SUPREME COURT OF QUEENSLAND

CITATION:	*Bourne v Queensland Building and Construction Commission* [2018] QSC 231
PARTIES:	**KATRINA MARGARET BOURNE** (applicant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (respondent)
FILE NO/S:	BS No 11056 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2018
JUDGE:	Douglas J
ORDER:	**1. The respondent's application, filed 25 January 2018, is granted.** **2. The applicant's originating application, filed 23 October 2017, is dismissed.** **3. The parties will be heard as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – GENERALLY – where the respondent paid money to a former client of the applicant's company pursuant to a statutory insurance scheme – where the applicant owed that money as a debt to the respondent – where the respondent commenced proceedings to recover that debt – where the applicant sought judicial review of the respondent's decision to commence those proceedings – where the respondent brought an application to have the applicant's judicial review application dismissed pursuant to s 48 of the *Judicial Review Act* 1991 (Qld) – whether the

decision to commence proceedings was judicially reviewable – whether the decision to commence proceedings was of an administrative character made under an enactment

Judicial Review Act 1991 (Qld), s 13, s 48
Queensland Building and Construction Commission Act 1991 (Qld), s 8, s 71, s 86F, s 93(1), 111C
Queensland Building Tribunal Bill 1999 (Qld)

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited
Deloitte Touche Tohmatsu v Australian Securities Commission (1995) 54 FCR 562, explained
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, applied
Mahony v Queensland Building Services Authority [2013] QCA 323, considered
Queensland Building and Construction Commission v Turcinovic [2018] 1 Qd R 156; [2017] QCA 77, cited
Queensland Building and Construction Commission v Watkins [2014] QCA 172, cited
Rawson Finances Pty Ltd v Deputy Commissioner of Taxation (2010) 189 FCR 189; [2010] FCA 538, considered
Rawson Finances Pty Ltd v Deputy Commissioner of Taxation (2010) 81 ATR 36; [2010] FCAFC 139, cited
Samimi v Queensland Building and Construction Commission [2015] QCA 106, cited

COUNSEL: C Martin for the applicant
N Andreatidis for the respondent

SOLICITORS: Michael Ohlson for the applicant
Rostron Carlyle Lawyers for the respondent

[1] The Queensland Building and Construction Commission ("QBCC") commenced proceedings on 25 August 2017 claiming $200,000 from Ms Bourne and Mr Hart as moneys owed by them to QBCC pursuant to s 71(1), s 111C(3) and s 111C(6) of the *Queensland Building and Construction Commission Act* 1991 ("the Act"). Ms Bourne, by her application filed 23 October 2017, sought to review the decision to commence that proceeding pursuant to the *Judicial Review Act* 1991. QBCC then brought an application to dismiss Ms Bourne's application pursuant to s 48 of the *Judicial Review Act.* Section 48 of the *Judicial Review Act* permits the court to dismiss an application if it would be inappropriate for proceedings in relation to the application or claim to be continued, or if it would be inappropriate to grant the application, or if no reasonable basis for the application or claim is disclosed.

[2] The principal ground on which QBCC relies is an argument that its decision to claim the money from Ms Bourne was not a decision of an administrative character made under an enactment but a procedural determination that was not expressly or impliedly required or authorised by the Act and which did not, itself, confer, alter or otherwise affect legal rights or obligations of Ms Bourne.

Factual background

[3] Ms Bourne was a director of J & K Homes Pty Ltd ("Kirra Homes"), a building company which undertook domestic building work pursuant to a written contract with Ms Joanna Lynton dated about 22 July 2013. On or about 4 November 2014, Ms Lynton terminated the building contract and then on 6 November 2014 lodged a claim with QBCC under the statutory insurance scheme.

[4] On 24 March 2015, QBCC approved the insurance claim made by Ms Lynton and paid out $5,000 on 10 April 2015 and $195,000 on 11 May 2015. Kirra Homes had been placed into liquidation on or about 21 April 2017. The $200,000 said to be owed by Ms Bourne to QBCC has not been paid. On 25 August 2017, QBCC filed its claim in the District Court. The defence to its claim challenges whether the payments were made in accordance with the statutory scheme and alleges an estoppel.

The statutory context

[5] Section 71(1) of the Act allows QBCC to recover the amount of any payment on a claim under the statutory insurance scheme from the building contractor, in this case Kirra Homes, or from "any other person through whose fault the claim arose." The words "building contractor" are defined inclusively in s 71(2) to include a variety of licensed contractors as well as a person who, for profit or reward, carried out the work. Section 71(2)(b) provides that a person through whose fault the claim arose is taken to include a person who performs services for the work if the services were performed without proper care and skill.

[6] Section 111C was, however, the principal source of liability relied on by QBCC against Ms Bourne. It extends liability for payment, where a company owes QBCC an amount because of a payment made by QBCC on a claim under the insurance scheme, to each individual who was a director of the company when building work the subject of the claim was or was to have been carried out: see s 111C(3) and s 111C(6)(a).

[7] Section 93(1) of the Act confers non-exclusive jurisdiction on QCAT in relation to a debt owed to QBCC under s 71(1) by providing that QBCC may recover a debt under s 71 by application to QCAT under that section. Such a decision is made not reviewable in QCAT by s 86F of the Act. In *Mahony v Queensland Building Services Authority*,[1] that led McMurdo P to observe, partly in reliance on explanatory notes to

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[1] [2013] QCA 323 at [35].

the *Queensland Building Tribunal Bill* 1999,[2] that the decision to recover an amount was judicially reviewable in the Supreme Court. QBCC submitted that observation was a dictum that should not determine this case because the proceedings did not depend on s 71 but rather on s 111C. I agree with that submission.

[8] Section 13 of the *Judicial Review Act* also provides that an application for review of a matter for which provision for review by another court or tribunal is made by a law other than the *Judicial Review Act* must be dismissed in certain circumstances. That led Mr Martin for Ms Bourne to submit that that was another reason why a decision made pursuant to s 71, which is excluded from review by QCAT because of s 86F of the Act, should be reviewable pursuant to the *Judicial Review Act*.

[9] The question that arises here, therefore, is whether, when s 111C is the primary source of a director's liability, rather than s 71, a decision made pursuant to s 111C should fall within the types of reviewable decision covered by the *Judicial Review Act*. It is also important to bear in mind that s 8 of the Act provides QBCC with all the powers of an individual. It was not contested that those powers would include the power to institute proceedings for the recovery of a debt, separately from the power in s 71.

Was the decision to institute proceedings one of an administrative character made under an enactment?

[10] The leading authorities in the High Court of Australia on the topic of how to determine whether a decision is one of an administrative character made under an enactment are *Australian Broadcasting Tribunal v Bond*[3] and *Griffith University v Tang*.[4] For present purposes it is sufficient to refer principally to the passage in *Griffith University v Tang* where Gummow, Callinan and Heydon JJ said:[5]

> "89 The determination of whether a decision is 'made ... under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made ... under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the

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2 See at p 32.

3 [1990] HCA 33; (1990) 170 CLR 321.

4 [2005] HCA 7; (2005) 221 CLR 99.

5 [2005] HCA 7 at [89]; (2005) 221 CLR 99, 130-131 at [89] (emphasis in the original).

> enactment in question. Affection of rights or obligations derived from the general law or statute will suffice."

[11] Mr Andreatidis, for QBCC, submitted that the decision to commence proceedings was not an "ultimate or operative determination" to use Mason CJ's language in *Australian Broadcasting Tribunal v Bond*.[6] Rather, it was procedural. Mr Martin's submission, however, relied on decisions such as *Deloitte Touche Tohmatsu v Australian Securities Commission*.[7] That was a case where a review was sought of a decision that it was in the public interest for the then Australian Securities Commission to cause proceedings to be instituted against a company. The review would have exposed for consideration the reasons for that conclusion, that it was in the public interest to commence proceedings. Lindgren J concluded that such a decision was reviewable. It gave the Australian Securities Commission a power not available to it under the general law and rendered lawful an act by it which would otherwise be unlawful. That decision was criticised by Mr Andreatidis on the basis that it was decided before *Griffith University v Tang* introduced the requirement that the decision must itself confer, alter or otherwise affect legal rights or obligations. It seems to me, however, that it is consistent with the decision in *Griffith University v Tang* because of the special nature of the decision justifying the institution of proceedings. It is, however, for that reason at least, distinguishable from a decision simply to institute recovery of a debt said, by an Act, to be owed to a body such as QBCC.

[12] Mr Andreatidis also submitted that there was no express or implied decision that must be made under the Act to commence proceedings against a person who is liable under s 111C of the Act because of a payment made by QBCC on a claim under the insurance scheme. Either the payment was made under the scheme, or it was not. Nor was the second of the criteria set out in *Griffith University v Tang* met as the commencement of a legal proceeding did not itself confer, alter or otherwise affect legal rights or obligations. The relevant decision altering rights or obligations would be the decision of the District Court in respect of the claim for the debt.

[13] Mr Martin submitted, however, that the decision to commence recovery proceedings by a claim filed in the District Court rather than by application to QCAT under s 93(1) of the Act, did affect legal rights and obligations by ousting the justiciability of issues surrounding the scope of works where, as here, QBCC had proceeded with rectification works and paid for them under a scope of works under review by QCAT at the time and where QBCC subsequently agreed to a reduced scope of works. As will be seen, however, challenges of that nature should be made by the company, the builder, at the appropriate time before a payment under the statutory scheme is made.

[14] He pointed out that a resulting judgment in QCAT in QBCC's favour would not, of itself, allow QBCC to enforce the debt before filing a copy of QCAT's decision in a

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[6] (1990) 170 CLR 321, 338.

[7] (1995) 54 FCR 562, 575-576.

court of competent jurisdiction together with an affidavit about the amount. He submitted that the decision to commence proceedings in the District Court, therefore, affected legal rights or obligations in relation to the enforcement of any liability to pay which might be found. He argued that the filing of a claim was a step altering the right to payment. Further, he submitted that, even if the only effect of the decision to commence proceedings, was to engage the provisions of other enactments or the general law, such as the rules in the *Uniform Civil Procedure Rules* 1999, then the fact that those obligations under the rules were enlivened was enough to satisfy the second criterion in *Griffith University v Tang*.

[15] To counter those submissions, Mr Andreatidis argued that the following propositions were established by authority, something that seems to me to be correct:

> "25. …
>
> (a) sections 71(1) and 111C of the *Queensland Building and Construction Commission Act* 1991 provides the Commission with a right of recovery as a debt, payments made under the statutory insurance scheme which are not dependent upon the Commission establishing the legal correctness of:[8]
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> i. a determination made by it to make the payment; or
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> ii. any anterior step taken by it that led to the payment being made;
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> (b) it is not enough to avoid liability to point to a mere error of fact connected with the claim process;[9]

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[8] Referring to *Queensland Building and Construction Commission v Turcinovic* [2017] QCA 77 at [23]-[28] and [32]; [2018] 1 Qd R 156, 163-169 at [23]-[28], 170-171 at [32] per North J (with whom Morrison and Philippides JJA agreed) and noting that the High Court refused special leave, *Turcinovic v Queensland Building and Construction Commission* [2017] HCASL 306; *Samimi v Queensland Building and Construction Commission* [2015] QCA 106 at [30] per Boddice J (with whom McMurdo P and Morrison JA agreed); *Namour v Queensland Building Services Authority* [2014] QCA 72 at [24]-[25]; [2015] 2 Qd R 1, 9 at [24]-[25] per Fraser JA (with whom McMurdo P and Douglas J agreed); *Mahony v Queensland Building and Construction Commission* [2013] QCA 323 at [34] per Gotterson JA (with whom McMurdo P and Douglas J agreed) and noting that the High Court refused special leave, *Mahony v Queensland Building and Construction Commission* [2014] HCASL 93. *Lange v Queensland Building and Construction Commission* [2011] QCA 58 at [72]-[73]; [2012] 2 Qd R 457, 471-472 at [72]-[73] per Margaret Wilson AJA (with whom Ann Lyons J agreed).

[9] Referring to *Queensland Building and Construction Commission v Turcinovic* [2017] QCA 77 at [23]-[28] and [32]; [2018] 1 Qd R 156, 163-171 at [23]-[28], [32] per North J (with whom Morrison and Philippides JJA agreed) and noting that the High Court refused special leave, *Turcinovic v Queensland Building and Construction Commission* [2017] HCASL 306; *Samimi v Queensland Building and Construction Commission* [2015] QCA 106 at [30] per Boddice J (with whom McMurdo P and Morrison JA agreed). The Court of Appeal cited, with approval, the decision of Henry J in *Queensland Building and Construction Commission v Orenshaw* [2012] QSC 241 at [38].

(c) the scheme of the *Queensland Building and Construction Commission Act* 1991 is that a building contractor or other interested person who wishes to challenge such decisions should make the challenge before the Commission pays under the policy. Where there is no challenge by the building contractor, liability under section 71(1) arises, whether or not one of the anterior decisions might have been the subject of a challenge.[10] A director caught by section 111C(6) is similarly unable to challenge one of those anterior decisions in a proceeding to recover a debt;[11] and

(d) there is limited scope to defend a claim made by the Commission to recover a payment made under the statutory insurance scheme on the basis that the payment sought to be recovered was not validly made under the *Queensland Building and Construction Commission Act* 1991.[12]"

[16] The view that there is limited scope to defend a claim to recover a payment made under the statutory insurance scheme on the basis the payment sought to be recovered was not validly made under the Act is also supported by *Queensland Building and Construction Commission v Watkins*.[13] But, as Boddice J pointed out for the Court of Appeal in *Samimi v Queensland Building and Construction Commission,*[14] it did not follow that no factual error could be the subject of a proper defence to a claim for recovery made pursuant to s 71(1) of the Act. The right of recovery had to pertain to payments made "on" claims under the insurance scheme. Those words connoted a requirement that the payment made be within the policy.

[17] QBCC also relied on the following passage in the judgment of Philippides JA in *QBCC v Turcinovic*:[15]

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[10] Referring to *Queensland Building and Construction Commission v Turcinovic* [2017] QCA 77 at [25] and [28]; [2018] 1 Qd R 156, 165-166, 169 per North J (with whom Morrison and Philippides JJA agreed) and noting that the High Court refused special leave, *Turcinovic v Queensland Building and Construction Commission* [2017] HCASL 306; *Namour v Queensland Building Services Authority* [2014] QCA 72 at [19]; [2015] 2 Qd R 1, 8 at [19] per Fraser JA (with whom McMurdo P and Douglas J agreed).

[11] Referring to *Namour v Queensland Building Services Authority* [2014] QCA 72 at [19]-[20]; [2015] 2 Qd R 1, 8 at [19]-[20] per Fraser JA (with whom McMurdo P and Douglas J agreed).

[12] Referring to *Samimi v Queensland Building and Construction Commission* [2015] QCA 106 at [31]-[38] per Boddice J (with whom McMurdo P and Morrison JA agreed); *Namour v Queensland Building Services Authority* [2014] QCA 72 at [24]; [2015] 2 Qd R 1, 9 at [24] per Fraser JA (with whom McMurdo P and Douglas J agreed); *Mahony v Queensland Building and Construction Commission* [2013] QCA 323 at [37] per Gotterson JA (with whom McMurdo P and Douglas J agreed) and see also McMurdo P at [2].

[13] [2014] QCA 172 at [14]-[16].

[14] [2015] QCA 106 at [30]-[31].

[15] [2017] QCA 77 at [15]; [2018] 1 Qd R 156, 160 at [15].

> "[15] The respondent's defence to the claim against him was no more than an attempt to seek a merits review of the payment made by the respondent under the insurance scheme. Section 71(1) of the *Queensland Building and Construction Commission Act* 1991 (Qld) should not be construed so as to permit a backdoor judicial review or a merits review of the appellant's decision to make a payment under the statutory insurance scheme set up under the Act. Such an approach would be contrary to the statutory framework of the Act as interpreted by the authorities referred to by North J, especially *Samimi v Queensland Building and Construction Commission* and would not be consonant with notions of finality of decision making"

[18] A similar approach to the making of a decision to sue to that advocated by QBCC is evident in *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation*.[16] There, there had been a decision to sue in respect of a taxation debt. As Yates J pointed out, the decision to sue did not alter the applicant's liability to the Commonwealth which arose on the making of the assessments to pay taxation. It did no more than initiate the process of recovery. The commencement of legal proceedings would expose the applicant to the prospect of substantive determinations being made in those proceedings by the separate exercise of judicial power but to challenge the decisions themselves did not confer, alter or otherwise affect legal rights or obligations respecting the applicant. They were not substantive determinations of any kind or in any sense.[17]

[19] In those circumstances, it is my view that the submissions that the decision to sue affects Ms Bourne's legal rights or obligations because of the differences between the procedural requirements of the UCPR and those under the Act does not persuade me that the decision to sue has itself conferred, altered or otherwise affected her legal rights or obligations. The obligation arose on the making of the payments by QBCC in circumstances where Kirra Homes had not challenged the making of those payments in accordance with the Act. Any further decision affecting that obligation will be made by the District Court, not by the mere issuing of the claim in that Court.

Orders

[20] For these reasons, QBCC's application pursuant to s 48 that Ms Bourne's application filed on 23 October 2017 be dismissed should be granted. I shall hear the parties as to costs.

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[16] [2010] FCA 538; (2010) 189 FCR 189, 199-200 at [48]-[54].

[17] See also *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* (2010) 81 ATR 36, 37-39 at [2], [6]-[9]; [2010] FCAFC 139 at [2], [6]-[9].