

CITATION: *Salam & Anor v Henley Properties (QLD) Pty Ltd* [2016] QCATA 98

PARTIES: Muhammad Salam
Seowmee Salam
(Applicants/Appellants)
v
Henley Properties (QLD) Pty Ltd
(Respondent)

APPLICATION NUMBER: APL429-14

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Senior Member O'Callaghan**
Member Deane

DELIVERED ON: 4 February 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Henley Properties (QLD) Pty Ltd is to pay Muhammad Salam and Seowmee Salam's costs of and incidental to the appeal on the Magistrates Court scale of costs for claims over \$50,000.**
- 2. Muhammad Salam and Seowmee Salam's costs are to be assessed by Hickey & Garrett, Legal Costs Assessors, on a short form basis.**
- 3. Henley Properties (QLD) Pty Ltd is to pay Muhammad Salam and Seowmee Salam's costs as assessed by Hickey & Garrett within 28 days from receipt by Henley Properties (QLD) Pty Ltd of the final decision or within 14 days of receipt by Henley Properties (QLD) Pty Ltd of the assessment made by Hickey & Garrett, whichever is the later.**

CATCHWORDS: APPEALS – DOMESTIC BUILDING DISPUTE
– COSTS – where appeal allowed – whether in the interests of justice to award costs
Queensland Civil and Administrative Tribunal

Act 2009 (Qld) s 48, s 100, s 102, s 105, s 107, s 127
Queensland Building and Construction Commission Act 1991 (Qld) s 77(3)(h)
Queensland Civil and Administrative Tribunal Rules 2009 (Qld) r 86.

Donald Campbell & Co v Pollak (1927) AC 732
Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52
Olindaridge Pty Ltd & Wagner v Tracey [2015] QCATA 175
Latoudis v Casey [1990] HCA 59
Lyons v Dreamstarter Pty Ltd [2011] QCATA 142
Lyons v Dreamstarter Pty Ltd [2012] QCATA 71
Pertzel v Queensland Paulownia Forests Ltd [2008] QCA 344
Stuart Homes and Renovations v Denton [2012] QCAT 43
Tamawood Ltd v Paans [2005] 2 Qd R 101

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

REPRESENTATIVES:

APPLICANTS:

Muhammad Salam and Seowmee Salam
 represented by Mr Russell Ensby of CBP
 Lawyers

RESPONDENT:

Henley Properties (QLD) Pty Ltd represented by
 Mr Dale Cliff of Mills Oakley Lawyers

REASONS FOR DECISION

- [1] Dr and Mrs Salam were successful in their appeal to set aside:
- a) the decision of 3 September 2014 to award Henley Properties the amount of \$17,779.53;¹ and consequently
 - b) the decision of 1 May 2015 as to costs.
- [2] The Salams now apply for an order that Henley Properties pay the costs of and incidental to the appeal.
- [3] The QCAT Act provides '*Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs*

¹ \$21,417 recoverable by Henley Properties under s 84(4) of the *Domestic Building Contracts Act 2000 (Qld)* less \$3,637.47 for damages for defective work found to be owing to the Salams.

*for the proceedings.*² It is not disputed that the Tribunal's discretion to award costs in a building dispute³ is a broader and more general discretion than the one conferred by the QCAT Act.⁴ The Appeal Tribunal has recently held in the matter of *Olindaridge Pty Ltd & Wagner v Tracey*⁵ that, for the purposes of considering an award of costs, a building dispute includes an appeal in relation to the claim or dispute.

[4] Henley Properties contend that as the matter has been remitted to the Tribunal for determination according to law that it is premature to determine costs of the appeal and that costs should be determined at the rehearing when the outcome is known, because *'the ordinary rule that costs should follow the event cannot yet be applied'*. Henley Properties concedes that this *'rule'* does not automatically apply.⁶ It contends that there is nothing in Henley Properties' conduct in the appeal, which would require an award of costs.

[5] On balance, we find that the factors are in favour of the award of an order for costs in respect of the appeal.

[6] In *Lyons v Dreamstarter Pty Ltd*⁷ the then President stated at [11]

The discretion to award costs starts with the proposition that it is just and reasonable that a party who causes another to incur costs should reimburse the other party for them⁸. Otherwise, the factors affecting the discretion will vary in each case.⁹

[7] The Tribunal, in exercising its general discretion to award costs, may consider the matters referred to in s 102(3) of the QCAT Act.

[8] The Salams do not contend that Henley Properties acted in a way that unnecessarily disadvantaged them¹⁰ nor do they seek to rely upon the nature and complexity of the appeal¹¹ nor the financial circumstances of the parties.¹²

[9] Essentially, they rely upon their success in setting aside the decision and contend that there was no disentitling conduct on their behalf. The relative strength of the Salams' claims in the appeal is a factor in favour of an award of costs.¹³ The Salams had strong grounds for overturning a number of findings at first instance.

² QCAT Act s 100.

³ *Queensland Building and Construction Commission Act 1991 (Qld) s 77(3)(h); Lyons v Dreamstarter Pty Ltd [2011] QCATA 142.*

⁴ QCAT Act s 100, s 102.

⁵ [2015] QCATA 175.

⁶ *Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52 at [26].*

⁷ [2012] QCATA 71.

⁸ *Latoudis v Casey [1990] HCA 59.*

⁹ *Donald Campbell & Co v Pollak (1927) AC 732 at 811-12.*

¹⁰ QCAT Act s 48(1)(a)-(g), s102(3)(a).

¹¹ *Ibid* s 102(3)(b).

¹² *Ibid* s 102(3)(e).

¹³ *Ibid* s 102(3)(c).

- [10] Ultimately, they succeeded in establishing a number of errors of law because of the inadequacy of the learned Member's reasons. The inadequacy of reasons was not a matter over which Henley Properties had any influence. However, they also succeeded in establishing a number of other errors of law.
- [11] As the matter has been remitted for determination, the Appeal Tribunal is not in a position to assess whether the Salams' ultimate success will be eroded through legal costs because the outcome is not yet known.¹⁴ This is a factor in favour of deferring determination.
- [12] A factor, which may be relevant, is whether or not either party sought to protect itself through the making of offers to settle.¹⁵ Henley Properties has not submitted that any such offers were made in support of its contention that it is premature to make a costs order.
- [13] The Salams' submit that in deciding whether they were successful on appeal for the purposes of awarding costs the tribunal is not bound to concern itself with the ultimate 'value' of the outcome of the appeal to the outcome at first instance. They rely upon *Pertzel v Queensland Paulownia Forests Ltd*.¹⁶ In that case, the Court of Appeal made such a statement in the context that the issue upon which the appellant succeeded on appeal was an issue of public importance.
- [14] The Salams' appeal was necessary to correct some errors although they were not necessarily issues of '*public importance*'. Henley Properties chose to oppose the appeal and as a consequence, the Salams incurred costs.
- [15] The Tribunal is to fix the costs if possible.¹⁷ If it is not possible, the Tribunal may make an order requiring the costs be assessed.¹⁸ The Salams did not provide evidence as to costs because they sought an order as to the appropriate scale of costs and an order for an assessment.
- [16] The Salams contend that in terms of quantum alone the appropriate court scale would be the Magistrates' Court scale of costs but submit that apart from the Magistrates' Court scale of costs for claims over \$50,000 the scales are ill suited. The Tribunal has previously accepted that lump sum scales are less suitable for assessing costs than itemised scales.
- [17] We find that Henley Properties are to pay the Salams' costs of and incidental to the appeal on the Magistrates Court scale of costs for claims over \$50,000 and that the costs are to be assessed by Hickey & Garrett, Legal Costs Assessors, on a short form basis.

¹⁴ *Tamawood Ltd v Paans* [2005] 2 Qd R 101; *Stuart Homes and Renovations v Denton* [2012] QCAT 43.

¹⁵ *QCAT Act, s 105; Queensland Civil and Administrative Tribunal Rules 2009 (Qld)* ('QCAT Rules'), r 86.

¹⁶ [2008] QCA 344 at [5].

¹⁷ *Ibid* s 107(1).

¹⁸ *Ibid* s 107(2).

[18] As the matter has been remitted for determination, we find that it is appropriate to defer payment of the amount of costs so assessed.¹⁹

¹⁹ *Ibid* s 127(b).