

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *DEEEE Pty Ltd as trustee v Body Corporate for Flinders Village Community Titles Scheme 37247* [2023] QCAT

PARTIES: **DEEEE PTY LTD AS TRUSTEE FOR THE SE
FAMILY TRUST**
(applicant)

V

**BODY CORPORATE FOR THE FLINDERS
VILLAGE COMMUNITY TITLE SCHEME 37247**
(respondent)

APPLICATION NO/S: OCL100-21

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 16 May 2023

HEARD AT: Brisbane

DECISION OF: Member Lember

ORDERS: **1. The application is dismissed.**
2. Each party is to bear its own costs.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND
TERRITORY COURTS – COSTS – whether costs should
be awarded - where claim paid in full prior to response –
where matter proceeded only on the question of costs

Body Corporate and Community Management Act 1997
(Qld) s 101B, s 118, s 149B, s 227A, schedule 1A,
schedule 2, schedule 6

Queensland Civil and Administrative Tribunal Act 2009
(Qld) s 12, s 100, s 102, s 105, s 106, s 107, schedule

Queensland Civil and Administrative Tribunal Rules 2009
(Qld) r 86

Ascot v Nursing & Midwifery Board of Australia [2010]
QCAT 364

Beasley v Department of Education and Training [2006]
VCAT 2044

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

Queensland Racing Integrity Commission v Vale [2017]
QCATA 110

Ralacom Pty Ltd v Body Corporate for Paradise Island
Apartments (No 2) [2010] QCAT 412

Sweetvale Pty Ltd v Minister for Planning [2004] VCAT

2000
Valuers Registration Board v Murphy (No. 2) [2019]
QCAT 332

APPEARANCES & REPRESENTATION: This proceeding was determined on the papers, based on the written submissions of the parties, pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

Applicant: Mahoneys Solicitors

Respondent: Self-represented

REASONS FOR DECISION

What is the application about?

- [1] The applicant spent \$7,068.63 pursuing a \$654.64 claim and wants the Tribunal to make an order against the respondent for those costs.
- [2] The Tribunal's decision on costs and the reasons for it follow.

Background facts

- [3] DEEEE Pty Ltd as trustee for the SE Family Trust (DEEEE) is the caretaker for the Flinders Community Village Title Scheme 37247, pursuant to an agreement (by assignment) between DEEEE and the respondent (body corporate).
- [4] A copy of the caretaker agreement is not in evidence; however, the disputed provisions are said by the parties to be:
 - (a) Clause 3.7:

Expenditure by On-Site Manager

The On-Site Manager may with the prior approval of the Body Corporate for the expenditure concerned, spend up to the Expenditure Limit, to purchase consumable supplies and materials, to engage tradesmen to carry out Skilled Work and for other purposes reasonably necessary to perform the Manager's Duties. The Body Corporate must promptly reimburse the On-Site Manager for any expenditure authorised by this clause.

- (b) Clause 3.8:

Provision of equipment

The On-Site Manager must at its own expense provide all equipment, machinery, and tools necessary to carry out the Manager's Duties and must keep them in good working condition.

- (c) Clause 5 of Schedule 1:

Purchase of supplies

Purchase all consumable supplies and materials required for the cleaning and maintenance of Scheme Property (but if the cost exceeds

the Expenditure Limit, the On-Site Manager must first obtain the consent of the Body Corporate).

- [5] The invoices the subject of the claim were partially paid by the body corporate as follows:

Date claimed	Amount claimed	Date Paid	Amount Paid	Balance
26.05.21	\$568.75	03.08.21	\$490.11	\$78.64
10.08.21	\$319.28	17.08.21	\$111.52	\$207.76
07.09.21	\$568.83	16.09.21	\$55.01	\$513.82

- [6] DEEEE says it was able to return and obtain a store refund for some disputed items (chainsaw oil at \$27.99 and Round-Up at \$189.92). This left a balance owing, according to DEEEE, of \$582.31.
- [7] The respondent says in its filed Response that it was prepared to reimburse expenses but needed particulars from the applicant to substantiate the disputed claims. It says that it made “numerous requests” for proper details and sufficient particulars of the disputed expenses, but the applicant refused to provide this information.
- [8] The respondent says it paid the claim amount, although disputed, “in an effort to avoid either party incurring costs unnecessarily”.

What is the legislative framework?

- [9] The *Body Corporate and Community Management Act 1997* (Qld) (BCCM Act) is an ‘enabling Act’ conferring original jurisdiction on the Tribunal for ‘complex’ body corporate disputes, which a contractual dispute between a caretaker and the body corporate is.¹ It is silent on costs, therefore, on this application the general position as to costs set out in sections 100 and 102 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) applies.
- [10] The starting point in the Tribunal is that each party to a proceeding must bear its own costs.² However, the Tribunal can order costs if it considers the interests of justice require it.³
- [11] In *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*⁴ Justice Wilson (then President) said:
- The phrase “in the interests of justice” is not defined in the Act but is to be construed according to its ordinary and plain meaning, which obviously confers a broad discretionary power on the decision-maker.
- [12] The question 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

¹ BCCM Act, section 149B and Schedule 6 Dictionary.

² Section 100, QCAT Act.

³ Section 102(1), *ibid.*

⁴ At [4].

overcome the strong contra-indication against costs orders in section 100 of the QCAT Act.⁵

[13] In deciding whether to award costs in a matter the Tribunal *may* have regard to factors such as:⁶

- (a) whether a party to a proceeding acted in a way that unnecessarily disadvantages another party to the proceeding;
- (b) the nature and complexity of the dispute the subject of the proceeding;
- (c) the relative strengths of the claims made by each of the parties to the proceeding;
- (d) the financial circumstances of the parties; and
- (e) anything else the Tribunal considers relevant.

[14] These factors are not grounds for awarding costs but factors to be considered in determining whether, within the context of the facts and circumstances of each case, the interests of justice require (not merely justify)⁷ a costs order.⁸

[15] Section 105 of the QCAT Act acknowledges that rules may authorise the Tribunal to award costs in other circumstances, including, for example, the payment of costs in a proceeding if an offer to settle the dispute the subject of the proceeding has been made but not accepted.

[16] Rule 86 of the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) (Rules) provides that:

86 Additional power to award costs if particular offers to settle rejected

(1) This rule applies if—

- (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
- (b) the other party does not accept the offer within the time the offer is open; and
- (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.

(3) If a proceeding involves more than 2 parties, this rule applies only if the acceptance of the offer would have resulted in the settlement of the matters in dispute between all the parties.

⁵ Ibid at [29].

⁶ Section 102(3), QCAT Act.

⁷ *Queensland Racing Integrity Commission v Vale* [2017] QCATA 110 at [34].

⁸ *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364 at [9]; *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49 at [8].

(4) In deciding whether a decision is or is not more favourable to a party than an offer, the tribunal must—

(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.

[17] Section 106 of the QCAT Act expressly permits the Tribunal to award costs “at any stage of a proceeding or after the proceeding has ended”.

[18] If costs are ordered, section 107 of the QCAT Act provides that costs must be fixed if possible, or, if not possible, assessed under the Rules.

Discussion

Did the body corporate act in a way that unnecessarily disadvantaged the applicant in the proceeding?

[19] This factor refers to conduct that occurs in a proceeding, as opposed to any that took place prior to the commencement of the proceeding.⁹ However, conduct prior to the proceeding would fall under a consideration of “any other factor the Tribunal considers relevant to its decision on costs” under section 102(3) of the QCAT Act and I address that earlier conduct here, for convenience, on that basis.

[20] DEEEE brought its application on 2 November 2021. The debt amount is described as \$582.31 but the claim sought payment of \$654.64 for “damages for breach of contract”. An explanation was not given for the additional \$72.33 claimed until later costs submissions stated that it pertained to a filing fee (although the filing fee paid was \$358.00, according to Tribunal records).

[21] On 3 December 2021 the body corporate paid the claim amount of \$654.64 and filed a response noting that the payment was made without admission of liability, particularly with respect to the then unexplained “additional amount” of \$72.33.

[22] Given the proceedings were commenced and the claim amount – even though disputed – was paid in response, there is no argument that the respondent disadvantaged the application in the proceeding. To the contrary, the respondent in the proceeding acted sensibly and on a commercial basis having regard to what would be the best use of its own time, resources, and those of the Tribunal. This does not favour a costs order in the applicant’s favour.

[23] As an “other relevant factor” there is no evidence to support the applicant’s submission that it was forced to bring proceedings against a recalcitrant body corporate. Each party accuses the other of being uncooperative, but evidence has not been filed by the applicant to support its case that it particularised the claims via solicitors in a letter dated 21 October 2021, as it asks the Tribunal to disregard evidence of correspondence between the parties filed by the respondent with their costs submissions.

[24] The respondent does not dispute that it did not reimburse the payments sought by the applicant when they were first claimed. They say they questioned some of the

⁹ *Valuers Registration Board v Murphy (No. 2)* [2019] QCAT 332 at [23].

claims and asked for further information in relation to them. They were entitled to do that as regardless of any contractual provision, the body corporate committee (and in fact the caretaker) each have an overriding statutory obligation to the body corporate to act in its best interests:

- (a) A caretaker must, among other things:¹⁰
 - (i) act honestly, fairly and professionally in performing the person's functions under the person's engagement; and
 - (ii) act in the best interests of the body corporate unless it is unlawful to do so.
- (b) Body corporate committee members must, among other things:¹¹
 - (i) act honestly and fairly in performing the member's duties as a committee voting member;
 - (ii) act in the best interests of the body corporate in performing the member's duties as a committee voting member; and
 - (iii) take reasonable steps to ensure the member complies with the BCCM Act, including the code of conduct, in performing the member's duties as a committee voting member.

[25] Even if the caretaker could spend under clause 3.7 and clause 5 of Schedule 1 without prior approval of the body corporate (which has not been established as the dispute resolved prior to any determination of that point), this is not *carte blanche* for the caretaker to spend to the approved limit without any oversight or accountability. Nothing in those clauses prevented the body corporate committee, acting reasonably, from seeking detail or particulars of expenses incurred, particularly where they seemed excessive having regard to spending in prior periods, or where they seemed to fall under clause 3.8, which was not reimbursable.

[26] Consistent with its statutory obligations to the body corporate, the caretaker ought to have responded within a reasonable time with the detail or explanation sought. There is no evidence before the Tribunal that the applicant did that. They were directed to file evidence by 7 January 2022, and they did not file it. The lawyer's letter dated 21 October 2021 appears to reference some explanation, but it was tendered by the respondent with a statement that the applicant objects to the Tribunal relying upon. Even if some expenses were explained, there was clearly a dispute between the parties as to whether the expenses were in fact reimbursable.

[27] In those circumstances it is impossible to find on the evidence that the body corporate acted unreasonably, unnecessarily or to the applicant's disadvantage prior to the commencement of proceedings.

[28] This factor does not favour an award for costs in the respondent's favour.

¹⁰ BCCM Act, section 118 and Schedule 2 Code of Conduct for body corporate managers and caretaking service contractors.

¹¹ BCCM Act, Section 101B and Schedule 1A Code of Conduct for committee voting members.

The relative strength of the parties' claims

- [29] The applicant says that because the claim was paid, the merits of the applicant's claim need not be explored on the costs application. It points out the respondent "capitulated to the entirety of the claimed amount" by paying it in full.
- [30] The respondent says this factor is no longer relevant, but observes that each party's claim had merit.
- [31] Noting that the payment made was expressly done without admission, to put an end to the Tribunal proceedings I find that the payment is not evidence of a concession by the respondent as to the merit of the applicant's claim.
- [32] The respondent appears to have held genuine concerns as to the amounts claimed and whether they were properly payable by the body corporate under the caretaker agreement. These were issues in dispute to be explored in the hearing.
- [33] As Justice Carmody observed in *Queensland Racing Integrity Commission v Vale*:¹²

The expression "relative strength" contemplates a "substantial disparity between the strength of one claim and the weakness of its competitor".¹³ A high level of un-tenability rather than mere tenuousness is envisaged.

It is unlikely that this criterion alone would call for a costs order where there was a real issue to be tried and real justification for the claims made on either side,¹⁴ however the ultimate test is still whether justice requires the costs order or not.

- [34] As there was a real issue to be tried, and no substantial disparity between the applicant's prospects and the respondent's on the material currently before the Tribunal, this factor does not favour an award of costs in DEEEE's favour.

The nature and complexity of the dispute the subject of the proceeding

- [35] The applicant says it was required to bring the dispute as an application to resolve a "complex dispute" because it did not meet the definition of a "debt dispute" in section 229A(7) of the BCCM Act.
- [36] The respondent says the application could have been brought as a minor civil dispute (MCD) – minor debt.
- [37] Among other things, section 149B of the BCCM Act applies to a dispute about a claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or caretaking service contractor for a community titles scheme. A party to such a dispute may apply for an order of QCAT exercising the tribunal's original jurisdiction to resolve the dispute.
- [38] Section 12 of the QCAT Act confers the Tribunal's jurisdiction over MCDs. A 'minor civil dispute' is relevantly defined as (emphasis added):¹⁵

1 (a).. a claim to recover a debt or liquidated demand...;

¹² [2017] QCATA 110 at [50]-[51]

¹³ *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 at [18]-[19].

¹⁴ *Beasley v Department of Education and Training* [2006] VCAT 2044 at [20].

¹⁵ QCAT Act, Schedule 3.

2 However, if an enabling Act confers jurisdiction on the tribunal to deal with a claim (however called) within the meaning of paragraph 1(a), the claim is not a minor civil dispute unless the enabling Act expressly states it is a minor civil dispute.

- [39] Although a “debt dispute” is expressly a minor civil dispute under section 227A, a “complex dispute” under section 149A is not. Therefore, it does appear that the applicant was compelled to bring the claim as a complex body corporate dispute rather than an MCD.
- [40] However, this does not mean the claim involved complexity in the ordinary sense. The nature of the claim and its particularly small amount did not, on the face of them warrant the engagement of legal representatives to assist in the conduct of complex proceedings.
- [41] This factor does not favour a costs order in the applicant’s favour.

The financial circumstances of the parties

- [42] The financial circumstances of the applicant have not been disclosed other than it being described as a “small company”. With respect to the applicant’s lawyers, this description is unhelpful and meaningless.
- [43] Informing the tribunal that a company is “small” (without even saying whether size refers to revenue, staffing or another measure entirely) tells the Tribunal nothing at all about that party’s profitability or financial position.
- [44] The financial circumstances of a party in a costs application involves an assessment of their ability or inability to meet or bear the costs burden. This ought necessarily involve some consideration of the asset/net income/cashflow position of the applicant which is not possible on the material before the Tribunal.
- [45] For the same reason, pointing out that any award of costs will be shared between unit owners is similarly unhelpful. The Tribunal is in no position to assess whether the financial position of the parties is disparate such that one party (the respondent in this case) should bear the applicant’s costs of the proceeding.
- [46] This factor, which the applicant has barely bothered to address, does not favour an award for costs.

Other relevant factors - offers

- [47] Although offers are mentioned in the submissions before the Tribunal there is no evidence of their content that would support a finding that rule 86 of the QCAT Rules is engaged with respect to any offers, nor whether it was unreasonable for the body corporate to reject any offer made by the applicant.
- [48] This factor does not favour an award of costs.

Decision

- [49] For the reasons given, nothing in the circumstances of this application satisfies me that the interests of justice require departure from the Tribunal’s usual position that each party bear their own costs.
- [50] The applicant informs the Tribunal that the only unresolved issue is the issue of costs. In the absence of a filed withdrawal, the decision of the Tribunal is therefore that:

- (a) The application is dismissed.
- (b) Each party is to bear its own costs.