

ANDREW LYONS

31.8.18

The President,
QCAT
Level 9,
259 Queen Street,
Brisbane, Q., 4000.

Dear President,

Lyons *ats* QBCC, APLs 222-16 & 223-16
Lyons *v* QBCC, APLs 299-10, 230-16 & 231-16
Lyons *v* Dreamstarter Pty Ltd (*in liq*), APLs 234-10 & 86-12

I am a party to the above seven applications presently before the Appeal Tribunal and referred to in this letter as the Homeowner. The QBCC is the other party in all applications. In this letter, references to the QBCC include its predecessor, the QBSA. A former party, Dreamstarter Pty Ltd (in liquidation), (“the Builder”) has been deregistered.

All applications relate to the Homeowner’s claims for \$532,017 of costs of successful proceedings to establish the Homeowner’s disallowed claim for payment by the QBCC under the Home Warranty Insurance Policy for loss suffered by reason of the failure of the Builder to complete a contract for residential construction work.

A central issue in the applications is whether the QBCC breached its duties to the Tribunal¹ and the Homeowner. In particular, whether it had reasonable grounds for submissions that it made to the Tribunal about liability (whether a Tribunal determination was required as to whether the Homeowner had terminated the building contract validly) and quantum (whether a determination of the Homeowner’s denied liability to the Builder was needed for assessment of the insurance claim). The Homeowner contends, amongst other things, that the Builder had not achieved the progress claim stage upon which the entirety of its, and the QBCC’s, claims depended. He relies upon sworn and documentary 2010 evidence of that fact including written admissions by the Builder’s principal that relevant work was yet to be performed. That evidence was uncontested.

Four of the applications are applications for leave to appeal a decision of Member Ann Fitzpatrick that awarded the Homeowner some of his standard costs and denied him indemnity costs and interest entirely.

The power to choose who is to constitute the Tribunal

Under s. 165(1) of the *QCAT Act*, the President chooses who is to constitute the Tribunal for a particular matter. Criteria relevant to that choice are identified in s. 167 and expressed widely. They include “the nature, importance and complexity of the matter”² and “the need for the tribunal hearing the matter to

¹ E.g. *QCAT Act*, s. 21(1) (“use his or her best endeavours to help the tribunal so that it can make its decision on the review”) and s. 21(2) (provide a compliant statement of reasons for the decision).

² *QCAT Act*, s. 167(1)(a).

have special knowledge, expertise or experience relating to the matter.”³ S. 167(1)(d) is “any other matter the president considers relevant”.

There are considerations within the scope of s. 167(1) that may not be considered unless they are drawn to your attention. Some of them are mentioned below. Before turning to them, it is appropriate to identify the relief sought.

Exercise of the power – requests

I request, in relation to the Homeowner’s seven applications now before QCATA, that the power to choose who constitutes the Tribunal be exercised:

- a. To choose a Judicial Member(s) within the meaning of that expression in s. 166 of the *QCAT Act*;
- b. To not choose any Member who is not a Judicial Member;
- c. To not choose any Member who has made a past reserved decision in any of the proceedings to which I am, or have been, a party; and
- d. To not choose any Member who has been privy to any undisclosed communication with the QBCC or the Builder that is of substance in connection with any of the proceedings to which I am, or have been, a party.

Exercise of the power – relevant facts

In addressing the statutory criteria, I acknowledge expressly that you, Carmody J and Sheridan DCJ were not party to the decisions and conduct described below, nearly all of which occurred before your appointments to the Tribunal.

To aid understanding of how those criteria are engaged by the facts mentioned below, critical elements of the chronology⁴ should be identified.

The first directions hearing in the Homeowner’s proceeding, GAR 150-10, to review the QBCC’s disallowance of his non-completion insurance claim was on 12.8.10. Upon an *instanter* application of the QBCC, a non-Judicial Member (Member Bridget Cullen-Mandikos) granted the QBCC an injunction that stayed the Homeowner’s review proceeding against the QBCC pending resolution of a proceeding, BDL 222-10, that had been instituted recently by the Builder against the Homeowner. The learned Member relied upon oral submissions made by the QBCC. It did not support its submissions with evidence or the usual undertaking as to damages. The QBCC knew that the Builder was impecunious and refusing to post security for costs as this was said at the hearing.

The Homeowner’s two challenges to this injunction failed to relieve him of it or secure the protection of the usual undertaking. The learned Members hearing those challenges relied upon submissions made by the QBCC as to liability and quantum. The QBCC did not support those submissions with evidence or the usual undertaking. Nor point to any flaw in the abovementioned evidence, including admissions, upon which the Homeowner relied.

³ *QCAT Act*, s. 167(1)(b).

⁴ A fuller chronology was filed 21.9.17 in APL 230-16.

To satisfy the injunction condition that the Builder's Proceeding be resolved before the Homeowner could progress his Review Proceeding, the Homeowner was required to suffer the substantial costs now claimed. He was a party to 9 proceedings in 5 Courts and Tribunals and established his claim at the maximum sum insured of \$200,000, beating 6 *Calderbank* offers.

He then sought his costs and interest. The applications raised issues of considerable sensitivity. The Homeowner's case was that he had been put to immense expense needlessly by a statutory corporation making submissions to the Tribunal for which it, the corporation, lacked any proper basis. Tribunal Members had relied upon those submissions in granting injunctive relief against the Homeowner. They were entitled to expect that the QBCC would discharge its duties to the Tribunal. The Homeowner now was drawing attention to the absence of evidence and usual undertaking in support of the injunction secured, and twice defended, by the QBCC,⁵ the abovementioned 2010 evidence of both the Builder and the Homeowner that showed that the Builder had not achieved the progress claim stage upon which its, and the QBCC's, claims depended⁶ and that the Builder was known in 2010 to be impecunious, incapable of maintaining its proceedings to verdict and unable to pay the Homeowner's costs⁷ which were foreseeably substantial.⁸ This 2010 evidence had been relied upon in both the Homeowner's attempts to overturn the injunction. Further, he submitted that his appeal against the injunction was heard by an Appeal Tribunal constituted to include a former Deputy President of the Tribunal that he knew. She did not notify him of her involvement in the disposition of his appeal. If he had been notified then he would have objected to her involvement.⁹

At first instance, the applications were heard by a non-Judicial Member sitting alone. She refused or failed to consider substantial evidence and submissions for the Homeowner without reasonable grounds for so failing. Amongst other refusals or failures, she did not make findings on important material facts including those summarized in the preceding paragraph.¹⁰ They were facts that were at the heart of the Homeowner's case and extremely damaging to the QBCC.

Those refusals and failures have led to submissions for the Homeowner in the present applications for leave to appeal that the learned Member breached her statutory duties to observe the rules of natural justice and act fairly.¹¹ They are relied upon as part¹² of the basis for a submission that the learned Member failed to bring a dispassionate mind to the issues before her.¹³

As submitted above, the issues that fell for determination by the learned Member were sensitive. They were awkward for any practitioner. Given the submissions now required of the Homeowner by the

⁵ For example, by paragraph 45 of Part 2 of the Homeowner's submissions filed 19.10.15 in GAR 150-10.

⁶ For example, by paragraphs 17, 27 and 32 of Part 2 of the Homeowner's submissions filed 19.10.15 in GAR 150-10.

⁷ For example, by paragraphs 14 and 15 of Part 2 of the Homeowner's submissions filed 19.10.15 in GAR 150-10.

⁸ For example, by paragraphs 14 and 16 of Part 2 of the Homeowner's submissions filed 19.10.15 in GAR 150-10.

⁹ Lyons' 6th statement, paragraph 334.

¹⁰ See, for example, the Homeowner's submissions filed 21.9.17 in APL 230-16, paragraphs 9, 185 and 186.

¹¹ *QCAT Act*, s. 28.

¹² There are other submissions including that the learned Member:

- a. relied upon arguments favourable to the QBCC that were not argued by it or otherwise notified to the Homeowner as arguments that she was considering;
- b. made errors as to the content of significant documents that were easily discernable but favourable to the QBCC;
- c. made inconsistent findings where, in both cases, the finding was to the advantage of the QBCC on the issue then being considered by the learned Member.

The learned Member erred asymmetrically in that there are not comparable errors in the Homeowner's favour.

¹³ One of the means by which bias may be apprehended reasonably is a decision maker's failure to consider a clearly articulated, substantial argument without expressing reasonable grounds for so failing.

determination of his applications at first instance, the sensitivity of the present applications is heightened. Respectfully, it is submitted that the issues are of such a nature and sensitivity that they call for the seniority, skills and experience of a Judicial Member(s).

There are further considerations that support that submission. Those further considerations include the nature of other issues in the applications now before the Appeal Tribunal. They overlap with the preceding issues and include that:

1. The QBCC makes an allegation against the former Deputy President Fleur Kingham which, if made out, constitutes misbehavior within the meaning of s. 61(2)(a) of the *Constitution of Queensland Act 2001* and s. 43(1) of the *Land Court Act, 2000*;¹⁴
2. Whether the QBCC committed an abuse of process¹⁵ and whether that abuse is perfected by the decision of Member Fitzpatrick.¹⁶ The Homeowner contends that this professional defendant attempted to defeat his claim by making the claim process so expensive and arduous that he would give up. Its submissions to the Tribunal that are mentioned above were a component of that strategy. Reliance upon the 'usual rule' in s. 100 is another;
3. Whether the QBCC attempted improperly to influence the Homeowner's participation in proceedings before the Tribunal;¹⁷
4. Whether access to justice against the QBCC is real or illusory.¹⁸ Amongst other considerations, to establish a straightforward \$200,000 claim, the QBCC compelled the Homeowner to be a party to 9 proceedings in 5 Courts and Tribunals suffering costs of \$532,017 (to 8.4.13). It contends that it should pay none of those costs. Member Fitzpatrick awarded the Homeowner such a low proportion of the Homeowner's costs that he is worse off than if he had never approached the Tribunal seeking justice. That is despite the Homeowner's evidence being uncontradicted, easily verified and supported by the Builder's admissions, the Homeowner recovering \$200,000 and beating 6 *Calderbank* offers. The net worth of the average Australian household in 2011-12 was \$728,000¹⁹ and may be compared with the \$532,017 costs suffered by the Homeowner. Those costs exclude the costs of the two applications before Member Fitzpatrick and the seven applications now before the Appeal Tribunal.

Further to the preceding paragraph, the following table²⁰ prompts enquiry as to whether the results of review proceedings may reflect unduly considerations other than the merits of homeowners' claims. In

¹⁴ Homeowner's submissions filed 21.9.17 in APL 299-10, paragraphs 10 and 11 responding to the QBCC's submissions filed 23.6.17 in, presumably, APL 299-10, at paragraph 23 (that the learned former Deputy President "deliberately" breached the statutory duties to observe the rules of natural justice and to act fairly. That was in failing to give the Homeowner an opportunity to be heard on the costs of APL 299-10).

¹⁵ Annexure 2 (to the Homeowner's submissions) filed 21.9.17 in APL 230-16 at paragraph 38 ff.

¹⁶ Annexure 2 (to the Homeowner's submissions) filed 21.9.17 in APL 230-16 at paragraph 15. Homeowner's submissions filed 21.9.17 in APL 230-16, paragraph 8.

¹⁷ Submissions on this are found within Annexure 2 (to the Homeowner's submissions) filed 21.9.17 in APL 230-16 at paragraph 38 ff and the correspondence consolidated behind tab 3 of volume 2 of the Homeowner's bundle tendered before Member Fitzpatrick ("Bundle"). The QBCC refused approval for the Homeowner to undertake even minor works, at the Homeowner's expense, to render the Homeowner's house safe and habitable without prejudice to the Homeowner's claim. The Homeowner's house was unoccupied for years. He was not protected by the usual undertaking as to damages.

¹⁸ Paragraphs 14 and 196 ff of the Homeowner's submissions filed 21.9.17 in APL 230-10.

¹⁹ ABS media release 147/2013 dated 21.8.13. A copy is attached to the Homeowner's submissions filed 21.9.17 in APL 230-16.

²⁰ The Homeowner will tender this table in support of his applications for leave.

particular, that it may reflect the QBCC attempting the strategy mentioned above against other homeowners. That is, making the claim process so expensive and arduous that homeowners give up. The table covers the time frame applicable to the Homeowner's non-completion claim made 16.12.9 and paid 8.4.13.

Table 6.2A: Outcomes of QCAT reviews of QBSA decisions relating to claims under the Queensland Home Warranty Scheme Financial year	No. of reviews of QBSA decisions regarding Insurance	% of reviews where QBSA's decision was not varied
2011/12	22	91% (20 cases)
2010/11	42	93% (39 cases)
2009/10	81	96% (78 cases)
2008/09	62	81% (50 cases)

There is a further factor supporting the requests. The Homeowner has evidence that suggests that there have been secret communications between the Tribunal and the QBCC and the Builder relevant to the proceedings before the Tribunal to which he has been a party.

Some of the evidence for that submission is in the record at first instance. That is because the communication contains content relevant to the Homeowner's applications for costs. The QBCC complained to the Registry about how much the Homeowner's proceedings had cost the QBCC. The QBCC knew that communications to the Registry might be conveyed to Tribunal Members.²¹ That occurred in this case. A diary note of the conversation was placed upon the Tribunal file relating to the Homeowner's review proceeding against the QBCC, GAR 150-10.²² There it was likely to be seen by Members involved in that and allied proceedings.²³

The reasonable apprehensions of a fair-minded lay observer about such conduct would be increased by other facts including that:

- a. The Homeowner discovered this communication by chance. There was no voluntary disclosure;
- b. When the Homeowner's solicitors enquired about the conversation, both the Registry and the QBCC omitted critical information from their responses:²⁴
 - i. Both failed to disclose that the QBCC made complaint about the costs it incurred;
 - ii. The Registry did not disclose that the contents of the conversation, including the complaint about the costs it had incurred, had been recorded in a diary note placed upon the Tribunal

²¹ The Homeowner's solicitors have had to write to the QBCC more than once to request that it desist from writing to the Tribunal on matters of substance in relation to proceedings without the Homeowner's consent.

²² Paragraphs 303 & 304 of Lyons' sixth statement filed on or about 17.5.15 in GAR 150-10.

²³ That is because affidavits and statements in GAR 150-10 had been, and were likely to continue to be, relied upon in allied proceedings.

²⁴ Letter QCAT to Homeowner's solicitors dated 15.4.13 (copied to QBSA) & letter QBSA to Homeowner's solicitors dated 16.4.13 at p. 1. A copy of both letters is attached without the attachment which is presently irrelevant.

file where it was likely to be seen by Members constituting the Tribunal for that proceeding;
and

- c. The Homeowner's request for a copy of the note was refused;²⁵

There is further evidence suggesting that this is not the only secret communication related to the Homeowner's proceedings. In particular, further evidence points to communications initiated within the Tribunal. Given that such conduct may constitute misbehaviour, details are withheld presently to assist the Tribunal in ensuring full disclosure. For the avoidance of misunderstanding, the Homeowner expresses that he does not suggest that Daubney J, Carmody J or Sheridan DCJ initiated such communications.

Conclusion

Respectfully, it is submitted that the Member(s) chosen to constitute the Appeal Tribunal should meet the request made above. In particular, that only a Judicial Member(s) should be chosen.

Such a choice should assist in reducing the risks of issues of the kind noticed above troubling the present applications. Given the nature of these issues, and their expensive and cruel consequences for the Homeowner, it is of especial importance that the Tribunal ensure that justice is not only done but seen to be done. A step in that direction is to ensure that the Appeal Tribunal is constituted only by Members whose independence is fortified by tenure or, in the case of a retired Judge, the security of the Judicial pension and presumed disinterest in further preferment. Further, Judicial appointment is an indicator of expertise and experience which, here, is required to navigate soundly issues which are important and complex and have become extensive and, in some cases, sensitive in nature.

Yours faithfully,
ANDREW LYONS

²⁵ Letter QCAT to Homeowner dated 31.7.13 received 19.8.13, bundle 2, tab 4, p. 665 (see also the related entry in the index to the bundle).