

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Tuddenham v CMP and DCM Pty Ltd t/as Designer Pools QLD* [2019] QCAT 320

PARTIES: **SHARON TUDDENHAM**

(applicant)

v

**CMP AND DCM PTY LTD T/AS DESIGNER
POOLS QLD**

(respondent)

APPLICATION NO/S: BDL208-18

MATTER TYPE: Building matters

DELIVERED ON: 17 October 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS: **There is no order as to costs**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - COSTS – DISCONTINUANCE OF OR WITHDRAWAL FROM PROCEEDINGS - where parties reached agreement to resolve the dispute the subject of the proceedings – where agreement silent on costs – whether costs should be awarded

Queensland Building and Construction Commission Act 1991 (Qld), s 77(3)(h)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 100, s 102(1).

Jones v Jones [2012] QSC 342

Lyons v Dreamstarter Pty Ltd [2011] QCATA 142

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*

REASONS FOR DECISION

- [1] The respondent built a pool for the applicant. The applicant alleges that the pool was constructed defectively. She commenced proceedings in the tribunal.
- [2] The proceedings progressed in the usual way. The parties attended a compulsory conference on 15 October 2018. At a directions hearing on 14 November 2018 the parties were directed to file statements of evidence upon which they sought to rely. The applicant subsequently advised the tribunal registry that the parties had agreed to resolve the dispute. The directions for the parties to file their evidence were subsequently vacated.
- [3] At a directions hearing on 18 July 2019 the parties informed the Tribunal that the dispute had been resolved and consented to a final decision that the application be dismissed. At the directions hearing the applicant sought her costs of the proceedings. Directions were made for the parties to file submissions.
- [4] The costs of the proceedings now fall for determination.

What do the parties say?

- [5] The applicant claims filing fees of \$338.20 and expert's report fees of \$1,400.00. The applicant says that she incurred the cost of engaging an expert in order to pursue the proceedings.
- [6] The applicant refers to the agreement she reached with the respondent to resolve the dispute and says that there were no costs referred to in the agreement.
- [7] The applicant says that the pool rectification works were completed by 12 July 2019.
- [8] The applicant says that had she not obtained the expert report and commenced these proceedings the respondent would not have rectified the defects.
- [9] The respondent refers to the agreement reached between the parties, which is silent as to costs, and says that it incurred costs additional to the agreed rectification works which were not passed on to the applicant.

Consideration

- [10] Unless an enabling Act or the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') provides otherwise, parties to tribunal proceedings must bear their own costs.¹ Under the QCAT Act, costs may be awarded if the tribunal considers the interests of justice require it to make an order.²
- [11] The relevant enabling Act in respect of the present dispute is the *Queensland Building and Construction Commission Act* 1991 (Qld) ('QBCC Act'). Section 77(3)(h) of the QBCC Act operates to modify the presumption against the awarding of costs under the QCAT Act. The discretion to award costs in building disputes

¹ QCAT Act, s 100.

² Ibid, s 102(1).

must be exercised judicially, not upon irrelevant or extraneous considerations but upon facts connected with or leading up to the litigation.³

[12] In *Jones v Jones*,⁴ McMeekin J considered the matters relevant to the exercise of the discretion to award costs where a proceeding is discontinued. A number of the matters are apposite for present purposes:

- (a) Costs discretions are truly discretionary and there are no absolute rules. The discretion must be exercised judicially;
- (b) Where the proceedings are discontinued prior to any hearing on the merits, the Court cannot try a hypothetical action between the parties to determine the question of costs. At the time of withdrawal, usually it will be impracticable to assess the eventual prospects of success in the action;
- (c) It may be necessary to analyse the whole of the proceedings to determine the appropriate costs order. A relevant consideration is whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them; all the relevant circumstances, and not just the fact of discontinuance, should be considered; thus, the reasons for the discontinuance can bear heavily on the exercise of the discretion as to costs
- (d) It is important to draw a distinction between cases in which one party, after litigating for some time, effectively surrenders to the other, and cases where some supervening event, or settlement, so removes, or modifies, the subject of the dispute that, although it could not be said that one side has simply won, no issue remains between the parties except that of costs. In the former type of case, there will commonly be lacking any basis for an exercise of the Court's discretion otherwise than by an award of costs by the successful party. It is the latter type of case that usually creates problems, since there may be difficulty in discerning a clear reason why one party, rather than the other, should bear the costs;
- (e) The Court is required to make such order as it thinks just in the particular circumstances of the case.

[13] In my view the matters relevant to the exercise of the discretion to award costs are:

- (a) It was after the applicant commenced the proceedings, having obtained expert evidence, that the dispute between the parties was resolved;
- (b) At no stage has the respondent formally conceded that the building work it performed was defective;
- (c) There is nothing before me to suggest that the applicant acted other than reasonably in bringing and prosecuting the proceedings or that the respondent acted unreasonably in defending the proceedings;
- (d) I cannot decide the hypothetical action between the parties to determine the question of costs. The parties have not complied with the directions for the

³ *Lyons v Dreamstarter Pty Ltd* [2011] QCATA 142.

⁴ [2012] QSC 342 [44].

filing of evidence. The only expert evidence before the tribunal is that relied upon by the applicant;

- (e) I am unable to assess the applicant's eventual prospects of success in the proceedings;
- (f) The parties negotiated a settlement of the dispute. They chose to reach an accord and satisfaction that made no reference to, or provision for, the payment of costs.

[14] In my view it is a matter of some significance that the parties reached a resolution of the dispute and that the resolution made no reference to the issue of costs. On the one hand the applicant says that the agreement was silent on costs thus entitling her to claim her costs, and on the other the respondent says that the bargain was in full and final satisfaction of the dispute.

[15] I am not prepared to go behind the bargain made by the parties or to rewrite it.

[16] If the applicant wished to preserve her entitlement to claim costs, she should have considered this and ensured that the settlement she reached with the respondent reflected this. She did not do so and I am not prepared to visit a costs order upon the respondent to overcome the applicant's failure to address costs as part of the settlement.

[17] In the circumstances the appropriate order is that there is no order as to costs.