SUPREME COURT OF QUEENSLAND

CITATION:	*Leberayte Pty Ltd v Body Corporate for Quoin Harbour Views CTS 19042* [2017] QCA 58
PARTIES:	**LEBERAYTE PTY LTD** **ACN 115 235 302** (applicant) **v** **BODY CORPORATE FOR QUOIN HARBOUR VIEWS CTS 19042** (respondent)
FILE NO/S:	Appeal No 5859 of 2016 QCATA No 378 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal Appeal Tribunal at Brisbane – [2016] QCATA 57
DELIVERED ON:	7 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2017
JUDGES:	Gotterson JA and Boddice and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal is refused.** **2. No order as to costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – BY LEAVE OF COURT – where the respondent brought a claim in QCAT against the applicant – where the applicant appealed the QCAT member's findings to the QCAT Appeal Tribunal – where the QCAT Appeal Tribunal dismissed the applicant's appeal – where the QCAT member found that the applicant should pay the respondent's recovery costs – where the applicant did not argue before the QCAT member that the cost of legal advice regarding the applicant's threats against members of the respondent was not properly a recovery cost – where the applicant did not argue before the QCAT member that the applicant owed no debt to the respondent – where the applicant argued that it would suffer substantial injustice if leave to appeal was refused – whether leave to appeal should be granted

Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld), s 145(1)

COUNSEL: S J Hogg for the applicant
No appearance for the respondent

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

[1] **GOTTERSON JA:** I agree with the orders proposed by Dalton J and with the reasons given by her Honour.

[2] **BODDICE J:** I agree, for the reasons given by Dalton J, that leave to appeal should be refused.

[3] **DALTON J:** This is an application under s 150(1) of the *Queensland Civil & Administrative Tribunal Act* 2009 (Qld) for leave to appeal against a decision of the Appeal Tribunal. Appeal to this Court lies only from a question of law. The document entitled Reasons for Decision dated 16 May 2016 does not in truth contain reasons for the decision of the Appeal Tribunal. It does not expose the controversy between the parties and explain why the Tribunal reached its conclusions in a way which allows a reader to identify and examine the Tribunal's reasoning. The document does little more than state conclusions. Secondly, the Appeal Tribunal appears to have erred in thinking that whether costs incurred by the respondent were within the statutory description, "… costs … reasonably incurred by the body corporate in recovering the amount"[1] was a question of fact rather than a question of law. Thus the applicant shows two questions of law.

[4] Nonetheless my view is that leave to appeal ought not be given. First, the points sought to be raised on appeal were not raised at the hearing before the QCAT member and accordingly the evidence at trial was not directed to them. Secondly, while the QCAT member proceeded carefully to make her findings, they depended on inference and credit. It would be difficult or impossible for this Court to make the findings necessary to support the applicant's new contentions. Thirdly, I am not convinced that the applicant's appeal has any substantial prospect of success, nor that it would suffer any substantial injustice if leave to appeal is refused. Lastly, determination of the appeal now proposed would very much depend upon the peculiar facts of this matter; points of general application are not raised. Compounding these matters, the respondent did not appear at the hearing before this Court. I now turn to explain my reasons for these conclusions.

[5] A Mr Roger Martins (aka Rogerio Jose da Silva-Martins) is a director of the applicant. The applicant purchased a lot in the respondent body corporate in 2005. At the time the vendor of the lot owed the body corporate an amount of around $17,475. In order to purchase the lot the applicant was required to pay this debt, and did so.

The QCAT Proceeding

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1 Section 145(1) of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld).

[6] The claim before the QCAT member was filed on 22 August 2014. It was for amounts owing to the respondent as body corporate levies; interest calculated at 30 per cent per annum (the penalty interest), and recovery fees incurred by the respondent body corporate. The notice of response to the claim relied upon a payment of $1,200 made to the body corporate on 15 July 2009, which it stated had not "been correctly applied"; contested the legitimacy of the penalty interest, and denied that recovery costs were reasonable because, it was alleged, the body corporate had never contacted the applicant to "discuss the alleged arrears before recovery costs were incurred".

[7] The matter was heard on 18 December 2014. The body corporate had no legal representation and factual matters relevant to the claims were complicated. Mr Martins did not attend before the QCAT member, but sent a Helmut Scholzel, who had been made a director of the applicant company the day before. Mr Scholzel is Mr Martins' brother in law and a barrister in South Africa. He gave an inadequate explanation for Mr Martins' failure to attend. The proceeding was hampered by the fact that Mr Scholzel had no first-hand knowledge of any of the matters which the member had to determine.

[8] The QCAT member found that the applicant company had a long history of not paying body corporate levies when due. Having purchased the unit in 2005, the applicant refused to pay any body corporate fees until 2009, when the respondent body corporate engaged a debt collector. Then on 4 July 2009 the amount of $1,030 on account of outstanding levies was paid, although the parties remained in dispute about debt collection fees of $151. On 15 July 2009, with no explanation, the applicant paid an amount of $1,200. The applicant then resumed its practice of not paying fees as levied until the body corporate again engaged debt collectors on 20 March 2014.

[9] The only explanation as to why the $1,200 was paid was in an email from the applicant on 15 July 2009 saying, "please find remittance for the sum of $1,200.00 to be set off against [the name of the apartment block]. If there are any queries please contact me ..." The body corporate manager placed the amount of $1,200 into its trust account; could receive no instructions from the applicant to transfer the money out of the account, and on the advice of its accountants, refunded the amount to the applicant on 15 January 2010. The applicant did not bank the refund cheque and the cheque became stale. The amount of $1,200 remained in the trust account until March 2011 when verbal authority was given by the applicant for its application to pay body corporate levies.

[10] A similar difficulty was caused when on 3 July 2014 an amount of $329 was deposited electronically to the respondent body corporate's account. There was no information as to who had deposited the money. The body corporate wrote to all lot owners including the applicant, but no lot owner claimed to have made the payment. After proceedings were commenced for recovery, solicitors acting for the applicant claimed that the applicant had made the payment.

[11] The applicant had a habit of not responding to correspondence sent by the body corporate. Further, when recovery steps were taken by the respondent body corporate, Mr Martins would raise a dispute to the effect that the $17,475 payment should not be regarded as having been made to settle the previous lot owner's debt, but ought be regarded as a payment to be credited against future levies owing by the applicant company. The QCAT member found there was no basis for the $17,475 being

regarded as a credit against future levies, and rejected the idea that Mr Martins could ever have had a reasonable expectation that the amount was a credit against future levies. The member described the argument as "spurious".

[12] Understandably such matters produced frustration and confusion as to the state of accounts between the applicant and the respondent. In the course of all this, apparently after the August 2014 claim was filed, the evidence before the QCAT member was that Mr Martins had made verbal threats to sue the individual body corporate directors. In response to that, the body corporate obtained advice from its solicitors as to whether or not the directors would be covered by body corporate insurance should such suit be brought.

[13] By the time the matter came to be heard there was $1,085.36 outstanding in respect of levies, which included $151 outstanding debt collection fees from 2009. As well, the body corporate claimed an amount of $2,524.50, which were solicitor's costs to provide advice. The advice was in evidence. It was requested on 21 November 2014 and provided on 25 November 2014. The bill was rendered on 4 December 2014. It gave advice about penalty interest; advice as to how to serve notices on Mr Martins, and advice as to whether the body corporate insurance covered the office bearers of the body corporate should they have to defend proceedings brought by Mr Martins.

[14] At the hearing, Mr Scholzel chose to re-agitate the point about the $17,475, although it was not mentioned in the notice of response to claim. The other argument raised by the applicant before the QCAT member was that it had not received the notices of contribution.

[15] As to the amount of $1,200, Mr Scholzel said at the hearing that it was intended to be a deposit of three years' levies in advance because such a payment would avoid the difficulties he said the applicant had had in the past in understanding the invoices sent by the body corporate. There is no logic to that. There was no adequate explanation presented as to why the applicant did not thereafter give authority for those monies to be applied against levies.

[16] At, and after, the hearing Mr Scholzel provided extensive written submissions, which the member received.

[17] After the hearing, but before judgment, the applicant paid an amount of $1,141 to the respondent.

The QCAT Member's Decision

[18] The QCAT member's decision was delivered on 17 August 2015. She preferred the evidence of the respondent body corporate to the material presented by Mr Scholzel. She found there was no historical reason (based on the initial $17,475 claim) for the applicant to dispute the respondent's claim for levies. She found that the levy notices had been sent to the correct address for the applicant. She found that there had never been any clear instruction to the respondent to use the amount of $1,200 to pay levies until March 2011. She found that the applicant was aware that the $1,200 could not be, and was not being, applied to pay its levies until March 2011. Her factual findings involve unfavourable decisions about Mr Martins' credit.

[19] The member found there was no legal basis for the penalty interest claimed by the respondent body corporate. Otherwise she made a careful accounting and gave judgment for the respondent:

> "**Conclusion**
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> Between July 2009 and December 2014 the lot owner had been charged levies totalling the sum of $2,961.30 and has also been found liable for the recovery costs claimed in the sum of $3,809.30. Because of the timing of payments made by the lot owner, it was not entitled to any discounts offered on the levies when rendered by the body corporate. Taking into account the sum of $4,169.74 now paid by the lot owner, I give judgment in favour of the body corporate in the sum of $2,600.86." (footnotes omitted)

The Appeal to the QCAT Appeal Tribunal

[20] The applicant appealed to the QCAT Appeal Tribunal saying that the member had erred in concluding that the applicant was liable to pay the body corporate's recovery costs. Three arguments were raised. First, it was said that the recovery costs were not reasonable because the respondent body corporate had failed to make sufficient efforts to contact the applicant about the matters. This had been raised before the QCAT member. Secondly, it was argued that some of the costs were not properly recovery costs because they included the cost of the legal advice sought about the position of the individual body corporate directors. Thirdly, it was said that at the time the QCAT proceedings were begun – 22 August 2014 – there was no amount owing by the applicant to the body corporate on account of levies (as opposed to penalty interest) and that therefore it was unreasonable to allow any amount to the respondent as recovery costs. Neither of these last two points were argued before the QCAT member, and the third point was not well developed in submissions to the QCAT Appeal Tribunal. The Appeal Tribunal dismissed the appeal after a hearing on the papers.

The Proposed Appeal to this Court

[21] The applicant sought leave to re-agitate, on appeal to this Court, the second and third points argued before the QCAT Appeal Tribunal. As to the point concerning legal advice, the QCAT member clearly understood that part of the recovery costs claimed was the fee for advice, including about the position of the individual directors. The QCAT member took the view that the applicant had obfuscated and delayed in an attempt not to pay body corporate fees since 2005. It was in this context that she found that the cost of advice in response to threats made by Mr Martins was reasonable. Had the argument now advanced before this Court been made before the QCAT member, it would have been entirely consistent with her factual and credit findings to have found that Mr Martins had threatened to sue the individual directors in order to prevent the body corporate recovering its levies. The conclusion that advice in relation to this threatened suit was a reasonable recovery cost would then have been well open to the QCAT member. Had such a finding been made by her, I do not see that it would have been incorrect.

[22] I conclude that the applicant's prospects on appeal on this point are slight. I also conclude that because of the unusual factual circumstances involved, any decision on the

point will be confined to the facts of the case, rather than be one of general application.

[23] The point as to whether levies were owing at the time the claim was filed was developed briefly in submissions put before the QCAT Appeal Tribunal, relying on some, but not all, of the factual findings made by the member below. The same submission was made in a much more detailed way in the applicant's amended outline of argument on this application: counsel had constructed a ledger with 40 line entries, which was said to demonstrate that no levies were owing at 22 August 2014. The information in the ledger was said to come out of the evidence at trial.

[24] The history of monies owing and payments made between the applicant and the respondent is difficult to follow. Since 2009 there is a history of non-payment; payment of amounts not referable to invoices, and insistence by the applicant that its payments be regarded as referable to various items, but not to others. The matter of whether there were any levies owing as at 22 August 2014, when the respondent filed its QCAT claim, was not in issue before the QCAT member. Thus no-one was concerned to direct evidence or submissions to that point, and the member made no factual findings as to it. The result is that the applicant's ledger, compiled from the evidence before the QCAT member, records entries inapposite to the task the applicant now invites this Court to perform. As well, it is not evident to me that the figures in the ledger do in fact accord with the evidence before the member: for example, line 6 of the ledger records a debt recovery fee as becoming due on 23 August 2010, when fairly clearly the evidence before the member was that it was owing from 4 July 2009.[2] Because the respondent played no part in this appeal, this Court has not heard any response about the material presented in this ledger.

[25] I am by no means convinced on the material before this Court that the applicant can make out its factual case in support of this proposed appeal point.

[26] Where the merits are unclear; no case was run before the QCAT member originally, and only a very short-form case was advanced before the QCAT appeal tribunal, I am not inclined to give leave to appeal so that this Court can closely analyse the evidence which extends over some five years from 2009 to 2014 and involves numerous transactions, all in amounts of hundreds of dollars or less. No general principles would be involved in such an exercise. The results would only relate to the facts between these parties.

[27] I am not persuaded that refusing leave to appeal will cause substantial injustice to the applicant. As to general matters, it is the applicant's behaviour, in an effort not to pay its debts, which has created the complicated and confused state of accounts between it and the respondent body corporate. It did not care to have Mr Martins attend the hearing before the QCAT member. It did not ask for an adjournment so that he could attend. It did not care to advance the arguments it now seeks to make before the QCAT member, but instead advanced other sophisticated and unmeritorious arguments. The decision of the QCAT member is not clearly incorrect.

[28] There was one particular matter said to cause a substantial injustice to the applicant if the judgment of the QCAT member were not set aside. It was said that

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2 Appeal Book page 7, and I note footnotes 22 and 26 of the applicant's submissions to this Court do not support the entries in relation to this fee.

Mr Martins, as well as being a director of the applicant, is the director of another company, Rockdrench, which "conducts business" with a certain governmental organisation in South Africa, NECSA. The contract between those parties was not put before the Court. Instead two rather curious documents were; each consisted only of one paragraph. The first "confirmed" that Rockdrench had an agreement with NECSA, terminable on a month's notice. The second document read as follows:

> "Kindly take notice that any person representing The South African Nuclear Energy Corporation SOC Ltd (NECSA) a company owned by the Government of Republic of South Africa should be a person of good character capable of demonstrating good standing with no criminal record to their name nor the subject of any civil judgements not exceeding a period of five years in any personal or fiduciary capacity."

[29] It was said that if the judgment of the QCAT member remained on the record, Rockdrench would lose its contract with NECSA. This is not what the above paragraph says. Rockdrench has no civil judgment against it. Moreover, I am not convinced that Rockdrench is "a person representing" NECSA, rather than a person who "conducts business" with NECSA. I cannot see that this additional matter is one which means the applicant ought to have leave to appeal.

[30] I would refuse leave to appeal. As it appears that the respondent has never taken part in this proceeding, it seems unnecessary to make an order as to costs.