

SUPREME COURT OF QUEENSLAND

CITATION: *Ericson v Queensland Building and Construction Commission*
[2016] QCA 140

PARTIES: **IAN JAMES ERICSON**
(applicant)
v
**QUEENSLAND BUILDING AND CONSTRUCTION
COMMISSION**
(respondent)

FILE NO/S: Appeal No 8105 of 2015
QCATA No 180 of 2012

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Queensland Civil and Administrative
Tribunal Act*

ORIGINATING
COURT: Queensland Civil and Administrative Tribunal at Brisbane

DELIVERED ON: Orders delivered ex tempore 2 March 2016
Reasons delivered 3 June 2016

DELIVERED AT: Brisbane

HEARING DATE: 2 March 2016

JUDGES: Margaret McMurdo P and Gotterson JA and Martin J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **Delivered ex tempore on 2 March 2016:**

- 1. Leave to appeal is refused.**
- 2. The Court will give its reasons for that order later.**
- 3. The Applicant is to pay the Respondent's costs of the application, to be assessed on the standard basis.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE
TRIBUNALS – QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL – where the respondent
suspended and later cancelled the applicant's building licence
– where a single member of the Queensland Civil and
Administrative Tribunal (QCAT) set aside that decision –
where the Appeal Tribunal of QCAT reversed the decision to
set aside and confirmed the respondent's decision – where
leave was granted to appeal the decision of the Appeal Tribunal to
the Court of Appeal – where the Court of Appeal allowed the
appeal on the basis that the Appeal Tribunal misapprehended
the nature of its jurisdiction – where, on remitter, the Appeal

Tribunal again set aside the original QCAT decision, and confirmed the respondent's decision – where leave was granted to the Court of Appeal in respect of that decision – where this Court allowed the appeal, on the basis that the Appeal Tribunal failed to adequately deal with the issue of whether it was proceeding under s 146 or s 147 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where the Court of Appeal remitted the matter to a differently constituted Appeal Tribunal for reconsideration – where the Appeal Tribunal thus constituted set aside the original QCAT decision and remitted the matter to the member for reconsideration – where the applicant contends that the Appeal Tribunal failed to properly take into consideration and apply the previous decisions of this Court – where the applicant also contends that the Appeal Tribunal failed to properly take into account s 48 of the *Queensland Building Services Authority Act 1991* (Qld) – where the applicant submits that the Appeal Tribunal erred by taking into consideration evidence not available to the original decision maker

Queensland Building Services Authority Act 1991 (Qld), s 48
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146, s 147, s 150

Ericson v Queensland Building and Construction Commission [2014] QCA 297, considered

Ericson v Queensland Building Services Authority [2013] QCA 391, considered

Queensland Building and Construction Commission v Ericson t/a Flea's Concreting [2015] QCATA 111, considered

Underwood v Queensland Department of Communities (State of Queensland) [2013] 1 Qd R 252; [2012] QCA 158, cited

COUNSEL: The applicant appeared on his own behalf
 G I Thomson for the respondent

SOLICITORS: The applicant appeared on his own behalf
 Queensland Building and Construction Commission for the respondent

- [1] **MARGARET McMURDO P:** I agree with Martin J's reasons for joining in this Court's orders on 2 March 2016 refusing leave to appeal and that the applicant pay the respondent's costs.
- [2] **GOTTERSON JA:** I also agree with the reasons given by Martin J for the refusal of leave to appeal and the order for costs.
- [3] **MARTIN J:** After the hearing of this appeal the Court made orders refusing leave to appeal and that the applicant pay the respondent's costs. These are my reasons for agreeing in those orders.

The application

- [4] Mr Ericson seeks leave under s 150 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) to appeal a decision of the Appeal Tribunal of QCAT delivered on 14 May 2015 (the third QCATA decision).

- [5] Section 150 of the QCAT Act provides that an appeal from an Appeal Tribunal to this Court applies only by leave and is limited to questions of law.¹
- [6] In order to understand the provenance of this application a review of the history of this matter will assist.

A brief history

- [7] The applicant held a contractor's licence which allowed him to carry out building work. In October 2010, the Queensland Building Services Authority (now the Queensland Building and Construction Commission (QBCC), the respondent) cancelled the applicant's licence on the basis that he had failed to satisfy the financial requirements under a Queensland Building Services Authority policy called "Financial Requirements for Licensing" (FRL Policy).
- [8] In May 2012 a member of QCAT set aside the decision to cancel the licence, and ordered that the suspension of the licence be terminated subject to certain conditions (the QCAT decision).
- [9] The QBSA appealed to the QCAT Appeal Tribunal and the QCAT decision was set aside (the first QCATA decision).
- [10] In December 2013 the Court of Appeal allowed an appeal² from the first QCATA decision and remitted the matter to an Appeal Tribunal of QCAT for reconsideration. In the reasons of Holmes JA (as her Honour then was) the circumstances leading up to the QCAT decision were summarised:³

"[2] Section 48 of the *Queensland Building Services Authority Act* 1991 gives the QBSA the discretion to suspend or cancel a licence where a licensee contravenes a condition of the licence. Section 35(3) of the Act makes it a standard condition of a building contractor's licence that the contractor's financial circumstances at all times satisfy relevant financial requirements set out in the Queensland Building Services Board's policies. In that regard, the "Financial Requirements for Licensing" have been promulgated. The aims of the Financial Requirements are set out at 1.1 of the document:

"to promote financially viable businesses and foster professional business practices in the Queensland building industry."

[3] The Financial Requirements include requirements that the contractor hold "Net Tangible Assets" at a level determined by reference to the business' annual turnover and maintain a prescribed ratio of current assets to current liabilities of at least 1:1. "Net Tangible Assets" are to be calculated by deducting the value of liabilities and intangible assets from the value of the contractor's assets. Contractors with a turnover above a certain level must provide an "Independent Review Report" the work in which is

¹ *Underwood v Queensland Department of Communities (State of Queensland)* [2013] 1 Qd R 252 at [2].

² *Ericson v Queensland Building Services Authority* [2013] QCA 391.

³ With whom Fraser JA and Applegarth J agreed.

to be performed in accordance with Australian accounting and auditing standards. It was common ground that the relevant accounting standard was AASB137.

The licence cancellation

- [4] On 25 June 2009, the QBSA suspended the applicant’s licence for failure to meet the Financial Requirements for Licensing. On 26 July 2010, the QBSA wrote to the applicant advising him that it proposed to “suspend or cancel” his licence because he had contravened both the net tangible assets requirement and the ratio of current assets to liabilities requirement. The dispute between the applicant and the QBSA focussed, in particular, on a trade debt owed to the applicant by a company, Hansen Yuncken Pty Ltd. The applicant had obtained an adjudicator’s decision in his favour as to that debt under the *Building and Construction Industry Payments Act 2004*, but the company had obtained an interlocutory injunction which prevented his enforcing the decision. The independent review report provided by the applicant had included the debt as an asset.
- [5] The QBSA concluded that the trade debt represented only a contingent asset, falling within the accounting standard’s definition as

“a possible asset that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity”.

Acting on the accounting standard’s prescription that contingent assets were not to be recognised in financial statements, the QBSA decided that the debt could not be taken into account in calculating the applicant’s net tangible assets and current assets/liabilities ratio. In relation to the latter, the definition of “current asset” in the Financial Requirements required that specific reference be had to an earlier accounting standard. It, in turn, defined current assets as those which would be realised within 12 months or within “the normal course of the entity’s *operating cycle*”, something which could not be said of the Hansen Yuncken debt. Ultimately, after some further correspondence, the QBSA gave the applicant notice on 11 October 2010 that his licence had been cancelled from that date because of his failure to meet the Financial Requirements for Licensing.”⁴

- [11] In reaching the conclusion that the Appeal Tribunal had misapprehended the nature of its jurisdiction, Holmes JA held that the Appeal Tribunal had been correct in two important matters:
- (a) That “while the member was correct in regarding as relevant the circumstances in which the applicant came to breach the Financial Requirements, he was wrong to the extent that he suggested that the QBSA ought to have treated the debt as a current asset. The objects of

⁴ Citations omitted.

the Financial Requirements could not convert a non-current asset into a current asset as determined by the accounting standards, the application of which the Requirements prescribed.”⁵

- (b) That the member did not have jurisdiction to exercise a power of review of the decision to suspend.⁶

[12] Her Honour also dealt with the question of whether, when hearing the appeal, the Appeal Tribunal was proceeding under s 146 of the QCAT Act (which concerns appeals on questions of law only) or s 147 (which concerns appeals on questions of fact or mixed fact and law). Holmes JA held:

- (a) That s 146 “...enables the appeal tribunal, if setting aside a decision, either to substitute its own decision or to remit the matter to the tribunal which made the appealed decision for further consideration. Plainly, it is only if the determination of the question of law is capable of resolving the matter as a whole in the applicant’s favour that the appeal tribunal will be in a position to substitute its own decision. Section 146, as already noted, does not entail any re-hearing of the matter, whether on the evidence below or on fresh evidence.”⁷

- (b) “The appeal tribunal’s decision in the negative of the questions whether the suspension decision could be reviewed and whether the member’s construction of the Financial Requirements for Licensing was correct could not determine the outcome of the applicant’s application for review of the exercise of discretion to cancel his licence. That could only be done on a consideration of all the evidence, with appropriate findings of fact and a fresh exercise of discretion. All of that might have occurred had the appeal tribunal been proceeding under s 147.”⁸

[13] On remittal, the Appeal Tribunal called for written submissions and made a decision on the papers in April 2014 (the second QCATA decision). The Tribunal overturned the QCAT decision and confirmed the cancellation of the licence.

[14] In November 2014 the Court of Appeal allowed an appeal from the second QCATA decision and remitted the matter to a differently constituted appeal tribunal.⁹ The Court held that the Appeal Tribunal did not deal adequately with the issue of whether it was proceeding under s 146 or s 147. It was conceded by the respondent “that the Appeal Tribunal had erred in purporting to determine the matter under s 146 and in failing to make the basis upon which it proceeded under s 146 and s 147 clear.”¹⁰

The third QCATA decision and the grounds for leave

[15] In the third QCATA decision the Appeal Tribunal allowed the appeal of the QBCC, set aside the QCAT decision, and returned the matter to the original member for reconsideration.

[16] The applicant lists a number of matters which he submits amount to errors of law or which give rise to questions of law. The grounds advanced do not always identify

⁵ *Ericson v Queensland Building Services Authority* [2013] QCA 391 at [20].

⁶ *Ibid* at [22].

⁷ *Ibid* at [25].

⁸ *Ibid* at [26].

⁹ *Ericson v Queensland Building and Construction Commission* [2014] QCA 297.

¹⁰ *Ibid* at [22].

the error except in the broadest of terms. For example, in paragraph 36 of his Amended Submissions he submits:

“The presiding Members erred in Law by failing to properly take into consideration and apply the decision handed down by the Court of Appeal on 20th December 2013 *Ericson v Queensland Building Services Authority* [2013] QCA 391 returning the matter to it originally for reconsideration.”

But he does not say how the Appeal Tribunal failed to apply that decision.

- [17] A review of the grounds reveals that they may be grouped into five broad categories.
- [18] First, there are grounds associated with the claim made by Hansen Yuncken and the characterisation of that claim. The characterisation of that claim in the QCAT decision was held (by this Court) to be correct. But the member had fallen into error by incorrectly applying the FRL policy. There was no error in the third QCATA decision on this point. That decision accepted the characterisation of the claim as found by the member and affirmed by this Court and then correctly applied the QBCC Act.¹¹
- [19] Secondly, the applicant asserts that the Appeal Tribunal “... found that because the [applicant] had become a bankrupt the decision to cancel the licence was vindicated and referred the matter back to QCAT.”¹² That is not correct. The Appeal Tribunal said (in [71] of its reasons) that it had no power to receive evidence of the bankruptcy and, thus, could not make a direction to the member to have regard to it. It was, the Tribunal observed, for the member to decide when reconsidering the matter.
- [20] Thirdly, the applicant asserts that the Appeal Tribunal did not apply either of the decisions of this Court.¹³ Without particulars of the alleged failure it is difficult to identify what the error is said to be. It is, most likely, a reference to the use of either s 146 or s 147 of the QCAT Act which was the subject of attention in the two decisions of this Court. The Appeal Tribunal carefully and correctly applied s 146. No error has been shown.
- [21] Fourthly, the applicant mounts an argument that the Appeal Tribunal failed to correctly take into account s 48 of the QBSA Act.¹⁴ It appears that the argument is directed towards a failure to exercise the discretion available under that section. But the Appeal Tribunal did not purport to exercise any discretion under that section because, having found error in the QCAT decision, it acted under s 146 of the QCAT Act and returned the matter for reconsideration. No error has been shown.
- [22] Fifthly, it is said that the Appeal Tribunal erred by taking into consideration evidence not available to the original decision maker.¹⁵ It did not. The Appeal Tribunal held that the member had erred in two respects and that each of those raised a question of law only. In its reasons the Tribunal expressly referred to s 146 as the basis of its jurisdiction and that it, therefore, had neither the power to receive fresh evidence nor to direct a member to take fresh evidence into account.

¹¹ *Queensland Building and Construction Commission v Ericson t/a Flea's Concreting* [2015] QCATA 111 at [33]-34].

¹² Applicant's Amended Outline of Argument at [34].

¹³ Applicant's Amended Outline of Argument at [36]-[37].

¹⁴ Applicant's Amended Outline of Argument at [39]-[40].

¹⁵ Applicant's Amended Outline of Argument at [42].

Conclusion

- [23] The Appeal Tribunal carefully applied the law as exposed in the earlier decisions of this Court. The applicant has not demonstrated that any question of law arises out of the Appeal Tribunal's reasons. I would refuse leave to appeal.