QUEENSLAND CIVIL AND ADMINISTRATIVE APPEAL TRIBUNAL

CITATION:	*Seeiseo Pty Ltd ATF Aqua Trust v Body Corporate for Taralla Apartments* [2020] QCATA 48
PARTIES:	**SEEISEO PTY LTD ATF AQUA TRUST** (applicant\appellant) **v** **BODY CORPORATE FOR TARALLA APARTMENTS COURTS 15627** (respondent)
APPLICATION NO/S:	APL034-19
MATTER TYPE:	Appeals
DELIVERED ON:	15 April 2020
HEARING DATE:	8 November 2019
HEARD AT:	Brisbane
DECISION OF:	Member Richard Oliver
ORDERS:	**Leave to appeal is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHERE APPEAL LIES – ERROR OF LAW- FRESH EVIDENCE – where original proceeding struck out under s 47 of the QCAT act – where respondent sought costs of the proceeding and the strike out application – where costs awarded against the applicant – where applicant sought to lead fresh evidence in the appeal – whether fresh evidence should be admitted – whether evidence available at the time of the hearing of the costs application – whether s 102(3) of the QCAT Act applied to the costs application – whether the tribunal gave consideration to the matters referred to in s 102(3) – whether discretion properly exercised in awarding costs. *Queensland Civil and Administrative Tribunal Act* 2009 ss 47, 48 100 and 102 *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 *Terera & Anor v Clifford* [2017] QCA 181. *Bradlyn Nominees Pty Ltd v Saikowski* [2012] QCATA 39. *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 384;
Cachia v Grech [2009] NSWCA 232 at 2.

APPEARANCES & REPRESENTATION	
Applicant:	Mr Lawrence and Mrs Lawrence for the Applicant
Respondent:	Mr Chesterman of counsel instructed by Nicholsons Solicitors

REASONS FOR DECISION

[1] The applicant is the caretakers of Taralla Apartments under a Caretaking Management Agreement with the Body Corporate for Taralla Apartments. It was dissatisfied with the remuneration it was receiving under the agreement, and sought to negotiate an increase with the Body Corporate. This was resisted. The applicant then engaged an independent contractor to assess the value of the work being carried out under the caretaking agreement to support its claim for an increase. The independent contractor recommended an increase in remuneration and this recommendation was put to a general meeting of the Body Corporate but it failed to pass. The applicant then filed an application in the tribunal seeking an order for the appointment of an independent valuer to carry out a valuation of the work undertaken by the applicant. In addition, the applicant also claimed extra costs for the work done and sundry items in the sum of $75,411.07 (extra costs claim).

[2] Soon after the application was filed in the tribunal, the Body Corporate agreed to the appointment of an independent valuer which resolved that part of the dispute. However, the extra costs claim remained on foot. Despite repeated requests by the Body Corporate that the applicant withdraw the application in QCAT, and also requests made by the Body Corporate's solicitors, the applicant held fast and would not agree to withdraw.

[3] This then forced the Body Corporate's hand and it filed an application to dismiss the applicant's application on the grounds the tribunal did not have jurisdiction to determine the applicant's extra costs claim and it was lacking in substance. The application was brought under s 47 of the QCAT Act which permits the tribunal to strike out a proceeding in whole or in part if it is unjustified. The proceeding can be struck out if it is found to be:

(a) frivolous, vexatious or misconceived; or

(b) lacking in substance; or

(c) otherwise an abuse of process.

[4] On 16 October 2018, the tribunal made a decision dismissing the applicant's extra costs claim and the application generally on the basis that the tribunal lacked jurisdiction. The learned member said:

> A dispute in terms of s.149B of the Act enlivening the tribunal's jurisdiction must be more than simply a difference of opinion on a subject outside the terms of the caretaking agreement. A dispute enlivening the tribunal's

> jurisdiction to deal with the dispute must be about *a claimed or anticipated contractual matter*. There must be a contractual issue in contention. A dispute for the purpose of jurisdiction needs to be more than a difference of opinion about whether agreed terms of engagement of a caretaker lack commercial profitability on the part of one of the parties.

[5] The learned Member also concluded that the 'current application is futile as it presently stands and lacks substance'. He then proceeded to strike it out under s 47(1)(b) of the QCAT Act.

[6] In coming to that decision, the learned member quite rightly had regard to what was said by the High Court in *General Steel Industries Inc v Commissioner for Railways* (NSW)[1] in denying the applicant the opportunity to pursue its case in the tribunal.

[7] Having succeeded in having the application struck out, the Body Corporate then applied for costs it had incurred because of what it submits was the unreasonable conduct of the applicant when it was invited to withdraw the application before it was necessary to apply to the tribunal to have the application struck out. Both parties were invited to file submissions on costs application which they did.

[8] On 22 January 2019 the tribunal made an order that the applicant pay the respondent's costs fixed in the sum of $3,539.58. In allowing the application for costs, the learned member had regard to s 47 of the QCAT Act and in particular subsection (2)(c) which provides:

> make a costs order against the party who brought the proceeding or part before the tribunal to compensate another party for any reasonable costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding or part.

[9] The applicant then filed an application for leave to appeal or appeal the tribunal's decision on costs. Under s 142(3)(a) of the QCAT Act an appeal on the question of costs can only be made if the applicant has first obtained the appeal tribunal's leave to appeal. Leave to appeal will usually only be granted when there is a reasonable argument that the decision was attended by error, or an appeal is necessary to correct a substantial injustice caused by the error.[2] An application for leave to appeal is not simply an opportunity to reiterate the arguments made at the hearing below in the hope of obtaining a different outcome.[3] Put another way, it is not a rehearing on the merits of the matter that was before the primary decision maker/s**.**

[10] In addition to the application for leave to appeal or appeal, the applicants have also filed further applications seeking leave to adduce fresh evidence in the appeal application. Reliance on fresh evidence in an appeal is not granted as a matter of right. In respect of fresh or new evidence generally it is well settled that the appeals tribunal will only accept fresh evidence if it was not reasonably available at the time the proceeding was heard and determined[4]. Ordinarily, an applicant for leave to adduce such evidence must satisfy each of the following tests:

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1 (1964) 112 CLR 125.
2 *Terera & Anor v Clifford* [2017] QCA 181.
3 *Bradlyn Nominees Pty Ltd v Saikowski* [2012] QCATA 39.

(a) The evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence, if allowed, would probably have an important impact on the result of the case (although it need not be demonstrated that it would be decisive); and

(c) That the evidence is credible though it need not be incontrovertible.[5]

[11] Although the fresh evidence sought to be admitted is principally set out in an attachment to the affidavit of Chris Lawrence filed on 15 August 2019, it is first referred to in the grounds of appeal which are annexed to the application for leave to appeal or appeal. There is a heading 'Not all facts were presented'. That document then goes on to set out history of the relationship between the applicant and the body corporate concerning reviews of the remuneration, issues with respect to the appointment of a suitable valuer, justification for bringing the application to QCAT for the appointment of an independent valuer and a disputation with the chairman of the body corporate. There is complaint about body corporate costs and the lack of a conciliation between the applicant and the body corporate concerning the subject matter of the original application. The grounds then go on to contend that the applicant's motive was not frivolous, did not engage in an abuse of the process and the motive for their application was that they were forced to do so as a last resort. There is some reference to the exercise of discretion to award costs but this merely reiterates those matters the applicant says that the tribunal ought to have taken into account when making a decision about the costs.

[12] The commentary, recognising of course that the applicant's director is not legally trained, does not, even on a generous reading, identify any basis upon which it could be said that the tribunal might have fallen into error in coming to the decision that it did. Obviously, the applicant does not agree with the decision, but that of itself is not enough.

[13] The evidence attached to the affidavit of Chris Lawrence is in a similar vein. That 'evidence' is unrelated to the issues for determination in this application for leave to appeal against the costs order. In respect of that 'evidence' a large part if not all is not evidence in the true sense of the word but commentary and submission on the evidence put forward in the strike out application.

[14] The affidavit of Mr Lawrence addresses the earlier strike out application and refers to the interactions between the applicant and the body corporate leading to that application. As an example, there is a history of the reviews of the caretaking agreement, the actual proceedings before the tribunal both the original application and this appeal and also a chronology of events between June 2018 and July 2019. Similar to the attachment to the application for leave to appeal, none of these matters, touch on the exercise of discretion to award costs under s 47 of the QCAT Act. This appeal is not a rehearing of the strike out application or the merits of it. The fact is that the proceeding was struck out on the basis set out in the learned Member's reasons after the parties were invited to provide submissions in respect of the costs application. It was necessary to adduce any evidence in respect of that

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5 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408

application that was the time to do it. There is simply no justification to now go behind those reasons.

[15] Further, the fresh evidence sought to be adduced now, was all available to the applicant at the time it made its submissions on costs and if any further evidence was necessary for that application that was the time to adduce it.

[16] The next consideration is whether that evidence if allowed would have an important impact on the result of the case. The evidence is not relevant to the question of whether leave should be granted to appeal. It does not address any error in the reasons for decision nor does it go to establishing that if any error is identified, it would lead to a substantial injustice. There is not only that question, but also whether it has any probative value for the purposes of deciding whether leave to appeal should be granted, or in the appeal proper.

[17] Even accepting that the evidence is credible and not incontrovertible, which I doubt to be the case in any event, it still does not warrant its admission to this appeal proceeding.

[18] In summary, I am satisfied that the evidence does not directly relate to the learned member's exercise of discretion in deciding costs, but rather relates to the original application to strike out. As indicated, it does not have probative value in terms of determining whether leave to appeal should be granted and finally, I am not satisfied that the evidence, if relevant, could not have been put before the learned member prior to making a costs decision.

[19] In the circumstances, I dismiss the application to rely on the fresh evidence.

[20] In its submission in support of the application for leave to appeal, the applicant lists a number of 'tribunal errors' many of which are irrelevant to the appeal. The applicant contends that the tribunal erred in the following ways:

(a) by not insisting the parties engage in a compulsory conference so the dispute could be resolved;

(b) by allowing the body corporate to be represented by solicitors;

(c) by allowing the body corporate to bring the application to have the case dismissed;

(d) by permitting and on the papers hearing in the face of the applicant's agreement;

(e) the practises and the procedures of the tribunal were not properly explained to the applicant by the tribunal;

(f) the tribunal did not explain to the applicant all of its options and that the strike out application would be heard on the papers without an oral hearing, it appears this occurred at case management directions hearing;

(g) the decision on the strike out application was not delivered in a timely manner;

(h) making the body corporate file, what it says is incorrect and misleading information;

(i) the tribunal did not follow the objects of the Act to ensure that the matter proceeded in a way that was 'fair, accessible, quick and inexpensive';

(j) the applicant was punished because it (its director) was not trained in legal terms and processes and court room procedure.

[21] It is immediately apparent that none of the above complaints constitute an error or a substantial injustice for the purposes of granting leave to appeal.

[22] The final error alleged by the tribunal is contained in paragraph 11 which is:

> According to the QCAT Act, the tribunal erred by not taking into consideration the following "determining factors" when making their cost decisions:
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> (I) If any party unnecessarily disadvantaged another;
>
> (II) The complexity of the case;
>
> (III) The strength of the claims;
>
> (IV) The financial circumstances of both parties;
>
> (V) Anything else.

[23] The applicant then addresses each of those criteria in some detail to establish that leave to appeal should be granted and the appeal allowed. Although the learned member did make reference to s 102 of the QCAT Act in considering whether or not to make the costs order, he did not proceed under s 102 but rather under s 47.

[24] Section 100 of the QCAT Act mandates that each party to a proceeding "must bear the party's own costs for the proceeding". There is of course an exception to that where costs can be awarded against a party in the interests of justice. Section 102(3) sets out those matters the Tribunal may have regard to when deciding to make an order for costs. There are, generally, those matters referred to above in the applicant's submission.

[25] However, there are other provisions in the QCAT Act dealing with costs, namely s 47 and s 48. Section 47, under which the body corporate proceeded to have the applicant's application struck out, is to allow a party to apply to bring proceedings to an early end, in this case, if they are lacking in substance.

[26] Section 48 on the other hand can be engaged if a proceeding is commenced in the tribunal where the tribunal has the jurisdiction or power to decide the dispute. But if one of the parties is engaging in conduct which disadvantages the other party an application can be made to end the proceedings. The type of conduct which would warrant the tribunal's intervention is set out in s 48(1) and the remedies available to the party are set out in s 48(2). In addition, s 48(2)(c) provides that in addition to those remedies the tribunal may 'make an order under s 102, against the party causing the disadvantage to compensate another party for reasonable costs incurred unnecessarily'.

[27] The obvious distinction between these two sections is firstly that, s 47, goes to the substance and legitimacy of the proceeding that has been instituted, and the secondly, s 48, goes to the conduct of a party in conducting legitimately commenced

proceedings. The legislature, in framing the costs remedies in the two sections, obviously intended that Section 47 should be independent of s 102 in terms of what should be taken into account when making a costs decision because it is not dependent on the conduct of the party. That is its plain meaning.[6]

[28] In my view s 47 stands alone and although it may be useful to have regard to those matters in s 102(3) as a guide in the exercise of discretion to award costs, it would depend on the circumstances of the particular case and it would not be fatal to the exercise of discretion not to do so.

[29] Although the learned member acknowledged this, he did not address each of the matters referred to s 102(3) sequentially. It is implicit in his reasons that he did have regard to some of those matters in the overall circumstances of the case.

[30] He had regard to the complexity of the dispute and noted that although the applicant's director is not legally trained, it did have the benefit of legal advice early in the proceeding. It was open to him to consider that the applicant may have received advice in respect to the extra costs claim when he applied for the appointment of an independent valuer,

[31] More importantly he had regard to the substance of the applicant's claim which was struck out. Importantly, despite the applicant being on notice of the 'embarrassing' proceeding it persevered with it leaving the body corporate no alternative but to take steps to end it under s 47.

[32] Other matters under s 102(3) are not relevant to this particular application, bearing in mind that it may be that none of the matters in s 102(3) need to be addressed if the costs order is made on the general ground of 'anything else the tribunal considers relevant'.

[33] I would also observe that the body corporate sought an order that the applicant pay its costs on an indemnity basis of the proceeding. However, in respect of the strike out application the costs claimed were in the sum of $7,079.16.

[34] By reducing the costs sought by 50% the learned member took into account the submissions of the applicant that the body corporate did not have the tribunal's leave to be legally represented and also considered some of the costs claimed did not directly relate to the strike out application.

[35] I am unable to conclude that there is any error in the exercise of discretion which would warrant the grant of leave to appeal. Further I am not satisfied that there is a reasonable prospect that the applicant will obtain substantive relief[7] even if leave were granted.

Order

Leave to appeal is refused.

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6 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384;

7 *Cachia v Grech* [2009] NSWCA 232 at 2.