

SUPREME COURT OF QUEENSLAND

CITATION: *Terera & Anor v Clifford* [2017] QCA 181

PARTIES: **SANDRA PHYLLIS TERERA**
(first applicant)
ROBERT BOLHAR
(second applicant)
v
ALAN CLIFFORD
(respondent)

FILE NO/S: Appeal No 10580 of 2016
QCATA No 52 of 2015

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Queensland Civil and Administrative Tribunal Act*

ORIGINATING COURT: Queensland Civil and Administrative Tribunal – [2016]
QCATA 25 (Senior Member O’Callaghan & Member Lumb)

DELIVERED ON: 18 August 2017

DELIVERED AT: Brisbane

HEARING DATE: 21 April 2017

JUDGES: Morrison JA and Atkinson and Douglas JJ

ORDERS: **1. The application for leave to adduce further evidence is refused.**
2. The application for leave to appeal the decision of the QCAT Appeal Tribunal made on 5 February 2016 and the QCAT Member made on 12 April 2016 is refused.
3. The applicants pay the respondent’s costs of the application to be assessed on the standard basis.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the respondent had performed tiling work for the applicants – where the applicants complained to the Queensland Building and Construction Commission and rectification work was completed – where the applicants remained unsatisfied with the work and refused to pay for the work – where the dispute proceeded to the Queensland Civil and Administrative Tribunal (QCAT) and then the QCAT Appeal division (QCATA) – where the applicants were successful only in part, and a costs order was made against the applicants – where the applicants seek leave to appeal the QCATA

decision and the costs order – where the applicants require an extension of time in which to appeal – whether an extension of time is necessary and appropriate – whether leave should be granted to allow the applicants to bring the appeal

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142, s 150, s 151

Berry v Commissioner of Police [2015] 1 Qd R 388; (2014) 244 A Crim R 518; [2014] QCA 238, cited

Pershouse v Queensland Police Service [2013] QCA 296, cited

Pickering v McArthur [2005] QCA 294, cited

Queensland Building and Construction Commission v

Meredith [2014] QCA 62, applied

R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited

Underwood v Queensland Department of Communities (Qld)

[2013] 1 Qd R 252; [2012] QCA 158, applied

White v Commissioner of Police [2014] QCA 121, cited

COUNSEL: The applicants appeared on their own behalf
S Kelly for the respondent

SOLICITORS: The applicants appeared on their own behalf
McCarthy Durie Lawyers for the respondent

- [1] **MORRISON JA:** Mr Clifford performed tiling work for Ms Terera and Dr Bolhar.¹ The contract price was \$5,337. Rectification work was done after a complaint was made to the Queensland Building & Construction Commission (QBCC).² Ms Terera remained unsatisfied with the work and a sum of \$1,631 remained unpaid.
- [2] Ms Terera commenced proceedings in the Queensland Civil and Administrative Tribunal (QCAT) seeking an order that the work be rectified. The application was dismissed and Ms Terera was ordered to pay Mr Clifford’s counterclaim (\$1,631) and costs.
- [3] Ms Terera appealed to the QCAT Appeal Tribunal. She was partly successful, in that one issue as to the scope of works was remitted by the Appeal Tribunal, along with the determination as to costs (the order as to costs having been set aside).
- [4] At the remitted hearing the QCAT Member awarded costs to Mr Clifford, and fixed the amount at \$3,712.17.³
- [5] Ms Terera now seeks leave to appeal to this Court from the decision as to costs, and the decision of the Appeal Tribunal.

¹ For ease of reference I will refer to them jointly as “Ms Terera”.

² Then known by its former name, the Queensland Building Services Authority.

³ AB 222.

- [6] The ground of the proposed appeal in respect of the decision by the Appeal Tribunal are that it erred in fact and law in that it should not have accepted Mr Clifford's evidence in certain respects.
- [7] The grounds of the proposed appeal in respect of the decision as to costs by the QCAT Member is that it would be unjust to award costs because Ms Terera has been left with sub-standard and defective work, and she still has to pay for rectification work.
- [8] Ms Terera requires an extension of time as the application was filed beyond the period of 28 days from the relevant decisions.

Applicable legal principles

- [9] On an application for an extension of time the issues are whether:⁴
- (a) good reason for the delay has been shown;
 - (b) it is in the interests of justice to grant the extension; and
 - (c) that may necessitate a provisional assessment of the strength of the proposed appeal, the prejudice to the respondent, and the length of the delay.
- [10] The issues raised on the question of leave to appeal are whether:⁵
- (a) an appeal is necessary to correct a substantial injustice;
 - (b) there is a reasonable argument that there is an error to be corrected; and
 - (c) on the question of whether leave to appeal might be given the court usually makes some preliminary assessment of the prospects of the proposed appeal. As was said in *Queensland Building & Construction Commission v Meredith*, there dealing with an appeal from the appellate tribunal of QCAT:⁶

“Section 150(3) of the QCAT Act permits an appeal to this Court against a final decision of the Appeal Tribunal only on a question of law and only if the party who wishes to appeal has obtained leave to appeal from this Court. The very structure of this provision forcefully implies, first, that leave to appeal may be given only with respect to a question of questions of law and, secondly, that in considering the exercise of the discretion to grant leave to appeal, this Court will have high regard for the prospects of success that the applicant for leave has of demonstrating error on the part of the Appeal Tribunal with respect to the question or questions of law concerned. There must be reasonable prospects of success to warrant a grant of leave.”⁷
 - (d) *Underwood v Queensland Department of Communities (Qld)*⁸ concerned an application for leave to appeal in respect of a tenancy agreement which had

⁴ *R v Tait* [1999] 2 Qd R 667 at [5]; *Pershouse v Queensland Police Service* [2013] QCA 296 at [13].

⁵ *Pickering v McArthur* [2005] QCA 294 at [3]; *Berry v Commissioner of Police* [2014] QCA 238 at [4]; *White v Commissioner of Police* [2014] QCA 121 at [5].

⁶ *Queensland Building & Construction Commission v Meredith* [2014] QCA 62, at [23].

⁷ Citing *Underwood v Queensland Department of Communities (Qld)* [2012] QCA 158, at [18] and [68].

⁸ *Underwood v Queensland Department of Communities (Qld)* [2012] QCA 158, at [18] and [68]. (*Underwood*).

been dealt with both at first instance and in the Appeal Tribunal in QCAT. The Appeal Tribunal refused leave to appeal. Muir JA⁹ stated:

“[53] The applicant’s claim was considered on its merits by the Tribunal. An application for leave to appeal from the Tribunal’s decision was considered and rejected. These are considerations which are traditionally regarded as weighing against a grant of leave to appeal.¹⁰

[54] This is not a case in which it is arguable that leave is necessary to correct ‘a substantial injustice to the applicant.’¹¹ The proceedings, however, do provide a good illustration of the reasons why courts exercise vigilance in managing proceedings carefully to prevent litigants, however well intentioned, from converting them into instruments of oppression of the other party and obstacles to the court’s ability to provide expeditious service to other litigants.”¹²

Chronology of the QCAT proceedings

- [11] A more detailed knowledge of the sequence of proceedings and orders in QCAT will assist in the consideration of the issues.
- [12] On 27 May 2014, Ms Terera instituted proceedings in respect of a domestic building dispute.¹³ The relief sought was that the defective works be rectified.¹⁴
- [13] On 10 October 2014, a QCAT Member ordered that the parties could be legally represented.¹⁵
- [14] **Decision 1:** on 2 February 2015, a QCAT Member dismissed the claim. Orders were made: dismissing the application (order 1); giving judgment in favour of Mr Clifford on the counterclaim (order 2); and ordering Ms Terera to pay his costs (order 3).¹⁶
- [15] On 13 February 2015, Ms Terera applied for leave to appeal decision 1, and to stay that decision.
- [16] On 19 February 2015, the Appeal Tribunal refused a stay in respect of order 2. Order 3 was stayed pending further order of the Appeal Tribunal.¹⁷
- [17] **Decision 2:** on 5 February 2016, the Appeal Tribunal set aside the costs order (order 3 made on 2 February 2015).¹⁸ It also allowed the appeal in part, setting aside the Member’s decision to enlarge the application to hear a dispute about the leak in the studio shower. The matter was returned to the Tribunal. The parties were allowed to make submissions about the costs of the appeal.¹⁹

⁹ With whom Dalton J agreed.

¹⁰ *ACI Operations Pty Ltd v Bawden* [2002] QCA 286, [14]; and *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100.

¹¹ *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100, [5]; and *Smith v Ash* [2011] 2 Qd R 175, [50].

¹² *Underwood* at [53] and [54].

¹³ AB 98.

¹⁴ AB 101, 104.

¹⁵ AB 190.

¹⁶ AB 212.

¹⁷ AB 354.

¹⁸ *Terera & Bohlar v Clifford* [2016] QCATA 25; AB 356.

¹⁹ AB 372.

- [18] **Decision 3:** on 12 April 2016, on the remitted hearing as concerns costs, the QCAT Member ordered that Ms Terera pay Mr Clifford's costs, fixed in the sum of \$3,712.17.²⁰
- [19] **Decision 4:** on 14 April 2016, the Appeal Tribunal ordered that each party must bear their own costs of the appeal.²¹
- [20] On 28 April 2016, Ms Terera prepared an application for leave to appeal against the Member's decision made on 12 April 2016 (Decision 3).²² It seems that the Court of Appeal registry may have rejected the document when an attempt was made to file it on 30 April,²³ but it seems likely to have come to the attention of the solicitor for Mr Clifford. Ms Terera knew by 10 May 2016 that the document had not been filed, and had been rejected by the registry.²⁴ Thus, I intend to proceed on the basis that Mr Clifford had notice in late April 2016 of the intention to challenge the costs decision by way of appeal to this Court.
- [21] On 17 October 2016, a document was filed which comprised an application for leave to appeal against the decisions of the Appeal Tribunal (Decision 2) and the Member's costs decision (Decision 3), a notice of appeal, and an application for an extension of time.
- [22] Ms Terera requires an extension of time within which to file the application for leave to appeal against the Appeal Tribunal's decision. The time period for filing an application expired on 4 March 2016,²⁵ and the application was filed on 17 October 2016, and thus about seven and a-half months late.

Extension of time

- [23] The principles applicable to an application for extension of time are set out in paragraph [9] above. They require consideration of whether good reason for the delay has been shown, and whether it is in the interests of justice to grant the extension. That may require a provisional assessment of the strength of the proposed appeal, the prejudice to the respondent, and the length of the delay. Here, where the merits of the proposed appeals were heard at the same time as the application for an extension of time, the assessment of the strength of the case does not need to be provisional.
- [24] The delay here is very long. The explanation²⁶ given is as follows:
- (a) Ms Terera and Mr Bolhar have had financial difficulties; he lost his job and was unemployed for 19 months; she was unemployed for three months;
 - (b) there were family tragedies with financial implications, including the cost of Mr Bolhar's father staying in a home in Germany;
 - (c) because Mr Bolhar lives and works overseas they have the costs of two households to maintain;

²⁰ *Terera & Anor v Clifford* [2016] QCAT 82; AB 222.

²¹ *Terera & Bolhar v Clifford (No 2)* [2016] QCATA 59; AB 373.

²² AB 316.

²³ AB 408, paragraphs 6 and 7.

²⁴ AB 408 paragraph 7.

²⁵ See s 151 of the *QCAT Act*.

²⁶ AB 408. It is not on oath, but Ms Terera is self-represented and may not have realised that was necessary. I intend to assume that if put to it Ms Terera would swear such an affidavit.

- (d) they waited for the costs decision to be handed down, which occurred on 12 April 2016; and
 - (e) Ms Terera unsuccessfully tried to file an application for leave to appeal, realising on 10 May that it had not been; she was overseas until 22 May 2016.
- [25] There are unsatisfactory aspects to the explanation.
- [26] First, while financial difficulty is pleaded, and extending back to March 2015, that did not prevent participation in the various QCAT steps in 2015 and into 2016, or the ability to prepare all the associated documents.
- [27] Secondly, the initial delay was because they chose to wait until the costs decision was handed down. Thus the 12 week delay between 5 February and 30 April 2016 was a matter of choice, not circumstance. The financial problems are not an answer in this period because a document was prepared on 28 April for filing on 30 April 2016.
- [28] Thirdly, the document prepared on 28 April is opaque as to whether it challenges the Appeal Tribunal's decision. It seems directed at the costs decision.
- [29] Fourthly, no good explanation has been given for the delay between 10 May 2016, when Ms Terera knew that the registry had rejected the document, and when one was filed five months later on 17 October 2016.
- [30] It is not necessary to reach a conclusion on whether that explanation, by itself, would be sufficient to warrant an extension of time. For reasons which follow, there are no reasonable prospects of success on the appeals. That would normally mean that an extension of time to apply for leave to appeal would be refused. However, since the merits of the appeals have been argued, the fate of the application for an extension of time need not be determined.

Application to appeal the decision of the Appeal Tribunal

- [31] The appeal to the Appeal Tribunal was from the Member's decision made on 2 February 2015. The orders were:²⁷
- “1. The Applicants application is dismissed.
 - 2. That the Applicant pay to the Respondent the sum of \$1,631.00 plus interest thereon of \$92.97 within fourteen (14) days.
 - 3. That the Applicant pay the Respondents costs to be assessed on the standard basis or as otherwise agreed. In the event of no agreement as to costs the parties are at liberty to apply.”
- [32] The orders made on 5 February 2016 by the Appeal Tribunal were as follows:²⁸
- 1. Leave to adduce further evidence is refused.
 - 2. Leave to appeal the costs order below (order number 3 of the Decision) is granted.

²⁷ AB 212.

²⁸ AB 356.

3. Otherwise leave to appeal is refused.
4. The appeal is allowed in part.
5. The Member's order that the application be enlarged to include the dispute in relation to the leak in the studio shower is set aside.
6. Order number 3 of the Decision is set aside.
7. Otherwise the appeal is dismissed.
8. The matter is returned to the Tribunal for reconsideration according to law on the question of costs.
9. Each party shall file and serve, within 14 days of the date of these orders, submissions in relation to the costs of the Application for leave to appeal and appeal.

[33] Appeals to the Court of Appeal from QCAT are governed by s 149 and s 150 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).²⁹ Appeals from the QCAT Appeal Tribunal are governed by s 150, which provides:

“150 Party may appeal—decisions of appeal tribunal

- (1) A person may appeal to the Court of Appeal against a decision of the appeal tribunal to refuse an application for leave to appeal to the appeal tribunal.
- (2) A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—
 - (a) a cost-amount decision;
 - (b) the final decision.
- (3) However, an appeal under subsection (1) or (2) may be made—
 - (a) only on a question of law; and
 - (b) only if the party has obtained the court's leave to appeal.”

[34] Ms Terera's application for leave to appeal comes within s 150(2) as the Appeal Tribunal did not refuse leave to appeal. Therefore the right to appeal is limited in several ways: (i) it can only be in respect of a cost-amount decision or the final decision; (ii) it can only be on a question of law; and (iii) it can only be with leave.

[35] The term “cost-amount decision” is defined to mean “a decision of the tribunal about the amount of costs fixed or assessed by it under section 107”: schedule 3, *QCAT Act*. Section 107(1) provides: “If the tribunal makes a costs order under this Act or an enabling Act, the tribunal must fix the costs if possible”.

[36] The cost-amount decision is a decision “about the amount of [the] costs”, not as to whether to award costs or not. Further, s 150(2)(a) makes it plain that the relevant cost-amount decision that can be appealed is the decision of the Appeal Tribunal.

²⁹ Which I will refer to as the *QCAT Act*.

- [37] No part of the Appeal Tribunal’s decision or orders on 5 February 2016 was a “cost-amount decision”. Therefore, if there is a right to appeal it can only be in respect of the “final decision” of the Appeal Tribunal. Having regard to the orders made, only those that dismissed the appeal could qualify as a “final decision”, principally orders 1, 3 and 7. By those orders leave to adduce further evidence was refused, the appeal against the dismissal of the claim to rectification and the judgment on the counterclaim, was dismissed.
- [38] That has the result that Ms Terera has a right to appeal, if leave is granted, in respect of the Appeal Tribunal’s decision to (i) refuse leave to adduce further evidence, and (ii) dismiss the appeal against orders 1 and 2 made by the Member on 2 February 2015. And that appeal can be on a question of law only.
- [39] Therein lies the difficulty confronting the application to this Court. Ms Terera does not raise any question of law in the proposed appeal. The grounds are that the Appeal Tribunal should not have accepted Mr Clifford’s evidence on various points. Insofar as the further evidence is concerned, Ms Terera’s submissions were directed at the decision of the Member, not the Appeal Tribunal.³⁰
- [40] There being no identified questions of law, the proposed appeal does not satisfy s 150, and would fail for that reason.

Consideration of the appeal points

- [41] Notwithstanding that conclusion, given that Ms Terera was self-represented in the QCAT proceedings and in this Court, I intend to examine the points raised in the proposed appeal.

Non-acceptance of Mr Clifford’s evidence

- [42] The Appeal Tribunal examined the basis upon which the Member dismissed Ms Terera’s application. It noted these features about the Member’s approach:
- (a) the photographs said to evidence the defects in tiling were found to be “not especially helpful”, and criticisms were made of their quality;³¹
 - (b) the applicants had the onus to adduce evidence which was satisfactory;³²
 - (c) he accepted Mr Clifford’s evidence on one issue (lippage); on another he was not satisfied that he could make findings that defective work caused a fault (stainage);³³ and
 - (d) on some areas there was no evidence or no expert evidence (bulging of walls and tiling issues).³⁴
- [43] The Appeal Tribunal addressed the authorities that established the test for interference in a primary decision,³⁵ namely:

³⁰ Applicants’ outline, paragraph 39.

³¹ *Terera & Bohlar (sic) v Clifford* [2016] QCATA 25 (**QCATA Reasons**) [44]-[45]. The Appeal Tribunal agreed with those descriptions: Reasons [46].

³² QCATA Reasons [47].

³³ QCATA Reasons [49]-[50].

³⁴ QCATA Reasons [51]-[52].

³⁵ *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247 at [29]; *Bannink v Solar Energy Group Pty Ltd* [2012] QCATA 148 at [16].

“Is there a reasonably arguable case of error in the primary decision? Is there a reasonable prospect that the applicant will obtain substantive relief? Is leave necessary to correct a substantial injustice to the applicant caused by some error? Is there a question of general importance upon which further argument, and a decision of the appellate court or tribunal, would be to the public advantage?”

[44] It was not suggested before this Court that the Appeal Tribunal proceeded on an incorrect view of the law as to their task.

[45] Having done so the Appeal Tribunal then reviewed the evidence, concluding that it was open to the Member to find as he did on the various issues.³⁶ The Appeal Tribunal concluded:³⁷

“For the reasons discussed above, we cannot be satisfied that the Applicants have demonstrated that there is a reasonably arguable case of error in the primary decision and that there is a reasonable prospect that the Applicants would obtain substantive relief if leave were granted. In our view, leave to appeal in relation to the matters raised in paragraphs 4, 5 and 7 of the Applicants’ written submissions should be refused.”

[46] As is evident, the Appeal Tribunal’s finding was that the Member’s findings were open on the evidence. The submissions on the appeal by Ms Terera went into considerable detail as to the defects in the Member’s approach, and the contended deficiencies in the evidence, especially Mr Clifford’s evidence.³⁸ However, it was not a case where the Appeal Tribunal had to accept or reject the evidence of Mr Clifford, though it was plainly not persuaded that his evidence should be rejected.

[47] The appeal to this Court is restricted to questions of law. None has been identified and no error of law in the approach of the Appeal Tribunal has been demonstrated.

Refusal to receive further evidence

[48] The two categories of further evidence were: (i) better quality photographs than had been used at the original hearing; and (ii) reports that relate to the leaks in the shower.

[49] As to the first category, the Appeal Tribunal noted Ms Terera’s concession that better evidence should have been led at the original hearing, and made two findings that impact upon the chance of a successful challenge. First, at the original hearing Ms Terera was alive to the need to produce evidence of alleged defects. Ms Terera could have, and on her own admission, should have produced better photographs.³⁹ Secondly, such evidence could have been obtained for the original hearing, as it was reasonably available.

³⁶ QCATA Reasons [56]-[60].

³⁷ QCATA Reasons [61].

³⁸ AB 326-336.

³⁹ QCATA Reasons [14].

- [50] On that basis there is no reasonable prospect of demonstrating that the Appeal Tribunal erred in law by refusing the further evidence. That application was renewed before this Court but for the same reasons it should be refused.
- [51] The second category, reports about the shower leaks, need not be considered further. They related to the ground upon which Ms Terera succeeded.⁴⁰ The effect of the Appeal Tribunal's orders was that the leak in the shower was an issue that was part of the ongoing dispute in QCAT.⁴¹ There was, therefore, no need to rely on that evidence before the Appeal Tribunal. However, the Appeal Tribunal also found that the evidence was reasonably available at the time of the original hearing and therefore its admission would have been properly refused in any event.
- [52] In my view, there is no reasonable prospect of demonstrating that the Appeal Tribunal erred in law in this respect.

Conclusion on the challenge to the Appeal Tribunal's decision

- [53] For the reasons given above the proposed appeal would fail. Leave to appeal should therefore be refused.

Application to appeal against the Member's decision

- [54] The decision of the Member was made on 12 April 2016, on the papers, on the issue of costs being remitted to the Member by the Appeal Tribunal. It was in these terms:⁴²

“Sandra Phyllis Terera and Robert Bolhar are to pay the costs of Alan Clifford, fixed in the sum of \$3,712.17, within 28 days.”

- [55] The proposed notice of appeal seeks to set aside that order.⁴³ Appeals from the decision of a QCAT Member, sitting alone, are governed by s 149 of the *QCAT Act*. Section 149 relevantly provides:

“149 Party may appeal—decisions of tribunal

- (1) A party to a proceeding (other than an appeal under division 1) may appeal to the Court of Appeal against a cost-amount decision of the tribunal in the proceeding, whether or not a judicial member constituted the tribunal in the proceeding.
- (2) A party to a proceeding (other than an appeal under division 1) may appeal to the Court of Appeal against another decision of the tribunal in the proceeding if a judicial member constituted the tribunal in the proceeding.
- (3) However—
 - (a) an appeal under subsection (1) may be made only on a question of law and only if the party has obtained the court's leave to appeal; and

⁴⁰ QCATA Reasons [15].

⁴¹ QCATA Reasons [34]; AB 365.

⁴² AB 222.

⁴³ Section 3, Order 1: AB 404.

- (b) an appeal under subsection (2) on a question of fact, or a question of mixed law and fact, may be made only if the party has obtained the court's leave to appeal.”

[56] The Member concerned was not a judicial member and therefore s 149(2) does not apply. The right to appeal under s 149(1) is only in respect of a “cost-amount decision”, and then only on a question of law and with leave: s 149(3).

[57] As mentioned above a “cost-amount decision” is one that is “about the amount of costs fixed ... under s 107”. The definitions in schedule 3 of the *QCAT Act* make a distinction between a “cost-amount decision” and a “costs order”, the latter of which means “an order awarding costs”.

[58] Section 149(1) does not confer a right of appeal in respect of a “costs order”. It is evident from the *QCAT Act* that if a “costs order” made by a Member is to be challenged, that is by way of an application for leave to appeal to the Appeal Tribunal: s 142(3). Conversely, s 142(2) provides that a “cost-amount decision” by a Member cannot be appealed to the Appeal Tribunal.

[59] The order of the Member referred to in paragraph [54] above did two things. First it awarded costs against one party in favour of another. In that respect it was a “costs order”. Secondly, it fixed the amount of the costs. In that respect it was a “cost-amount decision”. In my view, there is no reason why an order cannot be both. Nothing in the definition of “cost-amount decision” says that it must only be about the amount of the costs. Nor does the definition of “costs order” contain words that suggest the order must only be concerned with awarding costs.

[60] However, the combined effect of s 142(3) and s 149(1) is that:

- (a) an appeal does not lie to this Court against that part of the Member’s order which was to award costs; that appeal can only be made to the Appeal Tribunal; and
- (b) an appeal can lie to this Court against that part of the order which fixed the amount of the costs, but only with leave and then only on a point of law.

[61] An examination of the proposed notice of appeal reveals that the appeal against the Member’s decision seeks to challenge the decision to award costs at all, rather than simply the amount of the costs. Of course, a successful challenge to the decision to award costs at all would have the result that the amount fixed for the costs would be set aside, but the definitions of “costs order” and “cost-amount decision”, together with s 142 and s 149, suggest that the two subjects are, and should be, treated differently.

[62] An examination of the outline of submissions reveals that the challenge is directed at the decision to award costs, rather than the amount fixed.⁴⁴ Indeed, there is nothing said in the outline as to the amount fixed. In other words, the challenge is as to a “costs order” rather than a “cost-amount decision”.

[63] As such the proposed appeal is incompetent.

Disposition of the applications and appeal

⁴⁴ Applicants’ outline, paragraphs 2, 3, 6-10, and particularly 14.

[64] For the reasons given above the proposed appeals would fail. Therefore there is no basis upon which a grant of leave to appeal is warranted.

[65] I propose the following orders:

1. The application for leave to adduce further evidence is refused.
2. The application for leave to appeal the decision of the QCAT Appeal Tribunal made on 5 February 2016 and the QCAT Member made on 12 April 2016 is refused.
3. The applicants pay the respondent's costs of the application to be assessed on the standard basis.

[66] **ATKINSON J:** I agree with the orders proposed by Morrison JA and with his Honour's reasons.

[67] **DOUGLAS J:** I agree with Morrison JA.