

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Pacific Harbour Residential Community Association Inc
v Sharkey* [2018] QCATA 152

PARTIES: **PACIFIC HARBOUR RESIDENTIAL
COMMUNITY ASSOCIATION INC**
(appellant)
v
BRIAN SHARKEY
(respondent)

APPLICATION NO/S: APL409-17

ORIGINATING APPLICATION NO/S: MCDO92-17 (Caboolture)

MATTER TYPE: Appeals

DELIVERED ON: 16 October 2018

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **1. Leave to appeal granted.**
2. The decision made 13 July 2017 is set aside.
**3. The matter is remitted to the original tribunal for
determination with the hearing of such additional
evidence as is considered necessary.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL
PRINCIPLES – RIGHT OF APPEAL – where an
incorporated association sued for arrears of membership
fees – where the respondent raised an issue at hearing not
included in any material filed – where the association
taken by surprise at hearing – whether the association was
accorded procedural fairness – where a claim for costs of
debt collection made against the respondent not dealt with
at hearing – where fresh evidence relied on at hearing but
no formal application for such – where matter not suitable
for an order by the Appeal tribunal in substitution of the
order below

Queensland Civil and Administrative Tribunal Act 2009
(Qld), s 146

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd
R 404

Lyons v Building Services Authority & Anor [2011] QCATA 240
Pickering v McArthur [2005] QCA 294

REPRESENTATION:

Applicant: Self-represented by E Veara

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) ('QCAT Act').

REASONS FOR DECISION

- [1] The respondent bought a property at Pacific Harbour in 2006. At the time of purchase he agreed to become a member of the Pacific Harbour Residential Community Association Inc ('the Association').
- [2] The Association charged membership fees. Mr Sharkey failed to pay fees and the Association filed a minor civil dispute - minor debt application claiming 2 amounts of arrears of membership fees of \$216.17 each, debt collection costs of \$115.50 and filing fee and bailiff service fee of \$175.30.
- [3] The learned Adjudicator who heard the matter awarded the Association \$216.17 for one period of membership fees and made no other orders.
- [4] The Association want to appeal that decision.
- [5] Given this is an appeal from a decision made in the Tribunal's Minor Civil Dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.¹
- [6] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.²
- [7] The Association's grounds of appeal, if allowed to appeal, appear to be as follows:
 - (a) That the Association was taken unfairly by surprise at the hearing by Mr Sharkey raising without notice an issue about tree maintenance and the Association's failure to attend to it;
 - (b) That the learned Adjudicator failed to consider the Association's claim for collection costs against Mr Sharkey;
 - (c) That the Association was not awarded costs which it was entitled to because it was successful at the hearing.

¹ QCAT Act, s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294, [3].

Surprise at Hearing

- [8] At the hearing Mr Sharkey claimed he had been induced to enter the Association through a lie. He was told that if any trees fall down he could contact the Association who would attend to the matter. He said a tree came down on his back fence and another tree was leaning into the roadway at the front of the property but the Association told him to telephone the Council.
- [9] The learned Adjudicator who heard the matter accepted the evidence of Mr Sharkey. He found the Association had breached its maintenance obligations and he had ‘no reason to doubt the veracity of the evidence provided by any party to the Tribunal...’³
- [10] The difficulty is that Mr Sharkey made no mention of a tree issue as a reason for not paying his membership in any document filed in the Tribunal leading up to hearing, including in his response to the claim.

[11] As stated in *Lyons v Building Services Authority & Anor*:⁴

It is a fundamental requirement of procedural fairness that any person entitled to be heard in a matter be given appropriate notice of the case he is to meet. Appropriate prior notice allows a party to prepare and present his case effectively. Inadequate notice both in respect of either time or substance prevents a party from being able to do so, and amounts to a denial of procedural fairness.⁵

- [12] Indeed Mr Sharkey himself made the point at the hearing that his claim was not about the tree but about misrepresentations made to him when joining the Association in 2006. He said:

The tree was a side issue. Look they lied to me at the beginning. All right. But at the end of the day, even if I never had the tree, all right – I have issue, all right – although there was someone – I just don’t want to be in their association.

- [13] The Association filed fresh material concerning the tree issue with its Application for Leave to Appeal or Appeal. None of that material was filed at hearing, but as submitted by the Association, if they had known that the tree issue was an issue prior to hearing they would have appropriately prepared for it and submitted evidence. That other evidence is presumably the fresh evidence filed in their appeal application.
- [14] There was no application by the Association for leave to file fresh evidence on appeal, but the complaint is about lack of procedural fairness in being surprised at hearing, and the fresh evidence is clearly associated with that. Had the Association made an application for leave to file the fresh evidence in support of this ground of appeal it would most probably have succeeded.
- [15] To be permitted to file fresh evidence on appeal a party must show that:⁶

- (a) The evidence could not reasonably have been obtained for the original hearing;

³ Transcript Page 1-26, Line 30.

⁴ [2011] QCATA 240.

⁵ Ibid [13].

⁶ *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.

(b) If allowed it would probably have an important impact on the result of the case; and

(c) The evidence be credible.

[16] The evidence includes an email from the Association to Mr Sharkey at or about the time of complaint about the tree acknowledging the tree problem and advising that a maintenance request was being actioned and would be monitored. It is claimed that the trees were removed and replaced within 3 weeks of Mr Sharkey's complaint.

[17] If this was the case, then the Association could have had no reasonable expectation that this issue from 2015 formed any basis of defence without the issue being fairly raised before hearing.

[18] The representative appearing for the Association said she was not familiar with the issue about trees raised by Mr Sharkey.⁷ She said she had only been a member of the Association herself for a few months and she had become the treasurer because she was an accountant.⁸

[19] Mr Sharkey was served with the fresh evidence by the Association prior to the hearing of the appeal and was given the opportunity to file submissions but did not do so and has made no challenge to the material.

[20] The Association has not been accorded procedural fairness. That failure amounts to an error of law on the part of the Tribunal. Leave to appeal should be given in respect of this appeal ground.

Collection Costs

[21] The Association claimed \$115.50 as the costs of debt collection pursuing Mr Sharkey for his outstanding fees. The matter was not addressed in any meaningful way at hearing. At the commencement of the hearing the representative for the Association clearly stated that the claim being pursued included debt collection costs and filing fees. The issue of filing fees was subsequently addressed but not the collection costs.

[22] The Association was entitled to have the matter determined. This constituted an error of law on the part of the Tribunal. Leave to appeal should be granted in respect of this ground of appeal.

Costs

[23] The Association were not awarded costs. They complain that they were successful at the hearing, at least to the extent of \$216.17, and therefore should have been awarded their costs of the filing fee and the bailiff service fee.

[24] By s 100 of the QCAT Act:

⁷ T1-14, L11.

⁸ T1-16, L2.

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.

[25] By s 102 of the QCAT Act:

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.
- (3) In deciding whether to award costs under subsection (1) or (2) the tribunal may have regard to the following—
 - (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);
 - (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) for a proceeding for the review of a reviewable decision— (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;
 - (e) the financial circumstances of the parties to the proceeding;
 - (f) anything else the tribunal considers relevant.

[26] By rule 84 of the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld), as applicable, the only costs that may be awarded in a minor civil proceeding for a minor debt is the filing fee and bailiff service fee.

[27] The learned Adjudicator gave brief reasons for his decision not to award costs. He said:

Filing fees will not be awarded on the basis that the applicant has not been entirely successful and that the respondent has to some extent been successful in resisting the entirety of the claim made by the applicant against the respondent.⁹

⁹ T1-27, L10-13.

- [28] The successful resistance however was the issue about tree maintenance, which took the Association unfairly by surprise. Potentially, the Association may well have been successful in claiming all fees outstanding had the tree issue been dealt with on the basis of evidence available from the Association showing there was no real issue about trees. On that basis and having regard to the reasons of the learned Adjudicator the claim for costs may well have been granted. Leave to appeal should be granted in respect of this ground of appeal as well.

Orders

- [29] Leave to appeal is granted and the appeal is allowed.
- [30] By s 146 of the QCAT Act, in deciding an appeal against a decision on a question of law only, the Appeal Tribunal may do a number of things. It may confirm or amend the decision. It may set aside the decision and substitute its own. It may set aside the decision and return the matter to the Tribunal who made the decision for reconsideration with or without the hearing of additional evidence or with other directions appropriate.
- [31] There is insufficient evidence available from the hearing to allow the Appeal Tribunal to set aside the decision and substitute another decision in lieu. It is appropriate that the matter be returned to the original Tribunal for consideration with the hearing of additional evidence as deemed appropriate.