SUPREME COURT OF QUEENSLAND

CITATION:	*Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd* [2015] QCA 114
PARTIES:	**DONOVAN HILL PTY LTD** ACN 101 631 341 (applicant) **v** **McNAB CONSTRUCTIONS AUSTRALIA PTY LTD** ACN 102 840 906 (respondent)
FILE NO/S:	Appeal No 7267 of 2014 QCAT No 48 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2014] QCATA 172
DELIVERED ON:	23 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2015
JUDGES:	Margaret McMurdo P and Gotterson and Philippides JJA Separate reasons for judgment of each member of the Court, Gotterson and Philippides JJA concurring as to the orders made, Margaret McMurdo P dissenting
ORDERS:	**1. Leave to appeal granted.** **2. Appeal dismissed.** **3. Appellant to pay the respondent's costs of the application and the appeal on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW - QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the QBSA issued a number of directions to rectify to the respondent in respect of an apartment complex – where the respondent applied to the Commercial and Consumer Tribunal for review of the decisions to issue the directions – where the review proceedings became proceedings in QCAT as successor to the Commercial and Consumer Tribunal – where the respondent applied under s 42 of the QCAT Act for orders joining an array of entities as parties to each of the applications – where the applicant sought to be joined in each review proceeding under the name Donovan Hill Architects – where a member of QCAT ordered that the joinder application be dismissed with respect to all

entities sought to be joined – where directions were made that any application for costs by QBSA or any of the proposed parties be filed by 18 January 2013 and that the costs applications be determined on the papers – where the applicant filed an application for costs – where three of the other proposed parties also applied for costs – where the Tribunal member made orders in respect of the applications on 20 August 2013 – where the respondent appealed against those orders and costs orders made in favour of two of the other proposed parties – where an Appeal Tribunal of QCAT allowed the appeal, set aside the costs orders and dismissed the costs applications of the applicant and the other two proposed parties – where a live issue in both the application before the member and the appeal to the Appeal Tribunal was whether QCAT has power to award costs to a person who successfully resists a joinder application – where the member concluded that QCAT was so empowered – where the Appeal Tribunal held that QCAT was not so empowered – whether the determination of a joinder application under s 42 is in exercise of QCAT's original jurisdiction or its review jurisdiction – whether QCAT is empowered to award costs to a person whom a party to a proceeding in QCAT has unsuccessfully sought to join in the proceeding

Acts Interpretation Act 1954 (Qld), s 14A(1)
Queensland Building Services Authority Act 1991 (Qld), s 86(e)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 4, s 6(2), s 9, s 10(1), s 12, s 15, s 17, s 18, s 33, s 36, s 39, s 40(1), s 42, s 100, s 102(1), s 150(3)(b)
Queensland Civil and Administrative Tribunal Rules 2009 (Qld), r 75, r 75(4)
Uniform Civil Procedure Rules 1999 (Qld), r 765(2)

Jamieson v Body Corporate for Paradise Island Apartments [2011] QCA 80, cited
Kambarbakis v G & L Scaffold Contracting Pty Ltd [2008] QCA 262, considered
Lacey v Attorney General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
McNab Constructions Australia Pty Ltd v Donovan Hill Pty Ltd & Ors [2014] QCATA 172, cited
McNab Constructions Australia Pty Ltd v Queensland Building Services Authority [2012] QCAT 681, cited
McNab Constructions Australia Pty Ltd v Queensland Building Services Authority [2013] QCAT 749, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: D de Jersey for the applicant
B Codd for the respondent

SOLICITORS: Thynne & Macartney for the applicant
DibbsBarker for the respondent

[1] **MARGARET McMURDO P:** The respondent to the present application, McNab Constructions Australia Pty Ltd, applied to the Commercial and Consumer Tribunal for a review of directions issued by the Queensland Building Services Authority requiring McNab Constructions to rectify alleged defects in building work concerning some Teneriffe apartments. The jurisdiction of that tribunal was transferred to the Queensland Civil and Administrative Tribunal (QCAT) on 1 December 2009. It is common ground that McNab Constructions' applications were brought under QCAT's review jurisdiction: see *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 9(1) and (2)[1], Div 3 of Pt 1 of Ch 2[2] and s 40(1).[3]

[2] On 20 September 2012, McNab Constructions filed an application in QCAT to join as a party under s 42 *QCAT Act*,[4] a number of entities including the present applicant, Donovan Hill Pty Ltd. On 13 December 2012 QCAT dismissed McNab Constructions' joinder application.[5] On 20 August 2013, QCAT ordered that McNab Constructions pay the costs of Donovan Hill's and other entities' costs of the unsuccessful joinder application.

[3] McNab Constructions appealed to the QCAT Appeal Tribunal contending that QCAT had no power in exercising its review jurisdiction to award costs to entities like Donovan Hill who were non-parties in a review proceeding. The Appeal Tribunal upheld that contention, allowed the appeal and set aside the costs order in favour of Donovan Hill and others.[6]

[4] Donovan Hill seeks leave to appeal from that order under s 150(3)(b) *QCAT Act* on the question of law as to whether QCAT is empowered when exercising its review jurisdiction to award costs against a party who has unsuccessfully applied to join a person in the review proceeding.

[5] The answer to that question is by no means straight forward as is demonstrated by the reasons of the QCAT Appeal Tribunal, Gotterson JA and Philippides JA. I consider, however, that when the *QCAT Act* is construed as a whole, the preferable conclusion is that QCAT has power to award costs against a party in a review proceeding who unsuccessfully applies to join a person to that proceeding. These are my reasons for reaching that conclusion.

[6] In construing provisions in the *QCAT Act* it is necessary to ascertain the legislative purpose from the terms of the relevant provisions in the context of the Act as a whole: s 14A (1) *Acts Interpretation Act* 1954 (Qld); *Lacey v Attorney General (Qld)*[7] and *Project Blue Sky Inc v Australian Broadcasting Authority*.[8]

[7] The objects of the *QCAT Act* relevantly include to have QCAT deal with matters in a way that is accessible, fair, just, economical, informal and quick.[9] Chapter 2 of the *QCAT Act* deals with jurisdiction and procedure. QCAT exercises three types of jurisdiction. Chapter 2, Pt 1, Div 2 (s 10 – s 16) deals with original jurisdiction. Chapter 2, Pt 1, Div 3 (s 17 – s 24) deals with review jurisdiction. Chapter 2, Pt 1,

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1 Set out in Gotterson JA's reasons at [32].
2 *QCAT Act*, s 17 – 24.
3 Set out in Gotterson JA's reasons at [38].
4 Set out in Gotterson JA's reasons at [39].
5 *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* [2012] QCAT 681.
6 *McNab Constructions Australia Pty Ltd v Donovan Hill Pty Ltd & Ors* [2014] QCAT 172.
7 (2011) 242 CLR 573 [43] – [46].
8 (1998) 194 CLR 355, McHugh, Gummow and Hayne JJ [69].
9 *QCAT Act*, s 3(b).

Div 4 deals with appeal jurisdiction (s 25 – s 27). Chapter 2, Pt 2 deals with practices and procedures. Chapter 2, Pt 3 is headed "Starting proceeding". Under s 33 *QCAT Act*, a person may make an application to QCAT to deal with a matter. Under s 36 *QCAT Act*, a proceeding starts when the principal registrar accepts an application.

[8] Chapter 2, Pt 4 (s 39 – s 45) is headed "Parties to a proceeding." Its s 39 deals with parties to original jurisdiction.[10] Its s 40, of particular relevance to this case, deals with parties to review jurisdiction.[11] Section 40 does not include a provision akin to s 39(b) which provides that a person is a party to a proceeding in QCAT's original jurisdiction if the person is "a person in relation to whom a decision of [QCAT] is sought by the applicant." Under s 42[12] QCAT may make an order joining a person as a party to a proceeding in specified circumstances on the application of a person or on its own initiative.

[9] Chapter 2, Pt 6 is headed "Other provisions about a proceeding" and its Div 6 (s 100 - s 109) is headed "Costs". Ordinarily, each party to a proceeding bears its own costs for the proceeding[13] but s 102 provides:

> "**102 Costs against party in interests of justice**
>
> (1) The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if [QCAT] considers the interests of justice require it to make the order."

[10] The *QCAT Act* also allows QCAT to award costs against a representative of a party to a proceeding rather than the party where this is in the interests of justice;[14] to award costs against intervening parties;[15] generally to award costs in other circumstances;[16] and to award costs under the *QCAT Act* at any stage of a proceeding or after the proceeding has ended.[17] Costs may be fixed or assessed.[18]

[11] The *QCAT Act* Sch 3 dictionary[19] relevantly defines "applicant" as "(a) for an application or a proceeding to be started on application – the person who makes the application"; and "application" as "an application to the tribunal under this Act or an enabling Act."[20] The term "proceeding" is relevantly defined as "(a) generally – means a proceeding before the tribunal, including an appeal before the appeal tribunal and a proceeding relating to an application for leave to appeal to the appeal tribunal…".

[12] McNab Constructions' application to join Donovan Hill and others as a party to the review proceedings was an interlocutory application within the review proceeding. As that application was unsuccessful, Donovan Hill was not, in terms of s 102, a party to the review proceeding. It was, however, in terms of s 102, a party to the interlocutory proceeding within McNab Constructions' review proceeding. The term "proceeding"

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10 Set out in Gotterson JA's reasons at [38].
11 Above.
12 Set out in Gotterson JA's reasons at [39].
13 *QCAT Act*, s 100.
14 Above, s 103.
15 Above, s 104.
16 Above, s 105 (the parties do not contend that this provision allowed QCAT to award costs against McNab Constructions in favour of Donovan Hill in this case).
17 Above, s 106.
18 Above, s 107.
19 Above, s 8.
20 Above, s 6.

is widely defined and starts when the registrar, under s 36, accepts an application made under s 33. Here, McNab Constructions made a s 33 application to join Donovan Hill and others as parties in the review proceeding.[21] Sections 33 and 36 are contained in a discrete part of Ch 2 headed "Starting proceeding". The term "proceeding" in that part of the *QCAT Act* must include an interlocutory proceeding within a proceeding in the original, review or appeal jurisdiction. Section 102 is also contained in a discrete division of Ch 2, Pt 6 which is headed "Costs". The terms of s 33, s 36 and s 102 read together with the definitions of "applicant", "application", and "proceeding" suggest that costs may be awarded under s 102 to a party to an interlocutory proceeding within a substantive proceeding within QCAT's review jurisdiction where this is in the interest of justice. The provisions in the *QCAT Act* dealing with costs[22] are intended to be of broad compass. I consider that the preferable view is that s 102(1) gave QCAT power to award costs in favour of Donovan Hill in this case.

[13] This construction of s 102, which allows QCAT to make an order for costs in favour of those who have successfully resisted an interlocutory application for joinder in a QCAT proceeding where this is in the interests of justice, sits comfortably with the objects of the *QCAT Act*. These include dealing with matters in a way that is fair and just. It is not inconsistent with the provisions of the *QCAT Act* which state that ordinarily parties will represent themselves in proceedings[23] and that ordinarily each party will bear its own costs.[24] It seems unlikely the legislature would not want to empower QCAT to award costs in favour of those who have successfully resisted an unmeritorious interlocutory application for joinder where this is in the interests of justice.

[14] The fact that s 40 deals with parties to the review jurisdiction and s 39 deals with parties to the original jurisdiction and s 40 does not contain a provision such as s 39(b) does not lead me to conclude otherwise.

[15] Contrary to the respondent's contentions, I do not find helpful in construing the meaning of "proceeding" in s 102 *QCAT Act* my comments in *Kambarbakis v G & L Scaffold Contracting P/L*[25] which I specifically stated were confined to the meaning of the term "proceeding" in the *Uniform Civil Procedure Rules* 1999 (Qld), r 765(2).

[16] It seems unlikely that the legislature would have intended to prevent QCAT from making costs orders in interlocutory proceedings within a QCAT proceeding where the interests of justice warranted it. The better view, I consider, is that the legislative intent discernable from s 102 read in context in the *QCAT Act* (particularly s 33, s 36 and the heading of Ch 2, Pt 3, "Starting proceeding" in which those sections are contained, together with the definitions of "applicant", "application" and "proceeding") is that QCAT may award costs in favour of an entity who is a party to an unsuccessful joinder application in an interlocutory proceeding brought within a review proceeding.

[17] That said, I concede the provisions are unclear and contrary contentions are well arguable. My construction of s 102 is a minority view. If the legislature considers that those who successfully resist unmeritorious joinder applications in QCAT proceedings should have their costs where this is in the interests of justice, it may wish to consider legislative amendment.

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21 AB 85.
22 *QCAT Act*, s 100 – 106.
23 Above, s 43.
24 Above, s 100.
25 [2008] QCA 262, [3].

[18] I would grant the application for leave to appeal, allow the appeal with costs, set aside the decision of the QCAT Appeal Tribunal and instead order that the appeal to the QCAT Appeal Tribunal is dismissed with costs.

[19] **GOTTERSON JA:** The applicant, Donovan Hill Pty Ltd, applies for leave required by s 150(3)(b) of the *Queensland Civil and Administrative Tribunal Act* 2009 ("QCAT Act") to appeal to this Court against a decision of the Appeal Tribunal of QCAT made on 9 July 2014.[26] That decision allowed an appeal from a member of QCAT made on 20 August 2013.[27] The appeal to this Court may be made on a question of law only.[28]

[20] The question of law on which the appeal to this Court would be made here is whether QCAT is empowered to award costs to a person whom a party to a proceeding in QCAT has unsuccessfully sought to join in the proceeding. The question arises in the following circumstances.

Evolution of the question of law

[21] During the period from October 2007 to January 2009, the Queensland Building Services Authority ("QBSA") issued a number of directions to rectify to the respondent to the current application, McNab Constructions Australia Pty Ltd, in respect of an apartment complex at Skyring Terrace, Newstead, Brisbane. The respondent applied to the Commercial and Consumer Tribunal for review of the decisions to issue the directions. In all, there were some 15 applications for review. The review proceedings became proceedings in QCAT as successor to the Commercial and Consumer Tribunal.

[22] On 20 September 2012, the respondent applied under s 42 of the QCAT Act for orders joining an array of entities as parties to each of the applications. While those sought to be joined were not identical for each review proceeding, the applicant in the current application was sought to be joined in each review proceeding under the name "Donovan Hill Architects ABN 808 063 788 31". After a hearing on 19 October 2012, at which both the applicant and the respondent were legally represented by leave, on 13 December 2012, a member of QCAT ordered that the joinder application be dismissed with respect to all entities sought to be joined. Directions were made that any application for costs by QBSA or any of the proposed parties be filed by 18 January 2013 and that the costs applications be determined on the papers.

[23] On 18 January 2013, the applicant filed an application for costs[29] with supporting affidavit material and written submissions. Three of the other proposed parties also applied for costs. The Tribunal member made orders in respect of the applications on 20 August 2013. The following orders were made concerning the applicant's costs application:

> "7. McNab Constructions Australia Pty Ltd is to pay:
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> a. Donovan Hill & Associates Pty Ltd's costs of and incidental to the joinder application filed 20 September 2012 on the standard basis of assessment on the District Court Scale of Costs up to and including 16 October 2012; and

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26 *McNab Constructions Australia Pty Ltd v Donovan Hill Pty Ltd & Ors* [2014] QCAT 172.
27 *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* [2013] QCAT 749.
28 *QCAT Act* s 150(3)(a).
29 AB253-258.

b. all Donovan Hill & Associates Pty Ltd's reasonable costs (being actual costs incurred providing the costs are reasonably incurred and of a reasonable amount) of and incidental to the joinder application filed 20 September 2012 from 16 October 2012.

8. Donovan Hill & Associates Pty Ltd is to file in the Tribunal and serve upon McNab Constructions Australia Pty Ltd a short form costs assessment prepared by a registered costs assessor by 4.00pm 3 September 2013;

9. McNab Constructions Australia Pty Ltd is to file in the Tribunal and serve upon Donovan Hill & Associates Pty Ltd any submissions in response by 4.00pm 10 September 2013;

10. The Tribunal will fix Donovan Hill & Associates Pty Ltd's costs without an oral hearing not before 10 September 2013."[30]

[24] On 17 September 2013, the respondent appealed against those orders and costs orders made in favour of two of the other proposed parties.[31] On 9 July 2014, an Appeal Tribunal of QCAT allowed the appeal, set aside the costs orders and dismissed the costs applications of the applicant and the other two proposed parties.[32]

[25] A live issue in both the application before the member and the appeal to the Appeal Tribunal was whether QCAT has power to award costs to a person who successfully resists a joinder application. The member concluded that it was so empowered. The Appeal Tribunal held that it was not.

The application for leave to appeal

[26] The application for leave to appeal to this Court was filed by the applicant on 6 August 2014. A proposed Notice of Appeal[33] is exhibited to an affidavit filed in support of the application. At the hearing of the application on 19 March 2015, leave was granted to the applicant to file an Amended Application. Counsel for the applicant clarified that the orders sought on appeal were that the Appeal Tribunal's decision be set aside in so far as it relates to the applicant and that Order 7 made by the member be affirmed.[34]

[27] The grounds of the proposed appeal all challenge the correctness of the legal conclusions drawn by the Appeal Tribunal with respect to the meaning and effect of provisions in the QCAT Act, principally those relating to costs, parties to proceedings and the jurisdiction of QCAT, relevant to the issue. Reference to those provisions first will assist an analysis of the grounds of appeal.

QCAT Act provisions – costs

[28] Chapter 2 of the *QCAT Act* is concerned with the jurisdiction and procedure of QCAT. Part 6 Division 6 thereof (ss 100-105) relate to costs of a proceeding in QCAT.

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30 AB298-299. The significance of 16 October 2012 is that it was the date of a settlement offer made by the applicant to the respondent in respect of costs. It is accepted that Donovan Hill & Associates Pty Ltd is the same entity as the applicant.

31 AB1-5.

32 AB322.

33 AB347-349.

34 Tr1-16 l24 – 1-17 l4.

Section 100 provides that other than is provided under that Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding. It is common ground that there is no enabling Act which relevantly applies.

[29] Section 102(1) of the *QCAT Act* states:

> "The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order."

(The word "proceeding" is defined in the Schedule 3 Dictionary to the *QCAT Act* generally, to be "a proceeding before the tribunal".)

[30] The applicant accepts that the only statutory provision which it may contend invests QCAT with power to award costs to it is s 102(1). It also accepts that if that provision is unavailing, then s 100 operates and it must bear its own costs of the joinder application.

[31] The member proceeded on the footing that the applicant (and each of the others who applied for costs) was "another party to the proceeding" within the meaning of s 102(1) and hence was a party in whose favour costs might be awarded under the provision.[35] The Appeal Tribunal concluded differently.[36] How they came to a different conclusion is explained by different views they took of the jurisdiction that QCAT exercises when it decides a joinder application. I now turn to provisions relevant to that issue.

QCAT Act – parties and jurisdiction provisions

[32] Chapter 2 Part 1 of the *QCAT Act* (ss 9-27) concerns the jurisdiction of QCAT. Section 9 deals with jurisdiction generally. Subsections (1) and (2) thereof state:

> "(1) The tribunal has jurisdiction to deal with matters it is empowered to deal with under this Act or an enabling Act.
>
> (2) Jurisdiction conferred on the tribunal is—
>
> (a) original jurisdiction; or
>
> (b) review jurisdiction; or
>
> (c) appeal jurisdiction.
>
> …"

[33] The term "enabling Act" is defined in Schedule 3. For present purposes the applicable definition is the general definition in s 6(2) of the *QCAT Act*, namely:

> "(a) an Act, other than this Act, that confers original, review or appeal jurisdiction on the tribunal; or
>
> (b) subordinate legislation, other than subordinate legislation under this Act, that confers review jurisdiction on the tribunal."

[34] Thus, three species of jurisdiction are conferred on QCAT. What constitutes its original jurisdiction, its review jurisdiction and its appeal jurisdiction are defined in ss 10, 17 and 25 respectively.

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35 Reasons [15].

36 Reasons [30].

[35] The original jurisdiction is defined in s 10(1) to be:

> "…
>
> (a) the jurisdiction conferred on the tribunal by section 11; and
>
> (b) the jurisdiction conferred on the tribunal under an enabling Act to decide a matter in the first instance."

(Section 11 relates to minor civil disputes and is not relevant for present purposes.)

[36] The review jurisdiction as defined in s 17 is the jurisdiction conferred on the Tribunal by an enabling Act to "review a decision made or taken to have been made by another entity under that Act". It was this jurisdiction that the respondent invoked in its applications for review of the decisions to issue the directions to rectify.[37]

[37] It is unnecessary for present purposes to detail the appeal jurisdiction. Neither party relies upon it.

[38] The function of defining who are parties to a proceeding in QCAT's original jurisdiction and its review jurisdiction is the province of ss 39 and 40(1) respectively in Chapter 2 Part 4 of the *QCAT Act* (ss 39-45) which is headed "Parties to a proceeding". Those provisions are as follows:

> "39…
>
> A person is a party to a proceeding in the tribunal's original jurisdiction if the person is—
>
> (a) the applicant; or
>
> (b) a person in relation to whom a decision of the tribunal is sought by the applicant; or
>
> (c) intervening in the proceeding under section 41; or
>
> (d) joined as a party to the proceeding under section 42; or
>
> (e) someone else an enabling Act states is a party to the proceeding.
>
> 40…
>
> (1) A person is a party to a proceeding in the tribunal's review jurisdiction if the person is—
>
> (a) the applicant; or
>
> (b) the decision-maker for the reviewable decision the subject matter of the proceeding; or
>
> (c) intervening in the proceeding under section 41; or
>
> (d) joined as a party to the proceeding under section 42; or
>
> (e) someone else an enabling Act states is a party to the proceeding."

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[37] The review jurisdiction was conferred by s 86(e) of the *Queensland Building Services Authority Act* 1991, the relevant enabling Act.

[39] Also within Part 4 is s 42, the joinder provision. It states:

> "(1) The tribunal may make an order joining a person as a party to a proceeding if the tribunal considers that—
>
> (a) the person should be bound by or have the benefit of a decision of the tribunal in the proceeding; or
>
> (b) the person's interests may be affected by the proceeding; or
>
> (c) for another reason, it is desirable that the person be joined as a party to the proceeding.
>
> (2) The tribunal may make an order under subsection (1) on the application of a person or on its own initiative."

[40] Section 42 does not speak to the species of jurisdiction which QCAT exercises when it decides a joinder application. Nor does it stipulate that any party sought to be joined to a proceeding under it is a party to the proceeding whether the joinder application is successful or not. In these circumstances, it falls to ss 39 and 40(1) to play a pivotal role in the application of s 102(1).[38] Here, the applicant would be "another party to the proceeding" in whose favour a costs order might be made under that section, only if it is a party to a proceeding by virtue of s 39 or s 40(1).

[41] A perusal of the list of those who may be a party to a review proceeding under s 40(1) reveals that it does not include a person who has successfully resisted a joinder application under s 42.[39] By contrast, the list does include a party who is joined under s 42.

[42] The list of parties in s 39 is, however, differently composed. Whilst it does include a party who is joined under s 42,[40] it also includes a person in relation to whom a decision of the Tribunal is sought by the applicant: s 39(b). There is no counterpart to s 39(b) in the list in s 40(1). Thus, if a joinder application under s 42 is within a proceeding that is determined in QCAT's original jurisdiction, a person who successfully resists it will be a party to the proceeding pursuant to s 39(b) as a person in relation to whom a decision of QCAT is sought.[41] As a party to the proceeding, the person would be "another party to the proceeding" for whose benefit a costs order might be made under s 102(1).

[43] However, the position is different if the determination of a joinder application is in exercise of QCAT's review jurisdiction. As noted, a person who successfully resists such an application, is not a party to the review proceeding under s 40(1) and therefore cannot benefit from a costs order under s 102(1) as "another party to the proceeding".

The legal issue as refined

[44] The legal issue for consideration therefore refines itself to whether the determination of a joinder application under s 42 is in exercise of QCAT's original jurisdiction or its review jurisdiction. The applicant submits that it is in exercise of the original jurisdiction.

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38 No argument was advanced by the applicant that ss 39 and 40(1) do not inform the meaning of the term "party to a proceeding" in s 102(1). Such an argument would lack textual support.

39 Such a person is not stated to be a party under the relevant enabling Act as would satisfy s 40(1)(e). Likewise for s 39(e).

40 Section 39(d).

41 The same applies if the joinder application is regarded as an interlocutory step within a proceeding determined within QCAT's original jurisdiction.

[45] The applicant's submission characterises the joinder application here as a proceeding separate from the review proceedings initiated by the respondent and to which the respondent unsuccessfully sought joinder. It must be said that a conception of a joinder application as a separate QCAT proceeding has no support in the language of Chapter 2. To the contrary, the language of s 42 at least implies that such an application is interlocutory in nature and within the proceeding to which a person is sought to be joined by it.

[46] More significantly, however, there is a real difficulty in characterising such a separate proceeding as in exercise of QCAT's original jurisdiction. The difficulty arises in the following way. Section 10(1) defines exhaustively the content of the original jurisdiction. The provision consists of two limbs. As noted, the first limb is inapplicable here. The other limb requires the jurisdiction to be conferred on QCAT under an enabling Act to decide a matter in the first instance. Here, the relevant enabling Act, as counsel for the applicant correctly conceded,[42] does not confer on QCAT a jurisdiction to decide a joinder application. That jurisdiction is conferred by the QCAT Act itself, and it is not an enabling Act as defined.

[47] The irresistible conclusion then is that a joinder application is not a proceeding determined in QCAT's original jurisdiction. Given that and the terms of s 40(1), the applicant is not, and never was, a party in whose favour a costs order might be made under s 102(1).

[48] Counsel for the applicant sought to avoid that outcome by several different approaches. First, it was submitted that s 10(1)(a) should not be read as intended to admit of jurisdiction conferred by s 11 alone. Rather, the provision should be interpreted as intended to apply also to s 42.[43] I am unable to accept this submission. Section 10(1)(a) is expressed in clear terms referable to s 11 only. There is no latitude in the language used which would permit implicit extension of it to include s 42.

[49] Secondly, reliance was placed upon s 36 in Chapter 2 Part 3 of the QCAT Act (ss 33-37) which is headed "Starting proceeding". Section 36 states that a "proceeding starts when the principal registrar accepts an application or referral, whether or not on conditions." The submission based on this provision seeks to draw from it an inference that when a joinder application is accepted by the principal registrar, a proceeding separate from, and independent of the review proceeding to which a person is sought to be joined, is commenced.

[50] There are difficulties with this submission. In the first place, it seeks to attribute to s 36 a role in defining what a proceeding is. That, however, is the role of the definition of the term in Schedule 3. To my mind, s 36 is a timing provision only. Its role is to stipulate when a proceeding starts, but not to define what a proceeding is. Further, even if s 36 had a definitional role, the submission would not avail the applicant. For it to do so, the proceeding would have to be one within QCAT's original jurisdiction. For the reasons given, it is not.

[51] Thirdly, the applicant submitted that the outcome is discordant with the objects of the QCAT Act set out in s 3(b) and QCAT's function set out in s 4(c). The former is an objective of dealing with matters in a way that is fair and just. The latter speaks of ensuring that proceedings are conducted in an informal way consistent with achieving justice.

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42 Tr1-17 ll10-17.

43 Tr1-11 l44 – Tr1-12 l29.

[52] At the heart of this submission is a complaint of injustice in the nature of uneven-handedness in that a person who is successfully joined to a proceeding may be awarded costs under s 102, whereas one who successfully resists joinder may not. The perceived uneven-handedness may well be a legitimate basis for a call for an amendment to the legislation. However, it does not warrant an interpretation of s 40(1), or, for that matter s 10(1)(a), which not only would depart from the unambiguous language of the provision but also would require additional words to be read into it.

Disposition

[53] The question of law on which the proposed appeal would be made is one of statutory interpretation concerning the extent of QCAT's power to award costs. The question has significance beyond the present case and has, to this point, not been considered by this Court. These circumstances are sufficient, in my view, to warrant a grant of leave to appeal.

[54] However, for the reasons given, the appeal must fail. The applicant should pay the respondent's costs of the appeal on the standard basis.

[55] The decision in this appeal exposes a differential treatment with regard to costs between those who successfully resist a joinder application, depending upon whether the proceeding to which it relates is within QCAT's original jurisdiction or its review jurisdiction. The differential treatment would seem to be anomalous. It is arguably an anomaly which warrants legislative amendment. To remove it would not appear to intrude significantly upon the overall "no costs" philosophy for QCAT.

Orders

[56] I would propose the following orders:

1. Leave to appeal granted.
2. Appeal dismissed.
3. Appellant to pay the respondent's costs of the application and the appeal on the standard basis.

[57] **PHILIPPIDES JA: Background** Donovan Hill Pty Ltd is the applicant for leave to appeal against a decision of the QCAT Appeal Tribunal to set aside costs orders made by QCAT. The costs orders were made in favour of Donovan Hill (and other entities) which the respondent (McNab Constructions Australia Pty Ltd) had unsuccessfully applied to join as parties to review proceedings it had brought against the Queensland Building Services Authority (QBSA) in QCAT. The costs orders were made by QCAT on the basis that "each of the proposed parties was a party to a joinder application proceeding … being a proceeding within a proceeding" so as to engage the power to award costs in s 102 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the Act). McNab appealed to the Appeal Tribunal which rejected that conclusion.[44]

[58] The question of law raised for determination on the appeal concerns whether there is power under the Act to award costs in favour of a person who is the subject of an unsuccessful application to be joined as a party to a review proceeding.

[59] It is common ground that the answer to the question raised turns on whether such a person can be said to be a "party to a proceeding" for the purposes of s 102 of the Act.

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[44] Donovan Hill was joined as a respondent to that appeal by an order of the Appeal Tribunal.

That section provides for a qualification to the general position in relation to costs, stated in s 100 of the Act, that "each party to a proceeding must bear the party's own costs for the proceeding". If Donovan Hill is not a "party to a proceeding" for the purpose of s 102, no costs order may be made in its favour.[45] Section 102(1) is in these terms:

> "The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order."

[60] Donovan Hill argued that the joinder application was "a proceeding", separate from the review proceeding, brought pursuant to s 42 of the Act in QCAT's "original jurisdiction" and that it was "a party to a proceeding" within s 39(b) of the Act. Accordingly, there was power to make a costs order in its favour under s 102.

Was Donovan Hill "a party to a proceeding" for the purpose of s 102?

[61] The issue raised requires the Court to construe various provisions of the Act. In doing so, the objective is to give the words of a statutory provision the meaning the legislature is taken to have intended them to have.[46] Pertinent to that inquiry is s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) which requires that preference be given to that interpretation which will "best achieve" the purpose of the Act.[47]

[62] As Gotterson JA has observed at [40], s 42 does not specify the jurisdiction exercised in determining a joinder application nor that the proposed party is "a party to a proceeding" whether or not the joinder application succeeds. I agree that, in those circumstances, s 39 (which identifies the parties to a proceeding in QCAT's original jurisdiction) and s 40 (which identifies the parties to a proceeding in QCAT's review jurisdiction) are important in construing the meaning of the expression "party to a proceeding" for the purposes of s 102.

[63] Donovan Hill's argument was that the joinder application was "a proceeding", separate from the review proceeding, and one brought in QCAT's original jurisdiction, rather than in its review jurisdiction. That argument was premised on a perceived difference between s 39 and s 40 of the Act as to who is a "party" to a proceeding in the original as opposed to the review jurisdiction. Donovan Hill was concerned to argue that the application for joinder was a proceeding in QCAT's original jurisdiction because of a view that a person sought to be joined unsuccessfully came within, what was said to be, the wider identification of a "party" in s 39(b). Unlike the view adopted by Gotterson JA at [41]-[43] (and McMurdo P at [8], [14]) and, I consider that the assertion of inconsistency in the operation of the two provisions is ill-founded and that properly construed, they operate harmoniously. For the reasons stated below, the different terminology in s 39(b) and s 40(1)(b) simply reflects the difference in the nature of a proceeding in the original and review jurisdictions.

Was the joinder application one which involved QCAT's "original jurisdiction"?

[64] It is convenient to consider firstly Donovan Hill's argument that the joinder application was "a proceeding" separately brought in QCAT's original jurisdiction.

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45 There is no relevant provision of the enabling Act, the *Queensland Building Services Authority Act* 1991 (Qld), which conferred power to award costs.

46 *Lacey v AG for the State of Qld* (2011) 242 CLR 573 at [43]-[46]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78].

47 *Lacey v AG for the State of Qld* (2011) 242 CLR 573 at [46].

For the reasons stated by Gotterson JA at [46]-[48], the joinder application made pursuant to s 42 of the Act was not able to be characterised as a separate proceeding in QCAT's "original jurisdiction". Section 10 provides an exhaustive description of QCAT's original jurisdiction and is fatal to that contention.

Was the joinder application "a proceeding"?

[65] There is a further fundamental difficulty for Donovan Hill. That concerns the conception that a joinder application is itself "a proceeding" for the purposes of the Act. I agree with the observations made by Gotterson JA at [45] as to the lack of support in the language of Ch 2 for such a construction and his comments at [50] as to the limited role of s 36 of the Act.

[66] I make some additional observations as to why, on a proper construction of the Act, a joinder application does not qualify as a separate "proceeding".

[67] The dictionary in Sch 3 defines particular words used in the Act.[48] "Proceeding" is defined in (a) generally and in (b) for Ch 7 purposes (that do not apply here). The definition of "proceeding" in (a) means "a proceeding before the tribunal, including an appeal before the appeal tribunal and a proceeding relating to an application for leave to appeal to the appeal tribunal". It is not defined as including an application.

[68] A joinder application under s 42 is contained in Pt 4 of Ch 2 dealing with "Parties to a proceeding". By its nature, a joinder application concerns a proceeding already on foot; it is brought *within* the existing substantive proceeding, be it in the original or review jurisdiction. Not only is there no basis in Ch 2 for concluding that such an application brought within the existing proceeding is itself a separate "proceeding", but a contrary indication is provided in the definition of "applicant". It states:

> **"applicant means—**
> (a) for an application or a proceeding to be started on application—the person who makes the application; or
> (b) for a referral or a proceeding to be started on referral—
> (i) the person who makes the referral; or
> (ii) if the enabling Act under which the referral is made states another person is the applicant for the referral or proceeding—the person stated in the enabling Act."
>
> ("Application" is defined as "an application to the tribunal under this Act or an enabling Act. "Referral" is defined to mean "a referral of a matter to the tribunal under this Act or an enabling Act".)

[69] The definition of "applicant" identifies in (a) two situations in which a person who makes an application, is to be defined as an "applicant". Firstly, a person may be an applicant "for an application". Secondly, a person may be an applicant for "a proceeding to be started on application". It is clear by the use of the word "or" that the two types of "applicant" are to be seen as being in contradistinction. In identifying the two types of "applicant" who may make "an application", the definition recognises that "an application" may be used in either of two ways. It may be the procedure by which "a proceeding" in the original and review jurisdictions is to be started under Ch 2.[49]

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48 See s 8 of the Act.

49 See s 12(1), s 15(a) and s 18(1) of the Act.

Alternatively, an application may be made for other purposes; it is, inter alia, the procedure by which directions[50] and interlocutory or interim orders[51] may be sought in a proceeding.

[70] A distinction is likewise drawn in relation to "an applicant" who makes "a referral". Such a person may be an applicant "for a referral" or for "a proceeding to be started on referral". A referral may be the procedure by which a proceeding in QCAT's original jurisdiction is to be started.[52] Alternatively, a referral may be made for other purposes; for example, it is the procedure by which a question of law arising in a proceeding is referred for determination.[53]

[71] When the definition of "applicant" is considered, it is apparent that the term "proceeding" is reserved for a proceeding to be started on application (or referral) by which QCAT exercises its original or review jurisdiction. That is to be contrasted with an application or referral for some other purpose (such as the present application for joinder, which was brought as an application for miscellaneous matters, being an application for a direction pursuant to s 62 and r 75).

[72] Nothing in s 33 or s 36 detracts from that construction. Those provisions are found in Pt 3 of Ch 2 which is entitled "starting Proceedings". That part is concerned with the initiating application (or referral) by which a "proceeding" is started in QCAT's original or review jurisdiction. That much is made clear by s 33 and s 34 of the Act. Section 33 is entitled "Making an application" and allows for a person "to apply" to QCAT "to deal with a matter". Section 34 is entitled "Referring matter" and provides for "the referral of matters" to QCAT. Both sections reflect the language of s 9 which establishes QCAT's jurisdiction "to deal with matters it is empowered to deal with under this Act or an enabling Act" and confers it with original and review jurisdiction.[54]

[73] Moreover, it is to be observed that the fact that s 36 provides that a "proceeding starts when the principal registrar accepts an application or referral" does not result in the converse, as contended for by Donovan Hill, that any application, when accepted, starts a proceeding. When s 36 is construed in its statutory context, it is apparent that s 36 is directed to a proceeding to be started by application (or referral) by which QCAT exercises its original or review jurisdiction, and is concerned to identify that such a proceeding starts when the principal registrar accepts the application (or referral), whether on conditions or not. It does not operate to broaden the scope of the term "proceeding" to include any application or referral made to QCAT. Such a construction would render meaningless the distinction expressly drawn in the definition of "applicant" between an applicant "for an application" (or referral) and an applicant "for a proceeding to be started on application" (or referral).

Is a person the subject of an unsuccessful joinder application "a party to a proceeding"?

[74] There is a further difficulty with the contention advanced by Donovan Hill which concerns the relevance of s 39(b) and its asserted inconsistency with s 40(1)(b). In

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50 See s 62 of the Act and r 75 of the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld).

51 See s 58 of the Act as to interim orders and s 59 of the Act as to injunctions. See also other provisions in Div 1 of Pt 6.

52 See s 15(b) of the Act.

53 See s 117 of the Act.

54 It is also borne out by the role given to the principal registrar under s 35 to accept or reject the initiating application or referral, including on the ground that it is made after expiry of the period within which it is required to be made under the Act: see s 35(4).

relation to that matter, my view differs from those of McMurdo P and Gotterson JA for the following reasons.

[75] Section 39 provides:

> "**Parties to original jurisdiction**
>
> A person is a party to a proceeding in the tribunal's original jurisdiction if the person is—
> (a) the applicant; or
> (b) a person in relation to whom a decision of the tribunal is sought by the applicant; or
> (c) intervening in the proceeding under section 41; or
> (d) joined as a party to the proceeding under section 42; or
> (e) someone else an enabling Act states is a party to the proceeding."

[76] Section 40 provides:

> "**Parties to review jurisdiction**
>
> (1) A person is a party to a proceeding in the tribunal's review jurisdiction if the person is—
> (a) the applicant; or
> (b) the decision-maker for the reviewable decision the subject matter of the proceeding; or
> (c) intervening in the proceeding under section 41; or
> (d) joined as a party to the proceeding under section 42; or
> (e) someone else an enabling Act states is a party to the proceeding."

[77] Where a proceeding is brought in the review jurisdiction of QCAT rather than the original jurisdiction, the only difference between s 39 and s 40 as to those specified as parties concerns s 40(1)(b), which specifies as a party "the decision-maker for the reviewable decision the subject matter of the proceeding" rather than "a person in relation to whom a decision of the tribunal is sought by the applicant", as stated in s 39(b). In my view, that difference in terminology merely stems from the different nature of a proceeding in the original and review jurisdictions, and not from any anomalous inconsistency as to the inclusion of a proposed party as a party for a proceeding in the original but not the review jurisdiction.

[78] In construing s 39 and s 40, it is relevant to have regard to the distinction drawn in the definition of "applicant" as to the type of applicant that may make an application (or referral). It is apparent that, when the term "applicant" is used in both s 39(a) and s 40(1)(a), it is in the sense of "an applicant … for a proceeding … started" on application (or referral) in, respectively, the original or review jurisdiction. When that context is borne in mind in construing s 39(b) and s 40(1)(b), it is apparent that each of those provisions is intended to identify, as a party to the proceeding, the respondent to such an application (or referral).

[79] In the case of a review proceeding, that party is, as described in s 40(1)(b), "the decision-maker for the reviewable decision the subject matter of the proceeding". (Section 40(2) clarifies that "so far as is practicable, the official description of the decision-maker must be used as the party's name instead of the decision-maker's name".)

[80] In the case of a proceeding in QCAT's original jurisdiction, that party is described in s 39(b) as "a person in relation to whom a decision of the tribunal is sought by the

applicant".[55] The person so described ought to be construed as referring to the person identified in the application (or referral) for a proceeding in the original jurisdiction "as the person in relation to whom a decision of the tribunal is sought by the applicant". A person who is the unsuccessful subject of a joinder application subsequently brought in the proceeding is not such a person.

[81] So construed, there is no arbitrary difference or anomalous inconsistency between s 39(b) and s 40(1)(b) in terms of whether a proposed party is "a party to a proceeding". Both s 39 and s 40, by their terms, indicate that such a person is only a "party to a proceeding" if so joined. That construction allows the two provisions to operate harmoniously with each other and with the Act generally.

[82] That construction also best achieves the purposes of the Act which includes providing a jurisdiction that "is accessible, fair, just, economical, informal and quick" (s 3(b)) and "conducted in an informal way that minimises costs to the parties, and is as quick as is consistent with achieving justice" (s 4(c)). That is facilitated by a legislative scheme that favours participation without legal representation (s 43) and allows for applications to be dealt with on the papers (r 75(4)). There is no unfairness in a proposed party, who chooses to appear on a joinder application (as Donovan Hill did), being subjected to the same general no-costs regime that applies to parties to a proceeding. To the contrary, it maintains a consistency within the Act as a whole.

[83] It also gives effect to a clear legislative intent, in s 102, that where the interests of justice require the general no-costs position to be displaced, it is only a party to a proceeding that may be the beneficiary of a costs order.[56] And, while QCAT has additional powers to make costs orders (such as a security for costs order against a party under s 109 or a costs order against those who involve themselves in a proceeding as a representative of a party (s 103) or an intervening party (s 104)), those costs orders are likewise only able to be made in favour of a party to a proceeding. (The existence of a rule making power in s 105 permitting QCAT to award costs "in other circumstances" is of no moment; clearly its parameters are constrained by s 100 and s 102. Nor is the power in s 106 to award costs "at any stage of the proceeding"; it only applies if QCAT "may award costs under this Act or an enabling Act").

Disposition

[84] I agree with Gotterson JA at [53] that Donovan Hill should be given leave to appeal pursuant to s 150(3) on the question of law raised.[57]

[85] The appeal, however, must fail. For the reasons stated, an application for joinder is not itself "a proceeding" in either the original or review jurisdiction. Donovan Hill, being the subject of an unsuccessful joinder application, was not "a party to a proceeding" in either of QCAT's jurisdictions. Accordingly, there was no power to make a costs order in its favour pursuant to s 102.

[86] I agree with Gotterson JA as to the orders that should be made.

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55 I note the observations made in *Jamieson v Body Corporate for Paradise Island Apartments* [2011] QCA 80 at [13] by Fraser JA as to the scope of s 39(b). They were expressly stated to be obiter and do not concern the situation of a proposed party to a joinder application.

56 The provision for payment of the costs of a third party in producing a document or thing the subject of an order (s 63(4)) is not inconsistent with that intent.

57 McNab did not contend that the Appeal Tribunal's decision was not a "final decision"; see s 150(2)(b) of the Act.