QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Walden v Body Corporate for Seaquester Quays* [2020] QCATA 77
PARTIES:	**JONATHAN NIGEL WALDEN** (applicant\appellant) **v** **BODY CORPORATE FOR SEAQUESTER QUAYS 1 COURTS 21106** (respondent)
APPLICATION NO/S:	APL391-17
MATTER TYPE:	Appeals
DELIVERED ON:	22 May 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Richard Oliver
ORDERS:	**1. The applicant pay the respondent's reasonable costs on and from 24 April 2018 to be assessed and fixed by the Tribunal;** **2. The respondent file and give to the applicant a statement by Mr Hick attaching a short form assessment of costs consistent with these reasons by 18 June 2020.** **3. The applicant file any statement or objection in response to the respondent's assessment of costs by 9 July 2020.** **4. The Tribunal's decision to assess and fix the costs will be determined on the papers without an oral hearing.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL –where an application for costs was made after the applicant's appeal was struck out – where the respondent made a formal offer to settle – where the applicant did not accept the offer to settle – whether the interests of justice require a costs order to be made -whether the costs to be assessed and fixed by the Tribunal.

	Body Corporation and Community Management Act 1997 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 100, s 102 and s 107 *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) Rule 86 *Uniform Civil Procedure Rules* Rule 703
	Calderbank v Calderbank [1975] 3 All E.R. 333 *Fick v Groves (No 2)* 2010] QSC 182 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments CTS 17653* [2010] QCAT 412
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] On 24 October 2019, the Tribunal dismissed the applicant's appeal against a decision of an Adjudicator made on 19 October 2017 pursuant to the *Body Corporation and Community Management Act* 1997. The grounds for the dismissal related to the conduct of the applicant in prosecuting his appeal, and also that the appeal itself lacked merit. I refer to the reasons in that decision which sets out the out the background to the appeal and the reasons for its dismissal. In particular, it was found that the applicant engaged in obstructive conduct, did not comply with the Tribunal's directions on multiple occasions, did not identify any error of law, either in his application for leave to appeal or appeal or in any of the submissions filed in the appeal and finally, that the appeal had no prospects of success.

[2] The general rule in the Tribunal is that under s 100 of the QCAT Act each party must bear their own costs of the proceeding. However, there are exceptions to the general rule if it can be shown that the interests of justice require the Tribunal to make a costs order in favour of one of the parties. Section 103 sets out some of the matters the Tribunal can take into account when considering a costs application. As Justice Wilson said in *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments CTS 17653*[1]:

> Under the QCAT Act 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' point so compellingly to a costs award that they overcome the strong contra-indication against costs orders in s 100.

[3] The reasons for decision in dismissing the appeal demonstrate that this is a case where the interests of justice do require that the respondent be recompensed for the costs incurred in responding to this futile appeal.

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1 [2010] QCAT 412.

[4] Therefore, I will have no hesitation in making an order that the applicant pay the respondent's costs of and incidental to the appeal on a standard basis.

[5] However, that is not the end of the matter because the respondent submits that costs should be paid on an indemnity basis. The reasons for that are set out in submissions filed by the respondent together with, and in reliance on, an affidavit of Paul Jason Hick made on 10 December 2019 which attaches to it, correspondence between Active Law, solicitors for the respondent, and the applicant of 23 April 2018. The is also a letter in response to the offer dated and 29 May 2018.

[6] The letter of 23 April contains an offer to resolve the appeal on the basis that the applicant withdraw the appeal which would have the effect of lifting the stay order on the adjudication of 19 October 2017 and that each party pay their own costs of the appeal. In addition to the offer having been made under Division 3, Part 8 of the QCAT Rules, it was also made in reliance of the principles in *Calderbank v Calderbank* [1975] 3 All E.R. 333, The *Calderbank* offer has a similar effect as a 'formal offer to settle' in that if the end result of the litigation is less favourable to the party to whom the offer is being made, indemnity costs should follow. The letter can be produced at a later stage for the purposes of making a decision about costs.

[7] Although the applicant responded to that offer through his solicitors, Derek Lawyers, and agreed to withdraw the appeal, it was conditional upon the respondent doing certain things, such as removing a light pole and an electrical utilities box, which in effect, was a rejection of the respondent's offer to settle by making a counter-offer.

[8] Rule 86 of the QCAT Rules provides that the tribunal has an additional power to award costs if particular offers to settle are rejected. The rule is in the following terms:

> (1) This rule applies if –
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> (a) a party to a proceeding, other than a proceeding for a minor civil dispute, makes another party to the proceeding a written offer to settle the dispute the subject of the proceeding; and
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> (b) the other party does not accept the offer within the time the offer is open; and
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> (c) in the opinion of the tribunal, the decision of the tribunal in the proceeding is not more favourable to the other party than the offer.
>
> (2) The tribunal may award the party who made the offer all reasonable costs incurred by that party in conducting the proceeding after the offer was made.
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> …
>
> (4) In deciding whether a decision is or is not more favourable to a party than an offer, the tribunal must –
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> (a) take into account any costs it would have awarded on the date the offer was given to the other party; and

(b) disregard any interest or costs it awarded relating to any period after the date the offer was given to the other party.

[9] The Rule makes reference to 'all reasonable costs' rather that the nomenclature used under the *Uniform Civil Procedure Rules* of 'standard' costs and 'indemnity' costs. Therefore, 'reasonable costs' are not necessarily indemnity costs but there is a similarity because Rule 703(3) of the UCPR refers to indemnity costs being those that allow for 'all costs reasonably incurred and of a reasonable amount' by reference to: scale of fees prescribed for the court; any costs agreement between the party and the party's lawyer and charges ordinarily payable by a client to the lawyer. Standard costs are those that necessary or proper for the attainment of justice for enforcing or defending rights of the party whose costs are being assessed.

[10] In QCAT there is no 'scale of costs' as there is in the courts. Perhaps that is why s 107(1) requires the Tribunal to fix the costs if possible. If that is not possible costs can be assessed under the QCAT Rules by reference to a scale 'under the rules applying to a court'. Here the Body Corporate submits the appropriate scale is the District Court Scale which has jurisdiction to decide matter where a monetary claim is between $150,000.00 and $750,000.00. In my view the issues raised in this appeal are not such that would warrant an assessment under this scale and in light of the order to be made it is unnecessary to have regard to a particular scale of costs.

[11] Clearly the outcome for the applicant here was not more favourable than the offer made in the letter of 23 April 2018. Furthermore, the time for consideration and acceptance of the offer of 14 days was reasonable. However, the purported acceptance in the correspondence from Derek Legal did not arrive until a month after the offer was made, and was not a clear acceptance of the offer made by reason of the conditions sought to be imposed. Even if there was an acceptance, it was out of time.

[12] Thereafter, the appeal continued and because of non-compliance, the application to strike out was filed. By continuing on with the appeal, the applicant unnecessarily disadvantaged the respondent by forcing it to pointlessly incur costs.[2]

[13] The respondent relies on *Fick v Groves (No 2)*[3] where Applegarth J awarded indemnity costs because the applicants persisted with a practically hopeless case that included claims which they knew were contrary to the facts; they had continued with the proceeding even after receiving evidence that overwhelmingly contradicted their case; and that the persistence in conducting the action generated unnecessary (and substantial) costs for the respondent in resisting the claim.[4]

[14] The applicant here not only engaged in similar conduct which disadvantaged the respondent in terms of the conduct of the appeal but also, as found in the reasons striking out application, it was obviously frivolous and an abuse of process to which ss 47 and 48 of the QCAT Act applied. The applicant was given a fair opportunity to withdraw the appeal at a time when the respondent had already incurred substantial costs but chose not to do so. To bring matters to the head, the respondent was more

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2 *Ralacom* Ibid, [56].

3 [2010] QSC 182.

4 *Ralacom* Ibid, [61].

or less forced to bring the strike out application at an early stage to save costs of running the appeal proper an incurring more costs.

[15] Taking all of these matters into account, I am of the view that the applicant should pay the respondent's reasonable costs from the date of the offer to settle. Up to the date of the offer the usual mandate under s 100 that each party bear their own costs should apply.

[16] It is submitted that the Tribunal should make an order that the costs be assessed and an independent costs assessor be nominated by the Tribunal. That approach is in my view somewhat cumbersome and torturous and contrary to what is prescribed by s 107(1) that the Tribunal should try and fix costs if it is possible to do so. Although it may prolong the matter I propose instead to make a direction that the respondent file and give to the applicant a short form assessment of reasonable costs and outlays incurred to date. The applicant will have an opportunity to respond to the assessment. The Tribunal will then assess and fix the costs after considering any submission from the applicant. The short form assessment can be provided by attaching it to a short statement by Mr Hick confirming the costs incurred by the respondent.

Orders

[17] Therefore the orders are as follows:

1. The applicant pay the respondent's reasonable costs on and from 24 April 2018 to be assessed and fixed by the Tribunal.

2. The respondent file and give to the applicant a statement by Mr Hick attaching a short form assessment of costs consistent with this decision by:

   18 June 2020.

3. The applicant file any statement or objection in response to the respondent's assessment of costs by:

   9 July 2020.

4. The Tribunal's decision to assess and fix the costs will be determined on the papers without an oral hearing.