SUPREME COURT OF QUEENSLAND

CITATION:	*Reihana v QCAT Client Services Manager & Ors* [2017] QCA 117
PARTIES:	**TONI COLIN REIHANA** (appellant) **v** **QCAT CLIENT SERVICES MANAGER** (first respondent) **QCAT OPERATIONAL MANAGER** (second respondent) **BEENLEIGH SHOW SOCIETY** (third respondent)
FILE NO/S:	Appeal No 11178 of 2016 SC No 6260 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, Holmes CJ, 11 October 2016
DELIVERED ON:	6 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2017
JUDGES:	Morrison and McMurdo JJA and Byrne SJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay each respondent the costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – where the appellant, who was self-represented, successfully applied to the Supreme Court for statutory orders of review of a QCAT determination of a tenancy dispute – where the appellant sought remuneration for his own time in preparing his case on the basis of what he termed "Reasonable Man's Remuneration" – where the appellant contended that there was, or that the Court should establish, an equitable jurisdiction to award such compensation – whether the appeal was incompetent because it was made without a grant of leave by the Chief Justice or a judge of the Trial Division under s 64 *Supreme Court Act* 1991 (Qld) – whether there was an equitable

	jurisdiction to award compensation for the time of a self-represented litigant
	Supreme Court of Queensland Act 1991 (Qld), s 64
COUNSEL:	The appellant appeared on his own behalf S A McLeod for the first and second respondents A Laylee for the third respondent
SOLICITORS:	The appellant appeared on his own behalf Crown Law for the first and second respondents McCarthy Durie Lawyers for the third respondent

[1] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the orders his Honour proposes.

[2] **McMURDO JA:** The appellant, Mr Reihana, successfully applied for a statutory order of review against the respondents. His application had arisen from a matter which was being litigated between him and the third respondent, the Beenleigh Show Society, in the Queensland Civil and Administrative Tribunal (QCAT). With the consent of the respondents, last August Boddice J ordered that the matter be remitted to QCAT for further consideration.

[3] Mr Reihana, who was then and remains without legal representation, also sought an order that he be compensated for his legal expenses and for what he describes as his "time, labour and preparation in successfully prosecuting his review against the respondents". He did not argue that this order could be made as an order for costs under Ch 17A of the *Uniform Civil Procedure Rules* (Qld) (UCPR). Rather, the order was sought upon an argument that he had an equitable cause of action which entitled him to what he described as a "Reasonable Man's Remuneration". Ultimately, that argument was rejected, in a subsequent hearing, by the Chief Justice. Mr Reihana was awarded $160 (his photocopying and filing expenses) rather than the amount of $3,844 which he had sought from the first and second respondents.

[4] He now appeals against that decision, arguing that this Court should hold that he has an equitable entitlement to the sum which he had sought and indeed, to a further sum, upon the same basis, for the prosecution of this appeal.

[5] He has a further complaint about what was ordered, or not ordered, by the Chief Justice. He asked her Honour to direct that the matter which had been remitted to QCAT be reconsidered by an oral hearing rather than on the papers. The order for the reconsideration of the matter by QCAT had been made months earlier by Boddice J. That had left open, apparently, only the question of this entitlement to remuneration. The Chief Justice declined to so direct QCAT, for two reasons: there was no power to do so because the proceeding had been concluded (save for the question of remuneration) and that, in any case, there was no basis by which she could conclude that it would be improper for QCAT to reconsider the matter on the papers. Although the notice of appeal does not mention that decision, it is challenged by Mr Reihana's submissions.

Background

[6] The third respondent owns the Beenleigh Show Grounds. Mr Reihana owned two caravans which, like many others, were parked in a part of the show grounds which

was compulsorily acquired by the Logan City Council for the building of a road. He refused to move his vans and at first, he filed several applications in QCAT to resist their removal.

[7] In March 2013, the third respondent applied to QCAT to terminate Mr Reihana's tenancy. That application was not opposed. An order terminating the tenancy was made in QCAT and in May 2013, his caravans were removed pursuant to a warrant of possession. But more than two years later, in September 2015, Mr Reihana applied to QCAT to reopen the termination of his tenancy. That required an extension of time which QCAT refused to grant. He unsuccessfully applied to the QCAT Appeal Tribunal for leave to appeal that decision.

[8] In 2016, Mr Reihana filed a number of applications for statutory orders of review, to the end of having the termination of his tenancy set aside. In one of those proceedings (BS 6260/16) Boddice J made the order for a reconsideration by QCAT to which I have referred. The respondents consented to the order because it had emerged that Mr Reihana's written submissions to QCAT, in support of his application to reopen the termination of his tenancy, had been sent within QCAT to the adjudicator only to the extent of the first page. By this clerical error, the adjudicator had refused to reopen the termination of the tenancy without a proper consideration of Mr Reihana's case.

[9] Boddice J further ordered as follows:

> "3. The Application for costs and/or expenses to be paid to the Applicant by the Respondents be adjourned to a date to be fixed, to be brought on, on giving of three business' days written notices to the other side.
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> 4. The Application for interlocutory orders filed 25 August 2016 is otherwise dismissed."

[10] It was that application for "costs and/or expenses" which was decided by the Chief Justice. But before that application was heard, Mr Reihana made another application, which came before Martin J on 4 October 2016. Mr Reihana was concerned about the course which the matter was taking in QCAT. Directions had been made (on 16 September 2016) for the matter to be determined on the papers. Mr Reihana wanted an oral hearing. Martin J said that this could be decided by the judge who was to hear the costs (remuneration) question in the following week. Mr Reihana also sought an order that QCAT make no directions in the matter and that no QCAT member be allocated to hear it, until the Court had "finally disposed of … BS 6260/16". That order was also refused, partly because the third respondent, Mr Reihana's adversary in QCAT, had not been served with this application.

The argument for remuneration

[11] Mr Reihana's argument for remuneration, which was rejected by the Chief Justice and reargued in this Court, can be summarised as follows. It is anomalous that a legally represented party, which is successful in litigation, should have its costs of the preparation and presentation of its case paid by the unsuccessful party, whilst an unrepresented party, which is successful, should bear his or her own costs and expenses of prosecuting or defending the case. That anomaly is inequitable: in particular, it offends the maxim that equity is equality. Although there is no authority for this argument, Kirby J, writing extra-curially in 2008, said that "the categories of

equity are never closed"[1] and that courts have a responsibility in the further development of the general law by "the ongoing renewal of equity's doctrines and remedies".[2]

[12] In rejecting this argument the Chief Justice said as follows:

> "[T]he applicant … seeks remuneration, which he says in equity ought to be granted, effectively for the time and effort and stress of the proceedings, both in relation to the application as before Justice Boddice, which was successful, and the proceeding of this application before me in relation to compensation in equity for his efforts. He has advanced some interesting arguments and submissions in relation to the nature of the rules of equity. His essential argument is that equity would dictate that a litigant in person ought, just as much as a lawyer who proceeds on behalf of a client in a case, be reimbursed; and, if anything, that the impetus for doing so is all the more pressing, because the litigant in person has the stress of the proceedings as well.
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> It is an interesting argument; it has no basis in law and it certainly can't be acceded to. Mr Reihana is entitled to some very limited costs arising from his success in the application on which Justice Boddice ruled, and they are for photocopying and filing fees, which I understand amount to $160. That is the amount which can be ordered."

[13] For the first and second respondents, it is submitted that this is an incompetent appeal, because it is made without a grant of leave by the Chief Justice or a judge of the Trial Division. By s 64(1) of the *Supreme Court of Queensland Act* 1991 (Qld), an appeal only in relation to costs lies to this Court from a judgment or order in the Trial Division only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another judge of in the Trial Division. As I have noted, the notice of appeal refers only to the decision about remuneration.

[14] I would not dismiss Mr Reihana's appeal upon the basis of s 64. Although the notice of appeal did not raise the other point about QCAT's reconsideration, it was allowed to be fully argued in this Court and the appeal has become one which is not only in relation to costs. And at least arguably, this is not an appeal in relation to costs because the order which Mr Reihana seeks is not an order for costs under Ch 17 of the UCPR. Rather, it is based upon what is argued to be an entitlement under the general law.

[15] For the same reason, the decision of the High Court in *Cachia v Hanes*[3] is not determinative of this appeal. It was there held that the costs for which the relevant rules of court of Supreme Court of New South Wales then provided, did not include compensation for the time spent by a litigant, who was not a lawyer, in preparing and conducting his case. Again, Mr Reihana's argument is that he is entitled to remuneration under the general law, not under the UCPR.

[16] Mr Reihana argued his case in this Court, and no doubt before the Chief Justice, with a level of legal understanding, for a non-lawyer, which showed an attention to the preparation and presentation of his case. However, most of his oral submissions appeared to address concerns which he has about the course of the matter in QCAT.

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1 Michael Kirby, 'Equity's Australian Isolationism' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 444, 445.

2 Ibid.

3 (1994) 179 CLR 403.

Neither his written nor oral argument referred to any doctrine or remedy from which it could be said that the new right of action, for which he contends, would be no more than a rational and incremental development.

[17] It is obvious to say that the right of action which he seeks to have this Court create would be far reaching. It would not depend upon the nature of the conduct of the unsuccessful litigant. In the present case, for example, the matter had to be remitted to QCAT for reconsideration only because of a clerical error within the QCAT registry. His claim here does not arise from some unmeritorious resistance to a claim: the outcome was conceded when the clerical error was discovered. And the recognition of this right of action obviously would be far reaching for the administration of justice. If this entitlement to compensation, being equitable, would provide a discretionary remedy, it is far from clear that the discretion would be co-extensive with that which is exercised under the court's costs power, the breadth of which is important for the court's control of its own processes.

[18] In my view, there is no legitimate means by which this Court could uphold Mr Reihana's claim for compensation. I would also add that, in the course of his oral submissions, he agreed that much of his time and effort involved in his claim for $3,844 was occasioned by other arguments which did not need to be resolved because of the unopposed order which was made by Boddice J.

Directions to QCAT

[19] In my view, it may not have been too late for an order to be made that QCAT's reconsideration be conducted with an oral hearing. But alternatively, the Chief Justice would not have made that direction, in the exercise of her discretion, because of the absence of a demonstrated basis for doing so. In other words, it was not demonstrated to her Honour that Mr Reihana would not receive a fair and appropriate reconsideration of his case in the absence of an oral hearing in QCAT. There was no error in that discretionary judgment by the Chief Justice.

Conclusion and order

[20] I would order as follows:

1. Appeal dismissed.
2. Appellant to pay to each respondent the costs of the appeal.

[21] **BYRNE SJA:** I agree with McMurdo JA.