QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Dansur v Body Corporate for Cairns Aquarius CTS 1439 & Anor* [2023] QCATA 14
PARTIES:	**DANSUR PTY LTD** (applicant/appellant) **v** **BODY CORPORATE FOR CAIRNS AQUARIUS CTS 1439** (first respondent) **v** **CATHERINE ANNE BUGEJA and PAUL SADIAUR MARIA BUGEJA** (second respondent)
APPLICATION NO/S:	APL235-20
MATTER TYPE:	Appeals
DELIVERED ON:	23 February 2023
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Richard Oliver
ORDERS:	**1. The second respondents pay the applicant's cost assessed in the sum of $30,500.00 by 30 May 2023.**
CATCHWORDS:	COSTS – INTEREST OF JUSTICE – OFFERS TO SETTLE – where applicant wholly successful in the appeal – where applicant made offers to settle under Rule 86 of the QCAT Rules at various stages of the proceeding – where offer to settle more favourable – whether interest of justice require an order for costs – whether the applicant should recover reasonable costs *Body Corporate and Community Management Act* 1997 (Qld) *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld), s 161 *CH v Queensland Police Service* [2021] QCATA 137 *Mazini v Health Ombudsman (No 4)* [2020] QCAT 365 *Cowen v Queensland Building Construction Commission* [2021] QCATA 103 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (no 2)* [2010] QCAT 412 *Owltown Pty Ltd v Norwinn Commercial (No 3)* [2018]

QCATA 94
Katsikalis v Body Corporate for The Centre [2009] 2 Qld R 320
*Ainsworth v Albrecht (*2016) 261 CLR 167

APPEARANCES & REPRESENTATION: 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] Dansur Pty Ltd is the owner of a lot in the Cairns Aquarius CTS ("Aquarius"). The Bugejas are the owners of lot 83 in Aquarius. Lot 83 is on the top floor of Aquarius which is 16 floors. There are 86 lots in the scheme. The lot 23 has a view across the Cairns esplanade out onto the Coral Sea. The Body Corporate passed a resolution permitting the Bugejas to enlarge a window in their lot which involved the removal of part of the external façade of the building. Dansur challenged the resolution by a referral to an adjudication under the *Body Corporate and Community Management Act* 1997, ("BCCM Act") but the resolution passed by the Body Corporate was upheld. Dansur then appealed the adjudication to the Appeal Tribunal and argued, successfully, that the resolution by the second respondent to permit the work to be carried out by the Bugeja's, was void because a simple majority did not satisfy the requirements of s 161 of the Standard Module.

[2] Dansur now applies for costs of the appeal. The application for costs is opposed, principally on the grounds that the primary position under s 100 of *the Queensland Civil and Administrative Tribunal Act*, is that "each party to a proceeding must bear the party's own costs". Further, there is nothing about this appeal which would overcome the strong contra-indication against costs orders under s 100.[1]

[3] Dansur's position is that despite any contra-indication, the interests of justice require the Tribunal to make an order for costs because it was put to the expense of appealing the adjudicator's decision in the face of settled law.[2] Both *Katsikalis* and *Ainsworth* establish that a resolution approving the disposition of common property must be passed without dissent. In other words, to depart from this established precedent would result in an error of law. This is particularly so where there was no real dispute as to the application of the principles established in *Katsikalis* and *Ainsworth*.

[4] The decision of the adjudicator with respect to the central issue of whether there was a disposal of common property is as follows:

> While the windows are located in a boundary structure, I do not believe that enlargement of the windows involve the disposition of an interest in the common property. I am therefore of the view that an ordinary resolution was sufficient to authorise the works and a resolution without dissent was not required.

[5] It is apparent from those reasons that there was no consideration given by the adjudicator as the actual building work involved to enlarge the window or the impact of the change to the façade of the building. Had this been addressed it ought to have been

---

1 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (no 2).* [2010] QCAT 412
2 *Katsikalis v Body Corporate for "the Centre"* [2009] QCA 77 and *Ainsworth v Albrecht* (2016) 261 CLR 167

found that the existing external part of the windowsill, comprising bricks and mortar, had to be removed and as this was common property it was, inevitably, a disposal of common property. The Bugejas opposed the appeal mainly on the grounds that the above finding of the adjudicator amounted to a finding of fact, which could not be appealed under s 289 of the BCCM Act. Rather, in my view it was a conclusion reached without any finding of fact.

[6] Despite the vagueness of the reasoning of the adjudicator's statement, the Bugejas, by their lawyers opposed the appeal and sought to uphold the adjudication, knowing full well there had to be a removal of common property to achieve the outcome desired by the Bugejas. In doing so they raised novel arguments that were not relied on in the adjudication. In the end they had little relevance given the obvious fact of the removal of the external part of the windowsill.

[7] Although the Body Corporate for the scheme is a party to the proceeding, it sought to withdraw and did not actively participate in the appeal. Costs are only sought against the Bugejas.

[8] The Bugejas argue that having regard to the matters listed in s 102(3) of the QCAT Act there is no basis to depart from the general principle in s 100. However, there are other considerations. In *CH v Queensland Police Service*,[3] the appeal Tribunal endorsed the approach to the application of s 100 in *Mazini v Health Ombudsman (No 4)*[4] and *Cowen v Queensland Building Construction Commission*[5] in preference to approach taken in *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (no 2).*[6] That is, to adopt what was said in *Mazini* at [36]

> In my opinion the correct approach to the operations of s 100 and s 102 of the QCAT Act is similar to that formulated by the Hon P Lyons QC in *Thompson v Cannon* (*supra*): The ultimate question posed by the statutory provisions is whether in a particular case the interests of justice require the Tribunal to make a costs order. That is the effect of the terms of the statute. Because of the use in s 102(1) of the word "require", the default position of no order as to costs should not be too readily departed from. I respectfully agree with the approach of the Hon J B Thomas QC in *Lee* (*supra*) to the comments of Keane JA in *Tamawood* (*supra*), and with his analysis of the considerations relevant to the interests of justice in disciplinary proceedings in *Antley* (*supra*).
>
> I do not consider that there is any justification in the words of the statute for any further constraint on the operation of the power to order costs under s 102, although the section directs attention to a number of matters which may in a particular case be usefully considered. The reference to "any other matter the Tribunal considers relevant" shows that this list is not to be read in a confining sense.

[9] Therefore, the question for consideration here is whether this is a compelling case which requires and order for costs in the interests of justice. In support of such an outcome Dansur has addressed those matters the Tribunal might have regard to under section 102(3) of the QCAT Act. The Bugejas have filed submissions in response.

Complexity

---

3 [2021] QCATA 137 at [7] and [15].
4 [2020] QCAT 365.
5 [2021] QCATA 103.
6 [2010] QCAT 412.

[10] Dansur complains that the Bugejas overly complicated what was a simple case. There was no dispute of fact as to what occurred in the removal of the windowsill and that the replacement window was installed in accordance with the prepared plans. What complicated the case was the arguments attempting to distinguish *Ainsworth* and *Katsikalis* in circumstances where there was no dispute the about the removal of the bricks and mortar that supported the existing window. The Bugejas sought to argue that the new window did not change the boundary line between the common property and the lot but ignored how this was to be achieved. There was some complexity in trying to reconcile this approach with what actually occurred.

Relative Strengths

[11] Despite the decision being reserved and the arguments of the Bugejas being considered in the reasons, the core issue was straight forward, that is the removal of common property. The actual circumstances here had not been considered in other cases, but there is nothing unusual about that. The facts here were not in dispute and it was as case of applying the law to those facts. In doing so the end result should have been obvious to the Bugejas. Particularly in light of the existing authorities such as *Ainsworth* and *Katsikalis*. In my view Dansur had a strong case as opposed to the Bugejas'.

Financial Circumstances

[12] The Bugejas submit that both parties would have proceeded on the understanding that whatever the outcome there would be no order for costs. There is simply no basis for such an understanding in light of Division 6 of the QCAT Act. Although costs do not follow the event, a party who ignores the application of s 102 of the QCAT Act which provides for costs where the "interests of justice require it" does so at their potential peril. This is particularly so after the decisions in *Marzini* and *CD* referred to above.

[13] The legal representatives of the Bugejas are acutely aware of the purpose of "offers to settle" under Rule 86. They knew or ought to have known that costs were always going to be an issue in this appeal. To now simply attempt to brush the issue aside in reliance of s 100 is entirely inconsistent with how the Bugejas conducted this appeal. Every opportunity was given to the Bugejas to accede to the appeal, but this was ignored. I simply do not accept that this appeal was conducted on the basis proposed by the Bugejas with respect to costs.

Interests of Justice

[14] For the reasons set out above, the interest of justice in this case do require an order for costs in favour of Dansur.

Offers to settle.

[15] The application for leave to appeal or appeal initially only named the first respondent prior to the Bugejas coming into the appeal as second respondent. Despite not being an actual party to the appeal, Dansur made an offer to settle under Rule 86 to the Bugeja's in a letter of 17 August 2020. The offer was not simply to consent to the appeal, but it also set out in some detail the arguments in support of the appeal, including the cases to be relied upon such as *Katsikalis* and *Ainsworth*. Dansur says that on the submissions made to the Bugejas that "on any reasonable assessment the learned adjudicator had made a mistake of law".

[16] The terms of the offer were clear and given that there was an appeal on a question of law there could only be one of two outcomes, either there was an error of law or there was not. The offer was as generous as any offer of compromise could be.

[17] Having considered the offer, the Bugejas rejected it by being joined as a party and became the principal, and only, contradictor in the appeal despite the first respondent remaining a party.

[18] A second offer of settlement was made on 17 June 2021, after all submissions had been filed and before the hearing of the appeal. The offer was in similar terms of the first offer. This offer was not accepted.

[19] The Bugeja's submit that even if the offer was accepted it would not necessarily have disposed of the appeal because it required the agreement of the first respondent. However, there is no evidence that there was any attempt to engage with the Body Corporate to determine its attitude if the offer was accepted. That is also somewhat reflected in Rule 86 which provides:

> 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.

[20] Because the Body Corporate did not agitate the appeal and left it to the Bugejas it is reasonable to conclude that it would not have continued with it if the offer was accepted. Furthermore, it becomes somewhat academic because of the stance taken by the Bugejas. Even so, had the offer been accepted, the appeal would have been resolved between Dansur and the Bugejas. In *Owltown Pty Ltd v Norwinn Commercial (No 3)*[7] Member Barlow (as he then was) considered a similar situation where the body corporate was not an active party. Although not definitive he did not consider the argument that the Rule applied in these circumstances. Here, once the Bugeja's joined in the appeal, they effectively had control over the proceeding and had they chose to accept the offer and withdraw, it is questionable whether the body corporate would have continued with it. What is clear, is that the Bugeja's sought to uphold the adjudication in the appeal.

[21] Also Rule 86 is an "additional power to award costs" being additional to s 102 of the Act. It is silent as to whether those costs are to be indemnity costs or standard costs like the *Uniform Civil Procedure Rules* ("UCPR") but simply refers to "reasonable costs".

[22] Offers were made at reasonable times, more particularly after the filing of all submissions when the parties' various positions were crystal clear. Clearly the outcome was more favourable to Dansur. In the circumstances where the body corporate was not an active participant, I am of the view Rule 86 applies and Dansur is entitled to its reasonable costs of the appeal.

Costs Assessment

[23] As to the amount of costs, the Bugejas submit that the costs should be limited to $3,000 if assessed on a standard basis, and $5,000 if assessed on an indemnity basis. They do so on the basis that the Dansur would have incurred the costs in any event in pursuing the appeal against the Body Corporate. I reject that argument because firstly, the Body Corporate was never an active contradictor in the appeal, and secondly all of the work,

---

7 [2018] QCATA 94 at [33].

or nearly all, undertaken by Dansur in the appeal was to counter the arguments mounted by the Bugejas. They certainly had a propriety interest to protect. Also, by reason of the formal offers to settle, and the arguments put forward in correspondence by the solicitors for Dansur, being the same as those put in the appeal, the Bugejas could have extricated themselves from this appeal without cost at an early juncture.

[24] Section 107 of the Act requires the Tribunal to fix the costs if possible. To that end Mr Kliendschmidt, solicitor for Dansur, has filed a comprehensive affidavit setting out the costs incurred by Dansur and the basis upon which the costs have been charged. He has helpfully provided comparisons of hourly rates charged by other firms as a general guide as to what are reasonable hourly rates. I find the rates he has applied in the costs billed to Dansur are reasonable.

[25] He has also broken down the costs for each period work was undertaken subsequent to the offers being made. The costs incurred from the first offer to the second offer are $16,003.69 incl GST. From the second offer to completion, they are $17,230.87. In total costs from the first offer to conclusion are $33,234.56 including GST. There are additional outlays in the sum of $5,500 for counsel's fee. These outlays are reasonable because it is apparent from counsel's invoice his fee has been discounted in accordance with arrangements with the solicitors.

[26] Therefore, the costs claimed are the actual costs incurred by Dansur in this appeal. Again, using the UCPR comparison these costs can be regarded as "indemnity costs" which are recoverable under the UCPR if a party does better than a Formal Offer to Settle. The usual costs recoverable under the UCPR are 'standard costs" which could be regarded as reasonable costs as referred to in Rule 86. It is not for me to undertake a line-by-line assessment of each bill of costs rendered to Dansur, therefore a broad-brush approach will be adopted.[8]

[27] It seems generally accepted that standard costs are about two-thirds of actual costs.[9] To allow costs on this basis does not properly reflect the significance of the offers to settle in this case. Dansur made genuine attempts to resolve the matter by making the offers which were ignored. I therefore propose to take a more generous broad-brush approach and allow $25,000.00 inclusive of GST plus the outlay for counsel's fee of $5,500.00. Therefore, if I allowed total recoverable costs and outlays of $30,500,000 this would reflect, in my view, reasonable costs.

Order

[28] The order of the Tribunal will be that the Bugejas pay to Dansur the sum of $30,500.00 by 30 May 2023.

---

8 *Thompson v Body Corporate for Arila Lodge & Anor; Thompson v Body Corporate for Arila Lodge & Anor (No 2)* [2018] QCATA 133 [57].

9 *Thompson v Body Corporate for Arila Lodge & Anor*, supra at [59]; *Campbell v The Body Corporate for 70 Bowen St & Ors* [2020] QCATA 26 [24].