

**CITATION:** *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49

**PARTIES:** Queensland All Codes Racing Industry Board  
(Applicant/Appellant)  
v  
Justin Abbott  
(Respondent)

**APPLICATION NUMBER:** APL552 -14

**MATTER TYPE:** Appeals

**HEARING DATE:** 19 November 2015

**HEARD AT:** Brisbane

**DECISION OF:** **Justice DG Thomas, President  
Senior Member Stilgoe OAM**

**DELIVERED ON:** 3 March 2016

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The application for costs is dismissed.**

**CATCHWORDS:** APPEAL – RACING – HARNESS RACING – COSTS – where appeal wholly unsuccessful – where respondent applied for costs of the appeal – whether costs order in the interests of justice

*Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 3(c), 100, 102*

*Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364  
*Grasso v CMG Engineers Pty Ltd (No 2)* [2011] QCATA 326  
*Legal Services Commissioner v Madden* [2008] QCA 52  
*Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412  
*Tamawood Ltd & Anor v Paans* [2005] QCA 111

**APPEARANCES:**

**APPLICANT:** A.C. Freeman instructed by Queensland All Codes Racing Industry Board

**RESPONDENT:** S. Farrell instructed by Gabriel Ruddy and Garrett Solicitors

**REASONS FOR DECISION**

- [1] On 26 June 2015, we dismissed an appeal by Queensland All Codes Racing Industry Board against a decision by the Racing Disciplinary Board.
- [2] Justin Abbott, the respondent to that appeal, has filed an application that Queensland All Codes Racing pay his costs of the appeal.
- [3] Section 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') states that, other than as provided by the Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding.
- [4] The *Racing Act 2002* (Qld), which is the enabling Act, makes no provision about the costs of an appeal. Therefore, any application for costs must be made under the QCAT Act.
- [5] Section 102(1) of the QCAT Act states that the Tribunal may make an order for costs if it consider the interests of justice require it to make an order.

**General principles for an order for costs**

- [6] The starting point for any discussion about costs is that articulated by Alan Wilson J:<sup>1</sup>

...the question that will usually arise in each case in which costs are sought is whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice' points so compellingly to a costs order that they overcome the strong contra-indication against costs orders contained in s 100...

- [7] Section 102(3) of the QCAT Act states that, in deciding whether to award costs, the Tribunal may have regard to:
- a) Whether a party to the proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding;
  - b) The nature and complexity of the proceeding;

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<sup>1</sup> *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412; *Grasso v CMG Engineers Pty Ltd (No 2)* [2011] QCATA 326 at [11].

- c) The relative strengths of the claims made by each of the parties to the proceeding;
- d) ...
- e) The financial circumstances of the parties to the proceeding; and
- f) Anything else the tribunal considers relevant.

[8] It is important to remember, as Kingham DCJ observed,<sup>2</sup> that the provisions of section 102(3) of the QCAT Act are not grounds for awarding costs, merely factors the tribunal may take into consideration.

[9] Mr Abbott suggests that an application for the costs of an appeal should be treated differently from an application for the costs of a first instance hearing. In support of that proposition, the Appeal Tribunal was referred to *Grasso v CMG Engineers Pty Ltd (No 2)*<sup>3</sup> ('Grasso'):

The last factor is, in my view, relevant. While QCAT operates in different statutory costs environment from the civil courts, it has been accepted there that costs in an appeal may be viewed differently from costs in a proceeding – because, if the appellant fails, the respondent has had to face the additional burden and expense of the appeal, in litigation in which he or she has, already, been successful. This is a matter the QCAT Appeal Tribunal is entitled to take into account, under s 102(3)(f) of the QCAT Act.

[10] It is important to read those comments in the context of the whole decision. In the preceding paragraph,<sup>4</sup> the Appeal Tribunal set out the factors material to the exercise of its discretion. Those factors included the long history of the matter, the many directions, the experts' conclave in 2010, the late application to amend and the fact that the appeal was from an interlocutory order. The fact of the appeal, as the quoted paragraph shows, was **the last factor** (our emphasis). This means that, in the absence of other factors, an appeal, of itself, is not enough to justify an order for costs.

### **The nature and complexity of the proceeding**

[11] Mr Abbott suggests that the appeal was both complex and serious. Queensland All Codes Racing agrees that the appeal was serious, but does not agree that the matter was complex.

[12] Mr Abbott submits that the appeal was complex because Queensland All Codes Racing argued seven grounds of appeal, '*involving almost every aspect*'<sup>5</sup> of the decision on Charge 8 and penalty.

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<sup>2</sup> *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364.

<sup>3</sup> [2011] QCATA 326 at [13].

<sup>4</sup> *Ibid.*, at [12].

<sup>5</sup> Submissions on behalf of the respondent as to costs filed 19 August 2015, paragraph 14(a).

- [13] The Appeal Tribunal cannot decide that a proceeding is complex simply by a head count of grounds. To qualify as ‘*complex*’, an appeal should involve difficult or novel legal concepts or technical evidence that requires complex reasoning to enable the Tribunal to make a decision.
- [14] Queensland All Codes Racing argued two points before us; the Racing Disciplinary Board’s application for two Rules. The law in relation to both Rules was well settled but, according to Queensland All Codes Racing, an appeal was necessary because of the opacity of reasons given by the Racing Disciplinary Board. The proceeding, although involved, was not complex.

### **The relative strengths of the claims made by each party**

- [15] Mr Abbott concedes that mere success by one party will not necessarily answer ‘*the relative strengths of the claims made by each party to the proceeding*.’<sup>6</sup> He submits, however, that because Queensland All Codes Racing Industry Board was entirely unsuccessful on each of its seven grounds of appeal, an order for costs is warranted.
- [16] As we have already noted, there is a very strong contra-indication against costs orders in the Tribunal. The factors to be considered in s 102 of the QCAT Act make it clear that costs do not follow the event unless there is some other compelling reason to order costs. If the decision to file an application for appeal is reasonably based and not motivated to delay or obstruct the Tribunal dealing with the proceeding in a way that is accessible, fair, just, economical, informal and quick,<sup>7</sup> then we do not see that s 102(3)(c) justifies an order for costs.
- [17] This appeal should be contrasted with the situation in *Grasso* where the application for leave to appeal was just another step in a series of steps designed to obstruct and delay the Tribunal’s decision-making process. Here, Queensland All Codes Racing was obliged to appeal the decision which might, in the future, be used as a precedent in circumstances where the reasons for that decision were unclear, unhelpful and open to a number of possible interpretations.

### **The financial circumstances of the parties**

- [18] It is often the case in this Tribunal that the financial circumstances of the parties differ markedly. The Tribunal hears many disciplinary proceedings. In all cases, the regulatory body is funded by fees imposed on the registration to the profession or industry. In many cases, the registrant appears before the tribunal with little or no financial support and is prevented from earning in the profession the subject of the proceeding. That circumstance is not a reason for making an order for costs.

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<sup>6</sup> QCAT Act s 102(3)(c).

<sup>7</sup> *Ibid*, s 3(b).

- [19] The decision of Keane J in *Tamawood Ltd & Anor v Paans*<sup>8</sup> is often cited as support for an order for costs where the complexity of the matter justified legal representation. Again, it is important to consider those comments in the context of the whole decision.
- [20] The homeowner, Ms Paans, was successful in an action against Tamawood Homes in the Commercial and Consumer Tribunal. The Tribunal ordered Tamawood pay Ms Paans \$10,000.00 but did not order costs. The District Court, on appeal, ordered Tamawood pay Ms Paans' costs. The Court of Appeal's reasons for decision – that an order for costs was reasonable where a party had engaged legal representation – was informed by two important points. The first was that the value of the order for compensation was eroded by Ms Paans' costs of obtaining that order.<sup>9</sup> The second consideration was the behaviour of Tamawood Homes prior to the commencement of proceedings which showed a continuing default.<sup>10</sup>
- [21] Mr Abbott has had to fund the appeal from his own resources and has no substantial assets. In that, he is no different from many parties before this Tribunal. He has not been employed since his licence was suspended in March 2014. That circumstance is, unfortunately, a consequence of the disciplinary proceedings the subject of the appeal. Impecuniosity because of disciplinary proceedings has never been a ground for favourable consideration.<sup>11</sup>
- [22] There is no evidence that Queensland All Codes Racing acted improperly in bringing the application for appeal, nor any evidence that it misused any financial superiority. There is no evidence that an order in Mr Abbott's favour for the payment of money was eroded by the costs he incurred in obtaining that order.

### **Anything else the tribunal considers relevant**

- [23] As we have already noted, the fact that the proceeding is an appeal is but one of many factors and not, in itself, a reason to order costs.
- [24] There is no doubt that s 102(3)(f) of the QCAT Act gives the tribunal very wide discretion. No other factors which would influence a tribunal's decision to order costs have been advanced in this case.

### **Conclusion**

- [25] The application for costs is dismissed.

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<sup>8</sup> [2005] QCA 111.

<sup>9</sup> Supra at [33].

<sup>10</sup> Supra at [35].

<sup>11</sup> *Legal Services Commissioner v Madden* [2008] QCA 52.