QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Bode v Queensland All Codes Racing Industry Board (No 2)* [2017] QCAT 84
PARTIES:	Gerald Lansborough Bode (Applicant) v Queensland All Codes Racing Industry Board (Respondent)
APPLICATION NUMBER:	OCR224-15
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	On the papers
HEARD AT:	Townsville
DECISION OF:	**Member Pennell**
DELIVERED ON:	3 March 2017
DELIVERED AT:	Townsville
ORDER MADE:	**The application for costs is dismissed.**
CATCHWORDS:	PROCEDURE – COSTS – DISCRETION TO ORDER COSTS – principles applied – presumption is that each party must bear the party's own costs – rebuttal of legislative presumption only if in the interests of justice – must be sufficiently compelling grounds to depart from legislative presumption – in the interests of justice phrase is subjective and may vary depending on the facts, circumstances and the parties involved – award of costs is an exception rather than a rule – where Tribunal set aside a decision – natural justice – where a party acted without fairness – where party failed to make available a witness for cross examination but that conduct did not unnecessarily disadvantage the other party – decision maker must use best endeavours to assist the Tribunal – Tribunal's power to require witnesses to attend – factors to be taken into account –Tribunal undertaking a detailed assessment of the dispute is not enough to rebut presumption to award costs –disparity in financial resources between the parties – circumstances and facts not complex in nature – Applicant's genuine attempts to enable and help the decision maker to make a decision on the merits

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 21, s 28(4), s 48(1)(a), s 48(1)(b), s 48(1)(c), s 48(1)(d), s 48(1)(e), s 48(1)(f), s 48(1)(g), s 97, s 98, s 100, s 102(1), s 102(3)(a), s 102(3)(b), s 102(3)(c), s 102(3)(d)(i), s 102(3)(d)(ii), s 102(3)(e), s 102(3)(f) and s 107(1).
Queensland Civil and Administrative Tribunal Rules 2009 (Qld) s 85.

Ascot v Nursing & Midwifery Board of Australia [2010] QCAT 364
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577
Herron v The Attorney General for New South Wales (1987) 8 NSWLR 601
Latoudis v Casey (1990) 170 CLR 534
McEwen v Barker Builders Pty Ltd [2010] QCATA 49
Queensland All Codes Racing Industry Board v Abbott (No 2) QCATA 49
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412
Warren v Queensland Law Society Incorporated (No 2) [2013] QCAT 234
Wolfgram v Racing Queensland [2012] QCAT 44

APPEARANCES and REPRESENTATIONS:

Pursuant to section 32(2) of the *Queensland Civil and Administrative Tribunal Act 2009* ("the QCAT Act"), the Applicant's application for costs was heard and determined by the Tribunal on the papers by way of written submissions from the parties; and without an oral hearing.

REASON FOR DECISION

Introduction

[1] On 5 December 2016, the Tribunal set aside the conviction and penalty imposed by the Respondent upon the Applicant arising out of an incident at the Herbert River Jockey Club at Ingham on 29 August 2015.

[2] On 12 December 2016, the Applicant wrote to the Tribunal and asked for an opportunity to make submissions with regards to costs. On 20 December 2016, the parties were directed to file submissions to argue their respective positions according to a timeline.[1] The parties have filed their submissions.

[3] On 3 February 2017, the Applicant filed further material outside the timeline given in the directions by the Tribunal. That material was Submissions in Reply to the Respondent's submissions; and an affidavit by Gregory David Finlay, a

[1] The Applicant was directed to file by 06/01/2017 and the Respondent was to directed to file by 20/01/2017.

Solicitor from Purcell Taylor Lawyers[2] of Townsville dated 3 February 2017. Mr Finlay's affidavit is discussed later in these reasons.

The legislative pathway for costs

[4] The starting point relating to any consideration given by the Tribunal for costs arising out of any proceedings in the Tribunal is that each party must bear their own costs for the proceeding.[3]

[5] The QCAT Act allows the Tribunal to exercise discretion in making an order to require a party to pay all, or a part of the costs of another party, if it is considered in the interests of justice to require an order to be made.[4] However, before exercising that discretion, there are several factors to be considered, including whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party,[5] the nature and complexity of the dispute,[6] the relative strengths of the claims of each of the parties[7] and the financial circumstances of the parties involved.

[6] Regarding proceedings for a reviewable decision,[8] a further consideration is whether the Applicant was afforded natural justice by the decision maker, and whether the Applicant genuinely attempted to assist the decision maker to make the decision.

[7] If the Tribunal decides to award costs, the Tribunal must fix those costs, if possible.[9] If this is not possible, the Tribunal may order that costs be assessed under the *Queensland Civil and Administrative Tribunal Rules 1999* (the QCAT Rules). In undergoing that assessment, a scale under the *Uniform Civil Procedure Rules 1999* must be used.

[8] In addition to those points described above, if the Tribunal makes an order for costs against a Respondent in a review proceeding, the Tribunal has the discretion to order the Respondent pay the prescribed amount paid by the Applicant on filing the application for the proceedings.[10]

The position of each party

Applicant's position

[9] The Applicant argues that the Tribunal should consider displacing the ordinary no costs rule and exercise its discretion in the interest of justice to require the Respondent to compensate him for his legal costs. The Applicant also asked the Tribunal to consider that the costs sought were reasonable and necessary in all the circumstances and the amount of costs should be fixed at $6,357.10.

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2 Solicitor's firm representing the Applicant.
3 *Queensland Civil and Administrative Tribunal Act 2009*, s 100.
4 Ibid, s 102(1).
5 Ibid, s 102(3)(a). This includes those factors mentioned in s 48(1)(a) to (g).
6 Ibid, s 102(3)(b).
7 Ibid, s 102(3)(c).
8 Ibid, s 102(3)(d).
9 Ibid, s 107(1).
10 Ibid, s 85.

[10] In seeking that amount, the Applicant at first outlined that although the conduct of the Respondent did not unnecessarily disadvantage him[11] and the issues ventilated during the proceedings were not complex, it was however, necessary for the Tribunal to undertake a detailed assessment of the evidence and the nature of the dispute.[12]

[11] The Applicant also said that what strengthens his application for costs was the shift in the Respondent's position which was adopted at the Stewards' Inquiry, to the position taken at the Tribunal's review hearing. He also said that there was a lack of merit in the Respondent's case.[13]

[12] The Applicant asked the Tribunal to consider the Respondent's conduct in the Tribunal hearing process so far as not complying with the requirements of section 21 of the QCAT Act[14] and its failure to afford the Applicant natural justice.[15] He suggested that these were important considerations to give, along with the obvious disparity in the financial resources of the parties.

[13] The amount of costs sought comprises of –

Description	**Fees**
Professional Fees (Purcell Taylor Lawyers) ……	$3,300.00
Outlays	
Postage ……	$2.10
QCAT filing fee ……	$305.00
Counsel fees ……..	$2,750.00
TOTAL AMOUNT CLAIMED	**$6,357.10**

Respondent's position

[14] Like the Applicant, the Respondent observed that the facts and circumstances of the dispute were not complex and nor did it do anything which unnecessarily disadvantaged the Applicant.

[15] With regards to the relative strengths of its case, the Respondent argued that there had been no dispute that a physical altercation occurred between the Applicant and Mr Mitchell. Because of that physical altercation, the Respondent said that the Applicant could not sensibly argue that the case was weak or without support from any evidence.

[16] On the topic of natural justice, the Respondent argued that a fair opportunity was provided to the Applicant to present his case at both the Stewards' Inquiry and before the Racing Disciplinary Board. The Respondent also argued that in making his review application, natural justice was not a ground raised by the Applicant.

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11 Respondent's submissions at paragraph 4.
12 Respondent's submissions at paragraph 5.
13 Ibid, at paragraph 6.
14 Ibid, at paragraph 10.
15 Ibid, at paragraph 7.

[17] Regarding the financial circumstances of the parties, two points were raised by the Respondent. Firstly, the Respondent said that the Applicant failed to provide evidence to substantiate his financial position and demonstrate what impact it would have on his financial position if costs were not awarded. Secondly, the Respondent argued that the Applicant has failed to demonstrate what expenses were incurred.

[18] On those two issues, the Tribunal notes that attached to the Applicant's submissions filed 6 January 2017 and described as "ANNEXURE A" is a schedule of costs incurred by the Applicant in these proceedings.[16] Included in paragraph 11 of the same submissions is a brief overview of the Applicant's antecedents and his financial position.

[19] Another issue which the Respondent asked the Tribunal to consider was how the Queensland Racing Integrity Commission was funded by the industry participants. The Respondent guided the Tribunal's attention to the comments of Thomas J in *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49 at [18] where is was observed that in many cases, a party appears before the Tribunal with little or no financial support. This factor is not a reason for making an order for costs. The Tribunal's attention is also drawn to the observation of the Tribunal in *Wolfgram v Racing Queensland* [2012] QCAT 44 at [26] where the Tribunal determined that a factor which may weigh against an award of costs in racing matters is that an undesirable outcome in awarding costs is that to do so, this may act as a deterrent to the body fulfilling its duties.

[20] Ultimately, the Respondent argued that having regard to the factors raised with respect to section 102 of the QCAT Act, it was not in the interests of justice for the Tribunal to make an order for the Respondent to pay the Applicant's costs. The Respondent seeks an Order that there be no Order as to costs.

Additional material filed by the Applicant

[21] Earlier in these reasons mention was made of the Applicant filing an affidavit of Mr Finlay. The contents of that affidavit provided the Tribunal with the background of the conversations contained in correspondence exchanged between the legal representatives for both parties.

[22] As the Tribunal understands it, the purpose for the Applicant providing the Tribunal with the correspondence was to highlight the Respondent's reluctance to make available witnesses at the hearing. Those witnesses were Mr Mitchell, Mr Holden and Mr Woolaston. The chronology of the correspondence was –

> 7 June 2016. Email sent from Mr Andrew Peel, Solicitor from Purcell Taylor Lawyers to Mr Allan Lonergan from Racing Queensland asking that the witnesses Mr Mitchell, Mr Holden and Mr Woolaston be made available for cross examination at the hearing. Mr Peel also enquired as to which of the Applicant's witnesses were required for cross examination.[17]

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16 As described in paragraph 12 of these reasons.

17 Mr Finlay's affidavit at Annexure 1

8 June 2016. Email from Mr Lonergan in response to Mr Peel's email.[18] Mr Lonergan advised that he had not had the opportunity to confer with counsel in respect to what witnesses the Respondent will require for cross-examination. The email further indicates that it was not appropriate to assume that the Applicant's witnesses will not be required.[19]

22 June 2016. Letter from Mr Andrew Forbes, Partner of Lander & Rogers Lawyers[20] to Purcell Taylor Lawyers. Mr Forbes wrote –

> "You had asked our client to have certain witnesses available for cross examination. The directions did not contemplate the filing of any witness statements; only that your client file and deliver any expert report. The matter will therefore proceed upon the material that has been filed, including the bundle of material that was placed before the Board".[21]

23 June 2016. Letter in response from Mr Peel to Landers & Rogers Lawyers. Mr Peel wrote –

> "For the first time in the proceedings our client is confronted with a position adopted by Racing Queensland whereby they are refusing to call witnesses highly relevant to the determination of the review being conducted before QCAT.
>
> We note that we requested these witnesses be made available in correspondence to Racing Queensland on 7 June 2016 at 10.49am.
>
> We note your late involvement in the matter on behalf of Racing Queensland; and we can advise you that the representatives of the respective parties have previously conducted this review on the basis of a review hearing where witnesses would be made available and cross examined. This is apparent by our letter to Queensland Racing of 7 June 2016 but for which we have not received a response until your letter yesterday.
>
> The positions of the respective parties in relation to this is an explanation why it was unnecessary to seek specific directions from QCAT.
>
> However we note that you are relying on the previous direction orders as a basis upon which your client is not required to have witnesses available for cross-examination.
>
> Given your client's most recent position, it is our client's intention to apply for an adjournment of the hearing on Friday in the Magistrates Court at Townsville. Our client will also seek directions that the witnesses we have requested be made available at the hearing.
>
> We would be pleased if you would advise us as to your client's position on the proposed adjournment with associated directions in relation to the witnesses".[22]

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18 Email sent by Mr Peel on 7 June 2016.
19 Mr Finlay's affidavit at Annexure 2.
20 Solicitors firm representing the Respondent.
21 Mr Finlay's affidavit at Annexure 3.
22 Ibid, at Annexure 4.

23 June 2016. Mr Forbes responded and wrote –

> "You will note we are of the view your client's case is misconceived and ought be dismissed.
>
> We intend to book our flights to Townsville shortly. We therefore invite you to withdraw your client's application. If he agrees to do so by 4pm today, we will seek our client's instructions as to whether it will bear its own costs. Accordingly, please advise, prior to 4pm today, whether your client still wishes to proceed with this matter or will withdraw".[23]

23 June 2016. Mr Forbes again wrote to Purcell Taylor Lawyers. On this occasion, he advised –

> "As described in my letter of 22 June, the directions made in this matter did not contemplate the filing of any witness statements. Racing Queensland (RQ) has therefore not filed any witness statements.
>
> The witnesses to which you refer are not employees of RQ. Their statements were prepared by Queensland Police and placed before the Stewards and in turn the Racing Disciplinary Board. They are not RQ's witnesses.
>
> RQ can't be asked to call a witness for whom affidavit has not been filed. It is of course perfectly open for you to organise for those witnesses to be called.
>
> We remain of the view that the matter can proceed merely on the basis of the bundle of documents that have been filed with the Tribunal.
>
> We note you intend to have your client give evidence. As discussed, we are concerned if your client gives evidence before the Tribunal he may prejudice the conduct of his criminal trial. We trust you have advised your client accordingly.
>
> You have stated you intend to seek an adjournment of the hearing. That application will be opposed.
>
> You also intend to seek a direction that RQ have witnesses available at the hearing, For the reasons described above we do not know that basis you could seek such an order. It will be opposed. We are therefore at a loss as to how you would intend to obtain such an order".[24]

23 June 2016. Mr Forbes again wrote to Purcell Taylor Lawyers. Attached was a draft Order. Mr Forbes wrote –

> "I refer to our discussions earlier and enclose on a "without prejudice basis" a draft order that is intended be an offer to resolve your client's application.
>
> You will note that it contemplates, that under section 24 of the Queensland Civil and Administrative Tribunal Act, the decision under review be partly set aside and another substituted. The

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23 Mr Finlay's affidavit at Annexure 5.

24 Ibid, at Annexure 6.

> finding under section 175(q) of the Australian Racing Rules would be confirmed, so too the penalty of $500.
>
> Please let me know if your client will consent to an order in these terms".[25]

23 June 2016. Purcell Taylor Lawyers wrote to the Tribunal. The letter explained that an issue had arisen that will result in the Applicant seeking an adjournment of the review application.[26]

23 June 2016. Mr Forbes wrote to the Tribunal[27] saying –

> "We refer to the solicitors for the Applicant's letter to the Tribunal this afternoon that advised that they will be seeking an adjournment of tomorrow's hearing. We hold instructions to oppose the adjournment and to ask that the matter progress to hearing tomorrow,
>
> In any event, the parties have had some discussions today with the view of resolving some issues. We are hopeful those discussions will continue tomorrow morning.
>
> We regret to advise that we have had difficulty arranging flights to Townsville. We have been informed this has been due to Wednesday night's State of Origin game in Brisbane. The earliest flight we (Emily Fitton of our office and Michael Henry of Counsel) have been able to get to Townsville, is one that will land in Townsville at 10:55am.
>
> Therefore, we request that the hearing not commence until at least 11:30am. However, we will keep in touch with the Tribunal and the Applicant's solicitors tomorrow morning in this regard".[28]

[23] As already commented on above, the exchange of correspondence suggests that the Applicant was requesting the Respondent make available the witnesses Mr Mitchell, Mr Holden and Mr Woolaston at the hearing. The Respondent's response was to tell the Applicant[29] that the Tribunal's directions[30] did not contemplate the filing of any witness statements, therefore none were filed.

[24] The correspondence goes on to explain that the witnesses were not employed by the Respondent and their statements were prepared by the Queensland Police Service, and subsequently placed before the Stewards Inquiry, and then, the Racing Disciplinary Board. The Respondent was not going to call a witness for whom an affidavit has not been filed. The Respondent then suggested that it was open for the Applicant to organise and call those witnesses.

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25 Mr Finlay's affidavit at Annexure 7.
26 Ibid, at Annexure 8.
27 This letter was emailed to the Tribunal at 7:58pm on 23 June 2016 from the email address of Emily Fitton of Landers & Rogers Lawyers. Mr Peel's email address at Purcell Taylor Lawyers was cc'd into the email.
28 Mr Finlay's affidavit at Annexure 9.
29 Landers & Rogers letter dated 23 June 2016 marked as Annexure 6 to Mr Finlay's affidavit.
30 Directions made by Senior Member O'Callaghan on 23 December 2015 and 8 March 2016.

[25] Both parties should be aware that the QCAT Act provides that the decision maker must help the Tribunal.[31] That legislative onus implies that the Respondent was to use its best endeavours to help the Tribunal produce the correct and preferable decision on the review. Further guidance can be found in the Tribunal's Practice Direction No 3 of 2013 which gives a template for the roles that each of the parties play in respect of administrative review proceedings.

[26] In reaching its original decision, the Respondent relied upon the comments and statements of the witnesses to punish the Applicant. That evidence was an important cog in the Respondent's decision making process at both the Stewards' Inquiry and the Racing Disciplinary Board hearing.

[27] Putting aside the obligation of a party to call a witness in certain circumstances, the QCAT Act provides that if a party does not call a witness, that does not automatically mean that is the end of the matter. If the need arises, the Tribunal can exercise its powers to call witnesses. The QCAT Act allows the Tribunal to use its own initiative, or it can act on the application of either of the parties, to give a notice to a witness and require that witness to attend the hearing and give evidence.[32]

[28] The Tribunal also has the power to call any witness, examine and cross examine witnesses and compel those witnesses to answer questions the Tribunal considers relevant.[33] Perhaps this was overlooked by both parties during their discussions about whether witnesses should be called, and it is certainly something that could have been addressed by either party at any time well in advance of the hearing date.

Discussion

[29] Notwithstanding the issue relating to the witnesses, the correct and preferable decision arrived at by the Tribunal in the first instance was to set aside the Respondent's decision. The question for the Tribunal to determine in this application is whether in the interest of justice the Tribunal should make an order for costs.

[30] A well known principle is that costs are not awarded as punishment to an unsuccessful party, but are awarded to indemnify the successful party against the expenses they incur because of the legal proceedings.[34] For matters determined in the Tribunal, the starting position under the QCAT Act is the presumption that each party must bear its own costs.[35]

[31] That presumption was discussed by Wilson J in *McEwen v Barker Builders Pty* Ltd [2010] QCATA 49 at [17] where it was observed that –

> "The language of s 100 of the Queensland Civil and Administrative Tribunal Act plainly indicates that the legislature has turned its face against awards of costs in this Tribunal. The question that will

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31 *Queensland Civil and Administrative Tribunal Act 2009,* s, 21.
32 Ibid, s 97.
33 Ibid, s 98.
34 *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ.
35 *Queensland Civil and Administrative Tribunal Act 2009,* s.100.

> usually arise in each case in which costs are sought is, then, whether circumstances relevant to the discretion inherent in the phrase *'the interests of justice'* have arisen; and, whether or not they point to a costs award in a sufficiently compelling way to overcome the statutory hurdle".

[32] In *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412 at [4] and [5], the presumption was revisited where it was observed by Wilson J as –

> "The starting point concerning costs in QCAT is that each party must bear its own: QCAT Act, s 100. This presumption may, however, be displaced if the Tribunal considers it in the interests of justice to order a party to pay all or part of the costs of another party: s 102(1). The phrase *"in the interests of justice"* is not defined in the Act but is to be construed according to its ordinary or plain meaning, which obviously confers a broad discretionary power on the decision-maker.
>
> In determining whether it is in the best interests of justice to award costs against another party the Tribunal may have regard to the nature and complexity of the dispute; the relative strengths of the claims made by each of the parties; and, whether a party has acted in a way that unnecessarily disadvantages another party: QCAT Act, s 102(3)".

[33] If the Tribunal does depart from the presumption as outlined above, certain deliberations must be given to several considerations when exercising that discretion.[36] This issue was previously discussed by Kingham DCJ[37] in *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364 at [8] and [9] where it was observed –

> "The Tribunal may make a costs order if the tribunal considers the interests of justice require it to make the order. The tribunal may have regard to a number of considerations specified in s102(3).
>
> The public policy intent of the provisions in the QCAT Act is plain. The tribunal was established as a no costs jurisdiction. That may be departed from where the interests of justice require it. The considerations identified in s102(3) are not grounds for awarding costs. They are factors that may be taken into account in determining whether, in a particular case, the interests of justice require the tribunal to make a costs order".

[34] The expression of 'in the interest of justice' was revisited in *Warren v Queensland Law Society Incorporated (No 2)* [2013] QCAT 234 at [11], where Wilson J again commented on that phrase. It was the observation of Wilson J that the provisions of the QCAT Act relating to costs require the Tribunal to ask itself whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice' point so compellingly to a costs award that they overcome the strong contra-indication against costs.

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36 *Queensland Civil and Administrative Tribunal Act 2009*, s 102(3) and s 48(1)(a) to (g).

37 Kingham DCJ was the Tribunal's Deputy President at the time of this decision.

[35] That comment flowed from the determination that under section 102(1) of the QCAT Act, the Tribunal has a discretion to make a costs order. That discretion should only be exercised if the Tribunal considers the interests of justice requires it. As Wilson J observed in *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2),* if that departure is made, then the interests of justice must be considered according to its ordinary or plain meaning. In reflecting on that principle, the next consideration are the factors as outlined in section 102(3) of the QCAT Act. The view expressed by Kingham DCJ in *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364 about those factors has been explored above.

[36] In addition to considering the phrase 'in the interest of justice' according to its ordinary and plain meaning, the phrase generally refers to the source of fairness and equity used when the Tribunal has the discretion to make a decision in a particular situation. It is a very subjective phrase and its interpretation will vary depending upon the circumstances, facts and the parties involved in the proceedings.

Consideration of the section 102(3) factors

Whether a party acted in a way to disadvantage the other party[38]

[37] The Applicant told the Tribunal that the conduct of the Respondent did not unnecessarily disadvantage him.[39] The Respondent is of the same view and disputes any suggestion that it disadvantaged the Applicant in any way.

[38] A question for determination by the Tribunal in the first instance at the hearing[40] was not whether the original decision was the correct or preferable one on the material before the decision maker, but whether that decision was a correct or preferable one based on the material before the Tribunal at the hearing.[41] The correspondence annexed to the affidavit of Mr Finlay suggests a reluctance by the Respondent to make available the witnesses it earlier relied upon to punish the Applicant.

[39] The Tribunal has specific powers relating to reluctant parties or witnesses which has been discussed earlier in these reasons. If a party feels that the other party will not, or is reluctant to call witnesses, then the aggrieved party should consider exploring with the Tribunal the options available within the QCAT Act.

[40] In consideration of whether one party acted in a way to disadvantage the other in these proceedings, the Tribunal is of the view that notwithstanding what has already been discussed above, the reluctance of the Respondent to call those witnesses resulted in an advantage to the Applicant. Therefore, no disadvantage was applied to the Applicant and this factor cannot be relied upon by him in this application.

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38 *Queensland Civil and Administrative Tribunal Act 2009*, s 102(3)(a).
39 Respondent's submissions at paragraph 4.
40 See paragraph [34] of the decision.
41 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.

[41] The Applicant also argues[42] that another factor in his favour was the Respondent filing its submissions late, which the Applicant said was a failure by the Respondent to conduct itself in a proper manner during the proceedings. The Tribunal gave directions with regards to the filing of material to be relied upon by each of the parties. The Respondent did err and file material beyond the given timeline, however the Applicant also fell into the same error when he recently filed Mr Finlay's affidavit outside the directed timeline.

[42] The Tribunal takes no issue with either party on this point and it is not a feature determinable to the outcome of this application. Besides, there is provision within the QCAT Act that allows the Tribunal the discretion to admit into evidence the contents of any document, despite the noncompliance with any time limit or other requirement under the QCAT Act or the rules relating to the document or the service of it.[43]

[43] The Tribunal is satisfied that the Respondent's conduct in these proceedings did not disadvantage the Applicant.

The nature and complexity of the dispute[44]

[44] Neither of the parties suggest that the facts and circumstances and the nature of the dispute was complex. The Tribunal is of the same view and this was not a factor considered.

[45] Notwithstanding the issues ventilated during the proceedings were not complex in nature, the Tribunal was required to undertake a detailed assessment of the nature of the dispute and the available evidence. However, that alone is not a factor which should persuade a Tribunal to depart from the legislative presumption relating to costs. A consideration of the objects and functions of the QCAT Act is the requirement for the Tribunal to undertake a detailed assessment of all matters which come before it.

The relative strengths of the claims made[45]

[46] The Applicant argues that what strengthens his application for costs was the shift in the Respondent's position between the Stewards' Inquiry and the Tribunal's review hearing, and the lack of merit in the Respondent's case.[46]

[47] The Respondent's position is that there had been no dispute that an altercation occurred between the Applicant and Mr Mitchell. The Respondent also argued that because there had been the physical altercation, the Applicant could not sensibly argue that the Respondent's case was weak or without support from any evidence. The Respondent is correct in saying that there was no dispute that a physical altercation took place between the Applicant and Mr Mitchell. A feature in favour of the Applicant was the hypothesis of self-defence which could not be contested because the Respondent did not make witnesses available for cross-examination.

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42 Applicant's submissions in reply filed 3 February 2017 at paragraph 3.
43 *Queensland Civil and Administrative Tribunal Act*, s 28(4).
44 Ibid, s 102(3)(b).
45 Ibid, s 102(3)(c).
46 Respondent's submissions at paragraph 6.

[48] Notwithstanding the reasons above, to say that the Respondent's case lacked merit is not a position that the Tribunal adopts and the Tribunal does not accept that this is a ground to depart from the presumption that each party should bear their own costs.

Whether Mr Bode was afforded natural justice by the decision maker[47]

[49] The Applicant relies upon the consideration given by the Tribunal in its original decision to set aside the Respondent's decision and the observation made that the Respondent acted without fairness[48] by not making a witness[49] available for cross examination. The Applicant argues[50] that a factor in favour of the award of costs was that conduct by the Respondent.

[50] On the topic of natural justice, the Respondent argued that a fair opportunity was provided to the Applicant to present his case at both the Stewards' Inquiry and before the Racing Disciplinary Board. The Respondent also argued that in making his review application, natural justice was not a ground raised by the Applicant.

[51] The denial of natural justice resulting in the Applicant being penalised occurred well before the matter came before the Tribunal. The denial took place at the Stewards' Inquiry and the Racing Disciplinary Board hearing when the Respondent declined the Applicant an opportunity to cross examine Mr Holden.

[52] A consideration of the Tribunal in its original decision was the unfairness this caused to the Applicant. In analysing that factor, plainly the Respondent's decision to not call that witness did not impede or damage the Applicant's case before the Tribunal, it was more of an assistance than a hindrance and was a factor in setting aside the Respondent's decision. The Tribunal does not accept that this is a ground to depart from the presumption as provided in section 100 of the QCAT Act.

Whether Mr Bode genuinely attempted to enable and help the decision maker to make the decision on the merits[51]

[53] There is nothing before the Tribunal that suggests that the Applicant did not make genuine attempts to assist the Respondent in the original investigation, the Stewards' Inquiry or the Racing Disciplinary Board hearing. He attended all hearings, provided all relevant information and answered questions as required.

The financial circumstances of the parties[52]

[54] The Applicant relies upon the argument that there is an obvious disparity in the financial resources of the parties. A schedule of his legal expenses has been provided to the Tribunal. In response to this point, the Respondent raised two things. The first thing was the Applicant failing to provide evidence to substantiate his financial position and demonstrate what impact it would

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47 *Queensland Civil and Administrative Tribunal Act*, s 102(3)(d)(i).
48 See Reasons for Decision at paragraph [55].
49 Mr Holden.
50 Applicant's submissions in reply filed 3 February 2017 at paragraph 3.
51 *Queensland Civil and Administrative Tribunal Act*, s 102(3)(d)(ii).
52 Ibid, s 102(3)(e).

have on him financially if costs were not awarded. Secondly, the Applicant has failed to demonstrate what expenses were incurred.[53]

[55] The Applicant's counter argument,[54] which the Tribunal accepts, is to say that it is not necessary for him to adduce anything more than what he has already provided in the annexure attached to the submissions. The amount sought in in that annexure is within range.

[56] Another issue that the Respondent asked the Tribunal to consider was its own reliance upon funding by industry participants, and had previously been acknowledged by the Tribunal[55] in *Queensland All Codes Racing Industry Board v Abbott (No. 2)* [2016] QCATA 49 at [18] where is was observed that in many cases, a party appears before the Tribunal with little or no financial support. This circumstance is not a reason for making an order for costs. The Tribunal's attention is also drawn to the observations of the Tribunal in *Wolfgram v Racing Queensland* [2012] QCAT 44 at [26] where the Tribunal determined that a factor which may weight against an award of costs in racing matters is that an undesirable outcome in awarding costs against such a body is that it may act as a deterrent to the body fulfilling its duties.

[57] Both parties have effective arguments, however when turning to consider this point, it must be recognised that disparity in financial positions is not a ground for awarding costs, although it is a factor that can be taken into account whether it is in the interests of justice to award costs. The financial impact upon a successful party must be sufficiently compelling to justify a shift from the legislative presumption as provided in section 100 of the QCAT Act. The Tribunal is not convinced that there are significantly compelling reasons to rule otherwise.

Anything else that the Tribunal considers relevant[56]

[58] This factor gives the Tribunal a very wide discretion to award costs. There have been no other factors, outside the ones already discussed above, which have been advanced in this application which has influenced the Tribunal to order costs.

Conclusion

[59] The presumption as provided in the legislation tends to place an award of costs as an exception rather than as a rule. There must be a sufficiently compelling or persuasive reasons for the Tribunal to depart from the legislative presumption.

[60] Having regard to all the circumstances of this matter, it is the Tribunal's view that the factors relied upon by the Applicant are not sufficiently compelling enough to overcome the strong contra-indication against costs or compelling enough to convince the Tribunal that it is in the interest of justice to rebut the presumption as provided in section 100 of the QCAT Act.

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53 On that second issue, the Tribunal notes that attached to the Applicant's submissions filed 6 January 2017 and described as "ANNEXURE A" is a schedule of costs incurred by the Applicant in these proceedings.

54 Applicant's submissions in reply at paragraph 4.

55 Decision of Justice Thomas and Senior Member Stilgoe OAM.

56 *Queensland Civil and Administrative Tribunal Act*, s 102(3)(f).

[61] Each party must bear their own costs and the application is dismissed.

ORDER

[62] That application for costs is dismissed.