

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Dwyer Corporation Pty Ltd t/as Dwyer Quality Homes v Dunne* [2018] QCATA 193

PARTIES: **DWYER CORPORATION PTY LTD TRADING AS
DWYER QUALITY HOMES**
(applicant)

v
BRUCE DUNNE
(first respondent)

HEIDI DUNNE
(second respondent)

APPLICATION NOS: APL278-17, APL027-18

ORIGINATING APPLICATION NO: BDL105-16

MATTER TYPE: Appeals

DELIVERED ON: 19 December 2018

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown
Member Olding

ORDERS: **In APL278-17**

1. No order as to costs.

In APL027-18

1. Leave to appeal refused.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – STATUTORY BASIS GENERALLY – where appellant successful on appeal against primary decision – where success on limited grounds and to limited extent – whether appellant should be entitled to recover costs of appeal – where appropriate for there to be no order as to costs – where appeal against costs order – where leave to appeal costs order required – whether error by tribunal – whether substantial injustice to appellant as a result of error – whether discretion of tribunal to order costs miscarried

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), s 102(3), s 106, s 142(3)(a)(iii), s 147, s 147(3)(a), s 147(3)(b)

Cachia v Grech [2009] NSWCA 232

Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52

Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388

Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577

House v The King (1936) 55 CLR 499

John Urquhart t/as Hart Renovations v Partington & Anor [206] QCA 199

Latoudis v Casey (1990) 170 CLR 72

Lyons v Dreamstarter Pty Ltd [2011] QCATA 142

Oshlack v Richmond River Council (1998) 193 CLR 72

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

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

Richards v The Sandy Cape Deep Sea Fishing Club Inc [2003] QCA 72

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

REPRESENTATION:

Applicant: Garland Waddington, Solicitors

Respondent: Gadens Lawyers

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

Background

- [1] Dwyer Corporation Pty Ltd trading as Dwyer Quality Homes ('DQH') constructed a home for the Dunnes. The Dunnes filed an application for a domestic building dispute in the tribunal claiming that DQH had failed to properly install a termite barrier (proceeding BDL105-16). The Dunnes were successful in BDL105-16 and DQH was ordered to pay to the Dunnes \$71,217.72 (the primary decision).¹

¹ *Dunne v Dwyer Quality Homes* [2017] QCAT 262.

- [2] The tribunal subsequently ordered DQH to pay the Dunnes' costs in BDL105-16 in the amount of \$12,794.70 (the costs decision).²
- [3] DQH appealed both decisions. On 10 August 2018 the Appeal Tribunal delivered its final decision in APL278-17. The appeal was allowed and DQH was ordered to pay to the Dunnes \$66,537.18.
- [4] In APL027-18, being DQH's appeal against the costs decision, the parties were directed to file further submissions with the appeal to be decided on the papers absent a request by a party for an oral hearing.
- [5] For determination are:
- (a) The costs in APL278-17;
 - (b) The application for leave to appeal and appeal in APL028-18.

The decisions in BDL105-16 and APL278-17

- [6] DQH entered a contract to build a house for the Dunnes, with construction being completed around December 2007. The contract included a special condition that the house had a full thirty year structural guarantee.
- [7] Termites subsequently damaged the house. The Dunnes filed an application for domestic building disputes. They were successful at first instance and substantially successful in the appeal, the tribunal and the Appeal Tribunal finding that the termite damage was covered by the contractual warranty. The Dunnes were awarded damages at first instance of \$71,217.12. On appeal the damages payable by DQH were reduced to \$66,537.18.
- [8] The Dunnes sought their costs of the proceedings below. Both parties were self-represented. The tribunal found that the Dunnes were entitled to their costs.³ The costs allowed related to expert witness fees of \$12,452.00 and the filing fees on the application.

Costs in QCAT – the statutory framework

- [9] An appeal against a costs order may only be made if the leave of the appeal tribunal is first obtained.⁴ The relevant principles for determining whether leave should be granted are well established: is there a reasonably arguable case of error in the primary decision?;⁵ is there a reasonable prospect that the applicant will obtain substantive relief?;⁶ is leave necessary to correct a substantial injustice to the applicant caused by some error?;⁷ is there a question of general importance upon which further argument, and a decision of the appellate court or Tribunal, would be to the public advantage?⁸

² *Dunne v Dwyer Quality Homes (No. 2)* [2017] QCAT (unreported).

³ *Ibid.*

⁴ QCAT Act, s 142(3)(a)(iii).

⁵ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

⁶ *Cachia v Grech* [2009] NSWCA 232, [13].

⁷ *Ibid.*

⁸ *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578, 580.

- [10] The starting point in any consideration of costs in the tribunal is that, other than as provided under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) or an enabling Act, each party should bear their own costs.⁹
- [11] The relevant enabling Act in these appeals and in BDL105-16 is the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act). By s 77(3)(h) of the QBCC Act, the tribunal may award costs. The power to award costs under this section applies in appeal tribunal proceedings.¹⁰
- [12] The discretion to order costs under s 77(3)(h) is a broad general one, which must be exercised judicially, not upon irrelevant or extraneous considerations but upon facts connected with or leading up to the litigation.¹¹
- [13] The matters set out at s 102(3) of the QCAT Act may be considered by the tribunal in the exercise of the discretion to award costs.¹²

What do the parties say?

APL027-18 – the appeal against the costs decision

- [14] DQH says that, as the primary decision was set aside on appeal, there is no basis in fact and law for the costs decision to stand. DQH also says that it is untenable that the respondents should be able to recover their costs at first instance when some of the grounds upon which they proceeded have not been successful. DQH says that each party should bear their own costs of the appeal or alternatively that there should be no order as to costs. DQH also says that there is nothing unusual about the matter warranting departure from s 100 of the QCAT Act.
- [15] DQH is critical of the Appeal Tribunal's findings in the primary decision regarding the application of the *Limitation of Actions Act 1974* (Qld) and says that the Act applies as a defence to an alternative cause of action that was not brought by the Dunnes.
- [16] The Dunnes say that they remain substantially successful in their claim despite the primary decision being set aside. The Dunnes say that as the amount of damages was only reduced by a relatively minor amount as a result of the Appeal Tribunal's decision, the principle that costs should follow the event remains the appropriate principle to apply in relation to costs in BDL105-16. On this basis, say the Dunnes, leave to appeal the costs decision should be refused. If leave to appeal were to be granted, say the Dunnes, the costs decision should be confirmed.

Costs in APL278-17 – the appeal against the primary decision

- [17] DQH says that in order to vindicate its rights it was forced to appeal the primary decision. DQH says that it was granted leave to appeal and the primary decision set aside. DQH says that it was successful in the appeal in two respects: first, the Appeal Tribunal accepted that the tribunal at first instance erred in finding that a

⁹ QCAT Act, s 100.

¹⁰ See *Olindaridge Pty Ltd & Wagner v Tracey* [2015] QCATA 175 followed in *Pivovarova v Michelsen* [2016] QCATA 45. See also *Wharton v Duffy Constructions (QLD) Pty Ltd* [2016] QCATA 12 followed in *Lee Manson t/as Manson Homes v Brett & Anor* [2018] QCATA 109.

¹¹ *Lyons v Dreamstarter Pty Ltd* [2011] QCATA 142.

¹² *Salam & Anor v Henley Properties (QLD) Pty Ltd* [2016] QCATA 98.

flyer formed part of the contract between the parties; secondly, the issue of quantum was resolved in DQH's favour. DQH says that, as it was successful, it should have its costs of the appeal.

- [18] The Dunnes say that the findings of the tribunal at first instance as to the existence of the structural warranty and its meaning and effect, and DQH's liability to the Dunnes for the failure of the termite barrier, were not disturbed. The Dunnes say that the issues relating to quantum on which DQH was successful took up a very small amount of the time and costs of the appeal. On the issue of quantum, the Dunnes say that with a limited exception, the tribunal's determination on quantum was upheld and the reduction in quantum was an amount of \$4,679.94.
- [19] The Dunnes say that DQH was substantially unsuccessful in the appeal, that they were substantially successful in opposing the appeal and that DQH should therefore pay their costs of the appeal. The Dunnes say the costs should be assessed on the District Court scale.

Consideration

APL027-18

- [20] As we have observed, the relevant enabling Act governing proceeding BDL105-16 is the QBCC Act. The tribunal may, by s 77(3)(h) of the QBCC Act, award costs. The submission by DQH that costs in the proceeding below are governed by s 100 of the QCAT Act is not correct.
- [21] Section 147 of the QCAT Act constrains the powers of the Appeal Tribunal to decide an appeal on a question of fact or a question of mixed law and fact. The Appeal Tribunal may confirm or amend the decision under appeal¹³ or set aside the decision and substitute its own decision.¹⁴ As we observed in the primary decision:

[29] We now proceed to decide the appeal by way of rehearing. It was held in *Harrison & Anor v Meehan*, and confirmed on appeal by the Court of Appeal, that:

[20] . . . Appeals by way of rehearing involve a new determination of the rights and liabilities of the parties, rather than a mere correction of errors in the determination of the Tribunal below.

[21] An appeal by way of rehearing under s 147 of the QCAT Act is not a rehearing de novo. The Appeal Tribunal must make its own determination on the material before the Tribunal below (supplemented, if necessary, by additional evidence if permitted under s 147(2)) with due respect for the findings of fact of the primary Tribunal, and due to consideration of the advantages enjoyed by it.

[30] In *Harrison*, the appeal tribunal, in comments that on appeal were also specifically endorsed by the Court of Appeal, went on to say that in rehearing the matter:

¹³ QCAT Act, s 147(3)(a).

¹⁴ *Ibid*, s 147(3)(b).

... we have adopted the learned member's primary findings of fact other than where those findings have been challenged in these appeals or where there is some doubt as to the findings made. (footnotes omitted)¹⁵

[22] We also held in the primary decision:

[31] In this appeal the Member's findings that the termite barrier was breached; that the breach was caused by failure of the termite barrier; and that the breach caused the damage are not challenged. Consistent with the approach endorsed by the Court of Appeal, we adopt the Member's findings on these matters. One of the grounds of appeal relied upon is that the Member erred in assessing the home owners' entitlement to damages. We will address this ground of appeal in rehearing the matter.

[32] The issues raised in the grounds of appeal relate primarily to the construction and application of the Contract.

[23] In deciding the appeal by way of rehearing the matter, the decision of the learned member at first instance was set aside and in lieu a different decision made. DQH says that the consequence of this is that there is no basis for the learned member's decision on costs to stand.

[24] DQH does not articulate any specific error said to have been made by the learned member in making the decision to award costs. The sole ground upon which DQH relies in the appeal is, as has been observed, the decision of the Appeal Tribunal to set aside the primary decision at first instance.

[25] In his reasons for the costs decision, the learned member found that the building dispute involved a significant claim to recover the costs of rectification of the termite barrier to the Dunnes' house; that DQH denied responsibility to pay; and that what was at issue was the Dunnes' claim under the warranty and the factual basis of the claim that the termite barrier was defective.¹⁶

[26] The learned member found that:

- (a) the building contract entered into between the parties contained a warranty covering the failure of the termite barrier and termite damage;
- (b) the termite barrier installed by DQH had been breached;
- (c) the breach was the result of the failure by DQH to properly install it;
- (d) the Dunnes were entitled to damages as a result of the breach of warranty by DQH.

[27] The learned member correctly referred to the relevant principles for awarding costs in building disputes.¹⁷ He considered the claim for costs by the Dunnes, referring to the bases upon which the various amounts were claimed and the evidence in support of the amounts claimed.

¹⁵ *Dwyer Corporation Pty Ltd t/as Dwyer Quality Homes v Dunne* [2018] QCATA 112.

¹⁶ *Dunne v Dwyer Quality Homes (No. 2)* [2017] QCAT (unreported), [6].

¹⁷ *Ibid*, [4], [5], [7].

- [28] The learned member was required to exercise a discretion in deciding whether to award costs. DQH identifies no error by the learned member in the exercise of the discretion: that the learned member acted upon wrong principle, that the learned member failed to take into account a relevant consideration, took into account an irrelevant consideration, misapprehended the facts or that the costs order was inexplicably inconsistent with the facts. As the High Court held in *House v The King*:

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.¹⁸

- [29] In an appeal against a costs decision, establishing error is not sufficient alone for a grant of leave to appeal. An appellant is required to establish that leave is required to correct a substantial injustice.
- [30] In addressing the question of whether there was error by the learned member, we do not find that the learned member acted upon wrong principle, allowed extraneous or irrelevant matters to guide or affect him, or failed to take into account some material consideration. In the primary decision, we found that the learned member had mistaken the facts in assessing the Dunnes' entitlement to damages. It does not follow however that this error leads to the conclusion that there was error in the costs decision.
- [31] The Dunnes were successful in establishing that:
- (a) the building contract entered into between the parties contained a warranty covering the failure of the termite barrier and termite damage;
 - (b) the termite barrier installed by DQH had been breached;
 - (c) the breach was the result of the failure by DQH to properly install it;
 - (d) they were entitled to damages as a result of the breach of warranty by DQH.
- [32] The Dunnes were therefore completely successful in the proceedings below. That success has, to a very modest extent, been eroded on appeal with the reduction in the assessment of damages by an amount of \$4,679.94. This reduction in the recoverable damages must be seen in context. Firstly, it related to the double

¹⁸ (1936) 55 CLR 499, 504-505.

counting of one item within the cost of termite proofing the Dunnes' residence. Secondly the reduction was extremely modest in the context of the overall award of damages. Even if the learned member had not erred, and for the reasons outlined, it is sufficiently clear from the reasons below that the costs order would have been no different. DQH denied liability for the termite barrier breach and subsequent damage. DQH also asserted that it had no liability under the contractual warranty. As the learned member correctly found, the Dunnes were required to pursue proceedings in the tribunal in order to vindicate their rights. In so doing they incurred costs principally in respect of obtaining the assistance of expert witnesses. DQH makes no submissions that the learned member erred in assessing the quantum of the costs. As the learned member found, these costs were properly and reasonably incurred. The learned member also, quite properly, disallowed certain amounts claimed by the Dunnes in the form of travel expenses.

[33] We are not satisfied that the error by the learned member in the primary decision has resulted in error in respect of the costs decision. We are not satisfied that the learned member's discretion in making the costs order miscarried. Even if error by the learned member could be identified, DQH has failed to establish that it has suffered a substantial injustice as a result.

[34] Leave to appeal is refused.

APL278-17

[35] DQH relied on four grounds of appeal.¹⁹ Two of the grounds of appeal related to the findings by the learned member as to the meaning and effect of the structural warranty. One of the grounds related to the failure by the learned member to find that the claim by the Dunnes had been brought out of time. The final ground of appeal related to the learned member's assessment of damages.

[36] DQH was unsuccessful in the appeal to all but a limited extent on the final ground of appeal. We found that a flyer prepared by DQH containing a 'structure guarantee' did not form part of the contract between the parties. However, we found that the installation of the termite barrier fell within a 'full thirty year structural guarantee' and that the warranty in those terms contained in Special Condition 3 of the building contract therefore covered the failure of the barrier and the termite damage.

[37] We also found that the learned member did not err in finding that DQH could be liable for damage caused to the subject property by termites more than 6 years and 3 months after the date of practical completion. DQH is critical of the observations in the primary decision in relation to whether the claim by the Dunnes had been brought out of time. In the appeal, DQH argued that the learned member erred in finding that DQH could be liable for damage caused by termites more than 6 years and 3 months after the date of practical completion. DQH says that the reference in the primary decision to the application of the *Limitation of Actions Act 1974 (Qld)* is 'misconceived' and 'sets a dangerous precedent'. As we observed in the primary decision, it was readily apparent that the Dunnes claimed that DQH was liable under the contract to rectify the termite barrier and consequential damage.²⁰ It was open to DQH to seek to raise a limitation defence to the Dunnes claim and it did not do so

¹⁹ One ground of appeal was abandoned by DQH.

²⁰ *Dwyer Corporation Pty Ltd t/as Dwyer Quality Homes v Dunne* [2018] QCATA 112.

either at first instance or on the rehearing. In any case, it is not clear how DQH's comments in this regard are relevant to the exercise of the discretion to award costs.

- [38] In the appeal, DQH argued that the learned member erred in assessing the Dunnes' entitlement to damages by allowing amounts for drilling holes and rendering/painting work totalling \$5,780 with the result of permitting double recovery for these amounts. We found that the learned member erred in allowing an amount of \$3,780 for drilling works and reduced the damages recoverable by the Dunnes accordingly.
- [39] The success of DQH on appeal was therefore very modest.
- [40] There is no automatic rule that costs follow the event or that an unsuccessful party must pay the costs of the successful party.²¹ The discretion to award costs must be exercised judicially and not by reference to irrelevant considerations.²² The general or usual order as to costs, that a successful party in litigation is entitled to an order of costs in its favour, is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant.²³
- [41] Where a party has been successful in the outcome of an appeal the fact that it did not succeed on every issue or ground advanced will not usually warrant a departure from the general principle that costs should follow the outcome of the appeal.²⁴
- [42] However, an appellant will not invariably recover their costs of a successful appeal. In *Richards v The Sandy Cape Deep Sea Fishing Club Inc*²⁵ the appellant fishing club sought to appeal a judgement of the District Court in favour of Mr Richards who had been injured whilst on a boating trip. Both liability for the injuries sustained by Mr Richards and the quantum of damages awarded were in dispute. The Court of Appeal allowed the appeal, reducing Mr Richards's damages. The primary findings on liability were not disturbed. The Court held:
- The appellant was unsuccessful on appeal on the issue of liability but was successful in reducing the quantum of damages although not on all of its contentions on quantum. Questions of liability occupied a substantial portion of time at the hearing of the appeal. As each party was partially successful on the appeal, there should be no order as to the costs of the appeal.
- [43] We accept that the decision in *Richards* and similar cases²⁶ do not lay down a principle to be applied in every matter. However there will be circumstances in which it is appropriate that there is no order as to costs of an appeal. Such are the circumstances in this case.
- [44] For the reasons we have set out and in light of the outcome in the appeal, the appropriate order is that there is no order as to costs.

Orders

²¹ *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, [26].

²² *Latoudis v Casey* (1990) 170 CLR 534.

²³ *Oshlack v Richmond River Council* (1998) 193 CLR 72.

²⁴ *John Urquhart t/as Hart Renovations v Partington & Anor* [2016] QCA 199.

²⁵ [2003] QCA 72.

²⁶ See for example *Speight v Syme* (1894) 20 VLR 107; *Australian Machinery Co Pty Ltd v Hudson* (1939) St R Qd 168.

[45] We make the following orders:

- (a) In APL027-18 leave to appeal is refused.
- (b) In APL278-17 there is no order as to costs.