QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Simons & Ors v Dowd Lawyers Pty Ltd (No 2)* [2021] QCAT 1
PARTIES:	**ADAM MARK SIMONS** (first applicant) **FIX CONSULTANTS PTY LTD** (second applicant) **SPIEL GROUP PTY LTD** (third applicant) **v** **DOWD LAWYERS PTY LTD** (respondent)
APPLICATION NO/S:	OCL047-19
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	12 January 2021
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member
ORDERS:	**1. The applicants shall pay the costs of the respondent thrown away by reason of the adjournment of 2 March 2020, to be assessed under the *QCAT Rules*.** **2. The applicants shall pay the respondent's costs of the directions hearing on 13 May 2020, to be assessed under the *QCAT Rules*.** **3. The applicants shall pay the respondent's costs of its application to strike out the proceeding, to be assessed under the *QCAT Rules*.** **4. There is liberty to apply.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OTHER MATTERS – where the respondent seeks a number of costs orders against the applicants, including for costs thrown away by reason of an adjournment, its costs for a directions hearing, and its costs of an application to strike out the principal application – where the respondent also seeks a stay of the proceedings until the applicants pay costs the subject of a previous order, and a dismissal of

the proceedings if the costs are not paid by a certain date – where the respondent took steps to have the costs the subject of the previous order assessed in accordance with the *Uniform Civil Procedure Rules* 1999 (Qld), and not the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) – where the default position under s 100 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("*QCAT Act*") is that parties bear their own costs in a proceeding – where ss 48 and 102 of the *QCAT Act* permit departures from the default position in allowing the Tribunal to make a costs order in favour of a party, where the interests of justice require the making of a costs order – where ss 48(3) and 102(3) set out a number of factors that the Tribunal may have regard to, including whether a party has unnecessarily disadvantaged the other party, the extent to which the party causing disadvantage is familiar with the Tribunal's practices and procedures, the capacity of the party to understand and act on the Tribunal's orders and directions, and whether the party has acted deliberately – whether, in all the circumstances, it is in the interests of justice to make the costs orders sought by the respondent – whether an order to stay the principal application or fix a date for the payment of the costs should be made

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 45, s 48, s 58, s 100, s 102, s 107, s 108, sch 3
Queensland Civil and Administrative Tribunal Rules 2009 (Qld) r 87

Medical Board of Australia v Wong [2017] QCA 42
Simons & Ors v Dowd Lawyers Pty Ltd [2020] QCAT 348
Tamawood Ltd & Anor v Paans [2005] 2 Qd R 101

REPRESENTATION:

First and Second Applicants:	No appearance
Respondent:	H Clift, instructed by Dowd Lawyers Pty Ltd
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] On 24 September 2020, reasons were published and orders made dismissing an application by the respondent for an order that the applicants'[1] application be struck out either under s 47 or s 48 of the *Queensland Civil and Administrative Tribunal*

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[1] This term refers to the first applicant and the second applicant. The third applicant has not participated in the proceedings.

Act 2009 (Qld) ("*QCAT Act*").[2] Directions were then made for submissions on costs. The respondent filed its submissions on 1 October 2020, in accordance with those directions; but the applicants have not filed any submissions, notwithstanding that these were due by 8 October. On 4 November 2020, and again on 12 November 2020, the Principal Case Manager sent emails to the solicitors for the applicants, with the latter copied to Mr Simons, drawing attention to the fact that submissions had not been filed for the applicants, and the terms of the directions; and advising that, if submissions were not received by 4 pm on 16 November, the Tribunal would proceed to deal with the respondent's application without further delay. No reply has been received to either email.

Orders sought by the respondent

[2] The respondent, in its submissions of 1 October, has sought the following orders:

(a) That the applicants pay the costs of the respondent thrown away by reason of the adjournment of 2 March 2020, to be assessed;

(b) That the applicants pay the respondent's costs of the directions hearing on 13 May 2020, to be assessed;

(c) That the applicants pay the respondent's costs of its application to strike out the proceeding, to be assessed;

(d) That the proceedings be stayed until the applicants pay the costs the subject of the preceding orders, and the costs which the applicants were ordered to pay on 8 July 2020; and

(e) If the applicants do not pay the costs the subject of these orders within 3 months of the date of the order, the proceedings be dismissed.

Respondent's submissions

[3] The respondent submitted that the Tribunal's power to make the costs orders was to be found in ss 48 and 102 of the *QCAT Act*, notwithstanding s 100. After a reference to *Medical Board of Australia v Wong*,[3] it was submitted that it was in the interests of justice that the applicants be ordered to pay the costs of the respondent incurred as a result of the applicants' conduct. The conduct of the applicants was at best unreasonable, and, at worst, the product of bad faith. Reliance was placed on findings by the Tribunal that the applicants had unnecessarily disadvantaged the respondent by their late application for an adjournment of the hearing scheduled for 2 March 2020; and by failing to comply with Direction 2 of the Orders made on 26 March 2020 which required the filing of material by 15 April 2020, thereby causing the directions hearing of 13 May 2020. Reliance was also placed on findings that the applicants had, amongst other things, unnecessarily delayed the determination of their application; their conduct had left the respondent in a position where it had to prepare for hearings which were adjourned; the applicants had been indifferent to the need to comply with directions; and at the time of the hearing on 10 August, they had not completed the preparation of their case. Those considerations warranted the costs orders sought by the respondent.

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2 See *Simons & Ors v Dowd Lawyers Pty Ltd* [2020] QCAT 348 ("*Simons*").

3 [2017] QCA 42 ("*Wong*").

[4] In support of its application for a stay of proceedings pending payment of the costs, and a conditional order for dismissal of the proceedings, the respondent submitted that costs which were ordered to be paid on 8 July were still outstanding. It had had the costs assessed, and the assessment sent to the applicants, but the applicants had not responded. Because the Magistrates Court proceedings which the respondent has brought against the applicants have been stayed pending the determination of the applicants' application to this Tribunal, that application should be dismissed if the costs are not paid withing a specified time. The power to do so was said to be conferred by s 58 of the *QCAT Act*, the order being an interim order, the making of which is in the interests of justice.

Statutory provisions

[5] The following provisions are relevant to the respondent's application for orders for costs:

> **48 Dismissing, striking out or deciding if party causing disadvantage**
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> (1) This section applies if the tribunal considers a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including by—
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> (a) not complying with a tribunal order or direction without reasonable excuse; or
>
> (b) not complying with this Act, an enabling Act or the rules; or
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> (c) asking for an adjournment as a result of conduct mentioned in paragraph (a) or (b); or
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> (d) causing an adjournment; or
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> (e) attempting to deceive another party or the tribunal; or
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> (f) vexatiously conducting the proceeding; or
>
> (g) failing to attend conciliation, mediation or the hearing of the proceeding without reasonable excuse.
>
> (2) The tribunal may—
>
> (a) if the party causing the disadvantage is the applicant for the proceeding, order the proceeding be dismissed or struck out; or
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> (b) if the party causing the disadvantage is not the applicant for the proceeding—
>
> (i) make its final decision in the proceeding in the applicant's favour; or
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> (ii) order that the party causing the disadvantage be removed from the proceeding; or
>
> (c) make an order under section 102, against the party causing the disadvantage, to compensate another party for any reasonable costs incurred unnecessarily.
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> *Note–*
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> See section 108 for the tribunal's power to order that the costs be paid before it continues with the proceeding.

(3) In acting under subsection (2), the tribunal must have regard to the following—

(a) the extent to which the party causing the disadvantage is familiar with the tribunal's practices and procedures;

(b) the capacity of the party causing the disadvantage to understand, and act on, the tribunal's orders and directions;

(c) whether the party causing the disadvantage is acting deliberately.

(4) The tribunal may act under subsection (2) on the application of a party to the proceeding or on the tribunal's own initiative.

(5) The tribunal's power to act under subsection (2) is exercisable only by—

(a) the tribunal as constituted for the proceeding; or

(b) if the tribunal has not been constituted for the proceeding—a legally qualified member or an adjudicator.

…

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.

…

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.

[6] The following provisions were relied upon by the respondent for its application for orders staying the proceedings and conditionally dismissing them.

58 Interim orders

(1) Before making a final decision in a proceeding, the tribunal may make an interim order it considers appropriate in the interests of justice, including, for example—

(a) to protect a party's position for the duration of the proceeding; or

(b) to require or permit something to be done to secure the effectiveness of the exercise of the tribunal's jurisdiction for the proceeding.

Note–

See also section 22(3) for the tribunal's power to stay the operation of a reviewable decision while it is being reviewed by the tribunal.

…

108 Staying proceeding

(1) Subsection (2) applies if the tribunal makes a costs order under this Act or an enabling Act before a proceeding ends.

(2) The tribunal may make an order requiring that the costs be paid before it continues with the proceeding.

(3) Subsection (4) applies if a party has been ordered to pay the costs of another party under this Act or an enabling Act, and the party, before paying the costs, starts another proceeding before the tribunal against the other party.

(4) The tribunal may make an order staying the other proceeding until the costs are paid.

Consideration of costs orders

[7] The respondent correctly noted that the "usual position"[4] under the *QCAT Act* is that stated in s 100; namely, that each party is to bear its own costs. Both ss 48 and 102 are instances where something "otherwise [is] provided under" the *QCAT Act*, and thus permit departures from the "usual position".

[8] Unlike s 47(2)(c), s 48(2)(c) expressly invokes s 102. There is nothing in the Explanatory Notes for these sections which would account for this difference, and it is unnecessary to explore it further. It is sufficient to note that the question whether

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[4] Also described as the "default position" or "starting position" by McMurdo JA in *Wong* at [35] and [37] respectively.

an order for costs is to be made under s 48(2)(c) requires the application of s 102; but the matters identified in s 48(3) must also be taken into account.

[9] In *Tamawood Ltd & Anor v Paans*,[5] Keane JA (as his Honour then was) had to consider ss 70 and 71 of the *Commercial and Consumer Tribunal Act* 2003 (Qld), which have some broad similarity to ss 100 and 102 of the *QCAT Act*. His Honour made the following observations, which I consider relevant to the approach to be taken to the latter provisions:[6]

> As I have already said, in my view, the language of s 70 and s 71(5)(a) is sufficiently clear to negate the proposition that costs should, prima facie, follow the event unless the Tribunal considers that another order is more appropriate. In this regard, it is clear that the power of a court or tribunal to award costs to a party is now the creature of statute. The nature and extent of that power can only be discerned by close consideration of the terms of the statute which creates the power and prescribes the occasions for, and conditions of, its exercise. In the performance of this task, observations of the courts in relation to the operation of other statutory regimes relating to costs may afford general assistance but they cannot be allowed to distract attention from the terms of the particular statute in question.

[10] Adopting his Honour's approach of giving close consideration to the terms of the relevant statutory provisions, it is necessary in the present case to identify the relevant tests to be applied and the considerations to be taken into account. The test, ultimately, for determining whether costs are to be ordered under s 102 is whether "the interests of justice require" the making of a costs order. Some assistance in identifying what the interests of justice might require can be obtained from s 102(3)(a)–(e), but those paragraphs do not constrain or limit the relevant considerations, as is apparent from s 102(3)(f). The Tribunal is called upon to consider matters of fairness as between the parties; but also matters more broadly relevant to the administration of justice. Moreover, in acting under s 48, the Tribunal must have regard to the matters specified in s 48(3).

[11] It is convenient to commence with a consideration of the matters raised by s 48(3). Mr Simons has been responsible for the conduct of the case for the applicants. There is no evidence to suggest that he had any great familiarity with the Tribunal's practices and procedures of the Tribunal in the period leading up to 2 March 2020. However, Mr Simons knew that the applicants' application had been set down for hearing on that date. He is an experienced businessman. It must have been obvious to him that the Tribunal had allocated resources to enable the hearing to proceed on that day; and that the respondent would have been likely to have prepared for the hearing, and to have incurred costs in doing so. In those circumstances, any unfamiliarity with the practices and procedures of the Tribunal is of no significance in deciding whether an order should be made for the costs thrown away as a result of the adjournment granted on 2 March.

[12] The failure of the applicants to file material by 15 April involved a failure to comply with a direction of the Tribunal made on 26 March 2020. Some context to that failure is provided by another direction made contemporaneously (Direction 4); namely, that Mr Simons advise by 8 April of the steps he had taken to comply with that direction, and whether he expected to be able to file the material by the time

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5 [2005] 2 Qd R 101 ("*Tamawood*").

6 *Tamawood*, [23], and omitting citations.

specified. Mr Simons did not comply with Direction 4. Indeed, it was not until 12 May, after he had been given notice of a directions hearing to be held the following day, that Mr Simons informed the respondent and the Tribunal that he had not prepared any material. The plain purpose of Direction 4 was to give the respondent, and the Tribunal, some indication whether Mr Simons was experiencing difficulty in preparing material in a timely fashion, a matter likely to affect the future conduct of the proceedings. It must have been obvious to Mr Simons that the failure to do so would cause some disruption to the proceedings, and as a result, some disadvantage to the respondent. There is no reason to think that a lack of familiarity with the Tribunal's practices and procedures is a matter of any consequence when considering whether to make an order for costs in favour of the respondent, for the directions hearing which took place on 13 May 2020.

[13] Lawyers, including one of Her Majesty's Counsel, were engaged to resist the respondent's application. That application itself put the applicants on notice that a costs order was being sought against them, including for the costs of the application. They were therefore in a position to obtain advice as to the risk that such an order might be made. Indeed, it is a reasonable inference that they obtained such advice. Again, questions of knowledge of the Tribunal's practices and procedures do not seem of any great significance.

[14] There is nothing to suggest that the applicants, through Mr Simons, lacked any capacity to understand the Tribunal's relevant orders. Mr Simons sought to rely on his mental health, but did not provide adequate supporting evidence, although the need for this must have been clear to him.[7] I do not consider that Mr Simons' mental health was such that he lacked the capacity to comply with the Tribunal's directions. Other matters raised by Mr Simons as to his capacity to comply with the orders have previously been found not to provide an adequate explanation for his non-compliance.[8]

[15] It is difficult to conclude that Mr Simons deliberately failed to prepare for the hearing scheduled for 3 March (at least in the sense that he wilfully failed to prepare for the hearing); and that he deliberately failed to give notice that he wanted an adjournment until he had been contacted by the Tribunal's Registry on 2 March. Nevertheless, this conduct, and particularly the failure to give earlier notice of the request for an adjournment, represented serious neglect on the part of the applicants of their duties as litigants to advance their case and to act promptly in relation to it, a duty which finds statutory expression in s 45 of the *QCAT Act*. The fact that the conduct was not deliberate is not a reason not to exercise the power to make a costs order under s 48(2)(c).

[16] Nor is it clear that Mr Simons deliberately failed to cause material to be filed by 15 April. The applicants obviously knew that they were obliged to comply. The fact that this failure may not have been deliberate is again of little consequence.

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7 See Direction 5 of the Directions dated 26 March 2020: "Should the applicants or any of them apply for a further adjournment on a basis related to the state of health of [Mr Simons], the application is to be supported by an affidavit from [Mr Simons], setting out the steps taken to prepare the material and when they were taken, what health difficulties he has experienced and when, their impact on his capacity to prepare material, and his proposal for the progress of the matter; and is also to be supported by an affidavit or report from a medical practitioner which sets out the diagnosis of Mr Simons' condition, and when it is expected he will be able to prepare material for this proceeding".

8 See *Simons*, [53]–[54].

[17] The only matter identified in s 102(3) which has been directly raised is whether the conduct of the applicants has unnecessarily disadvantaged the respondent. Findings have been previously made on this question. It is nevertheless convenient to refer to other matters identified in the section.

[18] The nature and complexity of the dispute between the parties has no bearing on the question whether the costs orders sought by the respondent should be made. The grounds on which they are sought are unrelated to the underlying dispute between the parties. The same is true of the relative strengths of the claims made by each party in the proceedings. There is no evidence of the financial circumstances of the relevant parties, and it is not possible to take this into account.

[19] The primary question raised by s 102 is whether the interests of justice require the making of a costs order in favour of the respondent against the applicants, having regard to the matters identified in s 102(3). Of particular relevance in the present case is whether the applicants have acted in a way that has unnecessarily disadvantaged the respondent.

[20] The submissions of the respondent rely on a number of findings to that effect in the reasons delivered on 24 September 2020. These are obviously matters to which the Tribunal may have regard in determining whether the interests of justice require the making of a costs order.

[21] The other matters relied upon by the respondent were findings in those reasons that the applicants had, amongst other things, unnecessarily delayed the determination of their application; that their conduct had left the respondent in a position where it had to prepare for hearings which were adjourned; that the applicants had been indifferent to the need to comply with directions; and that at the time of the hearing on 10 August, they had not completed the preparation of their case. There is some overlap between some of these considerations, and the question whether the applicants have acted in a way that unnecessarily disadvantaged the respondent. Nevertheless, these are matters which should be considered relevant under s 102(3)(f). They give some additional colour to the circumstances in which the respondent has been caused unnecessary disadvantage by the conduct of the applicants.

[22] It is appropriate to make the costs orders sought by the respondent. Each order relates to, and seeks to provide some compensation to the respondent for, disadvantage caused to the respondent by the conduct of the applicants. No countervailing consideration has been advanced. This consideration is sufficient to establish that it is in the interests of justice to make the costs orders which the respondent seeks.

[23] The respondent's submissions refer to passages in *Wong* to the effect that, absent a finding that the Medical Board of Australia had acted unreasonably, there could not have been a basis for departing from the default position that each party pay its own costs.[9] The Board had referred to this Tribunal the matter of the ongoing registration of Dr Wong as a medical practitioner. In the result, Dr Wong remained registered, subject to conditions. At first instance, the Board was ordered to pay Dr Wong's costs of the proceedings, in part on an indemnity basis. Under the relevant legislation, which was the *Health Practitioner Regulation National Law*

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9 *Wong*, [35], [37].

(Queensland) ("the National Law"), a body such as the Board was required to refer to the responsible Tribunal a matter about a registered medical practitioner if the Board reasonably believed that the practitioner had behaved in a way that constituted professional misconduct.[10] McMurdo JA pointed out that, absent a finding that the Board did not have such a belief, there could be no criticism of the Board commencing the proceedings; and without such a finding, an order could not be made that the Board should pay the respondent's costs on the basis that it had unnecessarily commenced the proceeding.[11] The question of reasonableness was raised by the legislative mandate imposed on the Board to bring the proceeding if the Board held a reasonable belief that the respondent had behaved in a way that constituted professional misconduct. It was not introduced as some overarching general requirement for the application of the provisions of s 102. It is therefore unnecessary to consider separately whether the applicants' conduct was unreasonable.

[24] It is necessary to make some further observations about the costs sought of the application brought under s 48. These costs are not awarded simply as a consequence of the respondent's (limited) success in that application. They are costs incurred by the respondent in seeking redress for the consequences of unnecessary disadvantage caused to them by the conduct of the applicants. But for that conduct, it would not have been necessary to incur them.

Application for stay and guillotine order

[25] To evaluate the respondent's submissions, it is necessary to consider the following provision of the *QCAT Act*:

> **107 Fixing or assessing costs**
>
> (1) If the tribunal makes a costs order under this Act or an enabling Act, the tribunal must fix the costs if possible.
>
> (2) If it is not possible to fix the costs having regard to the nature of the proceeding, the tribunal may make an order requiring that the costs be assessed under the rules.
>
> (3) The rules may provide that costs must be assessed by reference to a scale under the rules applying to a court.

[26] The reference to the "rules" is a reference to the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) ("*QCAT Rules*"),[12] which include the following:

> **87 Assessing costs**
>
> (1) This rule provides for how costs are to be assessed under section 107 of the Act if the tribunal makes a costs order that requires the costs be assessed under the rules.
>
> (2) The costs must be assessed—
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> (a) by an assessor appointed by the tribunal; and

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10 See *Wong*, [9].

11 See *Wong*, [32].

12 See the definition of "rules" in Schedule 3 to the *QCAT Act*; the authorising Act for the rules is identified on the Queensland Legislation website as the *QCAT Act*.

> (b) if the tribunal directs the costs be assessed by reference to the scale of costs applying to a court—by reference to the scale of costs directed by the tribunal.
>
> …

[27] The *QCAT Act* does not make the provisions of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") applicable to an assessment of costs ordered by the Tribunal.[13]

[28] The document which the respondent sent to the applicants is, in form, a costs statement under r 705 of the *UCPR*. The person who prepared it is described in Mr Swan's affidavit filed on 1 October 2020 as a "court approved costs assessor in Queensland"; apparently a reference to an appointment under r 743L of the *UCPR*. As evidence of the assessor's approval, an extract of a document is exhibited to Mr Swan's affidavit, which appears to be an extract of the Register of Approved Costs Assessors, maintained by the courts. It is not evidence of the assessor's appointment by the Tribunal.

[29] The difficulty appears to have been recognised by the respondent. On 2 October 2020, it filed an application with the Tribunal for the appointment of a person to assess the costs ordered on 8 July.

[30] In the circumstances, the Tribunal is not prepared to find that the costs which the applicants were ordered to pay on 8 July have been assessed; nor that there has been a relevant failure to pay those costs. It is therefore not prepared to order a stay of the applicants' application, nor to fix a date by which the costs are to be paid.

Conclusion

[31] In view of the language of s 107, it is appropriate to order that any costs be assessed under the *QCAT Rules*. To cater for any difficulty which might arise in relation to the assessment or subsequently, it seems appropriate to provide for liberty to apply.

[32] The Tribunal makes the following orders:

1. The applicants shall pay the costs of the respondent thrown away by reason of the adjournment of 2 March 2020, to be assessed under the *QCAT Rules*;
2. The applicants shall pay the respondent's costs of the directions hearing on 13 May 2020, to be assessed under the *QCAT Rules*;
3. The applicants shall pay the respondent's costs of its application to strike out the proceeding, to be assessed under the *QCAT Rules*; and
4. There is liberty to apply.

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[13] Contrast this with *QCAT Act* s 219, dealing with contempt.