

# SUPREME COURT OF QUEENSLAND

CITATION: *J & MD Milligan P/L v Queensland Building Services Authority* [2012] QSC 213

PARTIES: **J & MD MILLIGAN PTY LTD**  
(applicant)  
v  
**QUEENSLAND BUILDING SERVICES AUTHORITY**  
(respondent)

FILE NO/S: BS3690/12

DIVISION: Trial

PROCEEDING: Applications

DELIVERED ON: 14 August 2012

DELIVERED AT: Brisbane

HEARING DATE: 13 July 2012

JUDGE: Margaret Wilson J

ORDERS: **1. The plaintiff's application filed on 20 June 2012 is refused;**  
**2. On the defendant's application filed on 9 July 2012;**  
**(i) paragraph 11B(b) and both paragraphs numbered 13B of the second amended statement of claim are struck out;**  
**(ii) summary judgment is refused.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – UNIFORM CIVIL PROCEDURE RULES 1999 (QLD) – where plaintiff seeks leave to amend claim to introduce new cause of action in estoppel – where plaintiff carries on business fabricating and installing steel structures – where defendant is the licensing authority with responsibility for the plaintiff's trade – where defendant sent plaintiff licence renewal notice – where licence suspended pursuant to s 53A *Queensland Building Services Authority Act 1991* (Qld) because plaintiff did not provide information about its continued satisfaction of relevant financial requirements – where information subsequently provided – where suspension ended – whether plaintiff should be given leave to amend claim to seek declaration that defendant

estopped from denying that the information provided was that required by s 53A

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – STRIKING OUT AND SUMMARY JUDGMENT – UNIFORM CIVIL PROCEDURE RULES 1999 (QLD) – Interpretation of s 53A *Queensland Building Services Authority Act 1991* (Qld) – whether plaintiff has pleaded elements necessary for estoppel – whether estoppel available to prevent exercise of statutory duty or statutory discretion – where application to strike out all or parts of statement of claim – whether summary judgment should be entered for defendant

*Queensland Building Services Authority Act 1991* (Qld), s 53A.

*Attorney-General (NSW) v Quin* (1990) 170 CLR 1, cited.

*Lambidis v Commissioner of Police* (1995) 37 NSWLR 320, cited.

*Wort v Whitsunday SC* (2001) 116 LGERA 179; [2001] QCA 344, cited.

COUNSEL: R E Schulte for the plaintiff  
J C Bell QC and T F Pincus for the defendant

SOLICITORS: R J Winter & Associates for the plaintiff  
Minter Ellison for the defendant

- [1] **MARGARET WILSON J:** By an application filed on 20 June 2012 the plaintiff sought leave to amend its claim to add a cause of action in estoppel and an interlocutory injunction. By a cross application filed on 9 July 2012 the defendant sought summary judgment against the plaintiff or alternatively an order striking out all, or alternatively paragraphs 2(g), 2A to 2H, 7, 7A, 7B, 8A, 8B, 9, 9A to 9C, 10, 11A to 11C, 13 and both paragraphs numbered 13B, of the second amended statement of claim.
- [2] The applications were heard together on 13 July 2012. I dismissed the application for an interlocutory injunction on 16 July 2012, giving reasons for doing so. The following reasons for judgment relate to the disposition of the balance of the applications.
- [3] The plaintiff filed a second amended statement of claim on 18 June 2012, no longer pleading breach of statutory duty and negligence, but instead pleading estoppel. It seeks leave to amend its claim (which was filed on 23 April 2012) by the deletion of some of the relief sought and the addition of other relief as follows:

- “1. A declaration that the suspension of licence number 24188 (‘the Licence’) under the *Queensland Building Services Authority Act 1991* (Qld) (‘the Act’) ended on 25 January 2012;
2. An order that the Defendant correct the register of licensees to show that the suspension of the Licence ended on 25 January 2012;
3. a declaration that the Defendant is estopped from denying that the Financial Documents are information for the purposes of section 53A(1) of the Act;
4. An order restraining the Defendant from taking any further steps in respect of the letter dated 8 June 2012 from the Defendant to the Plaintiff by which the Defendant required the Plaintiff to show cause as to why the Defendant should not suspend the Licence until determination of this matter by the Court;
- ~~1. A declaration that there are no reasonable grounds that there is a real likelihood that serious financial loss or other serious harm will happen to other licensees, the employees of other licensees, consumers or suppliers of building materials or services if the Licence is not immediately suspended;~~
- ~~2. A declaration that the Defendant cannot suspend the Licence under s. 49A of the Act;~~
- ~~3. Damages for breach of statutory duty;~~
- ~~4. Further or alternatively, damages for negligence;~~
5. Costs.”

- [4] I shall consider first the application to amend the claim and that part of the cross application which relates to the plaintiff’s second amended statement of claim.

#### **The plaintiff’s contractor’s licence**

- [5] The plaintiff carried on business fabricating and installing steel structures. This litigation concerns its contractor’s licence under the *Queensland Building Services Authority Act 1991*.

- [6] A contractor’s licence is subject to a condition imposed by s 35(3)(a) that:

“(a) the licensee’s financial circumstances must at all times satisfy the relevant financial requirements stated in the board’s policies; ...”

- [7] Section 53A provides:

#### **“53A Satisfying financial requirements at renewal**

- (1) The authority must not renew a contractor’s licence if the authority is not given information, in a form approved by the board, and within the time allowed under a regulation, about the contractor’s continued satisfaction of the relevant financial requirements stated in the board’s policies.

- (2) The form approved by the board may require some or all of the information to be given by a person suitably qualified and experienced in accountancy.
  - (3) If the contractor does not give the authority the information mentioned in subsection (1), the authority may, by written notice given to the licensee, suspend the licence.
  - (4) A suspension imposed under this section ends when the authority is given the information.
  - (5) If a licence has remained in suspension under this section for more than 3 months, the authority may, by notice to the licensee, cancel the licence.”
- [8] On or about 30 September 2010 the defendant sent the plaintiff a “licence renewal notice”. One of its stated purposes was to collect information on which the defendant could determine whether the plaintiff satisfied the requirements for renewal of the licence. Over the following months there was correspondence between the parties and reports were obtained from Ferrier Hodgson and Jason Croston.

[9] The plaintiff pleads:

“4. On or about 29 September 2011, by way of letter dated 29 September 2011 to the Plaintiff (the ‘29 September Letter’), the Defendant;

(a) notified the Plaintiff that it had -suspended the Licence pursuant to s. 53A(3) of the Act as a result of the Plaintiff’s alleged failure to give information;

(b) stated relevantly:

‘To lift the suspension on your licence you must supply the following documentation:

Independent Review Report and signed financial statements for a year end date after 30 June 2011 at which point the Company meets the QBSA’s Financial Requirement for Licencing [sic].

(c) stated further:

... While your licence is suspended, you are prohibited from carrying out any building work. This includes signing building contracts, providing quotes or tenders or completing building work currently in progress’.

4. ÷”

- [10] The plaintiff alleges that it satisfied the requirements of s 53A on or about 25 January 2012 when it gave the defendant certain “Financial Documents”, whereupon the defendant was obliged to “lift the suspension” on the licence, and it was entitled to carry on its business. It pleads:

“8. On or about 25 January 2012, the plaintiff provided gave the Defendant an Independent Review Report and signed financial statements for a year end date after 30 June 2011 under cover of a letter from Mr Jason Croston dated 25 January 2012 (‘Financial Documents’). Information to the Defendant.

**Particulars**

~~The Information was provided in a letter dated 25 January 2012 and attachments from Jason Croston, the Independent Reviewer, to the Defendant~~

8A On a proper construction, the Financial Documents were:

- (a) documents within the meaning given to the phrase ‘Independent Review Report and signed financial statements for a year end date after 30 June 2011’ as used in the 29 September Letter;
- (b) documents within the meaning given to the word ‘information’ as used in sections 53A(1) and 53A(4) of the Act.

8B By reason of the matters pleaded in paragraphs 8 and 8A(a) above, on 25 January 2012, the Plaintiff complied with the Defendant’s requirements set out in the 29 September Letter at which point the Plaintiff met ‘the QBSA’s Financial Requirements for Licensing’.

9. By reason of the matters pleaded in paragraphs 7 8, 8A(b), 8B above, the suspension of the Licence ended on 25 January 2012 pursuant to s. 53A(4) of the Act.

9A By reason of the matters pleaded in paragraph 8B above, on 25 January 2012 the Defendant was required to ‘lift the suspension’ on the Licence.

9B By reason of the matters pleaded in paragraphs 9 and 9A above, on 25 January 2012 the Defendant was, as a matter of law, entitled to carry on its business of fabricating and installing steel structures under the Licence.

9C By reason of the Defendant’s obligation under the Act and the PRA<sup>1</sup> (as pleaded in paragraphs 2 to 3 inclusive above)

<sup>1</sup> Public Records Act 2002 (Qld)

and the matters pleaded in paragraphs 9 and 9A above, the Defendant was obliged, on 25 January 2012;

(a) to notate on the Register that the suspension of the Plaintiff's licence had ended;

(b) to ensure that the Register, noting that the suspension of the Plaintiff's licence had ended, was available to be searched online by the public via the internet site www.bsa.qld.gov.au

9.

10. By way of letter dated 12 March 2012 from R. J. Winter & Associates, the Plaintiff's solicitors, to the Defendant, the Plaintiff requested the Defendant correct the Register to show that the Licence is no longer suspended."

[11] The plaintiff alleges that the defendant renewed the licence. It pleads:

"11. By way of letter dated 20 April 2012 from Robinson Locke Litigation Lawyers, the Defendant's solicitors, to R. J. Winter & Associates (the '20 April Letter'), the Defendant ~~admitted that the Plaintiff had complied with the renewal process.~~stated:

*'We are pleased to advise that [the Defendant] recognises technical compliance with the renewal process and therefore the suspension will be withdrawn.*

*Having said that, our client remains of the view that your client does not comply with the financial requirements for licencing. Accordingly, our client will contract your client in relation to the status of the licence in the immediate future.'*

11A By reason of the matters pleaded in paragraph 11, on 20 April 2012, the Defendant renewed the Licence pursuant to section 53A(1) of the Act.

11B By reason of the matters pleaded in paragraph 11A above:

(a) the giving of the Financial Information by the Plaintiff to the Defendant (as pleaded in paragraph 9 above) was the giving of 'information in a form approved by the board, and within the time allowed under a regulation, about the contractor's continued satisfaction of the relevant financial requirements stated in the board's policies' within the terms of section 53A(1) of the Act;

(b) the Defendant is estopped from denying that the Financial Information was ‘information in a form approved by the board, and within the time allowed under a regulation, about the contractor’s continued satisfaction of the relevant financial requirements stated in the board’s policies’ within the terms of section 53A(1) of the Act.

11.

11C By reason of the matters pleaded in paragraphs 11A and 11B and on a proper construction of section 53A(1) of the Act;

(a) the defendant has no power or entitlement to assert by reference to the Financial Document, as it did in the 20 April Letter, that the Plaintiff ‘does not comply with the financial requirements for licencing’;

(b) such as assertion is a wrongful exercise of the Defendant’s powers under the Act and accordingly is an unreasonable exercise of the Defendant’s functions;

12. At or about 9:15am on 23 April 2012, the Defendant amended the Register to show the Licence was not suspended from 23 April 2012.

13. The Defendant has failed or neglected to amend the Register to show that the Licence suspension ended on 25 January 2012 and by reason of the matters pleaded above that failure to act was wrongful and not a reasonable exercise of Defendant’s functions.”

[12] By letter dated 8 June 2012 the defendant called on the plaintiff to show cause why it should not suspend the licence. The plaintiff pleads:

“13A By letter dated 8 June 2012 from the Defendant to the Plaintiff, by reference to the Financial Documents, the Defendant required the Plaintiff to show cause as to why the Defendant should not suspend the Licence (the ‘Notice to Show Cause’).

13B By a letter dated 13 June 2012, the Plaintiff’s solicitors wrote to the Defendant’s solicitors seeking an undertaking that the Defendant’s not take any further steps under the Notice to Show Cause pending the resolution of this proceeding on the basis that it was improper to issue the notice to show cause in respect of the Financial Documents when the Defendant had accepted, by the action of renewing the License, as being compliant within the terms of section 53A(1) of the Act.

13B By an email dated 15 June 2012 at 2.05PM, the Defendant's solicitors wrote the Plaintiff's solicitors and refused to provide the requested undertaking."

### **Construction of s 53A**

- [13] For the reasons I gave for refusing the interlocutory injunction, I consider that the meaning of s 53A is clear. Sub-section (1) imposed a restraint upon the defendant's renewing the licence in the absence of information about the plaintiff's continued satisfaction of the relevant financial requirements, and sub-section (3) empowered the defendant to suspend the licence. Upon the provision of such information, the suspension was automatically lifted pursuant to sub-section (4). The defendant was not required by s 53A to make a determination that the relevant financial requirements had been satisfied.
- [14] But, of course, the proper construction of s 53A is a matter which should be finally determined at trial.
- [15] It follows that paragraphs 8A, 8B, 9, 9A to 9C, 10, 11A, 11B(a), 11C, and 13 of the second amended statement of claim should not be struck out.

### **Correction of register**

- [16] If I am correct in my interpretation of s 53A, the suspension imposed on 29 September 2011 was automatically lifted on 25 January 2012. The relevant public register was not notated to the effect that the licence was reinstated until 23 April 2012.<sup>2</sup>
- [17] But, because the proper construction of s 53A is a matter for determination at trial, I decline to strike out paragraphs 2(g), 2A – 2H, 7, 7A -7B of the second amended statement of claim, which relate to the plaintiff's claims for a declaration that the suspension ended on 25 January 2012 and for an order requiring the defendant to correct the register.

### **Estoppel**

- [18] Counsel for the plaintiff submitted that:
- (a) the language of s 53A required the defendant to review the Independent Review Report to determine whether it complied with the relevant financial requirements stated in the board's policies;<sup>3</sup>
  - (b) the defendant renewed the licence pursuant to s 53A on 20 April 2012;<sup>4</sup>
  - (c) renewal of the licence and simultaneous reservation of the right immediately to rely on a breach of the condition imposed by s 35(3)(a) to cancel or suspend the licence would be oppressive, capricious and arbitrary.<sup>5</sup>

<sup>2</sup> Search 5 July 2012 – pages 202 – 209 of exhibits to affidavit of Olivia McMahon sworn 6 July 2012.

<sup>3</sup> Written submissions filed by leave, 13 July 2012, para 62.

<sup>4</sup> Second amended statement of claim, para 11A.

<sup>5</sup> Written submissions filed by leave, 13 July 2012, para 63.

His submissions continued:

- “67. The next point is that if the power to renew is exercised in respect of particular information – as is the case here – the same material cannot then be relied on by the QBSA to contend that there is a breach of section 35(3)(a) because the licensee has satisfied *the relevant financial requirements stated in the board’s policies* in terms of section 53A(1). Again a construction that permits the QBSA to renew a licence on one day and then breach the licensee in respect of the same material the next day is oppressive, capricious and arbitrary and one for which there is no statutory basis.
68. The nature of the estoppel in this case arises by operation of section 53A(1) and goes to the way in which the QBSA is entitled to exercise its powers consequent upon renewal under section 53A(1) as a matter of statutory construction. In other words, it is the operation of the Act that binds the QBSA.
69. Certainly there is authority for the proposition that ‘*estoppel by representation cannot prevent the performance of a statutory duty.*’<sup>6</sup> However, the estoppel or the bar in this case arises because as a matter of statutory construction allowing the QBSA to renew a licence on one day and then breach the licensee in respect of the same material shortly thereafter is oppressive, capricious and arbitrary and a construction for which there is no statutory basis.<sup>7</sup>”

- [19] These submissions go beyond the pleaded estoppel – which is that the defendant is estopped from denying that “the Financial Documents” (by which I assume is meant those documents referred to in paragraph 8 of the second amended statement of claim) are “information” for the purposes of s 53A(1) of the *Queensland Building Services Authority Act*. These are submissions in support of the contention that upon receipt of those documents the defendant was required by s 53A to determine whether the plaintiff satisfied the relevant financial requirements contained in the board’s policies, and that, in advising the plaintiff that the suspension would be withdrawn, it represented that it had made a determination that the plaintiff did satisfy those requirements.
- [20] As counsel for the defendant submitted, the plaintiff has not pleaded the elements necessary for estoppel.
- [21] That a particular construction of a statute would produce a result that would be oppressive, capricious or arbitrary may be a powerful reason to reject that construction in favour of another.<sup>8</sup> But if, despite the potentially oppressive,

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<sup>6</sup> See *Brickworks Ltd v Warringah Corporation* (1963) 108 CLR 568 at 577 per Windeyer J where his Honour refused to apply the principle to a local authority.

<sup>7</sup> Written submissions filed by leave, 13 July 2012, para 67 – 69.

<sup>8</sup> *Public Transport Commission of New South Wales v Murray-More* (1975) 132 CLR 336.

- capricious or arbitrary result, that construction is the correct one, the doctrine of estoppel cannot be invoked to avoid that result.
- [22] Further, there must be a clear and unequivocal representation before there can be an estoppel by representation.<sup>9</sup>
- [23] By its letter of 20 April 2012 the defendant did not represent that the plaintiff satisfied the relevant financial requirements stated in the board’s policies. It acknowledged technical compliance with the renewal process – in other words, that the plaintiff had provided information in a form approved by the board, within the time allowed under a regulation, about its continued satisfaction of the relevant financial requirements stated in the board’s policies. (Emphasis added.) But it continued to assert that the plaintiff did not comply with the financial requirements for licensing, and foreshadowed further action about the status of the licence – in other words, that the information supplied failed to show that the plaintiff satisfied those requirements.
- [24] The plaintiff has not pleaded that it changed its position in reliance on a representation by the defendant that the relevant financial requirements had been satisfied.
- [25] If, contrary to the view I have expressed, the “withdrawal” of the suspension involved the defendant’s making a decision to renew the licence, in making that decision the defendant was not acting as an administrative tribunal deciding between competing claims. The decision was not one upon which an issue estoppel could be based.
- [26] In *Lambidis v Commissioner of Police*<sup>10</sup> the New South Wales Court of Appeal held that a decision of an administrative tribunal can give rise to an issue estoppel if the same issue is raised in later litigation. However, not every administrative decision has the capacity to do so. According to Kirby P, it is necessary to look at the composition, functions and procedures of the tribunal in determining whether it could reach a decision which would later bind the parties in related litigation before a court of law.<sup>11</sup> And Priestley JA considered that if the tribunal is legislatively empowered to decide competing claims and issues cardinal to the claims in a way which has legal effect, such issues once decided should be treated as having been set to rest.<sup>12</sup> In the present case the defendant’s decision (if it was such) did not satisfy those criteria.
- [27] Finally, as counsel for the defendant submitted, estoppel is not available to prevent the exercise of a statutory duty or a statutory discretion of a public character.
- [28] The defendant is responsible for the issue and renewal of licences under the *Queensland Building Services Authority Act*. It must decide whether an applicant for a licence is entitled to a licence,<sup>13</sup> and, in the case of an application for renewal, whether the licensee continues to be entitled to hold a licence.<sup>14</sup> There are certain

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<sup>9</sup> *Legione v Hateley* (1983) 152 CLR 406 at 435 – 437.

<sup>10</sup> (1995) 37 NSWLR 320.

<sup>11</sup> At 324.

<sup>12</sup> At 332.

<sup>13</sup> Section 34.

<sup>14</sup> Sections 37A – 37B.

entitlement criteria which an applicant for a licence or for renewal of a licence must satisfy.<sup>15</sup> The defendant's powers and those criteria are to be construed and applied having regard to the objects of the act, including, relevantly, regulating the building industry to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers.<sup>16</sup>

[29] In *Attorney-General (NSW) v Quin* Mason CJ said<sup>17</sup>:

“... The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power”

...

“What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion.”

[30] In *Wort v Whitsunday SC*<sup>18</sup> the appellant contended that the respondent local authority was estopped from applying an altered planning policy to its application for approval to develop land. Williams JA (with whom the other members of the Court of Appeal agreed) referred to what Mason CJ said in *Quin*, and said:

“If the appellant is to succeed in the light of those statements of principle he must establish that the asserted estoppel would not significantly hinder the exercise of the respondent's discretion under s 6.2(2) [of the *Local Government (Planning and Environment) Act 1990 (Qld)*] in the public interest or that failing to hold the respondent to the representation would cause some grave injustice to the appellant which would occasion a greater harm to the public interest than would arise from holding the respondent to its representation.”

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<sup>15</sup> Part 3 division 2.

<sup>16</sup> Section 3(a).

<sup>17</sup> (1990) 170 CLR 1 at 17 and 18.

<sup>18</sup> (2001) 116 LGERA 179; [2001] QCA 344 at [13].

- [31] The plaintiff has not pleaded facts which would provide a basis for taking this case outside the general principle that estoppel is not available to prevent the exercise of a statutory duty or a statutory discretion of a public character.
- [32] In summary, the plaintiff has not pleaded elements necessary for estoppel. I refuse leave to amend the claim to insert a claim based on estoppel, and I strike out paragraph 11B(b) of the second amended statement of claim.

### **Claim for injunction**

- [33] The plaintiff seeks to amend its claim to include a claim for an injunction restraining the defendant from taking any further steps in relation to the show cause notice until determination of the proceeding by the Court. It has not sought a final injunction. As I have already refused its application for an interlocutory injunction, I refuse to allow this amendment of the claim. Further, I strike out both paragraphs numbered 13B of the second amended statement of claim.

### **Disposition**

- [34] Amendment of the claim to include declaratory relief based on estoppel having been refused, and the paragraphs of the second amended statement of claim relating to estoppel having been struck out, there remain only the claims for a declaration that the suspension ended on 25 January 2012 and for an order for correction of the register.
- [35] Counsel for the defendant submitted that in the absence of any claim for relief based upon such declaration and order, or any pleading or evidence as to consequences for the plaintiff, the questions they raise are purely academic, and the declaration and order should be refused on that basis.
- [36] If I am correct in my interpretation of s 53A, the plaintiff has a strong case for the relief sought. In the context of legislation which seeks to achieve a reasonable balance between the interests of building contractors and consumers, it seems hardly arguable that the plaintiff does not have a real commercial interest in having the register corrected.
- [37] I do not accept the submission of counsel for the defendant, and refuse to give summary judgment in favour of the defendant with respect to the remaining claims.

### **Orders**

- [38] I make the following orders:
- (a) the plaintiff's application filed on 20 June 2012 is refused;
  - (b) on the defendant's application filed on 9 July 2012;
    - (i) paragraph 11B(b) and both paragraphs numbered 13B of the second amended statement of claim are struck out;
    - (ii) summary judgment is refused.
- [39] I will hear the parties on costs.