

# SUPREME COURT OF QUEENSLAND

CITATION: *Ryan v Worthington* [2016] QCA 128

PARTIES: **ANDREW WILLIAM RYAN**  
(applicant)  
v  
**STEVEN BRYAN WORTHINGTON**  
(respondent)

FILE NO/S: Appeal No 10142 of 2015  
QCAT No 189 of 2013

DIVISION: Court of Appeal

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

ORIGINATING COURT: Queensland Civil and Administrative Tribunal – [2014] QCATA 277

DELIVERED ON: 10 May 2016

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Morrison and Philippides JJA and Flanagan J  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **There is no order as to costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – where the applicant was granted leave to appeal on the basis of an error of contractual construction but the appeal was dismissed – where correcting that error benefitted both parties – where, in the circumstances, both parties had mixed success – whether costs should be awarded  
*Ryan v Worthington* [\[2015\] QCA 201](#), cited

COUNSEL: No appearance by the applicant, the applicant’s submissions were heard on the papers  
No appearance by the respondent, the respondent’s submissions were heard on the papers

SOLICITORS: No appearance for the applicant  
No appearance for the respondent

- [1] **MORRISON JA:** The Court delivered its decision on the application for leave to appeal in this matter, on 23 October 2015.<sup>1</sup> The parties were given leave to make such submissions as they may be advised as to the costs of the application and appeal. They have now done so.
- [2] It is helpful to set out a brief synopsis of the proceedings leading to the application for leave to appeal to this Court. The following is taken from paragraphs [4]-[6] of the primary decision.
- [3] Mr Worthington started proceedings in the Queensland Civil and Administrative Tribunal (QCAT) to recover \$93,696.83 for monies outstanding from his final payment claim under a building contract. Dr Ryan contended that Mr Worthington was only entitled to be paid a reasonable sum for the value of the works done, which had already been paid. He also counterclaimed for \$54,727.76, being liquidated and other damages.
- [4] At first instance in QCAT Mr Worthington succeeded, and was awarded \$80,833.09. Dr Ryan appealed to QCAT's Appeal Tribunal, which allowed the appeal, set aside the orders, and remitted the matter "for determination according to law".
- [5] The Appeal Tribunal made three relevant findings.
- [6] First, the Member at first instance made an error of law by awarding damages on a basis not claimed or pleaded, thereby denying procedural fairness. The Appeal Tribunal decided that error was sufficient in itself to warrant remitting the matter for fresh determination by a Member of QCAT. Before this Court there was no challenge to that finding.
- [7] Secondly, the Member erred in the calculation of the damages. But for the decision to remit, the Appeal Tribunal would have reduced the damages figure by \$17,844.38.
- [8] Thirdly, the Member did not err with respect to the construction of clauses 15.1 and 21.1 of the contract, because: (i) the construction of a contract is a question of fact; and (ii) the constructions reached by the member were "open on the evidence" and "were matters of fact open on the evidence".

### **Issues before this Court**

- [9] The issues raised by the application to this Court were identified as:
- (1) did the Appeal Tribunal err in its approach to the construction of a contract;
  - (2) the proper construction of clause 21.1 of the contract;
  - (3) the proper construction of clause 15.1 of the contract;
  - (4) did Dr Ryan validly terminate the contract;
  - (5) should leave to appeal be granted; and
  - (6) did the Appeal Tribunal fall into error by finding that it had no alternative but to remit the matter?

### **Issues 1 and 5**

- [10] The QCAT Appeal Tribunal's finding that the proper construction of a contract was a question of fact, did not survive scrutiny. This Court held that the proper construction of

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<sup>1</sup> *Ryan v Worthington* [2015] QCA 201.

a contract is not a question of fact, but law.<sup>2</sup> Consequently, the Appeal Tribunal made an error of law in that respect. That error by itself warranted the grant of leave to appeal, the Court saying:<sup>3</sup>

“The need to ensure that QCAT proceeds on the correct legal basis when dealing with questions of construction of contract, warrants the grant of leave under s 150 of the *QCAT Act*.”

- [11] However, even though counsel for Mr Worthington accepted that the proper construction of a contract is a question of law, submissions were made attempting to demonstrate that, properly understood, the QCAT Appeal Tribunal was merely discussing factual findings, which then enlivened the clauses in the contract. That contention was rejected.<sup>4</sup>

### ***Issues 2 and 3***

- [12] Much of the submissions to this Court concerned the construction of clauses 21.1 and 15.1 of the contract. Dr Ryan failed on clause 21.1 but succeeded on clause 15.1.

### ***Issue 4***

- [13] Dr Ryan’s contention that he had validly terminated under clause 21.1(b) of the contract did not succeed.

### ***Issue 6***

- [14] Dr Ryan also contended that the Appeal Tribunal took an erroneous approach to its power under s 146 of the *Queensland Civil and Administrative Act 2009* (Qld), and should have imposed its own decision rather than remit the matter for determination according to law. That contention failed.

### ***Discussion***

- [15] As is clear from the outcome on the issues listed above, each party before this Court had mixed success. Ultimately, Dr Ryan succeeded in a grant of leave to appeal, but the primary reason for that was the error of the Appeal Tribunal in its approach to the question of construction of the contract. Correcting that error benefited both sides, as the outcome on the construction issues revealed.

- [16] Counsel for Dr Ryan conceded that it was open to the Appeal Tribunal to remit the matter on the ground of the denial of procedural fairness. That, and the mixed success of the parties, was reflected in the reasons for preserving the order remitting the matter to a QCAT Member, rather than remitting it to the Appeal Tribunal:<sup>5</sup>

“[57] Even though Dr Ryan has succeeded in respect of challenging the Appeal Tribunal’s approach to construction of the contract and clause 15.1, he has failed in his challenge to the construction of clause 21.1 and the relief granted by the Appeal Tribunal.

[58] It has been demonstrated that the Member at first instance and the Appeal Tribunal have proceeded on an erroneous basis. Notwithstanding the complaints by Dr Ryan that Mr Worthington

<sup>2</sup> [2015] QCA 201, at [12].

<sup>3</sup> [2015] QCA 201, at [15].

<sup>4</sup> [2015] QCA 201, at [13].

<sup>5</sup> [2015] QCA 201, at [57]-[59]; internal footnotes omitted.

had no properly formulated claim for damages before the Member, in my view that is a matter best dealt with by QCAT, especially given the nature of its jurisdiction to deal with claims with less formality than a court normally requires.

[59] Even though Dr Ryan has had a degree of success, I consider that the appropriate order is that made by the Appeal Tribunal, that is the matter should be remitted to the Member, for determination according to law and in the light of these reasons. Indeed Counsel for Dr Ryan conceded that it was open to the Appeal Tribunal to remit the matter given its finding that Dr Ryan had been denied procedural fairness by the Member.”

[17] In my view, the mixed success of each party is a compelling reason for concluding the discretion as to costs be exercised on the basis that neither party be ordered to pay the costs of the other.

[18] I would propose the following order:

1. There is no order as to costs.

[19] **PHILIPPIDES JA:** I agree with reasons of Morrison JA and the order as to costs proposed by his Honour.

[20] **FLANAGAN J:** I agree with the order as to costs proposed by Morrison JA and with his Honour’s reasons.