QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Lyons v Building Services Authority & Anor* [2011] QCATA 240
PARTIES:	Andrew Lyons (Applicant/Appellant) v Building Services Authority (First Respondent) Dreamstarter Pty Ltd (Second Respondent)
APPLICATION NUMBER:	APL299-10
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Judge Fleur Kingham, Deputy President** **Mr Michael Howe, Member**
DELIVERED ON:	25 August 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	1. Leave to Appeal is granted. 2. The Appeal is upheld. 3. The decision made by the Tribunal on 12 August 2011 is set aside. 4. Proceeding GAR150-10 is stayed pending resolution of proceeding BDL222-10. 5. The Building Services Authority must pay Mr Lyons' costs of this appeal fixed at the sum of $1,000.
CATCHWORDS:	LEAVE TO APPEAL – APPEAL – Breach of natural justice – procedural fairness – party taken by surprise at hearing – Appealing Stay Order – Statutory Home Warranty Insurance Scheme – necessity to determine the liability of the homeowner as regards the builder prior to claiming under the Scheme policy – policy terms – statutory basis of Scheme – costs *Queensland Civil and Administrative*

Tribunal Act 2009, ss 100, 102, 142(3)(a)(ii), 146(b)

Anisminic Ltd v Foreign Compensation Commission [1969]1 All ER 208
Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/ Traineeship Scheme Ltd [2008] QCA 100
Babsari Pty Ltd v Wong & Ors [2000] QSC 38
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 118 ALR 248
Naomi Marble & Granite Pty Ltd v FAI Insurance Company Ltd [1999]1 Qd R 518
Nominal Defendant (Queensland) v Langman [1988] 2 Qd R 569
Oatley v Pertzel [2011] QCATA 92
Plaintiff 157/2002 v Commonwealth (2002) 211 CLR 476
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

REASONS FOR DECISION

Judge Fleur Kingham, Deputy President

[1] I have read the reasons of Mr Howe in draft and agree with them and with the orders proposed.

Mr Howe, Member

[2] Mr Lyons as homeowner entered into a domestic building contract with Dreamstarter Pty Ltd as builder in June 2009.

[3] Work was performed under that contract. Mr Lyons maintains he validly terminated that contract on or about 3 December 2009. The builder maintains the contract was lawfully terminated by it on 17 December 2009 when the builder accepted Mr Lyons purported termination as repudiation of the contract.

[4] Mr Lyons made claim on the Queensland Building Services Authority under the Statutory Home Warranty Insurance Scheme for financial assistance in completion of the building work.

[5] By letter dated 19 April 2010 the Authority rejected the claim because in their view the termination of the contract was not due to the builder's default.

[6] On 17 May 2010 Mr Lyons applied to the Tribunal for review of that decision by the Authority ("the review proceeding").

[7] On 19 July 2010 the builder commenced separate proceedings in the Tribunal (BDL222-10) against Mr Lyons for damages for breach of contract ("the contract proceeding").

[8] At a directions hearing on 12 August 2010 the builder was joined as a party to the review proceeding and the learned Member presiding also ordered that the review proceeding be stayed pending resolution of the contract proceeding.

Leave to Appeal

[9] It is against that stay order that Mr Lyons now seeks leave to appeal. Mr Lyons requires leave to appeal because the decision he appeals is not a final decision of the Tribunal.[1]

[10] Leave will usually only be granted where there is a question of importance to be decided or an error is apparent or a substantial injustice to Mr Lyons should be corrected.[2]

[11] There are a number of proposed grounds of appeal. One is that the learned Member conducting the directions hearing failed to act fairly, that is, that Mr Lyons was denied natural justice. Mr Lyons uses strong language to describe the circumstances leading up to the making of the stay order. He says he was ambushed with the Authority's application for a stay at the directions hearing, and that he was given only minutes oral notice of such. He submits he told the learned Member that, on the day. Also, he told her that he opposed the stay order. Lyons contends he was denied natural justice, or, as termed and explained below, procedural fairness.

[12] For the reasons set out below Mr Lyons has been denied procedural fairness and therefore it is appropriate to grant him leave to appeal.

The Appeal – Denial of Procedural Fairness

[13] 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.

[14] It does not seem to be disputed that the Authority failed to inform Mr Lyons of its intention to seek a stay order before the morning of the directions hearing. Mr Lyons maintains that three days prior to the directions hearing he had proposed a draft order to the Authority with respect to the future conduct of the review proceeding. The implication must therefore be that the future procedural conduct of the proceedings had been raised as an issue between the parties. It was accordingly

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1 *Queensland Civil and Administrative Tribunal Act 2009*, s 142(3)(a)(ii).

2 *Oatley v Pertzel* [2011] QCATA 92; *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100, [5].

appropriate that the intention to seek a stay of the review proceedings be advised to Mr Lyons before the morning of the directions hearing. Failing to do so resulted in Mr Lyons being unfairly taken by surprise on the day. That amounted to a breach of procedural fairness and the decision of the Tribunal to grant the stay on the application of the Authority was a decision in breach of procedural fairness which rendered the decision invalid for jurisdictional error.[3]

[15] Gleeson CJ said in *Plaintiff 157/2002 v Commonwealth*[4]:

> "In *Australian Broadcasting Tribunal v Bond*[27], Deane J explained that, in the past, it was customary to refer to the duty to observe common law requirements of fairness as a duty "to act judicially". In a passage from Hickman quoted above, Dixon J can be seen using that expression. Later, the duty came to be referred to as a duty to observe the requirements of "natural justice". Later again, it became common to speak of "procedural fairness". The precise content of the requirements so described may vary according to the statutory context; and may be governed by express statutory provision. Subject to any such statutory regulation, and relevantly for present purposes, the essential elements involved include fairness and detachment. Fairness and detachment involve "the absence of the actuality or the appearance of disqualifying bias and the according of an appropriate opportunity of being heard"[28]. A statute may regulate and govern what is required of a tribunal or other decision-maker in these respects, and prescribe the consequences, in terms of validity or invalidity, of any departure.[29] Subject to any such statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and jurisdictional error."

[16] Accepting Mr Lyons was unfairly taken by surprise with the application for a stay order, that he was prevented from adequately preparing his opposition to the application, and what followed was a jurisdictional error in the making of the order, then the appeal against the stay order should succeed.

Joinder

[17] Mr Lyons' submissions are voluminous. They also appear to raise additional grounds of appeal not identified in the initial Application for Leave to Appeal and Appeal. Much of his material comprises submissions asserting the inappropriateness of ordering any stay in the review proceeding and then urging the appropriateness of having the review proceeding and the contract proceeding heard together.

[18] The issue of jurisdictional error involves a question of law. The Appeal Tribunal may set aside the decision of the learned Member below and substitute its own decision,[5] and accordingly there is power to make the orders suggested by Mr Lyons, if that is the point of his submissions.

[19] What becomes abundantly clear from Mr Lyons' material overall however is that a key motivator prompting this course is that Mr Lyons wants to safeguard his potential to recover costs from a financially sound litigant, namely the Authority. Mr Lyons makes it very clear that in his opinion the

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3 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208.

4 *Plaintiff 157/2002 v Commonwealth* (2002) 211 CLR 476, 489-90.

5 *Queensland Civil and Administrative Tribunal Act 2009*, s 146(b)

builder is impecunious. If the course urged by Mr Lyons eventuates the potential is to expose the Authority to a costs order in the Applicant's favour encompassing both proceedings.

[20] Mr Lyons argues if he is successful in the contract proceedings he should be able to seek a costs order against the parties that required him to incur the costs and expenses of obtaining that verdict; that there are two such parties, the insurer being one and the builder the other. He maintains the stay (and having the two proceedings heard separately), strips the compulsory insurance policy of value to him as a homeowner and gifts a windfall gain to the insurer/Authority; the stay (and non-joinder of the two proceedings) facilitates oppressive conduct by the insurer/Applicant and increases costs and causes other injustice and shelters the insurer/ Authority from normal accountability for its "extreme behaviour". The extreme behaviour so called seems to amount to a failure of the Authority to accept the Applicant's claim under the insurance policy at the time it was first made.

[21] Mr Lyons wants the review and the contract proceedings heard together with evidence in one to be evidence in the other. The Applicant argues it is cheaper, quicker and fairer for the review proceeding and the contract proceeding to be heard together rather than the contract proceeding being heard prior to the review.

[22] With all due respect to Mr Lyons, it is not clear at all that in end result hearing the review and the contract proceedings together is the cheapest, quickest and fairest manner of determining the rights between all parties in both proceedings.

[23] On the part of the Authority, the Authority submits Mr Lyons' liability under the building contract with the builder must first be ascertained in order for the Authority to determine the reasonable costs of completing the building contract and undertaking works necessary to rectify defects, if any.

The Home Warranty Scheme

[24] Clause 1.2 of the Home Warranty Insurance Scheme Policy provides that the Authority is liable to pay for loss for non-completion when the insured has "properly" terminated the contract with the builder. "Properly" is defined to mean lawfully under the contract or otherwise at law, upon the contractor's default. By its letter to the Applicant of 19 April 2010 the Authority made this point quite clear. It said:

> "*Based on information provided to the BSA, there is a complicated contractual argument that currently exists between yourself and Dreamstarter. The BSA is not a judicial body and cannot finally determine whether or not you have validly terminated the contract…. The BSA is not satisfied that the contract has been terminated at the contractor's default.*"

[25] Additionally the Authority relies on clauses 1.4(a) and 2.2 of the Policy conditions. Clause 1.4(a) relevantly provides that the amount of the liability of the Authority is limited to the Authority's assessment of the reasonable cost of completing the contract, *less the owner's remaining liability under the contract as at the date of termination of the contract.*

[26] Clause 2.2 relevantly provides the amount of the payment by the Authority will be limited to the reasonable cost, as determined by the Authority, of undertaking those works necessary to rectify the defective construction, less, where the insured contracted with the builder for the undertaking of the residential construction work which is defective, *the owner's remaining liability under the contract*.

[27] The Authority's argument therefore is that there is a condition preceding its accrual of liability under the contract of insurance, namely the default justifying termination resting with the builder and then determination of the extent of Mr Lyons' remaining liability under the building contract.

[28] The Authority's argument appears to be correct. The wording of the policy is clear.

[29] The relevant parties to determine the question who lawfully terminated the building contract at whose default are the Applicant and the builder. The relevant proceeding to do that in is the contract proceeding. Adopting Mr Lyons' proposal to draw the Authority into that argument cannot be readily understood to have any benefit other than expose the Authority to Mr Lyons as a pecunious party against whom he might pursue a claim for costs associated with the issue of liability, if the builder proves impecunious, as Mr Lyons asserts.

[30] The Authority has given an undertaking to abide by the decision of the Tribunal on the question of lawful termination of the building contract. This is appropriate and answers the claim by Mr Lyons that not hearing both proceedings together means a decision in the builder's proceeding will not decide any issue falling for decision in the review proceeding. Mr Lyons argues the undertaking is not wide enough. Given the issue of builder fault in the termination of the building contract is one that precedes any liability of the Authority under the policy, the undertaking given appears adequate in the circumstances.

A Statutory Scheme

[31] Mr Lyons arguments also fails to take into account the fact that the policy of insurance in question has a statutory basis and concomitant obligations therefore arise which may not exist in matters concerning marketplace insurers and schemes.

[32] An insurer in the position of the Authority is not permitted to adopt a careless approach to litigation or make payments otherwise than as necessary by the statutory scheme.[6] To the contrary, the Authority must take the steps required to ensure the public funds it administers are carefully managed and used in furtherance of the public purpose for which the statutory scheme was created.

[33] The statutory basis of the Home Insurance Scheme, and the funds expended therewith, must be borne in mind when considering complaints such as those brought by Mr Lyons that it is an unfair imposition on his purse not to be able to recover moneys from the Authority (the public purse) instead of the builder if the builder is unable to pay costs.

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6 *Nominal Defendant (Queensland) v Langman* [1988] 2 Qd R 569.

[34] By s 26A of the *Queensland Building Services Authority Act 1993* the Authority is required to ensure the statutory insurance scheme is managed in accordance with actuarially sustainable principles so that the amounts paid into the Insurance Fund under s 26(2) will be sufficient to satisfy the amounts to be paid from the Insurance Fund under s 26(3). I take that statutory direction to impose a positive duty on the part of the Authority to ensure good management of the statutory funds.

[35] Any payment by the Authority, and any decision resulting in a claim on the funds of the Authority must be able to be supported by responsible decision making in accordance with the terms of the policy and scheme generally. The Policy requires Mr Lyons to establish certain conditions preceding the Authority's liability there under, which conditions are set out above. A means of doing that is the contract proceedings presently on foot. The Authority is not a party to those proceedings and should not be forced to become a party other than through its own choice as a consequence of a decision associated with the prudent conduct of legal proceedings. This conclusion is bolstered by the undertaking given.

Conclusion

[36] The Appeal succeeds on the issue of breach of procedural fairness. Given the extensive canvassing of the issues of the stay and joinder of actions in this appeal, it is not appropriate to return the matter to the learned Tribunal Member to reconsider the stay order. Rather, it is appropriate that the decision below as to stay be set aside and in substitution thereof an order made by the Appeal Tribunal that the review application be stayed pending prior resolution of proceeding BDL222-10.

Costs

[37] As to costs, Mr Lyons seeks costs on an indemnity basis. The first threshold that he must cross however is to satisfy the Tribunal that an order for costs is meet. In this jurisdiction, parties normally bear their own costs.[7] That general rule may, where justice dictates, be displaced and a party's costs be ordered to be paid by another. Some guidance to that end is given in the legislation,[8] but in end result the matter for determination is whether the interests of justice require the "usual" rule to be displaced with a costs order.

[38] The Authority failed to advise Mr Lyons of the intention to seek a stay order at the directions hearing on a timely basis, and as a result the Tribunal fell into jurisdictional error which has resulted in the Application for Leave to Appeal and the Appeal, upon which Mr Lyons is entitled to succeed. Mr Lyons however failed to adhere to the schedule set for the conduct of this Appeal, which tardiness has resulted in the Authority filing submissions prior to Mr Lyons' submissions in attempted adherence to the schedule and not being able to respond in an entirely satisfactory manner to all matters raised in Mr Lyons' submissions.

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7 *Queensland Civil and Administrative Tribunal Act 2009*, s 100.

8 *Queensland Civil and Administrative Tribunal Act 2009*, s 102.

[39] Given the Authority's failure to accord appropriate notice of its intention to seek the stay order to Mr Lyons, a cost order is appropriate against the Respondent Authority in favour of Mr Lyons on a party and party basis. It is not appropriate to make an indemnity award[9] as sought by Mr Lyons. Much of the material comprising the Applicant's submissions was not directed to relevant appeal issues and Mr Lyons' submissions have not been accepted with respect to the appropriate orders that should be made for the further conduct of the proceedings below. Accordingly, to finalize this matter, the costs of the Appeal should be set, the amount should be set at a modest sum, and the costs so fixed are adequately fixed at $1,000, given this matter was determined on the papers.

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9 The approach to indemnity costs was fully discussed by Sheppard J of the Federal Court in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248; see also White J in *Babsari Pty Ltd v Wong & Ors* [2000] QSC 380 following the decision of Shepherdson J in *Naomi Marble & Granite Pty Ltd v FAI Insurance Company Ltd* [1999]1 Qd R 518, 522. A Court ought not depart from the general rule that costs be awarded on a party and party basis unless the circumstances of the case warrant, namely where justice requires.