

SUPREME COURT OF QUEENSLAND

CITATION: *Manwin v Board of Professional Engineers* [2010] QCA 130

PARTIES: **ATANAS VASS MANWIN**
(applicant)
v
BOARD OF PROFESSIONAL ENGINEERS
(respondent)

FILE NO/S: Appeal No 13452 of 2009
DC No 254 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 17 May 2010

JUDGES: McMurdo P and Muir and White JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The application for leave to appeal be dismissed with costs**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF THE COURT – GENERALLY – applicant a registered professional engineer – applicant found to have engaged in unsatisfactory professional conduct – applicant’s arguments considered by the Commercial and Consumer Tribunal and twice by the District Court – applicant’s grounds of application challenged factual findings – principles to apply when determining applications for leave to appeal – whether there was an error of law on the part of the primary judge – whether application for leave to appeal should be granted

Commercial and Consumer Tribunal Act 2003 (Qld)
(Repealed)
District Court of Queensland Act 1967 (Qld), s 118(3)
Manwin v Board of Professional Engineers of Queensland
[2009] QDC 328, discussed
Rodgers v Smith [\[2006\] QCA 353](#), cited

COUNSEL: The applicant appeared on his own behalf
M F Johnston for the respondent

SOLICITORS: The applicant appeared on his own behalf
Holding Redlich for the respondent

- [1] **McMURDO P:** This application for leave to appeal should be refused with costs for the reasons given by Muir JA.
- [2] **MUIR JA:** The applicant, a registered professional engineer, was found by the Commercial and Consumer Tribunal on 6 December 2007 to have engaged in unsatisfactory professional conduct within the meaning of Schedule 2 of the *Professional Engineers Act 2002* (Qld). He applied to the District Court for leave to appeal from the decision under s 100 of the *Commercial and Consumer Tribunal Act 2003* (Qld).¹
- [3] On 29 August 2008, McGill SC DCJ, granted the leave to appeal, ordered that the Tribunal's order be set aside and that the proceeding be remitted to the Tribunal for rehearing by a different Member. McGill SC DCJ found that the Tribunal Member had erred in not appropriately addressing the question of whether the facts found by the Tribunal Member involved unsatisfactory professional conduct on the part of the applicant. He held also that the Tribunal Member erred in law in making a finding of fraud in the absence of an allegation of fraud by the respondent Board.
- [4] The matter was reheard by another Tribunal Member on 18 and 20 November 2008. He gave extensive and careful reasons and held that grounds existed for taking disciplinary action against the applicant. He ordered that: the applicant be reprimanded; the applicant pay the Board \$4,000; and that the applicant pay the respondent's costs of the proceedings. The applicant applied to the District Court for leave to appeal from the Tribunal's decision under s 100 of the *Commercial and Consumer Tribunal Act*. Under s 100 an appeal lay only on the grounds of error of law or excess or want of jurisdiction. It was ordered on 30 October 2009 that the appeal be refused. The applicant now applies to this Court under s 118(3) of the *District Court of Queensland Act 1967* (Qld) for leave to appeal. Section 118(3) provides:
- "(3) A party who is dissatisfied with any other judgment of the District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court."
- [5] In *Rodgers v Smith*,² Keane JA, with whose reasons the other members of the Court agreed, said in relation to applications for leave to appeal pursuant to s 118(3):
- "... It is well settled that '[l]eave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected'. The statutory restriction on appeals to this Court:
- 'serves the purpose of ensuring that this Court's time is not taken up with appeals where no identifiable error or

¹ The Act was repealed by Act No 23 of 2009, s 243.

² [2006] QCA 353 at [4].

injustice can be articulated by those litigants whose arguments have already been fully considered at two judicial hearings.'" (footnotes deleted)

- [6] The applicant has had not only the benefit of having his arguments fully considered by the Tribunal, he has had the two previous hearings in the District Court referred to above. In some of the applicant's 12 grounds of appeal, the applicant is seeking to re-ventilate issues found against him by two District Court judges and one Tribunal Member.
- [7] The applicant was not legally represented on the hearing of his application. His submissions were brief but clear. At the centre of his concerns were perceived injustices visited upon him by the respondent and, to his mind, an absence of any facts which could support any finding of misconduct against him. The oral submissions, like the applicant's written submissions, consisted mainly of assertions and did not attempt to demonstrate that any particular findings of fact were erroneous.
- [8] The factual background to the proceeding was explained as follows in the reasons of the learned primary judge:³

"The subject matter of the proceedings is Mr Manwin's performance of what the learned Member described as the 'provision of relatively simple engineering advice concerning a suburban house'. Mr Manwin's clients were the owners of a run down Queenslander at Clayfield. Many of the stumps were white-ant ridden or missing, bearers had sagged and the house was in a dangerous state. They planned to renovate the building, but decided to first re-stump it and to repair the dilapidated front stairs, before considering any final plan. They engaged Mr Del Veccio to do the preliminary work of re-stumping and stabilising. They engaged Soils Test Australia (STA) to soil test the site. The learned Member described Mr Manwin's role as follows:

'The work that Mr Manwin was asked to do was quite plain. Essentially it was to advise (and certify where necessary) as to necessary footings and posts for the proposed re-stumping and to advise in relation to two steel beams that were intended to be placed under the house'.

The particulars of the Board's complaint were set out in paragraph 16 of Exhibit 2 before the learned Member. They concerned Mr Manwin's conduct in:

- (a) giving advice concerning bearer strengthening design; and
- (b) delivering a site investigation report, and an invoice for that report.

The Board asserted that Mr Manwin's conduct met the following elements of the definition of 'unsatisfactory professional conduct':

- (a) conduct that is of a lesser standard than that which might reasonably be expected of the registered professional engineer by the public or the engineer's professional peers;

³ [2009] QDC 328 at [5] - [8].

- (b) conduct that demonstrates incompetence, or lack of adequate knowledge, skill, judgement or care, in the practice of engineering;
- (e) other improper or unethical conduct.

The learned Member found that:

- (a) the advice concerning bearer strengthening design, provided by Mr Manwin, in a fax of 3 August 2004 was unsatisfactory. He provided inappropriate and ambiguous specifications 'unrelated to his clients' needs despite their repeated attempts to obtain what should have been relatively simple guidance';
- (b) the service provided by Mr Manwin in this respect was substandard and satisfied sub-paragraphs (a) and (b) of the defendant of 'unsatisfactory professional conduct';
- (c) the site investigation report was spurious. It had not been requested; and it was misleading in claiming to have done things that had not been done. It was a 'manufactured exercise'. Mr Manwin's conduct in rendering an invoice in respect of the report was 'improper and unethical'."

- [9] I propose to deal with the grounds to be relied on by the applicant should the appeal be allowed generally in the order in which the primary judge addressed them.
- [10] The grounds of application to this Court for the most part, mirror the grounds of application to the District Court. In dealing with each ground, I will identify the ground number in the application to the District Court and in the application to this Court. Grounds 1 and 12 in the application to this Court have no counterpart in the District Court application and it is only ground 12 which, arguably, alleges error on the part of the primary judge. All of the other grounds are concerned with alleged errors on the part of the Tribunal Member, with the possible exception of ground 1, which does not allege error on the part of the Tribunal Member or the primary judge. Consequently, with the possible exception of his case in relation to ground 12, the applicant has not set out to establish what he needs to establish in order to succeed on the application; an error of law on the part of the primary judge. It would thus be futile to allow the application for leave to appeal and it is unnecessary to consider further the grounds and arguments advanced by the applicant, except in relation to ground 12. However, for the sake of completeness, I propose to do so briefly.

CA Ground 1: As a professional engineer, the Applicant did not breach any Australian Standards or requirements of the Building Code of Australia. In the building industry, disputes occur on a daily basis between clients, builders, engineers, and architects. That does not mean that a dispute over \$300.00 should be resolved in the courts. If the Board of Professional Engineers wants to reprimand an engineer, there should be alternative ways of doing so. The Board of Professional Engineers and their legal team are not achieving anything positive for the public or residents of Brisbane by persecuting – for five years – an innocent, professional man.

- [11] In his submissions in support of this ground, the applicant criticised the content and means of preparation of the complaint report prepared for the respondent by an engineer, Mr Bowler. The arguments advanced were all of a factual nature. The

applicant asserted that, "The error of law is that the law is based on the facts". The applicant appeared to be asserting that if he could show errors of fact, it would follow that there were also errors of law. Factual errors may give rise to errors of law, for example, where a finding of fact is made without any factual foundation. The applicant, however, did not attempt to show that the errors he alleged amounted to anything more than conclusions of the Tribunal which he regards unacceptable. His arguments did not refer to evidence from which it could be ascertained that the Tribunal Member had erred factually. There is no substance in this ground.

Ground 1 (CA 2): The Tribunal Member has not acknowledged illegal construction activity on behalf of the complaining party without approved plans or Council approvals.

Ground 3 (CA 5): The Tribunal Member has not acknowledged that the construction work has been carried out without any builder's licensing or professional BSA registered contract and professional manner of work.

- [12] It is apparent from the formulation of these grounds that, even if factually justified, they would not reveal any relevant error of law on the part of the primary judge.
- [13] As the primary judge pointed out in his reasons, the grounds lack even a factual foundation. The written argument advanced by the applicant in respect of these grounds advances irrelevant factual contentions. They include the questioning of: the utility of the work done by the respondent; the manner in which a report commissioned by the respondent was prepared and its factual accuracy.

Ground 2 (CA 4): The Tribunal Member did not recognize proven evidence of beam installation between two supports contrary to engineer sizing and directions. The position of the Member was that my fax contained contradicting information. Any information can be contradicting, however this is not sufficient grounds to go to court. I supplied my telephone number in this fax and advised that I was available at any time for professional advice, however I believe my fax did not contain any contradicting information and I clearly wrote 5.1m maximum span.

- [14] It is apparent from the language of this ground that it seeks to challenge factual findings.
- [15] The applicant's argument contains various statements of fact and opinion. It does not reveal any question of law, let alone an error of law. There is no substance in this ground, but, nevertheless, the primary judge carefully considered the factual basis for the ground and concluded that the Member's findings were supported by the evidence. No doubt has been cast on the primary judge's findings in that regard.

Ground 4 (CA 6): The Tribunal Member has not acknowledged the evidence that excessive ground excavations were carried out at a total depth of over 2 metres, and as per STA limitations a re-assessment of the soil type should be provided. The applicant determined as demanded by the owners the soil classification without error.

- [16] It is apparent on the face of this ground that it does not raise an error of law.
- [17] The primary judge said of this ground:⁴

⁴ [2009] QDC 328 at [23].

"Mr Manwin contends that the excavation work that had been carried out on the site necessitated the re-assessment of the soil type provided in his site investigation report and that this was responsive to his clients' request. This is, again, is an attempt to re-agitate a factual issue upon which Mr Manwin was unsuccessful. It is also a repetition of a ground which was not accepted by McGill SC DCJ in the earlier appeal." (footnote deleted)

- [18] He proceeded to consider the facts relating to the ground and concluded that the Member's relevant findings were open. No doubt has been cast on the primary judge's findings.

Ground 5 (CA 7): The Tribunal Member has not acknowledged that the construction work has been carried out without any Builder's licensing or professional BSA registered contract and professional manner of work.

- [19] The primary judge held, correctly, that this ground was irrelevant. He noted that the particular alleging that the applicant ought to have certified the PFC 180 design bearer strengthening as acceptable was deleted at the rehearing.
- [20] The applicant's outline of submissions sought to agitate factual matters only.

Ground 6 (CA 8): The Tribunal Member did not acknowledge the under-qualified position of the person preparing the report on behalf of the Respondent with his education, practice and structural experience.

- [21] The argument advanced in support of this ground was purely factual. It disclosed no error of law and raised no argument concerning an error of law. Nor was doubt cast on the primary judge's factual findings.

Ground 7 (CA 9): The Tribunal Member has not recognized the many years of professional experience of the Applicant including the engineering assistance of five churches in the Brisbane Metropolitan area and a large number of references from satisfied clients. This is in complete contradiction with the fraud charges and accusations of unprofessional engineering conduct labelled against me. The Member described all presented recommendations for the Applicant as a "bunch of papers".

- [22] As the primary judge pointed out, the question before the Tribunal stood to be determined by reference to the actual conduct of the applicant rather than by reference to his professional reputation. The Tribunal Member pointed that out also, as did McGill SC DCJ.

Ground 8 (CA 10): The Tribunal Member did not recognize that the engineering work has not been paid and the complaint has been raised upon presentation of a modest invoice.

- [23] Plainly, this ground does not give rise to a question of law or disclose an error of law. The argument in support of it is mere assertion and it would, in any event, appear to go only to a question of credibility. As the primary judge held, the Member's findings on credibility were open to him.

Ground 9 (CA 11): This case was already heard in the District Court on 8 April 2008 by Judge McGill DCJ. The Member disregarded Judge McGill's findings completely.

- [24] The primary judge rejected the factual basis of this contention. No attempt before this Court was made to substantiate the assertion that the Member disregarded McGill SC DCJ's findings. In any event, the matter had been remitted by McGill SC DCJ to the Tribunal for a rehearing. It was for the Member who reheard the matter to make his own findings of fact. The question before McGill SC DCJ was whether there had been an error or errors of law.

CA Ground 12: The District Court Judge is not finding a connection between the law and the facts, however in reality, there is a clear dependence on the way the law will be applied on the basis of the facts presented. The law is based on the facts in every case, therefore if the facts prove that the Applicant did not act unlawfully, the Board of Professional Engineers does not have sufficient grounds to persecute the Applicant.

- [25] The applicant appears to have returned to an earlier theme that if factual errors can be shown it follows that errors of law have been established. As explained earlier, the applicant's proposition has no foundation in law and, moreover, no factual errors have been demonstrated.
- [26] The applicant's argument also suffers from the difficulty that the case against him was not that he acted unlawfully but that he engaged in unsatisfactory professional conduct.

Conclusion

- [27] The applicant has failed to show even a faint prospect that any of the grounds relied on by him would succeed on an appeal. His case was carefully considered and dealt with on at least two previous occasions. The granting of leave to appeal would be both pointless and unjust. Accordingly, I would order that the application for leave to appeal be dismissed with costs.
- [28] **WHITE JA:** I agree with Muir JA's reasons.