QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Queensland Home Improvements Pty Ltd v Flanagan & Anor* [2019] QCATA 44
PARTIES:	**QUEENSLAND HOME IMPROVEMENTS PTY LTD** (applicant/appellant) **v** **EMMA CAROLINE FLANAGAN and LEOPOLD RICHARD LAVARRE-WATERS** (respondents)
APPLICATION NO/S:	APL245-18
ORIGINATING APPLICATION NO/S:	BDL313-16
MATTER TYPE:	Appeals
DELIVERED ON:	9 April 2019
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown Member Howe
ORDERS:	**Leave to appeal refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – where respondents successful in counter application against applicant – where tribunal awarded respondents costs of the proceedings below – where costs awarded pursuant to s 77(3)(h) of the *Queensland Building and Construction Commission Act* 1991 (Qld) – where applicant's legal representative failed to file submissions on costs – whether parties afforded procedural fairness – whether tribunal observed natural justice – whether tribunal erred in stating in costs decision that a finding had been made allowing applicant's claim – whether leave to appeal should be granted. APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – HEARING OF APPEAL – PROOF AND EVIDENCE – where informal communications between tribunal registry and parties – whether leave should be given to rely on communications as fresh evidence. *Queensland Civil and Administrative Tribunal Act* 2009

(Qld), s 28, s 29, s 107, s 142, s 230
Queensland Civil and Administrative Tribunal Rules 2009 (Qld), sch

Cachia v Grech [2009] NSWCA 232 (30 July 2009)
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577*Queensland Home Improvements Pty Ltd v Flanagan & Anor (No 2)* [2018] QCAT 292 (27 August 2018)
Queensland Home Improvement Pty Ltd v Flanagan and Levarre-Waters [2018] QCAT 217 (8 June 2018)
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Rocci v Diploma Construction Pty Ltd [2004] WASC 18 (16 February 2004)

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

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] Queensland Home Improvements Pty Ltd ('QHI') entered into a contract with the respondents to build a deck at the respondents' property. The parties fell into dispute. QHI commenced proceedings in the Magistrates Court of Queensland seeking the recovery of monies due and owing to it under the contract.

[2] A Magistrate subsequently ordered the transfer of the proceedings to the tribunal.[1] For reasons not entirely clear, the proceeding was transferred to the tribunal's minor civil disputes jurisdiction. The proceeding was subsequently transferred to the tribunal's building list.[2]

[3] QHI claimed an amount of $3,224.00, interest and costs. The respondents counterclaimed for damages for breach of contract by QHI claiming $22,245.58.[3]

[4] The matter progressed to a hearing and a final decision. The Tribunal found that QHI had breached the contract and, on the counter application, awarded the respondents damages of $8,632.31. In assessing damages, the Tribunal made allowance for the outstanding balance payable under the contract to QHI by

1 Order made 17 October 2016.
2 Order made 1 December 2016.
3 Response and counter-application filed in BDL313-16.

deducting the sum of $3,224.00[4] (the primary decision). The Tribunal made no separate decision in respect of QHI's application.

[5] The Tribunal made directions for the parties to file submissions on costs. The Tribunal subsequently ordered QHI to pay the respondents' costs of the proceedings fixed in the amount of $10,683.85[5] (the costs decision).

[6] QHI appeals the costs decision. The primary decision is not appealed.

Appeals – the statutory framework

[7] A party may appeal to the appeal tribunal against a decision of the tribunal if a judicial member did not constitute the tribunal in the proceeding.[6] A party cannot appeal against a cost-amount decision.[7] A cost-amount decision means a decision of the tribunal about the amount of costs fixed or assessed under s 107 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').[8] A party may only appeal against a costs order with the leave of the appeal tribunal.[9] An appeal on a question of fact or mixed law and fact can only be made with the leave of the appeal tribunal.[10]

[8] In deciding an appeal on a question of law the appeal tribunal may confirm or amend the decision, set aside the decision and substitute its own decision, set aside the decision and return the matter to the tribunal for reconsideration, or make any other order the appeal tribunal considers appropriate.[11]

[9] If the appeal tribunal grants leave to appeal, where an appeal involves a question of fact or mixed law and fact, the appeal must be decided by way of rehearing. The appeal tribunal may confirm or amend the decision or set aside the decision and substitute its own decision.[12]

[10] The principles in relation to whether leave to appeal should be granted are well established:

(a) Is there a reasonably arguable case of error in the primary decision?[13]

(b) Is there a reasonable prospect that the applicant will obtain substantive relief?[14]

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4 *Queensland Home Improvement Pty Ltd v Flanagan and Levarre-Waters* [2018] QCAT 217 (8 June 2018).
5 *Queensland Home Improvements Pty Ltd v Flanagan & Anor (No 2)* [2018] QCAT 292 (27 August 2018).
6 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), s 142(1).
7 Ibid, s 142(2)(c).
8 Ibid, sch 3 (definition of 'cost-amount decision').
9 Ibid, s 142(3)(a)(iii).
10 Ibid, s 142(3)(b).
11 Ibid, s 146.
12 Ibid, s 147.
13 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
14 *Cachia v Grech* [2009] NSWCA 232 (30 July 2009), [13].

(c) Is leave necessary to correct a substantial injustice to the applicant caused by some error?[15]

(d) 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?[16]

The grounds of appeal and the submissions by the parties

[11] QHI relies upon the following grounds of appeal:

(a) The failure by QHI's then legal representatives to file submissions on costs in the proceeding below has resulted in a 'substantial miscarriage of justice'.

(b) QHI was denied natural justice and procedural fairness.

[12] The submissions by QHI expand upon the grounds of appeal. QHI says that its legal representatives did not file a costs submission or advise it that the respondents had filed a costs submission. QHI says that it was entitled to rely upon its legal representatives to act in a timely and professional manner, maintain communication and provide advice when required.

[13] QHI says that the learned member erred in allowing the respondents' costs submission. QHI says that what the respondents filed were not submissions but rather a costs schedule. QHI says that it has 'not seen a copy of the respondents cost submission'.

[14] QHI says that the tribunal registry made contact with the respondents after the filing of the costs schedule and requested that the respondents file a costs submission. QHI says that this occurred after the date had passed for the filing of the respondents' submissions. QHI says that this constitutes a discretionary error and a procedural error.

[15] QHI says that the result of it being given no opportunity by the learned member to 'submit (its) costs' is that it could be perceived that QHI has been disadvantaged 'or the subject of bias'. QHI says that no attempt was made by the registry to contact it or its legal representatives to request that QHI file its cost submission which indicates possible bias.

[16] The submissions by QHI raise what is a further ground of appeal. QHI says that the learned member erred in finding that the respondents were the successful party in the proceedings. QHI says that it was also successful in the proceedings in respect of its claim and that the respondents were only partially successful in respect of their counterclaim. In addition, QHI says that the learned member erred in allowing costs that were not costs in relation to the conduct of the proceedings referring to amounts allowed for certification fees and costs and airfares.

[17] QHI says that the respondents should be ordered to pay QHI's costs of the proceedings below fixed in the amount of $9,455.

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

16 *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.

[18] The respondents say that they have at all times proceeded on the basis that QHI was legally represented and communicated with QHI's legal representatives. The respondents say that any failure by QHI's legal representatives is a matter between QHI and its lawyers and that QHI had sufficient time to file costs submissions if it was concerned its legal representatives had not done so.

[19] The respondents say that there is no evidence upon which it could be suggested that the learned member displayed bias and that QHI was given an extension of time to file its costs submissions.

[20] The respondents say that QHI was not successful in its claim, that the learned member found the works had not reached practical completion and QHI failed to establish an entitlement to the final payment. The respondents say that, in allowing for the balance payable under the contract, the learned member was correctly applying the relevant principles in relation to the assessment of damages in building disputes where a home owner sues a builder for breach of contract.

A brief history of the costs decision

[21] It is appropriate to set out a brief history of the costs decision.

[22] The primary decision was delivered on 8 June 2018. The decision included directions for the parties to file submissions on costs. The respondents were directed to file and serve submissions by 14 June 2018 and QHI was directed to file and serve submissions in response by 21 June 2018.[17] The tribunal record indicates that the decision was sent to the parties by post and email on 8 June 2018.

[23] It is at this point that a series of communications occurred between the parties and the tribunal registry. Both parties refer to these communications in their submissions in this appeal. Before we address those communications and their relevance in this appeal, we will make some observations about the tribunal record, the tribunal file and how the tribunal may inform itself. Schedule 2 of the QCAT Act sets out the various subject matters for the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) ('QCAT Rules').

[24] The principal registrar of the tribunal must, for each proceeding, keep a record containing all documents filed in the registry for the proceeding.[18] Pursuant to the QCAT Rules, the record for a proceeding means the record kept under s 230 of the QCAT Act.[19] A party to a proceeding may, without charge, inspect the record kept for the proceeding.[20] A document is filed when the principal registrar records the document and stamps the tribunal's seal on it.[21] A document that is electronically filed is taken to be a document in a record for the proceeding.[22]

[25] Separate to the record for the proceeding is the tribunal file. The tribunal file is maintained by the registry and contains administrative documents which include, among other documents, copies of communications between the registry and the

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17 Decision in BDL313-16 dated 19 August 2018.
18 QCAT Act, s 230(1).
19 QCAT Rules, sch (definition of 'record').
20 QCAT Act, s 230(2).
21 QCAT Rules, r 31(1).
22 Ibid, r 34(1)(b).

parties. The file does not form part of the record for the proceeding and is not therefore available to be inspected.

[26] The various email communications referred to by the parties do not form part of the record of the proceeding. Should the email communications be considered as evidence and, if so, are the communications fresh evidence upon which the parties should be given leave to rely? We pause here to note that neither party has applied for leave to adduce fresh evidence yet both parties seek to rely upon (largely) the various communications to which we have referred.

[27] In order to obtain leave to rely upon fresh evidence in an appeal a party must show that:

(a) The evidence could not have been obtained with reasonable diligence at the original hearing;

(b) That if it was allowed to be relied upon it would probably have an important impact on the result of the case; and

(c) That the evidence is credible.[23]

[28] All of the requirements set out above must be satisfied before fresh evidence will be permitted. For the reasons that follow, we allow the fresh evidence.

[29] As we have observed, the respondents were directed to file and serve their costs submissions by 14 June 2018. The respondents forwarded by email to the tribunal registry, which email was also forwarded to QHI's legal representatives, a document titled 'Costs Schedule' on 14 June 2018.[24] The document comprised a list of outlays incurred by the respondents attaching various receipts, invoices and the like. The document contained no submissions addressing the substantive issues relevant to seeking an order for costs.

[30] On 21 June 2018 the tribunal registry forwarded an email to the respondents, which was also forwarded to QHI's legal representatives. The email reads:

> I have forwarded the attached costs submissions to the Tribunal Member and the Tribunal Member has advised that what you have provided is a series of statements and invoices. What the Tribunal requires is submissions as to why you are entitled to costs, what those costs are with an explanation and the reasonableness of the charges.[25]

[31] On 21 June 2018 the respondents forwarded by email to the tribunal registry, which email was also forwarded to QHI's legal representatives, an amended costs schedule.[26] The amended schedule set out the various amounts claimed by the respondents by way of costs and submissions addressing each amount claimed.

[32] On 22 June 2018 QHI's legal representative forwarded an email to the tribunal registry, which email was also sent to the respondents, stating:

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23 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.
24 Applicant's Appeal Book, 65.
25 Ibid, 64.
26 Ibid, 64.

> Please advise when the Applicant's submissions on costs in reply will now be due. We suggest by 4.00pm on 6 July 2018.
>
> Please confirm, thank you.[27]

[33] On 25 June 2018 the tribunal registry forwarded an email to QHI's legal representatives, which email was also sent to the respondents, stating:

> The Tribunal Member has advised that that date is satisfactory.[28]

[34] It is common ground that no costs submissions were filed by QHI. On 27 August 2018 the costs decision was delivered after a determination on the papers.

[35] The relevance of the email communications, which were in existence at the time of the costs decision, was not apparent at the time. The communications have only become relevant as a result of what QHI says is the failure by the tribunal below to afford procedural fairness and observe natural justice. There can be no doubt that the evidence is credible and that it is directly relevant to the disposition of the appeal.

[36] The emails make clear that both parties received all communications between the tribunal registry and the parties. It is apparent from the Tribunal directions and the emails that both parties were aware of the dates by which submissions on costs were required to be filed. Although the directions made by the learned member regarding costs did not explicitly state that the determination of costs would be on the papers, it is reasonably clear from the primary decision and the directions that this would be the case.

[37] Perhaps a different course of action the Tribunal below might have adopted, after the filing by the respondents of their original costs submissions, would have been to list the matter for a directions hearing and, in that hearing, raise with the parties any relevant matters concerning the costs submissions. Alternatively the tribunal below could have made further directions setting out clearly what the Tribunal required the parties to address in their costs submissions. These courses of action would also have enabled the Tribunal to discharge its duties pursuant to s 28 and s 29 of the QCAT Act. The tribunal must deal with matters in a way that is accessible, fair, just, economical, informal and quick.[29] Achieving these objects must not be at the expense of ensuring that the rules of natural justice are observed and the parties are afforded procedural fairness. Informal communications, such as those that occurred here, between the tribunal registry and parties have the potential to create at least an appearance of a failure to observe natural justice and to afford procedural fairness.

[38] QHI complains that it was not made aware the respondents had filed costs submissions and that its solicitors did not file costs submissions. Neither of these complaints reveals error by the learned member. QHI's complaints relate to the conduct of its legal representatives. This is a matter between QHI and its solicitors, and is not a proper ground of appeal.

[39] QHI complains that the tribunal below acted in a way that advantaged the respondents. This relates to the communications preceding the filing by the

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27 Respondents' Appeal Book, 13.
28 Ibid.
29 QCAT Act, s 3(b).

respondents of their further costs submissions. There was no error by the learned member. Both parties were included in the communications with the tribunal registry. QHI's solicitor nominated a date by which the applicant's costs submissions would be filed. The tribunal registry confirmed this date. That QHI did not then file its costs submissions is a matter between QHI and its legal representatives.

[40] QHI says that it was successful in the proceedings below and that it should be entitled to its costs. In the primary decision the learned member found:[30]

> [45] In my opinion the contract as varied was to provide a deck that complied with the DA, which meant that it was to have screening, in accordance with that DA. QHI have failed to provide such a deck and are in breach of the Contract as varied as it has not carried out the work in accordance with the amended plans nor has it complied with the relevant laws and legal requirements.
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> …
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> [50] The subject work has not reached a stage where the contract as varied had been performed and all relevant statutory requirements have been reached.
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> …
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> [55] The Homeowners claim damages for QHI's breach. In doing so they must give credit for the amount of $3,224.00 outstanding as the final progress payment.
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> …
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> [56] Part of QHI's claim is for $1,224 for additional digging. The claim was particularised in a spreadsheet entitled Provisional Costs and Variations for Flanigan 2 March 2016 set out dates, hours charged and whether the work was carried out by a labourer or tradesman. The Homeowners allege that the spreadsheet is an accurate, (sic) contradictory and inflated…
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> …
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> [58] I accept that there may have been some inaccuracy in the spreadsheet but I am unable to identify, with any degree of precision, how much was overcharged if any, I decline to make any reduction in the additional amount claimed.

[41] The learned member then went on to assess the respondents' damages for QHI's breach of contract.[31]

[42] In the costs decision, the learned member found:[32]

> [1] The decision in this matter was delivered on 19 April 2018. I allowed the Applicant/Builder's claim for $3,224.00 under the contract. I allowed the Respondents'/Owners' counter claim for damages for $11,856.30. I directed

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30 *Queensland Home Improvement Pty Ltd v Flanagan and Levarre-Waters* [2018] QCAT 217 (8 June 2018), [45], [50], [55], [56], [58].

31 Ibid, [59]

32 *Queensland Home Improvements Pty Ltd v Flanagan & Anor (No 2)* [2018] QCAT 292 (27 August 2018), [1], [4] (citations omitted).

> the Applicant pay the Respondents/Owners the sum of $8,632.31. I directed the parties file their submissions as to costs. The Respondents/Owners have filed submissions within the time limits directed, the Applicant, despite having been granted an extension of time, has not filed any submissions.
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> …
>
> [4] Section 77 of the *Queensland Building & Construction Commission Act* 1991 (Qld) displaces the usual order in Tribunal proceedings that each party bear their own costs. The general rule about costs is thereby incorporated into building disputes before the Tribunal. The general rule is that a successful party is entitled to recoup its costs against the other party. That is, costs should follow the event.

[43] We have some difficulty in reconciling, on the one hand, the learned member's assessment of damages in the reasons for the primary decision and, on the other, the statement in the reasons for the costs decision that QHI's claim under the contract was allowed.

[44] The learned member made no finding in favour of QHI in the primary decision in respect of QHI's claim. The learned member found that the respondents were required to give credit for the amount of $3,224.00 outstanding as the final progress payment. The learned member relied upon *Rocci v Diploma Construction Pty Ltd* ('*Rocci*')[33] as setting out the applicable principles in respect of the respondents' entitlement to damages.[34]

[45] The learned member observed that the claim for $3,224, the subject of the proceedings as commenced by QHI in the Magistrates Court, comprised the last stage payment of $2,000 and $1,224 for additional digging. Although the reasons are not clear, the claim for additional digging appears to have been accepted by the learned member as a variation amount with the learned member declining to make any reduction 'in the additional amount claimed'.[35] It also appears from the reasons that the learned member found the consequence of the build not reaching practical completion was that QHI was not entitled to the final payment of $2,000.

[46] The learned member made no finding as to whether the contract between the parties was an entire contract. Despite this, the learned member referred to the requirement that the respondents give credit for the amount of $3,224 outstanding as the final progress payment in assessing the amount of damages in favour of the respondents. This reference, and the learned member's reference to the passage from *Rocci*, leads us to conclude that the learned member in fact determined the amount (namely, $3,224) that would have been payable to the builder under the contract, as varied, had the builder *not* breached the contract. The learned member then applied orthodox principles in assessing the respondents' entitlement to damages for the builder's breach of the contract. When approached this way, it is readily apparent that there was no decision in favour of QHI on its claim in the primary decision. Not only is this the preferable interpretation of the primary decision, it is the only logical interpretation of the decision. We conclude that the learned member erred in the

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33 [2004] WASC 18 (16 February 2004), [23].

34 *Queensland Home Improvement Pty Ltd v Flanagan and Levarre-Waters* [2018] QCAT 217 (8 June 2018), [55].

35 Ibid, [58].

reasons for the costs decision in stating that he allowed QHI's claim under the contract. Nothing however, in the end result, flows from this error.

[47] Whether the learned member erred, not in his approach to assessing the respondents' entitlement to damages, but in relation to QHI's entitlement to a final decision in respect of its claim, is not a matter for determination in this appeal. QHI was entitled to appeal the primary decision below. It has not done so.

[48] Finally, QHI makes a number of submissions regarding the amount of the costs awarded. In this regard, the decision below is a cost-amount decision. As we have observed, an appeal against a cost-amount decision may only be made to the Court of Appeal. QHI has no right of appeal to this Appeal Tribunal on a cost-amount decision.

Conclusion

[49] We have concluded that the learned member erred in the reasons in stating that a finding had been made allowing QHI's claim under the contract however nothing flows from this error. We have concluded that there is otherwise no reasonably arguable case of error in the costs decision. It follows that there is no reasonable prospect that QHI will obtain substantive relief or that leave is necessary to correct a substantial injustice to the applicant caused by some error. Finally there is no question of general importance upon which further argument, and a decision of the appeal tribunal, would be to the public advantage.

[50] Leave to appeal is refused.