SUPREME COURT OF QUEENSLAND

CITATION:	*Medical Board of Australia v Alroe* [2016] QCA 120
PARTIES:	**MEDICAL BOARD OF AUSTRALIA** (appellant) **v** **CHRISTOPHER ALROE** (respondent)
FILE NO:	Appeal No 1103 of 2016 QCAT No 197 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2015] QCAT 482
DELIVERED ON:	4 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2016
JUDGES:	Gotterson and Philip McMurdo JJA and Applegarth J Judgment of the Court
ORDERS:	**1. Appeal allowed.** **2. Paragraph 2 of the order made on 27 November 2015 that the appellant pay the respondent's costs of and incidental to the proceedings in an amount to be assessed be set aside.** **3. The matter be remitted to the Queensland Civil and Administrative Tribunal to determine the question of the costs of the proceedings.** **4. The respondent pay the appellant's costs of and incidental to the appeal.** **5. The respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 in respect of the appeal.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NATURE OF HEARING – OPPORTUNITY TO PRESENT CASE – where judicial member of Queensland Civil and Administrative Tribunal (QCAT) made order for costs against a party without affording the parties an opportunity to be heard on the question of costs – where parties

agree appeal to Court of Appeal should be allowed and the costs order set aside

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – where judicial member of QCAT ordered respondent to a review to pay applicant's costs of the proceedings – where s 100 of *QCAT Act* provides that each party to a proceeding must bear the party's own costs for the proceeding unless otherwise provided by that Act or an enabling Act – where neither party made submissions as to why the QCAT should depart from the position stated in s 100 – where the judge made a costs order based on the principle that costs follow the event – where parties agree appeal should be allowed because the judge applied the wrong principle

Appeal Costs Fund Act 1973 (Qld), s 15
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 100, s 102
Uniform Civil Procedure Rules 1999 (Qld), r 681

Alroe v Medical Board of Australia [2015] QCAT 482, related
Clements v Independent Indigenous Advisory Committee (2003) 131 FCR 28; [2003] FCAFC 143, cited
Dovedeen Pty Ltd v GK [2013] QCA 194, cited
Owen v Menzies [2013] 2 Qd R 327; [2012] QCA 170, cited

COUNSEL:	C Wilson for the appellant P J Davis QC, with C Hartigan, for the respondent
SOLICITORS:	Lander & Rogers for the appellant Russells for the respondent

[1] **THE COURT:** The appellant ("the Board") appeals from the part of a decision of the *Queensland Civil and Administrative Tribunal* ("QCAT") awarding the respondent ("Dr Alroe") costs of the proceedings. Dr Alroe concedes that the appeal must be allowed, the costs order in his favour set aside and the costs issue argued and properly decided by QCAT.

[2] The parties have agreed that the appropriate orders are:

> "1. Appeal allowed;
>
> 2. Paragraph 2 of the order made on 27 November 2015 that the appellant pay the respondent's costs of and incidental to the proceedings in an amount to be assessed be set aside;
>
> 3. The matter be remitted to the Queensland Civil and Administrative Tribunal to determine the question of the costs of the proceedings; and
>
> 4. The respondent pay the appellant's costs of and incidental to the appeal."

[3] Dr Alroe applies for a certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld). The Board supports Dr Alroe's application for a certificate and acknowledges that no conduct of Dr Alroe in the proceedings:

(a) led QCAT into error; or

(b) otherwise necessitated the appeal.

The Board concedes that in the event that Dr Alroe does not secure a certificate, it will not seek an order for costs of the appeal against Dr Alroe.

[4] To their credit, the parties have avoided, as much as possible, the costs of the appeal and seek the above orders on the basis of a joint submission and the materials attached to it. These reasons draw heavily on those submissions.

Background

[5] Dr Alroe applied to the Board to be registered as a specialist general practitioner under the *Health Practitioner Regulation National Law (Qld)* ("the National Law"). The Board decided that Dr Alroe should have registration as a specialist general practitioner, but on certain conditions. Dr Alroe did not accept the conditions. It was common ground that by force of the National Law the Board had refused to register Dr Alroe as a specialist general practitioner. This gave Dr Alroe a right of review under Part 1 Division 3 of the *Queensland Civil and Administrative Tribunal Act* 2009 ("the *QCAT Act*").

[6] Dr Alroe filed an application in QCAT. The application sought (amongst other things) an order for costs against the Board. The application came before a judge of the Supreme Court on 1 September 2015 constituting QCAT.

[7] Upon the commencement of the proceedings, written submissions on some matters were tendered on behalf of Dr Alroe. After the hearing, pursuant to directions made by the judge, further written submissions were provided to QCAT. There was no argument on the question of costs at the hearing of the application on 1 September 2015.

[8] The written submissions did not deal with the question of costs except for Dr Alroe's written submissions which provided:

> "93. The Applicant also seeks his costs. If the Applicant is successful, the Applicant seeks orders:
>
> (i) Reserving the question of costs for further submissions;
>
> (ii) Seeking directions for the delivery of detailed submissions on costs."

[9] QCAT published reasons dated 23 November 2015.[1] Its formal decision is, however, dated 27 November 2015. QCAT ordered the Board to register Dr Alroe as a specialist general practitioner without conditions.

[10] On the question of costs, QCAT ordered:

> "2. The respondent must pay the applicant the costs of and incidental to the proceedings in an amount to be assessed."

The reasons for judgment deal with costs in only one paragraph as follows:

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1 *Alroe v Medical Board of Australia* [2015] QCAT 482.

> "[55] As the applicant has been fully successful in his application, the respondent must pay the applicant's costs of and incidental to the proceedings."

The appeal

[11] The notice of appeal has two grounds:

> "(a) The learned judge at first instance erred in failing to allow the parties to make submissions on costs;
>
> (b) The learned judge at first instance erred in ordering that the respondent (appellant in this appeal) pay the costs of the applicant (respondent in this appeal)."

[12] The Board's notice of appeal sought an order setting aside the costs order and then either an order from this Court that there be no costs of the proceeding in QCAT or, alternatively, that the question of costs be remitted to QCAT. The notice of appeal also sought an order that Dr Alroe pay the Board's costs of the appeal.

[13] Dr Alroe, as respondent to the appeal, acknowledges that the judge made two errors, namely:

(a) he did not hear the parties on the question of costs; and

(b) he applied the wrong test in deciding to award costs to Dr Alroe.

The judge did not hear the parties

[14] Because of ss 100 and 102 of the *QCAT Act*, it was never practically possible to argue the question of costs until QCAT had determined the review application.

[15] The parties proceeded on that basis. There was no invitation by the judge at the hearing of the application to address the question of costs. None of the written submissions dealt with the question of costs, except (as already noted) that Dr Alroe stated that he sought an order that the costs issue be reserved for later submissions. No directions were made by the judge in relation to costs submissions.

[16] The failure to give the Board an opportunity to be heard before making an order for costs against it constituted a denial of natural justice.

The wrong test

[17] Section 100 of the *QCAT Act* provides:

> "**100 Each party usually bears own costs**
>
> Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding."

[18] Section 102 then 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 the tribunal considers the interests of justice require it to make the order.

(2) However, the only costs the tribunal may award under subsection (1) against a party to a proceeding for a minor civil dispute are the costs stated in the rules as costs that may be awarded for minor civil disputes under this section.

(3) In deciding whether to award costs under subsection (1) or (2) the tribunal may have regard to the following –

(a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);

(b) the nature and complexity of the dispute the subject of the proceeding;

(c) the relative strengths of the claims made by each of the parties to the proceeding;

(d) for a proceeding for the review of a reviewable decision –

(i) whether the applicant was afforded natural justice by the decision-maker for the decision; and

(ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;

(e) the financial circumstances of the parties to the proceeding;

(f) anything else the tribunal considers relevant."

[19] The reasons show that the judge did not consider the position which is stated in s 100. His Honour adopted the "costs follow the event" principle which applies to proceedings under the *Uniform Civil Procedure Rules* 1999 (Qld) unless the court orders otherwise.[2] That principle does not apply in a QCAT proceeding. Sections 100 and 102 make that clear.

An Appeal Costs Fund Certificate

[20] Section 15(1) of the *Appeal Costs Fund Act* 1973 provides:

"**15 Grant of indemnity certificate**

(1) Where an appeal against the decision of a court –

(a) to the Supreme Court;

(b) to the High Court of Australia from a decision of the Supreme Court;

on a question of law succeeds, the Supreme Court may, upon application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal."

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2 Rule 681.

[21] The term "court" is defined in s 4 of the *Appeal Costs Fund Act* as follows:

> "***court*** includes any board, other body or person from whose decision there is an appeal to a superior court on a question of law or which may state a case for the opinion or determination of a superior court on a question of law or reserve any question of law in the form of a special case for the opinion of a superior court."

[22] QCAT is a court[3] and is a court for the purposes of s 15.[4] This court is a division of the Supreme Court and is comprehended in s 15(1).[5]

[23] Proceeding to decide the question of costs without hearing the parties was an error of law.[6] Applying the wrong test in the exercise of the discretion to award costs was an error of law. The appeal has succeeded on a question of law.

[24] Dr Alroe indicated to the judge constituting QCAT that if he succeeded then the parties should be heard on the question of costs after the decision had been delivered. However, he did not make a submission to QCAT that costs should be awarded on a "costs follow the event" basis. Dr Alroe has not led QCAT into error or otherwise conducted his case such as to necessitate an appeal.

[25] A certificate should issue to him in the circumstances.

[26] The consent orders agreed by the parties, together with the following additional order should be made:

> "5. The respondent be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 in respect of the appeal."

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3 *Owen v Menzies* [2013] 2 Qd R 327 at 338 [20], 348 [61] and 357 [103].
4 *Dovedeen Pty Ltd v GK* [2013] QCA 194 at [8].
5 Ibid.
6 *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 at 32 [8], 39 [35].