

SUPREME COURT OF QUEENSLAND

CITATION: *Beale v O'Connell & Ors (No 2)* [2018] QSC 63

PARTIES: **JAMES ANDREW BEALE**
(applicant)
v
DAVID O'CONNELL
(first respondent)
ANGIE JORGENSEN
(second respondent)
WOMEN'S LEGAL SERVICE QUEENSLAND
(third respondent)
and
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(intervening)

FILE NO/S: SC No 9640 of 2016

DIVISION: Trial Division

PROCEEDING: Application for costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 March 2018

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Jackson J

ORDER: **That there be no order as to costs.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – where application under *Judicial Review Act* 1991 (Qld) – where third respondent was a successful party – where application supported on a reasonable basis – where another respondent carried the burden of responding to application – whether costs order should be made

Civil Proceedings Act 2011 (Qld), s 15
Judicial Review Act 1991 (Qld), s 49
Uniform Civil Procedure Rules 1999 (Qld), r 681

Anghel v Minister for Transport (No 2) [1995] 2 Qd R 454, cited
Foster v Shaddock & Ors [2016] QCA 163, cited

COUNSEL: A Boe with P Morreau for the applicant
K Hillard for the third respondent

SOLICITORS: Robertson O’Gorman for the applicant
Wallace O’Hagan Lawyers for the third respondent

- [1] On 19 June 2017 I ordered that the application for a statutory order of review (or prerogative order) in relation to a number of decisions made by the first respondent in connection with an investigation into the death of Tracey Ann Beale under the *Coroners Act* 2003 (Qld) be dismissed.¹ Following that decision, the third respondent applies for an order that the applicant pay the third respondent’s costs of the proceeding or, alternatively, that the applicant pay the third respondent’s costs of the issues relating to the sixth decision, being the first respondent’s order that Professor Douglas attend to give evidence at the inquest.²
- [2] The third respondent was named as the respondent to the originating application, appeared on the occasions when application was returned before the Court and directions were made, filed an affidavit or affidavits and two outlines of argument and appeared on the final hearing.
- [3] There was a question raised in the proceeding as to whether the third respondent’s interest extended to all of the issues or questions raised by the originating application, or was more limited. There is no question, however, that the third respondent was a successful party in the proceeding.
- [4] Accordingly, if the discretionary power to make an order as to costs were simply that engaged under s 15 of the *Civil Proceedings Act* 2011 (Qld) and r 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld), the usual order would be that the costs follow the event and the applicant would be ordered to pay the third respondent’s costs of the application or at least of the issues relating to the sixth decision.
- [5] However, s 49 of the *Judicial Review Act* 1991 (Qld) (“JRA”) provides:
- “(1) If an application (the **costs application**) is made to the court by a person (the **relevant applicant**) who—
- (a) has made a review application; or
 - (b) has been made a party to a review application under section 28;
or
 - (c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;
- the court may make an order—

¹ *Beale v O’Connell & Ors* [2017] QSC 127.

² *Beale v O’Connell & Ors* [2017] QSC 127, [107]-[111].

- (d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
 - (e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.
- (2) In considering the costs application, the court is to have regard to—
- (a) the financial resources of—
 - (i) the relevant applicant; or
 - (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
 - (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
 - (c) if the relevant applicant is a person mentioned in subsection (1)(a)—whether the proceeding discloses a reasonable basis for the review application; and
 - (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)—whether the case in the review application of the relevant applicant can be supported on a reasonable basis.
- (3) The court may, at any time, of its own motion or on the application of a party, having regard to—
- (a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or
 - (b) any significant change affecting the matters mentioned in subsection (2);
- revoke or vary, or suspend the operation of, an order made by it under this section.
- (4) Subject to this section, the rules of court made in relation to the awarding of costs apply to a proceeding arising out of a review application.
- (5) An appeal may be brought from an order under this section only with the leave of the Court of Appeal.
- (6) In this section—
- review application*** means—
- (a) an application for a statutory order of review under section 20 , 21 or 22 ; or
 - (b) an application for review under section 43 ; or
 - (c) an appeal to the Court of Appeal in relation to an order made by the court on an application mentioned in paragraph (a) or (b).”

- [6] It is clear that s 49(1) of the JRA envisages a costs application made before the final hearing of an application for a statutory order of review. And on such an application it is clear also that the relevant factors identified in s 49(2) must be considered. However, it appears that it was decided in *Anghel v Minister for Transport (No 2)*³ that s 49 has a wider role and “may be now the only source of power to award costs in proceedings arising out of review applications.”⁴
- [7] If that be right, the financial resources of the third respondent, whether the case of the third respondent was supportable on a reasonable basis and whether the proceeding involved an issue that may have affected the public interest are all relevant considerations to take into account on the question of costs. The applicant’s submissions proceeded on the assumption that s 49 of the JRA applied. The applicant submitted that:
- (a) first, the reasons for judgment in respect of the first and second decisions indicate that the application was brought or supportable on grounds of substance;
 - (b) second, whether an inquest should be held engages an assessment of the public interest to hold an inquest under s 28 of the *Coroners Act 2003* (Qld); and
 - (c) third, the third respondent’s interests in the application were slight namely whether an order should have been made that Professor Douglas give evidence and that order was one appropriately defended by the Attorney-General who intervened under s 51 of the *Judicial Review Act 1991* (Qld).
- [8] Proceeding on the assumption that section 49(2) does set out relevant considerations to which the Court must have regard in deciding the present application for costs, in my view, it is appropriate that there should be no order that the applicant pay the third respondent’s costs.
- [9] Although the application was supported on a reasonable basis, that is not a relevant factor under s 49(2)(d) of the JRA, which looks to whether the case of the third respondent on the application for review can be supported, not whether the case of the applicant was supported.
- [10] Next, although whether an inquest should be held engages an assessment of the public interest by a coroner under s 28 of the *Coroners Act 2003* (Qld), the proceeding of the application for review was not one that directly engaged that question, except to the extent that the first respondent’s decisions to hold an inquest were challenged as invalidly made.
- [11] However, in my view, although the third respondent reasonably sought to be heard before the coroner in relation to the orders and directions made for the inquest and was

³ [1995] 2 Qd R 454.

⁴ [1995] 2 Qd R 454, 458. And see *Foster v Shaddock & Ors* [2016] QCA 163, [13].

made a respondent to the originating application appropriately, there is some force in the proposition that the third respondent did not have a sufficient interest to generally defend the application and that the Attorney-General as intervenor appropriately should have carried and did carry the burden of generally responding to the application.

- [12] Those circumstances, in my view, are enough to displace the usual order as to costs and to warrant that there be no order that the applicant pay the third respondent's costs of the proceeding.