SUPREME COURT OF QUEENSLAND

CITATION:	*Namour v Queensland Building Services Authority* [2014] QCA 72
PARTIES:	**GUS NAMOUR** (appellant) **v** **QUEENSLAND BUILDING SERVICES AUTHORITY** (respondent)
FILE NO/S:	Appeal No 8710 of 2013 DC No 1664 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2014
JUDGES:	Margaret McMurdo P and Fraser JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where the appellant was a director of a building company that had its licence cancelled and was unable to complete several building contracts – where the property owners of those contracts made claims against the respondent under the insurance scheme – where the respondent then brought proceedings against the appellant to recover those amounts as a debt pursuant to ss 71(1) and 111C of the *Queensland Building Services Authority Act* 1991 (Qld) – where summary judgment for that debt was entered – whether the appellant director needed to be at 'fault' to be liable for those debts – whether, if the appellant's licence was wrongfully cancelled, the property owners' claims were not made validly under the insurance scheme and therefore the respondent's payments were not "payment[s] on a claim" under s 71(1) – whether the correctness of the licence cancellation is justiciable in recovery proceedings brought against a director PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULE OF COURT

– SUMMARY JUDGMENT – where the appellant argues the primary judge erred in summarily determining the quantum of debt to be paid – whether the Act requires the amount of the payments made under the insurance scheme be reasonable in order for those amounts to be recoverable against the appellant – whether summary judgment should have been refused because the quantum of the debt was not proved to the necessary degree of assurance – whether r 292 of the *Uniform Civil Procedure Rules* 1999 was correctly applied

Queensland Building Services Authority Act 1991 (Qld), s 71(1), s 111C(3), s 111C(6)
Uniform Civil Procedure Rules 1999 (Qld), r 292

Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24, cited
Lange v Queensland Building Services Authority [2012] 2 Qd R 457; [2011] QCA 58, cited
Mahony v Queensland Building Services Authority [2013] QCA 323, discussed

COUNSEL: L Boccabella with A C Freeman for the appellant
P O'Shea QC, with N M Cooke, for the respondent

SOLICITORS: AJ Torbey & Associates for the appellant
Rostron Carlyle Solicitors for the respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for dismissing this appeal with costs.

[2] **FRASER JA:** Trans Asia Pacific Projects Pty Ltd ("the Company"), a licensed builder, made separate contracts with eight property owners to construct residences on each property. The appellant was a director of the Company when four of the contracts were made and he was a director at times when building work was carried out and was to be carried out under all eight contracts. The respondent cancelled the Company's licence on 15 February 2008. The company went into external administration on 29 May 2008. Each property owner terminated the contract with the Company and made a claim against the respondent on the insurance policy in favour of each owner under the *Queensland Building Services Authority Act* 1991 (Qld)[1] ("the Act") for the cost of completing the construction work. The respondent paid those claims and sued the appellant and others to recover the total amount of the payments, $192,878.37. The primary judge granted the respondent's application for summary judgment in that amount against the appellant. The appellant has appealed against that judgment.

[3] The summary judgment was given on the basis that ss 111C(3) and 111C(6) of the Act attached liability to the appellant as a director of the Company at relevant times for the debt owing by the Company to the respondent pursuant to s 71(1) of the Act. Those subsections provide as follows:

"71 …

[1] The provisions of that Act which are relevant in this case are contained in reprint No 8F. Subsequent amendments to that Act do not affect this appeal.

(1) If the authority makes any payment on a claim under the insurance scheme, the authority may recover the amount of the payment, as a debt, from the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose."

"111C …

(3) This section also applies if a company owes the authority an amount because of a payment made by the authority on a claim under the insurance scheme.

…

(6) If this section applies because of subsection (3), the liability to pay the amount attaches to –

(a) 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; and

(b) each individual who was a director of the company when the payment was made by the authority."

[4] It was not in issue in the appeal that the appellant fell within s 111C(6)(a).

[5] The appellant's main argument was that summary judgment should not have been given because, with the assistance of disclosure and possibly third party disclosure, the appellant might prove at trial that the property owners' insurance claims against the respondent, and thus the respondent's payments on those claims, resulted from the respondent's wrongful cancellation of the Company's building licence.

Wrongful cancellation of the building licence by the respondent?

[6] The appellant did not argue that the respondent lacked statutory power to cancel the Company's licence or that the cancellation was legally ineffective. Rather, the appellant's case was that the Company's licence should not have been cancelled and, if the Company's licence had not been cancelled, the Company could have completed the relevant contracts; the result was said to be that the appellant was "not a person who falls within the category of a person through whose fault the claim arose within the meaning of section 71(2)(b) of [the Act]".[2] The basis of the proposition that the licence should not have been cancelled lay in allegations that the respondent based the cancellation upon the purported failure of the Company to comply with the requirements of a compliance audit and a subsequent notice issued on 17 December 2007 to produce documents, but the Company did comply with those requirements because it delivered an independent review report on 6 December 2007 and delivered the Company's financial records to the respondent in accordance with the notice on or about 18 January 2008.

[7] The affidavit evidence upon which the appellant relied evidenced the following chronology:

(a) On 8 November 2007, the respondent required the production of information by the Company pursuant to s 50C of the Act.[3]

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2 Defence of the first defendant, subparagraphs (d) – (f) of each of paragraphs 10, 38, 62, 76 and 89, and subparagraphs (e) – (g) of each of paragraphs 26, 47 and 105.

3 Affidavit of the appellant, para 4; respondent's letter to the Company dated 17 December 2007 (AB 547).

(b) On 17 December 2007 the respondent gave three notices:

(i) "Notice of Reasons for Proposed Cancellation or Suspension" to the Company under s 49 of the Act that the respondent had determined that the Company had contravened a condition of its licence by not supplying the information required by the respondent's 8 November 2007 notice. This notice gave the Company 21 days to make written representations on the matter which the respondent would consider before deciding whether to cancel or suspend the Company's licence.[4]

(ii) Notice to the Company under s 106A of the Act requiring the Company to produce or make available for inspection any documents provided by the Company to its accountant Eunica Pty Ltd in relation to all independent review reports regarding the Company, including but not limited to various specified documents. This notice included a statement that a person who failed to produce a document might be liable for a penalty of up to $15,000.[5]

(iii) Notice to Eunica Pty Ltd in the same terms as the notice in (ii).[6]

(c) In response to a statement by a representative of Eunica Pty Ltd offering to supply to the respondent the requested documents and information, on 20 December 2007, the respondent advised the representative that the documents were required to be delivered to the respondent.[7]

(d) On 11 January 2008:

(i) Eunica Pty Ltd wrote to the respondent stating that Eunica Pty Ltd had provided the documents in its possession to the Company.[8]

(ii) The respondent wrote to the Company giving notice that, because the Company had failed to make any representation in response to the respondent's "Notice of Reasons for Proposed Cancellation or Suspension" of 17 December 2007, the respondent suspended the Company's licence as from 11 January 2008. The letter advised that the decision to suspend the Company's licence was reviewable by the Commercial and Consumer Tribunal under s 102 of the *Commercial and Consumer Tribunal Act* 2003 ("CCT Act").[9]

(e) On 18 January 2008 the Company delivered numerous documents to the respondent. The appellant exhibited to his affidavit a statutory declaration by Mr Fitzpatrick dated 24 April 2008. The appellant deposed that Mr Fitzpatrick was the managing director of the Company until an unstated time in December 2007. The effect of the statutory declaration was that all of the documents requested by the respondent were delivered to the respondent on or around 18 January 2008.

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4 Affidavit of the appellant, para 6; respondent's letter to the Company dated 17 December 2007 (AB 547).

5 Affidavit of the appellant, para 5; respondent's letter to the Company dated 17 December 2007 (AB 544).

6 Affidavit of the appellant, para 5.

7 Affidavit of the appellant, paras 8 and 9; letter from Eunica Pty Ltd to the respondent dated 11 January 2007 (AB 522).

8 Letter from Eunica Pty Ltd to the respondent dated 11 January 2007.

9 Letter from the respondent to the Company dated 11 January 2008 (AB 525).

(f) On 15 February 2008 the respondent cancelled the Company's licence. (This event was common ground but no notice of cancellation was in evidence.)

[8] The appellant relied upon findings made in the Commercial and Consumer Tribunal on 5 September 2008 when that Tribunal dismissed an application by the respondent for disciplinary proceedings against Eunica Pty Ltd. The respondent's allegation against Eunica Pty Ltd was that it failed to produce documents pursuant to the notice served upon it on 17 December 2007. The Tribunal Member dismissed the application on the ground that the Tribunal lacked jurisdiction to hear it. The appellant relied upon observations by the Member that he would have dismissed the application in any event because he was not satisfied on the balance of probabilities that the respondent had proved its allegation that Eunica Pty Ltd held and failed to deliver any of the demanded documents.

[9] The appellant contended that on this evidence he had an arguable case that the Company had supplied to the respondent all of the documents which the respondent had sought on 17 December 2007. In reply, the respondent pointed out that the effect of the evidence was that the respondent suspended the Company's licence on 11 January 2008 – a week before the Company delivered documents to the respondent – and not because of any failure by the Company to comply with the 17 December 2007 letter requiring the production of documents, but because of the earlier failure by the Company to produce the information sought by the respondent on 8 November 2007. The effect of the respondent's argument seemed to be that the appellant's contention that the cancellation was referable to non-compliance with the 17 December 2007 notice to produce documents was not sustainable. That may be so, but that was not the basis upon which the primary judge rejected the appellant's argument. The respondent did not distinctly argue that the appeal should be dismissed on that ground and it did not file a notice of contention to that effect. It is therefore inappropriate to decide the appeal on that basis.

[10] The primary judge reasoned instead that the appellant's allegation "that the cause of the company's incapacity to perform the building work was the inappropriate cancellation of the building licence by the [respondent] does not entitle the [appellant] to effectively go behind the provisions in s 71 and 111C of the Act, in circumstances where the decision to cancel the building licence was not challenged by the company of which the [appellant] was a director or by the [appellant] himself."[10] The appellant challenged that conclusion.

The first ground of appeal

[11] The appellant's first ground of appeal contended that the primary judge misconstrued ss 71 and 111C of the Act "in the sense that the use of the word 'fault' in s 71 necessarily involves concepts of wrong doing and/or causation".

[12] This contention cannot stand with the decision in *Mahony v Queensland Building Services Authority*.[11] Gotterson JA, with whose reasons the President and Douglas J agreed, rejected a building contractor's contention that the concluding clause in s 71(1) "through whose fault the claim arose" not only qualified the expression "other person" in the second limb of s 71(1) but also qualified the expression in the

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10 *Queensland Building Services Authority v Gus Namour & Ors (No 1)* [2013] QDC 200 at [17].

11 [2013] QCA 323.

first limb "the building contractor by whom the relevant residential construction work was, or was to be, carried out":

> "…That, I think, is quite clearly indicated by the definitional provisions in s 71(2). Paragraph (a) thereof contains an extensive list of persons, generally licensed contractors, who, for the purposes of s 71(1), are to be regarded as the building contractor by whom any given residential construction work was, or was to be, carried out whereas paragraph (b) of the section is concerned with the composite expression "a person through whose fault the claim arose". It states that the expression "is taken to include a person who performed services for the work if the services were performed without proper care and skill". Thus, paragraph (b) focuses upon those who have performed services for the work rather than those who have contracted to carry out the work for the owner. Its focus is different from that of paragraph (a).
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> As well, the expression "other person" in the second limb of s 71(1) indicates that the two limbs of that section are mutually exclusive. If a person falls within the first limb, they may not, at the same time, fall within the second. That circumstance aligns well with the difference in focus of the definitions to which I have referred.
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> Also, features of punctuation tend to support the construction I prefer. Had the clause in question been intended to qualify both limbs in s 71(1), it is to be expected that commas would have been used both immediately before, and after, the phrase "or any other person" in order to indicate that the clause qualifies both limbs."[12]

[13] The appellant argued that the reliance upon the placement of a comma involved an unrealistic assessment of the Parliamentary process but the absence of commas immediately before and after the phrase "or any other person", whilst supportive of the construction adopted in *Mahony*, was far from being the main reason for adopting that construction. More significance was attributed to the natural meaning of the statutory text in its context. The appellant also argued that s 111C, the construction of which was not in issue in *Mahony*, supplied important context for the construction of s 71(1) because it suggested that clearer language was required in order to attach liability to directors in the absence of fault. As to that proposition, ss 111C(3) and (6) do not impose as a condition of liability that the director be at fault. Rather, in relation to the liability of a company under s 71(1) those provisions were plainly designed to displace the distinction made in companies legislation for many years[13] between the liability of a company and its members and directors. Gotterson JA's reasons in *Mahony v Queensland Building Services Authority* convincingly demonstrate that there is no room for any implication that the liability of a building contractor under the first limb of s 71(1) depends upon fault.

[14] The appellant relied upon Gotterson JA's observation in *Mahony*[14] that s 71(1) left open scope for a defence that the payment which was sought to be recovered "was not in fact made upon a claim made validly under the Act". That reflects the text of s 71(1), but the extent of the matters which are thereby made justiciable in s 71(1)

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12 [2013] QCA 323 at [27] – [29].

13 See *Salomon v Salomon & Co Ltd* [1897] AC 22.

14 [2013] QCA 323 at [37].

recovery proceedings was relevantly settled by the decision in *Mahony*.[15] For the following reasons, matters upon which the appellant relied could not justify a conclusion in relation to any of the payments made by the respondent that the payment was not a "payment on a claim under the insurance scheme" for the purposes of s 71(1).

[15] The appellant argued that each claim against the respondent was not a claim "under the insurance scheme" and for that reason the payment made by the respondent to the person otherwise entitled to indemnity was not a "payment on a claim" within the meaning of those expressions in s 71(1). In this respect the appellant referred to a term of the standard form policy which qualified the respondent's obligation to pay for loss suffered by the insured in the event that the building contractor failed to complete the contract for the residential construction work. The relevant provision, cl 1.2, provided that, in relation to a fixed price contract, the respondent was only liable to pay for loss under that part of the policy where the insured had "properly terminated the contract with the contractor". The term "properly" was then defined as meaning:

> "…lawfully under the contract or otherwise at law, upon the contractor's default which extends to, but is not limited to:
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> (i) the cancellation or suspension of the contractor's licence; or
>
> (ii) the death or legal incapacity of the contractor; or
>
> (iii) the insolvency of the contractor."

[16] The appellant argued that the word "default" in the definition of "properly" implied that the contractor must be at fault in order for the insured properly to terminate the contract. No such implication is available in a provision which unambiguously extends the meaning of "default" to cover cancellation or suspension of a building contractor's licence as well as the building contractor's death, legal incapacity, and insolvency. Each of those events might occur without any fault by the contractor; death and legal incapacity are glaringly obvious examples.

[17] The appellant also invoked "the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is 'in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used' (*Potter v Minahan*, and see also, *Ex parte Walsh and Johnson; In re Yates*)."[16] In relation to s 71(1), the appellant did not articulate what fundamental principle, right, or aspect of the general system of law might be said to be affected by the operation of s 71(1). Whilst s 111C(6) does cut across the relevant corporations legislation, that provision makes it irresistibly clear that a director of a company which is a building contractor will be liable in the defined circumstances to make a payment which otherwise would be payable only by the company.

[18] Insofar as the appellant's argument relied upon the suggested injustice of rendering the appellant liable to the respondent where the respondent had itself indirectly caused the loss by cancelling the Company's licence upon a ground which was

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15 See [2013] QCA 323 at [31] – [37].

16 *Bropho v Western Australia* (1990) 171 CLR 1 at 18. I have omitted citations.

wrong in fact, the suggested injustice is ameliorated by the building contractor's power to seek review by an independent tribunal of the respondent's decision to cancel the licence and of other decisions which might culminate in a claim against the contractor. The Act conferred jurisdiction upon the Tribunal to review decisions to suspend or cancel a licence, a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete the relevant work, and a decision that a domestic building contract has been validly terminated having the consequence of allowing a claim for non-completion under the statutory insurance scheme.[17] The right of review for each decision was required to be exercised within 28 days of receiving written notice of the decision.[18] As Gotterson JA observed in *Mahony*,[19] the availability of those rights of review provides a sound rationale for a legislative intention that some decisions are not to be justiciable in debt recovery proceedings under s 71(1). That is consistent with the literal meaning of s 71(1) and, as Gotterson JA also pointed out in the same passage, the defences allowed by subsections 71(4), (5), and (6) concern different matters.

[19] The scheme of the Act is that a building contractor or other interested person who wishes to challenge such decisions should make the challenge before the respondent pays under the policy. A building contractor who does not make such a challenge is liable under s 71(1) whether or not one of those anterior decisions might have been the subject of a challenge. In the case of a building contractor which is a company, a director caught by s 111C(6) is similarly unable to challenge one of those anterior decisions in a proceeding for recovery of a debt. This is so because the director's liability is fixed by reference only to the liability of the building contractor. (I would add that there is a strong argument that in circumstances such as occurred in this case, a director is also entitled to challenge a decision to cancel a company's building licence. A director may plausibly claim to be a person affected by such a decision because the readily foreseeable results of cancellation of a corporate building contractor's licence during the course of a contract include termination of the contract, a claim upon the respondent by the owner under the statutory insurance policy, payment of that claim by the respondent, and a claim by the respondent against the company and its directors.[20])

[20] The appellant argued that the provisions for review might be availed of in "an ideal world"[21] but that the appellant lacked the financial resources and information necessary to seek review of the decision to cancel the licence. The appellant's own evidence was instead that he did not "pursue a review of the decision to cancel the Company's licence at the time of the cancellation because Sean Fitzpatrick was looking after the financial affairs of the company, as he was the Managing Director of the Company. Unbeknownst to me, Sean Fitzpatrick resigned as Director in December 2007." As a director of the Company the appellant was entitled to access its books and records, and the reasons he gave for not pursuing the decision to cancel the Company's licence did not include any lack of financial resources. More fundamentally, this argument did not come to grips with the scheme of the Act that challenges to such decisions should be made well before a recovery proceeding is brought against the contractor or directors.

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17 The Act, ss 86(1)(c), (g), (i).

18 See the Act, s 86, and the *Commercial and Consumer Tribunal Act* 2003 (Qld), s 102 (reprint No 2B).

19 [2013] QCA 323 at [35].

20 Cf *Lange v Queensland Building Services Authority* [2012] 2 Qd R 457 at 471–472 [73] (Margaret Wilson AJA), concerning a decision by the respondent to pay a claim under the insurance scheme.

21 Transcript of argument, 1–23.

The second ground of appeal

[21] The appellant's second ground of appeal was that the primary judge "wrongly ruled that the appellant could not challenge a claim by plaintiff/respondent under ss 71 and 111C unless the building contractor or the appellant had previously challenged the cancelling of the building licence before another body". That misconstrues the relevance of these statutory avenues for challenge to a decision by the respondent to cancel a building licence – see [17] of these reasons.

The third and fifth grounds of appeal

[22] Two grounds of appeal concern the quantum of the debt found against the appellant. The third ground of appeal contended that the primary judge misconstrued ss 71 and 111C "in not recognising that any payment pursuant to the insurance scheme had to be reasonable in order to be recoverable against the appellant" and the fifth ground of appeal contended that the primary judge "failed to determine an integer of the case before him namely that the appellant had real prospect of a [sic] successfully defending all or a part of the respondent/plaintiff's claim on quantum issues."

[23] Much of the appellant's argument before the primary judge concerned liability, but the appellant did argue that there were insufficient particulars of the amount of the respondent's claims, that cross-examination and expert evidence might be called to determine whether the amounts claimed were reasonable, and the trial judge would have to consider what amounts remained owing to the Company under each of the contracts it had entered into.[22] The primary judge did not expressly deal with those submissions. It is not appropriate to remit the matter to the primary judge for further consideration of this aspect of the case. Because the application for the primary judge was dealt with wholly on affidavit and the quantum issues are very narrow ones, it is appropriate for this Court instead to consider whether summary judgment should have been refused on the ground that the quantum of the debt was not proved with the necessary degree of assurance.

[24] Neither the reasonableness of a payment made by the respondent nor the amount owing by a claimant under the insurance scheme to the contractor is made a criterion of liability under s 71(1). Those criteria would be relevant in a recovery action under s 71(1) only if they were relevant to the determination of the question whether the amount sought to be recovered by the respondent is the amount of the "payment on a claim under the insurance scheme". The appellant argued that they were made relevant by the statutory insurance policy. The relevant provision is in cl 1.4(a), which applies where the contractor had embarked upon the contract works. In such a case, the policy limits the amount of a payment by reference to "[the respondent's] assessment of the reasonable cost of completing the contract less the owner's remaining liability under the contract (exclusive of any amount by way of liquidated damages or damages for delay) at the date of termination of the contract…".

[25] Because there is no reason to doubt that each claim was paid in accordance with the terms of the policy, it is not necessary to decide whether or to what extent these matters might be justiciable in a recovery action under s 71(1). The detailed affidavit evidence of the respondent was not challenged; the amount paid by the respondent to each owner was the cost of completing the work reduced by the

22 Transcript of 6 December 2012, 1–37.

amount which remained owing to the Company under the construction contract. The exhibited documents supplied detailed particulars of each claim. The cost of completing the contract work was fixed by competitive quotes. The appellant did not identify any material which suggested that there might be reason to doubt either the amounts shown in the documentary exhibits as being owing to the Company under the contracts or that the quoted cost of completion was reasonable (beyond an unspecified complaint that the respondent had not particularised how it took into account amounts owing to the Company and whether the payments made were reasonable).

The fourth ground of appeal

[26] The remaining ground of appeal, the fourth ground, was that the primary judge misapplied the provision for summary judgment in r 292 of the *Uniform Civil Procedure Rules* 1999. The appellant emphasised the observation made by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*[23] that there must be a "high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way" before a proceeding should be disposed of summarily. The primary judge referred to that caution.[24] On the evidence, the proper conclusion was that the appellant had no real prospect of successfully defending any part of the respondent's claim and there was nothing to suggest that there needed to be a trial. The terms of rule 292 were satisfied. This was an appropriate case for summary judgment.

Proposed order

[27] The appeal should be dismissed with costs.

[28] **DOUGLAS J:** I agree with the reasons for judgment and the order proposed by Fraser JA.

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23 (2000) 201 CLR 552 at 576.

24 [2013] QDC 200 at [8].