

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Sommers v Bycroft* [2020] QCATA 55

PARTIES: **MARY LYNNE SOMMERS**
(appellant)

v

DANIEL PETER BYCROFT
(respondent)

APPLICATION NO/S: APL187-19

ORIGINATING APPLICATION NO/S: MCDT713/19 (Southport)

MATTER TYPE: Appeals

DELIVERED ON: 23 April 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS: **The application for costs made by Daniel Peter Bycroft is dismissed.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where appeal from an Adjudicator in a minor civil dispute was dismissed for non-compliance with the directions of the Appeal Tribunal – where application for costs by respondent to the appeal – whether the Appeal Tribunal can award costs in an appeal in a minor civil dispute

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – STATUTORY BASIS GENERALLY – where appeal said to have no merit and was brought to frustrate the result of proceedings – where respondent to appeal inconvenienced by way appeal conducted – where party seeking legal costs had no leave for legal representation – whether it is in the interests of the justice to award costs

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 100, s 102
Queensland Civil and Administrative Tribunal Rules 2009 (Qld), r 83, r 84

Maszlik v Lorraine Palmer t/as Bundaberg Park Lodge

[2016] QCATA 94
Meiklejohn's Accountants (Qld) Pty Ltd v Chen [2016]
 QCATA 1
Oatley v Pertzelt [2011] QCATA 92
Sommers v Bycroft [2019] QCATA 130

REPRESENTATION:

Appellant: Self-represented
 Respondent: Solicitor with Bell Legal Group

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] This is an application for costs in an appeal from a decision made by an Adjudicator in a residential tenancy application. The Adjudicator had terminated the periodic tenancy of Mary Lynne Sommers on the ground that the lessor would suffer excessive hardship if the tenancy were not terminated. The lessor was a representative of a deceased's estate. The Adjudicator issued a warrant for possession to give effect to the termination.
- [2] The tenant appealed to the Appeal Tribunal against that order and applied for a stay. On 30 August 2019, the stay was refused by the Appeal Tribunal and the warrant for possession was reissued.¹
- [3] Meanwhile the appeal continued, and the tenant was directed by the Appeal Tribunal in the usual way to file submissions in support of the appeal. The tenant applied for an extension of time to file such submissions and this was granted, but the directions warned the tenant that if submissions were not filed by the extended date, the appeal may be dismissed without further notice. The tenant did not file submissions and so, on 12 December 2019, the appeal was dismissed pursuant to section 48 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) for non-compliance with the Appeal Tribunal's directions. By that time some six weeks had elapsed since the extended time for compliance.
- [4] Daniel Peter Bycroft was the applicant in the tribunal proceedings and is the respondent to this appeal. He now applies for costs in the appeal. It is relevant to the costs application that the Administrator of the estate of the deceased was a consultant employed by Bell Legal Group and Mr Bycroft is a solicitor who is an Associate in that same firm. Mr Bycroft says that he was appointed agent for the Administrator for the termination proceedings and also for the appeal, and that Bell Legal Group was engaged to act as legal representatives in those proceedings.²

¹ Reasons were given in writing and reported in *Sommers v Bycroft* [2019] QCAT 130.

² Paragraphs 23, 26 and 27 of submissions dated 9 January 2020. No point was taken in the appeal about whether the agency satisfied the provisions of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) so it should be assumed that it did.

- [5] The costs application stated that as at 1 November 2019 total costs of \$15,000 had been incurred in the application made to the tribunal below and in the appeal, although only \$5,000 was sought for the costs of the appeal.³ In submissions of 9 January 2020 it was said that the costs of dealing with the appeal had risen to \$15,000 on their own, although the amount then sought for costs was \$10,000. It was suggested that an alternative approach would be to have the costs assessed on the Supreme Court scale and paid by the tenant after assessment.
- [6] The grounds relied on in support of the application for costs are that the appeal had no merit and the tenant should have been aware of this. Also the tenant's conduct of the appeal unnecessarily caused disadvantage to Mr Bycroft, and it appeared that the appeal was made simply to frustrate Mr Bycroft obtaining vacant possession of the premises on behalf of the estate, and it would be unfair not to make a costs order. It was said that on two occasions in October 2019 Mr Bycroft put the tenant on notice that costs would be sought against her.
- [7] The submissions filed in support of the costs application did not address a possible issue arising from the fact that the appeal was in a 'minor civil dispute'. The concern is that Justice Carmody in the Appeal Tribunal held in *Maszlik v Lorraine Palmer t/as Bundaberg Park Lodge* [2016] QCATA 94 that no costs can be awarded at all in an appeal in a minor civil dispute. Having considered this and having reviewed other authorities however, I have reached the view that costs in an appeal in a minor civil dispute fall to be considered in the usual way. Therefore, respectfully I differ from the view expressed in *Maszlik*. I need to explain why.
- [8] The starting point is Division 6 of the QCAT Act which, together with the QCAT Rules,⁴ govern when costs can be awarded in the tribunal. The most relevant parts of Division 6 for the purpose of this analysis are section 100 and subsections (1) and (2) of section 102. They read:

100 Each party usually bears own costs

Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding.

102 Costs against party in interests of justice

- (1) The tribunal may make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order.
- (2) However, the only costs the tribunal may award under subsection (1) against a party to a proceeding for a minor civil dispute are the costs stated in the rules as costs that may be awarded for minor civil disputes under this section.

- [9] Section 102(2) needs to be read with the relevant rules:

83 Costs that may be awarded for minor civil dispute other than minor debt claim

³ Paragraphs 3 and 40 of the submissions dated 1 November 2019.

⁴ *Queensland Civil and Administrative Tribunal Rules 2009* (Qld).

For section 102 of the Act, the tribunal may award costs against a party to a proceeding for a minor civil dispute other than a minor debt claim—

- (a) only if the party is a respondent against whom the tribunal has made a final decision; and
- (b) only to order the party to pay to the applicant the amount of any prescribed fee paid by the applicant on filing the application for the proceeding.

84 Costs that may be awarded for minor debt claim

(1) For section 102 of the Act, the tribunal may award costs against a party to a proceeding for a minor debt claim only to order the party to pay an amount for 1 or more of the following—

- (a) the prescribed fee for filing the application for the claim;
- (b) a fee charged by a service provider for electronically filing a document;
- (c) a service fee and travelling allowance at the rate of the prescribed bailiff fees;
- (d) a business name or company search fee.

(2) In this rule—

prescribed bailiff fees means the fees prescribed under the Uniform Civil Procedure (Fees) Regulation 2009, schedule 2, part 2.

[10] In *Maszlik*, Justice Carmody considered that an appeal in a minor civil dispute came within section 102(2) of the QCAT Act and therefore the Appeal Tribunal was constrained by Rule 83 and could not award costs. On first reading it does appear that section 102(2) applies to the tenant in this appeal because the tenant is indeed a ‘party to a proceeding for a minor civil dispute’. The tenant did not cease to hold that status merely because she appealed to the Appeal Tribunal. Hence, it might be argued that the restricted costs regime in minor civil disputes applies to the tenant.

[11] However, by virtue of the appeal, in my view the tenant had another status as well. By section 143 of the QCAT Act, in order to appeal in a minor civil dispute, the tenant was required to apply for leave to appeal. It seems clear from the QCAT Act that such an application is a ‘proceeding’ and that if leave is granted the appeal will be a ‘proceeding’. This appears from the definition of proceeding in Schedule 3 to the Act:

proceeding—

- (a) generally—means a proceeding before the tribunal, including an appeal before the appeal tribunal and a proceeding relating to an application for leave to appeal to the appeal tribunal; or
- (b) for chapter 7—see section 244.

[12] It may be noted that the words ‘a proceeding relating to an application for leave to appeal’ are also used in section 165 of the QCAT Act when referring to the constitution of the Appeal Tribunal.

- [13] Section 39 of the QCAT Act defines a ‘party to a proceeding’ but that section clearly only applies to the original application. Hence a party to an application for leave to appeal or to an appeal would not be a party to a proceeding by virtue of section 39. Instead, in section 148 (giving final decision in an appeal) and section 150 (party may appeal – decisions of appeal tribunal) such a party is described as a ‘party to the appeal’ or a ‘party to an appeal’. A party to an appeal is also described in the Act in many places as a ‘party to a proceeding’ because several appropriate procedures are applied to such a party in that way.⁵ Where a party to an appeal is described in that way in the Act, the word ‘proceeding’ must be a reference to an application for leave to appeal or to the appeal itself.
- [14] Having applied for leave to appeal therefore, the tenant would not only be a party to a proceeding for a minor civil dispute but would also be a party to the application for leave to appeal which itself is a proceeding. If leave is given, then the tenant would be a party to the appeal, which is also a proceeding. Neither of these appeal proceedings can be described as a ‘proceeding for a minor civil dispute’ within section 102(2).
- [15] From a perspective of legislative drafting it also seems to be the case that Rules 83 and 84 applied by section 102(2) were not intended to restrict the costs which could be awarded in an appeal in a minor civil dispute because the restrictions in those rules are only relevant to the original application and not to anything ordinarily done on appeal.
- [16] Hence, in my view section 102(2) of the QCAT Act is not engaged in an appeal in a minor civil dispute. Instead, the usual rule in section 100 of the QCAT Act applies to such an appeal and by section 102(1) a costs order can be made if it is in the interests of justice to do so. A review of previous Appeal Tribunal decisions discloses that this has also been the approach of the Appeal Tribunal where there has been an application for costs in an appeal in a minor civil dispute.⁶
- [17] Turning now to the merits of this particular application, it is notable that there was no order giving leave for Mr Bycroft to be legally represented in the appeal. Legal representation is not a right enjoyed in the tribunal – leave must be applied for.⁷ This was regarded as fatal to an application for costs for a successful strike out application in *Oatley v Pertz* [2011] QCATA 92, [22] (Justice Wilson President). However, where there was no oral hearing so that leave was not really required, the lack of leave was not regarded as conclusive in *Meiklejohn’s Accountants (Qld) Pty Ltd v Chen* [2016] QCATA 1, [15] (Senior Member Stilgoe).
- [18] It is not a good use of the tribunal’s resources, and it can cause delays, if a party is required to obtain leave for legal representation when a matter is to be dealt with on the papers. This is because if such an application is made, submissions are usually

⁵ Obvious examples are section 29 (ensuring proper understanding and regard), section 42 (joinder), section 43 (representation), and sections 47 and 48 (early disposal).

⁶ *Caysand No 24 Pty Ltd v Nugent* [2012] QCATA 73 (Justice Wilson President); *Fast Access Finance (Beaudesert) Pty Ltd and Anor v Charter and Anor (No 2)* [2012] QCATA 172 (Dr J R Forbes); *Meiklejohn’s Accountants (Qld) Pty Ltd v Chen* [2016] QCATA 1, [23] (Senior Member Stilgoe). This was also the approach in *Jasen v Robert Herd, Stuart Harrigan, Herdlaw Solicitors* [2014] QCATA 3 although in that case the tribunal decided that the claim was not in fact a minor civil dispute (Senior Member O’Callaghan and Acting Senior Member Howard).

⁷ Section 43 of the QCAT Act.

required from the other party and then a decision has to be made by the tribunal about it. Yet the tribunal cannot stop a party obtaining legal help to prepare submissions which the party then signs in their own name. And the tribunal cannot stop a party from engaging solicitors to advise on the evidence required or to help in gathering such evidence. So there is little point in requiring leave to be obtained where a matter is to be heard on the papers.

- [19] In those circumstances and bearing in mind the approach taken in *Meiklejohn's Accountants*, in my view it would be unfair to restrict costs awards in a matter determined on the papers to those parties who have leave to be legally represented.
- [20] In his submissions Mr Bycroft addresses the criteria in section 102(3) to which the Appeal Tribunal may have regard when deciding whether to award costs.⁸
- [21] One main point is that the appeal lacked merit. It is said that this appears from the tribunal's written reasons on the tenant's application for a stay of the order. The difficulty with the submission is that although the tribunal member who heard the stay application observed that the Adjudicator had made a number of critical findings of fact, this was not the reason why the stay was refused. The stay was refused because the balance of convenience did not favour the granting of the stay in the tenant's particular financial and personal circumstances.⁹ The tenant's main points on the appeal were based on fresh evidence which she wished to put before the Appeal Tribunal. Since she never applied for leave to do this, nor made submissions in the appeal, the merits of the appeal are difficult to assess. It is difficult therefore to accept Mr Bycroft's submissions that the tenant acted unreasonably in bringing the appeal.¹⁰
- [22] Mr Bycroft says that he was 'unnecessarily disadvantaged' by the way the appeal was dealt with by the tenant.¹¹ He provides a list of things which are alleged to be of disadvantage.¹² Apart from causing delays, the main point made is that having brought the appeal, and having failed to achieve a stay, the tenant then lost interest in the appeal and did nothing. This meant the tenant failed to comply with the tribunal's direction to file submissions in the appeal. The tenant may have taken the view that the warrant of possession would be executed before the appeal had a chance to be heard and so it was pointless to pursue the appeal. If that was the tenant's approach to the matter, it would have been completely understandable. But she should have withdrawn the appeal if she was not going to pursue it. By failing to withdraw the appeal, it can be seen that Mr Bycroft's costs increased. This is because he needed to inform the tribunal that he had not yet received the tenant's submissions.¹³ It was right that Mr Bycroft informed the tribunal about this in order to keep the tribunal informed.¹⁴

⁸ Submissions dated 9 January 2020.

⁹ *Sommers v Bycroft* [2019] QCATA 130, [10].

¹⁰ Paragraphs 42 and 43 to 45 of the submissions.

¹¹ The words used in section 48 of the QCAT Act.

¹² Paragraph 37 of the submissions.

¹³ Letter of 1 November 2019.

¹⁴ Although it is noted that Mr Bycroft was only obliged to file submissions in reply if the tenant filed submissions, which she did not do. So Mr Bycroft was not himself in breach of the Appeal Tribunal's directions.

- [23] Of more central importance to the application for costs is the question whether it would be fair to order the tenant to pay the legal costs. The Appeal Tribunal's starting point is that neither side will be legally represented and each party usually bears their own costs.¹⁵ This means that when the tenant applied to the Appeal Tribunal for leave to appeal and appeal, her reasonable expectation would have been that if she failed to achieve a stay of the warrant for possession she would not have to pay Mr Bycroft's costs. I think she would have been aware that Mr Bycroft was a solicitor at Bell Legal Group and that he was acting as agent for the Administrator of the estate who had engaged Bell Legal Group to act on behalf of the estate. On that basis the tenant would be aware that her appeal would probably cause the Administrator further legal costs. But there would be no reason for the tenant to think she would be ordered to pay those costs in the ordinary event.
- [24] As the appeal progressed it is likely, from the warning letters from Mr Bycroft, that the tenant understood that there was a possibility that she would be ordered to pay costs. However the appeal had already started and her application for a stay had already been decided by that time. There is nothing in these circumstances which would make it fair to require her to pay costs.
- [25] The only thing which the tenant failed to do which might make it fair for her to pay costs is that she did not withdraw the appeal as soon as she decided not to pursue it. However, as can be seen above, the only additional costs incurred by Mr Bycroft because of this was his communication with the tribunal that no submissions had been received. Bearing in mind that this could be seen from the Appeal Tribunal's file in any case, because the tenant had been ordered to provide the submissions to the Appeal Tribunal as well as to Mr Bycroft, a telephone call or short email to the tribunal from somebody in Mr Bycroft's office would have sufficed.
- [26] This is insufficient to overcome the strong contra-indication against the making of an order for costs. In the circumstances I dismiss the application for costs.

¹⁵ Section 100 of the QCAT Act.