DISTRICT COURT OF QUEENSLAND

CITATION:	*Saunders v Paragon Property Investments Pty Ltd* [2009] QDC 19
PARTIES:	**JOAN ISOBEL SAUNDERS**
	(Applicant)
	v
	PARAGON PROPERTY INVESTMENTS PTY LTD
	(Respondent)
FILE NO/S:	2930 of 2008
DIVISION:	Appellate
PROCEEDING:	Appeal subject to leave from Commercial and Consumer Tribunal, determination of costs
ORIGINATING COURT:	Brisbane
DELIVERED ON:	13 February 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23 December 2008 with written submissions following
JUDGE:	Robin QC
ORDER:	**Respondent to pay the applicant her costs of and incidental to the appeal and application for leave to appeal, no order as to costs in the Tribunal**
CATCHWORDS:	*Commercial and Consumer Tribunal Act 2003* s 70, s 71 *Uniform Civil Procedure Rules* s 766, s 785 – effect of statutory provisions whose express purpose is that parties in the tribunal 'pay their own costs unless the interests of justice require otherwise' – general discretion of District Court as to costs of appeals to it unaffected – discretion existed to award costs of tribunal hearing
COUNSEL:	Rangiah SC for appellant
	Blaxland for respondent
SOLICITORS:	David Wise for appellant
	Watson & Quinn Lawyers

[1] The Court's reasons for allowing the underlying appeal against the determination of the Commercial and Consumer Tribunal were published to the parties on 19 December 2008 and can be found at [2008] QDC 322. Orders were made for the payment of sums of money by the respondent on 23 December 2008. To suit its legal representatives' convenience, consideration of costs issues was adjourned.

[2] As expected, the respondent's outline of argument contesting Mr Rangiah's application for costs was received in the course of last month. This was followed by submissions in reply. In issue are the costs of the appeal proceeding in the District Court and those at first instance in the Tribunal.

[3] Sections 70 and 71 of the *Commercial and Consumer Tribunal Act* 2003 make special provision about costs:

> "**70 Purposes of div 7**
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> The main purpose of this division is to have parties pay their own costs unless the interests of justice require otherwise.
>
> **71 Costs**
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> (1) In a proceeding, the tribunal may award the costs it considers appropriate on—
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> (a) the application of a party to the proceeding; or
>
> (b) its own initiative.
>
> (2) The costs the tribunal may award may be awarded at any stage of the proceeding or after the proceeding has ended.
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> (3) If the tribunal awards costs during a proceeding, the tribunal may order that the costs not be assessed until the proceeding ends.
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> (4) In deciding whether to award costs, and the amount of the costs, the tribunal may have regard to the following—
>
> (a) the outcome of the proceeding;
>
> (b) the conduct of the parties to the proceeding before and during the proceeding;
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> (c) the nature and complexity of the proceeding;
>
> (d) the relative strengths of the claims made by each of the parties to the proceeding;
>
> (e) any contravention of an Act by a party to the proceeding;
>
> (f) for a proceeding to which a State agency is a party, whether the other party to the proceeding was afforded natural justice by the State agency;
>
> (g) anything else the tribunal considers relevant.
>
> *Examples of paragraph (g)—*
> *The tribunal may consider whether a party to a proceeding is*
> *acting in a way that unreasonably disadvantages another party to*
> *the proceeding.*
> *The tribunal may consider whether the proceeding, or a part of*
> *the proceeding, has been frivolous or vexatious.*

> (5) A party to a proceeding is not entitled to costs merely because—
>
> (a) the party was the beneficiary of an order of the tribunal; or
> (b) the party was legally represented at the proceeding.
>
> (6) The power of the tribunal to award costs under this section is in addition to the tribunal's power to award costs under another provision of this or another Act.
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> (7) The tribunal may direct that costs be assessed—
> (a) in the way decided by a presiding case manager; or
> (b) by a person appointed by the tribunal."

Section 70, as the respondent submits, obviously applies to Tribunal hearings and not so obviously to appeals in the District Court.

> "However, the Section does set up the notion that each party should bear its own costs in this type of proceeding…the Appeal is an extension of the Tribunal hearing. This…Court is only supposed to do what the Tribunal should have done, if the Appeal is successful, and that is to limit orders for costs"

[4] The respondent's submission goes on to assert that its defence of the appeal was reasonable, that there was no misconduct by it to support an adverse order for costs and that (as this court determined) there were issues of public interest and importance to be resolved.

[5] All of the foregoing is reasonable enough, but in my opinion the answering argument, that s 70 should not be read as limiting the District Court's powers under r 766(1)(d) of the *Uniform Civil Procedure Rules* (applicable in this appeal by reason of r 785) to make any order for the costs of appeal which the District Court thinks appropriate, is correct. I agree with the submission that *Tamawood Limited v Paans* [2005] 2 Qd R 101 defeats any argument that anything in the Act impairs the District Court's powers under the rules to award costs to a successful party or requires the parties to bear their own costs of the proceeding in the Tribunal.

[6] As to costs of the appeal, I think there is an analogy with the well known practice in appeals to the Court of Appeal from the Planning and Environment Court whereby, in appeals to the former, costs are awarded, and usually to follow the event, notwithstanding the proscription of costs (apart from specified cases) in the inferior court. See the discussion in *Ballymont Pty Ltd v Ipswich City Council* [2002] QCA 454, especially at [19] and [20].

[7] In the appeal, which should be treated as including the application for leave to appeal which the terms of legislation required to be sought, costs of the appeal should follow the event and be ordered to be paid by the respondent. The appeal is not a mere extension of the original proceeding for purposes of the Court becoming bound by sections 70 and 71, or even becoming obliged to take them into account.

[8] Part of the respondent's argument was that the applicant/appellant's "grounds for success are of recent origin"; it referred to the so-called calculation of time argument which was heard only because this court gave leave and, of course, had not surfaced in the Tribunal. The so-called apportionment argument, it is correctly said, was raised by the Court. It may well be that if the appeal had succeeded only by reference to those arguments, so that the respondent would have been successful in their absence, it should not be ordered to pay costs of the appeal. My view is that the appeal succeeded on the general ground of the meeting of s 15(2) of the *Retirement Villages Act* 1999, quite apart from the "new" grounds.

[9] The applicant/appellant should get her costs of her successful appeal.

[10] The question of costs of the proceeding in the Tribunal is a very different one. There, the respondent was not awarded costs, indeed, there seems to have been no thought of its being awarded costs. The respondent's contention that Ms Saunders would not have obtained costs in the Tribunal had she been successful there, notwithstanding what Keane JA, Williams JA and Philippides J agreeing said in *Tamawood*:

> "[32] If orders for costs were not to be made in favour of successful parties in complex cases, then just claims might not be prosecuted by persons who are unable to manage complex litigation by themselves. Such a state of affairs would truly be contrary to the interests of justice; and an intention to sanction such a state of affairs cannot be attributed to the legislature which established the Tribunal.
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> [33] To say this is not to ignore s71(5)(b) of the Act. There is a clear distinction, in terms of the interest of achieving justice, between the mere fact of having representation and the fact of having reasonably obtained that representation because of the complexity of the case. In the absence of countervailing considerations, where a party has reasonably incurred the cost of legal representation, and has been successful before the Tribunal, it could not rationally be said to be in the interest of justice to allow that success to be eroded by requiring that party to bear the costs of the representation which was reasonably necessary to achieve that outcome. Finally in this regard, it should also be borne in mind that s71(4)(a) of the Act expressly recognises that "the outcome of the proceeding" is a consideration which is relevant to the exercise of the discretion conferred by s71(1) of the Act."

is disputed in the submissions in reply which disclose an offer to settle made before the hearing by Ms Saunders which was marginally less favourable to her than the outcome in the appeal.

[11] The respondent's submissions included material indicating that Ms Saunders in the Tribunal had the support of Mr Phillips of the Association of Residents of Queensland Retirement Villages (Inc) and that hers was a proceeding supported by the Association. In the Tribunal, as in this Court, there seem to have been wider interests at play than the narrow ones of the parties.

[12] I think there is weight in the respondent's argument that the Court should not lightly order costs of the Tribunal stage in the face of s 70. There is some risk of creating a precedent which, as the respondent says, would be as useful for the operators of retirement villages as for residents. It appears to have been assumed that the residents as a class would be less favourably placed to meet an adverse costs order. While accepting that a discretion exists to award costs of the Tribunal stage to Ms Saunders, I think the sounder course is for the court to eschew doing so. The only costs the respondent will be ordered to pay are those of the proceeding in the District Court.

[13] I do not doubt that there may arise in the Tribunal circumstances in which a party might properly be required to pay costs following rejection of an offer to settle. One can imagine circumstances in which it might be assessed as mischievous to continue a proceeding in the Tribunal which was clearly pointless, because an offer made regarding the subject matter could not possibly be bettered. This is not such a case. I would be loath to set a precedent for parties who might invoke the jurisdiction of the Tribunal, or be brought before it which introduced anything like the "sudden death" aspects of the UCPR Rules about offers to settle.