

CITATION: *Podmejersky v Cullens* [2012] QCATA 17

PARTIES: Dr Karol Podmejersky
(Applicant/Appellant)
v
Cullens
(Respondent)

APPLICATION NUMBER: APL378-11

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Richard Oliver, Senior Member**

DELIVERED ON: 7 February 2012

DELIVERED AT: Brisbane

ORDERS MADE: **1. Leave to appeal is refused.**

CATCHWORDS: Minor Civil Dispute – where application to set aside decision by default dismissed – where decision discretionary – where no satisfactory explanation for delay

Queensland Civil and Administrative Tribunal Act 2009, s 142(3)

APPEARANCES and REPRESENTATION (if any):

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

REASONS FOR DECISION

- [1] Cullens commenced a proceeding in the minor civil disputes jurisdiction of the Tribunal to recover the costs of professional services rendered to Dr Podmejersky between December 2009 and December 2010. The claim was for \$4,226.34 together with interest and filing fees and service fees, totalling \$4,394.99.
- [2] Dr Podmejersky did not file a response to the minor civil dispute and on 27 May 2011 Cullens applied for a decision by default. On 27 May 2011 the Tribunal made an order that Dr Podmejersky pay Cullens the amount claimed.

- [3] On 22 August 2011 Dr Podmejersky applied to have the default decision set aside. In support of that application he filed an affidavit disputing the debt to Cullens and gave a brief explanation for the delay in responding to the application.
- [4] The application to set aside the default decision was considered by a Tribunal Adjudicator on 21 September 2011 and the application to set aside the default decision was dismissed.
- [5] From that decision Dr Podmejersky has filed an application for leave to appeal or appeal. Leave to appeal is necessary because this is an appeal from a minor civil dispute matter¹.
- [6] Leave to appeal will ordinarily only be granted where there is some question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage; or, there is a reasonably arguable case of error in the primary decision and a reasonable prospect that the applicant would obtain further substantive relief. Another question sometimes asked is: is leave necessary to correct a substantial injustice to the applicant, caused by some error?
- [7] The starting point here is that the original decision by default was regularly entered in that the Tribunal was satisfied that the requirements of the Act and Rules had been complied with. Therefore Dr Podmejersky must establish some error on the part of the learned Adjudicator in dismissing the application to set aside the decision or that leave should be granted to correct a substantial injustice.
- [8] Dr Podmejersky's submissions in support of the appeal are unhelpful because they are virtually the same as those he put before the Tribunal in his application to set aside the default decision. These were considered by the learned Adjudicator.
- [9] The submissions go on to explain the basis of his defence to the applicant's claim which, at best, is in the nature of a counter-claim because he contends that Cullens either misled him or did not undertake the work in accordance with his understanding of the agreement between them. Simply because a decision by default has been entered requiring him to pay the claimed amount, does not prevent him from commencing a separate proceeding for breach of contract.
- [10] The learned Adjudicator gave consideration to the defence raised but more importantly, was not satisfied that there was a satisfactory explanation of the delay in filing the response to the application. The history of the matter suggests that Dr Podmejersky did seem to take a casual approach to dealing with the application. He left the matter in the hands of a friend, and did not take any particular interest in the proceeding until he returned from overseas. Further, it was not until 22 August 2011, did he take steps to set aside the default decision.
- [11] The setting aside of a default decision is discretionary. The usual principles are that the applicant must establish a good defence on the merits, and also

¹ QCAT Act, s 142(3).

have a satisfactory explanation for delay. If the judgment is irregularly entered that is, there is a flaw in the process such as, defective service or the claim is not truly a debt or liquidated demand, then the default decision must be set aside. That is not the case here.

[12] Dr Podmejersky has not been able to identify any error on the part of the Tribunal Member who dismissed his application.

[13] I should say in passing that Cullens have provided extensive submissions setting out the full history of their relationship with Dr Podmejersky which substantiates their claim for the outstanding debt. There is considerable doubt that Dr Podmejersky would have any real prospect of obtaining substantive relief if the matter went to hearing. Also the submissions do not establish that there has been any substantial injustice.

[14] As no error of law has been identified, nor is there any other good reason why leave to appeal should be granted, leave to appeal is refused.