably, nor whether there has shown to be duplication. The question is whether it is reasonable for the unsuccessful litigant to bear more than one set of costs.[13]

[16] The *third* is the rationale underpinning the general rule that costs follow the event, as explained by McHugh J 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 unsuccessful litigation.[14]

[17] Those rationales have different perspectives. The *third* has a focus on the successful party's right to an indemnity for the costs of the litigation. The *second* has a focus on whether that indemnity will require the unsuccessful party to bear an unreasonable burden – more than one set of costs. And the *first* has a focus on each parties' responsibility for the costs of the litigation as well as the more elusive concept of fairness.

[18] Of course, the *Statham* principles are a small subset of the court's absolute and unfettered discretion to award or not award costs.[15] The court is required to exercise that discretion judicially and, in doing so, will apply the general rule that costs follow the event. Where the unsuccessful party may be burdened by more than one set of costs the Statham principles are a useful guide to the exercise of the discretion.

One Set of Costs

[19] It is necessary to say something about the concept of 'one set of costs'.

[20] In *Statham v Shephard (No. 2),* partnership proceedings, the plaintiff sued two defendants and lost. The defendants had different shares in the partnership, but the same interest in opposing the plaintiff's claim. The first-named defendant was represented at the trial of the action by senior and junior counsel from the New South Wales bar. The second-named defendant was represented by his A.C.T. solicitor. Counsel all relied upon the same material which was before the court. No oral evidence was called, and the arguments advanced on behalf of the two defendants were parallel but differed in content and emphasis.[16]

[21] In that context, it made sense for the Woodward J to take the view that it was reasonable for the defendants to have maintained their separate representations at the hearing. In reaching that conclusion His Honour was influenced by the fact that one defendant was represented only by his local practitioner. His Honour said he

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13 [2017] NSWCA 79 at [14].
14 (1998) 193 CLR 72 at [67].
15 *Donald Campbell & Co v Pollak* [1927] AC 732 at 811.
16 (1974) 23 FLR 244 at 245.

would not have regarded it as reasonable, in the circumstances of this case, for both defendants to have been represented by senior counsel.[17]

[22] This case was far more complex. Here there were three separate applications brought by three sets of applicants – Austin, Veolia and the Ashworth parties. In each proceeding the applicants sued three respondents, the Deputy Premier, Wanless and the Council. The three proceedings were run together and involved common issues, although the Ashworth proceeding involved some human rights issues which were not litigated in the other two proceedings. All six parties were represented by separate experienced counsel and solicitors, as was the Attorney-General who intervened on the human rights issues.

[23] With one exception, all six parties, and the Attorney-General, made separate submissions. The exception was that Austin and Veolia joined forces, as the Joint Applicants, in their written and oral submissions. The Ashworth parties adopted much of the Joint Applicants' submissions but made their own submissions and put on the human rights case.

[24] One bundle of evidence was used for all three proceedings. The parties co-operated to produce that bundle. There were relatively few objections to the admissibility of evidence. There were no significant instances of duplication. It is true that there was some overlap involving the Deputy Premier's written submissions and Wanless' written submissions. But there was also some overlap involving the Joint Applicants' submissions and the Ashworth parties' submissions. Overall, the trial of the issues was conducted efficiently and properly by experienced legal teams.

[25] In this context, it makes no sense to speak of 'one set of costs'. If the applicants had succeeded, they would each have sought orders (albeit covering the same ground) and costs in the three separate proceedings. In the three applications orders were sought against the Deputy Premier, Wanless and the Council. Where two or more proceedings are heard together because they share common features, the court has jurisdiction to make a global order for costs.[18]

Waterfront Place Pty Ltd v Minister for Planning (No 2)

[26] A recent case that bears some similarity to the present case is the Victorian Court of Appeal's decision in *Waterfront Place Pty Ltd v Minister for Planning (No 2)*.[19] In that case the court made orders refusing the applicant leave to appeal against the decision of the trial judge, which concerned the validity of the Minister's exercise of his 'call in' power in respect of an application for a planning permit. Both the Minister and the third respondent (**Ports Corporation**) sought their costs of the appeal on the standard basis. The unsuccessful applicant accepted that it was appropriate for the court to make an award of costs against it but submitted that the costs should be limited to a single set of costs, being the costs of the Minister.[20]

[27] The Victorian Court of Appeal resolved the costs issue by reference to the second proviso in *Statham*, namely: 'circumstances in which, although the defendants were

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17 (1974) 23 FLR 244 at 248.

18 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 at 980; Dal Pont, *Law of Costs*, 5th ed 2021 at [11.65].

19 [2019] VSCA 166. This case is relied on by Wanless.

20 [2019] VSCA 166 at [1]-[2].

united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation'.[21] The second proviso was activated because:

> The Ports Corporation submits that in the circumstances of this case and more generally, its relationship with the Minister is such that it had to remain at arm's length during the course of the litigation: it is a public entity established under the *Transport Integration Act 2010* but does not represent the Crown; its statutory objects and functions are to manage and develop Station Pier and it has announced the Station Pier Redevelopment Project adjacent to the development that was the subject of the Minister's 'call in'; upon exercising his 'call in' power, the Minister became the decision maker in relation to a permit application to which the Ports Corporation was an objector, and to which it continues to object…
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> The Ports Corporation has an interest in how the applicant's land is to be developed. It has its own plans for the development of adjacent land under its management and control. It had, and continues to have, an interest in the applicant's permit application, in respect of which the Minister is now the decision maker and to whom the Ports Corporation will be obliged to make submissions on the merits of the permit application. In the trial division, the Ports Corporation was recognised to be a proper party to the appeal from the Tribunal and no opposition was recorded to an award of costs in its favour.[22]

[28] The Joint Applicants sought to distinguish *Waterfront Place Pty Ltd v Minister for Planning [No 2]* on the grounds that the Ports Corporation had to remain at arm's length because of its status as a separate public entity. However, it seems to me that this case is a more compelling case than *Waterfront Place*. There are many reasons why Wanless, a private corporation, should remain at arm's length from the Minister. There are less reasons for the Ports Corporation, a statutory corporation, to remain at arm's length from the Minister. Both are public entities.

Exercise of the Discretion: Application of the *Statham* Principles

[29] The precondition to the Statham principles, specifies that the court will not normally allow two sets of costs to defendants where there is no possible conflict of interest between them in the presentation of their cases. Here, a major plank in the claims brought by all three applicants was that a reasonable observer might conclude that the Minister was biased in favour of Wanless. As Wanless points out, that allegation of apprehended bias was based on at least three broad allegations:

(a) Wanless engaged Anacta Strategies Pty Ltd (**Anacta**) to lobby the Minister and Anacta had direct contact with the Minister's chief of staff;

(b) Wanless' project manager, Mr Soorley, had communications with the State Planner;

(c) Anacta, whilst engaged by Wanless, made donations to the Australian Labor Party at times proximate to the Minister's call-in decision.

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21 [2019] VSCA 166 at [5].
22 [2019] VSCA 166 at [6]-[7].

[30] I accept Wanless' submission that there was an obvious need for the Deputy Premier and Wanless to remain at arm's length. The Minister and Wanless could hardly be expected to closely collaborate on the litigation. And, the Deputy Premier's interests and motivations are likely to be quite different from the commercial interests of Wanless.

[31] Perhaps recognising those different interests, and the differences in the way in which the litigation was conducted, the Joint Applicants accept that it was reasonable for Wanless to appear and be separately represented in the proceedings commenced by Austin and Veolia.

[32] The second proviso to the *Statham* principles acknowledges that there could be circumstances in which, although the defendants were united in their opposition to the plaintiff, their relationship to each other might be such that they would be acting reasonably in remaining at arm's length during the general course of litigation. Those circumstances exist here. Each of the Deputy Premier and Wanless had different interests, and the nature of the apprehended bias allegations meant that each acted reasonably in engaging separate lawyers and in remaining at arm's length during the course of the litigation. Indeed, the nature of the apprehended bias allegations means that each may have, quite reasonably, thought it inappropriate for them to cooperate in defeating an allegation that they were too close.[23]

[33] The Joint Applicants invoke the third proviso, namely that, even if the Deputy Premier and Wanless were acting reasonably in maintaining separate representation for some time, or for some purposes, they may still be deprived of part of their costs if they act unreasonably by duplicating costs on any particular matter or at any particular time.

[34] The Joint Applicants submit that, whilst it was reasonable for Wanless to appear and be separately represented, it was neither necessary nor reasonable for it to participate in the proceedings as if it were, in effect, the only respondent. The Joint Applicants contend that the Deputy Premier bore the primary responsibility for defending the challenge to the 'call-in' and that, therefore, the appropriate order is that the Joint Applicants pay the Deputy Premier's costs and 50% of Wanless' costs.[24]

[35] I reject that submission. *First*, the Joint Applicants' submission seems to be that, because of the presence of the Deputy Premier's legal team, Wanless' legal team ought to have, like a cruise ship, engaged their engines to 'half speed ahead'. The conduct of complex litigation like this almost inevitably throws up difficult forensic and tactical challenges for the legal teams. It is unreasonable to expect that Wanless' legal team was free to excise parts of its defence effort on the assumption that those excised parts would be carefully and properly advocated in Wanless' interests by the Deputy Premier's team – a team with entirely different instructions, and a client with a different public interest perspective.

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23 Too close in the sense that a fair-minded observer might consider that the decision maker might resolve the questions for determination other than on their merits: see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 at [37].

24 It is unclear whether this order is sought on a 'global' basis. Presumably, the Joint Applicants seek one 'global' order in both the Austin proceedings and in the Veolia proceedings (but not the Ashworth proceedings), or separate orders in both the Austin and Veolia proceedings.

[36] *Second*, the Joint Applicants' specific complaint is that Wanless did not file submissions that merely supplemented the Deputy Premier's submissions but, instead, filed submissions in a substantially independent and overlapping way. There are some practical problems with the idea that Wanless would just file supplementary submissions. The orders were not staggered and so Wanless was obliged to file submissions at the same time as the Deputy Premier. And, as the reasons of Martin J make clear in *Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina*,[25] Wanless was entitled to a reasonable difference of opinion about the conduct of the defence. That meant Wanless was entitled to take a different approach to its submissions. For example, Wanless contended that the Deputy Premier had no obligation of procedural fairness and opposed the human rights claims. The Deputy Premier did not make submissions on those topics. In any event, the production of the written submissions was only part of the work on the case.

[37] *Third*, the Joint Applicants point out that the Deputy Premier filed 48 pages of submissions while Wanless filed 52 pages of submissions. For the reply submissions the page count was 8 and 9 pages respectively. That coincidence in the page count is not of great significance. It is true that many of the same topics were covered. That is also the case for the Joint Applicant's submissions and the Ashworth submissions. But there was no repetition in the way the cases were presented orally.

[38] There is, it seems to me, a danger in revisiting the conduct of the case, with the benefit of hindsight, with the objective of depriving the successful party of any costs that appear to fall within the 'primary responsibility' of another party. The demarcation lines are hard to draw, and a party may genuinely and appropriately wish to advocate its own position in its own way.

[39] *Fourth,* it is not accurate or fair to characterise Wanless' participation in the proceedings as acting as if it were the only respondent. As I have explained, the parties cooperated in conduct of the case. They agreed to split the hearing time evenly between both sides of the record – that is the Deputy Premier and Wanless on one side and the applicants and the Council on the other. A joint bundle of evidence was tendered for all three proceedings. There was also a joint bundle of authorities. The Deputy Premier and Wanless raised objections to two categories of evidence. Those objections were argued efficiently with Wanless addressing the objections from a different perspective (i.e. whether the documents comprised admissions).

[40] Only two witnesses gave evidence and were cross-examined. Ms Cohen was called by the Deputy Premier and cross-examined by Mr Holt KC for the joint applicants. No other party actively participated in that process. Ms Morrissey was called by Mr Holt KC for the joint applicants and was cross-examined by Mr Webster for Wanless. No other party actively participated. In short, there was a significant degree of cooperation and efficiency in the way in which the litigation was conducted. In those circumstances, the court would be reluctant to conclude that, in effect, the conduct of Wanless' legal team was more enthusiastic or more extensive than necessary for the proper defence of the proceedings.

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25 [2009] 2 Qd R 356; [2009] QSC 084 at [34].

[41] For those reasons, costs should follow the event. Wanless is entitled to its costs from the Joint Applicants.

The Deputy Premier's Costs

[42] The Joint Applicants and the Deputy Premier accept that costs should follow the event on a standard basis.

[43] The appropriate orders are that Austin pay the costs of the Deputy Premier and Wanless in proceeding 2105/22 and that Veolia pay the costs of the Deputy Premier and Wanless in proceeding 2198/22.

The Ashworth Proceedings (2192 of 2022)

[44] The Ashworth parties have not delivered any submissions on costs.

[45] The issues in that proceeding included the human rights issues. The Ashworth parties lost that issue. The court accepted the arguments of the Attorney-General and Wanless on those issues.

[46] However, the Deputy Premier does not seek its costs of defending the Ashworth proceeding. Similarly, the Attorney-General does not seek the costs of the Attorney-General's intervention. That leaves only Wanless. Wanless is entitled to its costs of that proceeding on the basis of the general principle that costs should follow the event.

The Council's Liability for Costs

[47] The Council was joined as the third respondent to each of the three proceedings although, ultimately, it supported the applicants.

[48] The Deputy Premier does not seek any costs orders against the Council. That, again, leaves Wanless as the remaining successful party seeking its costs. Curiously, Wanless only seeks costs orders against the Council in proceeding 2105/22 and 2198/22 – the Austin and Veolia proceedings.

[49] The controversy here is that the Council says that it played a relatively small role in the three sets of proceedings and so it should not be obliged to pay all of the Deputy Premier's costs and all of Wanless' costs for all three proceedings.

[50] Two answers to that (perhaps pessimistic) submission are that:

(a) the Minister does not seek any costs against the Council; and

(b) even Wanless does not seek costs against the Council in respect of 2192/22 – the Ashworth proceeding.

[51] And so, there is no prospect that the Council will be obliged to pay six sets of costs (i.e., the costs of the Deputy Premier and Wanless in all three proceedings). The only party seeking its costs against the Council is Wanless and it seeks its costs only for 2105/22 and 2198/22 – the Austin and Veolia proceedings.

[52] Nevertheless, as the costs claimed by Wanless, there is an issue as to how the discretion should be exercised in relation to the Council. The Council submits that its active involvement in the proceedings was very limited. The Council points out that out of the 279 pages of written submissions provided by all parties and the intervenor, the council's submissions were only 13 pages (or 4.66% of the total submissions provided). Of the total transcript of 316 pages Council's submissions occupied only 21 pages (or 6.65% of the hearing time).[26] The Council says that the extent to which its conduct caused any additional expense to the Deputy Premier or Wanless it was *de minimis*.

[53] The Court of Appeal has recently warned against a detailed analysis like this:

> In a case with multiple issues, the court will not generally attempt to differentiate between issues on which a party was successful, and those on which it failed, unless a particular issue or group of issues is clearly separable and occupied a significant part of a trial. Thus the respondent's very detailed analysis of issues, all of which were closely connected, did not demonstrate that this case was a suitable one for making costs orders according to separable questions or parts. Moreover, there is authority to the effect that, particularly in complex disputes, the court will not enter into a detailed analysis of the often numerous disputes between parties to litigation, but will award costs according to the "ultimate sum due from one to another".[27]

[54] However, there are some aspects that make this case different and unique. The first aspect is that, as the Council points out, the Council did not commence any of the proceedings. In fact, in each case the Council was named as the third respondent to proceedings brought by the three applicants. The Council was therefore a necessary party. Certainly, the Council may have resisted the applications, or adopted a neutral stance or sided with the applicants. It had those choices, and perhaps others. In the end the Council, as their submissions concede, 'backed the wrong horse'. And it did so based on its own legal advice.

[55] That said, the Council are right to point out that the purpose of a costs order is to indemnify the successful party for the legal costs it would not otherwise have incurred if the proceeding had not been brought. Here, the Council was not responsible for the commencement of the proceedings. Indeed, the Council had sought that the relevant Minister 'call-in' previous similar town planning applications. The Council's position was unique in that it submitted that the Minister having refused to 'call-in' prior applications ought not to have called-in the Wanless application. The Council sought to advance the concerns of the local residents of Ipswich. There was a public element to its submissions and it did not participate in many of the controversies such as the human rights aspect.

[56] However, the Council did actively participate in the proceedings, and it is appropriate that, as an unsuccessful party, the Council should bear a proportion of the additional costs attributable to its involvement. Adopting a broad-brush approach, and using the figures above as well as making a rough estimate, the

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26 Wanless submit that these figure do not take into account that the Council will only ever be obliged to pay costs in two of the three proceedings.

27 *Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [No 2]* [2023] QCA 140 at [27].

Council ought to pay Wanless' costs in the two proceedings but limited to 10% of those costs.