SUPREME COURT OF QUEENSLAND

CITATION:	*Hytch v O'Connell (No 2)* [2018] QSC 99
PARTIES:	**ROBERT PAUL HYTCH** (applicant) **v** **DAVID O'CONNELL** (respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervener)
FILE NO:	BS No 8603 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Applegarth J
ORDER:	**The applicant pay 75 per cent of the intervener's costs of and incidental to the proceeding**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – where the applicant applied to judicially review a Coroner's findings – where the intervener successfully contested both limbs of the applicant's argument and the application was dismissed – where the intervener seeks an order that the applicant pay the intervener's costs of and incidental to the proceeding – where the intervener was a necessary party – where intervention was necessary to protect an interest not common with the main parties – where the applicant did not apply for an order under s 49 *Judicial Review Act 1991* (Qld) – where the applicant raised an important issue of statutory interpretation

Judicial Review Act 1991 (Qld) s 49(4)

Uniform Civil Procedure Rules r 681

Attorney-General for the State of Queensland v Barnes & Anor [2014] QCA 152 cited

City of Burnside v Attorney-General of South Australia and Others (1994) 63 SASR 65 cited

Oshlack v Richmond River Council (1998) 193 CLR 72 cited

COUNSEL:	G R Rice QC and R W Haddrick for the applicant M T Hickey for the intervener
SOLICITORS:	Ruddy Tomlins Baxter for the applicant Crown Solicitor for the intervener

[1] The parties have made written submissions on costs. The intervener seeks an order that the applicant pay the intervener's costs of and incidental to the proceeding. The applicant submits that he should be ordered to pay 50 per cent of the intervener's costs.

[2] The fact that an intervener is a necessary party and provides important assistance to the Court does not necessitate an order that the intervener recover costs.[1] Professor Dal Pont, after referring to authority, states the following proposition:

> "As a general rule, a successful intervener can recover costs only if the intervention was necessary to protect an interest not common with the main parties ..."[2]

[3] In this matter, intervention was necessary to protect an interest not common with the main parties.

[4] The respondent, a coroner, appropriately took no active role in the proceeding. The issues raised in the application involved questions of statutory interpretation and matters of some public importance relating to judicial review of a coroner's finding. Without the assistance of the intervener, the Court would have been obliged to consider a large body of evidence without the assistance of a contradictor in order to properly determine the applicant's arguments.

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1 *City of Burnside v Attorney-General of South Australia and Others* (1994) 63 SASR 65 at 67.

2 G.E. Dal Pont, *Law of Costs* (3rd ed., 2013, Lexis Nexis Butterworths: Chatswood) at [11.42].

[5] The applicant did not apply before the hearing for an order under s 49 of the *Judicial Review Act* 1991 which may have permitted an order for indemnification or an order that he bear his own costs, regardless of the outcome of the proceeding. Such an application may only be made prospectively, not (as is the case here) when the substantive decision has been handed down and costs of the proceeding have already been incurred.[3]

[6] Therefore the order for costs, which is in my discretion to make, is governed by the rules of court.[4] That includes r 681 that the costs of a proceeding are in the discretion of the Court but follow the event, unless the Court orders otherwise.

[7] The intervener successfully contested both limbs of the applicant's argument. 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.[5] 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.

[8] Section 49(2)(b) of the *Judicial Review Act* refers to considerations that apply in an application under s 49(1). On such an application one consideration is 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. That provision does not apply to the costs application I am required to decide. Nevertheless I have regard to the fact that, whilst advancing an argument in support of his own interests, the applicant raised an issue of statutory interpretation of some potential significance.

[9] I consider that an appropriate order is to not require the applicant to pay all of the intervener's costs. I apprehend that a substantial part of preparation for the hearing would have been occupied in relation to the second limb of the applicant's argument. An appropriate allocation between the intervener's costs associated with the first limb and the second limb is not necessarily reflected in the pages devoted to each limb in written submissions, let alone in my reasons for judgment. In the circumstances, I consider the most appropriate exercise of my discretion in relation to costs is to order that the applicant pay 75 per cent of the intervener's costs of and incidental to the proceeding.

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[3] *Attorney-General for the State of Queensland v Barnes & Anor* [2014] QCA 152 at [44] in relation to an order for indemnification under s 49(1)(d).

[4] *Judicial Review Act* 1991 (Qld), s 49(4).

[5] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67] – [68].